IN THE SUPREME COURT OF NEVADA

NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION Petitioners, vs. CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Respondents.	Sup. Ct. No. _____ Case No.: A-12-661726-C Dept. No.: XXVIII

PETITIONERS' APPENDIX

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Plaintiffs, vs. NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION Defendants.	Case No.: A-12-661726-C Dept. No.: XXVIII

DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)

COMES NOW, NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION, by and through their undersigned counsel of record, MARC C. GORDON, ESQ., and TAMER B. BOTROS, ESQ., and hereby respectfully file their Motion to Dismiss Pursuant to NRCP 12(b)(5).

This Motion is made and based upon the pleadings and papers on file herein, and such oral argument of counsel as may be heard.

DATED this 6th day of January, 2015.

YELLOW CHECKER STAR TRANSPORTATION CO. LEGAL DEPT.

/s/ Tamer Botros
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NOTICE OF MOTION

TO: CHRISTOPHER THOMAS, Plaintiff

TO: CHRISTOPHER CRAIG, Plaintiff

TO: LEON GREENBERG, ESQ., Plaintiffs' counsel

TO: DANA SNIEGOCKI, ESQ., Plaintiffs' counsel

PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion on for hearing in the above-entitled Court at the Clark County Courthouse, Las Vegas, Nevada, in Dept. No. XXVIII, on the 10 day of February, 2015 at the hour of 9:00am, or as soon thereafter as counsel may be heard.

DATED this 6th day of January, 2015.

YELLOW CHECKER STAR TRANSPORTATION CO. LEGAL DEPT.

/s/ Tamer Botros

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NEVADA STAR CAB CORPORATION

I.

FACTS

1. On May 11, 2012, Plaintiffs, who were taxicab drivers, filed a Complaint naming Defendants and alleged violations of the Minimum Wage law.
2. On August 14, 2012, this Honorable Court granted Defendants' Motion to Dismiss.
3. On September 6, 2012, Plaintiffs filed the Notice of Appeal.
4. On October 8, 2013, Oral Arguments were conducted before the Nevada Supreme Court.
5. On June 26, 2014, the Nevada Supreme Court rendered its decision.
6. On October 14, 2014, Plaintiffs filed Motion to "Correct" Nevada Supreme Court's Opinion of June 26, 2014. See Motion attached hereto as Exhibit **1**.
7. On October 17, 2014, Defendants filed their Opposition to Motion to "Correct." See Opposition attached hereto as Exhibit **2**.
8. On October 27, 2014 the Supreme Court Denied Plaintiffs' Motion to "Correct" and ruled that the wording of the opinion shall stand as issued. See Order attached hereto as Exhibit **3**.
9. On November 4, 2014, the Nevada Supreme Court issued the Remittitur.
10. On November 5, 2014, Plaintiffs filed their First Amended Complaint alleging violations of Minimum Wage law, malicious and/or fraudulent and/or oppressive conduct, stating that Defendants made "no effort to seek any judicial declaration of their obligation," conversion, and seeking damages of alleged violations from November 28, 2006.

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II.

LEGAL ARGUMENT

A. Plaintiffs Have No Claim For Minimum Wage Since The Application of The Thomas Decision is Prospective, Not Retroactive

NRCP 12(b)(5) states as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (5) **failure to state a claim upon which relief can be granted**.

In this case, on June 26, 2014, the Nevada Supreme Court decided the *Thomas* case and recognized in its decision, that at the time, there were two (2) conflicting laws regarding the same subject matter, namely NRS 608.250(2) and the 2006 Constitutional Minimum Wage Amendment. The Court also recognized that employers were put in the most impossible and unenviable position in choosing between which legal provision to follow, on the same exact subject matter. Following passage of the Nevada Minimum Wage Amendment in 2006, the statutory exemption for taxi and limo drivers remained. There was no express or implied repeal at that time and in the years following. In addition, the Nevada Labor Commissioner comported with NRS 608.250(2). Up until June 26, 2014, NRS 605.250(2) was the law that employers were following and it was reasonable to do so. Therefore, the Nevada Supreme Court decided, that from June 26, 2014 it would make clear to employers and employees in the State of Nevada what the current law on Minimum Wage would be moving forward. The decision is clear and speaks for itself.

There is nothing in the *Thomas* decision either directly or indirectly, that supports the proposition that a taxicab driver, or anyone who was previously exempted under NRS 608.250(2), can now go back in time and pursue minimum wage claims against individual employers prior to June 26, 2014. Substantive statutes are presumed to only operate prospectively, unless it is clear that the drafters

intended the statute to be applied retroactively. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994); *PEBP,* 124 Nev. at 154, 179 P.3d at 553; *Cnty. of Clark v. Roosevelt Title Ins. Co.*, 80 Nev. 530, 535, 396 P.2d 844, 846 (1964). (Cited in Sandpointe Apartments, LLC v. Eighth Judicial District Court, 129 Nev. Adv. Op. 87 Nov. 14, 2013). The presumption against retroactivity is typically explained by reference to fairness. *Landgraf,* 511 U.S. at 270.

Statutes are presumptively prospective only, *see McKellar v. McKellar,* 110 Nev. 200, 871 P.2d 296, 298 (1994) ("[t]here is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent or unless the intent of the legislature cannot otherwise be satisfied").

In this case, the *Thomas* decision provides affirmative support that Plaintiffs will not be able to go back in time and pursue minimum wage claims against Defendants prior to June 26, 2014. The Court ruled, "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)." (Page 9 of *Thomas* decision) From the use of the present tense, the decision never intended for Plaintiffs to go back in time; otherwise, the majority of the Supreme Court would have clearly stated **"superseded and supplanted,"** the past tense, which would have entirely different implications. Plaintiffs became aware of the specific use of the present tense use of **"supersedes"** and **"supplants"** in the *Thomas* decision and on October 14, 2014, filed a "Motion to Correct" with the Nevada Supreme Court to "correct" its opinion. See Exhibit **1**.

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B. <u>The Supreme Court Denied Plaintiffs' "Motion to Correct" Its Opinion</u>

Plaintiffs' counsel has admitted that *<u>Thomas</u>* is not retroactive by filing the "Motion to Correct" and seeking from Supreme Court to change its written opinion to include past tense terminology so that it would be retroactive, rather than prospective, as it currently is. See Exhibit **1**. On October 17, 2014, Defendants filed their Opposition to Motion to "Correct," and persuasively argued that the *<u>Thomas</u>* decision was meant to only apply prospectively, not retroactively. See Exhibit **2**. On October 27, 2014, the Supreme Court denied Plaintiffs' "Motion to Correct," and ruled that the opinion "shall stand as issued." See Exhibit **3**. This provides further support that the Court never intended its decision to be used to pursue actions against Defendants or similarly situated employers, retroactively prior to June 26, 2014. This was a compelling decision by the Supreme Court to deny Plaintiffs' "Motion to Correct," and was a clear pronouncement by the Court indicating, that their decision was to be **<u>only</u>** applied prospectively. If the Supreme Court had intended its landmark decision on minimum wage in *<u>Thomas</u>*, to have a retroactive effect as argued by Plaintiffs' Counsel in his "Motion to Correct," the Supreme Court would have certainly granted Plaintiffs' "Motion to Correct," and changed the language from the current present tense, to past tense as specifically requested by Plaintiffs' Counsel. However, the Court refused to change the wording of its opinion, which is profound and compelling. The Court's decision to deny Plaintiffs' "Motion to Correct," is a clear, recent and authoritative evidence that the *<u>Thomas</u>* decision only applies prospectively and thus Plaintiffs have no claim upon which relief can be granted.

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C. <u>There Were Two (2) Conflicting Laws Regarding The Same Subject Matter</u>

NRS 608.250(2) was the law that employers were following until the *Thomas* decision. Following passage of the Nevada Minimum Wage Amendment in 2006, the statutory exemption for taxi and limo drivers remained on the books and effective (NRS 608.250(2)). There was no express or implied repeal at that time and in the years following. In 2009, Federal Judge Clive Jones was the first jurist to weigh in on the question of "implied repeal," interpreting Nevada law in the Lucas case. His decision against "implied repeal," although not binding on the Nevada Supreme Court, was nonetheless the only statement of competent judicial authority on the Nevada law question, and remained so until *Thomas*. All during those years from 2006 until June 26, 2014, employers and employees followed the law as interpreted by Judge Jones, and were reasonable in doing so, since the Supreme Court had not spoken otherwise. In addition, the Nevada Labor Commissioner comported with that state of affairs, and continued to recognize NRS 608.250(2) by issuing **"Rules to be Observed By Employers,"** dated November 13, 2012, where it specifically listed the exceptions to minimum wage, including taxicab drivers. See attached Exhibit **4**. Therefore, Defendants were following the law as it existed at the time, which was being enforced by the Office of Labor Commissioner and hence there were no violations of existing laws. The Supreme Court recognized this fact when it stated, "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). This clearly indicates that there were two (2) conflicting laws regarding the same subject matter and hence the Supreme Court ruled that both laws could not operate. Therefore, the two are "irreconcilably repugnant,"… such that "both cannot stand,"… and the statute **<u>is impliedly repealed</u>** by the constitutional amendment." (Page 6 of *Thomas* decision) The majority did not state "the statute **<u>was</u>** impliedly repealed." This means that up until the *Thomas* decision, the Supreme Court believed there was a reasonable and legitimate confusion amongst

the public and employers, in that there were two (2) conflicting laws on the same subject matter requiring a conclusive decision that would establish precedent moving forward. Nothing from the decision indicates that it granted Plaintiffs a right to pursue claims against Defendants retroactively after the *Thomas* decision. Since there were no violations of existing laws, Plaintiffs have no claims against Defendants upon which relief can be granted.

The *Thomas* decision made it clear that the exemptions under NRS 608.250(2) no longer applies. NRS 608.250(2) contained exemptions in effect since 1965, which employers reasonably and legitimately relied upon. The intent of the *Thomas* decision was not to punish Defendants including other employers who reasonably and legitimately relied upon NRS 608.250(2). Rather, the intent of *Thomas* was to make one conclusive opinion on minimum wage law and to clarify the law prospectively. The implications of a retroactive legal effect are enormous and profound, especially considering the list of exemptions under NRS 608.250(2) that were completely wiped away by the *Thomas* decision. The decision was not meant to have a retroactive effect. Despite Plaintiffs' "Motion to Correct," the Supreme Court purposefully did not indicate, imply or even hint that their decision meant that a taxicab driver or anyone who was previously exempted under NRS 608.250(2), can now go back in time and pursue minimum wage claims against individual employers prior to June 26, 2014. The reason is one of fundamental fairness as stated in *Landgraf, Id* at 511 U.S. at 270. Furthermore, the Court also recognized that employers were put in the most impossible and unenviable position in choosing between which legal provision to follow, on the same exact subject matter. The Court **did not** want to punish employers when they were following the same law that was being enforced by the Office of Labor Commissioner.

The Supreme Court recently took the opportunity to cite to the *Thomas* decision, by specifically using the present tense language, which provides further support that their decision had **prospective**

effect. In Terry v. Sapphire Gentlemen's Club, 130 Nev., Advance Opinion 87, at Page 6 the Court stated:

> … and though this court has recognized that the text of the Minimum Wage Amendment **supplants** that of our statutory minimum wage laws to some extent, see Thomas v. Nev. Yellow Cab Corp., 130 Nev. ___, ___, 327 P.3d 518, 522 (2014) (holding that "[t]he text of the Minimum Wage Amendment … **supersedes** and **supplants** the taxicab driver exception set out in NRS 608.250(2)")

The Nevada Department of Business and Industry agrees that the application of *Thomas* is prospective, not retroactive. In its recent publication, The Business Advocate, it contained an article titled, "A Minimum Wage Guide for Nevada Employers," where it stated:

> While the constitutional amendment did not directly conflict with the exemptions outlined in NRS 608.250, its passage created some **uncertainty**. It was this uncertainty that the Nevada Supreme Court addressed this past summer in *Thomas v. Nevada Yellow Cab*, 130 Nev. Adv. Op. 52 (2014). In its opinion, the Nevada Supreme Court found that exemptions outlined in the Nevada Constitution supersede the exemptions previously provided for in NRS 608.250. The only individuals who are exempt from the payment of minimum wage, according to the Nevada Supreme Court, are those specifically outlined in the constitutional amendment.
>
> What does this decision mean for Nevada's employers? It means that **employers who have previously relied on the exemptions outlined in NRS 608.250** will be mandated to pay minimum wage to individuals not specifically exempted in the Nevada Constitution. See Page 7 of "A Minimum Wage Guide for Nevada Employers" Winter 2014 attached hereto was Exhibit **5**.

The Supreme Court recognized that prior to June 26, 2014, employers were reasonably and legitimately relying on NRS 608.250, and that there was confusion about which law employers must follow and hence, decided to make a definitive ruling moving forward that would apply prospectively, not retroactively. Defendants have been in compliance with the *Thomas* decision since June 26, 2014. See Affidavit of Gene Auffert, CEO and CFO attached hereto as Exhibit **6**. Therefore, Defendants respectfully request this Honorable Court to grant Defendants' Motion to dismiss, because Plaintiffs do not have a claim upon which relief can be granted.

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III.

CONCLUSION

Based on the foregoing points and authorities, Defendants respectfully request that this Honorable Court grant Defendants' Motion to Dismiss.

DATED this 6th day of January, 2015.

YELLOW CHECKER STAR TRANSPORTATION CO. LEGAL DEPT.

/s/ Tamer Botros
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NEVADA CHECKER CAB CORPORATION and
NEVADA STAR CAB CORPORATION

CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to Rule 9 of Nevada Electronic Filing and Conversion Rules, I hereby certify that on the 6th day of January, 2015, service of the foregoing **DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)** made this date by electronic service as follows:

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Dana Sniegocki, Esq.
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CHRISTOPHER THOMAS
CHRISTOPHER CRAIG

/s/ Tamer Botros
For **Yellow Checker Star Transportation Co. Legal Dept.**

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER THOMAS and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Appellants, vs. NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, NEVADA STAR CAB CORPORATION, Respondents,	Sup. Ct. No. 61681 Dist. Ct No.:A-12-661726-C Dept. No. XXVIII

APPELLANTS' MOTION TO CORRECT OPINION OF JUNE 26, 2014 AND STAY REMITTITUR

Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
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(702) 383-6085
Attorney for Appellants

Appellants, Christopher Thomas and Christopher Craig, hereby file this motion seeking to correct this Court's Opinion of June 26, 2014, by removing any present tense language that can be interpreted as directing such Opinion is only to be applied prospectively.

NATURE OF RELIEF SOUGHT

The holding of the Court's Opinion of June 26, 2014 is not in dispute. What is sought by this motion is a correction to the present tense language of two sentences, and three words, of the Opinion which, if uncorrected, will be the subject of further litigation, and a further appeal to this Court, over whether such Opinion's application is only prospective. These two sentences, with the requested corrected language in brackets and removed words struck through, are set forth below:

> 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~~ [supplanted] the exceptions listed in NRS 608.250(2). Opinion, page 2; 327 P.3d at 520.

> The text of the Minimum Wage Amendment, by enumerating specific exceptions that do not include taxicab drivers, ~~supersedes~~ [superceded] and ~~supplants~~ [supplanted] the taxicab driver exception set out in NRS 608.250(2). Opinion, page 9; 327 P.3d at 522.

WHY THE RELIEF REQUESTED SHOULD BE GRANTED

The relief requested is sought to conserve judicial resources and promptly secure for the appellants, and many thousands of other employees in the Nevada taxicab industry, the relief afforded to them by the Court's Opinion of June 26, 2014. Appellants' counsel is aware of six other pending litigations involving taxi driver plaintiffs seeking minimum hourly wages, including one currently on appeal to this Court, *Gilmore v. Desert Cab, Inc.* No. 62905. *See*, Ex. "A" ¶ 1. This case, the *Gilmore* appeal, and all of those other cases, involve the identical issue resolved by this appeal, the entitlement of taxi drivers to the minimum hourly wage specified by Nevada's Constitution.

This litigation has been most vigorously contested, as evidenced by respondents' recently denied, and wholly specious, Petition for Rehearing. *See*, Order of September 24, 2014. Despite the speciousness of any claim that the Court's Opinion of June 26, 2014 only has prospective application, it seems virtually certain that respondents in this case, and one or more defendants in the other taxi driver minimum wage cases, will insist on litigating that issue. They will do so based upon the foregoing enumerated language. If that language is not modified as requested they will insist it establishes that, under the Court's June 26, 2014 Opinion, the Minimum Wage Amendment has not "superceded" and "supplanted" the exceptions set out in NRS 608.250(2) as of the Amendment's effective date but only "supercedes" and "supplants" them as of the date of such Opinion. *See*, Ex. "A" ¶ 2.

THE COURT SHOULD STAY REMITTITUR TO CORRECT ITS OPINION

Pursuant to NRAP Rule 41(a)(1) this Court is to issue remittitur of this case on October 20, 2014, unless it enlarges the time for it to do so by appropriate Order. It is submitted that the Court should suitably enlarge the time for its remittitur to issue so it can consider and rule upon this motion

before it relinquishes jurisdiction over this appeal.

Dated this 14th day of October, 2014.

/s/ Leon Greenberg

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Attorney for Appellant

EXHIBIT “A”

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER THOMAS and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Appellants, vs. NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, NEVADA STAR CAB CORPORATION, Respondents,	Sup. Ct. No. 61681 Dist. Ct No.:A-12-661726-C Dept. No. XXVIII Declaration

Leon Greenberg, an attorney duly licensed to practice law in the State of Nevada, hereby affirms, under penalty of perjury, that:

1. I am counsel for the appellants in this case. I am also counsel for the plaintiffs in the following six other cases that also involve claims for unpaid minimum hourly wages allegedly owed to taxi cab driver employees pursuant to the Nevada Constitution: *Murray v. A Cab Taxi Service LLC,* Eighth Judicial District Court, Case No. A-12-669926-C; *Herring v. Boulder Cab, Inc.*, Eighth Judicial District Court, Case No. A-13-691551-C; *Tesema v. Lucky Cab Co.*, Eighth Judicial District Court, Case No. A-12-660700-C; *Golden v. Sun Cab, Inc.*, Eighth Judicial District Court, Case No. A-13-678109-C; *Perera v. Western Cab Company*, Eighth Judicial District Court, Case No. A-14-707425-C and *Gilmore v. Desert Cab, Inc.,* appeal pending, Nevada Supreme Court No. 62905. In all of these cases, except *Perera* which has yet to be served,

defendants have asserted that taxi cab drivers are not subject to the minimum wage protections of Nevada's Constitution, an issue resolved by this appeal.

2. I have engaged in discussions about the Court's Opinion of June 26, 2014 with several of the counsel representing defendants in the cases enumerated in paragraph 1. Such counsel have advised me that defendants in those cases believe that the Court's Opinion of June 26, 2014 has only prospective application. They claim to base that belief upon the Opinion's use of the present tense "supercede" and "supplant," and not the past tense of those words, in its discussion of how the Nevada Constitution has overridden the exceptions set out in NRS 608.250(2). Based upon those conversations it is my belief that defendants in some, or all, of such cases, and in this case as well, intend to argue that the Court's Opinion of June 26, 2014 found the Nevada Constitution "supercedes" and "supplants" the exceptions set out in NRS 608.250(2) only as of the date of such Opinion and not as of its enactment date.

Dated this 14th day of October, 2014.

/s/ Leon Greenberg

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Attorney for Appellant

EXHIBIT 2

IN THE SUPREME COURT OF NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated,	)	Sup. Ct. No. 61681
Petitioners,	)	Case No.: A-12-661726-C Dept. No.: XXVIII
vs.	)	
NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION NEVADA STAR CAB CORPORATION	)	
Respondents.	)	

RESPONDENTS' OPPOSITION TO MOTION TO CORRECT OPINION OF JUNE 26, 2014 AND STAY REMITTITUR

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ARGUMENT

A. Appellants' "Motion to Correct" Is Time Barred Under NRAP 40(a)(1).

NRAP 40(a)(1) states in pertinent part:

> Unless the time is shortened or enlarged by order, a petition for rehearing may be filed **within 18 days** after the filing of the court's decision under Rule 36.

First, Appellants' "Motion to Correct," is pre-mature and inappropriate procedurally, since it is essentially requesting that this Honorable Court step into the shoes of the District Court, and determine trial court issues prior to this matter being remanded – issues that have neither been briefed, argued or ruled upon by the District Court Judge as part of the continuing litigation following remand.

Second, Appellants so-called "Motion to Correct," an unknown procedure under NRAP, is time barred. This Motion to Correct should in effect be construed as a Petition for Re-Hearing, since what Appellants are seeking would significantly alter the *Thomas* decision and thus requires a rehearing. The *Thomas* decision was rendered on June 26, 2014. Pursuant to NRAP 40(a)(1), Appellants had until July 14, 2014 to file their "Motion to Correct." Instead, Appellants filed their "Motion to Correct," on October 14, 2014 and thus are time barred. Therefore, Respondents respectfully request that this Honorable Court deny Appellants' Motion to Correct Opinion of June 26, 2014 and Stay Remittitur.

B. Appellants Are Seeking to Change This Honorable Court's Opinion in *Thomas.*

On June 26, 2014, this Honorable Court decided the *Thomas* case. The Court recognized in its decision, that at the time, there were two (2) conflicting laws regarding the same subject matter dealing with occupational exemptions, namely NRS 608.250(2) and the 2006 Constitutional Minimum Wage Amendment. Following passage of the Nevada Minimum Wage Amendment in 2006, the statutory occupational exemption for taxi and limo drivers remained in NRS 608.250(2). There was no express or implied repeal at that time and in the years following. In addition, the Nevada Labor Commissioner acted in accord with NRS 608.250(2) until June 26, 2014, by recognizing the taxi driver occupational exemption in NRS 608.250(2). Thus, until June 26, 2014, NRS 608.250(2) was the law that employers were following in Nevada, and were reasonable in doing so.

The Court then decided in *Thomas,* that from June 26, 2014 it would make clear to employers and employees in the State of Nevada what the current law on Minimum Wage occupational exemptions would be moving forward. The decision speaks for itself. Appellants now seek at this very late date to have this Court change its opinion, in order to enable Appellants and others to pursue minimum wage claims retroactively.

Thomas is a landmark decision in Nevada pertaining to minimum wage occupational exemptions. The decision as released and published several months ago, June 26, 2014, must stand with no corrections or changes, allowing this matter to be remanded to District Court for continuing proceedings (please recall that this case was dismissed at its inception pursuant to Respondents successful Motion to Dismiss - there still remains the stages of pleadings, class action certification, discovery and trial to take place in the trial court upon remand). Therefore, Respondents respectfully request the Court deny Appellants' Motion to Correct Opinion of June 26, 2014 and Stay Remittitur.

C. The *Thomas* Decision Was Meant to Only Apply Prospectively, Not Retroactively.

There is nothing in the *Thomas* decision, either directly or indirectly, express or implied, that supports the proposition that a taxicab driver, or any other occupational category formerly exempt under NRS 608.250(2), can now go back years in time and pursue minimum wage claims against individual employers. Laws and court decisions are presumed to only operate prospectively, unless an intent to apply retroactively is made clear. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994); *PEBP,* 124 Nev. at 154, 179 P.3d at 553; *Cnty. of Clark v. Roosevelt Title Ins. Co.,* 80 Nev. 530, 535, 396 P.2d 844, 846 (1964). (Cited in Sandpointe Apartments, LLC v. Eighth Judicial District Court, 129 Nev. Adv. Op.

87 Nov. 14, 2013); *McKellar v. McKellar*, 110 Nev. 200, 871 P.2d 296, 298 (1994) ("[t]here is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent or unless the intent of the legislature cannot otherwise be satisfied"). This presumption against retroactivity is typically explained by reference to fairness. *Landgraf,* 511 U.S. at 270.

In this case, the implications of a retroactive legal effect are profound, considering the lengthy list of occupational exemptions under NRS 608.250(2) that were completely wiped away by the *Thomas* decision. If this Honorable Court were to grant Appellants' Motion, it would mean that other previously exempt occupations such as casual babysitters, domestic service employees, outside salespersons, agricultural employees, persons with severe disabilities, and limo drivers can now go back possibly years in time and file minimum wage claims in District Court.

The *Thomas* decision provides compelling affirmative support that it was not intended to allow Appellants and other previously exempt occupations under NRS 608.250(2) to be able to go back years in time pursuing minimum wage claims. This Court ruled, "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)." (Page 9 of *Thomas* decision, emphasis added). From the use of the present tense, the *Thomas*

decision never intended for Appellants to go back in time; otherwise, the majority of the Supreme Court would have clearly stated **"superseded and supplanted,"** the past tense, which would have entirely different implications.

NRS 608.250(2) was the law that employers were following until the *Thomas* decision issued on June 26, 2014. Following passage of the Nevada Minimum Wage Amendment in 2006, the statutory occupational exemptions for taxi and limo drivers (and others) remained on the books and effective pursuant to NRS 608.250(2). There was no express or implied repeal at that time or in the years following. In 2009, federal District Judge Robert Clive Jones was the first jurist in Nevada to weigh in on the question of "implied repeal," of NRS 608.250(2), interpreting Nevada law in the Lucas case. His decision against "implied repeal," although not binding on the Nevada Supreme Court, was nonetheless the only statement of competent judicial authority on the Nevada law question, and remained so until Thomas. All during those years from 2006 until June 26, 2014, employers and employees followed the law as interpreted by Judge Jones, and were reasonable in doing so since the Supreme Court had not spoken otherwise. Moreover, the Nevada Labor Commissioner agreed with that state of affairs, and continued to recognize the occupational exemptions of NRS 608.250(2) until *Thomas*. The Supreme Court recognized this fact in *Thomas* when it stated, "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,"… such that "both cannot stand,… and the statute **is impliedly repealed** by the constitutional amendment." (Page 6 of *Thomas* decision; emphasis supplied). The majority did not state "the statute **was** impliedly repealed," in 2006 by the Nevada Minimum Wage Amendment. Thus, this Court is recognizing the legal quandary due to two (2) conflicting laws in force and in effect on the same subject matter since 2006. That quandary moved the majority in *Thomas* to issue a conclusive decision that would resolve the conflict going forward. Nothing in the language of *Thomas* indicates that it meant to grant Appellants a right to pursue minimum wage claims retroactively.

In Stokes v. Aetna Casualty and Surety Company, 232 So. 2d 328 (La.App.1970), (cited with approval in Klosterman v. Cummings, 476 P.2d 14, 86 Nev. 684 (Nev., 1970), that court said: 'We conclude, therefore, that the question of retroactive or prospective application of civil law changes must be determined in the light of (1) extent of reliance on previous legislation or judicial decision, (2) the reasonableness of such reliance, (3) the degree of hardship resulting from a retroactive application of the change, (4) the public interest in the stability of the social institutions involved, if any, and (5) the purpose and intent of both the new and old rule.'

In this case, prior to June 26, 2014, there was no Nevada Supreme Court decision on this matter and Respondents, including other employers in Nevada, were reasonably and legitimately relying on NRS 608.250(2). That reliance was reasonable, since NRS 608.250(2) remained the law until the *Thomas* decision. The degree of hardship resulting from a retroactive application will be enormous and profound, since many employment sectors listed under NRS 608.250(2) were reasonably and legitimately relying on that law during all that time.

If retroactive application were to take place, Respondents and those other employment sectors would be unjustly punished for following the same law that the Nevada Labor Commissioner was following and enforcing all those years. Instead, the *Thomas* decision rightfully and reasonably makes it clear that NRS 608.250(2) no longer applies, and hence there are no occupational exemptions under that statute in the State of Nevada after June 26, 2014.

The occupational exemptions contained in NRS 608.250(2) had been in effect in Nevada since 1965. Employers and government agencies reasonably and justifiably relied upon those occupational exemptions until *Thomas*. The intent of the *Thomas* decision was not to punish Respondents or other employers who in good faith reasonably and lawfully relied upon NRS 608.250(2). Rather, the intent of *Thomas* was to issue a conclusive opinion on minimum wage law that would

resolve the conflict between two existing laws, and apply that resolution on a going forward basis after June 26, 2014.

CONCLUSION

Based on the foregoing points and authorities, Respondents respectfully request that this Honorable Court deny Appellants' Motion to Correct Opinion of June 26, 2014 and Stay Remittitur.

DATED this 16th day of October, 2014.

YELLOW CHECKER STAR
TRANSPORTATION CO. LEGAL DEPT.

Marc C. Gordon

MARC C. GORDON, ESQ.
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Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned certifies that on October 16th, 2014, service of the foregoing, **RESPONDENTS' OPPOSITION TO MOTION TO CORRECT OPINION OF JUNE 26, 2014 AND STAY REMITTITUR** was made by depositing same in the U.S. mail, first class postage, prepaid, addressed as follows:

Leon Greenberg, Esq.
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
Attorney for Appellants

/s/ Sheila Robertson
For **Yellow Checker Star Transportation Co. Legal Dept.**

EXHIBIT 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER THOMAS; AND CHRISTOPHER CRAIG, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARILY SITUATED,
Appellants,
vs.
NEVADA YELLOW CAB CORPORATION; NEVADA CHECKER CAB CORPORATION; AND NEVADA STAR CAB CORPORATION,
Respondents.

No. 61681

FILED

OCT 27 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER

This court issued an opinion in this matter on June 26, 2014. Appellants have filed a motion to correct the opinion by changing three words from present tense to past tense, and also request that this court stay issuance of the remittitur, which was due to issue October 20, 2014. Respondents have filed an opposition to the motion, and appellants have filed a reply. No good cause appearing, we deny the motion to the extent it requests changes to the wording of the opinion; the opinion shall stand as issued. We grant the motion to the extent that the remittitur was not

issued while this court considered the motion. As we have now ruled on the motion, we direct the clerk to issue the remittitur forthwith.

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Ronald J. Israel, District Judge
Leon Greenberg Professional Corporation
Marc C. Gordon
Tamer B. Botros
Eighth District Court Clerk

EXHIBIT 4

RULES TO BE OBSERVED BY EMPLOYERS

EVERY EMPLOYER SHALL POST AND KEEP CONSPICUOUSLY POSTED IN OR ABOUT THE PREMISES WHEREIN ANY EMPLOYEE IS EMPLOYED THIS ABSTRACT OF THE NEVADA WAGE AND HOUR LAWS (NRS 608)

PLEASE NOTE: Every person, firm, association or corporation, or any agent, servant, employee or officer of any such firm, association or corporation, violating any of these provisions is guilty of a misdemeanor.

The legislature hereby finds and declares that the health and welfare of workers and the employment of persons in private enterprises in this state are of concern to the state and the health and welfare of persons required to earn their livings by their own endeavors require certain safeguards as to hours of service, working conditions and compensation therefor.

1. Discharge of employee: Whenever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately.

2. Quitting employee: Whenever an employee resigns or quits his employment, the wages and compensation earned and unpaid at the time of his resignation or quitting must be paid no later than the day on which he would have regularly been paid or 7 days after he resigns or quits, whichever is earlier.

3. An employer shall not employ an employee for a continuous period of 8 hours without permitting the employee to have a meal period of at least one-half hour. No period of less than 30 minutes interrupts a continuous period of work.

4. Every employer shall authorize and permit covered employees to take rest periods, which, insofar as practicable, shall be in the middle of each work period. The duration of the rest periods shall be based on the total hours worked daily at the rate of 10 minutes for each 4 hours or major fraction thereof. Authorized rest periods shall be counted as hours worked, for which there shall be no deduction from wages.

5. Effective July 1, 2010 each employer shall pay a wage to each employee of not less than $7.25 per hour worked if the employer provides health benefits, or $8.25 per hour if the employer does not provide health benefits. Offering health benefits means making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. Tips or gratuities received by employees shall not be credited as being any part of or offset against the minimum wage rates.

6. A part of wages or compensation may, if mutually agreed upon by an employee and employer in the contract of employment, consist of meals. In no case shall the value of the meals consumed by such employee be computed or valued at more than 35 cents for each breakfast actually consumed, 45 cents for each lunch actually consumed, and 70 cents for each dinner actually consumed.

7. An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee whose wage rate is less than 1 1/2 times the minimum rate prescribed pursuant to the Constitution of the State of Nevada: (a) Works more than 40 hours in any scheduled week of work; or (b) Works more than 8 hours in any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee whose wage rate is 1 1/2 times or more than the minimum rate prescribed pursuant to the Constitution, works more than 40 hours in any scheduled week of work.

The above provisions do not apply to: (a) Employees who are not covered by the minimum wage provisions of the Constitution (b) Outside buyers; (c) Employees in a retail or service business if their regular rate is more than 1 ½ times the minimum wage, and more than half their compensation for a representative period comes from commissions on goods or services, with the representative period being, to the extent allowed pursuant to federal law, not less than one month; (d) Employees who are employed in bona fide executive, administrative or professional capacities; (e) Employees covered by collective bargaining agreements which provide otherwise for overtime; (f) Drivers, drivers' helpers, loaders and mechanics for motor carriers subject to the Motor Carrier Act of 1935, as amended; (g) Employees of a railroad; (h) Employees of a carrier by air; (i) Drivers or drivers' helpers making local deliveries and paid on a trip-rate basis or other delivery payment plan; (j) Drivers of taxicabs or limousines; (k) Agricultural employees; (l) Employees of business enterprises having a gross sales volume of less than $250,000 per year; (m) Any salesman or mechanic primarily engaged in selling or servicing automobiles, trucks or farm equipment; and (n) A mechanic or workman for any hours to which the provisions of subsection 3 or 4 of NRS 338.020 apply.

8. Every employer shall establish and maintain records of wages for the benefit of his employees, showing for each pay period the following information for each employee: (a) Gross wage or salary; (b) Deductions; (c) Net cash wage or salary; (d) Total hours employed in the pay period by noting the number of hours per day; (e) Date of payment.

9. Wages must be paid semimonthly or more often.

10. Every employer shall establish and maintain regular paydays and shall post a notice setting forth those regular paydays in 2 conspicuous places. After an employer establishes regular paydays and the place of payment, the employer shall not change a regular payday or the place of payment unless, not fewer than 7 days before the change is made, the employer provides the employees affected by the change with written notice in a manner that is calculated to provide actual notice of the change to each such employee.

11. It is unlawful for any person to take all or part of any tips or gratuities bestowed upon his employees. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves.

12. An employer may not require an employee to rebate, refund or return any part of his or her wage, salary or compensation. Also, an employer may not withhold or deduct any portion of such wages unless it is for the benefit of, and authorized by written order of the employee. Further, it is unlawful for any employer who has the legal authority to decrease the wage, salary or compensation of an employee to implement such a decrease unless:

(a) Not less than 7 days before the employee performs any work at the decreased wage, salary or compensation, the employer provides the employee with written notice of the decrease; or

(b) The employer complies with the requirements relating to the decrease that are imposed on the employer pursuant to the provisions of any collective bargaining agreement or any contract between the employer and the employee.

13. All uniforms or accessories distinctive as to style, color or material shall be furnished, without cost, to employees by their employer. If a uniform or accessory requires a special cleaning process, and cannot be easily laundered by an employee, such employee's employer shall clean such uniform or accessory without cost to such employee.

For additional information or exceptions, contact the Nevada State Labor Commissioner: Carson City 775-687-4850 or Las Vegas 702-486-2650
TOLL FREE: 1-800-992-0900 Ext. 4850 Internet: www.LaborCommissioner.com

BRIAN SANDOVAL
Governor
State of Nevada

THORAN TOWLER
Nevada Labor Commissioner

BRUCE BRESLOW
Director
Nevada Department of Business & Industry

REVISED 11-13-2012

EXHIBIT 5

THE BUSINESS
ADVOCATE

WINTER 2014

A publication of the Nevada Department of Business and Industry

A Minimum Wage Guide for Nevada Employers

Increasing the minimum wage has been a hot topic since President Obama proposed raising the federal minimum wage from $7.25 to $10.10 per hour in his 2014 State of the Union Address. While the President and his supporters claim that increasing the minimum wage would ultimately benefit the economy, with no associated job loss, opponents of the plan refute those claims and declare an increase would harm small business and result in the loss of hundreds of thousands of jobs.

The debate is likely to move closer to home this spring if a bill, currently being deliberated, is indeed introduced for consideration during the upcoming state legislative session. While those discussions and debates will be taking place in Carson City, and around dinner tables and places of business throughout the state, the Office of the Labor Commissioner continues to implement existing statutes and regulations governing Nevada's minimum wage and overtime.

A recent Supreme Court ruling issued earlier this year clarified who is entitled to receive minimum wage. In order to help employers avoid the pitfalls and potential penalties associated with noncompliance, we've outlined a few of the basics concerning minimum wage in Nevada. For specific issues or questions not covered, we recommend contacting the Labor Commissioner's Office, referring directly to the language of applicable statutes and regulations or consulting with an attorney familiar with wage and hour laws.

Unique Two-Tiered System

In 2006, Nevada voters gave final approval for an amendment to the Nevada Constitution which permitted employers to pay one dollar less than the minimum wage indexed for inflation if they provided qualified health insurance to their employees. The result was a unique two-tiered minimum wage system.

Each year, at the direction of the Governor, Nevada's Labor Commissioner conducts an annual review of the minimum wage to determine if an increase is required. The wage is adjusted by the amount of increases in the federal minimum wage, or, if greater, by the cumulative increase in the cost of living. A bulletin is published each year on April 1 outlining any changes to the minimum wage to be in effect the following July.

The current minimum wage in Nevada, which was put into effect July 2010, is $7.25 per hour if an employer offers qualified health benefits, $8.25 per hour if they do not.

Minimum Wage Exclusions

In addition to a two-tiered system, the Constitutional amendment provided that individuals under the age of 18, those employed by a nonprofit for after-school or summer employment and those employed as trainees for a period of not more than 90 days were not entitled to receive minimum wage.

Prior to the amendment, Nevada law provided for other exemptions to the payment of minimum wage, specifically, NRS 608.250 exempted

Continued, page 7

six categories of individuals: (1) casual babysitters; (2) domestic service employees who reside in the household; (3) outside salespersons whose earnings are based on commissions; (4) certain agricultural employees; (5) taxicab and limousine drivers; and (6) certain persons with severe disabilities.

While the constitutional amendment did not directly conflict with the exemptions outlined in NRS 608.250, its passage created some uncertainty. It was this uncertainty that the Nevada Supreme Court addressed this past summer in *Thomas v. Nevada Yellow Cab*, 130 Nev. Adv. Op. 52 (2014). In its opinion, the Nevada Supreme Court found that exemptions outlined in the Nevada Constitution supersede the exemptions previously provided for in NRS 608.250. The only individuals who are exempt from the payment of minimum wage, according to the Nevada Supreme Court, are those specifically outlined in the constitutional amendment.

What does this decision mean for Nevada's employers? It means that employers who have previously relied on the exemptions outlined in NRS 608.250 will be mandated to pay minimum wage to individuals not specifically exempted in the Nevada Constitution.

"Qualified" Heath Insurance

State law outlines what is required of health insurance provided by an employer to be considered "qualified" in order to pay the lower tier minimum wage to their employees. Among other requirements outlined in NAC 608.102, including coverage for certain health care expenses, the cost of the premium for the health insurance plan paid by the employee must not exceed 10 percent of the gross taxable income of the employee paid by an employer. In addition, the insurance must be made available to the employee's dependents and the waiting period cannot exceed 6 months.

If an employer does not offer a health insurance plan, or the health insurance plan is not available or not provided within 6 months, the employee must be paid at least minimum wage until the employee is eligible or the plan become available. An employer is required to maintain documentation in the event that an employee declines qualified health insurance.

The passage and implementation of the Affordable Care Act, a federal health insurance mandate outside of Nevada's jurisdiction, adds an additional burden on employers related to offering health insurance benefits to employees. Although it is likely that an employer offering a qualifying plan under the Affordable Care Act will often also qualify to pay the lower minimum wage rate, a separate analysis under Nevada law and the Act should be done to ensure compliance with the requirements under both.

Regulatory Review

Rulemaking workshops were conducted earlier this year to solicit comments on Nevada's unique minimum wage structure and give the public an opportunity to provide input on existing regulation to ensure the best interest of Nevada's workers. Testimony provided at the initial workshops and any workshops that may be conducted in the future will assist the Labor Commissioner in determining if an amendment to the existing regulations should be proposed. Until that formal process concludes, one thing is clear: a little education will go a long way to ensure Nevada's employers are familiar with their obligations and responsibilities to their employees under law.

Minimum Wage Resources

Statutes and regulations governing minimum wage
NRS 608- www.leg.state.nv.us/NRS/NRS-608.html
NAC 608- http://www.leg.state.nv.us/NAC/NAC-608.html

2014 Minimum Wage Bulletin
www.laborcommissioner.com/min_wage_overtime/2014%20Annual%20Bulletin%20-%20Minimum%20Wage.pdf

Supreme Court Advisory Opinion
www.leg.state.nv.us/division/legal/weblawcd/SCop/130/130NevAdvOpNo52.html

Nevada Office of the Labor Commissioner
www.laborcommissioner.com

EXHIBIT 6

AFFIDAVIT OF EUGENE AUFFERT, CEO and CFO OF YELLOW CHECKER STAR TRANSPORTATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Eugene Auffert, being first duly sworn, depose and says:

1. I am the Chief Executive Officer (CEO) and Chief Financial Officer (CFO) of Yellow Checker Star Transportation (hereinafter "YCS").

2. I have been CEO and CFO of YCS since the year 2008.

3. The facts set forth in this affidavit are known to me personally, or are based upon my information and belief, and if called to do so, I would competently testify under oath regarding the same.

4. After the *Thomas* decision was rendered on June 26, 2014, I ensured that YCS' payroll department was in compliance with the decision.

5. Since June 26, 2014, YCS has been in compliance with the *Thomas* decision.

I declare under penalty of perjury under the laws of the State of Nevada that the above information is true and correct.

DATED this 2nd January, 2015.

EUGENE AUFFERT

SUBSCRIBED AND SWORN to before me this 2nd day of January, 2015.

NOTARY PUBLIC

SHEILA ROBERTSON
Notary Public, State of Nevada
Appointment No. 90-1933-1
My Appt. Expires July 19, 2018

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CLERK OF THE COURT

OPPM
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Plaintiffs, vs. NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION, Defendants.	Case No.: A-12-661726-C Dept.: XXVIII RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs, by and through their attorney, Leon Greenberg Professional Corporation, submit this memorandum of points and authorities in response to defendants' motion to dismiss.

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF RESPONSE

DEFENDANTS' ASSERTION THAT THE SUPREME COURT'S DECISION IN THIS CASE HAS NO CURRENT APPLICATION IS FRIVOLOUS

Like the apocryphal ostrich that sticks its head in the sand to avoid an unpleasant reality, defendants latch upon the Supreme Court Opinion's use of the "present voice" or "active" tense of certain verbs as creating a previously unknown form of "future conduct only" precedent. Defendants even more preposterously assert

that this new and revolutionary view of the law is properly divined in a *sub silentio* fashion from the Nevada Supreme Court's Opinion, which makes no comment whatsoever on limiting its decision only to future conduct.

Defendants' argument, based entirely upon the Nevada Supreme Court Opinion's use of the present tense, or active voice, verbs "supercedes" and "supplants" (and not the past tense, and passive voice, "superceded" and "supplanted"), is not only without support, it is not even logically consistent. The Opinion also, as is traditional, interchangeably uses the past and present tense and active and passive verb forms in its same critical discussions. It states that when a statute, in this case the taxi driver minimum wage exemption of NRS 608.250(2), "is irreconcilably repugnant" to a constitutional amendment it is "deemed to have been impliedly repealed." Under defendants' own reasoning this past tense and passive voice verb form renders a "future conduct only" reading of the Opinion impossible. But, just like an ostrich with its cranium buried in the sand, defendants ignore this branch of the Opinion and the resulting illogic of their completely frivolous argument.

ARGUMENT

I. DEFENDANTS MISREPRESENT WHAT CONSTITUTES A "RETROACTIVE" APPLICATION OF A LAW AND NO "RETROACTIVE" APPLICATION OF LAW ISSUE IS EVEN ARGUABLY PRESENT IN THIS CASE

A. The "retroactive application of law" jurisprudence that defendants rely upon concerns the application of a new statutory obligation to conduct taking place *prior* to such statute's effective date, a situation not present in this case.

1. Nevada's Minimum Wage Constitutional Amendment became effective on November 28, 2006 and plaintiffs' claims only concern conduct taking place after that date.

Defendants' brief, at page 5, states that "[f]ollowing the passage of the Nevada Minimum Wage [Constitutional] Amendment in 2006, the statutory exemption [from Nevada's minimum wage] for taxi and limo [sic] drivers remained" and that "[t]here was no express or implied repeal [of such exemption] at that time and in the years following." Defendants cite no authority for these remarkable conclusions, that

the constitutional amendment remained ineffective for taxi drivers until the Nevada Supreme Court's Opinion was issued, except for their wholly self serving, unsupported, and illogical reading of that Opinion.

Amendments to Nevada's Constitution become "effective upon the canvass of the votes by the supreme court." *Tovinen v. Rollins*, 560 P.2d 915, 916-917 (Nev. Sup. Ct. 1977). Article 15, Section 16, of the Nevada Constitution, creating new minimum wage rights for Nevada's employees, was enacted by the voters in the 2006 general election and became effective on November 28, 2006. *See*, N.R.S. § 293.395(2).

Article 15, Section 16, of the Nevada Constitution, and all of its terms, became the law of Nevada as of its effective date of November 28, 2006, not on the date of the Supreme Court's Opinion on June 26, 2014. Plaintiffs are not making any claims against defendants involving conduct occurring prior to that effective date. The only "prospective application" of Article 15, Section 16, of the Nevada Constitution is its application *after* November 28, 2006: "As a general rule, a constitutional amendment is to be given *only prospective application from its effective date* unless the intent to make it retrospective clearly appears from its terms." *Tovinen,* 560 P.2d at 917 (emphasis added).

2. Every court decision cited by defendants concerns whether to impose a new legal obligation to events occurring prior to the effective date of a new statute, an issue not present in this case.

Every case cited by defendants in support of their motion involves whether to "retroactively" apply a new law to conduct taking place *prior* to its effective date, an issue not present in this case. *See*, *Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't (PEBP)*, 179 P.3d 542, 553–54 (Nev. Sup. Ct. 2008) ("A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, ***in respect to transactions or considerations already past***.")(emphasis provided). Every other authority cited by defendants, just as in *PEBP*, involves whether to apply a statute to conduct taking place *prior* to such statute's enactment and specified effective

date. *See*, *Landgraf v. USI Films Products,* 511 U.S. 244, 273 (1994) (Conduct taking place *prior* to Civil Rights Act of 1991's enactment not subject to its provisions); *County of Clark v. Roosevelt Title Insurance*, 396 P.2d 844, 846 (Nev. Sup. Ct. 1964) (Statute could not revive right to redeem land taken by county for tax lien when that right had expired *prior* to the statute's enactment); *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 313 P.3 849 (Nev. Sup. Ct. 2013) (Statute limiting mortgage deficiency judgments not applicable to foreclosures or trustees sales taking place *prior* to statute's effective date) and *McKellar v. McKellar*, 871 P.2d 296, 298 (Nev. Sup. Ct. 1994) (Statute abolishing period of limitations to collect child support arrearage does not create right to collect arrearage barred by limitations period in effect *prior* to statute's enactment).

Defendants mislead this court by citing precedents dealing with the application of new statutes to conduct taking place *before* such statutes' effective dates. Such precedents have no application to this case, which solely involves conduct taking place *after* the effective date of Article 15, Section 16, of the Nevada Constitution, which was November 28, 2006.

II. DEFENDANTS' ARGUMENT THAT THE SUPREME COURT'S OPINION ONLY APPLIES TO "FUTURE CONDUCT" HAS NO SUPPORT AND IS CONTRARY TO FUNDAMENTAL PRINCIPLES OF LAW

A. Defendants' assertion that the Nevada Supreme Court has directed that its Opinion only be applied to conduct taking place after its publication on June 26, 2014 is baseless.

1. The argument the language of the Opinion directs a "future conduct only" application of its holding is completely without merit and unsupported.

Defendants assert that the Supreme Court's Opinion has no application to conduct taking place prior to its issuance on June 26, 2014 because of its use of the present tense and active voice verbs "supercedes" and "supplants" and not the past tense and passive voice verb forms of "superceded" and "supplanted." They offer no explanation of why the tense and active voice verb form of these two words, in an

Opinion that makes no mention of limiting its application to only future conduct, are significant. Nor do they explain why the interchangeable use in the Opinion of the past tense and passive voice verb form should be ignored in evaluating defendants' argument, *e.g.,* the Opinion also uses the "past" tense in the exact fashion defendants assert would indicate it has a current, and not just future conduct, application:

> But when a statute "is irreconcilably repugnant" to a constitutional amendment, the statute ***is deemed to have been impliedly repealed*** by the amendment." *Mengelkamp v. List*, 88 Nev. 542, 545–46, 501 P.2d 1032, 1034 (1972).... ....Therefore, the two [NRS 608.250(2)(e) and the Nevada Constitution] are "irreconcilably repugnant," *Mengelkamp*, 88 Nev. at 546, 501 P.2d at 1034, such that "both cannot stand," *W. Realty Co. v. City of Reno*, 63 Nev. 330, 344, 172 P.2d 172, 165 (1946), and the statute [NRS 608.250(2)(e)] ***is impliedly repealed*** by the constitutional amendment. 327 P.3d at 521 (emphasis provided).

Defendants insist that the Opinion's "is impliedly repealed" language is strictly and literally construed in respect to temporal effect. Under the approach urged by defendants the Opinion only effected the statute's "repeal" it speaks of, and the creation of the plaintiffs' rights under Nevada's Constitution, at the "is" or present time, even though "repealed" is a past tense verb, *e.g.,* the repeal only occurred upon the date of the Opinion's publication, June 26, 2014. They ignore that the Opinion also expressly states that the rule of law it was enforcing requires that such a statute "is deemed to *have been* impliedly repealed," a choice of words that can *only* be strictly construed, under defendants' approach, to an event taking place *in the past* ("have been"). Perhaps in their reply defendants will argue that there is a "scorecard" that must be taken in applying their approach to reading judicial opinions, and in this case four "present" and "active" tense verbs outscore one "passive" and "past" tense verb. They certainly can cite no precedents giving any guidance on how to apply their novel method of reading judicial opinions.

Defendants' self-invented method of reading judicial opinions, by literally applying some, but not all, the verb tenses, and using those that they cherry pick to determine if there is a current or only future conduct holding, is not only absurd, it is unworkable. The Nevada Supreme Court, as do all courts, interchangeably uses the

"active" and "passive" verb voice styles, the technically "past" and "present" verb forms, in the language of their opinions. The use of the present and past tense of "supercedes" and "superceded" appears in *State v. Connery,* 661 P.2d 1298, 1301 (Nev. Sup. Ct. 1983) ("...we hold that NRAP 4(b) supersedes NRS 177.066...") with the Nevada Supreme Court using, as in this case, the present tense and the West reporter in the headnotes and summary using the past tense. *Connery*, despite its use of the present tense "supercedes," did not make a "future conduct only" ruling but applied its supersession finding to the procedural rule presented and to the controversy before it, and by doing so denied defendant the relief it sought. *See, also*, *Jacobson v. Estate of Clayton*, 119 P.3d 132, 134 (Nev. Sup. Ct. 2005) using "supercedes" and "superceded," present and past tenses, active and passive verb styles, interchangeably and applying its supersession finding to the controversy before it and not just to future cases (Stating in first paragraph "We conclude that *Bodine* is **superseded** by the Legislature's 1971 amendment of NRS 140.040..." and in last paragraph under the "Conclusion" heading "The current language of NRS 140.040(3) **supersedes** this court's decision in *Bodine*...). *See, also, Goldman v. Clark*, 1 Nev. 607, 611 (1866) (Holding that if Nevada's Constitution, "by its own terms exempts a homestead from forced sale" it would **"supercede"** contrary provisions of prior statute "[b]ut if the Constitution did not take effect in regard to homesteads, until the legislature passed the required law, then the old act was not **superseded** until the new one went into effect.")

2. That the Nevada Supreme Court would take the radical step of issuing a "future conduct only" holding in a completely *sub silentio* fashion is absurd.

"The general rule that judicial decisions are given retroactive effect is basic in our legal tradition." *See, Newman v. Emerson Radio Corp.,* 48 Cal. 3d 973, 978 (Cal. Sup. Ct. 1989), citing *Linkletter v. Walker*, 381 U.S. 618, 622 (1965) ("At common law there was no authority for the proposition that judicial decisions made law only for the future", citing 1 Blackstone, Commentaries 69 (15th ed. 1809)). As discussed,

infra, in the Twentieth Century, the common law rule prohibiting judicial decisions from only making "future law" was slightly relaxed, in exceptional circumstances, none of which are present in this case. The idea the Nevada Supreme Court engaged in such an exceptional "future law only" ruling through a cryptic tea leaf reading of its stylistic choice to use, in some places but not others, active voice and present tense verbs in an Opinion, is preposterous. No decision, from any jurisdiction, has ever made such a "future law only" ruling in that *sub silentio* fashion.

It is also preposterous to hold that the Nevada Supreme Court's order rejecting plaintiffs' pre-emptive motion to change the Opinion's verbs to their past tense forms was affirming, again *sub silentio*, such a "future conduct only" holding. Just like the Opinion itself, such order makes no mention of such a "future conduct only" holding. Rather, the Supreme Court was refusing to dignify the absurd arguments now being raised by defendants in this Court with even an acknowledgment that they deserved a response. It was confident it could stand by its stylistic choices of language and that this Court was competent enough to know that if the Supreme Court was making such a remarkable, and previously unheard of, "future conduct only" ruling, the Opinion would so state expressly and unmistakably. Presumably it was also hoping that members of the State Bar would show enough respect to the judicial process to not raise such a frivolous argument upon its remittitur of this case, a hope that has now been dashed.

B. This case does not present the very narrow sort of situation where a "future conduct only" application of the Nevada Supreme Court's Opinion would potentially be proper.

As discussed in *Linkletter, Newman*, and every other case dealing with the issue, the common law, since its inception, has always commanded the application of court decisions to the immediate controversies and parties before it. Under the traditional common law view, courts *never* issued "future conduct only" decisions when a party's past conduct had been found to violate a legal duty. This was because the common law view was that court decisions were not "making" the law but simply "declaring"

what the law had always been, *See*, *Newman*, 48 Cal 3d 978-80, discussing the origins of the "rule of retroactivity" exemplified in Chief Justice Rehnquist's observation that "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student" *citing and quoting United States v. Security Industrial Bank* 459 U.S. 70, 79 (1982).

Defendants seek to apply a grossly corrupted version of the "prospective application" of certain decisions, such as in *Linkletter*, involving new *judicially created rights* or that *overrule prior judicial precedents*. In *Linkletter*, the United States Supreme Court declined to grant retroactive force to its decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), which overruled prior Supreme Court precedents on the application of the Fourth Amendment's exclusionary rule to state criminal prosecutions. 381 U.S. at 637-38. Such a retroactive application would have invalidated countless convictions that were completely valid under prior United States Supreme Court precedents and created an untenable situation.

The decision in *Linkletter* and similar "prospective" or "law only for the future" cases do not involve, and are inapplicable to, situations, such as this case, where a party's rights are created by the express language of a newly enacted statute or constitutional provision. They are inapplicable because the parties whose conduct is governed by those new statutes and constitutional provisions ***have notice of the language of those new laws and are aware that they disregard the same at their peril.*** Defendants can cite to no "future conduct only" ruling that any court has ever made in respect to any new voter or legislatively enacted law that displaces a prior law or judicial precedent. *See*, *Jacobson,* and every other decision the Nevada Supreme Court has issued where a prior judicial precedent or legislative or constitutional enactment has been found to be superseded by a subsequently enacted statute or

constitutional amendment.[1] That no such decisions exist does not seem to stop defendants from believing they are entitled to such a decision in this case.

C. Even if this case was of the type where a "future conduct only" application of the Nevada Supreme Court's Opinion could potentially be proper, the relevant circumstances do not justify such a "future conduct only" application.

As already discussed, the sort of "future conduct only" effect that defendants seek from the Nevada Supreme Court's Opinion is impossible. Such a "future conduct only" limitation on a judicial decision has *never* been utilized or allowed in *any* case involving a new voter or legislatively enacted and expressly conferred statutory or constitutional right. Such rulings have only been utilized in the very narrow area of "judicially created" law, where a jurisdiction's highest court has recognized previously unknown, and otherwise unknowable, rights or set aside prior judicial precedents. Yet even if this Court were to disagree with the foregoing fundamental legal principle, and consider whether a "future conduct only" application of the Supreme Court's Opinion was appropriate, it would have to reject any such application.

While, as discussed in *Sierra Club v. San Joaquin Local Agency* 21 Cal 4th 489, 509-10 (Cal. Sup. Ct. 1999), citing and quoting *Newman*, there are "narrow exceptions" to the common law rule forbidding "future conduct only" rulings, such as was done in *Linkletter,* they require the demonstration that "considerations of fairness and public policy [that] are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule." Such an examination looks to whether application of a Court's decision to events occurring prior to its publication creates "an unusual hardship" because a substantial "detrimental reliance" or "vested right" was created by or rested upon an overturned rule of law. *Id.*

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[1] Diligent research by plaintiffs' counsel has likewise failed to find a reported case from any jurisdiction where a "future conduct only" ruling was issued in such circumstances.

Defendants present no support for their assertion that the sort of exceptional circumstances discussed in *Sierra Club* and *Newman* are present. Nor would any prior judicial decision support finding them to be so present and that the Supreme Court's Opinion should be given the "future conduct only" application requested by defendants. The decision in *Isbell v. County of Sonoma*, 21 Cal.3d 61, 74-75 (Cal. Sup. Ct. 1978) is illustrative. *Isbell* found that the Fourteenth Amendment's due process protections rendered California's statutory confession of judgment procedures void. *Id.* Given the massive number of judgments entered under those procedures, most or almost all of which presumably did involve legitimate debts that were owed, *Isbell* declined to vacate *en mass* all prior judgments so entered by all California creditors despite their now discovered constitutional infirmity. *Id.* Nonetheless, it granted such judgment debtors the benefit of the rule of law it announced by holding they could seek hearings to void those judgments at which the creditor would have the burden of showing compliance with its holding. *Id.*

The sort of "future conduct only" ruling defendants urge this Court to apply to the Supreme Court's Opinion goes far beyond the very narrow, and exceptionally justified, temporal limitations applied in *Isbell* and similar cases. Nor do defendants present any justification for imposing any sort of restriction on the temporal scope of the Opinion.

Defendants were well aware of the "absolute" language of Article 15, Section 16, of the Nevada Constitution. The Nevada Attorney General's opinion, 05-04 Op. Atty Gen. (2005), issued before November 28, 2006, put the defendants and the entire Nevada taxi industry on notice that they would be subject to Article 15, Section 16. Nor do, or can, defendants argue such constitutional amendment's language, read in isolation, fails to confer the rights claimed by the plaintiffs. Rather they argued that *another law*, the previously enacted statute NRS 608.250, must be read together with the constitutional amendment and that under such a coordinated reading the rights claimed by the plaintiffs do not exist.

Defendants seem to believe they are entitled to some sort of special treatment, or excuse from liability, because the Nevada Supreme Court rejected their arguments on a "coordinated" reading of Article 15, Section 16, of the Nevada Constitution and NRS 608.250. That certain Nevada taxi industry employers managed to convince some, but not all, lower court jurists of the correctness of that argument is irrelevant.[2] Until a final decision was issued on such argument by the Nevada Supreme Court, defendants had no right to take shelter in it, irrespective of it being embraced by certain lower court jurists or an administrative agency (and defendants' assertion that the administrative agency dealing with Nevada's labor laws, the Nevada Labor Commissioner, agreed with their argument is absolutely false).[3]

Defendants' claim imposing a pre-June 26, 2014 liability upon them for their drivers' unpaid minimum wages would be unfair and a punishment is sheer hubris. It is defendants that are attempting to seek an unfair and unjust enrichment at the expense of their taxi drivers by avoiding a very modest liability for the very small minimum hourly wage they are required to pay those hardworking employees. The reality is that defendants come before this Court as litigants with unclean hands who knew their actions could violate Nevada's Constitution and chose to accept that risk.

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[2] On February 11, 2013, Judge Kenneth Cory of this Court, in *Murray v. A Cab Taxi Service*, Case No. A-12-669926-C, in a decision made over four months *prior* to the Nevada Supreme Court's Opinion, rejected those arguments and adopted the holding ultimately expressed in that Opinion.

[3] Defendants mislead the Court by claiming the Nevada Labor Commissioner stated that NRS 608.250 still exempted taxi cab drivers from all minimum wage requirements after the effective date of Article 15, Section 16, of the Nevada Constitution. The sole support they cite for that claim is a 2012 document, Ex. "4" of their moving papers. The discussion in that document about drivers of taxicabs refers to their exemption from Nevada's overtime pay requirements, not Nevada's Constitutional Minimum Wage. The Nevada Labor Commissioner took no position on defendants' argument that a coordinated reading of NRS 608.250 and the Nevada Constitution exempted taxi drivers from all minimum wage requirements prior to the Nevada Supreme Court's Opinion.

Defendants could have, but did not, seek a declaratory ruling years ago on their obligations under Article 15, Section 16, of Nevada's Constitution. They could have done so immediately after the passage of the constitutional amendment by bringing an NRCP Rule 23 class action proceeding, just like this case, that would have bound all of their taxi driver employees. Pending a final ruling in such a proceeding, they could have deposited into escrow all amounts that might be due to their drivers and avoided the imposition of any punitive damages, future penalties or interest on such unpaid amounts. They consciously chose not to do so. Having made that decision, defendants cannot complain about the liabilities that they now must reckon with. The only victims of unfair treatment in this case are defendants' taxi drivers, who for years have been denied the most modest minimum hourly wage payments from defendants that the Nevada Constitution commands.

If this Court still has doubts about denying defendants' request for a "future conduct only" application of the Supreme Court's Opinion, it should also review *Hansen v. Harrah's*, 675 P.2d 394 (Nev. Sup. Ct. 1984). *Hansen* further illustrates the complete fallaciousness of the idea the Supreme Court's Opinion has no application to conduct occurring prior to its publication. *Hansen* created, through judicial recognition of Nevada's public policy, a tort cause of action for the retaliatory discharge of an employee who files a worker's compensation claim. No such cause of action was authorized in the text of any Nevada statute, the creation of such a cause of action was an exception to Nevada's well established "employment at will" law, and the creation by judicial recognition of such a cause of action had been rejected by some other state courts. 675 P.2d at 396. Nonetheless, even though the employer defendants in *Hansen* had no express advance notice that such a cause of action existed as an exception to the "employment at will" law of Nevada, the Nevada Supreme Court exposed the defendant/employers in that case to a *current* liability for compensatory damages. *Hansen* both created a new cause of action and allowed liability for that newly recognized caused of action to be imposed on the defendants'

prior conduct, it did not merely determine the defendants' future legal obligations.

Hansen also details the limited circumstances under which the Nevada Supreme Court will make a "future conduct only" holding. It limited the branch of its holding that an employer could be liable for punitive damages claims for the newly recognized wrongful discharge tort it created to future cases. It did so because the purpose of punitive damages is to punish and deter reprehensible conduct that violates the law. 675 P.2d at 397. Such purpose would not have been advanced by allowing punitive damages in *Hansen* since the employer defendants had no reason to believe their conduct was illegal. *Id.* It did *not* impose any "future conduct only" limitation on the *Hansen* plaintiffs' ability to recover compensatory damages on such newly recognized tort claim. *Id.*

It is impossible to reconcile the very sound and well grounded approach taken by the Nevada Supreme Court in *Hansen* with the application of the Nevada Supreme Court's Opinion being urged by the defendants. Unlike the defendants in *Hansen*, defendants in this case had every reason to believe their conduct was in violation of the plain language of Article 15, Section 16, of Nevada's Constitution, as ultimately found by the Supreme Court in this case. Such a conclusion by defendants was absolutely required by any isolated reading of such constitutional provision and in 2005 the Nevada Attorney General publicly opined that such conclusion was correct. If a party, as in *Hansen*, can be liable for damages as a result of their conduct occurring *prior* to the Nevada Supreme Court's creation of a new cause action, one not set forth expressly in any written law, defendants in this case must be liable for their conduct occurring prior to June 26, 2014, which conduct was indisputably in violation of any "isolated" reading of Article 15, Section 16, of Nevada's Constitution.[4]

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[4] Plaintiffs do not concede that, as in *Hansen*, defendants should be excused from liability for punitive damages in this case. That issue should be addressed by the Court at a future date if the parties are unable to resolve this litigation cooperatively.

CONCLUSION

Wherefore, for all the foregoing reasons, the defendants' motion should be denied in its entirety.

Dated: January 23, 2015

Respectfully submitted,

/s/ Leon Greenberg

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CERTIFICATE OF MAILING

The undersigned certifies that on January 23, 2015, she served the within:

RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

by court electronic service to:

TO:

Marc C. Gordon, Esq.
General Counsel
Yellow Checker Star Transportation Co.
Legal Dept.
5225 W. Post Road
Las Vegas, NV 89118

/s/ *Dana Sniegocki*

Dana Sniegocki

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CLERK OF THE COURT

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Plaintiffs, vs. NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION, Defendants.	Case No.: A-12-661726-C Dept.: XXVIII SUPPLEMENT TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS CONSISTING OF NEWLY ISSUED AUTHORITY Hearing Date: February 10, 2015 Hearing Time: 9:00 a.m.

Plaintiffs, by and through their attorney, Leon Greenberg Professional Corporation, submit this supplement to plaintiffs' response to defendants' motion to dismiss consisting of newly issued authority .

MEMORANDUM OF POINTS AND AUTHORITIES

ON JANUARY 27, 2015, THE NINTH CIRCUIT COURT OF APPEALS CONFIRMED THAT THE OPINION ISSUED BY THE NEVADA SUPREME COURT IN THIS CASE DOES NOT HAVE A "FUTURE CONDUCT ONLY" EFFECT

Annexed as Ex. "A" is a copy of the United States Court of Appeals for the Ninth Circuit's decision in *Greene v. Executive Coach & Carriage*, No. 12-17306 (argued January 14, 2015, decision issued January 27, 2015). *Greene* involved the exact issue raised in defendants' motion to dismiss: Whether the Nevada Supreme

Court's opinion in this case applied to conduct prior to its publication on June 26, 2014. It absolutely rejected that baseless argument raised in this case by defendants:

> The district court erred in dismissing Greene's claim under the Nevada Minimum Wage Amendment, embodied in Article 15, § 16 of the Nevada Constitution. *See Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 522 (Nev. 2014) (holding that the Nevada Minimum Wage Amendment, which contains no taxicab and limousine exception, "supersedes and supplants the taxicab driver exception set out in [Nevada Revised Statutes §] 608.250(2)"). Because the repeal of § 608.250(2) occurred in 2006 when the amendment was ratified, we reject Executive Coach and Carriage's ("Executive") retroactivity argument. Greene does not allege that he is owed wages for hours worked prior to 2006. We therefore reverse the district court's dismissal of the minimum wage claim. Ex. "A"., p. 2, ¶ 1.

In respect to the post-opinion order issued by the Nevada Supreme Court in this case, declining to revise the "supercedes" and "supplants" (present tense) language of the opinion, the Ninth Circuit Court of Appeals, at oral argument, found the same to be irrelevant. In its colloquy with counsel for Executive Coach, who insisted that such post-opinion order indicated that the opinion was intended to have only "future conduct" application, the Ninth Circuit Court of Appeals stated the following (transcribed from the video of such argument online at http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000006947):

> Starting at time count 10:54:
>
> Mr. Lovato (counsel for Executive Coach): The Amendment did not repeal any law. It was the Nevada Supreme Court in *Thomas* that implied the repeal of the law.
>
> Justice Friedland: Well, the Amendment was passed in 2006, correct?
>
> Mr. Lovato: It was passed in 2006.
>
> Justice Friedland: And so you're saying it didn't actually do anything in 2006...it didn't do anything until now?

Mr. Lovato: Well it did what it says. It can only be interpreted by the public for what it actually states. There's no question that it does not expressly repeal any other laws, and it makes no reference to any other laws.

Justice Friedland: But, the Nevada Supreme Court has now said that it did, and you're saying it didn't do it in 2006? There was just, like, this vacuum for eight years?

Mr. Lovato: The Nevada Supreme Court has not held that the Minimum Wage Amendment effectuated a repeal in 2006, in fact it said to the contrary where it used present tense language and...

Justice Friedland: But they're just interpreting the law in the present tense, saying this is what the law means, right?

Mr. Lovato: But, yeah, I think we can take the Nevada Supreme Court for what its saying when the issue is pointedly raised by way of a motion before it [referring to the post-opinion motion and resulting order at Ex. 3 of defendants' moving papers], requesting that [present tense] language be changed so that it is clearly retroactive.

Justice Friedland: But, maybe that's because it's so silly to think that when you say that this is what the law means it doesn't need to be changed because obviously it's interpreting what the law means.

Ending count time: 12:09

As Justice Friedland astutely observed, the Nevada Supreme Court's post-

opinion order was, as stated in plaintiffs' memorandum already submitted to the Court, refusing to dignify the "silly" argument now made by defendants about the use of "supercedes" and "supplants" and not "superceded" and "supplanted." It declined to amend that language on that basis, not because it was confirming such "silly" and absurd argument about its opinion having only a "future conduct" application.

CONCLUSION

Wherefore, for all the foregoing reasons, defendants' motion to dismiss should be denied in its entirety.

Dated: January 27, 2015

Respectfully submitted,

/s/ Leon Greenberg
Leon Greenberg, Esq. (Bar # 8094)
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Attorney for Plaintiffs

CERTIFICATE OF MAILING

The undersigned certifies that on January 27, 2015, she served the within:

SUPPLEMENT TO PLAINTIFFS'
RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS
CONSISTING OF NEWLY ISSUED
AUTHORITY

by court electronic service to:

TO:

Marc C. Gordon, Esq.
General Counsel
Yellow Checker Star Transportation Co.
Legal Dept.
5225 W. Post Road
Las Vegas, NV 89118

/s/ *Dana Sniegocki*

Dana Sniegocki

EXHIBIT “A”

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 27 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT G. GREENE, AKA Robert A. Greene, Plaintiff - Appellant, v. EXECUTIVE COACH & CARRIAGE, a Nevada corporation, Defendant - Appellee.	No. 12-17306 D.C. No. 2:09-cv-00466-GMN-RJJ MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, Chief District Judge, Presiding

Argued and Submitted January 14, 2015
San Francisco California

Before: M. SMITH, NGUYEN, and FRIEDLAND, Circuit Judges.

Robert Greene ("Greene") appeals from the dismissal of his minimum wage claim, entry of summary judgment on another wage-and-hour claim, and denial of leave to amend his complaint. We have jurisdiction under 28 U.S.C. §1291. We

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

review the district court's interpretation of state law de novo, *Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1055 (9th Cir. 1997), and its denial of leave to amend for abuse of discretion, *Ventress v. Japan Airlines*, 603 F.3d 676, 680 (9th Cir. 2010). We reverse and remand.

1. The district court erred in dismissing Greene's claim under the Nevada Minimum Wage Amendment, embodied in Article 15, § 16 of the Nevada Constitution. *See Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 522 (Nev. 2014) (holding that the Nevada Minimum Wage Amendment, which contains no taxicab and limousine exception, "supersedes and supplants the taxicab driver exception set out in [Nevada Revised Statutes §] 608.250(2)"). Because the repeal of § 608.250(2) occurred in 2006 when the amendment was ratified, we reject Executive Coach and Carriage's ("Executive") retroactivity argument. Greene does not allege that he is owed wages for hours worked prior to 2006. We therefore reverse the district court's dismissal of the minimum wage claim.

2. The district court erred in granting summary judgment on Greene's claim under Nevada Revised Statute § 608.016. First, we assume, without deciding, that there is a private right of action to bring this claim, because Executive does not argue otherwise. *See Cal. Alliance of Child & Family Servs. v. Allenby*, 589 F.3d 1017, 1020 n.5 (9th Cir. 2009) (holding that because the

existence of a private right of action is not jurisdictional, the issue of whether a private right of action exists may be deemed waived if not raised). Second, the district court erred in finding that § 608.016 does not apply to commission-based pay arrangements. Regardless of how § 608.012 defines wages, they still must be paid "for each hour the employee works." Nev. Rev. Stat. § 608.016. We therefore reverse the district court's entry of judgment on this claim.

3. The court abused its discretion in denying Greene's motion for leave to amend the complaint. It had already found good cause and granted Greene leave to amend, but the court's order, issued on June 21, 2011, set the deadline for amendment on a date that had already passed—June 15, 2011. That is a deadline with which Greene of course *could not* have complied. Nevertheless, Greene attempted to amend promptly on June 21, 2011, the date the ruling was issued, but his request was denied. We reverse, and on remand Greene will be allowed to file an amended complaint.[1] *See United States v. Henderson*, 241 F.3d 638, 646 (9th Cir. 2001), *as amended* (holding that it is an abuse of discretion to "rule[] in an

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[1] We note, however, that the proposed amended complaint would result in an overlap between the instant action and *Schemkes v. Jacob Transp. Servs., LLC*, No. 2:11-cv-00355-JAD-NJK (D. Nev.). Greene may not maintain identical claims against the same defendant in separate lawsuits, *see Adams v. Cal. Dep't Health Servs.*, 487 F.3d 684, 688 (9th Cir. 2007), but of course how these cases are managed—if Greene continues to maintain his Fair Labor Standards Act claims in both cases—is best left to the district court.

irrational manner"). For the same reason, we reverse the district court's imposition of sanctions on Greene, which was predicated on the conclusion that Greene's effort to amend his complaint was frivolous.

REVERSED AND REMANDED.

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Plaintiffs, vs. NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION Defendants.	Case No.: A-12-661726-C Dept. No.: XXVIII Date of Hearing: February 10, 2015 Time of Hearing: 9:00 a.m.

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION

COMES NOW, NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION, by and through their undersigned counsel of record, MARC C. GORDON, ESQ., and TAMER B. BOTROS, ESQ., and hereby respectfully file their Reply to Plaintiffs' Opposition.

I.

FACTS

1. On January 6, 2015, Defendants filed the Motion to Dismiss.

2. On January 23, 2015, Plaintiffs filed their Opposition to the Motion to Dismiss.

3. On January 27, 2015, Plaintiffs filed their Supplement to their Opposition.

4. Defendants have recently discovered that the Barbara Gilmore vs. Desert Cab, Inc., case, Supreme Court No. 62905, District Court No. A-12-668502-C, has been appealed to the Nevada Supreme Court and Leon Greenberg, Esq., is seeking to have the Nevada Supreme Court rule that the *Thomas* decision applies retroactively. See Mr. Greenberg's Opening Brief attached hereto as Exhibit **1**.

5. Counsel on behalf of Desert Cab, Inc., Jeffrey A. Bendavid, Esq., has filed an Answering Brief. See Answering Brief attached hereto as Exhibit **2**.

6. Mr. Greenberg also filed a Reply Brief. See Mr. Greenberg's Reply Brief attached hereto as Exhibit **3**.

7. Based on the most recent review of the Nevada Supreme Court's Appellate Case Management website, the Barbara Gilmore vs. Desert Cab, Inc., case has not yet been scheduled for oral arguments. See Nevada Supreme Court's Appellate Case Management website printout attached hereto as Exhibit **4**.

8. Given this newly discovered information, Defendants are respectfully seeking a stay of the entirety of the *Thomas* case, until the Nevada Supreme Court renders a decision in the Barbara Gilmore vs. Desert Cab, Inc., case.

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II.

LEGAL ARGUMENT

A. The Issue of Whether The *Thomas* Decision is Prospective or Retroactive is Now Before the Nevada Supreme Court in Barbara Gilmore vs. Desert Cab, Inc.

As stated in Maheu v. Eighth Judicial District, 88 Nev. 26, 493 P.2d 709, at 725 (1972) (quoting Landis v. North American Co., 299 U.S. 248, 254-55 (1936))

> The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with the economy of time and effort for itself, for counsel, and for litigants.

Also, according to Mikulich v. Carner, 68 Nev. 161, 168, 228 P.2d 257, at 260 (1951), when actions with common questions of law or fact are pending, Nevada courts can make "orders concerning the proceedings to avoid delay or unnecessary costs."

In this case, Defendants recently discovered that Mr. Greenberg is seeking from the Nevada Supreme Court a ruling in the *Gilmore* matter, that the *Thomas* decision be applied retroactively. See attached Exhibit **1**. The *Gilmore* matter involves a common question of law, which was briefed in Defendants' Motion to Dismiss regarding whether the *Thomas* decision applies retroactively or prospectively from June 26, 2014. Mr. Greenberg is seeking a ruling from the Nevada Supreme Court on that very same question of law in the *Gilmore* matter. To conserve judicial resources and unnecessary costs, Defendants are respectfully requesting that this Honorable Court **stay the entirety of the *Thomas* case**, until the Nevada Supreme Court renders a decision on whether the *Thomas* decision applies retroactively or prospectively. If the Nevada Supreme Court elects not to decide the issue of whether the *Thomas* decision applies retroactively or prospectively, at such appropriate time, Defendants will seek putting their Motion to Dismiss, back on calendar for hearing, since all of the written briefs have been filed and submitted to this Honorable Court.

III.

CONCLUSION

Based on the foregoing points and authorities, Defendants respectfully request that this Honorable Court stay the entirety of the *Thomas* case, until the Nevada Supreme Court renders a decision in the *Gilmore* matter.

DATED this 6th day of February, 2015.

YELLOW CHECKER STAR TRANSPORTATION CO. LEGAL DEPT.

/s/ Tamer B. Botros

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CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to Rule 9 of Nevada Electronic Filing and Conversion Rules, I hereby certify that on the 6th day of February, 2015, service of the foregoing **DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION**, was made this date by electronic service as follows:

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EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARBARA GILMORE, Individually and on behalf of others similarly situated, Appellant, vs. DESERT CAB, INC., Respondent.	Sup. Ct. No. 62905 Dist. Ct. No: A-12-668502-C

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal because it is an appeal of a final judgment.

The Order of Dismissal constituting a final judgment was entered by the District Court in this case on February 25, 2013 and Notice of Entry of the same served by mail on February 26, 2013. The Notice of Appeal was served and filed on March 28, 2013.

STATEMENT OF ISSUES PRESENTED

This appeal presents the following issues:

(1) Whether the Nevada Constitution, Article 15, Section 16, requires the payment of an hourly minimum wage to employees working as taxi drivers in Nevada even though such employees are exempted from Nevada's statutory minimum wage requirement, NRS 608.250(1), by N.R.S. 608.250(2)(e).

STATEMENT OF THE CASE

This case was commenced on September 17, 2012 in the Eighth Judicial District Court. The appellant, Barbara Gilmour (hereinafter "appellant" or "Taxi Drivers") allege the appellee, Desert Cab, Inc. (hereinafter "appellee" or "Desert") failed to compensate their taxi driver employees with the minimum hourly wage required by the Nevada Constitution. Appellant's Class Action Complaint alleged Desert failed to pay her and a class of similarly situated Taxi Drivers the minimum hourly compensation required by Nevada's Constitution. AA 01-06.[1]

Desert moved the district court to dismiss this case pursuant to Nev. R. Civ. P. 12(b)(5), for failure to state a claim upon which relief could be granted. That motion was argued before the district court on January 16, 2013 and, by an order signed on February 23, 2013, and entered by the clerk of the district court

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[1] Referenced page numbers of Appellant's Appendix are referred to as "AA."

on February 25, 2013, such motion was granted. AA 09-11.

STATEMENT OF FACTS

Appellant was employed by Desert as a taxi cab driver in Clark County, Nevada. She claims Desert has, at certain times, failed to pay her the minimum hourly compensation required by Article 15, Section 16 of the Nevada Constitution. AA 04. Desert has not disputed that it failed to pay its Taxi Drivers employees the minimum hourly compensation specified in the Nevada Constitution.

SUMMARY OF ARGUMENT

The issues raised by this appeal have been conclusively resolved, against Desert, by this Court's Opinion in *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 372 P.3d 518 (2014). As *Thomas* made clear, Article 15, Section 16 of the Nevada Constitution (the "Nevada Constitutional Minimum Wage"), requires the payment of the minimum hourly wage specified therein to taxi driver employees irrespective of the terms of NRS 608.250(2)(e) or any other Nevada statute. As this appeal raises no other issues of fact or law besides those raised and resolved in *Thomas*, the district court's decision must be reversed and this case remanded to the district court for further proceedings.

The Court, in its Order reversing and remanding this case, should expressly advise the district court that *Thomas* does not establish the rights recognized therein only as of June 26, 2014, the date of the *Thomas* Opinion. While the relief, if any, that the Taxi Drivers are entitled to in this case, or in *Thomas*, is unknown, the availability of such relief is not properly limited to claims accruing after June 26, 2014. Such relief, to the extent it is otherwise warranted, should be available from the effective date of Article 15, Section 16 of the Nevada Constitution, which was November 28, 2006. Judicial efficiency will be significantly advanced by such an express advisement, as the appellees in *Thomas* have already announced that they will continue to oppose the Taxi

Drivers' claims on the basis that the *Thomas* decision has no application to conduct taking place prior to June 26, 2014.

APPLICABLE STANDARD OF REVIEW

This Court reviews a decision by the district court to dismiss under Nev. R. Civ. P. 12(b)(5) under a "rigorous appellate review" standard. *See, Sanchez v. Wal Mart Stores, Inc.*, 221 P.3d 1276, 1280 (Nev. 2009). The plaintiff's factual allegations must be accepted as true and dismissal is improper if those allegations sufficiently allege the elements of the claims asserted. *Id.* In reviewing the district court's dismissal order, every reasonable inference is drawn in the plaintiff's favor. *Id.*

ARGUMENT

I. THE DISTRICT COURT'S DECISION MUST BE REVERSED IN LIGHT OF THIS COURT'S OPINION IN *THOMAS V. NEVADA YELLOW CAB CORPORATION*

This appeal presents the identical issue of law resolved by this Court in *Thomas v. Nevada Yellow Cab Corporation.* It presents no other issues and the district court rested its determination on the reasoning rejected not once, but twice, by this Court in *Thomas*. *See, Thomas, Order of September 24, 2014*, unanimously denying petition for rehearing. Indeed, the district court in this case cited, and expressly adopted, the "findings, analysis and decision" of the now reversed district court decision in *Thomas*. AA 10.

The district court in this case, as in *Thomas*, erred by failing to properly recognize, understand, and apply, the language and meaning of Article 15, Section 16 of the Nevada Constitution and the doctrine of constitutional supremacy. There is no further briefing on the error of the district court's decision that is needed or from which this Court could benefit. This Court's opinion in *Thomas* completely disposes of all of the issues raised by this appeal and mandates that the district court's decision be reversed and this case remanded to the district court for a determination of the merits of the Taxi

Drivers' claims.

II. THIS COURT SHOULD EXPRESSLY ADVISE THE DISTRICT COURT THAT THE HOLDING IN *THOMAS V. NEVADA YELLOW CAB CORPORATION* IS NOT LIMITED TO CONDUCT TAKING PLACE AFTER JUNE 26, 2014

A. Appellee and the Nevada taxi industry have indicated that they intend to argue *Thomas* only creates the rights recognized by this Court for conduct taking place after June 26, 2014.

This litigation is one of seven known lawsuits brought against Nevada taxi cab driver employers seeking unpaid minimum wages pursuant to Article 15, Section 16 of the Nevada Constitution. *See*, *Appellants' Motion to Correct Opinion*, filed October 14, 2014 in *Thomas*.[2] Copy at AA 12-18. Counsel for more than one of those employers have advised appellant's counsel that they intend to argue this Court's Opinion in *Thomas* only creates a right to minimum wages for taxi drivers under Nevada's Constitution for work performed after the date of such opinion, June 26, 2014. AA 18. Counsel for the *Thomas* appellees have already expressly advised this Court that they intend, upon remand of *Thomas* to the district court, to make that exact argument to the district court. AA22-27.

B. This Court will conserve judicial resources, and forestall another appeal, by expressly advising the district court that Article 15, Section 16 of the Nevada Constitution created the rights recognized in *Thomas* as of November 28, 2006 and not as of the date of the *Thomas* Opinion.

In four of the seven known litigations involving the rights of Nevada taxi driver employees under Article 15, Section 16 of the Nevada Constitution the defendant taxi companies sought to dismiss such claims, based upon the arguments rejected by this Court in *Thomas*. Yet in three of those four cases the

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[2] By Order issued on October 27, 2014 this Court denied such motion, seeking to change three words in the *Thomas* Opinion from present tense to past tense. Such Order did not opine on whether the holding in *Thomas* did, or did not, apply to conduct taking place prior to June 26, 2014.

district court erred and granted such motions to dismiss.[3] Given this history, the probability of further error by the district court in one or more of these litigations is substantial unless this Court expressly declares that the rights recognized in *Thomas* were effective as of November 28, 2006.

The Nevada taxi industry, in response to these cases, has elected to engage in litigation tactics that will serve no purpose except to delay the progress of these cases and consume the limited time and resources of the counsel for the taxi drivers. Those tactics will also unduly burden this Court and the district court. Such tactics are already documented before this Court, where appellees in *Thomas* made a completely specious petition for rehearing. Such petition intentionally *excluded* any request that this Court declare the rights recognized by *Thomas* were only effective as of the date of the *Thomas* opinion. The *Thomas* appellees sought to *not* have this Court rule on that issue so they could litigate it in the district court and subject appellants' counsel to another appeal to this Court over such issue.

This Court may, or may not, choose to address in this appeal the completely frivolous contention that the rights secured by Article 15, Section 16 of the Nevada Constitution, and recognized in *Thomas*, were only effective as of the date of the *Thomas* opinion. In event that this Court declines to exercise its discretion to address that issue, a further appeal to this Court over that issue, and a substantial waste of judicial resources, is extremely probable.

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[3] In addition to this case and the *Thomas* case the district court dismissed such claims in *Tesema v. Lucky Cab Co.,* Eighth Judicial District Court, A-12-660700-C, Order of February 14, 2013 (such order revoked and those claims reinstated after the *Thomas* opinion by order of September 8, 2014). The only district court decision pre-dating *Thomas*, and making the correct finding as made by this Court in *Thomas*, is the decision in *Murray v. A Cab Taxi Service LLC*, Eighth Judicial District Court, A-12-669926-C, entered on February 11, 2013, rehearing denied by order entered on May 2, 2013.

C. The claim that the rights recognized in *Thomas* arose only on the date of the *Thomas* Opinion, and not on the date that Article 15, Section 16 of the Nevada Constitution otherwise became effective, is specious.

Amendments to Nevada's Constitution become "effective upon the canvass of the votes by the supreme court." *Tovinen v. Rollins*, 560 P.2d 915, 916-917 (Nev. Sup. Ct. 1977). Article 15, Section 16, of the Nevada Constitution was enacted by the voters in the 2006 general election and became effective on November 28, 2006. *See*, N.R.S. § 293.395(2). Appellant is not making any claims against appellee involving conduct occurring prior to that effective date.[4] The proper prospective application of Article 15, Section 16, of the Nevada Constitution is its application *after* November 28, 2006: "As a general rule, a constitutional amendment is to be given *only prospective application from its effective date* unless the intent to make it retrospective clearly appears from its terms." *Tovinen,* 560 P.2d at 917 (emphasis added).

This case does not present any retroactive application of law issue. *See*, *Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 179 P.3d 542, 553–54 (Nev. Sup. Ct. 2008) ("A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, ***in respect to transactions or considerations already past***.")(emphasis provided). No retroactive application of law issue is raised in respect to appellee's, or any other taxi cab employer's, conduct occurring after November 28, 2006, neither in this case nor in any of the other pending taxi driver litigations.

The argument that the Nevada Constitution imposed no obligation upon taxi driver employers prior to this Court's Opinion in *Thomas* is tantamount to a claim that there is no legal obligation to comply with *any* duty imposed by the

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[4] The statute of limitations applicable to the appellants' claims is not before this Court and no request is made for the Court to consider that issue.

text of Nevada's Constitution until that duty is enforced by the Nevada Supreme Court. Such assertion is contrary to the fundamental principles of our system of justice and close to a millennium of common law whereby courts are required to make substantive, and not merely future conduct, rulings about the civil legal rights of the parties. *See Linkletter v. Walker*, 381 U.S. 618, 622 (1965) ("At common law there was no authority for the proposition that judicial decisions made law only for the future", citing 1 Blackstone, Commentaries 69 (15th ed. 1809)). Embracing the revolutionary view, urged by the Nevada taxi industry, that "a new law imposes no consequences on violators until its effectiveness is confirmed by the Supreme Court of Nevada," would encourage, and reward, lawbreakers.

The argument that *Thomas* has no application to conduct taking place prior to such Opinion's release seeks to apply a grossly corrupted version of the "prospective application" of certain decisions, such as in *Linkletter*, involving new *judicially created rights* or that *overrule prior precedents*. In *Linkletter* the United States Supreme Court declined to grant retroactive force to its decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), which overruled prior Supreme Court precedents on the application of the Fourth Amendment's exclusionary rule to state criminal prosecutions. 381 U.S. at 637-38. The decision in *Linkletter* and similar cases do not involve, and are inapplicable to, situations where a parties' rights are created by the express language of a newly enacted statute or constitutional provision. They are inapplicable because the parties whose conduct is governed by those new statutes and constitutional provisions ***have notice of the language of those new laws and are aware that they disregard the same at their peril.***

The Nevada taxi industry was well aware of the "absolute" language of

Article 15, Section 16, of the Nevada Constitution.[5] They have not, and do not, argue such constitutional amendment's language, read in isolation, fails to confer the rights claimed by the taxi drivers. They argued to the district court, and this Court, that *another law*, the previously enacted statute NRS 608.250, must be read together with the constitutional amendment and that under such a coordinated reading the rights claimed by the appellants do not exist. The Nevada taxi industry cannot claim any unfair prejudice as a result of this Court's rejection of their arguments.[6]

This Court's decision in *Hansen v. Harrah's*, 675 P.2d 394 (Nev. Sup. Ct. 1984), illustrates the complete fallaciousness of the claim *Thomas* has no application to conduct occurring prior to its publication. *Hansen* created, through judicial recognition of Nevada's public policy, a tort cause of action for the retaliatory discharge of an employee who files a worker's compensation claim. No such cause of action was authorized in the text of any Nevada statute, the creation of such a cause of action was an exception to Nevada's well established "employment at will" law, and the creation by judicial recognition of such a cause of action had been rejected by some other state courts. 675 P.2d at 396. Nonetheless, even though the employer defendants in *Hansen* had no express advance notice that such a cause of action existed as an exception to the "employment at will" law of Nevada, this Court imposed a *current* liability for

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[5] They were also aware of the Nevada Attorney General's opinion, 05-04 Op. Atty Gen. (2005), issued before November 28, 2006, opining that the Nevada taxi industry employers would be subject to Article 15, Section 16.

[6] The Nevada taxi industry employers could have promptly sought a judicial declaration of their obligations after November 28, 2006 and arranged to pay into escrow, pending the issuance of such a declaration, the disputed sums now found to be owed to their taxi driver employees. They declined to do so and now seek to profit from their failure to comply with the law by not having to pay any such sums accruing prior to June 26, 2014.

compensatory damages upon the defendant employers. *Hansen* both created a new cause of action and imposed liability for that newly recognized claim on the defendants' *prior* conduct, it did not merely determine the defendants' future legal obligations.

It is impossible to reconcile the very sound and well grounded approach taken by this Court in *Hansen* with the application of *Thomas* being argued by the Nevada taxi industry. If a party, as in *Hansen*, is liable for damages as a result of their conduct occurring *prior* to this Court's creation of a new cause action, one not set forth expressly in any written law, appellee in this case must be liable for its conduct occurring prior to June 26, 2014, which conduct was indisputably in violation of any "isolated" reading of Article 15, Section 16, of Nevada's Constitution. In its Order reversing and remanding this appeal this Court should so state.

CONCLUSION

Wherefore, for all the foregoing reasons, the Order and Judgment appealed from should be reversed in its entirety and this Court should also expressly hold that its Opinion in *Thomas* is not limited to conduct taking place after June 26, 2014.

Dated: October 29, 2014

Respectfully submitted,

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Certificate of Compliance With N.R.A.P Rule 28.2

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 14 point Times New Roman typeface in wordperfect.

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 proportionately spaced, has a typeface of 14 points or more and contains 2,808 words.

Finally, I hereby certify that I have read this 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 this 29th day of October, 2014.

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CERTIFICATE OF MAILING

The undersigned certifies that on the October 30, 2014, she served the within:

Appellant's Opening Brief

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/s/ *Sydney Saucier*

Sydney Saucier

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARBARA GILMORE,
Individually and on behalf of others similarly situated,

Appellant,

vs.

DESERT CAB, INC.,

Respondent.

Supreme Court Case No.: 62905

District Court Case No.: A-12-668502-C

RESPONDENT, DESERT CAB, INC.'S ANSWERING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BARBARA GILMORE, Individually and on behalf of others similarly situated, Appellant, vs. DESERT CAB, INC., Respondent.	**Supreme Court Case No.: 62905**

RESPONDENT, DESERT CAB, INC.'S NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in *NRAP26.1(a)*, and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Parent corporations – No such corporation.
2. Publicly held company owning 10% of Respondent's stock – No such corporation.
3. Respondent's Law Firm – Moran Brandon Bendavid Moran
4. Pseudonym – None

/s/Jeffery A. Bendavid
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I. Cases:

II. Nevada Constitution:

I. JURISDICTIONAL STATEMENT

Respondent, Desert Cab, Inc. ("Respondent") objects to Appellant, Barbara Gilmore's ("Appellant") statement of jurisdiction. Appellant contends that this Court has jurisdiction over this appeal because it is a final appeal.[1] However, this Court does not have jurisdiction over Appellant's self-created "Second" Issue on Appeal identified as part of Appellant's Argument since Appellant's alleged "issue" was never raised, argued, or addressed before the District Court and the District Court never made a final judgment on this issue.[2]

II. ISSUES PRESENTED

Respondent does not object to Appellant's First Issue on Appeal. However, Respondent objects to Appellant's self-created "Second" Issue on Appeal identified as part of Appellant's Argument. Appellant lacks standing to assert this "issue" on appeal since Appellant's alleged "issue" was never raised, argued, or addressed before the District Court.

III. COMBINED STATEMENT OF THE CASE AND FACTS

On September 17, 2012, Appellant, on behalf of herself and those similarly situated, filed a Complaint against Respondent in the Eighth Judicial District

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[1] *See Appellant's Opening Brief at 1.*
[2] *See infra.*

Court for Clark County, Nevada.[3] Appellant's Complaint alleged that while employed by Respondent as a taxicab driver she was not paid minimum wage in the amount required by Article 15, Section 16 of Nevada's Constitution (the ("Minimum Wage Amendment").[4]

Based on this simple allegation, Appellant's Complaint asserted two (2) Claims for Relief.[5] Appellant's First Claim for Relief sought all relief permitted her by Nevada's Minimum Wage Amendment, including, but not limited to equitable relief, compensatory damages, and an award for punitive damages.[6]

Appellant's Second Claim for Relief alleged that Respondent failed to pay Appellant certain unpaid wages owed Appellant at the time of her separation from employment by Respondent.[7] Based on this allegation, Appellant asserted her Second Claim of Relief pursuant to *NRS 608.040* and further alleged that Respondent violated *NRS 608.020* or *608.030* and therefore, Appellant was entitled all such relief afforded her under these statutes.[8]

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[3] *See Appellant's Appendix at 01.*
[4] *See Id. at 02.*
[5] *See Id. at 04-06.*
[6] *See Id. at 04.*
[7] *See Id. at 05.*
[8] *See Id. at 05-06.*

In response to Appellant's Complaint, Respondent filed its Motion to Dismiss Appellant's Complaint pursuant to *N.R.C.P. 12(b)(5).*[9] Respondent's Motion to Dismiss established that Appellant's Complaint failed to state any claims upon which relief could be granted since Appellant failed to provide sufficient factual allegations demonstrating her claims for relief.[10] Further, Respondent's Motion to Dismiss demonstrated that Respondent's Complaint failed to state any claim upon which relief could be granted since *NRS 608.250(2)(e)* expressly excluded taxi drivers from Nevada's minimum wage laws.[11]

On January 13, 2013, the District Court held a hearing on Respondent's Motion to Dismiss.[12] After hearing oral arguments, the District Court granted Respondent's Motion to Dismiss.[13] On February 23, 2013, the District Court executed the Order Granting Respondent's Motion to Dismiss and subsequently,

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[9] *See Respondent's Appendix at 1.* Since Appellant never contacted Respondent's counsel to discuss and agree on the submission of a Joint Appendix as required *NRAP 30(a)*, Respondent is forced to submit a separate Appendix. Wherever possible, Respondent has referenced Appellant's Appendix as required by *NRAP 30(b)(4).*

[10] *See Id. at 6-14.* Prior to having any opportunity or obligation to admit or deny any allegations present in Appellant's Complaint. Accordingly, Respondent objects to Appellant's declaration that Respondent never "denied" that Respondent did not pay Appellant the required minimum wage.

[11] *See Id. at 6-12.*

[12] *See Appellants' Appendix at 09.*

[13] *See Id. at 09-11.*

the Order was entered on February 25, 2013.[14] Thereafter, Appellant filed this Appeal.

IV. STANDARD OF REVIEW

The Supreme Court of Nevada reviews orders granting a motion to dismiss for failure to state a claim *de novo*.[15] On appeal, the Court accepts the plaintiff's factual allegations as true and then makes a determination whether the relevant allegations are legally sufficient to satisfy the elements of the claim asserted.[16]

V. SUMMARY OF THE ARGUMENT

Appellant's Appeal, and in particular, Appellant's Opening Brief relies entirely on the Court's prior decision rendered in *Thomas v. Nevada Yellow Cab Corporation*.[17] In *Thomas*, this Court held that the constitutional supremacy of Nevada's Minimum Wage Amendment required the implied repeal of *NRS 608.250(2)(e)* and therefore, Nevada's Minimum Wage Amendment "supersedes and supplants" the taxi drivers exception provided by *NRS 608.250(2)(e)*.[18]

Appellant's Opening Brief contends that her Appeal is identical to the appeal addressed in *Thomas* and therefore, the District Court's decision in this matter

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[14] *See Id.*
[15] *See Pack v. LaTourette, 128 Nev. Adv. Rep. 25 * 5-6, 277 P.3d 1246, 1248 (May 31, 2012) (citation omitted).*
[16] *See Id.*
[17] *See Appellant's Opening Brief at 2-3.*
[18] *130 Nev. Adv. Op. 52, *9, 372 P.3d 518 (2014).*

must be reversed.[19] At the same time, Appellant also seeks an "advisement" (*i.e.*, a "Declaration") from this Court declaring that the decision in *Thomas* somehow established that any relief afforded Appellant, and in truth, all subsequent taxi drivers, is available from the November 28, 2006 effective date of Nevada's Minimum Wage Amendment.[20]

Appellant's arguments on appeal fail. First, Appellant's appeal is not identical to the appeal addressed in *Thomas*. Respondent's Motion to Dismiss identified issues and asserted specific legal arguments not addressed by the Court in *Thomas*.[21] As such, Appellant's Appeal must be reviewed and addressed on its merits and not as a casualty of *Thomas* as argued by Appellant.

Second, Appellant absolutely has no standing to seek or obtain an "advisement" from this Court regarding the retroactive application of *Thomas*.[22] Appellant is precluded as a matter of Nevada law from seeking such relief on appeal as neither Appellant nor Respondent identified, raised, or argued this issue before the District Court as part of the proceedings concerning Respondent's

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[19] *See Appellant's Opening Brief at 2 and at 3-4.*
[20] *See Id. at 2 and at 6-8.*
[21] *See infra.*
[22] *See Id.*

Motion to Dismiss.[23] Further, Appellant has not identified any legal support for obtaining such an "advisement" from the Court.[24]

Third, Appellant's argument, improperly asserted as a "Second" Issue on Appeal, that the proper application of the Court's decision in *Thomas* is as of the November 28, 2006 effective date of Nevada's Minimum Wage Amendment is not supported by the Court's actual holding in *Thomas*.[25] Further, the legal references relied on by Appellant, which supposedly demonstrates Appellant's argument, actually operates to establish that the application of *Thomas*, as provided by the Court, must only occur from the Court's July 26, 2014 date of decision in order to avoid the unjust and unfair retroactive application against Respondent.[26]

As such, the District Court was correct to grant Respondent's Motion to Dismiss since Appellant failed to state any claim against Respondent upon which they could recover.

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[23] *See Id.*
[24] *See Id.*
[25] *See Id.*
[26] *See Id.*

VI. ARGUMENT

A. The District Court's Decision Is Not Identical and Need Not Be Reversed In Light of This Court's Opinion in *Thomas v. Nevada Yellow Cab Corporation*.

Appellant's First Issue on Appeal relies solely on Appellant's declaration that this matter is "identical" to the matter addressed by this Court in the previous case of *Thomas v. Nevada Yellow Cab Corporation*.[27] However, Appellant fails to demonstrate exactly how this matter is "identical."[28] Instead, Appellant merely declares that *Thomas* "completely disposes of all of the issues raised by this appeal."[29]

Without question, this Court in *Thomas* held that Nevada's Minimum Wage Amendment to the Constitution, Article 15, Section 16, implicitly repealed the exception for taxi drivers provided in Nevada's minimum wage statute, *NRS 608.250(2)(e)*.[30] However, the Court, in deciding *Thomas*, did not consider arguments raised and addressed by the District Court in this matter.[31]

In particular, Respondent's Motion to Dismiss specifically relied on the similar facts in the Nevada Supreme Court's prior case of *Mengelkamp v. List* to demonstrate that no evidence could show that Nevadans who voted to raise the

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[27] *See Appellant's Opening Brief at 3.*
[28] *See Id.*
[29] *Id.*
[30] *See Thomas, 130 Nev. Adv. Op. 52 at *3 and at *9.*
[31] *See Id.*

amount of Nevada's minimum wage also intended to abolish the specific categories of individuals already exempted by *NRS 608.250(2).*[32] Although this Court referenced *Mengelkamp* in *Thomas*, this Court only relied on *Mengelkamp* for the principal that a statute "irreconcilably repugnant" to a constitutional amendment is deemed to have been impliedly repealed by the amendment.[33] This Court did not analyze *Thomas* against the arguments and facts in *Mengelkamp* nor was it obligated to do so since it does not appear that such an issue or analysis occurred in *Thomas* either on appeal or before the District Court.[34]

Unlike *Thomas*, Respondent's raised this matter and asserted this argument before the District Court[35], which demonstrates plainly that this matter is not "identical" to *Thomas* as concluded by Appellant.

In *Mengelkamp,* a 19-year old Nevada citizen challenged the validity of *NRS 218.010,* which in part, required a candidate for Nevada office to be 21-years old.[36] The individual challenging *NRS 281.010* "suggested" that *NRS 218.010* was repealed by implication when Nevadans voted in 1971 to amend the Nevada Constitution to grant 18-year olds the right to vote.[37] The Court dismissed this

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[32] *See Respondent's Appendix at 6-11.*
[33] *Thomas, 130 Nev. Adv. Op. 52 at *5.*
[34] *See Id.*
[35] *See Respondent's Appendix at 6-11.*
[36] *See, 88 Nev. 542, 544-45, 501 P.2d 1032, 1034 (1972).*
[37] *Id. at 545-46.*

"suggestion" since it could not say that votes somehow intended to abolish the age requirements for holding office when they allowed 18-year-olds to vote.[38] Specifically, the Court stated:

> We cannot say that members of the public who cast their ballots to allow 18-year-olds to vote thereby manifested intent to abolish age requirements theretofore imposed on candidates for state office.[39]

Here the Court's determination in *Mengelkamp* also applies, as no evidence exists that Nevadans who voted to raise the amount of Nevada's minimum wage in the Amendment somehow also intended to abolish the specific categories of individuals already exempted from receiving Nevada's minimum wage by *NRS 608.250(2).*[40] Unlike this matter, *Thomas* never considered whether the voters intended through the Minimum Wage Amendment to abolish specifically the *exceptions of NRS 608.250(2).*[41] Instead, *Thomas* only addressed whether Respondent's adequately demonstrated whether the voters intended only to raise the minimum wage and not "create a new minimum wage scheme."[42]

Appellant's Complaint evidences this reality. Appellant's Complaint asserted two (2) separate claims for relief.[43] Appellant's First Claim for Relief sought all

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[38] *Id. at 546.*
[39] *Id.*
[40] *See Respondent's Appendix at 6-11.*
[41] *See, 130 Nev. Adv. Op. 52 at *5-6.*
[42] *See Id.*
[43] *See Appellant's Appendix at 01-06.*

relief permitted her by Nevada's Minimum Wage Amendment, including, but not limited to equitable relief, compensatory damages, and an award for punitive damages.[44] However, Appellant's Second Claim for Relief specifically sought all relief afforded her under *NRS 608.040* because of Respondent's alleged violations of *NRS 608.020* or *608.030*.[45]

Had Nevada's Minimum Wage Amendment and this Court's decision in *Thomas* intended to "create an entirely new minimum wage scheme," then Appellant had no need and more importantly, could not rely on alleged violations of *NRS 608.020* and *NRS 608.030* to recover against Respondent.[46] Those statutes, along with *NRS 608.250*, would be impliedly repealed by Nevada's Minimum Wage Amendment had Nevada's Minimum Wage Amendment and this Court's decision in *Thomas* truly intended to "create an entirely new minimum wage scheme." Obviously, Appellant does not contend such intent exists since Appellant specifically relied upon other statutes in Chapter 608 to recover against Respondent that apparently remain in effect and enforceable despite Nevada's Minimum Wage Amendment and this Court's decision in *Thomas*.[47]

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[44] *See Id. at 04.*
[45] *See Id. at 05-06.*
[46] *See supra.*
[47] *See Id.*

As such, this matter is not identical to *Thomas* as issues and arguments not set forth in *Thomas* were raised before the District Court as demonstrated above.[48] Accordingly, the Court should now consider such issues and arguments in this appeal and not summarily dismiss them because of *Thomas* as argued by Appellant.

B. Appellant Is Precluded by Nevada Law from Seeking an "Advisement" From the Court and From Arguing That the Holding in *Thomas v. Nevada Yellow Cab Corporation* Is Not Limited to Conduct Taking Place After June 26, 2014.

Appellant's "Second" Issue on Appeal is not an actual Assignment of Error on Appeal.[49] Instead, Appellant improperly seeks an "advisement" from the Court determining that the Court's previous holding in *Thomas* applies as of the date the Nevada Supreme Court canvassed the votes for Nevada's Minimum Wage Amendment.[50]

Appellant seeks this "advisement" because Appellant's counsel allegedly was informed by "Counsel for more than one" taxicab company[51] that they "intend to argue" that the holding in *Thomas* "only creates a right to minimum wage for taxi

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[48] *See supra.*

[49] *See Appellant's Opening Brief at 4-6.*

[50] *See Id. at 6 (citing Tovinen v. Rollings, 560 P.2d 915, 916-917 (1977)).*

[51] Strangely, Appellant does not identify any specific allegation that Respondent's counsel made such a statement. *See Id.*

drivers . . . after the date of such opinion, June 26, 2014."[52] Based on this allegation, Appellant proceeds to provide a dissertation on the events that have, have not, or may occur in *Thomas* after the Court's decision[53] and legal argument as to why this "intended" argument is without merit.[54]

Regardless, Appellant has asserted these arguments and in reality, her "Second" Issue on Appeal improperly to this Court in this appeal. Nevada law expressly precludes any appellant from asserting any argument or issue not raised below in the District Court.[55] In fact, the Nevada Supreme Court has determined that an appellant's failure to assert any argument or issue in the District Court before an appeal constitutes a waiver of this argument or issue on appeal.[56]

Here, Appellant is precluded from raising her "Second" Issue on appeal and asserting her arguments in support thereof, because she never raised the issue or asserted any arguments concerning the date Nevada's Minimum Wage Amendment took effect at any time before the District Court.[57] Neither Appellant's Complaint nor her Opposition to Respondent's Motion to Dismiss

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[52] *Id. at 4.*
[53] *See Id. at 4-5.*
[54] *See Id. at 5-6.*
[55] *See Peat v. Peat, 92 Nev. 338, 390, 551 P.2d 242, 244 (1976). See also, Heidt v. Heidt, 108 Nev. 1009, 1011, 842 P.2d 723, 725 (1992);and State of Washington v. Bagley, 114 Nev. 788, 792, 963 P.2d 498, 501 (1998).*
[56] *See Kahn v. Morse & Mowbray, 121 Nev. 464, 480, n.24, 117 P.3d 227, 238, n.24 (2005) (citing Bagley, 114 Nev. at 792).*
[57] *See Respondent's Appendix at 48-65.*

identified, considered, raised, or asserted any allegation, claim, or argument regarding the effective date of Nevada's Minimum Wage Amendment.[58] Further, Respondent's Motion to Dismiss never raised this issue as grounds for dismissing Appellant's Complaint.[59]

As such, Nevada law precludes Appellant from raising her "Second" Issue on appeal and all of the arguments related thereto since Appellant never raised this issue and certainly never made any of her arguments asserted as part of her "Second" Issue on Appeal before the District Court.

In addition, Appellant's "Second" Issue on Appeal fails to provide any legal reference or authority allowing this Court to provide Appellant "advice" on how to proceed in response to an issue that does not yet exist.[60] Appellant is required to "cogently argue, and present relevant authority," supporting her issues on appeal.[61] Here, Appellant has not met this required burden since her Opening Brief fails to provide a single reference demonstrating that this matter was raised, argued, and resolved before the District Court.[62] In addition, Appellant has not provided any reference of Nevada law that permits her in any way to request,

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[58] *See Appellant's Opening Brief at 1-2.*
[59] *See Respondent's Appendix at 1-13.*
[60] *See Appellant's Opening Brief at 4-5.*
[61] *Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330, n.38, 130 P.3d 1280, 1288, n.38 (2006) (citations omitted). See also, NRAP 28(a)(9).*
[62] *See Appellant's Opening Brief at 4-5.*

obtain, or argue for "advice" or a determination from this Court of an issue that was not addressed below in the District Court, and also as admitted by Appellant, may only become an issue in an entirely different case.[63]

In truth, the only support provided by Appellant is her self-serving declaration that if the Court declines to address Appellant's request for an "advisement," a further appeal is probable at the loss of judicial resources.[64] Appellant, of course, offers no legal citation or support that allows this Court to provide such an "advisement."[65] More importantly, Appellant fails to provide any legal reference that permits Appellant to raise this issue without first being addressed and determined before the District Court, for any reason, let alone the alleged loss of judicial resources.[66]

Appellant provides no legal reference because none exists. First, the Nevada Supreme Court does not consider speculative or "probable" arguments in the future and Appellant has not offered any reference justifying or authorizing otherwise.[67] Instead, *NRAP 3A(a)* expressly only permits Appellant standing to make an appeal if she was aggrieved by an appealable judgment or order. Appellant's Opening Brief concedes that her "Second" Issue on Appeal does not

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[63] *See Id.*
[64] *See Id. at 5.*
[65] *See Id.*
[66] *See Id.*
[67] *See Id.*

arise from an appealable judgment or order.[68] As such, neither an alleged waste of judicial resources nor any other ground permits Appellant to receive an "advisement" on an issue that was not addressed below in the District Court and, on an issue upon which Appellant never received an adverse judgment or order.[69]

Second, Appellant's "Second" Issue on Appeal has no merit because Respondent never made a claim or argued at any time that the rights recognized in *Thomas* arose only on the date of the *Thomas* Opinion, and not on the effective date of the Article 15, Section 16, of the Nevada Constitution.[70] To begin with, the "rights" recognized in *Thomas* did not exist at the time the District Court, on February 25, 2013, granted Respondent's Motion to Dismiss Appellant's Complaint.[71] This Court did not decide *Thomas* until 2014.[72] Thus, it was impossible for Respondent's to have asserted such a "claim" for Appellant to appeal.

Consequently, neither Respondent nor Appellant ever asserted any "claim" that the "rights" provided by *Thomas* arose only on the date of the *Thomas* Opinion and not on the effective date of Nevada's Minimum Wage Amendment.[73]

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[68] *See Id. at 4.*
[69] *See supra.*
[70] *See Respondent's Appendix at 48-65.*
[71] *See Id.*
[72] *See, 130 Nev. Adv. Op. 52 at *1.*
[73] *See supra.*

Therefore, Appellant has no standing to raise such an alleged "claim" as an appealable issue in this matter.

Of course, Appellant's counsel, who was also counsel for the appellant in *Thomas*, has recognized the absence of this issue. Here, for the second time, Appellant's counsel attempts to circumvent the entire appellate process and have this Court address the issue of the effective date of Nevada's Minimum Wage Amendment's implicit repeal of the taxicab driver exemption without any District Court proceeding or determination. Essentially, Appellant's counsel is attempting to refine and re-litigate this Court's decision in *Thomas* through this Appeal.

As admitted in Appellant's Opening Brief, Appellant's counsel already attempted to obtain from this Court a "correction" of this Court's opinion in *Thomas* without any legal right to do so determining the effective date of Nevada's Minimum Wage Amendment. This Court denied this attempt. Now, Appellant's counsel disguised as Appellant's "Second" Issue on Appeal, is attempting to obtain the same "correction" that this Court denied in *Thomas*. Appellant's counsel cannot succeed as this matter does not concern itself with this "issue" and Appellant has no standing to raise this issue on appeal. Therefore, this Court must not consider Appellant's "Second" Issue on Appeal.

C. The Nevada's Supreme Court Decision in *Thomas v. Nevada Yellow Cab Corporation* Expressly Limits Conduct Taking Place After June 26, 2014.

Notwithstanding the above and in the event that this Court elects to consider Appellant's self-concocted "Second" Issue on Appeal, Appellant does not demonstrate the absence of an issue of retroactivity as concluded in Appellant's Opening Brief.[74] Specifically, Appellant first contends in her Opening Brief that this matter does not present "any retroactive application of law" since Nevada's Minimum Wage Amendment became effective on November 28, 2006, or the date that the Nevada Supreme Court canvassed the votes.[75] Therefore, Appellant incorrectly concludes that no issue remains regarding the retroactive application of the Court's decision in *Thomas*, which impliedly repealed *NRS 608.250*.[76]

As is the case with Appellant's entire argument on this issue, neither *Thomas* nor this matter ever raised the issue or challenged in any way the effective date of Nevada's Minimum Wage Amendment.[77] More importantly, the Court in *Thomas* considered only a single issue - whether Nevada's Minimum Wage

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[74] *See Appellant's Opening Brief at 6.*
[75] *See Id.*
[76] *See Id.*
[77] *See 130 Nev. Adv. Op. 52. See generally, also, Respondent's Appendix at 1-13.*

Amendment repealed the taxi drivers exception as provided in *NRS 608.250(2)(e)*.[78]

Contrary to Appellant's Opening Brief, the Court in *Thomas* expressly recognized the simultaneous existence of Nevada's Minimum Wage Amendment and the prior enacted exception for taxi drivers to Nevada minimum wage laws as expressed in *NRS 608.250(2)(e)*.[79] Thus, prior to the Court's decision in *Thomas*, employers of taxicab drivers were lawfully permitted not to pay Nevada's minimum wage pursuant to *NRS 608.250(2)(e)*.

Only the Court's analysis in *Thomas* determined that these two (2) laws could no longer coexist (*i.e.*, be harmonized), since Nevada's Minimum Wage Amendment failed to identify taxicab drivers as a specific exception to the new definition of "employee" prescribed by Nevada's Minimum Wage Amendment.[80] Therefore, the Court held that *NRS 608.250(2)(e)* was "irreconcilably repugnant" to Nevada's Minimum Wage Amendment.[81] Consequently, this Court in *Thomas* held that the constitutional supremacy of Nevada's Minimum Wage Amendment required the implied repeal of *NRS 608.250(2)(e)* and therefore, Nevada's

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[78] *See, 130 Adv. Op. 52 at *3-6.*
[79] *See Id.*
[80] *See Id. at *9.*
[81] *Id. at *6.*

Minimum Wage Amendment "supersedes and supplants" the taxi drivers exception provided by *NRS 608.250(2)(e)*.[82]

Never did this Court in *Thomas* declare that *NRS 608.250(2)(e)* did not exist prior to or because of Nevada's Minimum Wage Amendment.[83] Never did this Court in *Thomas* declare that implied repeal of *NRS 608.250(2)(e)* retroactively applied to the effective date of Nevada's Minimum Wage Amendment.[84]

Instead, the implied repeal of *NRS 608.250(2)(e)* was accomplished only by the Nevada's Supreme Court holding in *Thomas* and not by the effectuation of Nevada's Minimum Wage Amendment.[85] As such, both existed side by side until *Thomas*, wherein the Court held that Nevada's Minimum Wage Amendment impliedly repealed *NRS 608.250(2)(e)*.[86]

The Court's use of the present tense in *Thomas* in two (2) distinct instances cements the reality that the implied repeal of *NRS 608.250(2)(e)* was never intended to occur from the effective date of Nevada's Minimum Wage Amendment. First, in determining that *NRS 608.250(2)(e)* was "irreconcilably repugnant" to Nevada's Minimum Wage Amendment, the Court expressly stated

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[82] *Id. at *9.*
[83] *Id. at *6-9.*
[84] *See Id.*
[85] *Id. at *9 ("supersedes and supplants the taxicab drivers exception set out in NRS 608.250(2)").*
[86] *See Id.*

in *Thomas* that *NRS 608.250(2)(e)* "is impliedly repealed."[87] In other words, the Court, using the present tense statement "is impliedly repealed," appropriately concluded and declared that going forward from its decision in *Thomas*, *NRS 608.250(2)(e)* could no longer be used by employers of taxi drivers to avoid paying Nevada's minimum wage.[88] Any other ruling would unjustly penalize an entire industry and possibly lead to calamitous results for some of the cab companies.

Had the Court, which it was free to do, made use of the past tense statement, "was impliedly repealed," then the Court would have indicated that it deemed *NRS 608.250(2)(e)* repealed as of the effective date of Nevada's Minimum Wage Amendment. The Court in *Thomas* made no such past tense statement.[89]

Second, the Court in *Thomas* declared, "the Minimum Wage Amendment, by enumerating specific exceptions that do not include taxi drivers, **supersedes and supplants** the taxicab driver exception set out in *NRS 608.250(2)*."[90] Again, the Court in *Thomas* made use of the present tense plainly indicating that Nevada's Minimum Wage Amendment, prospectively from *Thomas*, "supersedes and

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[87] *Id. at *6.*

[88] *See Id. See also, e.g., United States v. Jackson, 480 F.3d 1014, 1019 (9th Cir. 2007) (use of verb tense is significant) ("words used in the present tense include the future as well as the present") (citations and quotations omitted).*

[89] *See Id.*

[90] *Id. at *9. (Emphasis Added).*

supplants" *NRS 608.250(2)*.[91] As before, the Court in *Thomas* had the ability to make use of the past tense, "superseded and supplanted," and elected instead to make use of the present tense.[92]

Appellant's Opening Brief makes no argument regarding the Court's use of the present tense in *Thomas*.[93] Nonetheless, the *Thomas* Court's election to make use of the present tense plainly demonstrates the Court's intention only to hold *Thomas* and the implied repeal of *NRS 608.250(2)(e)* effective prospectively from the Court's decision rendered on July 26, 2014.[94] As such, the effective date of Nevada's Minimum Wage Amendment does not determine in any way the Court's implied repeal of *NRS 608.250(2)(e)* pursuant to *Thomas* or the date for determining when the employers of taxi drivers were required to pay Nevada's minimum wage.

In addition, Appellant's reliance on the Court's decision in *Hansen v. Harrah's* has no merit and the actual application of *Hansen* supports the prospective application only from the date of the Court's decision in *Thomas*.

Appellant's Opening Brief declares that *Hansen* somehow "illustrates the complete fallaciousness of the claim that *Thomas* has no application" to conduct

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[91] *See Id.*
[92] *Id.*
[93] *See generally, Appellant's Opening Brief.*
[94] *See supra.*

that occurred prior thereto"[95] However, the Court's decision in *Hansen* is distinguishable and in fact supportive of such a claim. In *Hansen*, the Court first considered "whether Nevada should adopt the public policy exception to the at-will employment rule recognizing as a proper cause of action retaliatory discharge for filing a workmen's compensation claim."[96] As an exception to Nevada's common law at-will employment rule, the Court in *Hansen* adopted, as a common law claim in tort, a claim for retaliatory discharge for an injured person's wrongful discharge in response to that injured person's filing of a worker's compensation claim.[97]

Unlike *Hansen*, neither *Thomas* nor this matter is concerned with the application of Nevada's common law at-will employment rules or any other common law rules or claims.[98] Further, *Hansen*, unlike *Thomas*, never concerned itself with the application of a decision by the Nevada Supreme Court implicitly repealing a Nevada statute.[99] Instead, the Court in *Hansen* made use of its exclusive power to create a common law claim in tort to support Nevada's public policy of protecting injured workers.[100] Accordingly, the Court's decision in

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[95] *Id. at *8.*
[96] *Hansen v. Harrah's, 100 Nev. 60, 62, 675 P.2d 394, 396 (1984).*
[97] *See Id. at 64-65.*
[98] *See generally, 130 Nev. Adv. Op. 52, and Appellant's Opening Brief at 8-9.*
[99] *See, 100 Nev. at 63-65.*
[100] *See Id. at 64-65.*

Hansen to create a new common law claim in tort for retaliatory discharge has no application or influence on the application of the Court's decision in *Thomas* implicitly repealing *NRS 608.250* because of Nevada's Minimum Wage Amendment.

Appellant also contends that the Court in *Hansen* "imposed a current liability" on the employer in *Hansen* based on that employer's "prior conduct" even though the employers in *Hansen* had no advance notice of the newly created common law claim for retaliatory discharge.[101] Appellant's declaration actually is contrary to the Court's decision in *Hansen*.

First, the Court in *Hansen* never imposed any liability on any party.[102] Instead, the Court in *Hansen*, after creating an entirely new common law claim in tort, specifically remanded the matter to the District Court without imposing any liability whatsoever on any party.[103]

Second, the Court in *Hansen* expressly considered whether punitive damages were available to a party who prevails on the newly created claim for retaliatory discharge.[104] In *Hansen*, the Court found that punitive damages were available to

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101 *Appellant's Opening Brief at 8-9.*
102 *See, 100 Nev. at 65.*
103 *See Id.*
104 *See Id.*

a party prevailing on such a claim, but not in that case.[105] Although not discussed in Appellant's Opening Brief, the Court in *Hansen* specifically found that the imposition of punitive damages "would be unfair" since the Court determined it was impossible for employers to know beforehand that their conduct was now, because of *Hansen*, actionable in Nevada.[106] The Court in *Hansen* therefore determined that these same unknowing employers could not be punished for such conduct.[107] As such, the Court in *Hansen* expressly held that if the employees in *Hansen* prevailed in trial, they still were prohibited from obtaining an award of punitive damages against their employers.[108]

It is the Court's analysis of the "Second" Issue in *Hansen* that actually supports the prospective application of *Thomas* only from the date of decision. Like the employers in *Hansen*, Respondent, as an employer of Appellant, a taxicab driver, had no knowledge prior to *Thomas* that its reliance on the taxicab driver exception set out in *NRS 6082.250(2)(e)* to not pay minimum wage was no longer valid.[109] Appellant's Opening Brief declares that Respondent had such

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[105] *See Id.*
[106] *Id.*
[107] *See Id.*
[108] *See Id.*
[109] *See supra.*

"knowledge," but fails to reference any facts or allegations demonstrating such alleged knowledge.[110]

Like the employers in *Hansen*, Respondent had no possibility of knowing that that taxicab driver exception to Nevada's minimum wage laws was going to be found years later, "irreconcilably repugnant" because of this Court's decision in *Thomas*.[111] To date, four (4) sessions and five (5) special sessions of Nevada's Legislature convened and closed since the 2006 enactment of Nevada's Minimum Wage Amendment.[112] None of those sessions enacted any law repealing *NRS 608.250* or recognized the possible conflict or "irreconcilable repugnancy" of this statute in light of the passage and enactment of Nevada's Minimum Wage Amendment.

Further, Nevada's Labor Commissioner, until this Court's decision in *Thomas*, identified, recognized, and enforced all of the exceptions to Nevada's minimum wage laws as set forth in *NRS 608.250*. Finally, as recognized in Appellant's Opening Brief, at least six other District Courts, and in one instance, the United States District Court for Nevada, previous to *Thomas*, held that the taxicab driver exception provided by *NRS 608.250* remained enforceable despite Nevada's

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[110] *See Appellant's Opening Brief at 6-7.*

[111] *See supra.*

[112] 74th through 77th Sessions and 23rd through 27th Special Sessions.

Minimum Wage Amendment.[113] In other words, every branch of Nevada's government recognized for nearly eight (8) years after the passage and enactment of Nevada's Minimum Wage Amendment that employers of taxi drivers were still exempt from paying Nevada's minimum wage. As such, it was impossible for Respondent, as an employer of taxi drivers such as Appellant, to have any knowledge that their alleged failure to pay Nevada's minimum was somehow unlawful and actionable prior to this Court's decision in *Thomas*.[114]

As a result, the retroactive application of the Court's decision in *Thomas*, as in *Hansen*, would be completely unjust and unfair to Respondent since it was impossible for Respondent to know that *NRS 608.250(2)(e)* was "irreconcilably repugnant" to Nevada's Minimum Wage Amendment.[115] Such "irreconcilable repugnancy" only arose by operation of this Court's decision *Thomas*.

Consequently, applying *Thomas* retroactively against Respondent, as argued for by Appellant, would unjustly punish Respondent in the same manner as the employers in *Hansen*. Therefore, as in *Hansen*, the Court's decision in *Thomas* should not apply to Respondent so that Respondent would not be unfairly punished by the Court's implied repeal of *NRS 608.250(2)(e)*.[116]

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[113] *See Appellant's Opening Brief at 4-5.*
[114] *Accord, Hansen, 100 Nev. at 65.*
[115] *See Id.*
[116] *See Id.*

Thus, the Court's decision in *Hansen* fails to support Appellant's argument on appeal. Further, the Court's determination in *Hansen* that it would be unfair to employers to be subject to punitive damages where they had no prior indication that their conduct was actionable, demonstrates the Court's willingness to consider the effect of its decision on those parties, who like Respondent had engaged in lawful business practices until the Court's decision to repeal.[117]

VII. CONCLUSION

Pursuant to the arguments provided above, the District Court did not error in any way by granting Respondent's Motion to Dismiss Appellant's Complaint. Appellant failed to provide any arguments or assignments of error on appeal that concern Respondent's actual Motion to Dismiss.

Based upon the foregoing, Respondent respectfully requests that this Honorable Court uphold the District Court's Order Granting Respondent's Motion to Dismiss Appellant's Complaint.

DATED this 1st day of December, 2014.

/s/Jeffery A. Bendavid

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[117] *See Id.*

VIII. CERTIFICATE OF COMPLIANCE PURSUANT TO N.R.A.P. 28.2

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief, including footnotes, has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman 14-point;

2. I further certify that this brief complies with the page limit and/or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(A)(ii) and (C), is proportionately spaced, has a typeface of 14 points or more, and only contains 6,218 words, including footnotes and quotations.

3. I further certify that I have read this Respondent's Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

4. Finally, I 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 this 1st day of December, 2014.

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EXHIBIT 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARBARA GILMORE, Individually and on behalf of others similarly situated, Appellant, vs. DESERT CAB, INC., Respondent.	Sup. Ct. No. 62905 Dist. Ct. No: A-12-668502-C

APPELLANT'S REPLY BRIEF

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IN REPLY TO RESPONDENT'S JURISDICTIONAL STATEMENT AND STATEMENT OF ISSUES PRESENTED

Respondent Desert Cab Inc. ("Desert") asserts that Appellant Barbara Gilmore ("Gilmore") has improperly attempted to create a "Second Issue on Appeal" over which this Court does not have jurisdiction. Desert insists this Court cannot consider Gilmore's request (her alleged "Second Issue") that it make clear *Thomas v. Nevada Yellow Cab Corporation,* 130 Nev. Adv. Op. 52, 372 P.3d 518 (2014), applies to employer conduct taking place after the effective date of Article 15, Section 16 of the Nevada Constitution and not just after the issuance of the *Thomas* Opinion on June 26, 2014.

Desert cites no support for its assertion the Court lacks the jurisdiction to confirm the rights recognized in *Thomas* apply to all conduct taking place after the effective date of Article 15, Section 16 of the Nevada Constitution. Instead Desert argues that Gilmore cannot properly make such a request because no such request was presented to the District Court. Desert ignores that it was impossible to present any such request to the District Court as *Thomas* was decided *after* this appeal ensued and the District Court had relinquished jurisdiction over this case

This Court is the master of its own decisions. The American system of jurisprudence has historically, on appropriate occasions, involved explicit directives from superior judicial tribunals to lower courts on how to effectuate the rule of law enunciated in appellate opinions. That was done most famously in *Brown v. Board of Education*, 349 U.S. 294, 300-01 (1955) (Directing district courts to retain continuing jurisdiction over cases challenging segregation and to institute appropriate remedies "with all deliberate speed" that comply with *Brown's* determination that such segregation was unconstitutional.) While this Court need not issue any statement, as part of this appeal, on the temporal scope of

its Opinion in *Thomas*, the argument that it lacks the jurisdiction to do so is specious.

ARGUMENT

I. DESERT'S CLAIM THAT IN THIS CASE THE DISTRICT COURT RELIED UPON ARGUMENTS NOT CONSIDERED IN *THOMAS V. NEVADA YELLOW CAB* IS SPECIOUS

Desert insists *Thomas* did not consider this Court's holding in *Mengelkamp v. List* 88 Nev. 542, 544-45, 501 P.2d 1032, 1034 (1972) and the District Court in this case, in reliance upon *Mengelkamp,* based its ruling upon Desert's argument "that no evidence could show that Nevadans who voted to raise the amount of Nevada's minimum wage also intended to abolish the specific categories of individuals already exempted by NRS 608.250(2)." Respondent's answering brief, p. 7-8.

There is nothing in the District Court's decision in this case, which was drafted by Desert's counsel, to distinguish its reasoning from that of the District Court in *Thomas*. Such decision cites the District Court decision in *Thomas* for support and does not cite to *Mengelkamp*. While it does make the finding that the "purpose and effect" of the minimum wage constitutional amendment was to raise the minimum wage for only those persons *not* excluded from Nevada's statutory minimum wage, NRS 608.250, it makes no finding on the "intent" of Nevada's voters.

In any event, *Thomas* did reach the argument now raised by Desert, that there is no evidence of "intent" by the voters of Nevada to apply the constitutionally mandated minimum wage to persons, such as taxi drivers, exempted from the existing minimum wage coverage of NRS 608.250. It expressly rejected any such examination in light of the clear language of the constitutional amendment:

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. It would be impossible, for instance, to identify and query every Nevadan who voted in favor of the provision—and it is not even clear that such a survey would reveal the true intentions of those voters....

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. *See generally, District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (interpreting the Second Amendment by seeking the original public understanding of the text, with majority and dissent disagreeing on content of public understanding). "The issue ought to be not what the legislature," or, in this case, the voting public, "meant to say, but what it succeeded in saying." Lon L. Fuller, Anatomy of the Law 18 (Greenwood Press 1976).
327 P.3d at 522.

Desert's argument that this case and this appeal vary from the issues considered, and resolved by, this Court in *Thomas* has no basis whatsoever.

II. DESERT'S CLAIM THAT *THOMAS* DID NOT RESOLVE WHETHER NEVADA'S VOTERS INTENDED TO ABOLISH THE "EXCEPTIONS OF NRS 608.250(2)" IS NOT INTELLIGIBLY ARTICULATED AND RAISES AN IRRELEVANCY

Desert's brief, at pages 9, line 13 through page 10, line 22, states:

> Unlike this matter, *Thomas* never considered whether the voters intended through the Minimum Wage Amendment to abolish specifically the *exceptions of NRS 608.250(2)*. Instead, *Thomas* only addressed whether Respondent's [sic] adequately demonstrated whether the voters intended only to raise the minimum wage and not "create a new minimum wage scheme."

Appellant's Complaint evidences this reality. Appellant's Complaint asserted two (2) separate claims for relief. Appellant's First Claim for Relief sought all relief permitted her by Nevada's Minimum Wage Amendment, including, but not limited to equitable relief, compensatory damages, and an award for punitive damages. However, Appellant's Second Claim for Relief specifically sought all relief afforded her under *NRS 608.040* because of Respondent's alleged violations of *NRS 608.020* or *608.030*.

Had Nevada's Minimum Wage Amendment and this Court's decision in *Thomas* intended to "create an entirely new minimum wage scheme," then Appellant had no need and more importantly, could not rely on alleged violations of *NRS 608.020* and *NRS 608.030*

> to recover against Respondent. Those statutes, along with *NRS 608.250,* would be impliedly repealed by Nevada's Minimum Wage Amendment had Nevada's Minimum Wage Amendment and this Court's decision in *Thomas* truly intended to "create an entirely new minimum wage scheme." Obviously, Appellant does not contend such intent exists since Appellant specifically relied upon other statutes in Chapter 608 to recover against Respondent that apparently remain in effect and enforceable despite Nevada's Minimum Wage Amendment and this Court's decision in *Thomas*. (Italics in original, footnotes omitted).

The foregoing assertions are unclear and to the extent that they intend to address anything, which is presumably whether NRS 608.250(2) has been abolished and the status of the plaintiffs' claims under NRS 608.030 and 608.040, they set forth no coherent argument.

Whether NRS 608.250(2) has been "abolished" is not germane to this appeal nor was it germane to *Thomas*. Neither Gilmore nor the plaintiffs in *Thomas* asserted any claims under NRS 608.250. This Court's Opinion in *Thomas* rested upon the supremacy of the Nevada Constitution and the constitutional amendment's broad language granting minimum wage rights to all employees, except for its specific exclusions which did not include taxi drivers. 327 P.3d at 521-22. While *Thomas* discusses the result as an "implicit repeal" of NRS 608.250(2) by the constitutional amendment, the issue presented in *Thomas*, and this case, was whether the plaintiffs had enforceable rights arising under the constitution, not whether NRS 608.250(2) was "abolished."

Desert's argument in respect to Gilmore's claims under NRS 608.030 and 608.040, as best as can be understood, seems to be that because Gilmore is making *other* claims under NRS Chapter 608 *all* of her claims are dependent upon her status (or lack of status) as a person entitled to the minimum wage under NRS 608.250. Such cryptic and unexplained argument is without merit. These two statutes, NRS 608.030 and 608.040, grant employees certain monetary damages when their employer fails to pay all of the wages due the employee promptly upon

the termination of their employment. Gilmore's claims under those statutes are derivative of her claim that she was entitled to minimum wages under Nevada's Constitution, such wages being unpaid at the time of her termination of employment with Desert. Those claims have no asserted, or actual, relationship to NRS 608.250.

III. DESERT SPECIOUSLY ARGUES THAT NEVADA'S CONSTITUTION CONFERRED NO MINIMUM WAGE RIGHTS UPON TAXI DRIVERS UNTIL JUNE 26, 2014, THE DATE OF THE *THOMAS* DECISION

A. While this Court need not, in this appeal, address the application of Article 15, Section 16, of Nevada's Constitution to conduct taking place prior to the June 26, 2014, release of the *Thomas* Opinion, it should do so.

Desert fallaciously asserts it would be improper for the Court to address in this appeal whether Article 15, Section 16, of Nevada's Constitution extends rights to taxi driver employees for conduct occurring prior to June 26, 2014, the date of the *Thomas* Opinion. While Gilmore concedes this Court need not address, in this appeal, that issue, Desert proffers no compelling reason why this Court should, in the exercise of discretion, refuse to do so. Desert proffers no such compelling reason because none exists.

Desert, and the rest of the Nevada taxi industry, as a litigation tactic, seek to defer a ruling on when taxi drivers' minimum wage rights became actionable under Nevada's Constitution for as long as possible. In their view, the longer this Court takes to affirm that the rights granted to taxi drivers under Article 15, Section 16, of Nevada's Constitution became effective on November 28, 2006, the better. Until such time as this Court so rules, the taxi industry can implore the District Court Judges to find no such rights existed until the *Thomas* Opinion's issuance on June 26, 2014. If it is successful, it can then force counsel for the taxi drivers to appeal, again, to this Court. If it is unsuccessful, it can also seek to

appeal such issue to this Court. By doing so it will delay its day of reckoning and avoid having to pay any unpaid minimum wages owed to any taxi drivers in the interim.

Resolving the taxi industry's completely specious claim that *Thomas* has no effect on conduct occurring prior to June 26, 2014 will conserve judicial resources. It will put an end to those claims being presented to the District Court and forestall the need for any future appeal to this Court on that issue. Desert's assertion that there is no basis to believe any judicial resources will be conserved by making such a ruling is belied by the conduct of the defendant-respondent in *Thomas*. Such defendant, upon remittitur from this Court, has renewed its motion to dismiss in the District Court in *Thomas* solely on the basis that this Court's Opinion in *Thomas* has no application to conduct occurring prior to its issuance on June 26, 2014. *See*, Eighth Judicial District Court, *Thomas v. Nevada Yellow Cab,* Case # A-12-661726-C, motion to dismiss filed on January 6, 2015. Until this issue is addressed by this Court there is every reason to believe Desert, upon remittitur, and every other Nevada taxi driver employer subject to a similar lawsuit, will seek dismissal from the District Court on the same basis.

B. Desert's claim that *Thomas* did not, by its language, cover conduct occurring prior to June 26, 2014, and that *Thomas* should not be applied to past conduct, lacks any support.

Desert asserts that *Thomas* has no application to conduct taking place prior to its issuance on June 26, 2014 because of its use of the present tense and active voice verbs "supercedes" and "supplants" and not the past tense and passive voice verb forms of "superceded" and "supplanted." It offers no explanation of why the tense and active voice verb form of these two words, in an Opinion that makes no mention of limiting its application to future conduct, are significant. Nor does it

explain why the interchangeable use in *Thomas* of the past tense and passive voice verb form should be ignored in weighing Desert's argument on this point, *e.g.*, *Thomas* also uses the "past" tense in the exact fashion Desert asserts would indicate it has a current, and not just future conduct, application ("....and the statute [NRS 608.250(2)(e)] is impliedly ***repealed*** by the constitutional amendment.") 327 P.3d at 521 (emphasis provided). Desert simply insists, without citation to any supportive authority whatsoever,[1] that such present tense and active voice verb forms refer to a "supersession" and "supplanting" taking place on the date of the publication of the *Thomas* Opinion and not on November 28, 2006, the effective date of Article 15, Section 16, of Nevada's Constitution.

Desert's nonsensical attribution of significance to the non-exclusive usage of present tense verbs in *Thomas*, and the Opinion's use, in part, of an "active" and not "passive" verb voice style, is amply demonstrated by this Court's other decisions. The use of the present and past tense of "supercedes" and "superceded" appears in *State v. Connery,* 661 P.2d 1298, 1301 (Nev. Sup. Ct. 1983) ("...we hold that NRAP 4(b) supersedes NRS 177.066...") with this Court using, as in *Thomas*, the present tense and the West reporter in the headnotes and summary using the past tense. *Connery*, despite this Court's use of the present tense "supercedes," did not make a "future conduct only" ruling but applied its supersession finding to the procedural rule presented and to the controversy before it, and by doing so denied defendant the relief it sought. *See, also*, *Jacobson v.*

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[1] It cites to *United States v. Jackson*, 480 F.3d 1014, 1019 (9th Cir. 2007) for the proposition that the "use of verb tense is significant" and "words used in the present tense include the future as well as the present." *Jackson* concerned the use of present tense language in statutes. It does not suggest such tense determines, or is relevant to determining, if a judicial decision has only future impact.

Estate of Clayton, 119 P.3d 132, 134 (Nev. Sup. Ct. 2005) using present and past tenses, active and passive verb styles, interchangeably and applying its supersession finding to the controversy before it and not just to future cases (Stating in first paragraph "We conclude that *Bodine* is **superseded** by the Legislature's 1971 amendment of NRS 140.040..." and in last paragraph under the "Conclusion" heading "The current language of NRS 140.040(3) **supersedes** this court's decision in *Bodine*...). *See, also, Goldman v. Clark*, 1 Nev. 607, 611 (1866) (Holding that if Nevada's Constitution, "by its own terms exempts a homestead from forced sale" it would **"supercede"** contrary provisions of prior statute "[b]ut if the Constitution did not take effect in regard to homesteads, until the legislature passed the required law, then the old act was not **superseded** until the new one went into effect.")

Setting aside the irrelevancy of the active (and at times passive) voice and present (and at times past) verb tense used in *Thomas*, Desert presents not one iota of support for its contention that applying *Thomas* only to future conduct would be proper. It does not refute, as explained in Gilmore's Opening Brief, that such "future conduct only" decisions are an extraordinary Twentieth Century jurisprudential development unknown under the common law and limited almost without exception to situations where *judicially created law* is overturned by a subsequent judicial decision. *See, Linkletter v. Walker*, 381 U.S. 618, 622 (1965). Nor does Desert dispute that a "future conduct only" ruling has never been made when this Court determines that a new voter or legislatively enacted law displaces a prior law or judicial precedent. *See, Jacobson* and every other Opinion this Court has issued where a prior judicial precedent or legislative or constitutional enactment has been found to be superseded by a subsequently enacted statute or

constitutional amendment.[2] The idea this Court in *Thomas,* in a completely cryptic and not expressly stated fashion deviated from this rule, is, kindly stated, without any sound basis.

Desert also cites no precedent from Nevada or any other jurisdiction supporting its assertion *Thomas* is properly applied only to conduct occurring after its publication. It fails to do so because no such precedents exist. *See, Newman v. Emerson Radio Corp.,* 48 Cal. 3d 973, 978 (Cal. Sup. Ct. 1989), citing *Linkletter* ("The general rule that judicial decisions are given retroactive effect is basic in our legal tradition.") While, as discussed in *Sierra Club v. San Joaquin Local Agency* 21 Cal 4th 489, 509-10 (Cal. Sup. Ct. 1999), citing and quoting *Newman*, there are "narrow exceptions" to the rule, they require the demonstration of "considerations of fairness and public policy [that] are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule." Such an examination looks to whether application of a Court's decision to events occurring prior to its publication creates "an unusual hardship" because a substantial "detrimental reliance" or "vested right" was created by or rested upon an overturned rule of law. *Id.*

Desert presents no support for its assertion that the sort of exceptional circumstances discussed in *Sierra Club* and *Newman* are present. Nor would any prior precedent support holding them to be so present and that *Thomas* should be given the "future conduct only" application requested by Desert. The decision in *Isbell v. County of Sonoma*, 21 Cal.3d 61, 74-75 (Cal. Sup. Ct. 1978) is illustrative. *Isbell* found that the Fourteenth Amendment's due process protections

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[2] Diligent research by Gilmore's counsel has likewise failed to find a reported case from any jurisdiction where a "future conduct only" ruling was issued in such circumstances.

rendered California's statutory confession of judgment procedures void. *Id.* Given the massive number of judgments entered under those procedures, most or almost all of which presumably did involve legitimate debts that were owed, *Isbell* declined to vacate *en mass* all prior judgments so entered despite their now discovered constitutional infirmity. *Id.* Nonetheless, it granted such judgment debtors the benefit of the rule of law it announced by holding they could seek hearings to void those judgments at which the creditor would have the burden of showing compliance with its holding. *Id.* The sort of "future conduct only" ruling Desert urges this Court to apply to *Thomas* goes far beyond the very narrow, and exceptionally justified, temporal limitations applied in *Isbell* and similar cases.

C. Even if it could be proper to limit the application of *Thomas* to conduct occurring after June 26, 2014, Desert proffers no reason for limiting its application in that fashion.

Desert argues that this Court's decision in *Hansen v. Harrahs,* 675 P.2d 394, 397 (1984) provides no guidance in this case because it dealt with the recognition of new common law rights, not voter or legislatively enacted laws. As already discussed, Desert's assertion *Thomas,* or other decisions dealing with the supersession of voter or legislatively enacted laws, can properly be given "future conduct only" application is completely specious. But even if this Court were to allow the "future conduct only" application of *Thomas* or similar supersession decisions, *Hansen* is highly relevant because it illustrates the very limited use of "future conduct only" decisions by this Court.

As Desert helpfully points out, *Hansen's* "future conduct only" ruling was limited to punitive damages claims for the newly recognized wrongful discharge tort it created. It limited that branch of its decision because the purpose of

punitive damages is to punish and deter reprehensible conduct that violates the law. 675 P.2d at 397. Such purpose would not be advanced by allowing punitive damages in *Hansen* since the employer defendants had no reason to believe their conduct was illegal. *Id.* It did not impose any "future conduct only" limitation on the *Hansen* plaintiffs' ability to recovery compensatory damages on such newly recognized tort claim. *Id.*

Unlike the defendants in *Hansen*, Desert had every reason to believe its conduct was in violation of the plain language of Article 15, Section 16, of Nevada's Constitution, as found ultimately by *Thomas*. Such a conclusion by Desert was absolutely required by any isolated reading of such constitutional provision and the Nevada Attorney General publicly opined that such conclusion was correct.[3] That Desert choose to believe its conduct was lawful, under a coordinated reading of Article 15, Section 16, of Nevada's Constitution and NRS 608.250, is irrelevant. Nor does the fact one or more trial court judges agreed with Desert's argument provide a basis to excuse Desert from liability for the minimum wage compensation it owes its taxi drivers that pre-dates *Thomas*. Desert does not cite a single precedent that would support excusing it from such liability and granting it such an excuse would be contrary to the approach taken by this Court in *Hansen*.[4]

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[3] Nevada Attorney General's opinion, 05-04 Op. Atty Gen. (2005), issued before November 28, 2006, concluded that all Nevada taxi industry employers would be subject to Article 15, Section 16.

[4] Gilmore does not concede that, as in *Hansen*, Desert should be excused from liability for punitive damages. She does acknowledge that under *Hansen* whether Desert should be exposed to any punitive damages liability involves different considerations than Desert's liability for the unpaid minimum wages owed to its taxi drivers.

Desert supports its claim that it should be excused from any minimum wage payment liability prior to June 26, 2014 by making inaccurate and unsupported assertions about how Nevada's Labor Commissioner[5] and "every branch of Nevada's government"[6] recognized that taxi drivers were subject to no state minimum wage standards prior to *Thomas*. In the same baseless fashion Desert insists "it was impossible" for it, prior to *Thomas*, to know its actions were contrary to law and that it would be "unfairly punished" if it were forced to pay the minimum wages owed to its taxi drivers for their work prior to June 26, 2014.

Desert's claim imposing a pre-June 26, 2014 liability upon it for its drivers' unpaid minimum wages would "unfair" and a "punishment" is sheer hubris. It is Desert that is attempting to seek an "unfair" and unjust enrichment at the expense of its taxi drivers by avoiding a very modest liability for the very small minimum hourly wage it is required to pay those hardworking employees. Nor can, or does, Desert present itself to the Court as anything other than a litigant with unclean hands who knew its actions could violate Nevada's Constitution and chose to accept that risk. Desert and Nevada's other taxi cab driver employers, could have, but did not, seek a declaratory ruling years ago on their obligations under Article

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[5] Desert's assertions about the position taken by the Nevada Labor Commissioner are not documented by anything in the record. Deserts cites to nothing in the record, nor anything else, supporting its assertion that the Nevada Labor Commissioner took a position supportive of Desert's incorrect view of the law. That the Nevada Labor Commissioner, in the exercise of its discretion, declined to prosecute Desert or other Nevada taxi cab driver employers for violations of Article 15, Section 16, of Nevada's Constitution is irrelevant.

[6] This assertion completely ignores the published opinion of then Attorney General Brian Sandoval, *id.*

15, Section 16, of Nevada's Constitution.[7] It chose not to do so and now seeks to avoid paying those minimum wages it should have paid, but refused to pay, in the first instance. The only victims of unfair treatment in this case are Desert's taxi drivers, who for years have been denied the most modest minimum hourly wage payments from Desert that Nevada's Constitution commands.

CONCLUSION

Wherefore, for all the foregoing reasons, the Order and Judgment appealed from should be reversed in its entirety and this Court should also expressly hold that its Opinion in *Thomas* is not limited to conduct taking place after June 26, 2014.

Dated: January 7, 2015

Respectfully submitted,

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[7] The class action procedure invoked by Gillmore as a plaintiff in this case under NRCP Rule 23 could have been equally as easily invoked by Desert as a plaintiff to seek a binding decision against a certified class of its taxi driver employees as defendants.

Certificate of Compliance With N.R.A.P Rule 28.2

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 14 point Times New Roman typeface in wordperfect.

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 proportionately spaced, has a typeface of 14 points or more and contains 4036 words.

Finally, I hereby certify that I have read this 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 January 8, 2015

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CERTIFICATE OF SERVICE

The undersigned certifies that on the January 8, 2015, she filed the forgoing Appellant's Reply Brief through the electronic filing system of the Nevada Supreme Court. Service was accomplished by the Clerk as follows:

TO:

Moran Law Firm
630 South 4th Street
Las Vegas, NV 89101

Attention: Jeffrey Bendavid

/s/ *Sydney Saucier*

Sydney Saucier

EXHIBIT 4

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Case Information: 62905

Short Caption:	GILMORE VS. DESERT CAB	Classification:	Civil Appeal - General - Other
Lower Court Case(s):	Clark Co. - Eighth Judicial District - A668302	Case Status:	Briefing Completed/To Screening
Disqualifications:		Panel Assigned:	Panel
Replacement:			
To SP/Judge:		SP Status:	Exempt
Oral Argument:		Oral Argument Location:	
Submission Date:		How Submitted:	

+ Party Information

Docket Entries

Date	Type	Description	Pending?	Document
04/01/2013	Filing Fee	Filing fee due for Appeal.		
04/01/2013	Notice of Appeal Documents	Filed Notice of Appeal. Appeal docketed in the Supreme Court this day.		13-08523
04/01/2013	Notice/Outgoing	Issued Notice to Pay Supreme Court Filing Fee. No action will be taken on this matter until filing fee is paid. Due Date: 10 days.		13-08526
04/01/2013	Notice/Outgoing	Issued Notice to File Case Appeal Statement/Civil. Due date: 10 days.		13-08529
04/01/2013	Filing Fee	E-Payment $250.00 from Leah M. Greenberg		
04/01/2013	Notice/Outgoing	Issued Notice of Referral to Settlement Program. This appeal may be assigned to the settlement program. Timelines for requesting transcripts and filing briefs are stayed. Docketing Statement due: 20 days.		13-08571
04/02/2013	Settlement Notice	Issued Notice: Exemption from Settlement Program		13-08868
04/03/2013	Transcript Request	Filed Certificate of No Transcript Request.		13-08819
04/17/2013	Docketing Statement	Filed Docketing Statement		13-11302
05/16/2013	Motion	Filed Appellant's Motion to Stay Appeal Briefing		13-14484
		Filed Order Granting Motion to Stay		

06/28/2013	Order/Procedural	Briefing Schedule. Briefing in this appeal is stayed pending further order of this court.	13-19108
07/02/2014	Order/Procedural	Filed Order Reinstating Briefing and Directing Appellant to File Case Appeal Statement. Opening Brief due: 30 days. Case Appeal Statement due: 5 days.	14-21624
07/03/2014	Notice of Appeal Documents	Filed Case Appeal Statement.	14-21849
07/25/2014	Motion	Filed Appellant's and Respondent's Joint Motion to Reinstate Stay of Appeal Briefing	14-24304
08/04/2014	Motion	Filed Motion of Appellant for an Extension of Time to File their Opening Brief Pursuant to NRAP Rule 31(b)(3)	14-25302
08/04/2014	Notice/Outgoing	Issued Notice Motion/Stipulation Approved. Opening brief due: September 2, 2014.	14-25319
08/08/2014	Order/Procedural	Filed Order Granting Motion to Stay Briefing Schedule.	14-26029
10/03/2014	Order/Procedural	Filed Order Reinstating Briefing. Opening Brief due: 30 days.	14-32918
11/03/2014	Brief	Filed Appellant's Opening Brief	14-36217
11/03/2014	Appendix	Filed Appellant's Appendix.	14-36218
12/01/2014	Brief	Filed Respondent, Desert Cab, Inc.'s Answering Brief.	14-39164
12/01/2014	Appendix	Filed Respondent, Desert Cab, Inc.'s Appendix.	14-39165
12/24/2014	Motion	Filed Stipulation for an Extension of Time to File the Reply Brief	14-42049
12/24/2014	Notice/Outgoing	Issued Notice - Stipulation Approved. Reply Brief due: January 30, 2015.	14-42051
01/12/2015	Brief	Filed Appellant's Reply Brief.	15-01215
01/12/2015	Case Status Update	Briefing Completed/To Screening.	

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION,

Defendants.

CASE NO. A-12-661726

DEPT. NO. XXVIII

Hearing Date: February 10, 2015
Hearing Time: 9:00 a.m.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Defendants filed their Motion to Dismiss Pursuant to NRCP 12(b)(5) on January 6, 2015. Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss was filed on January 23, 2015. On January 27, 2015, Plaintiffs filed a "Supplement to Plaintiffs' Response In Opposition To Defendants' Motion To Dismiss Consisting of Newly Issued Authority." Defendants thereafter filed their Reply to Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss on February 6, 2015. Such Reply also sought a stay of all proceedings in this case until the Nevada Supreme Court rendered a decision in

3/23/15

the case of *Gilmore v. Desert Cab, Inc.*, Supreme Court No. 62905, currently pending before the Nevada Supreme Court. This matter, having come before the Court for hearing on February 10, 2015, with appearances by Tamer B. Botros, Esq., on behalf of all Defendants, and Leon Greenberg, Esq., on behalf of all Plaintiffs, and following the arguments of such counsel, and after due consideration of the parties' respective briefs, and all pleadings and papers on file herein, and good cause appearing, therefore

IT IS HEREBY ORDERED:

Defendants' Motion to Dismiss Pursuant to NRCP 12(b)(5) is **DENIED** in its entirety. The legal argument put forth in Defendants' Motion to Dismiss that the Nevada Supreme Court's Opinion in the appeal in this case was not intended to have retroactive application to conduct pre-dating that Opinion is rejected. This Court does not view the actions of the Nevada Supreme Court in this case as supporting such argument. Defendants to file an Answer to the First Amended Complaint within 10 days of notice of entry of this order being electronically filed. Defendants' request to stay all proceedings in this case until the Nevada Supreme Court issues a decision in *Gilmore v. Desert Cab, Inc.*, Supreme Court No. 62905 is also **DENIED**.

IT IS SO ORDERED.

Dated this 24 day of ~~February,~~ March 2015.

Hon. Ronald J. Israel
District Court Judge

Submitted:

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