IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

v.

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

Respondents

and

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

Real Parties In Interest.

Case No. 68523

District Court No. A-14-711638-C

Department No. XVI

AMICI CURIAE'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

JACKSON LEWIS P.C.
Elayna J. Youchah, Bar No. 5837
Steven C. Anderson, Bar No. 11901
3800 Howard Hughes Parkway, #600
Las Vegas, Nevada 89169
(702) 921-2460
Attorneys for Amici Curiae

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, counsel of record for Amici Curiae certifies that the following are persons or entities described in NRAP 26.1(a) that must be disclosed.

1. Fertitta Group, Inc., a Delaware corporation, owns 100% of Landry's Inc.
2. Landry's Inc., a Delaware corporation, owns 100% of Bubba Gump Shrimp Co. Restaurants, Inc., Claim Jumper Acquisition Company, LLC, Landry's Seafood House – Nevada, Inc., Landry's Seafood House – Arlington, Inc., Bubba Gump Shrimp Co. Restaurants, Inc., Morton's of Chicago/Flamingo Road Corp. and Bertolini's of Las Vegas, Inc.

These representations are made so the judges of the Court may evaluate possible disqualification or recusal.

DATED: August 24, 2015.

JACKSON LEWIS P.C.

/s/ Elayna J. Youchah
Elayna J. Youchah, Bar No. 5837
Steven C. Anderson, Bar No. 11901
3800 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

Attorneys for Amici Curiae

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BRIEF OF AMICI CURIAE

I. INTEREST OF THE AMICI CURIAE

Claim Jumper Acquisition Co., LLC, Landry's Inc., Landry's Seafood House – Nevada, Inc., Landry's Seafood House – Arlington, Inc., Bubba Gump Shrimp Co. Restaurants, Inc., Morton's of Chicago/Flamingo Road Corp. and Bertolini's of Las Vegas, Inc. (collectively, "Landry's" or "Amici"), seek to participate as Amici Curiae in the Writ proceeding *MDC Restaurants, LLC v. Diaz*, Case No. 68523, District Court No. A-14-701633-C, Dept. XVI (the "Diaz Action"). Landry's submits this brief pursuant to NEV. R. APP. P. 29. Petitioners and Real Parties in Interest extended to Landry's the courtesy of their written consent to participation as Amici Curiae. *See* NEV. R. APP. P. 29(a). Landry's filed its Notice Written Consent of All Parties concurrently with this Brief.

Landry's owns and operates restaurants throughout Nevada (as well as elsewhere in the United States), is subject to the Minimum Wage Amendment (sometimes the "MWA" or "Amendment"), and is involved in three active lawsuits in Nevada where the dispute is centered on alleged violations of the MWA. There is no doubt that Landry's will face the same legal arguments advanced by the same counsel at issue in this Writ proceeding.[1] In addition, Landry's is a plaintiff in

[1] In 2014, Amici were named as defendants in two actions in the Eighth Judicial District Court: *Williams v. Claim Jumper Acquisition Co., LLC*, A-14-702048 and *Lopez v. Landry's Inc.*, A-14-706449 (the "Landry's Cases"). The

Case 2:15-cv-1160, *Landry's Inc., et al v. Sandoval, et al.*, in which plaintiffs seek declaratory and injunctive relief based on, among other things, the Employee Retirement Income Security Act's preemption of the Minimum Wage Amendment.

MDC's Writ Petition addresses the meaning of "provide" and "offering" as used in the MWA. Landry's supports Petitioner's position that "provide" cannot be reasonably interpreted to mean an employee must affirmatively *accept* the offered health benefits *and enroll* in the plan before the employer can lawfully pay the lower tier rate. Because this issue is central to the resolution of the consolidated Landry's Cases, and because Landry's has been litigating the MWA on several fronts over the past year, Amici Curiae are well-versed on the subject and able to provide the Court with additional insight based their experience.

II. INTRODUCTION

Amici support Petitioner's argument that the district court improperly found that the phrase "to provide health care" means to "enroll" in health care. As Petitioner's argue, such an interpretation is unreasonable because it ignores the

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assertions by the plaintiffs and putative classes in the Landry's Cases include alleged violation of the MWA (that plaintiffs are current or former employees who were paid $7.25 an hour, but, should have been paid $8.25 an hour because Landry's failed to provide, offer or make health benefits available as required by the Amendment). These allegations mirror the law and factual allegations in the Diaz Action. The cases against Claim Jumper and Landry's are now consolidated into one action pending in Department XX of the Eighth Judicial District Court for Clark County, Nevada. Claim Jumper Acquisition Co., LLC is also the real party in interest in a Writ proceeding pending with the Court, Docket 66629, which will resolve the MWA's applicable statute of limitations.

MWA's plain language and impermissibly renders irrelevant the critical phrase "*[o]ffering health benefits within the meaning of this section shall consist of making health insurance available* to the employee for the employee and the employee's dependents." Petition at 15-22. Amici also agree with Petitioner that even if "provide" means "furnish," as the district court found, furnish does not require acceptance or enrollment in the plan. *Id.* at 22-23. In this Brief, Amici raise two additional arguments for why the district court's order is contrary to law.

First, by ignoring the canon of interpretation that "the specific controls the general," the lower court failed to give effect to the MWA's plain meaning. The instant dispute implicates the Amendment's first three sentences. The first sentence reads: "Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section." Const. of Nev. Art. 15, § 16(A). The second sentence states: "The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits." *Id.* (The "General Sentence.") The third sentence states: "Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee[.]" *Id.* (The "Definitional Sentence.")

Applying the "specific controls the general" canon to the MWA establishes that the term "provides," as it appears in the General Sentence ("if the employer

provides health benefits as described" in the MWA), is controlled by the immediately following Definitional Sentence, which plainly explains that "provide" means "*[o]ffering* health benefits" and "making health insurance available[.]" *Id.* Despite the Definitional Sentence's controlling nature, the lower court ignored the Definitional Sentence, concluding that the General Sentence unambiguously establishes that "provides" means to "enroll."

Second, Amici establish that the lower court's interpretation should be rejected because it is an unreasonable interpretation that leads to absurd results. Even assuming there is an ambiguous provision, the Court may resolve the ambiguity by rejecting an interpretation that leads to absurd results.

In sum, by concluding that the MWA unambiguously dictates that "provide" means an employee must "enroll" in an employer's plan such benefits, the lower court ignored the MWA's plain meaning, violating numerous canons of interpretation along the way. As a result, Amici Curiae urge the Court to grant the Petition and overturn the lower court's ruling.

III. THE LOWER COURT ERRED BY IGNORING THE DEFINING TERMS "OFFERING" AND "MAKE AVAILABLE" THAT CONTROL THE INTERPRETATION OF "PROVIDES."

A. Applicable Textual Interpretation Framework

The Nevada Supreme Court has repeatedly explained the proper process for textual interpretation of Nevada law. The interpretive process must "begin with

the text," itself. *Strickland v. Waymire*, 126 Nev. Adv. Op. 25, 235 P.3d 605, 608 (2010). At this stage, words are given their "normal and ordinary" meaning. *Id.*; *McKay v. Board of Supervisors of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). Terms should not be considered in isolation, but must be interpreted within the proper "context" of the provision as a whole. *Strickland*, 730 P.2d at 609 ("[it] is a mistake to divorce the debate over the meaning of words from their context"); *Orr Ditch and Water Co. v. Justice Court*, 64 Nev. 138, 146, 178 P.2d 558, 562 (1947) ("the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute").

Where "a constitutional provision's language is clear on its face," the analysis is over and the Court will not look to other considerations. *Strickland*, 730 P.2d at 609. Only if the text is subject to two or more *reasonable* interpretations will it be deemed ambiguous and appropriate to look to other considerations. *Id*; *State Indus. Ins. System v. Woodall*, 106 Nev. 653, 657, 799 P.2d 552, 554 (1990) ("[s]ince these two statutes . . . are not ambiguous . . . the district court's statutory interpretation was not warranted"). Parties, however, cannot manufacture an ambiguity by concocting an unreasonable interpretation or an interpretation that leads to absurd results. *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, LLC*, 127 Nev. Adv. Rep. 5, 249 P.3d 501, 505-06 (2011) (it is impermissible to "resort to ingenuity to create ambiguity").

If there are competing *reasonable* interpretations, the Court's analysis may go beyond the provision's text to aid in resolution. *Strickland*, 235 P.3d at 605-06. Avoiding interpretations that lead to absurd results, as unreasonable interpretations tend to do, is a fundamental tool in resolving ambiguous provisions. *J.E. Dunn*, 249 P.3d at 506 (rejecting interpretation that would also lead to "an absurd reading of the statute, [and] . . . yield unreasonable or absurd results"); *Secretary of State v. Burk*, 124 Nev. 579, 590, 188 P.3d 1112, 1120 (2008); (interpretations should be "in line with what reason . . . would indicate the legislature intended" and avoid "unreasonable interpretations" that yield "absurd results").

B. The Amendment's Construction Confirms That "Provides" Cannot Mean "Enroll," As The Lower Court Determined

1. The Text's Specific Terms Control Its General Terms

It is a well-settled rule of statutory construction that a "specific provision controls over the general provision." *Western Realty v. City of Reno*, 63 Nev. 330, 337, 172 P.2d 158, 161 (1946). "Under this rule, general terms in a statute may be regarded as limited by subsequent more specific terms." *Orr*, 64 Nev. at 146, 178 P.2d at 562; *Western Realty*, 63 Nev. at 337, 172 P.2d at 161 (the "specific provision controls" a general term, while the general term "embraces" the specific term); *Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005). In other words, "[g]eneral and specific words in a statute which are associated together, and which are capable of an analogous meaning, take color from each other, so that ***the***

general words are restricted to a sense analogous to the less general" and specific terms. *Orr*, 64 Nev. at 146, 178 P.2d at 562 (emphasis added).

The closely related "doctrine of construction . . . '*noscitur a sociis*,'" dictates that "the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." *Id.* ("The rule of [the specific controlling the general] has been declared to be a specific application of the broader maxim of '*noscitur a sociis*'"); *see Strickland*, 235 P.3d at 607-09. Thus, "[w]here two or more words of analogous meaning are employed together in a statute, they are understood to be used in their cognate sense, to express the same relations and give color and expression to each other." *Orr*, 64 Nev. at 146, 178 P.2d at 562. As a consequence, a term's contextual "meaning and application must be accepted as proper and controlling" when the term's "use or connection in the statute" is more definite than the term's meaning in isolation. *Id.*

In *Orr*, the Court interpreted the term "excavation" as it appeared in a statute that included the following general purpose: "An Act to secure persons and animals from danger arising from mining and other excavations." *Id.* at 144, 178 P.2d at 561. The act required landowners to construct "good and substantial fences, or other safeguards" if the land contained "any shaft, excavation, or hole, whether used for mining or otherwise[.]" *Id.* The plaintiff contended that the defendant's irrigation canals were "excavations" requiring fencing under the act.

Id. The lower court agreed. Defendant filed a writ petition, in response. *Id.*

On appeal, the Supreme Court looked to the text and identified the "limitation of general words by specific terms" and that "the meaning of a word may be known from accompanying words." *Id.* at 146, 178 P.2d at 561-62. The Court considered various definitions of "excavation" and employed more specific statutory terms to determine whether the proper definition could include a "ditch." *Id.* at 151, 178 P.2d at 565. Importantly, the Court emphasized that "excavation" did not appear in isolation. Rather, the terms appeared with more specific terms that contextualized and limited "excavation's" possible meaning. *Id.*

The Court explained, "if the word 'excavation' be construed to include 'ditch,' either the word 'around' in the phrase 'around such works or shafts' would have to be disregarded, or action, so unnecessary as to border on the absurd or the ridiculous, taken, and the ditch fenced 'around' or encircled." *Id.* In addition, the Court "observed that the statute employs the words, 'danger . . . from falling into such . . . excavations,' and says nothing as to any concurring cause such as water or drowning therefrom." *Id.* at 145-46, 178 P.2d at 562. These "omissions" supported the "contention in favor of the application of the rule of *ejusdem generis* [the specific controls the general]. *Id.* (emphasis in opinion).

Strickland further exemplifies the impact of context and how more definite terms control less-definite, but analogous, terms. Here, the Nevada Supreme Court

interpreted a "recall by special election" provision in Article 2, Section 9 of the Constitution. 235 P.3d at 607-09. The specific issue was whether signatures on a recall petition had to come from registered voters or from "voters who in fact—'actually'—voted." *Id.* The district court, ignoring the interpretive principles described above, ultimately agreed with plaintiffs ruling that the registered voter need not have "actually voted." *Id.* On appeal, the Court examined "the text of Article 2, Section 9," which provides that a recall petition must be signed by "not less than twenty-five percent of the number [of registered voters] who actually voted in the state or in the county [that the officer] represents, at the election in which [the officer] was elected." *Id.* at 607 (modifications in opinion). The Court explained "[i]t is a mistake to divorce the debate over the meaning of words from their context." *Id.* at 608-09. The Court then analyzed the general term "voter" by considering the meaning of the terms "number" and "actually" holding that the word "actually" means "an existing fact; really." *Id.* "Actually," in the context of Article 2, Section 9, "vivified" and clarified that the "*voters who*" qualified to sign the petition were those who "actually" voted. *Id.* at 610. Thus, the phrase "registered voters who actually voted in the . . . the election in which [the officer] was elected," the term "actually" modified "registered voter" by limiting the qualifying "registered voter" to one that "really" or "actually" voted. *Id.*

The two well-established principles discussed above—"the specific controls the general" and "the meaning of a word may be known from accompanying words"—play a critical role in resolving the question presented in this case.

2. The MWA's Specific Terms Control And Clarify What The MWA Requires When It Uses The Term "Provides"

This dispute is based on the interpretation of the MWA's General and Definitional Sentences. The General Sentence states: "The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer *provides* health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits." Const. of Nev. Art. 15, § 16(A). The Definitional Sentence, which immediately follows the General Sentence, states: "*Offering* health benefits within the meaning of this section shall consist of *making health insurance available* to the employee[.]" *Id.* (emphasis added).

Resolving the instant issue turns on the meaning of the General Sentence's phrase, "if the employer *provides* health benefits *as described herein*" and its relation to the Definitional Sentence's phrase, "[o]ffering health benefits within the meaning of this section shall consist of making health insurance available to the employee[.]" *Id.* The lower court erred because its interpretation only considered the General Sentence's phrase containing "provides," ignoring the Definitional Sentence's subsequent and more specific terms "offering" and "make health insurance available." *See* Appendix at 262. According to the lower court, an

employer does not "provide health benefits" unless "an employee actually enroll[s] in health insurance that is offered by the employer." *Id.* This interpretation flaunts every "plain language" interpretive principle employed by the Court.

Moreover, applying its own interpretative methodology, the lower court implicitly found that the use of the word "provides" in the General Sentence has several potential definitions, such as "furnish" or "supply," that do not require a corresponding acceptance. The lower court then ignored the Amendment's express Definitional Sentence ("offering" and "make available") inserting the terms "actually provide" and "actually enroll in health insurance[.]" Appendix at 262.

Because "a statute may be regarded as limited by subsequent more specific terms" the possible definitions of "provides," as it appears in the MWA, must be limited to those definitions consistent with the MWA's more specific terms, "offering" and "make available." The *Orr* decision provides the relevant framework for analyzing this issue. Again, *Orr* considered whether the term "excavation" could include irrigation ditches. 64 Nev. at 146, 178 P.2d at 562. Because subsequent and more specific terms such as "mining" and "shafts" were used in connection with "excavation," the Court eliminated the potential definition of excavation that would include irrigation canals. *Id.* at 152, 178 P.2d at 567.

Here, the MWA's term "provides" does not appear in isolation; rather, "provides" must be considered within the context of the more specific definitional

terms "offering" and "making available," both of which eliminate the definition the lower court used. These specific words describe and define what "provides" means under the MWA. *See Orr*, 64 Nev. at 146, 178 P.2d at 562. Indeed, the General Sentence's phrase "provides health benefits *as described herein*" expressly signals that the following sentence will define for the reader what "provides" means. *Id*.

More important, however, is that the lower court defined "provide" as "to *actually* provide," which it further reasoned, necessarily required acceptance or that "an employee actually enroll." Appendix at 262. This definition completely ignores that to "offer" or and "make available," words used to explain "provides," are inconsistent with requiring acceptance or enrollment.

In sum, a definition of "provides" that translates to acceptance or "enrollment" violates the interpretive principle that the specific controls the general. The MWA's Definitional Sentence is more specific than, and restricts, the General Sentence to an interpretation analogous to "offering." The lower court wrongly ignored the Definitional Sentence, which led to an unreasonable interpretation. This unreasonable interpretation should, therefore, be rejected.

C. The Lower Court's Interpretation Leads To Absurd Results

A second clear principle applicable to the instant dispute is that courts will reject "an absurd reading of [a] statute [and] avoid[s] interpretations that yield

unreasonable or absurd results. *J.E. Dunn*, 249 P.3d at 505; *Burk*, 124 Nev. at 590, 188 P.3d at 1120 ("when a constitutional provision's language is clear on its face, we will not go beyond that language . . . or create an ambiguity where none exists"). An interpretation that adds or omits language should be rejected in the face of a reasonable, plain-language interpretation. *Id.*; *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998) (rejecting addition of language that would require a "causal connection").

Here, the lower court interpretation of the MWA leads to grammatical inconsistencies and should be rejected. *J.E. Dunn*, 249 P.3d at 505 (the "statutory construction is grammatically incorrect"). Critically, the lower court inexplicably equates the term "provides" with "actually enrolls," thereby omitting the MWA's entire Definitional Sentence. Appendix at 262. This is plainly unreasonable if the Amendment's terms are given effect and not "turned into mere surplusage." *Albios v. Horizon Comm'ty, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006)). Indeed, the lower court's interpretation leaves the Definitional Sentence with "no job at all, which [the Court's] rules do not allow." *Strickland*, 235 P.3d at 610.[2]

[2] The lower court's interpretation is also unreasonable because it fails to attribute meaning to the MWA's analogous terms "provide," "offer" and "make available." Const. of Nev. Art. 15, § 16(A). By finding that an employer can only "provide" insurance if the employee "actually enrolls," the lower court equated the term "provides" with the employee's act of "accepting" or "actually enrolling in" a plan. But construing "provides" to mean the employee affirmatively "enrolls,"

Moreover, if a statute is ambiguous, the Court can resolve the ambiguity by rejecting interpretations that lead to absurd results. *J.E. Dunn*, 249 P.3d at 505 ("unreasonable or absurd results" should be avoided). A statute is ambiguous, however, only if there are more than one reasonable interpretations of the text. *Strickland*, 235 P.3d at 605-06. To the extent the lower court's interpretation can be considered reasonable, which it cannot, the district court still erred because its interpretation leads to absurd results.

The lower court's interpretation of the MWA, requiring an employee to actually enroll in order for an employer to lawfully pay the employee the lower tier minimum wage, leads to the following absurd results: (a) suppose an employee's held beliefs include rejection of healthcare and therefore the employee declines insurance. The employer would still be required to pay the higher tier minimum wage despite the employee's conscious decision not to participate in health care and the employer's deliberate effort to "offer" and "make available" health insurance; or (b) suppose an employee under the age of 26 is insured through parents as required by the Affordable Care Act[3], and declines the employer's "offer" of insurance because the employee is fully insured and pays nothing in premiums. Under the lower court's interpretation of the MWA, the employer is

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violates the interpretive canon that analogous terms be controlled by the more specific term's meaning. *Orr*, 64 Nev. at 146, 178 P.2d at 562.

[3] YOUNG ADULTS AND THE AFFORDABLE CARE ACT, Dept. of Labor ("dependent coverage must be available until a child reaches the age of 26"), *available at http://www.dol.gov/ebsa/faqs/faq-dependentcoverage.html*.

still required to pay the employee the upper tier minimum wage rate. In contrast the employee over the age of 26, who is no longer insurable by parents under the ACA, accept the offer of insurance from the employer, gets paid the lower tier rate, ***and*** contributes up to 10% of the employees relevant income to premiums. This leads to the unintended and absurd consequence that a 25-year-old would be insured with no premium deduction, but paid $8.25 an hour, while a 26-year-old, who obtained insurance through the employer, would receive $7.25 less the insurance premium of up to, approximately, $.75. The 26-year-old, with employer insurance, would make $1.75 less an hour than the 25-year-old. This absurd result cannot be justified by the MWA's language, but necessarily follows from the lower court's unreasonable interpretation. This result is unsupported as a matter of law.

III. CONCLUSION

Amici Curiae respectfully urge the Court to grant MDC's petition and direct the lower court to enter an order that an employer may lawfully pay the lower tier rate by offering or making health insurance available as stated in the MWA.

DATED: August 24, 2015.

JACKSON LEWIS P.C.

/s/ Elayna J. Youchah
Elayna J. Youchah, Bar No. 5837
Steven C. Anderson, Bar No. 11901
3800 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

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

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

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

[ ] Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or ___ lines of text; or

[**XX**] Does not exceed 15 pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix

where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: August 24, 2015.

JACKSON LEWIS P.C.

/s/ Elayna J. Youchah

Elayna J. Youchah, Bar No. 5837
Steven C. Anderson, Bar No. 11901
3800 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Jackson Lewis P.C. and that on this 24th day of August 2015, I caused to be served a true and correct copy of the above and foregoing **AMICI CURIAE'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** via the Court's Case Management and Electronic Case Filing (CM/ECF) system and U.S. Mail, postage prepaid, properly addressed to the following:

Rick D. Roskelley
Montgomery Y. Paek
Littler Mendelson, P.C.
3960 Howard Hughes Parkway, Suite 300
Las Vegas, Nevada 89169
Attorneys for Petitioners

Don Springmeyer
Bradley Schrager
Daniel Bravo
Wolf Rifkin Shapiro Shulman & Rabkin LLP
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120
Attorneys for Real Parties in Interest

Hon. Timothy Williams
Eighth Judicial District Court
Department 16
200 Lewis Avenue
Las Vegas, Nevada 89155

/s/ Emily Santiago
An Employee of Jackson Lewis P.C.