IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

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

Respondents,

and

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

Real Parties in Interest.

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Eighth Judicial District Court
Case No.: A701633

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

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N.R.A.P. 26.1 DISCLOSURE

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

Dated this 26th day of October, 2015.

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ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

Petitioners want something for nothing, and they want it at the expense of Nevada's lowest-paid workers. They believe that article XV, section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or the "Amendment") gives them the right to pay employees a full dollar below Nevada's minimum hourly wage rate of $8.25 an hour without giving those employees anything in return. What employees get, they say, is the chance to enroll in whatever plan the employer has selected, and the employer always gets the benefit of the wage reduction whether the employee receives any tangible benefit at all. Neither the text nor the context of the Amendment, however, grants them that advantage.

The textual command of the Amendment is clear: "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." Nev. Const. art. XV, § 16(A). The succeeding sentence—"Offering 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 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"—does not define the term "provide." *Id*. Instead, it "describes herein" the type and cost of the benefits that *may* permit the employer to pay below the upper-tier hourly wage. Those benefits must be "health insurance," meaning they must meet legal requirements for health insurance under pertinent state and federal laws, they must be available to the employee and all dependents, and they must not cost the employee more than ten percent of his or her income from the employer.

Here is how the Amendment was supposed to function: Employers go ahead and choose whether it was better to pay every employee at least $8.25 per hour, or to pay employees down to $7.25 an hour but provide those employees and their dependents with health insurance, at a capped premium cost to the employee of 10%

of what the employer paid the worker in wages. That cap meant that employers had to weigh the possibility that health insurance premiums might run above the 10% of wages figure, leaving them responsible for overages. Employees either received the insurance and up to a dollar less in pay, or the full $8.25 hourly wage.

Petitioners, however, think they have found a loophole that benefits them mightily. The case below originated because Petitioners were offering wholly substandard health benefits in order to try and qualify to pay less than the upper-tier constitutional wage. Petitioners' Appendix ("Petr. Appx.") 1-31. Over the years they offered minimum wage employees limited-benefits and fixed-indemnity plans which featured no out-of-pocket caps, no protections for pre-existing conditions, abysmally low coverage levels, and which cannot qualify under law as health insurance at all. Petr. Appx. 184-186. The 2015 version of the health plan Petitioners employ is so bad it does not cover surgery of any kind—not even stitches—and the policy will not pay any benefits if the insured is admitted to the hospital. Petr. Appx. 184-186, 193-200. That bears repeating. That is the health benefits plan that Petitioners—right now, at this moment—are using to justify paying employees less than $8.25. Not surprisingly, 80% of Petitioners sub-minimum wage employees over the last five years declined Petitioners' "health insurance." Petr. Appx. 773. Of the 2,545 employees that Petitioners reported last March as having been paid below the $8.25 hourly level since mid-2010, fully 2,022—including Ms. Diaz—declined to enroll. Petr. Appx. 47, 773. Petitioners still went ahead and paid those two thousand-plus employees below the $8.25 level. Petr. Appx. 773.

The Minimum Wage Amendment requires that employees actually receive qualified health insurance in order for the employer to pay, currently, down to $7.25 per hour to those employees. Otherwise, the purposes and benefits of the Amendment are thwarted, and employees (the obvious beneficiaries of the Amendment) who reject insurance plans offered by their employer would receive neither the low-cost health insurance envisioned by the Minimum Wage

Amendment, nor the raise in wages its passaged promised, $7.25 per hour already being the federal minimum wage rate that every employer in Nevada must pay their employees anyway. That cannot be the appropriate function of the Amendment.[1]

The distinction the parties here draw between "provide" and "offering" is no small matter. The fundamental operation of the Minimum Wage Amendment, fairly construed, demands that employees not be left with none of the benefits of its enactment, whether they be the higher wage rate or the promised low-cost health insurance for themselves and their families.

I. STATEMENT OF THE ISSUE

Below, the district court ruled that "[a]n employer must actually provide, supply, or furnish qualifying health insurance to an employee as a precondition to paying that employee the lower-tier hourly minimum wage in the sum of $7.25 per hour. Merely offering health insurance coverage is insufficient." Petr. Appx. 262, 267. The issue before the Court on a petition for a writ to vacate that order is whether the district court ruled in error as a matter of law.

II. FACTS AND PROCEDURE

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

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[1] Petitioners mention more than once that they cannot force their employees to enroll in their health benefits plans. Petition at 15-16. No one is forcing them, or their employees, to do anything, however. Petitioners always had the choice to pay the full minimum hourly wage, and thus never to have to concern themselves about who accepted the benefits or declined them, or whether the quality or cost of their plans met legal requirements. They took on those obligations voluntarily, in their decision to pay what Petitioners refer to as a "sub-minimum wage." Petr. Appx. 51.

and former employees of Petitioners, allege that pursuant to the Minimum Wage Amendment, they were allegedly underpaid because Petitioners did not provide the qualifying health insurance necessary for paying Real Parties in Interest less than the upper-tier minimum wage set by the Minimum Wage Amendment. Petr. Appx. 19-20, 21-24. On June 22, 2014, Petitioners answered the Amended Class Action Complaint. Petr. Appx. 32-42.

On April 24, 2015, Real Party in Interest Paulette Diaz ("Diaz") moved for partial summary judgment on liability as to her first claim for relief. Petr. Appx. 43-149. Diaz argued that during her employment with Petitioner MDC Restaurants, LLC ("MDC"), Diaz was not provided qualifying health insurance, yet was paid less than the upper-tier minimum wage by MDC. Petr. Appx. 43-46, 47-48. Petitioners filed an opposition, and Diaz subsequently filed a reply. Petr. Appx. 150-167, 168-207.

After a June 25, 2015 hearing, on July 1, 2015 the district court issued a minute order granting the Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief. Petr. Appx. 262. Later, on July 17, 2015, the Notice of Order regarding the Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief was entered. Petr. Appx. 263-268. The district court made the following Findings of Fact and Conclusions of Law:

> 1. The language of the Minimum Wage Amendment, Nev. Const. art. XV, § 16, is unambiguous: An employer must actually provide, supply, or furnish qualifying health insurance to an employee as a precondition to paying that employee the lower-tier hourly minimum wage in the sum of $7.25 per hour. Merely offering health insurance coverage is insufficient.
>
> 2. This Court finds under the Minimum Wage Amendment, Nev. Const. art. XV, § 16, that for an employer to "provide" health benefits, an employee must actually enroll in health insurance that is offered by the employer.

Petr. Appx. 267. Petitioners filed this Writ on July 1, 2015.

On August 12, 2015, in the matter of *Hancock v. State of Nevada ex rel. Labor Commissioner*, First Judicial District Case No. 14 OC 00080 1B, the district court

struck down and invalidated N.A.C. 608.100(1), which had purported to permit employers to "offer," rather than "provide" health insurance to employees in order to pay below the upper-tier hourly wage under the Minimum Wage Amendment. Real Parties in Interest's Appendix ("RPII Appx.") 6-19. The court there found that the regulation was unconstitutional, and was promulgated in excess of the Labor Commissioner's authority pursuant to Nevada law. RPII Appx. 16-19.

On October 13, 2015, the district court in this case certified a Rule 23 class of at least 2,022 present and former employees of Petitioners who were paid less than $8.25 per hour since July 1, 2010, but who were never provided with health benefits as required by the Minimum Wage Amendment. RPII Appx. 20-24. On October 19, 2015, the Notice of Order regarding the Rule 23 class certification was entered. RPII Appx. 25-32.

III. EXTRAORDINARY WRIT REVIEW

There is no question that Petitioners have an appellate remedy for the issue they seek reviewed by this Court by writ petition. Additionally, the basic question at stake here—whether employers must *provide* or merely *offer* health insurance to sub-minimum wage employees—is before the Court in two other procedural settings. In *State v. Hancock*, Case No. 68770, the Labor Commissioner has filed a straight appeal of the ruling of the First Judicial District Court invalidating the administrative regulation permitting employers merely to offer insurance. In both *Kwayisi v. Wendy's of Las Vegas*, Case No. 68754, and *Hanks v. Briad Restaurant Group, LLC*, Case No. 68845, the United States District Court for the District of Nevada has certified the question to this Court pursuant to N.R.A.P. 5. The present writ petition, therefore, may not be the optimum avenue for resolving the question presented, especially where this is now the second mid-case writ petition filed by Petitioners, with the promise of more to come.

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IV. IF THE COURT ACCEPTS REVIEW AND CONSIDERS THE PETITION, IT SHOULD BE DENIED

Section A of the Minimum Wage Amendment clearly and unambiguously authorizes an employer to pay the lower-tier minimum wage (originally $5.15 per hour, now $7.25) *only* to those employees to whom it "provides health insurance benefits." Nev. Const. art. XV, § 16(A).[2] If, on the other hand, an employer "does not provide such benefits" to an employee, it must pay that employee the upper-tier wage (originally $6.15 per hour, now $8.25). *Id*. The two-tiered wage provision of the Amendment is mandatory and remedial, and creates a strong incentive to employers to provide qualifying health plans or increased wages to their employees.

The pertinent text of the Amendment reads as follows:

> Each employer ***shall pay*** a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, ***if the employer provides health benefits*** as described herein, or six dollars and fifteen cents ($6.15) per hour ***if the employer does not provide such benefits***. Offering 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 at a total cost of not more than 10 percent of the employee's gross taxable income from the employer.

Id. (emphasis supplied).

The Minimum Wage Amendment is a remedial act, and will be liberally construed to ensure the intended benefit for the intended beneficiaries. *See, e.g., Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 496, 915 P.2d 288, 289 (1996); *see also Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336

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

P.3d 951, 954 (2014), *reh'g denied* (Jan. 22, 2015).

A. The Plain Text Of The Minimum Wage Amendment Requires The Provision Of Health Insurance For The Privilege of Paying Less Than The Upper-Tier Minimum Wage

The meaning and operation of the Amendment's two-tiered wage scheme is evident: The employer's privilege of paying the lower-tier hourly wage is conditioned upon the actual provision of qualifying health insurance benefits to the employee. *See* Nev. Const. art. XV, § 16(A). If, as here, a provision is clear and unambiguous, Nevada courts will not look beyond the language of the provision. *Miller v. Burk*, 124 Nev. 579, 590-91, 188 P.3d 1112, 1119-20 (2008). Although the Amendment does not expressly define "provide," the meaning is facially evident from the text of the Amendment, and easily divined from the purpose of the Amendment generally, which was to raise the pay of minimum wage employees. As the district court determined below after extensive briefing and oral argument, the Constitution is "unambiguous" on this point: "An employer must actually provide, supply, or furnish qualifying health insurance to an employee as a precondition to paying that employee the lower-tier hourly minimum wage in the sum of $7.25 per hour. Merely offering health insurance coverage is insufficient." Petr. Appx. 267.

1. The plain and ordinary meaning of "provide"

It is well-established that, when interpreting a statute or constitutional provision, courts first look to the plain language of the provision, giving every word, phrase, and sentence its usual, natural, and ordinary import and meaning, unless doing so violates the provision's spirit. *See Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001); *McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). When facially clear, courts will not generally go beyond the plain language of the provision. *McKay*, 102 Nev. at 648, 730 P.2d at 441. Stated another way, when a provision is susceptible to only one honest construction, that alone is the construction which properly can be given. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 846 (1997); *Washoe*

Med. Ctr., Inc., 112 Nev. at 496, 915 P.2d at 289 (citing *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610, 836 P.2d 633, 636 (1992)). Plain language controls unless it would lead to absurd results. *See United States v. Romero-Bustamente*, 337 F.3d 1104, 1109 (9th Cir. 2003); *Harris Associates v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003).

Here, the plain language and intended operation of the Amendment is ascertainable from the face of the Amendment. An employer must do more than merely offer a health insurance to an employee in order to qualify for paying the employee the lower-tier wage. Any other construction would be absurd, and would turn the incentives embodied by the Amendment to encourage employers to provide qualifying health plans to their employees or else pay higher wages to those employees, on their heads.

By looking only at the plain and unambiguous language of the Amendment's two-tiered wage provision, it is clear that the operative word "provide" means something other than simply "offering" some sort of health plan. Interpretation necessarily begins with the assumption that the language employed by the drafters was intentional and its ordinary meaning accurately expresses the drafter's purpose. *See, e.g., Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175, 129 S. Ct. 2343, 2350 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). "Provide" and the other terms of the Amendment must be respected as being chosen carefully and deliberately by the drafters, with recognition that they were approved overwhelmingly by the people of Nevada at two general elections.

The ordinary and everyday meaning of "provide" is "to supply ***for use***," not merely to offer for potential use. *See Merriam-Webster's Dictionary and Thesaurus* at 838 (Merriam-Webster, Inc. 2006) (emphasis supplied). Synonyms of "provide" include "deliver," "give," "hand," "hand over," "supply," and "furnish[.]" *Id.*

Likewise, *Black's* definition of "provide" is "an act of furnishing or supplying a person with a product." *Black's Law Dictionary Free Online Legal Dictionary* (2d ed.) http://thelawdictionary.org/provide/ (accessed Oct. 22, 2015); *see also Black's Law Dictionary* (5th ed. 1979) (defining "furnish" as interchangeable with "provide"—"To supply, provide, or equip, for accomplishment of a particular purpose.").

Both the Labor and Insurance Codes support the distinction between *provide* and *offering*. Under N.R.S. 608.1555, "[a]ny employer who provides benefits for health care to his or her employees shall provide the same benefits and pay providers of health care in the same manner as a policy of insurance pursuant to chapters 689A and 689B of NRS." N.R.S. 608.1555. Chapters 608, 689A and 689B use some form of the terms *provide* and *offer* in the context of health insurance benefits hundreds of times.[3] In them, "offering" almost always is used with reference to an insurer, whose

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[3] *See, e.g.*:

N.R.S. 608.156(1): If an employer ***provides*** health benefits for his or her employees, the employer shall ***provide*** benefits for the expenses for the treatment of abuse of alcohol and drugs. N.R.S. 608.156(1) (emphasis supplied).

N.R.S. 608.157(1): If an employer ***provides*** health benefits for his or her employees which include coverage for the surgical procedure known as a mastectomy, the employer must also ***provide*** commensurate coverage for at least two prosthetic devices and for reconstructive surgery incident to the mastectomy. N.R.S. 608.157(1) (emphasis supplied).

N.R.S. 608.1576: The purpose of this section is to ensure that children are promptly enrolled in a program of health insurance ***provided*** by the responsible parent and that the health insurance is maintained. N.R.S. 608.1576 (emphasis supplied).

N.R.S. 608.1575(2): The benefits ***provided*** by the employer must not limit: (a) Coverage for services ***provided*** by such a registered nurse to a number of occasions less than for services ***provided*** by another provider of health care. (b) Reimbursement for services ***provided*** by such a registered nurse to an amount less than that

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product is being *offered* into the Nevada marketplace and is therefore regulated before it can be made available for sale.[4] When treating employer obligations regarding insurance plans, however, the Insurance Code, for example, switches to the more active "provide." If an employer "provides" health insurance, the Codes mandate, the insurance in question must have certain qualities—meaning, essentially, if an employee is to subject themselves and their families to a particular employer-provided insurances, it must have certain types and amounts of coverage. At that point, the Legislature is assuming "provide" means that real employees will be subject to employer-*provided* insurance—they have, in other words, *accepted* the benefits—and that therefore those policies must carry, for example, coverage for drug and alcohol abuse treatment, treatment of autism spectrum disorders, or gynecological or obstetrical services. *See* N.R.S. 608.156; N.R.S. 689B.0335; N.R.S. 689B.031. In these statutory sections, unmistakably, "provide" always has the connotation of receipt of the benefit in question.[5]

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reimbursed for similar services ***provided*** by another provider of health care. N.R.S. 608.1575(2) (emphasis supplied).

[4] *See, e.g.*:

N.R.S. 689B.0265: An insurer may ***offer*** a policy of group health insurance to a guaranteed association if the policy ***provides*** coverage for 200 or more members, employees of members or employees of the guaranteed association or their dependents. N.R.S. 689B.0265 (emphasis supplied).

N.R.S. 689B.028: An insurer shall provide to the group policyholder to whom it ***offers*** a policy of group health insurance a copy of the disclosure approved for that policy pursuant to NRS 689B.027 before the policy is issued. An insurer shall not ***offer*** a policy of health insurance unless the disclosure for that policy has been approved by the Commissioner. N.R.S. 689B.028 (emphasis supplied).

[5] *See, e.g.*:

N.R.S. 689B.0285(4): Each insurer that issues a policy of group health insurance in this State that ***provides, delivers, arranges for, pays for or reimburses*** any cost of

(continued on next page)

Nevada courts also have used "provide" interchangeably with the word "furnish" to connote a transfer of possession from one to another, as opposed to making something merely available. In *State v. Powe*, No. 55909, 2010 WL 3462763, at *1 (Nev. July 19, 2010), the district court, interpreting a criminal statute's use of "furnish," found as a matter of law that "furnishing" calls for actual delivery by one person to another. Reviewing that interpretation *de novo*, the Nevada Supreme Court affirmed. *Id.* Nevada Rules of Civil Procedure use "provide" in similar fashion: N.R.C.P. 16.1(a)(1) mandates the initial disclosures that "a party must, without awaiting a discovery request, ***provide*** to other parties." N.R.C.P. 16.1(a)(1) (emphasis supplied). Under N.R.C.P. 32(c), "a party ***offering*** deposition testimony pursuant to this rule may ***offer*** it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also ***provide*** the court with a transcript of the portions so ***offered***." N.R.C.P. 32(c) (emphasis supplied).

"To offer," defined, is merely "to present for acceptance." Merriam-Webster's, *supra*, at 733. Synonyms for "offer" include "extend," "pose," "proffer," and "suggest," but notably not "provide", "furnish", or "supply[.]" *Id.* at 734. Neither does *Merriam-Webster* list "offer" as synonymous with "provide." *Id.* at 838. Thus, "offer," which carries no connotation of <u>transference of possession</u>, is not synonymous or interchangeable with "provide" in the wage provision of the Amendment, or in any other context. The overall definitional weight of "provide,"

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health care services through managed care shall ***provide*** a system for resolving any complaints of an insured concerning the health care services that complies with the provisions of NRS 695G.200 to 695G.310, inclusive. N.R.S. 689B.0285(4) (emphasis supplied).

N.R.S. 689B.0306, concerning provision of coverage for treatment received as part of clinical trial or study, employs "provide" seventeen times, and in each instance it means "receive." *See* N.R.S. 689B.0306.

even alone with no reference to the context or meaning it has within the Amendment, connotes an actual exchange, not simply the potential for an exchange.[6]

It is a basic rule of construction that "[w]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1057 (2014), *reh'g denied* (Mar. 5, 2014) (quoting Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)). Here, the different idea is the difference between a full bargain (a dollar less in wages, but provision of health insurance to one's entire family), and an incomplete one (no dollar and no insurance, because one did not accept the offered benefits). "Provide" and "offer" are not synonyms, therefore, neither in the everyday sense of those words nor in the sense that is to be employed when courts engage in constitutional or statutory construction.

2. The meaning of the "offering" clause in the Amendment

If they meant to, the drafters of the Minimum Wage Amendment could easily have stated that:

> The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer ***offers*** health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not ***offer*** such benefits.

They did not so state. The command of the provision, if one if going to take

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[6] Roget's Thesaurus lists 54 synonyms for "provide", none of them are "offer": Add, administer, afford, arrange, bring, cater, contribute, equip, furnish, give, grant, hand over, implement, keep, lend, maintain, prepare, present, produce, serve, transfer, yield, accommodate, bestow, care, dispense, favor, feather, feed, fit, heel, impart, indulge, line, minister, outfit, procure, proffer, provision, ration, ready, render, replenish, stake, stock, store, sustain, fit out, fix up, fix up with, look after, stock up, take care of, turn out. *See Roget's 21st Century Thesaurus* (3rd ed.) http://www.thesaurus.com/browse/provide (accessed Oct. 22, 2015).

advantage of the privilege afforded to pay below the upper-tier wage rate, is to "provide health benefits as described herein."

The function of the succeeding sentence in the Amendment—"Offering 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 at a total cost of not more than 10 percent of the employee's gross taxable income from the employer"—is to define the particular health benefits in question, not to define what it means to "provide" them. *See* Nev. Const. art. XV, § 16(A). Anything can be a "health benefit" (a bowl of free aspirin, or a discount card to a drugstore chain, for example), but the Amendment directs that the "health benefits" necessary to qualify an employer to pay less, currently, than $8.25 per hour must be "health insurance," and they must not come at a premium cost to the employee and his or her dependents of more than ten percent of the employee's income form the employee. *Id*.

That the benefits must be *health insurance* subjects Petitioners and other employers to state and federal law regarding certain insurance standards. Health insurance, of course, is a highly-regulated and defined area of law. N.R.S. 608.1555 mandates that "Any employer who provides benefits for health care to his or her employees shall provide the same benefits and pay providers of health care in the same manner as a policy of insurance pursuant to chapters 689A and 689B of NRS." N.R.S. 608.1555. This means that the insurance Petitioner used to try and qualify under the Amendment to pay a reduced minimum wage must meet the requirements of, at least, N.R.S. Chapters 689A (Individual Health Insurance) and 689B (Group and Blanket Health Insurance). That stands to reason: one could not expect to provide, or to offer, a policy under the Amendment that failed to qualify legally as health insurance and yet still claim the right to underpay one's employees. The Amendment clearly subjects employers to the basic particular requirements of health

insurance law.[7]

The "offering" clause of the Amendment does not define what it means to "provide;" it defines what the "health benefits must consist of. *Offering* those particular benefits is a predicate act; there must be an offer before one can accept those benefits, before those benefits can be provided. That is basic contract law: an offer must precede acceptance, and an acceptance is what constitutes provision. But under the terms of the Amendment, "provide" remains the command, if Petitioners are to qualify to pay the sub-minimum hourly wage.

Petitioners, and to a clearer extent *amici*, however, argue that the "offering" clause actually defines what it means to "provide" health benefits. But "offering" is not used as a synonym for "provide;" in fact the two are not even employed as the same parts of speech in the clause, as *provide* is used as an imperative verb therein, while *offering* is a gerund, and speaks to what must be offered if the required benefits are to be provided at all. In no way does the use of "offering" in the succeeding sentence operate to reach back and alter or diminish the meaning of "provide" as employed as the basic command of the Amendment in the preceding sentence.

Neither can the two words or concepts—*provide* and *offering*—mean the same thing. Where a provision uses "one term in one place, and a materially different term in another … the presumption is that the different term denotes a different idea." *Lorton*, 322 P.3d at 1056 (2014) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 170 (2012)).

The Court should assume that the Amendment's drafters, and the voters who twice approved it, intentionally employed and approved of the ordinary meaning of

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[7] This, of course, forms part of the allegations and arguments below, that Petitioners failed to provide—or even to offer—health insurance that met the requirements under law. Petr. Appx. 184-186, 193-200.

the plain language of the text, including the requirement to "provide" health insurance before reducing wages. *See, e.g.*, *Gross*, 557 U.S. at 175. If the drafters of the Amendment had meant for "provide" to mean "offer," there were limitless opportunities to make that the abundantly clear and inevitable command of the provision. Instead, "provide" is the command and the keystone for qualifying to pay less than the full minimum hourly wage, while "offering" is used to describe elements of what the required benefits must be.

The terms "provide" and "offering" are not "synonymous" or interchangeable, and they do not define one another. They are different, and they are sequential. Employers must provide health benefits in order to qualify to pay employees below the upper-tier wage. Offering those benefits—making them available, as health insurance at a specific capped cost—is a natural and necessary predicate to complying with the command of the Amendment. The two are not linguistically synonymous. The clause beginning "[o]ffering health benefits" does have clear meaning and purpose, but its meaning and purpose is not to dilute or otherwise offend the basic command of the text. Nev. Const. art. XV, § 16(A).

The enormous, employer-friendly loophole that Petitioners seek to open up within the Amendment is, plainly, that employers may aggrandize to themselves the benefit of saving a large portion of their wage bill, at no cost to themselves, while the minimum-wage worker is assured of receiving neither the raise in wages established by the Amendment nor its alternative promise of affordable health insurance. There is no context in which such an about-face in the meaning and impact of a popularly-enacted constitutional provision is a plausible construction of its terms.

Petitioners cannot point to instances where "provide" and "offer" are used synonymously. At the very least, they cannot amass the weight of citations to law, cases, rules, and other authorities that support the clear distinction between those two terms, as demonstrated by Real Parties in Interest. Petitioners' argument is not supported by grammar, semantics, or any interpretive canon; it is supported, if at all,

only by their desire to escape liability for those employees like Ms. Diaz that they have underpaid for so long.

B. The History, Purpose, And Policy Of The Amendment

1. The Amendments' text in context

There is more involved in the analysis than a simple determination of the meaning of the word "provide," read in isolation. This Court's first duty, of course, is to construe the laws of Nevada in manners that comport with their purpose and intent, and to ensure that those laws are not thwarted in their aims. This is especially true if this Court senses any ambiguity in the Amendment on the point here at issue.[8] "The leading rule is to ascertain the legislature's intent, and to accomplish that goal we may examine the context and spirit of the statute in question, together with the subject matter and policy involved." *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998). Furthermore, "the entire subject matter and the policy of the law may also be involved to aid in its interpretation, and it should always be construed so as to avoid absurd results." *Welfare Div. v. Washoe Co. Welfare Dep't*, 88 Nev. 635, 637-38, 503 P.2d 457, 458-59 (1972).

In this instance, it is not difficult to determine that the context, spirit, intent, and purpose of the Minimum Wage Amendment was to raise the wages of Nevada's working poor, and to encourage provision of low-cost comprehensive health insurance to those employees. Petitioners' interpretation of the Amendment achieves neither of those goals, and in fact directly defeats them. The federal minimum wage is already $7.25 per hour. Employees like Plaintiff Diaz below, therefore, have received <u>no benefit whatsoever</u> from the passage of the Minimum Wage

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[8] The district court below, of course, found no ambiguity and ruled that the meaning of "provide" here was entirely clear: There is no paying below the upper-tier hourly wage without actually furnishing the employee with the promised health insurance. Petr. Appx. 267.

Amendment: they are paid at the federal minimum, and they receive no health benefits from their employer.

If all an employer has to do is "offer" benefits in order to pay 12.2% less in wages to an employee, why would any employer ever pay the full $8.25? The upper-tier would be illusory. Especially given the fact that the employee has no input into what type or quality of insurance is being offered by the employer, a wily employer could arrange to offer benefits the employee is unlikely to accept. Employers could target their hiring from populations unlikely to want to accept their insurance—those under 26 and covered by parents' policies, or spouses on their partner's insurance. Employers may seek out and offer health benefits plans that are junk, like limited-benefits plans or hospital indemnity plans with near-worthless coverage (and this is exactly what happened here, by the way). This sort of gaming of the Amendment cannot be in line with its meaning.

The structure, text, and meaning of the Minimum Wage Amendment combine to insist that the lower-tier wage level have some meaning, that employees receive something for their loss of a dollar per hour worked. Petitioners claim all they get is an offer, of whatever benefits plans the employers deigns to make. In the their interpretation, employers always receive the benefit of the bargain—a significantly lower wage bill. What do employees like Ms. Diaz receive? If the Amendment had any remedial effect at all, how can an interpretation that so blithely guts any actual benefit to minimum wage employees be valid?

2. The public understanding of the Amendment

The ballot materials that came with the 2004 and 2006 initiative that became the Amendment, which noted that "[l]iving expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families." Petr. Appx.

95, 106.[9] That is as true today as it was a decade ago when the Amendment was proposed, and yet Petitioners' interpretations allow employers merely to "offer" rather than "provide" health insurance, and take a dollar off of wages every hour. That means an employee who does not accept the employer's benefits—perhaps because of substandard coverage, for example—is left with less money in his or her pocket as wages, but still needs (either because of the Affordable Care Act or out of

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[9] The title of the actual ballot initiative itself was "RAISE THE MINIMUM WAGE FOR WORKING NEVADANS." Petr. Appx. 95, 106. The initiative further stated that the "people of the State of Nevada hereby make the following findings and declare their purpose in enacting this Act as follows:"

1. No full-time worker should live in poverty in our state.
2. Raising the minimum wage is the best way to fight poverty. By raising the minimum wage form [sic.] $5.15 to $6.15 an hour, a full-time worker will earn an additional $2,000 in wages. That's enough to make a big difference in the lives of low-income workers to move many families out of poverty.
3. For low-wage workers, a disproportionate amount of their income goes toward cost of living expenses. Living expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families.
4. In our state, 6 out of 10 minimum wage earners are women. Moreover 25 percent of all minimum wage earners are single mothers, many of whom work full-time.
5. At $5.15 an hour, minimum wage workers in Nevada make less money than they would on welfare. When people choose work over welfare, they become productive members of society and the burden on Nevada taxpayers is reduced.
6. Raising the minimum wage from $5.15 an hour to $6.15 an hour affirms Nevadan's beliefs that we value work, especially the difficult jobs performed by hotel maids, childcare workers, and nursing home employees. We need to make sure the workers who are the backbone of our economy receive fair paychecks that allow them and their families to live above the poverty line.

Petr. Appx. 95, 106.

common sense and desire for wellness and peace of mind) to procure health insurance.

The Amendment's drafters and the voters who approved it did *not* intend the minimum wage to stagnate at the lower-tier, without a wage-increase substitute—namely, the provision of qualifying health insurance. For Plaintiff Diaz below, and for the tens of thousands of employees represented by the putative Classes in the actions listed above, wages right now remain at the lower tier—the federal minimum—yet they have no employer-provided qualifying health insurance.

Additionally, the written arguments both for *and against* the Amendment given to the voters clearly stated that if the measure passed, wages would go up. Petr. Appx. 91-94, 102-105. The proponents, for example, began, "All Nevadans will benefit from a long-overdue increase in the state's minimum wage through a more robust economy, a decreased taxpayer burden and stronger families." Petr. Appx. 91, 102. The initiative's opponents' also operated on the premise of higher wages in positing that "the most credible economic research over the last 30 years has shown that minimum wage hikes hurt, rather than help, low-wage workers." Petr. Appx. 92, 103. The opponents continued that under the Amendment, "wages paid in Nevada ***must***, from now on, ***exceed the federal minimum wage by about $1 an hour***." Petr. Appx. 93, 104 (emphasis supplied). Although the proponents and opponents disagreed about the measure's policy and fiscal impact, they both emphatically agreed that, as proposed, the Amendment would mean an increase in Nevada's minimum wage. For those like Ms. Diaz, whose wages were not raised and who never received any benefit in the form of health insurance from Petitioners, none of that occurred. It is very difficult to argue that the public understanding of the Amendment was that she and all other minimum wage workers in Nevada would fail to see their lots improve, while the wage bill of Petitioners would decrease. *See Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 522 (2014), *reh'g denied* (Sept. 24, 2014) ("The goal of constitutional interpretation is to

determine the public understanding of a legal text leading up to and in the period after its enactment or ratification.") (quoting *Strickland v. Waymire*, 126 Nev. Adv. Op. 25, 235 P.3d 605, 608-09 (2010)). That is not merely an absurd result, it is positively grotesque.

3. Contemporary notions of the Amendments' requirements

Although not controlling, post-enactment interpretations of the Minimum Wage Amendment by Nevada agencies and others familiar with Nevada labor laws may also assist in a proper determination of the meaning of the wage structure of the Amendment, as well as its mandatory requirements. *See* 6 Treatise on Const. L. § 23.32 ("[T]he court may examine a variety of legal and other sources—all post-enactment—to seek to determine the public understanding of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation.") (internal quotations omitted).

In April of 2014, the Legislative Counsel Bureau ("LCB") reported that "the State minimum wage is $7.25 per hour [the new rate per the Amendment's variable formula] for employees who ***receive*** health care benefits and $8.25 for employees who do ***not receive*** health care benefits." Petr. Appx. 58, 121 (emphasis supplied). The LCB reiterated its interpretation just a few months ago, that "Nevada's minimum wage for employees who ***received*** qualified health benefits from their employers is $7.25 per hour, and the minimum wage for employees who do ***not receive*** health benefits is $8.25 per hour." Petr. Appx. 58, 113 (emphasis supplied).

The Nevada Department of Business and Industry states it the same way: "The minimum wage for employees who ***received*** health benefits from their employers is $7.25 per hour, and the minimum wage for employees who do ***not receive*** health benefits will remain at $8.25 per hour." Petr. Appx. 58, 116 (emphasis supplied).

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Nongovernmental sources have described the Amendment in similar terms, going back to the period of its enactment:

> "[E]mployers in Nevada will be required to pay a minimum wage of either $5.15 or $6.15 per hour depending on whether health insurance benefits ***are provided to employees***[.] Those employees ***receiving*** health insurance benefits according to this standard can still be paid at a rate of $5.15 per hour."

Petr. Appx. 59, 131-134 (emphasis supplied).

> "Our state's minimum wage increased effective July 1, for cost-of-living adjustment to $5.30 per hour (***with qualified health plan***) and $6.33 per hour (***without qualified health plan***)."

Petr. Appx. 58-59, 128-129 (emphasis supplied).

> "Effective November 28, 2006, the state constitution was amended to create a two–tiered minimum wage, $5.15 per hour ***with health benefits***, or $6.15 per hour ***without***."

Petr. Appx. 58, 110-111 (emphasis supplied).

Real Parties in Interest's interpretation is not some wild, implausible rendering of the constitutional meaning; it has been shared by governmental and nongovernmental bodies and stakeholders since the day the Amendment went into effect.

C. Petitioners' Arguments Regarding The Nevada Labor Commissioner's Regulation Fail To Support Their Position

1. No deference is due to the Labor Commissioner's interpretations in this matter

Petitioners attempt an argument that the Court should defer to the Nevada Labor Commissioner, who once maintained—after first having maintained the opposite—that all employers had to do was offer benefits in order to pay the lower-tier hourly wage under the Amendment.[10] This approach does not hold much water.

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[10] The Commissioner's initial Emergency Regulations, proposed and implemented immediately upon passage in late 2006, assigned the Amendment its plain meaning in accordance with its widely demonstrated purpose and intent. They stated as follows:

(continued on next page)

First, the Labor Commissioner does not declare what is or is not constitutional; that is the province of the judiciary, which is unlikely to cede that important role to an administrative agency. Second, the regulation Petitioners reference have been invalidated, precisely because a district court determined that N.A.C. 608.100(1) was unconstitutional and had been promulgated in excess of the Commissioner's authority pursuant to law. RPII Appx. 6-19.

The Labor Commissioner is charged with "enforcing" Nevada labor laws, and with promulgating regulations that "carry out" those provisions of law. N.R.S. 607.160(1). Pursuant to N.R.S. 233B.110(1), "the validity or applicability of any regulation may be determined in a proceeding for a declaratory judgment … when it is alleged that the regulation, or its proposed application, interferes with or impairs,

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> Nevada has established a two-tiered minimum wage. (A) The first tier, lower tier, is from $5.15 per hour to $6.14 per hour for employers who ***provide qualified health insurance benefits***. (B) The second tier, upper tier, is $6.15 per hour for employers who do ***not provide qualified health benefits***.

RPII Appx. 1. (emphasis supplied).

Emergency regulations, by their nature, are for meeting immediate statutory or constitutional exigencies, do not require public comment, and expire by their terms so that temporary and permanent regulations may succeed them through the rulemaking process. Temporary and permanent regulations, therefore, are subject to input from stakeholders, including persuasion by interests amounting to *lobbying*.

It is unsurprising, therefore, that in the Commissioner's later-issued Temporary Regulations, the pertinent interpretation of the constitutional text diverged from their initial rendering. The Temporary Regulations stated as follows:

> Sec. 2(1): The lower tier is from $5.15 to $6.14 per hour for employees who [are] ***offered*** qualified health insurance benefits. (2) The upper tier is $6.15 per hour for employees who are ***not offered*** qualified health benefits.

RPII Appx. 3 (emphasis supplied). It was this concept, after further input from interested parties, that the Commissioner ultimately codified into N.A.C. 608.100(1), which has remained un-amended ever since.

or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." N.R.S. 233B.110. This is exactly what the district court in *Hancock* found—that the challenged regulations interfered with and impaired legal rights pursuant to the Nevada Constitution. RPII Appx. 16-19. The standard for the analysis there was also clear: "[T]he court shall declare the regulation invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency." RPII Appx. 11. The Commissioner's regulation, therefore, was not "based on a permissible construction of the statute," or in this case, the Nevada Constitution, and is owed no deference. Petition at 25.

If the district court that was reviewing—and then striking down—N.A.C. 608.100(1) owed the Commissioner's interpretation no deference, it is unlikely that now, in a completely separate case where the validity of the now-invalidated regulation is not even in issue, this Court owes the type of deference Petitioners are urging in order to press their constitutional argument. In fact, deference is only given "when [the interpretation] is within the language of the statute." *United States v. State Engineer*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001) ("An administrative agency's interpretation of a regulation or statute does not control if an alternate reading is compelled by the plain language of the provision."). This is further established by the long line of Nevada cases stating that "a reviewing court may undertake independent review of the administrative construction of a statute." *Banegas v. State Indus. Ins. System*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001). *See also American Intern. Vacations v. MacBride*, 99 Nev. 324, 326, 661 P.2d 1301, 1302 (1983); *Diamond v. Swick*, 117 Nev. 671, 674, 28 P.3d 1087, 1089 (2001) ("Independent appellate review of an agency decision, rather than a more deferential standard of review, is appropriate when the agency's decision rests on questions of law, such as statutory construction."); *Bacher v. State Engineer*, 122 Nev. 1110, 1118, 146 P.3d 793, 798 (2006) (courts "may decide purely legal questions without deference to an agency's determination."). There is nothing, therefore, about the

mere fact that the Nevada Labor Commissioner promulgated—wrongly, as it turned out—regulations on this subject that requires the Court to defer in any way to the agency's interpretation.

2. There is no principled reason that the usual rule of retroactivity of the Court's constitutional decisions should not be maintained in this circumstance

What Petitioners struggle towards in raising the Labor Commissioner's regulation is a coherent retroactivity defense. They do not, however, get the analysis quite right. The cases they point to (*Bradley*, *Security Industrial Bank*, *In re Ashe*, and *Roth*) do not support the argument, and instead involve issues of constitutional avoidance or questions retroactive application *of newly enacted or interceding statutes*, which is not the case here.[11] Those are very different issues than the argument they probably wish to make here: that if the Court agrees with Real Parties in Interest that Petitioners actually had to provide benefits under the Amendment, this Court's *judicial decision* should be given only prospective application. Properly framed, that argument does not run through *Bradley* or *Security Industrial Bank*, but rather through *Breithaupt v. USAA Property & Cas. Ins. Co.*, 110 Nev. 31, 867 P.2d 402 (1994), and the cases upon which it relies.[12]

The general rule is that "judicial decisions will apply retroactively." *City of*

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[11] *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 94 S. Ct. 2006 (1974); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 103 S. Ct. 407 (1982); *In re Ashe*, 712 F.2d 864 (3rd Cir. 1983) (prohibiting the retroactive application of the same bankruptcy lien avoidance provision addressed in *Security Industrial Bank*); *Roth v. Pritikin*, 710 F.2d 934 (2nd Cir. 1983) (prohibiting the retroactive application of the 1978 Copyright Act to work-for-hire agreements executed prior to the Act's enactment).

[12] *See also* this Court's unpublished decision in *Garmong v. Rogney & Sons Const.*, No. 60517, 2014 WL 1319071 (Nev. Mar. 31, 2014), *cert. denied*, 135 S. Ct. 458 (2014).

Bozeman v. Peterson, 227 Mont. 418, 420, 739 P.2d. 958, 960 (1987), *overruled* to the extent Peterson permitted prospective application of judicial decisions regarding constitutional rules in criminal proceedings by *State v. Waters*, 296 Mont. 101, 987 Mont. 1142 (1999). *See also Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 596, 790 P.2d 242, 251 (1990) ("[U]nless otherwise specified, an opinion in a civil case operates retroactively as well as prospectively."); *Truesdell v. Halliburton Co., Inc.*, 754 P.2d 236, 239 (Alaska 1988) ("In civil cases, retroactivity is the rule, and pure prospectivity is the exception."). This rule is especially strong in matters of constitutional interpretation, for reasons made clearly and persuasively by Justice Scalia in his concurrence in *American Trucking Association, Inc. v. Smith*, 496 U.S. 167, 110 S. Ct. 2323 (1990):

> [P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be. The very framing of the issue that we purport to decide today—whether our decision in *Scheiner* shall "apply" retroactively—presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is.
>
> Such a view is contrary to that understanding of "the judicial Power," U.S. Const., Art. III, § 1, which is not only the common and traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures,
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> To hold a governmental Act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it; and when, as in this case, the constitutionality of a state statute is placed in issue, the question is not whether some decision of ours "applies" in the way that a law applies; the question is whether the Constitution, as interpreted in that decision, invalidates the statute.
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> Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense.

Id., 496 U.S. at 201 (Scalia, J., concurring) (internal citations omitted; emphasis in original).

But if the Court is to go beyond a direct statement that its decision on the constitutional point here declares the law of this state, and to entertain the question of

whether its decision on the question presented here is to be applied prospectively only, *Breithaupt* instructs that:

> In determining whether a new rule of law should be limited to prospective application, courts have considered three factors: (1) the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the court must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation; and (3) courts consider whether retroactive application could produce substantial inequitable results.

Breithaupt, 110 Nev. at 35 (internal quotations omitted). Initially, then, prior even to considering the potential for non-retroactive application, the judicial decision must be a "new rule," which raises Justice Scalia's threshold point about constitutional interpretation. A ruling that the words and clauses of the Minimum Wage Amendment mean what they say does not immediately imply that a new rule of law is at issue here.

If it is a "new rule," thereafter the decision must "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id*. Here there is no past precedent involved—and this Court has noted that "where this Court overrules its own construction of a statute" full retroactivity may not be appropriate—but the matter is one of first impression. *See id.* at 36. Whether its resolution "was not clearly foreshadowed" is a closer question. The interpretation in question here is no lightning bolt out of the blue; the then-Labor Commissioner, as discussed earlier, modified the regulations to indicate an understanding that he was wading into contested territory that benefitted employers at the expense of minimum wage workers, and certainly there were myriad examples of agency and stakeholder understandings that "provide" meant "furnish," or "receive" health insurance benefits, as outlined above. Arguably, this matter is "subject to rational disagreement," however. *Truesdell*, 754 P.2d at 239.

Looking to the "prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation," here the full retroactive application of this Court's decision would fulfill the purpose and intent behind the Minimum Wage Amendment generally: employees were to get the full benefit of the rights embodied in its text, as enacted by the people. To call the entire years-long period in which Petitioners got the benefit of the Amendment—was, in fact, enriched—simply an honest mistake that happened to leave workers like Plaintiff Diaz below both impoverished and without the promised health insurance does little to further the operation of a fundamentally remedial constitutional enactment. In any case, Petitioners here have done nothing to demonstrate whether the unexceptional retroactive application of this court's decision would "retard its operation," as would be their burden. *See Marinez v. Industrial Commission of the State of Colorado*, 746 P.2d 552, 558-59 (Colo. 1987).

Lastly, in considering "whether retroactive application could produce substantial inequitable results," that factor weighs heavily in favor of retroactivity here. The inequitable result is Plaintiff below and the Class having no recourse to recover back pay and damages in the face of serial, long-term constitutional violations by Petitioners that deprived them of both money and benefits. A "substantial, inequitable result" here is not merely Petitioners declaring "We didn't think we'd have to pay." The fact of their liability for back pay and damages will be unwelcome to Petitioners, that much is understood. That is not commensurate, however, with the deprivations experienced by Plaintiff, and surely does not amount to the kind of substantial inequitable result that is necessary to overcome the basic rule of retroactive application of a judicial decision of this Court.

In any event, the *federal* constitutional concerns pointed to briefly by Petitioners in making their retroactivity argument are also not substantiated. The "Ex Post Facto Clause of the U.S. Const., Art. I, § 9, cl. 3" is unavailing because that clause describes limitations on *Congress'* power, not the initiative and referendum

power of the citizens of Nevada.[13] Petition at 29. The due process aspect of Petitioners' argument is entirely undeveloped and without support or authority.

Pure prospectivity is the exception for judicial decisions, especially when constitutional rights are at stake, and where constitutional violations are found. Petitioners have made no extraordinary showing that it is appropriate in this instance, and it is not. They themselves state that it was not merely the Labor Commissioner's regulation upon which they relied for guidance a to how to conduct themselves under the Minimum Wage Amendment, but also their own reading of "the plain language" of the Amendment itself "for the past nine years." Petition at 29. There is no get-out-of-liability-free card for Petitioners in a retroactivity analysis.

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[13] Even if petitioners' citation to art. I, sec. 9 was a scrivener's error, and they meant to refer to art. I, sec. 10, which prohibits *states* from passing ex post facto laws, section 10's prohibition cannot save the argument either, because the clause prohibits the retroactive application of *criminal or penal* statutes, not remedial provisions such as the Minimum Wage Amendment. *See Collins v. Youngblood*, 497 U.S. 37, 43, 110 S. Ct. 2715, 2719 (1990) (observing that the ex post facto clauses of article I are aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts").

V. CONCLUSION

A ruling that employers like Petitioners must provide health benefits—actually furnish to the employee, and the employee actually accept the benefit—in order to pay workers less than the upper-tier minimum hourly wage, is the only appropriate manner of interpreting the Amendment, if it is to function at all as a remedial act serving its intended beneficiaries.

Based upon the foregoing Real Parties in Interest ask the Court to deny the Petition for Writ of Mandamus or, in the alternative, for Writ of Prohibition.

Respectfully submitted, this 26th day of October, 2015.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this Answer complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Petition exempted by N.R.A.P. 32(a)(7)(C), it contains 10,917 words.

3. Finally, I hereby certify that I have read this Answer, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Answer complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the Answer regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26th day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2015, a true and correct copy of the foregoing **REAL PARTIES IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

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