IN THE SUPREME COURT

OF THE STATE OF NEVADA

STATE OF NEVADA, ex. rel. OFFICE OF THE LABOR COMMISSIONER; and SHANNON CHAMBERS in her official capacity as Labor Commissioner of Nevada, Appellants, v. CODY C. HANCOCK, Respondent.	Supreme Court No.: 68770 District Ct. No.: 14OC00080 On Appeal from the First Judicial District Court

OPENING BRIEF OF THE STATE OF NEVADA, OFFICE OF THE LABOR COMMISSIONER

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I.

JURISDICATIONAL STATEMENT

This appeal arises following a final decision of a district court imposing injunctive relief against the Nevada Labor Commissioner. JA 0407-0416. Jurisdiction is proper under NRAP 3A(b)(1) and Nev. Const. art. 6 § 4.

II.

STATEMENT OF THE ISSUES

The appeal in this matter presents the following issues:

1. Whether NAC 608.100(1) conflicts with the Nevada Constitution when it uses the word "offer" to describe an employer's obligations to qualify to pay the lower-tier minimum wage rate.

2. Whether NAC 608.104 conflicts with the Nevada Constitution by stating that federal income tax laws be used to measure an employee's gross taxable income, when federal tax laws deem tips as taxable income.

III.

STATEMENT OF THE CASE

This case is an appeal from a decision of the Honorable James E. Wilson of the First District Court that granted declaratory and injunctive relief in favor of Respondent and Plaintiff below Cody Hancock against the Nevada Labor Commissioner. JA 0407-0416.

Hancock challenged two administrative regulations codified in Chapter 608 of the Nevada Administrative Code. JA 0097-0099. Hancock first claim contended that NAC 608.100(1)(a) was unconstitutional and in conflict with the provisions of Nev. Const. art. 15, § 16. JA 0097-0098. Hancock's second claim contended that NAC 608.104(2) was unconstitutional under the same theory. JA 0098.

Both Hancock and the Labor Commissioner agreed that the case presented a pure question of law and did not depend upon particular factual circumstances. JA 0136-0138. The parties agreed that discovery was not warranted and stipulated to a briefing schedule for dispositive motions. JA 0136-0138. The stipulation also scheduled oral arguments on the motions before Judge Wilson in August of 2015. JA 0137:14-16.

Hancock and the Labor Commissioner each moved for summary judgment before the district court. JA 0139-0163; 0245-0258. Although oral arguments had been scheduled for the afternoon of August 11, 2015, *see* JA 0338, on the eve of the scheduled hearing the district court cancelled the hearing and issued the decision in favor of Mr. Hancock. JA 0407-0416. The decision invalidated both NAC 608.100(1) and NAC 608.104(2) and enjoined the Labor Commissioner from enforcing either of the regulations. JA 0407-0416.

Notice of entry of the district court's order was provided on August 18, 2015. JA 0417-0418. This appeal then followed.

IV.

STATEMENT OF RELEVANT FACTS

This case turns on a pure question of law and does not depend upon factual findings. The district court's order did not include any specific factual findings. JA 0407-0416.

To the extent that factual matters are relevant, the Labor Commissioner did not dispute that Plaintiff Hancock was an employee affected by the operative portions of the minimum wage amendment and the Administrative Code.

Mr. Hancock is an employee in the state of Nevada. JA 0171, ¶ 3. He has been paid the lower-tier wage rate and had not been enrolled in an

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employer-provided health plan at the time the complaint was filed. JA 0171, ¶¶ 3-4.

V.

SUMMARY OF ARGUMENT

When this Court expounds the constitution, it does so in a way that gives expression and meaning to each word and phrase of the constitutional text. This approach is a bedrock of constitutional interpretation.

The district court's decision should be reversed because it does not follow this fundamental canon and instead selectively emphasizes portions of the constitutional text while writing off other portions of the text entirely. Critically, those portions that were disregarded by the district court below support the administrative regulations at issue here.

The district court's interpretation of the minimum wage amendment in such a way that conditions payment of the lower-tier wage rate upon actual receipt of health insurance benefits disregards the constitutional text that defines "offering health benefits" to consist of an employer "...making health insurance available..." The district court reached this conclusion only after improperly isolating the terms "provides" and "offering" and considering these terms in the abstract rather than within the context of the minimum wage amendment. This further resulted in disregard for the constitutional text that specifies that an employer's provision of health benefits must be "as described herein", *i.e.* within the amendment itself. That internal description clearly specifies that the lower-tier wage rate is predicated upon an employer "making health insurance available."

NAC 608.100 is faithful to the constitutional text because the regulation specifies that in order to pay an employee the lower-tier wage rate an employer

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must offer health insurance available to an employee by making it available to the employee.

NAC 608.104 is also faithful to the constitutional text because this regulation looks to federal income tax law to provide the measurement for an employee's "gross taxable income," and federal tax law is the only viable source of standards to measure an employee's taxable income. The district court's analysis of the 10 percent cost cap suffers from the same defect – it interprets the minimum wage amendment in a way that renders portions of the constitutional text meaningless. The district court emphasized the phrase "from the employer," but did so in such a way that it renders the antecedent condition of "gross taxable income" meaningless.

In contrast to the district court's order, the Labor Commissioner's regulations in NAC 608.100 and NAC 608.104 do not require the violation of any fundamental canon of constitutional interpretation. The Labor Commissioner's regulations achieve a systematic interpretation of the minimum wage amendment that does not disregard any portion of the text, and is consistent with the general purpose of the amendment.

V.

LEGAL ARGUMENT

A. Standard of Review

This case does not concern any factual dispute, and turns primarily on an interpretation of the Nevada constitution. This Court reviews matters of constitutional interpretation under a *de novo* standard, without any deference to the lower court's decision. *Hernandez v. Bennett-Haron*, 128 Nev. ___, 287 P.3d 305, 310 (Adv. Op. 54, 2012).

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As such, the district court's decision in this matter does not merit deference on appeal and this Court should conduct an independent *de novo* review of the decision. *Id.*

B. Standards of Constitutional Interpretation

1. The Court Must Presume the Challenged Regulations to be Valid

"[T]he law cannot be declared unconstitutional unless it be clearly, palpably, and plainly in conflict with some of the provisions of the Constitution. This is a rule recognized by all the Courts, and probably has never been questioned." *Gibson v. Mason*, 5 Nev. 283, 299 (1869).

When a law is challenged as constitutionally invalid this Court indulges every presumption in favor of the law's validity and the law must be upheld unless it is in clear derogation of a constitutional provision. *Vineyard Land & Stock Co. v. Dist. Court of Fourth Judicial District,* 42 Nev. 1, 171 P. 166, 168 (1918). The same presumptions and standards applicable to constitutional challenges against statutes also apply with equal force to constitutional challenges to administrative regulations. 16A Am. Jur. 2d Constitutional Law § 167.

2. The Court Must Follow the Canons of Constitutional Interpretation

"In expounding a constitutional provision, such constructions should be employed as will prevent any clause, sentence or word from being superfluous, void or insignificant." *Youngs v. Hall*, 9 Nev. 212, 222 (1874); *see also State ex rel. Herr v. Laxalt*, 84 Nev. 382, 386, 441 P.2d 687, 690 (1968).

Under this fundamental canon of constitutional interpretation, a district court is not permitted to disregard the actual constitutional language in order to advance an interpretation that the court prefers as generating a more equitable result. *Cook v. Maher*, 108 Nev. 1024, 1026, 842 P.2d 729, 730 (1992).

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Further, this Court prefers a construction that harmonizes constitutional provisions if possible. *E.g. Guinn v. Legislature*, 119 Nev. 460, 471, 76 P.3d 22, 29 (2003); *Ex parte Shelor*, 33 Nev. 361, 375, 111 P. 291, 293 (1910).

Regarding the minimum wage amendment in particular, this Court bases its construction on the actual text of the amendment rather than an abstract understanding of the purposes of the amendment. *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. ___, 327 P.3d 518, 522 (Adv. Op. 52, 2014).

The district court's decision in this case disregards these fundamental canons of constitutional interpretation in order to reach an interpretation of the minimum wage amendment that is undoubtedly more employee-friendly, but that disregards significant portions of the constitutional text.

C. Nevada's Two-Tiered Minimum Wage Amendment

1. The Two-Tier Wage Rate

In Nevada, the minimum wage is established by the state constitution. Nev. Const. art 15. § 16. This provision, which is commonly referred to as the "minimum wage amendment" sought primarily to raise the minimum wage in Nevada. *See Thomas*, 327 P.3d at 520. The portions of the minimum wage amendment that are critical to this appeal are contained in section A of the amendment and read 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 to the

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> employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer.
>
> Nev. Const. art 15. § 16(A).

At the time the amendment was adopted in 2006, the federal minimum wage rate was $5.15 per hour. *See* 29 U.S.C. § 206(a) (2006) (specifying a federal minimum wage of $5.15 per hour). The amendment raised the state minimum wage rate to $6.15 per hour, but also provided for a lower-tier wage rate that remained consistent with the prior federal wage rate of $5.15 per hour. This lower-tier wage rate created a residual exception to the amendment's general increase in wages by allowing employers the ability to continue to pay the same wage rate that had been in effect prior to the amendment's approval, provided that the employee be afforded access to affordable employer-provided health insurance. Nev. Const. art. 15 § 16(A). If an employee does not have access to such employer-provided health insurance, or if the health insurance does not satisfy the 10 percent cost cap, then the standard higher-tier wage rate applies. *Id.*

2. The Development of the Administrative Regulations

Prior to the amendment's final approval in the 2006 general election, the Labor Commissioner had sought and obtained an Attorney General opinion indicating that the Labor Commissioner would likely retain administrative enforcement authority over the new minimum wage amendment. Op. Nev. Att'y Gen. 2005-04 (March 2, 2005) (cited with approval in *Thomas*, 327 P.3d at 521, n. 2). In the wake of the amendment's approval, and in order to provide necessary guidance concerning compliance with the lower-tier exception, the Labor Commissioner invoked the rulemaking authority granted by NRS 607.160(1)(b) to promulgate emergency regulations that interpreted the new minimum wage amendment and provided guidance to Nevada

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employers on the issue of compliance. JA. 0289-0297. The progenitors of NAC 608.100 and NAC 608.104 were part of these emergency regulations. JA 0294 §2(a); 0295 § 7. These emergency regulations were then converted to temporary regulations, and finally to the current permanent regulations.

In the legislative session immediately following the 2006 general election, while in the process of converting the emergency regulations into temporary regulations, then-Labor Commissioner Michael Tanchek appeared before the Senate Committee on Commerce and Labor to explain these administrative regulations and his view of the amendment. *See* Minutes of Hearing on Minimum wage before Senate Committee of Commerce and Labor, 2007 Leg. 74th Sess. (Feb. 8, 2007); JA 0299-0319.

Commissioner Tanchek provided the Senate committee with a written explanation of the Labor Commissioner's view of the amendment and the objectives of the administrative regulations. JA 0321-0337. Commissioner Tancheck identified the relation of health benefits to the two-tier structure as "the major area of confusion over the amendment." JA 0328 (emphasis in original). Commissioner Tanchek explained that in order to qualify for the lower-tier wage rate an employer must satisfy each of the following conditions: that insurance be made available to the employee; that it must be for the employee and dependents; and that it must fall within the 10 percent cost cap. JA 0328.

Commissioner Tanchek also addressed the question "what if the employee does not want health insurance" and explained that if an employee were to decline health insurance the employer would still meet its obligations under the amendment if it makes the insurance available. JA 0329.

Acting through the Administrative Procedures Act's full notice-and–comment rulemaking procedures, the Labor Commissioner codified

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administrative regulations that are based upon these premises as the permanent regulations that were recently invalidated by the district court below. NAC 608.100; NAC 608.102; NAC 608.104.

D. The District Court's Order Is Internally Inconsistent

The district court's order is comprised of two main parts that are logically irreconcilable with each other.

The district court first held that the 10 percent cost cap applies to an employer's provision of health benefits such that an employer can only qualify to pay the lower-tier wage if the cost of health premiums does not exceed 10 percent of the wages paid to the employee, excluding tips. JA 0412:10-13. But the district court also held that the employer's provision of health benefits does not mean that the employer must make health insurance available to the employee in order to qualify to pay the lower-tier wage rate. Instead the district court held that "...the minimum wage amendment requires that employees actually receive qualified health insurance in order for an employer to pay [the lower-tier wage rate]." JA 0414:10-12. These two holdings expose a logical defect in the court's reasoning because in doing so the district court simultaneously applied and rejected elements of the constitutional definition of "offering health benefits."

The minimum wage amendment defines the term "offering health benefits" as follows: "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." Nev. Const. art. 15 § 16(A).

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The constitutional definition of "offering health benefits" thus includes four discrete elements: health benefits must be (1) actual health insurance;[1] (2) must be made available to the employee; (3) must provide coverage for the employee and dependents; and (4) must satisfy the 10 percent cost cap.

Within the same order the district court held that the second of these elements (the "make available" requirement) did not apply to an employer's provision of insurance while at the same time finding that the fourth of these elements (the 10 percent cost cap) did apply. But both the "make available" requirement and the cost cap requirement are elements of the same definition of the term "offering health insurance."

There is no discernable basis in logic, linguistics or law to selectively apply one element of "offering health benefits" to an employer's provision of health benefits while simultaneously disregarding another element. Consistency demands that either the entirety of term "offering health benefits," with each of its attendant elements, applies to an employer's provision of health benefits under the amendment or it does not apply at all.

The Labor Commissioner's regulations hold that the term "offering health benefits" does apply and that each element of the definition must be satisfied in order for an employer to "provide health benefits" and qualify to pay the lower-tier wage rate. NAC 608.102; JA 0328. As set forth below, the Labor Commissioner's regulations do this in way that gives effect to each word and phrase of the constitutional text.

E. NAC 608.100 Does Not Conflict with the Amendment

NAC 608.100(1)(a) sets the minimum wage rate for a non-exempt employee by stating "[i]f an employee is offered qualified health insurance, is

[1] The word "insurance" does not appear anywhere else in the minimum wage amendment.

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$5.15 per hour..." NAC 608.102(2) confirms that this means that "[t]he health insurance must be made available to the employee..." These administrative regulations are based upon the constitutional definition of "offering health benefits" and its stipulation that the employer must make health insurance available to the employee. Nev. Const. art. 15 § 16(A). There is no conflict between the regulations and this portion of the amendment.

The fundamental concern raised by this appeal is the relation between the amendment's directive for employers to "provid[e] health benefits" and the amendment's definition of the term "offering health benefits." If these two constitutional clauses are read together then the Labor Commissioner's regulations cannot conflict with the minimum wage amendment because the regulations mirror the same language and standards expressed in the definition of "offering health benefits." Only if these two constitutional clauses are divorced from each other, as the district court's order presumes, can there even arise any argument that the regulations conflict with the constitutional text.

1. The Meaning of Constitutional Terms Cannot be Divorced from Context

The cardinal error committed by the district court was that it isolated the terms "provides" and "offering" from the context of the rest of the minimum wage amendment, and then considered the meaning of these isolated terms in the abstract in order to justify its conclusion. This Court condemned just such an approach to statutory interpretation in *Midwest Livestock Commission Co. v. Griswold*, 78 Nev. 358, 372 P.2d 689 (1962). In *Griswold* this Court held that an issue of statutory interpretation cannot be properly decided by divorcing one particular statutory term from its context within an act as a whole and then considering the plain meaning of that term in isolation. *Id.* at 361, 372 P.3d at 691. Rather the correct approach is to derive the meaning by

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considering the statutory term in context. *Id.* Although *Griswold* concerned a statutory term rather than a constitutional term, the rationale of *Griswold* is directly applicable to the question in this appeal.

a. *"As described herein" Must Have Some Meaning*

The constitutional text does not simply state that the lower-tier wage rate applies when an employer provides health benefits. In context, the clause states, "[t]he rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein..." Nev. Const. art. 15 § 16(A) (emphasis added).

The phrase "as described herein" is a clear constitutional directive that the meaning of "provides health benefits" should not be considered in isolation and must be considered within the context of the amendment as a whole. The district court's order not only fails to account for this phrase, it deprives the phrase of any meaning or significance at all. If the phrase "as described herein" does not refer to the definition of "offering health benefits" that immediately follows in the text, then it lacks meaning because no other provision of the amendment plausibly offers a description that can correspond to the phrase "as described herein."

The remainder of section A of the amendment concerns the publication and adjustment of the annual wage rate, notice of adjustments to employees, and the rule that tips or gratuities cannot be used by an employer to satisfy the wage rate. Nev. Const. art. 15 § 16(A). None of these provisions can plausibly be deemed the subject of the phrase "provides health benefits as provided herein." Even looking beyond section A of the amendment to sections B, C or D does not suggest a description of what is meant by providing health benefits. *See* Nev. Const. art. 15, § 16.

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Apart from this definitional clause, the term "offering health benefits" does not appear anywhere else in the amendment. If the phrase "as described herein" is to have any meaning, it must link the meaning of "provides health benefits" to the definition of "offering health benefits" that immediately follows it in the constitutional text.

If the constitutional text defining "offering health benefits" does not refer to an employer's provision of health benefits, then to what does this definition refer? The district court's order provides no answer. Rather the district court's order reduces this definition to the bizarre and superfluous status of defining a non-existent term.

The district court's rationale thus reduces both the amendment's phrase "as described herein" and the entire definition of "offering health benefits" to meaninglessness. This result cannot be reconciled with well-established directive to avoid just such an interpretation.

2. The District Court Placed a Disproportionate Emphasis On the Canon of Consistent Usage

The district court agreed with an argument advanced by Hancock that the terms "provide" and "offering" were not synonymous because of the presumption that use of a different term denotes a different idea. JA 0414, citing Antonin Scalia and Bryan A. Garner, *Reading Law: the Interpretation of Legal Texts*, 170 (Presumption of Consistent Usage) (1st ed. 2012).

While this general presumption of statutory interpretation can apply in principle to constitutional interpretation, *see Lorton v. Jones*, 130 Nev. ___, 322 P.3d 1051, 1056 (Adv. Op. 8, 2014), the district court greatly overemphasized its application to the present case. This presumption is not helpful to the constitutional interpretation presented in this case for three reasons.

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First, this presumption is only a presumption, and a rather weak one that can be easily rebutted by context. *Barneck v. Utah Dept. of Transporation*, 353 P.3d 140, 150 (Ut. 2015) (citing Scalia & Garner at 171). As set forth above, the district court considered the terms "offering" and "provides" in isolation rather than accounting for the context within the rest of the amendment. A consideration in context that accounts for the phrase "as described herein" and accounts for the definition of "offering health benefits" plainly links the provision of health insurance with the requirement that it be made available. An in-context consideration easily overcomes this presumption.

Second, this presumption stands opposed to other, more forceful canons of interpretation that each word must be given meaning and that if possible harmonious construction should be achieved with an act. An overly rigid application of the presumption stands as a barrier to this canon. *See Sachs v. Republic of Austria*, 737 F.3d 584, 598, n. 13 (9th Cir. 2013) (discounting the presumption of consistent usage when it conflicts with other canons of statutory construction). In this case, the district court's construction fails to achieve a harmonious construction between the condition that employer "provides health benefits" and the definition of "offering health benefits."

Finally, the presumption is not particularly helpful in this case because unlike laws that are passed through the legislature and reviewed by the Legislative Counsel Bureau, the minimum wage amendment was not subject to a review for internal consistency before being submitted to the voters.[2] Thus,

[2] The minimum wage amendment was one of the final initiative petitions that did not first undergo a linguistic review for internal consistency by the Legislative Counsel Bureau. In 2007 the legislature altered the initiative process to provide for such a review and for technical suggestions to be made by the Legislative Counsel Bureau. NRS 295.015(3)(b), Act of June 13, 2007, ch. 476, § 24(b), 2007 Nev. Stat. 2543.

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unlike laws that originate within a legislative body, an initiative measure is more susceptible to draftsman's error and weighs against application of this presumption. *E.g. People v. Skinner*, 704 P.2d 752, 759 (Cal. 1985) (recognizing inconsistent language in initiative measure was merely draftsman's error). Because there was no review for linguistic consistency, the presumption of an intent to deliberately signal a different concept is greatly diminished in this case.

3. The District Court's View Is Not Consistent with Plain Meaning

Even if isolated consideration of constitutional terms in the abstract were an acceptable approach to constitutional interpretation, the administrative regulations still would not create a conflict with the minimum wage amendment because the meaning of "offer" in NAC 608.100(1)(a) does not actually conflict with the abstract meaning of "provide."

The meaning of "offer" as used within the administrative regulations means "to make available." NAC 608.102(2). The dictionary definition of the "provide" likewise means "to make available." *Webster's New World College Dictionary*, 1155 (4th ed. 2002); *Merriam-Websters Collegiate Dictionary,* 941 (10th ed. 1999) (defining "provide" as "to make something available to"). The canon of harmonious construction holds that this Court will prefer an interpretation that harmonizes the constitution and statutory provisions where possible. *E.g. State v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982).

Thus, there is no substantive conflict between NAC 608.100(1)(a) and the minimum wage amendment, let alone the clear, palpable and plain conflict that is required before a law may be declared unconstitutional. *Gibson v. Mason*, 5 Nev. at 299.

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4. Abstract Purpose Cannot Be Elevated Above Constitutional Text

The abstract purpose of the minimum wage amendment cannot be elevated over the actual constitutional text. *Thomas*, 327 P.3d at 522 (2014).

The district court below advanced policy reasoning as the primary support for its finding that employees must receive health insurance benefits, when it held that any other view of the amendment would thwart the purposes and benefits of the amendment. JA 0414. This holding cannot stand, either as a matter of sound rationalization or as a matter of constitutional interpretation.

The district court described the lower-tier wage rate of the amendment as reflecting an "inherent bargain." JA 0414. The amendment does indeed reflect an inherent bargain, but not the bargain found by the district court.

The administrative regulations construe that bargain to be that an employee must receive either higher wages or access to affordable employer-provided health insurance. The district court however determined that the bargain of the amendment was that employee receives either higher wages or is actually enrolled in employer-provided health insurance. JA 0414. Only one of these views is tied to the actual constitutional text.

In effect, the district court ignored the constitutional text in order to make a policy determination that merely receiving access to health insurance is not an adequate benefit for employees. It is not the prerogative of the courts to make policy choices such as this. *Sissions v. Sommers*, 24 Nev. 379, 389, 55 P. 829, 831 (1899); *see also N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs,* 129 Nev. ___, 310 P.3d 583, 587 (Adv. Op. 72, 2013). Instead, the policy choice was made by Nevada voters in adopting constitutional text reflecting that an employer must either pay the higher wage rate or must make health insurance available. Nev. Const. art. 15§ 16(A).

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5. Regulations Achieve Harmonious Reading of the Amendment

Each of the defects with the district court's order are avoided by the view advanced by the Labor Commissioner's regulations.

The Labor Commissioner's interpretation properly accounts for the context of the amendment by linking an employer's provision of health benefits with the definition of "offering health benefits." This approach achieves a harmonious construction of the amendment by recognizing that the term "provides health benefits as described herein," incorporates the definition of "offering health benefits," including the condition that an employer must make health insurance available to it employees. NAC 608.100(1)(a); NAC 608.102(2). Under this approach the terms "offers" and "provides" are synonymous as each has the same substantive meaning: to make insurance available. NAC 608.102(2); Nev. Const. art. 15 § 16(A). Thus, the terms are interchangeable.

The Labor Commissioner's regulations have in fact used the terms interchangeably. The first iteration of the emergency regulations stated that the lower-tier wage rate applies "...for employers who provide..." health benefits. JA 0294 § 2(A). This iteration also clarified that this meant the employer must make health insurance available. JA 0295 §5(A).

The current iteration states that the lower tier wage rate applies if the employer "offers" health benefits. NAC 608.100(1)(a). Like the emergency regulations, the current iteration likewise clarifies that this means an employer must make health insurance available. NAC 608.102(2). Even if the Labor Commissioner were to amend NAC 608.100(1) by substituting the word

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"provides" for the word "offers," it would not result in any change to the substantive meaning of the regulation.[3] JA 0294-0295.

This approach gives meaning to each word and phrase of the constitutional text. The phrase "provides health benefits" has meaning because it serves as the predicate for the lower-tier wage rate to apply. The phrase "as described herein" has meaning as a bridge that ties the provision of health benefits to the succeeding definition of "offering health benefits." Each element of "offering health benefits" has meaning as a required element in order to satisfy the predicate of an employer's provision of health insurance. Thus under the Labor Commissioner's approach a harmonious construction that affords meaning to each word of the constitutional text is achieved.

6. The Court Should Follow the Labor Commissioner's Interpretation

The Labor Commissioner's interpretation of the minimum wage amendment was not reached as the result of an impulsive judgment. The Labor Commissioner's interpretation is reflected in codified administrative regulations.

These regulations were adopted only after public participation through the Administrative Procedures Act's notice-and-comment provisions and underwent review and with oversight by legislative counsel. *See Labor Commissioner v. Littlefield*, 123 Nev. 35, 43, 153 P.3d 26, 31 (2007) (describing the benefits of notice-and-comment rulemaking). As part of this process, the Labor Commissioner's interpretation has also been reviewed and

[3] Employing the word "offer" in NAC 608.100(1) does provide for some small amount of clarity by bridging the amendment's use of the two terms "provides" and "offering."

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approved by the legislature through the Legislative Commission. NRS 233B.067.

While the ultimate interpretation of the amendment is the prerogative of this Court, the interpretation held by the executive branch through the Labor Commissioner and the legislative branch reflected in the legislative approval of the regulations nonetheless warrants due consideration by this Court. *e.g. State v. Glenn*, 18 Nev. 34, 44, 1 P. 186, 190-191 (1883); *Nevada Power Co. v. Pub. Serv. Comm'n of Nevada,* 102 Nev. 1, 4, 711 P.2d 867, 869 (1986) ("while not controlling, the interpretation of the statute by the agency charged with administration of the statute is persuasive."). Further, the administrative expertise wielded by the Labor Commissioner in interpreting the amendment calls for a degree of deference. *See Steamboat Canal Co. v. Garson*, 43 Nev. 298, 316-317, 185 P. 801, 807 (1919) (recognizing the role of agency expertise in interpreting the law).

The definition of "offering health benefits" applies to the directive that an employer must provide health benefits in order to qualify to pay the lower-tier wage rate. Nev. Const. art. 15 § 16(A). As NAC 608.100(1) is consistent with this understanding of the constitutional text, it does not conflict with the minimum wage amendment, let alone generate the clear conflict necessary to invalidate a regulation. The district court's decision finding otherwise should be reversed.

F. NAC 608.104 Does Not Conflict With the Amendment

The second part of the district court's order found that the amendment's 10 percent cost cap on insurance premiums based upon "gross taxable income from the employer" means that the cost cap must be calculated based only upon the taxable income such as base wages paid by the employer to the employee, and must exclude tips. JA 0410-0413.

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If the Court accepts the first premise of the district court's order and finds that the term "offering health benefits" does not apply to an employer's provision of insurance then the issue of the 10 percent cost cap is rendered moot, as the cost cap is also an element of "offering health benefits." Nev. Const. art. 15. § 16(A). If, however, the Court finds that "offering health benefits" and its attendant elements do apply to an employer's provision of insurance, then it should still overturn the district court's order on this point.

1. The Necessity of Looking to Federal Law

The amendment's cost cap is limited to "not more than 10 percent of the employee's gross taxable income from the employer." Nev. Const. art. 15 sec. 16.

Under the Nevada Constitution, there is no taxable income on employee earnings. Nev. Const. art. 10, § 1(9). Hence the only viable source of standards to measure an employee's gross taxable income is federal tax law. NAC 608.104(2) reflects this reality by referring to federal individual income tax standards to determine the amount of "gross taxable income of the employee attributable to the employer." NAC 608.104(2). The reason that NAC 608.104(2) includes tips as part of an employee's gross taxable income is because federal income tax laws deem it to be so. *See Declaratory Order of Nevada Labor Commissioner Affirming Validity of NAC 608.102(3) and NAC 608.104(2)*, JA 0218-0222.

2. Under Federal Income Tax Law, Tips Are Wages Earned in Connection with Employment

Under federal tax law tips are considered part of an employee's income. *Olk v. United States*, 536 F.2d 876, 879 (9th Cir. 1976). For purposes of income tax law, tips are not considered to be gifts to the employee from a customer. *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278

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(1960). Rather, tips are defined as "wages." 26 U.S.C. § 3401(f). "Wages" in turn are defined as "...remuneration (other than fees paid to a public official) for services performed by an employee for his employer." 26 U.S.C. § 3401(a) (ellipsis in original). Therefore under federal income tax laws, tips are deemed remuneration for services performed by an employee for his employer. Thus, an employee's "gross taxable income" includes tips. *Roberts v. Commissioner of Internal Revenue*, 176 F.2d 221 (9th Cir. 1949).

The district court however, held that under the minimum wage amendment tips are not to be included as part of the "gross taxable income from the employer" when calculating the 10 percent cost cap. The district court reached this conclusion by stressing the phrase "from the employer" and reasoning that this phrase can mean only "...such income that comes 'from the employer,' as opposed to gross taxable income that emanates from any other source, including from tips and gratuities provided by an employer's customers." JA 0411:5-7.

This aspect of the district court's order also renders a portion of the constitutional text meaningless. In particular the word "gross" is deprived of any meaning. "Gross income " means "...all income from whatever source derived..." 26 U.S.C. § 61(a). The word "gross" thus envisions more than a single source of income. If the district court were correct to hold that the minimum wage amendment only applies to income from a single source (the employer) and does not allow for any other source of income then there is no discernable meaning to the word "gross." In contrast, under NAC 608.104's deference to federal income tax law the word "gross" retains meaning.

Under the administrative regulations, this meaning of the phrase "gross taxable income" does not come at the expense of any other constitutional language. Contrary to the district court's analysis, NAC 608.104 does not

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negate the phrase "from the employer" or deprive it of meaning. The phrase "from the employer" has meaning in that it clarifies that the extent of "gross taxable income" means only that income that is earned in connection with employment for a particular employer. *See* NAC 608.104(1) (establishing the income reported on an employer's Form W-2 as the base measure of gross taxable income relative to the 10 percent cost cap). Under the Labor Commissioner's view the phrase "from the employer" performs the function of specifying that an individual's "gross taxable income" must be employment-related and excludes include income from non-employment related sources, such as rents, dividends, annuities or alimony that are otherwise included as part of an individual's gross income. 26 U.S.C. § 61.

3. Excluding Tips from Gross Taxable Income Unnecessarily Creates Disparity

Excluding tips from the measure of an employee's gross taxable income, as the district court found, creates disparity between tipped employees and non-tipped employees. Under the district court's interpretation an employee that does not earn tips will actually pay a higher percentage of his or her taxable income in health insurance premiums than will an employee who earns tips. For example, if an employee is a non-tipped employee and earns $6,746.66 annually, the premium rate for health insurance benefits should be no more than $674.66 per year, which is 10 percent of the employee's taxable earnings. However, if that same employee is a tipped employee and earns $15,979.16 annually (including tips),[4] but is under the same cost-cap of $674.66 for health insurance premiums, this premium cost would be only

[4] These figures are taken from the Form W-2 submitted by Hancock to the district court. JA 0354.

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roughly 4 percent of the employee's taxable earnings. Such a rule would disparately favor tipped employees over non-tipped employees.

Whether or not to create such a rule that favors tipped employees is a policy question. Within the amendment itself the drafters included a provision that favors tipped employees in the context of using tips to satisfy the applicable wage rate. *See* Nev. Const. art. 15 § 16(A) ("Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section"). However, the drafters of the amendment did not include a similar specific provision that allows for such a disparate rule under the 10 percent cost cap provision. *Id.*

The district court's order further creates a new and inconsistent requirement on employers when treating employee tips. Under the Internal Revenue Code, an employer is responsible for treating tips as taxable income and making the appropriate withholding. 26 U.S.C. § 3402(a)(1). But under the minimum wage amendment employers must treat tips effectively as gifts rather than "gross taxable income." Aside from creating needless complications for employers resulting from an inconsistent treatment of tips, this reasoning has no support in the text of the amendment itself.

Under both the minimum wage amendment and NAC 608.104, the federal standards for measuring gross taxable income apply. This is consistent with the language of the minimum wage amendment and achieves an interpretation that gives effect to every word of the minimum wage amendment.

VI.

CONCLUSION

The canons of constitutional interpretation hold that this Court should not read the constitution in such a way as to exclude meaning from any portion

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of the constitutional text. When this canon is applied, the district court's order cannot be affirmed.

The lower-tier wage rate is predicated upon an employer providing health benefits as described within the amendment. That means an employer "making health insurance available" to an employee as described in the constitutional text. The district court's contrary finding that an employee must actually receive health benefits cannot be achieved without writing off the phrase "as described herein" and the constitutional definition of "offering health benefits."

The challenged administrative regulations comport with the constitutional text, and allow for meaning for each word and phrase in the amendment because they reflect the same language and standard contained within the constitutional definition of "offering health benefits."

NAC 608.104 does not conflict with the minimum wage amendment because the amendment's cost cap is based upon "gross taxable income" and the regulations simply refer to federal tax laws to provide the measure of an employee's gross taxable income. Consistent with the amendment's phrase "from the employer," the regulations exclude non-employment related sources of income from the calculation.

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Ultimately there is no conflict between either NAC 608.100 or NAC 608.104 and the text of the minimum wage amendment. The regulations are constitutionally valid and the district court's decision finding otherwise should be reversed.

DATED this 30th day of November, 2015.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening Brief of the State of Nevada, Office of the Labor Commissioner complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and has been prepared in a proportionally spaced typeface using Times New Roman in font 14.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 7,625 words.

2. I hereby certify that I have read this Answering Brief of the State of Nevada, Local Government Employee-Management Relations Board and to the best of my knowledge, information and belief it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 30th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General and that on the 30th day of November, 2015, pursuant to NRAP 25(c)(1)(B), I caused the foregoing OPENING BRIEF OF STATE OF NEVADA, OFFICE OF THE LABOR COMMISSIONER to be served by mail on the parties listed below:

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ADDENDUM A: Text of Nev. Const. art. 15 § 16

Sec. 16. **Payment of minimum compensation to employees.**

A. 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 to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.

B. The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this

section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.

C. As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.

D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section.

ADDENDUM B: Text of NAC 608.100

NAC 608.100 Minimum wage: Applicability; rates; annual adjustments. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

1. Except as otherwise provided in subsections 2 and 3, the minimum wage for an employee in the State of Nevada is the same whether the employee is a full-time, permanent, part-time, probationary or temporary employee, and:

(a) If an employee is offered qualified health insurance, is $5.15 per hour; or

(b) If an employee is not offered qualified health insurance, is $6.15 per hour.

2. The rates set forth in subsection 1 may change based on the annual adjustments set forth in Section 16 of Article 15 of the Nevada Constitution.

3. The minimum wage provided in subsection 1 does not apply to:

(a) A person under 18 years of age;

(b) A person employed by a nonprofit organization for after-school or summer employment;

(c) A person employed as a trainee for a period not longer than 90 days, as described by the United States Department of Labor pursuant to section 6(g) of the Fair Labor Standards Act; or

(d) A person employed under a valid collective bargaining agreement in which wage, tip credit or other provisions set forth in Section 16 of Article 15 of the Nevada Constitution have been waived in clear and unambiguous terms.

4. As used in this section, "qualified health insurance" means health insurance coverage offered by an employer which meets the requirements of NAC 608.102.

ADDENDUM C: Text of NAC 608.102

NAC 608.102 Minimum wage: Qualification to pay lower rate to employee offered health insurance. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of NAC 608.100, an employer must meet each of the following requirements:

1. The employer must offer a health insurance plan which:

(a) Covers those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213 and any federal regulations relating thereto, if such expenses had been borne directly by the employee; or

(b) Provides health benefits pursuant to a Taft-Hartley trust which:

(1) Is formed pursuant to 29 U.S.C. § 186(c)(5); and

(2) Qualifies as an employee welfare benefit plan:

(I) Under the guidelines of the Internal Revenue Service; or

(II) Pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

2. The health insurance plan must be made available to the employee and any dependents of the employee. The Labor Commissioner will consider such a health insurance plan to be available to the employee and any dependents of the employee when:

(a) An employer contracts for or otherwise maintains the health insurance plan for the class of employees of which the employee is a member, subject only to fulfillment of conditions required to complete the coverage which are applicable to all similarly situated employees within the same class; and

(b) The waiting period for the health insurance plan is not more than 6 months.

3. The share of the cost of the premium for the health insurance plan paid by the employee must not exceed 10 percent of the gross taxable income of the employee attributable to the employer under the Internal Revenue Code, as determined pursuant to the provisions of NAC 608.104.

ADDENDUM D: Text of NAC 608.104

NAC 608.104 Minimum wage: Determination of whether employee share of premium of qualified health insurance exceeds 10 percent of gross taxable income. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

1. To determine whether the share of the cost of the premium of the qualified health insurance paid by the employee does not exceed 10 percent of the gross taxable income of the employee attributable to the employer, an employer may:

(a) For an employee for whom the employer has issued a Form W-2 for the immediately preceding year, divide the gross taxable income of the employee paid by the employer into the projected share of the premiums to be paid by the employee for the health insurance plan for the current year;

(b) For an employee for whom the employer has not issued a Form W-2, but for whom the employer has payroll information for the four previous quarters, divide the combined total of gross taxable income normally calculated from the payroll information from the four previous quarters into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year;

(c) For an employee for whom there is less than 1 aggregate year of payroll information:

(1) Determine the combined total gross taxable income normally calculated from the total payroll information available for the employee and divide that number by the number of weeks the total payroll information represents;

(2) Multiply the amount determined pursuant to subparagraph (1) by 52; and

(3) Divide the amount calculated pursuant to subparagraph (2) into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year; and

(d) For a new employee, promoted employee or an employee who turns 18 years of age during employment, use the payroll information for the first two normal payroll periods completed by the employee and calculate the gross taxable income using the formula set forth in paragraph (c).

2. As used in this section, "gross taxable income of the employee attributable to the employer" means the amount specified on the Form W-2 issued by the employer to the employee and includes, without limitation, tips, bonuses or other compensation as required for purposes of federal individual income tax.