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.

Electronically Filed
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Tracie K. Lindeman
Clerk of Supreme Court

Case No.: 68523

Eighth Judicial District Court
Case No.: A701633

COLLINS KWAYISI, *et al.*,

Appellants,

vs.

WENDY'S OF LAS VEGAS, INC., an Ohio Corporation; and CEDAR ENTERPRISES, INC., an Ohio Corporation,

Respondents.

Case No.: 68754

United States District Court
Case No.: 2:14-cv-00729-GMN-VCF

STATE OF NEVADA, *ex rel.* OFFICE OF THE LABOR COMMISSIONER; and SHANNON CHAMBERS in her official capacity as Labor Commissioner of Nevada, Appellants, vs. CODY C. HANCOCK, an individual Respondent,	**Case No.: 68770** First Judicial District Court Case No.: 14 OC 00080 1B
ERIN HANKS, *et al.*, Appellants, vs. BRIAD RESTAURANT GROUP, LLC, a New Jersey Limited Liability Company, Respondent.	**Case No.: 68845** United States District Court Case No.: 2:14-cv-00786-GMN-PAL

APPELLANTS COLLINS KWAYISI'S AND ERIN HANKS' CONSOLIDATED REPLY BRIEF

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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 12th day of January 2016.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

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I. ARGUMENT

Consolidated Respondents Wendy's of Las Vegas, Inc., Cedar Enterprises, Inc., and Briad Restaurant Group, LLC ("Respondents) harbor a very different, and deficient, version of the Minimum Wage Amendment, Nev. Const. art. XV, § 16 ("Minimum Wage Amendment" or "Amendment"), than its plain text allows. They insist upon transforming a remedial act of the people into an unabashedly pro-employer windfall, an approach neither the text, context, meaning, or policy of the Amendment supports.

Respondents add little, however, that is new to the arguments already made in the briefing of these consolidated cases. In the interest of brevity, and in not overburdening this Court with repetitive arguments found elsewhere in the voluminous filings in these actions, Appellants Erin Hanks and Collins Kwayisi ("Appellants") here confine themselves to rebutting those of Respondents' approaches that are not addressed already, and shall incorporate arguments already made where appropriate.

A. "Provide" In The Minimum Wage Amendment Means More Than "To Make Available"

Under the plain language of the Amendment, an employer must do more than merely make barebones health plans—which may cost the employer nothing—available to its employees prior to reducing their wages by as much as a dollar per hour. Appellants, as well as Consolidated Respondent Cody Hancock and Consolidated Real Parties in Interest, have briefed the linguistic underpinnings of "provide" as it is used in the Amendment fully and at length elsewhere. *See* Appellant Erin Hanks' Opening Br., *Hanks v. Briad Restaurant Group, LLC*, Nevada Supreme Court Case No. 68845, at 7:18-11:8; Appellant Collins Kwayisi's Opening Br., *Kwayisi v. Wendy's of Las Vegas, Inc., et al.*, Nevada Supreme Court

Case No. 68754, at 7:17-12:3; Real Parties' in Interest Answering Br., *MDC Restaurants, LLC, et al. v. Eighth Judicial District Court (Diaz)*, Nevada Supreme Court Case No. 68523, at 7:19-12:13; Respondent Cody Hancock's Answering Br., *State of Nevada ex rel. Nevada Labor Commissioner, et al. v. Hancock*, Nevada Supreme Court Case No. 68770, at 18:23-21:9. Appellants incorporate these arguments and submit that this briefing adequately rebuts the staccato arguments of Respondents. It is sufficient here to say that Respondents want to argue that "provide" can mean many things in many different contexts; Appellants answer that it only matters what "provide" means in *this* context, that of the Minimum Wage Amendment.

1. "Provide" and "offering" in the Minimum Wage Amendment are not synonymous

The key faulty premise advanced by Respondents is that "provide and offer [are] used synonymously in the [Minimum Wage Amendment]." *See* Answering Br. at 1. No, they are not.

A drafter's choice of different and distinct terms in different places or sentences carries with it a presumption that the different terms denote different ideas. *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1056 (2014), *reh'g denied* (Mar. 5, 2014). A drafter's use of one word over another is a decision "imbued with legal significance and should not be presumed to be random or devoid of meaning." *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) (embracing the "well-established canon of statutory interpretation" that the use of different words or terms within the same statute demonstrates the intention by the legislature to convey different meanings for those words, and a "decision to use one word over another … is material"); *see also Alberto-Gonzalez v. I.N.S.*, 215 F.3d 906, 909-10 (9th Cir. 2000) (use of different language in a statute creates a *presumption* that the drafter intended the terms to have different meanings);

Legacy Emanuel Hosp. & Health Ctr. v. Shalala, 97 F.3d 1264 (9th Cir. 1996) (construing different terms in adjacent provisions to connote different meanings).

The different terms "provide" and "offering" in such close proximity in the Amendment convey different ideas and requirements. If the drafters of the Minimum Wage Amendment had wanted to convey the idea that merely offering health insurance entitled an employer to pay the lower-tier wage and avoid a minimum wage increase, they easily could have used the term "offer" or "make available" in the sentence concerning the two-tiered wage structure. They did not. Instead, they used "provide" as the command of the provision, should an employer wish to pay the lower-tier wage. Thereafter the drafters described what benefits must be secured to be able to meet that requirement. Appellants have already explained at length elsewhere the function and meaning of the "offering" clause as a description of the health benefits employers must make available before they provide them to their employees. *See* Appellant Erin Hanks' Opening Br., *supra*, at 11:18-13:3; Appellant Collins Kwayisi's Opening Br., *supra*, at 11:13-12:25. Respondents' plea that the terms "provide" and "offering" be read synonymously does not persuade.

2. The common sense definition of "provide" does not render any part of the Amendment nugatory

Respondents also pursue two closely-related lines of argument that hinge upon a grammatical misreading of the Amendment. First, Respondents argue that "as described herein" in the Amendment's phrase "if the employer provides health benefits as described herein" controls the meaning of "provide," rather than what the required "health benefits" must entail. *See* Answering Br. at 7. Second, based on this misreading, Respondents then conclude that the common sense definition of "provide" renders some part of the "offering" sentence nugatory.

Basic grammatical rules tie the modifier "described herein" to the adjacent

subject or, in this case, its object. Thus, "described herein" modifies "health benefits," and announces the immediately-forthcoming description of the benefits that must be secured before they can be provided to employees. Consolidated Respondent Hancock offers a more in-depth explanation of this rebuttal, which Appellants now incorporate. *See* Respondent Cody Hancock's Answering Br., *supra*, at 18:23-21:9. As such, "offering … shall consist of making health insurance available" is part of the "description herein" of what "health benefits" means and the required act of making them available before they can be provided. The common sense meaning of "provide" creates no surplusage in the Amendment. When read correctly, the Amendment describes two acts: 1) qualifying to pay a lower wage by providing required health benefits to employees, and 2) the elements of the health benefits necessary to do so at all.

B. Respondent's Hail-Mary ERISA and Discrimination Arguments Are Wrong-headed

Respondents make two forays into ERISA preemption and anti-discrimination arguments, neither of which assist the Court in its determination of the issues herein.

First, Respondents attempt an ERISA-preemption argument challenge to, essentially, the entire set of Nevada's health insurance-related statutes to which Appellants point in their briefing. They do not appear, however, to understand ERISA or ERISA preemption. None of the Nevada's state laws referenced in Consolidated Appellants' opening briefs—not N.R.S. 608.1555, nor N.R.S. 608.156-1577, nor any portion of N.R.S. Chapter 689B—are preempted by ERISA in this context. In their rush to seize upon the ERISA language that Section 514(a) "preempts all state laws that 'relate to' any employee benefit plan," Respondents miss the import of that section entirely, and its lengthy history of interpretation by courts, including this Court.

ERISA is, primarily, a pension-and-benefits protection statute, and its concern is not with regulating the substance of health insurance made available by an employer through a private third-party insurer under state law—an area left, appropriately, to the states—but with self-funded or self-insured benefits plans that may include health benefits, so that those promised benefits are administered and paid out to qualified employees in a uniform manner overseen by federal courts.[1] While the text of ERISA states that it "preempts all state laws that 'relate to' any employee benefit plan," such "sweeping 'relate[d] to' language cannot be read with uncritical literalism," and that "the United States Supreme Court noted that if the statute's 'relate[d] to' language is taken to extend to the furthest reaches imaginable, Congress's words of limitation would hold no meaning." *Cervantes v. Health Plan of Nevada, Inc.*, 127 Nev. Adv. Op. 70, 263 P.3d 261, 265 (2011).[2]

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[1] As this Court has stated, "We cannot believe that [ERISA] regulates bare purchases of health insurance where, as here, the purchasing employer neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits." *Turnbow v. Pac. Mut. Life Ins. Co.*, 104 Nev. 676, 678, 765 P.2d 1160, 1161 (1988) (citing *Taggart Corp. v. Life & Health Benefits Admin., Inc.*, 617 F.2d 1208, 1211 (5th Cir. 1980)).

[2] *See also Mack v. Estate of Mack*, 125 Nev. 80, 98, 206 P.3d 98, 110 (2009):

> State laws that 'relate to any employee benefit plan' are preempted by ERISA. In the context of ERISA, '[t]he words 'relate to' must be interpreted broadly to effectuate Congress' purpose of 'establish[ing] **pension plan regulation** as exclusively a federal concern.'' While there is no concrete rule to determine whether a state law is preempted by ERISA, the United States Court of Appeals for the Second Circuit provided some guidance in *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 146 (2d Cir. 1989), when it stated that
>
> > [W]e find that laws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee. Those that have not been preempted are laws of general application—often traditional exercises of state power or regulatory authority—whose effect on ERISA plans is incidental.
>
> *Id*. (certain internal quotations omitted; emphasis supplied).

(footnote continued on next page)

Furthermore, if more were needed, Respondents' ERISA argument is derailed by the simple fact that paying less than $8.25 per hour to employees, and providing health insurance in order to do so, is entirely optional under the Minimum Wage Amendment. Respondents chose to submit themselves to Nevada's health insurance statutes, in their desire to pay the subminimum wage. Where a statutory "scheme does not force employers to provide any particular employee benefits or plans, to alter their existing plans, or even to provide ERISA plans or employee benefits at all," ERISA can have no preemptive effect on the state law in question. *See WSB Elec., Inc. v. Curry*, 88 F.3d 788, 793 (9th Cir. 1996); *see also Keystone Chapter, Associated Builders & Contractors, Inc. v. Foley*, 37 F.3d 945, 960 (3d Cir. 1994). Even under ERISA, Nevada gets to regulate health insurance in this state. "[N]othing in the language of ERISA suggests that Congress sought to displace general health care regulations." *Cervantes*, 263 P.3d at 266. Respondents' off-key resort to an ERISA argument is both a *non-sequitor* and incorrect as a matter of legal analysis.

Respondents then argue that a requirement to actually furnish health benefits (versus merely offering them) would discriminate against those who are older than 26 (and cannot enroll in their parents' insurance) or those who are unmarried (and cannot enroll in their spouses' insurance). *See* Answering Br. at 18. So let us get this straight: Respondents are positing, as a matter of law, that the ability to reject Respondents' insurance thus disallowing them to withhold a dollar an hour results in a constitutional violation of a magnitude on par, for example, with fair-housing

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The application of N.R.S. 608.1555 *et seq.*, or any of the pertinent portions of N.R.S. Chapter 689B, do not "provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee." Further, there is no any pension plan at issue here. There is no ERISA conflict, and no ERISA preemption of the statutes Respondents attempt to challenge here.

violations because of its "disparate impact" upon those employees who have no other source of health insurance except that offered by Respondents. *Id*. Given that none of Respondents' health plans satisfy the minimum requirements of the federal Affordable Care Act, and that anyone who actually accepted those plans has to go on the state or federal exchange and purchase real health insurance anyway, this argument requires considerable audacity. *See* Respondent Cody Hancock's Answering Br., *supra*, at 2:3-16. Respondents attempt to cover the scent of desperation this approach gives off by stating that "Employers cannot require their employees to enroll in their insurance." Answering Br. at 17. No one, of course, is arguing that they can or that they should, only that by not providing employees the required insurance, employers cannot then take wages from employees' pockets and keep it for themselves. Like their ERISA argument, Respondents' discrimination argument does nothing to advance understanding of the issues in these actions.

C. Appellants Incorporate Arguments From Briefing In The Consolidated Actions

The other arguments made by Respondents, and all those made by the *amici*, have been addressed in the briefing in the other actions consolidated with this matter. Appellants now incorporate them specifically, for brevity.

1. The Labor Commissioner's regulations are due no deference in this case

Respondents make much of the notion that in 2006 and 2007 the Nevada Labor Commissioner promulgated regulations that supported their reading of the Amendment. *See* Answering Br. at 25-29. But in the context of this action, the Labor Commissioner has no power to decide what is and is not constitutional. That is the province of the judiciary. Second, the regulations upon which Respondents hang their hats have been invalidated, which is the very reason the State of Nevada

and the Labor Commissioner appear in these consolidated actions. A district court determined that N.A.C. 608.100(1) unconstitutionally exceeded the Labor Commissioner's authority, and that it was—and always has been—contrary to. *See* Real Parties in Interest's Answering Br., *MDC Restaurants, LLC, et al.*, *supra*, at 21:20-24:3; *see also generally* Respondent Cody Hancock's Answering Br., *supra*, which Appellants here incorporate.

2. Inherent in the Minimum Wage Amendment is a bargain between employee and employer

Respondents believe that the Amendment does not encapsulate any sort of bargain between employee and employer. *See* Answering Br. at 15 ("Indeed, the [Amendment] does not discuss any action whatsoever that must be taken by the employee"); *id.*at 17 (the purpose of the Amendment "was not to allow minimum wage employees to select their own rate of pay."); *id.* at 29 ("the [Amendment] focuses entirely on the actions of the employer."). In this belief, Respondents diverge from the stated views of the Nevada Labor Commissioner, who seems to understand the function of the Amendment in broad terms. *See* State of Nevada's Opening Br., *State of Nevada ex rel. Nevada Labor Commissioner, et al. v. Hancock*, *supra*, at 16 ("The amendment does indeed reflect an inherent bargain …"). The State and Appellants here may disagree on the full meaning of that bargain, but at least they agree that one exists.

Under the common sense reading of the Amendment, the employer gets something (one dollar back in wages an hour), only if the employee gets something (qualifying, low-cost health insurance). As Respondents tell it, however, employees are at the whim of their employer, in whom the Amendment vests all control and power. In fact, the prerogative of withholding a dollar per hour for work performed is, in Respondents' version, an immediate benefit the Amendment assigns to the employer almost as of right. This reading is not only contrary to the

Amendment's plain text, but turns a pro-employee, remedial provision on its head. *See* Respondent Cody Hancock's Answering Br., *supra*, at 21:11-23:6, which Appellants now incorporate.

3. 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 Respondents hope to tee up by raising the regulations and retroactivity is a prospective application defense, but they do not get the analysis quite right. Critically, Respondents' case authority involves retroactive application of *newly enacted* or *interceding statutes*, which is not the case here.

The general rule is that "judicial decisions will apply retroactively." *State, City of 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 P.2d 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.

In any event, Respondents' prospectivity argument has been rebutted elsewhere in these consolidated matters. *See* Real Parties in Interest's Answering Br., *MDC Restaurants, LLC, et al.*, *supra*, at 24:6-28:10, which Appellants now incorporate.

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II. CONCLUSION

A ruling that employers like Respondents 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 reading of the Amendment, if it is to function at all as a remedial act serving its intended beneficiaries.

Based upon the foregoing, therefore, Appellants ask this Court to answer the certified question in the affirmative.

Respectfully submitted this 12th day of January 2016.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Brief 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 Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 3,201 words.

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

Dated this 12th day of January 2016.

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CERTIFICATE OF SERVICE

STATE OF NEVADA, COUNTY OF CLARK

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Clark, State of Nevada My business address is 3556 E. Russell Road, 2nd Floor, Las Vegas, Nevada 89120-2234.

On January 12, 2016, I served true copies of the following document(s) described as **APPELLANTS COLLINS KWAYISI'S AND ERIN HANKS' CONSOLIDATED REPLY BRIEF** on the interested parties in this action as follows:

BY CM/ECF: Pursuant to N.E.F.R., the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system.

BY U.S. MAIL: I enclosed the document(s) listed above in a sealed envelope or package addressed to the persons at the addresses listed below and placed the envelopes for collection and mailing, following our ordinary business practices. I am readily familiar with Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on January 12, 2016, at Las Vegas, Nevada.

By: */s/ Christie Rehfeld*
Christie Rehfeld, an Employee of
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SCHULMAN & RABKIN. LLP