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 C. WILLIAMS, DISTRICT JUDGE, Respondents, and PAULETTE DIAZ, AN INDIVIDUAL; LAWANDA GAIL WILBANKS, AN INDIVIDUAL; SHANNON OLSZYNSKI, AN INDIVIDUAL; AND CHARITY FITZLAFF, AN INDIVIDUAL, ON BEHALF OF THEMSELVES AND ALL SIMILARLY-SITUATED INDIVIDUALS, Real Parties in Interest.	No. 68523
COLLINS KWAYISI, AN INDIVIDUAL, Appellant, vs. WENDY'S OF LAS VEGAS, INC., AN OHIO CORPORATION; AND CEDAR ENTERPRISES, INC., AN OHIO CORPORATION, Respondents.	No. 68754
THE STATE OF NEVADA, OFFICE OF THE LABOR COMMISSIONER; AND SHANNON CHAMBERS, NEVADA LABOR COMMISSIONER IN HER OFFICIAL CAPACITY, Appellants, vs. CODY C. HANCOCK, AN INDIVIDUAL, Respondent.	No. 68770

ERIN HANKS, Appellant, vs. BRIAD RESTAURANT GROUP, LLC, A NEW JERSEY LIMITED LIABILITY COMPANY, Respondent.	No. 68845

Appeal from the First Judicial District Court, Carson City
THE HONORABLE JUDGE JAMES WILSON, District Judge
District Court Case No. 14 OC 00080 1B

BRIEF OF AMICUS CURIAE NEVADA RESTAURANT ASSOCIATION (Brief Supports Reversal)

By: /s/ S. Brett Sutton
S. Brett Sutton, Esq. Nevada Bar No. 12109
Charity F. Felts, Esq. Nevada Bar No. 10581
Sutton Hague Law Corporation, P.C.
9600 Gateway Drive, Suite 100
Reno, NV 89521
Phone: (775) 284-2770
Fax: (775) 313-9877

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the Nevada Restaurant Association is a domestic non-profit corporation without stock and there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

DATED: December 3, 2015

By: /s/ S. Brett Sutton

S. Brett Sutton, Esq. Nevada Bar No. 12109
Charity F. Felts, Esq. Nevada Bar No. 10581
Sutton Hague Law Corporation, P.C.
9600 Gateway Drive, Suite 100
Reno, NV 89521
Phone: (775) 284-2770
Fax: (775) 313-9877

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Other Authorities

Regulations

Constitutional Provisions and Statutes

Nevada Cases

Cases From Other Jurisdictions

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Nevada Restaurant Association ("NvRA") was founded in 1982 with the mission of supporting and protecting Nevada's rapidly growing restaurant industry. The restaurant industry in Nevada includes more than 5,200 restaurants and food service outlets, provides jobs to roughly 200,000 people, and produces over $6 billion in sales each year. NvRA members represent many different facets of the industry including restaurants, hotels, casinos, taverns, and vendors of restaurant goods and services.

Therefore, the NvRA is uniquely situated to understand the tremendous impact the issues before the Court will have on the restaurant industry—an industry that is vital to Nevada's economic growth and well-being. A great number of the restaurant employees in Nevada are paid the minimum wage and regularly and customarily receive tips. Accordingly, nearly every restaurant in the state stands to be significantly affected by the decision of the District Court in *Hancock v. State of Nevada*, Case No. 14 OC 00080 1B.

STATEMENT OF THE CASE

NvRA adopts the Statement of the Case and Statement of Facts set forth in the Opening Brief filed by the Labor Commissioner.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The District Court's decision to invalidate NAC 608.100(1) is in error because it is built upon a false premise that "provide" and "offer" are materially different terms. The text of the Minimum Wage Amendment explains that payment of the lower-tier minimum wage is conditioned only upon making health insurance available, rather than requiring actual enrollment by employees.

The District Court erred when it invalidated NAC 608.104(2). The Labor Commissioner reasonably promulgated a regulation that defines gross taxable income using the only definition known to Nevadans for this term: the federal definition included on tax form W-2. Furthermore, the prohibition on tip credits included in the Minimum Wage Amendment applies only to wage rates and does not invalidate the Labor Commissioner's regulations that include tips in the calculation of gross taxable income. For the reasons set forth below, the NvRA respectfully requests this Court reverse the District Court's Order.

I. ARGUMENT

A. This Court Should Reverse the District Court's Invalidation of NAC 608.100(1).

The Minimum Wage Amendment ("MWA") is a mandate directed at employers. The ballot question and the MWA each speak to what the amendment would require *employers* to do. That mandate includes a directive that employers shall pay a certain minimum wage dependent upon whether the employer provides

health benefits as "described herein." Nev. Const. art 15 § 16(A). The description that follows in the third sentence of the MWA explains that an employer will qualify for payment of the lower-tier minimum wage by "making health insurance **available** to the employee." *Id.* (emphasis added). As such, the constitutional mandate of the MWA is not one that requires employees to enroll in health insurance benefits or that requires employers to ensure that their employees enroll in health benefits—such benefits must be made **available**. The District Court's Order turns the language of the MWA which requires "making insurance available" into something completely different—a requirement to enroll employees in health insurance.

1. **The Labor Commissioner's position is correct that the terms "provide" and "offer" are synonymous, and the District Court's finding of two different meanings for these terms creates an improper internal contradiction within the MWA.**

The District Court's Order relied upon the notion that when materially different terms are used within a document, there is a presumption that the different term denotes a different idea. However, it is a "basic rule of statutory construction that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless." *Hughes Air Corp. v. Pub. Utilities Comm'n of State of Cal.*, 644 F.2d 1334, 1338 (9th Cir. 1981) *disapproved on other grounds by*

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *United States v. Powell*, 6 F.3d 611, 614 (9th Cir. 1993).

The terms "provide" and "offer" and not materially different. In fact, they are synonyms. *See* Oxford Dictionary, available at http://www.oxforddictionaries.com/us/definition/american_english-thesaurus/provide, last viewed November 30, 2015; *see also*, NRS 47.140; *Nix v. Hedden*, 149 U.S. 304, 306-07 (1893) (looking to dictionaries to aid the court's understanding). The language of the MWA itself supports the notion that "provide" and "offer" are synonyms, as it dictates that an employer who provides health benefits "as described herein" shall be entitled to pay the lower-tier minimum wage. The description included within the MWA of what it means to offer benefits clearly states that it shall consist of "making health insurance available."

The different meanings erroneously ascribed to "provide" and "offer" by the District Court create an internal contradiction and additionally render superfluous the description within the amendment of what is meant to provide health benefits. This is a result that is not supported by the rules of construction, nor is it supported by this Court's prior guidance in these issues. *See Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) (interpreting a rule or statute in harmony with others and construing statutes such that no part of the statute is rendered nugatory or a surplusage).

2. Courts and administrative agencies have found that the plain meaning of the term "provide" is to "make available."

A review of other examples of the meaning of the word "provide" demonstrate that "provide" means precisely what the third sentence in the MWA says it means: "make available." The District Court's decision, by contrast, would have the phrase "make available" create an additional, and different, requirement of ensuring or requiring usage of that which has been made available. This creates an obligation not present in the plain language of the amendment. *See Harris Associates v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003).

The meaning of the terms "provide" and "offer" have been addressed in other employment contexts. The California Supreme Court was asked to determine what is meant by an employer's duty to "provide" meal periods. *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1017, 273 P.3d 513, 520-21 (2012). The Court concluded that "an employer's obligation is to relieve its employee of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done." *Id.* The result is that an employer has satisfied the requirements by making the meal period available but that compliance is not further conditioned on the employer's policing of the actual use of the meal period.

Another example is found in the Occupational Safety and Health Act ("OSH Act") which requires employers to provide employees with toilet facilities. The

Director of the Occupational Safety and Health Administration ("OSHA") has explained, quite logically, what that means in a Memorandum to its regional administrators and state designees. *See* NRS 47.140; *Peardon v. Peardon*, 65 Nev. 717, 737, 201 P.2d 309, 319 (1948) ("We believe we have the right to take judicial notice of the official acts of the head of an executive department or agency of the government, of general public interest.").

The OSHA Director described the term "provide" as follows:

> The language and structure of the general industry sanitation standard reflect the Agency's intent that employees be able to use toilet facilities promptly. The standard requires that toilet facilities be "provided" in every workplace. The most basic meaning of "provide" is "make available." *See* Memorandum from John B. Miles, *Director,* on behalf of the U.S. Depart. of Labor (April 6, 1998), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22932 (last visited Nov. 23, 2015).

Clearly the OSHA has relied on the most basic meaning of the term "provide" which is to "make available." In support of this conclusion, the OSHA Director cited to cases that have addressed this issue. For example, in *Borton, Inc. v. Occupational Safety & Health Review Comm'n*, 734 F.2d 508, 510 (10th Cir. 1984), an employer sought review and administrative determination that it violated the provision of the OSH Act requiring that "an access ladder or equivalent safe access shall be provided." In practice the employer made the access ladder ***available*** to its employees and argued that such actions were consistent with the mandate that it ***provide*** an access ladder. *Id.* (emphasis added). The Tenth Circuit

agreed with the employer and cited an earlier decision, *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113 (10th Cir. 1977), which stated that "the plain meaning of the phrase 'shall be provided' is that an employer must furnish or make available an access ladder and that the regulation could not be read as directing employers to require use of an access ladder." *Id.*

In *Borton*, the Tenth Circuit admonished the administrative agency for adopting an interpretation inconsistent with prior case law, even under the guise that the Commission was concerned about the remedial nature of the regulation. *Borton*, 734 F.2d at 510. The *Borton* and *Kennecott* courts declared that the term "provide is not ambiguous." *Id.* The question was simply whether the employer provided the safety equipment required by the regulations. Because the employer made the safety equipment available, it was provided as required. *Id.*

Applying that sound logic here, the requirement that employers "provide" health benefits does not mean that the benefits were not provided if they were not accepted by the employee. Practically speaking, employees may decline the health benefits offered by their employer for a number of reasons. Whatever the reason, the employer's obligation—and the only one relevant in this case—is that it make health benefits available. While the District Court was concerned about the context and scheme of the MWA, any such interpretation that creates internal

contradictions and uses an interpretation that abandons the plain meaning of the terms "provide" and "offer" creates an impermissible result.

Therefore, the Labor Commissioner did not exceed her statutory authority in promulgating NAC 601.100(1) because the plain meaning of the term "provide" means to make health benefits available to its employees, which is consistent with, and therefore does not violate, the MWA.

3. Traditional contract law demonstrates that the term "offer" is separate and distinct from any acceptance of that which has been offered.

Under traditional contract law, there is a clear difference between offer and acceptance—each is a separate step in the formation of a contract. *See e.g.*, *Gulf Oil Corp. v. Clark Cty.*, 94 Nev. 116, 118, 575 P.2d 1332, 1333 (1978). The party offering to make a contract invites acceptance but does not demand it. *See e.g.*, NRS 104.2206 (an offer invites acceptance). The individual to whom the offer was extended then has the choice of whether to accept the offer.

Despite the backdrop of the basic elements of contract formation, the District Court's Order would have the meaning of the term "offer" turned into a concept far broader than the normal meaning of the term. It marries two very distinct principles in a manner not contemplated by the MWA. The only act contemplated by the MWA is that the employer *provide* health benefits by extending an offer of insurance benefits, i.e. make them available, to its employees.

If the employee voluntarily declines the health insurance benefits made available, that act does not negate the fact that an offer was made in compliance with the dictates of the MWA. As such, NAC 608.100(1) does not violate the constitution or exceed the Labor Commissioner's authority.

B. This Court Should Reverse the District Court's Invalidation of NAC 608.104(2).

According to the MWA, an employer-provided health insurance plan will qualify the employer to pay the lower-tier minimum wage only if the premium costs to the employee do not exceed ten percent of the employee's "gross taxable income from the employer." Nev. Const. art. 15 § 16(A). In NAC 608.104(2), the Labor Commissioner reasonably includes amounts specified on Form W-2, including tips, in the calculation of "gross taxable income from the employer."

1. The Court may invalidate NAC 608.104(2) only if the regulation exceeds the Labor Commissioner's statutory authority or conflicts with the MWA.

"When determining the validity of an administrative regulation, courts generally give 'great deference' to an agency's interpretation of a statute that the agency is charged with enforcing." *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293 (2000) (citing *State v. Morros*, 104 Nev. 709, 713 (1988)). Indeed, because the Labor Commissioner is charged with enforcing "all labor laws of the state of Nevada," which undoubtedly includes the MWA, the only avenue for a court to declare NAC 608.104(2) invalid is through a finding that the

regulation exceeds the statutory authority of the agency or violates a constitutional or statutory provision. *See* NRS 607.160; NRS 233B.110; *State Farm Mut. Auto. Ins.*, 116 Nev. at 293. Nevada law provides that "**each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law** and shall adopt such regulations as are necessary to the proper execution of those functions." NRS 233B.040 (emphasis added).

a. The phrase "gross taxable income from the employer" is unambiguous, and the Labor Commissioner's reasonable interpretation merely gives effect to its plain meaning.

"When a statute's language is unambiguous, this court does not resort to the rules of construction and will give that language its plain meaning." *Mardian v. Greenberg Family Trust*, 131 Nev. Adv. Op. 72, 359 P.3d 109, 111 (2015). Statutory language is unambiguous when it is subject to only one reasonable interpretation. *See City of Sparks*, 302 P.3d at 1126. Residents of Nevada do not pay Nevada state tax on individual income. As a result, to the extent any Nevadan's individual income is taxable, it is only taxable under federal law. Therefore, gross taxable income can only have one plain and ordinary meaning for a Nevadan: it must refer to gross income that is **taxable under federal law**. This is the only way Nevada voters and Nevada legislators could have understood the term "gross taxable income" as used in the MWA. *See City of Sparks v. Sparks Mun. Court*, 129 Nev. Adv. Op. 38 (2013) ("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.").

The Internal Revenue Service's W-2 Form includes employee tips as an aspect of an employee's individual income that is **taxable under federal law**. *See* IRS Form W-2, (2015), *available at* https://www.irs.gov/pub/irs-pdf/fw2.pdf; NRS 47.140; JA 0354. Therefore, gross taxable income, as Nevadans would understand it, includes tips. Accordingly, in order to aid employers in making determinations as to whether their health insurance plans are in compliance with the ten percent premium cap, it was reasonable for the Labor Commissioner to promulgate NAC 608.104(2) and expressly give "gross taxable income" its plain meaning, which is the meaning ascribed to it on the W-2 Form. JA 0354.

The qualifying phrase "from the employer" is clearly meant to distinguish between different sources of income (e.g., income from different employers), and not between different types of income from the same employer. If the MWA simply required that health insurance be provided to employees at a premium cost of "not more than ten percent of the employee's gross taxable income"—omitting the qualifier "from the employer"—then an employer could consider all of an employee's income sources, including other employers, in calculating the ten percent premium cap. After all, an employee's true gross taxable income would be an aggregate of all individual income from all sources.

Therefore, by limiting the employer's consideration of the employee's gross taxable income to only the employee's income "from the employer," the MWA requires employers to exclude from their gross taxable income calculation any and all income received by the employee **from other employers or other sources not related to employment**. For example, if an employee works part-time for two different employers, and earns $15,000 in gross annual income at each job, the employee's gross taxable income will be $30,000. However, due to the "from the employer" language of the MWA, each employer must provide health insurance to the employee at a premium cost of not more than ten percent of $15,000 in order to qualify to pay the lower-tier minimum wage. This is the plain meaning of the "from the employer" language of the MWA. NAC 608.104(2) merely gives effect to this meaning.

Moreover, there is nothing to suggest that using "from the employer" to modify "gross taxable income" makes the MWA's meaning any less plain. The MWA uses a term—"gross taxable income"—which is widely understood to expressly include tips and gratuities among its various components. Interpreting "from the employer" to exclude tips would undermine the significance of the MWA's express usage of "gross taxable income," a concept that includes tips.

b. Even if the Court determines that "gross taxable income from the employer" is ambiguous, NAC 608.104(2) is reasonable and in harmony with the MWA.

"A provision is ambiguous if its language may be reasonably interpreted in two or more inconsistent ways." *City of Sparks*, 302 P.3d at 1126. The District Court concluded that "gross taxable income from the employer" is limited to payments made directly from the employer's "business revenue," and excludes "income that emanates from any other source, including from tips and gratuities." Even assuming that this is a reasonable interpretation of the MWA, the Labor Commissioner's interpretation in NAC 608.104(2) is also reasonable, and thus should only be invalidated if found to conflict with the MWA. *State Farm Mut. Auto. Ins. Co.*, 116 Nev. at 293.

"If a constitutional provision's language is ambiguous . . ., we may look to the provision's history, public policy, and reason to determine what the voters intended." *Miller v. Burk*, 124 Nev. 579, 590 (2008). The clearly apparent purpose of the MWA's ten percent cap on employee premium costs is to ensure that the health plan provided by the employer is reasonably affordable to the employee. To accomplish this goal, the MWA imposes a cap on employee premiums based on a percentage of gross income; in other words, the premiums are capped in proportion to the employee's ability to pay.

In industries with tipped workers—and especially in the restaurant industry—employees are paid at least minimum wage and also receive significant tip income. The result is that many restaurant workers earn income well above the minimum wage. Accordingly, the increased income makes them more able to afford increased premium costs. Two employees, both making $15 per hour, one in wages alone and the other in wages plus tips, both have the same income; thus, they both have the same ability to pay health insurance premiums.

NAC 608.104(2) is in harmony with the purpose and policy of the MWA to restrict employee premiums in proportion with the employee's ability to pay. For this reason, NAC 608.104(2) is both a reasonable interpretation, and is consistent with the policy behind the MWA.

2. NAC 608.104(2) does not violate the Nevada Constitution.

The District Court's decision implies that the MWA's prohibition on tip credits is inconsistent with NAC 608.104(2). This is not the case. The MWA provides: "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." (Emphasis added.) As used in this provision, "wage rates" can only have one meaning: it refers to the two-tier minimum wage rates established by Section 16A of the Constitution. Here, NAC 608.104(2) does not conflict with the MWA.

The plain language of the MWA only restricts consideration of tips insofar as tips are used as a credit against wages. "[W]hen a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 731 (2004). The Court must not read additional restrictions on consideration of tips into the MWA.

Furthermore, the tip credit prohibition relates to the employer's obligation to pay wages. In contrast, the gross taxable income calculation relates to the employee's economic ability to afford health insurance premiums. These are distinct concepts, and including tips as a component of gross taxable income does not in any way undermine or conflict with the MWA's tip credit prohibition.

II. CONCLUSION

For the reasons stated above, the NvRA respectfully requests this Court reverse the District Court's Order.

Respectfully submitted,

By: /s/ S. Brett Sutton

S. Brett Sutton, Esq. Nevada Bar No. 12109
Charity F. Felts, Esq. Nevada Bar No. 10581
Sutton Hague Law Corporation, P.C.
9600 Gateway Drive, Suite 100
Reno, NV 89521
Phone: (775) 284-2770
Attorneys for Amicus Curiae Nevada Restaurant Association

Date: December 3, 2015

CERTIFICATE OF COMPLIANTCE

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

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

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

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

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

[XX] Does not exceed 15 pages.

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

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

Date: December 3, 2015 SUTTON HAGUE LAW CORPORATION, P.C.

/s/ S. Brett Sutton

S. Brett Sutton, Esq. Nevada Bar No. 12109
Sutton Hague Law Corporation, P.C.
9600 Gateway Drive, Suite 100
Reno, NV 89521
Phone: (775) 284-2770
Attorneys for Amicus Curiae Nevada Restaurant Association

CERTIFICATE OF SERVICE

I hereby certify that I a.m. an employee of Sutton Hague Law Corporation, P.C. and that on this 3rd day of December 2015, I caused to be served a true and correct copy of the above and foregoing **BRIEF OF AMICUS CURIAE NEVADA RESTAURANT ASSOCIATION** via the Court's Case Management and Electronic Case Filing (CM/ECF) system and U.S. Mail, postage prepaid, properly addressed to the following:

Don Springmeyer, Esq.
Bradley Schrager, Esq.
Daniel Bravo, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 E. Russell Road, 2nd Floor
Las Vegas, NV 89210
Attorneys for Cody C. Hancock and Kwok Yen Moy

Adam Paul Laxalt
Nevada Attorney General
Scott Davis
Senior Deputy Attorney General
555 E. Washington Ave., #3900
Las Vegas, NV 89101
Attorneys for State of Nevada,
Office of the Labor Commissioner
And Shannon Chambers

/s/ Linda Gentry
An Employee of Sutton Hague Law Corporation, P.C.