IN THE SUPREME COURT
OF THE STATE OF NEVADA

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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

BRIEF OF AMICI CURIAE THE NEVADA RESORT ASSOCIATION AND LAS VEGAS METROPOLITAN CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT STATE OF NEVADA, OFFICE OF THE LABOR COMMISSIONER

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NRAP 26.1 DISCLOSURES

Undersigned counsel of record for amici curiae the Nevada Resort Association and the Las Vegas Metropolitan Chamber of Commerce hereby certifies that there are no parent corporations or publically-held companies having a ten percent or more ownership interest.

Fisher & Phillips LLP is the only law firm that has appeared in this matter on behalf of the Nevada Resort Association and the Las Vegas Metropolitan Chamber of Commerce.

Theses representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Date: December 7, 2015

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I. INTEREST OF THE AMICI

The Nevada Resort Association is a non-profit corporation that serves as the primary advocacy voice for Nevada's gaming and resort industry—Nevada's largest and most vital industry sector. Nevada Resort Association, Mission and Purpose, http://www.nevadaresorts.org/about/ (last visited Dec. 4, 2015). The leisure and hospitality industry employs 337,700 workers, or 27.7 percent of Nevada's total workforce. How Gaming Benefits Nevada, http://www.nevadaresorts.org/benefits/jobs.php (last visited Dec. 4, 2015). The leisure and resort industry generates more economic output than any other sector of the State's economy. Twelve of the state's top twenty employers are resort properties. *Id.* The industry is also Nevada's largest taxpayer, generating 2 billion dollars annually for state and local governments, schools and other public service providers. *Id.* In short, the Resort Association's participation in this brief provides the Court with the perspective of some of Nevada's largest employers in the State's largest industry.

The Las Vegas Metropolitan Chamber of Commerce ("Chamber") is the largest business organization in Nevada. As such, it provides a voice for the Southern Nevada business community in local, state and federal government. About the Las Vegas Metro Chamber of Commerce, http://www.lvchamber.com/chamber/about (last visited Dec. 4, 2015). The

Chamber has thousands of businesses ranging the gamut of industries. Those businesses employ over 200,000 workers. *Id.* The Chamber therefore provides this Court with the perspective of the State's broadest-based business organization, comprising businesses of every size range.

The amici have a profound interest in this matter. Their members employ thousands of workers impacted by the District Court's decision invalidating NAC 608.100(1) and 608.104. The amici's members have relied upon the Labor Commissioner's longstanding regulations in determining how to comply with the dictates of Nevada's Minimum Wage Amendment to the State Constitution, Nev. Const. art. 15, § 16. The District Court's decision upsets employers' settled expectations, and introduces confusion and uncertainty. Under the Labor Commissioner's logical and sound interpretation of the actual text of the amendment, employers knew that, in exchange for offering qualifying and affordable health insurance to all their employees and dependents, they would have the benefit of paying the lower of the two minimum wage tiers. Or, employers could forego offering such benefit, but would be required to pay the higher of the two tiers. Either way, the consequences were predictable.

Under the District Court's interpretation, employers will no longer have the benefit of a clear and predictable trade-off. Instead, whether an employer is required to pay the higher of the two minimum wage tiers will be dependent upon

individual employees' decisions as to whether they wish to enroll in the employer's health insurance—choices that may vary from year to year, location to location, or across different job categories. Employers' ability to budget for payroll costs will be negatively affected by this uncertainty, which, in turn, is likely to have an adverse impact on hiring in the lower wage job sectors. Furthermore, the District Court's decision does not exist in a vacuum. There are numerous lawsuits pending against Nevada employers seeking damages relating to employers' alleged failure to comply with Nevada's Minimum Wage Amendment. Indeed, three of those lawsuits have been consolidated with this case for purposes of resolving the issue presented by this appeal. Order Granting Mot. to Consolidate, Nov. 13, 2015. If the District Court's decision is affirmed, employers face the spectre of additional lawsuits, with uncertain but potentially severe economic consequences.

II. SUMMARY OF ARGUMENT

Nevada employers have relied upon the Labor Commissioner's regulations for nearly a decade, in making decisions about what to pay their employees and whether to offer health insurance. For years, employers have had a settled understanding of the trade-offs under the Minimum Wage Amendment. If employers offered health insurance, then they knew that they could pay the lower of the two-tiered wage rates. Alternatively, if employers chose not to offer health

insurance, then they understood that the higher tier wage rate would apply. Either way, employers could budget for their labor costs based upon the incentives provided by the Amendment.

The District Court's decision disrupts those settled expectations. Under the District Court's interpretation of the Amendment, employers will not know which rate applies to a given employee until the employee makes a choice as to whether to enroll in the employer's health insurance. These decisions are likely to be highly variable, depending upon the employee's individual circumstances. This will diminish employers' ability to budget or plan for labor costs, and may provide a disincentive for hiring of workers in the lower wage sectors of the economy. Given the patent lack of textual support for the District Court's interpretation of the Amendment, employers' settled expectations should not be overridden, and the Labor Commissioner's longstanding regulatory determination should be reinstated.

The District Court's ruling also leads to perverse and absurd results—results that could not have been envisioned by the proponents of the Amendment or the voters who approved it. Even though the Amendment advances a parallel policy goal of promoting the provision of affordable health insurance to all Nevada employees, the District Court's interpretation of the Amendment undermines employers' incentive to provide such insurance, as they will not receive the benefit of being able to pay the lower tier wage rate unless an employee chooses to enroll.

Employers may choose not to incur the administrative cost of purchasing group health insurance coverage where they are not assured of the monetary incentive they had understood was provided by the Amendment.

The District Court's interpretation of the Amendment's language capping the employee's share of the cost of health insurance is also unreasonable and leads to absurd results. The plain English phrase "from the employer" is interpreted by the District Court to exclude tips and gratuities from the definition of "gross taxable income" without a shred of textual support. The District Court's reasoning that "from the employer" was intended to refer to cash supplied by the employer, as opposed to tips, as denominated in the sub-parts of the Form W-2, is a hyper-technical and non-intuitive reading of the phrase "from the employer." The Labor Commissioner's longstanding interpretation that "from the employer" simply means the income derived from employment, as opposed to other sources of income, is more reasonable and intuitive, and comports better with the voters' presumed understanding of the ballot measure put before them. Furthermore, the District Court's interpretation of the cap on health insurance premiums perversely creates a favored class of tipped workers, as to whom employers will be required to more heavily subsidize insurance costs. There is utterly no indication in the text of the Amendment that the proponents intended to create two classes of workers—tipped and non-tipped—who would be treated disparately as to the cost of insurance.

Finally, the fact that the Amendment expressly excludes tips and gratuities from the calculation of an employee's wage rate, but makes no mention of tips and gratuities in the separate context of defining the percentage of an employee's gross taxable income that can be used to purchase health insurance should be presumed to be deliberate. It is a well-established principle of statutory interpretation that where a term or distinction is explicitly spelled out in one section of a law, its absence in another section should be presumed to be deliberate, and not accidental. Hence, contrary to the District Court's reasoning, the fact that tips and gratuities are excluded from the calculation of the wage rate actually supports, rather than denigrates from, the Labor Commissioner's regulatory interpretation.

III. ARGUMENT

A. The District Court's Decision Upsets Settled Expectations Upon Which Nevada Employers Have Relied For Nearly A Decade.

The Nevada Minimum Wage Amendment represents a compromise between two competing public policy goals: (1) increasing the minimum wage for Nevada's workers; and (2) providing an economic incentive for Nevada's employers to offer affordable health insurance for all persons employed by them, including the lowest paid workers. Nev. Cont., art. 15, § 16. To that end, the Amendment provides for a two-tiered minimum wage, allowing employers to pay the lower tier rate if they offer or make available qualifying health insurance that costs no more than 10% of the employee's gross income from the employer. Id.

The Labor Commissioner's regulations at issue here--§§ 608.100(1) and 608.104—have been in effect since 2006. For nearly a decade, they have represented the settled understanding of what the Minimum Wage Amendment means, and what bargain has been struck between two competing policy goals. Nevada employers have relied upon those regulations in making decisions about whether to provide health insurance to all employees, and, if so, what plans to purchase.

The law disfavors penalizing businesses that have relied on established legal interpretations—in this case, the Labor Commissioner's regulations—in making hiring, compensation and benefits decisions. *See, e.g., Public Employees' Benefits Prog. v. LVMPD,* 124 Nev. 138, 155 (2008)("In deciding whether a statute has retroactive application, courts are guided by fundamental notions of fair notice, reasonable reliance, and settled expectations"); *Ariad Pharmaceuticals, Inc. v. Eli Lilly and Co.*, 598 F.3d 1336 (Fed. Cir. 2010) (in a case involving a change to patent law, the court noted "that this has been the law for over forty years [. . .] and to change course now would disrupt the settled expectation of the inventing community, which has relied on it in drafting and prosecuting patents, concluding licensing agreements, and rendering validity and infringement opinions"). As the United States Supreme Court has stated in the context of the presumption against retroactive legislation, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform

their conduct accordingly; settled expectation should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 256 (1994)

The principle of settled expectations applies equally here. Nevada employers have relied upon the regulations promulgated by the Labor Commissioner—the Nevada agency charged with the enforcement of all labor laws in the State, and with the specific legal authority to adopt regulations. NRS § 607.160(1). Specifically, Nevada employers have relied upon the regulations at issue here in purchasing insurance, setting wage rates, and making decisions about the mix of pay and benefits for their workforce. The District Court's decision invalidating the regulations disrupts those expectations by imposing an entirely different bargain after the fact in which employers are only able to pay the lower tier rate if the employee actually elects to enroll in the health insurance plan. Making the bargain or trade-off hinge upon employees' disparate choices as to whether to enroll creates uncertainty, as employers will not know from year to year what percentage of their workforce will choose to enroll in the company health insurance. This unpredictability will render it more difficult, if not impossible, for employers to budget for their total labor costs, or make informed decisions about the mix of benefits to offer.

The presumption against disrupting settled expectations should not give way unless there are strong countervailing reasons for doing so. Here, as the State's

opening brief demonstrates, the District Court's rationale for invalidating the Labor Commissioner's longstanding regulations simply does not square with a fair reading of the actual text of the Amendment. To the contrary, the District Court's opinion examined individual words out of context, and ignored other language that favored the State's position. The net effect of the District Court's approach was to render superfluous entire clauses of the Amendment's text, violating bedrock principles of Constitutional and statutory interpretation. Opening Br., pp. 15-18. Conversely, the Labor Commissioner's regulations at issue here are faithful to the text of the Amendment and harmonize all of its provisions, giving each clause meaning and effect. *Id.*, pp. 18-23.[1] Certainly, and at a minimum, the District Court did not establish that the Commissioner's regulations are in "clear derogation of a constitutional provision." *Id.*, p. 5, citing *Vineyard Land & Stock Co. v. Dist. Court of Fourth Judicial District,* 42 Nev. 1 (1918).

As the State's opening brief also established, the District Court engaged in policymaking in justifying its interpretation of the Amendment based not on the text (which, after all, says nothing about employee enrollment in insurance), but on what the Court viewed as the abstract, underlying purposes of the Amendment. In

[1] It is noteworthy that the Labor Commissioner's interpretation of the Minimum Wage Amendment's command to employers parallels the incentive scheme established in the federal Affordable Care Act ("ACA"). Under the ACA, employers avoid the imposition of a penalty if they merely "make a qualifying offer of coverage" to their employees. 26 U.S.C. § 4980H(a). There is no further condition that the employees must choose to accept such coverage.

doing so, the District Court overreached and stepped outside its circumscribed judicial role. Opening Br., p. 16. It is well-established that courts are not to act as legislators or policymakers. Yet, that is precisely what the District Court did with its ruling, by accepting an interpretation of the Amendment that it perceived as most favorable to employees, rather than one that is faithful to the actual text of the Constitution. Moreover, as shown herein, in addition to the sound textual interpretation arguments raised by the State's opening brief, the District Court's ruling leads to absurd results and perverse incentives that could not have been envisioned by the voters in adopting the Amendment.

In sum, this is plainly not an instance where the presumption against disrupting settled expectations should give way to other considerations.

B. The District Court's Ruling Undermines The Minimum Wage Amendment's Parallel Goal Of Encouraging Provision Of Health Insurance To All Nevada Employees.

The District Court's opinion focused almost entirely upon only one of the goals of the Minimum Wage Amendment—raising the minimum wage for Nevada employees. In doing so, the District Court all but ignored the Amendment's other goal of encouraging Nevada employers to offer affordable health insurance to all their employees, including low wage workers.

The District Court's determination that employees must choose to enroll in the employer's plan as a condition of allowing the employer to pay the lower-tier

rate creates perverse incentives that undermine the clear goal of encouraging employers to offer health insurance. Nevada employers incur significant fixed administrative costs in purchasing group health insurance for their employees and often enter into multi-year agreements in order to provide such insurance. Yet, under the District Court's interpretation of the Amendment, even if an employer incurs such cost, an employee may elect to forego the employer's insurance and still be paid the higher tier wage rate. Hence, employers incur the significant cost of offering health insurance benefits but, in many instances, will receive no corresponding benefit of being able to pay at the lower-tier rate.

Absent the clear and predictable monetary incentive of the lower-tier rate, many Nevada employers may choose to discontinue offering health insurance benefits, or curtail their availability. This undercuts the Amendment's parallel policy goal of promoting widespread availability of health insurance for Nevada employees.[2] This perverse disincentive is avoided by leaving the regulatory framework intact.

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[2] The federal Affordable Care Act ("ACA") does not moot the concern raised herein regarding disincentives to provide health insurance, as ACA's coverage is more limited in scope than that of the Minimum Wage Amendment. *First*, ACA only applies to "full-time employees." 29 U.S.C. § 4980(H). *Second*, ACA only covers employers with more than 50 employees. *Id.* The Chamber's membership, in particular, includes many small employers that are not subject to the dictates of the ACA. Conversely, the Minimum Wage Amendment broadly applies to **all** Nevada employers and employees, regardless of size of employer, or whether the employee is on full or part-time status.

C. The District Court's Invalidation Of NAC 608.104 Contravenes The Intent Of The Voters And Leads To Absurd Results.

The Minimum Wage Amendment requires that the cost of health insurance be capped at no more than "10 percent of the employee's gross taxable income from the employer." The Labor Commissioner's regulations interpreted that phrase in a manner that comports with plain English. Specifically, "gross taxable income" means what the federal tax code says it means—all wages, inclusive of tips. NAC 608.104(2). The further clause "from the employer" is interpreted by the Labor Commissioner to mean income attributable to the employer, as opposed to other sources of income, such as rent, annuities, alimony payments, etc. *Id.*

The District Court's interpretation of "from the employer" as excluding tips is not only unsupported by the text of the Amendment, as the State has demonstrated (Opening Br., pp. 20-21), but violates other interpretive principles as well. To begin with, the rules of statutory interpretation apply equally to the interpretation of Constitutional provisions. *We the People Nev. v. Miller*, 124 Nev. 874, 881 (2008). Courts must interpret a statute in a reasonable manner—i.e., "the words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results." *Desert Valley Water Co. v. State Engineer*, 104 Nev. 718, 720 (1988). It is simply unreasonable to interpret the words "from the employer" as conveying the hyper-technical meaning of cash supplied by the employer, as reflected in one of the subparts of a Form W-2. This

is a Constitutional provision the District Court was being asked to interpret, not a tax code provision. The Labor Commissioner's interpretation of "from the employer" much more naturally comports with the commonsense use of the English language, and is far more likely to align with what the average Nevada voter would have interpreted those words to mean. *See Strickland v. Waymire*, 235 P.3d 605, 608 (2010) ("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."). There is no indication in the record before this Court that the public would have had any reason to believe that the Amendment intended there to be a special treatment of tipped employees, requiring a fine parsing of the subparts of a Form W-2, in connection with the establishment of a cap on the cost of premiums to employees.

The District Court's interpretation of "from the employer" leads to the further absurd result of treating different sub-classes of Nevada employees—i.e., tipped versus non-tipped employees—in a disparate manner with respect to subsidization of health insurance. On its face, the Amendment makes no distinction between non-tipped and tipped employees with respect to promoting affordability of insurance. Rather, the provision refers to a cap on premium costs for any Nevada employee. Art. 15, § 16. Significantly, in the ballot measures presented to the voters, non-tipped occupations are singled out as prime examples

of the intended beneficiaries of the Amendment. For example, the ballot measure references "the difficult jobs performed by hotel maids, childcare workers, and nursing home employees." Joint Appendix ("JA") at 273. These same categories of non-tipped workers are singled out elsewhere in the arguments put forth by proponents of the Amendment that were presented to Nevada's voters. JA 282.

Despite the Amendment's evident solicitude for all Nevada employees, including such non-tipped workers as hotel maids, childcare workers, and nursing home employees, the District Court's ruling creates a special, favored class of tipped employees. As the State's opening brief points out (Br., p. 23), under the District Court's interpretation, tipped employees will be allowed to pay a significantly lower percentage of their overall income on health insurance than non-tipped employees. Indeed, using the example of Hancock's own earnings, as the State showed, he would be required to pay only approximately 4% of his total income on health insurance, whereas a comparable employee without the benefit of tipped income can be charged up to the full 10% of his or her income for the same health insurance. Opening Br., pp. 22-23. In effect, under the District Court's interpretation, employers are required to more heavily subsidize tipped employees than non-tipped employees.

Because the District Court's interpretation of § 608.104 is not compelled by the Amendment's plain language, for all of the reasons discussed herein as well as

those discussed at greater length in the State's opening brief, it should be rejected as it manifestly leads to the establishment of a favored sub-class of Nevada employees, contrary to the intent of the voters. This absurd result is avoided by reversing the District Court and reaffirming the validity of the Labor Commissioner's longstanding regulatory guidance as to the meaning of the 10% cap on health insurance premiums.

D. The District Court's Invalidation Of § 608.104 Violates Well-Established Principles Of Statutory Interpretation.

In support of its decision invalidating NAC Section 608.104, the District Court referenced the fact that the "drafters of the Amendment expressly excluded tips and gratuities from the calculation of the minimum hourly wage." JA at 412. While this is true, the District Court's observation actually supports, rather than denigrates from, the State's position that tips and gratuities are **not excluded** from the definition of gross taxable income. It is hornbook law that when a drafter of legislation "includes particular language in one section of a statute but omits from another . . . it is generally presumed that [the drafters] act intentionally and purposefully in the disparate inclusion or exclusion." *Keene Corp. v United States*, 508 U.S. 200, 208 (1993) (quoting *Russelo v. United States*, 464 U.S. 16, 23 (1983)). *See also Bailey v. United States*, 516 U.S. 137, 146 (1995) (distinction in one provision between "used" and "intended to be used" creates implication that related provision's reliance on "use" alone refers to actual and not intended use.)

Here, it is significant that the drafters of the Minimum Wage Amendment expressly carved out tips and gratuities from being credited against the required wage rate, while elsewhere, in the same paragraph, made no mention of tips and gratuities in connection with the cap on premium costs tied to the employee's gross taxable income. The express exclusion of tips and gratuities with reference to the wage rate shows that the drafters were aware of that issue and knew how to explicitly address it when they needed to do so. The lack of any express exclusion of tips and gratuities in the quite different context of defining the cap on health insurance premiums should be presumed to be meaningful. *Central Bank of Denver v. First Interstate Bank,* 511 U.S. 164, 176-77 (1994). *See also Franklin Nat'l Bank v. New York,* 347 U.S. 373, 378 (1954) (finding "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances"); *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 485 (1996) ("Congress . . . demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and . . . the language used to define the remedies und RCRA does not provide that remedy"); *FCC v. NextWave Personal Communications, Inc.,* 537 U.S. 293, 302 (2003) (when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly").

In sum, far from supporting the District Court's interpretation of the Amendment's premium cap, the fact that the drafters of the Amendment expressly excluded tips and gratuities elsewhere in another context supports the State's position that tips should be included in the definition of "gross taxable income."

III. CONCLUSION

For all of the foregoing reasons, as well as those set forth in the State's opening brief, the District Court's decision should be reversed.

DATED this 7th Day of December, 2015.

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AND LAS VEGAS
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Brief Of Amici Curiae The Nevada Resort Association And Las Vegas Metropolitan Chamber Of Commerce In Support Of Appellant 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 3,938 words.

3. I hereby certify that I have read this Brief Of Amici Curiae The Nevada Resort Association And Las Vegas Metropolitan Chamber Of Commerce In Support Of Appellant State Of Nevada, Office Of The Labor Commissioner 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 7th Day of December, 2015.

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IN THE SUPREME COURT
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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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief Of Amici Curiae The Nevada Resort Association In Support Of Appellant State Of Nevada And Reversal Of District Court's Decision was served via U.S. Mail, postage prepaid, on each the following parties:

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