IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANTS' OPENING 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 5th day of November, 2015.

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This matter requires both a textual interpretation of article XV, section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or the "Amendment") and some consideration of its nature. Appellants claim that the Amendment was designed to provide a benefit to minimum wage employees, either in the form of a raise in wages or in the form of actually-received health insurance. Respondents counter that the benefit those employees receive from their employer is merely the *offer* of health benefits, and that such offer negates the raise in wages the Amendment promised. Neither the text, context, nor policy underpinning the Minimum Wage Amendment, however, support Respondents' position, and the question certified to this Court by the United States District Court should be answered in the affirmative.

I. STATEMENT OF THE ISSUE PRESENTED

The United States District Court for the District of Nevada has certified, and this Court has accepted, the following question for resolution:

> *Whether an employee must actually enroll in health benefits offered by an employer before the employer may pay that employee at the lower-tier wage under the Minimum Wage Amendment, Nev. Const. art. XV, sec. 16.*

II. JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter pursuant to N.R.A.P. 5. *See* N.R.A.P. 5. Under Rule 5, this Court has the power to answer questions of law that "may be determinative of the cause then pending in the certifying court and … it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state." N.R.A.P. 5(a); *see also* Appellants' Appendix ("App. Appx.") 0066-0068.

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III. STATEMENT OF THE CASE

At the 2006 General Election, the people of Nevada approved the constitutional amendment denominated as Question 6 by a two-to-one margin regarding the minimum wage to be paid to all Nevada employees.[1] The Minimum Wage Amendment became effective in November 28, 2006, and was codified as new article XV, section 16 of the Nevada Constitution. *See* Nev. Const. art. XV, § 16.

The Minimum Wage Amendment guaranteed to each Nevada employee, with very narrow exceptions, a particular hourly wage: "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."[2] Nev. Const. art. XV, § 16(A).

As alleged, Respondents paid Appellant Collins Kwayisi less than the Amendment's upper-tier wage rate. App. Appx. 0005-0007, 0024-0030. Appellant and his co-plaintiffs filed their class action complaint in this matter on May 9, 2014, and filed an amended complaint on May 20, 2014. App. Appx. 0001-0018, 0019-0040. Respondents, after resolution of a motion to dismiss, answered the amended complaint on February 23, 2015. App. Appx. 0041-0057. On April 30, 2015, Appellant Collins Kwayisi filed a motion for partial summary

[1] This represented the second passage of Question 6 by the people. It had been approved by a similarly wide margin at the 2004 General Election.

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

judgment and argued that, under the Amendment, Respondents were ineligible to pay him below $8.25 because he was never actually provided with qualifying health insurance. App. Appx. 0065-0067. On August 21, 2015, the United States District Court for the District of Nevada certified the present question of law *sua sponte*, and denied Appellant's motion without prejudice pending the outcome of this proceeding. App. Appx. 0058-0069. This Court accepted the certified question and directed briefing by the parties. App. Appx. 0070-0071.

IV. STATEMENT OF RELEVANT FACTS

Appellants discern no reason to diverge from the usual rule that factual inquiries in N.R.A.P. 5 matters are limited to the order certifying the question and to the pleadings filed by the parties. *In re Fontainebleau Las Vegas Holdings*, 127 Nev. Adv. Op. 85, 267 P.3d 786, 794-95 (2011) ("The answering court's role is limited to answering the questions of law posed to it, and the certifying court retains the duty to determine the facts and to apply the law provided by the answering court to those facts."). Here, the portion of the District Court's order that dealt specifically with the issue of certifying the question confines itself to recitation of the respective positions of the parties. App. Appx. 0065-0068.

V. STANDARD OF REVIEW

The question presented is a matter of law, which this Court reviews *de novo*. *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).

VI. ARGUMENT

The textual command of the Minimum Wage Amendment is clear: "The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer ***provides*** health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not ***provide*** such benefits." Nev. Const. art. XV, § 16(A) (emphasis supplied). The succeeding sentence—"Offering health benefits within the meaning of this section shall consist of making health insurance

available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer"—does not define the term "provide." *Id.* Instead, it "describes herein" the type and cost of the benefits that *may* permit the employer to pay below the upper-tier hourly wage. Those benefits must be "health insurance," meaning they must meet legal requirements for health insurance under pertinent state and federal laws, they must be available to the employee and all dependents, and they must not cost the employee more than ten percent of his or her income from the employer.

Here is how the Amendment was supposed to function: Employers go ahead and choose whether it was better to pay every employee at least $8.25 per hour, or to pay employees down to $7.25 per hour but provide those employees and their dependents with health insurance, at a capped premium cost to the employee of ten percent of what the employer paid the worker in wages. That cap meant that employers had to weigh the possibility that health insurance premiums might run above the ten percent of wages figure, leaving them responsible for overages. Employees either receive the insurance and up to a dollar less in pay, or the full $8.25 hourly wage.

Respondents believe they have found a loophole that benefits them mightily, however, by asserting that all an employer must do in order to reduce employees' wages all the way down to $7.25 per hour from $8.25 is to "make qualifying health benefits available to employees." App. Appx. 0066. In other words, in Respondents' version, the employer receives the benefit of the Amendment—a dollar off for every hour worked—whether or not the employee receives anything in exchange for the loss of that hourly dollar.

But the Minimum Wage Amendment requires that employees actually receive qualified health insurance in order for the employer to pay, currently, down

to $7.25 per hour to those employees. Otherwise, the purposes and benefits of the Amendment are thwarted, and employees (the obvious beneficiaries of the Amendment) who reject insurance plans offered by their employer would receive neither the low-cost health insurance envisioned by the Minimum Wage Amendment, nor the raise in wages its passaged explicitly promised them. $7.25 per hour is already the federal minimum wage rate that every employer in Nevada must pay employees anyway.

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

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

Section A of the Minimum Wage Amendment unambiguously authorizes an employer to pay the lower-tier minimum wage (originally $5.15 per hour, now $7.25) *only* to those employees to whom it "provides health insurance benefits." Nev. Const. art. XV, § 16(A). If, on the other hand, an employer "does not provide such benefits" to an employee, it must pay that employee the upper-tier wage (originally $6.15 per hour, now $8.25). *Id*. The two-tiered wage provision of the Amendment is mandatory and remedial, and requires employers either to provide qualifying health plans or increased wages to their employees. The Amendment is a remedial act, and will be liberally construed to ensure the intended benefit for the intended beneficiaries. *See, e.g., Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 496, 915 P.2d 288, 289 (1996); *see also Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 954 (2014), *reh'g denied* (Jan. 22, 2015).

The meaning and operation of the Amendment's two-tiered wage scheme is evident: The employer's privilege of paying the lower-tier hourly wage is conditioned upon the actual provision of qualifying health insurance benefits to the employee. Although the Amendment does not expressly define "provide," the meaning is facially evident from the text of the Amendment, and easily divined from the purpose of the Amendment generally, which was to raise the pay of minimum wage employees.

1. The plain and ordinary meaning of "provide"

It is well-established that, when interpreting a statute or constitutional provision, courts first look to the plain language of the provision, giving every word, phrase, and sentence its usual, natural, and ordinary import and meaning, unless doing so violates the provision's spirit. *See Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001); *McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). When facially clear, courts will not generally go beyond the plain language of the provision. *McKay*, 102 Nev. at 648, 730 P.2d at 441. Stated another way, when a provision is susceptible to only one honest construction, that alone is the construction which properly can be given. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 846 (1997); *Washoe Med. Ctr., Inc. v. Reliance Ins. Co., supra*, 112 Nev. at 496, 915 P.2d at 289 (citing *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610, 836 P.2d 633, 636 (1992)). Plain language controls unless it would lead to absurd results. *See United States v. Romero-Bustamente*, 337 F.3d 1104, 1109 (9th Cir. 2003); *Harris Associates v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003).

Here, the plain language and intended operation of the Amendment is ascertainable from the face of the Amendment. An employer must do more than merely offer a health insurance to an employee in order to qualify for paying the

employee the lower-tier wage. Any other construction would be absurd, and would turn the incentives embodied by the Amendment to encourage employers to provide qualifying health plans to their employees or else pay higher wages to those employees, on their heads.

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

The ordinary and everyday meaning of "provide" is "to supply ***for use***," not merely to offer for potential use. *See Merriam-Webster's Dictionary and Thesaurus* at 838 (Merriam-Webster, Inc. 2006) (emphasis supplied). Synonyms of "provide" include "deliver," "give," "hand," "hand over," "supply," and "furnish[.]" *Id.* Likewise, *Black's* definition of "provide" is "an act of furnishing or supplying a person with a product." *Black's Law Dictionary Free Online Legal Dictionary* (2d ed.) http://thelawdictionary.org/provide/ (accessed Oct. 22, 2015); *see also Black's Law Dictionary* (5th ed. 1979) (defining "furnish" as interchangeable with "provide"—"To supply, provide, or equip, for accomplishment of a particular purpose.").

Both the Nevada Labor and Insurance Codes support the distinction here

made between *provide* and *offering*. Under N.R.S. 608.1555, "[a]ny employer who provides benefits for health care to his or her employees shall provide the same benefits and pay providers of health care in the same manner as a policy of insurance pursuant to chapters 689A and 689B of NRS." N.R.S. 608.1555. Chapters 608, 689A and 689B use some form of the terms *provide* and *offer* in the context of health insurance benefits hundreds of times.[3] In them, "offering" almost always is used with reference to an insurer, whose product is being *offered* into the Nevada marketplace and is therefore regulated before it can be made available for sale.[4] When treating employer obligations regarding insurance plans, however, the Insurance Code, for example, switches to the more active "provide." If an

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

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

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

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

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

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

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

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

employer "provides" health insurance, the Codes mandate, the insurance in question must have certain qualities—meaning, essentially, if an employee is to subject themselves and their families to a particular employer-provided insurances, it must have certain types and amounts of coverage. At that point, the Legislature is assuming "provide" means that real employees will be subject to employer-*provided* insurance—they have, in other words, *accepted* the benefits—and that therefore those policies must carry, for example, coverage for drug and alcohol abuse treatment, treatment of autism spectrum disorders, or gynecological or obstetrical services. *See* N.R.S. 608.156; N.R.S. 689B.0335; N.R.S. 689B.031. In these statutory sections, unmistakably, "provide" always has the connotation of receipt of the benefit in question.[5]

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

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

N.R.S. 689B.0285(4): Each insurer that issues a policy of group health insurance in this State that ***provides, delivers, arranges for, pays for or reimburses*** any cost of health care services through managed care shall ***provide*** a system for resolving any complaints of an insured concerning the health care services that complies with the provisions of NRS 695G.200 to 695G.310, inclusive. N.R.S. 689B.0285(4) (emphasis supplied).

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

deposition testimony pursuant to this rule may ***offer*** it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also ***provide*** the court with a transcript of the portions so ***offered***." N.R.C.P. 32(c) (emphasis supplied).

"To offer" is merely "to present for acceptance." Merriam-Webster's, *supra*, at 733. Synonyms for "offer" include "extend," "pose," "proffer," and "suggest," but notably not "provide", "furnish", or "supply[.]" *Id.* at 734. Neither does *Merriam-Webster* list "offer" as synonymous with "provide." *Id.* at 838. Thus, "offer," which carries no connotation of transference of possession, is not synonymous or interchangeable with "provide" in the wage provision of the Amendment, or in any other context. The overall definitional weight of "provide," even alone with no reference to the context or meaning it has within the Amendment, connotes an actual exchange, not simply the potential for an exchange.[6]

It is a basic rule of construction that "[w]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1057 (2014), *reh'g denied* (Mar. 5, 2014) (quoting Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)). Here, the different idea is the difference between a full bargain (a dollar less in wages, but provision of health insurance to one's entire family), and an incomplete one (no dollar and no insurance, because one did not accept the offered

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

benefits). "Provide" and "offer" are not synonyms, therefore, neither in the everyday sense of those words nor in the sense that is to be employed when courts engage in constitutional or statutory construction.

2. The meaning of the "Offering" Clause in the Amendment

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

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

They did not so state. The command of the provision, if an employer is going to take advantage of the privilege of paying below the upper-tier wage rate, is to "provide health benefits as described herein." *See* Nev. Const. art. XV, § 16(A).

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

That the benefits must be *health insurance* subjects Respondents and other employers to state and federal law regarding certain insurance standards. Health insurance, of course, is a highly-regulated and defined area of law.

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

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

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

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

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

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

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

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

There is more involved in the analysis than a simple determination of the meaning of the word "provide," read in isolation. This Court's first duty, of course,

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

In this instance, it is not difficult to determine that the context, spirit, intent, and purpose of the Minimum Wage Amendment was to raise the wages of Nevada's working poor, and to encourage provision of low-cost comprehensive health insurance to those employees. The federal minimum wage is already $7.25 per hour. Employees continuing to earn $7.25 per hour but with no employer-provided health insurance, therefore, have received no benefit whatsoever from the passage of the Minimum Wage Amendment.

If all an employer has to do is "offer" benefits in order to pay 12.2% less in wages to an employee, why would any employer ever pay the full $8.25? The upper-tier minimum wage would be illusory. Especially given the fact that the employee has no input into what type or quality of insurance is being offered by the employer, a wily employer could arrange to offer benefits the employee is unlikely to accept. Employers could target their hiring from populations unlikely to want to accept their insurance—those under 26 and covered by parents' policies, or spouses on their partner's insurance. Employers may seek out and offer health benefits plans that are junk insurance, like limited-benefits plans or hospital indemnity plans with near-worthless coverage. This sort of gaming of the

Amendment cannot be in line with its meaning.

The structure, text, and meaning of the Minimum Wage Amendment combine to require that the lower-tier wage level have some meaning, that employees receive something for their loss of a dollar per hour worked. Respondents claim all they get is an offer, of whatever benefits plans the employers deigns to make. In the their interpretation, employers always get the benefit of the bargain—a significantly lower wage bill. If the Amendment had any remedial effect at all, an interpretation that so blithely guts any actual benefit to minimum wage employees cannot be valid.

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VII. 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 manner of interpreting 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 5th day of November, 2015.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Opening 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 Opening Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Opening Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 5,467 words.

3. Finally, I hereby certify that I have read this Opening 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 Opening 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 Opening 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 Opening Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of November, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager, Esq.*

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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 November 5, 2015, I served true copies of the following document(s) described as **APPELLANTS' OPENING 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.

Rick D. Roskelley, Esq.
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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 above 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.

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

Executed on November 5, 2015, at Las Vegas, Nevada.

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