IN THE SUPREME COURT OF THE STATE OF NEVADA

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WESTERN CAB COMPANY,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK; and THE HONORABLE LINDA MARIE BELL, District Judge,

Respondents,

and

LAKSIRI PERERA, Individually and on behalf of others similarly situated,

Real Party in Interest.

Case No.: 68796

District Court Case No. A-14-707425-C

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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I. INTRODUCTION

While Real Party in Interest Perera does not even agree with Petitioner Western Cab as to the applicable standard for writ relief,[1] he at least concedes that he would "welcome" this Court's resolution of "the merits of the issue raised by the petition," which is what statute of limitations applies to claims for back minimum wage for Nevada plaintiffs previously exempted from the minimum wage by NRS 608.250(2).[2] Resolution of this issue which is being treated inconsistently by trial courts sitting in Nevada is important to employers and employees. As demonstrated by Western Cab's petition and the following points and authorities, the only resolution that makes sense, even under Perera's Answer, is application of the analogous and corresponding two-year limitation, NRS 608.260, to ***all*** claims for back minimum wage in Nevada. This resolution conforms and harmonizes the Minimum Wage Amendment and NRS Chapter 608's existing "Compensation, Wages and Hours" statutory scheme, which is the purpose and goal of any Constitutional interpretation.[3]

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[1] Perera's Answer, p. 2.

[2] Perera's Answer, p. 3.

[3] *Landreth v. Malik*, 127 Nev. Adv. Op. 16, 251 P.3d 163, 166 (2011), *quoting We the People Nevada v. Secretary of State*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008) ("the interpretation of a... constitutional provision will be harmonized with other statutes.").

II. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

A. THE DRAFTING OF THE MINIMUM WAGE AMENDMENT DOES NOT SUGGEST ANY INTENT TO SET A STATUTE OF LIMITATIONS OTHER THAN UNDER NRS 608.260

The Minimum Wage Amendment was never intended to create a new statute of limitations for recovery of back minimum wage, but to level the playing field between unionized and non-union employers. Thus, Danny Thompson, the Executive Secretary-Treasurer of the Nevada AFL-CIO, explained in recent federal court filings that the Nevada AFL-CIO drafted the Minimum Wage Amendment's language "in conjunction with our lawyers at the law firm of McCracken, Stemerman and Holsberry," in order to "level the playing field" between union and non-union employers.[4] According to Mr. Thompson, the Minimum Wage Amendment:

> helped increase the compensation of the AFL-CIO members in Nevada and helps level the playing field between non-union employers and unionized employers (who generally have been paying their employees better than non-union employers). Most unionized employers provide health benefits readily meeting the MWA's standard of not costing employees more than 10 percent of their gross income, while a number of non-union plans are reported

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[4] *See* App. 18, 7/8/15 Declaration of Danny Thompson in Support of Nevada AFL-CIO's Motion to Intervene in U.S. District Court, District of Nevada, Case No. 2:15-cv-01160-GMN-PAL, "Landrey's, Inc., a Delaware corporation, et al., v. Brian Sandoval, et al," a case filed June 19, 2015, seeking injunctive relief preliminarily and permanently enjoining all enforcement of Nevada's Minimum Wage Amendment and related regulations as preempted under ERISA and in violation of the U.S. Constitution (the "Landry's Case"). *See also*, App. 19 and 20, respectively, the Complaint and First Amended Complaint filed therein.

to be failing such standard inside Nevada, and we understand many outside Nevada fail such standard.[5]

See also, *id,* at ¶ 3, in which Mr. Thompson continues:

> We are very active in the health benefits arena within Nevada and have developed expertise in this arena as many unionized employers provide health benefits through plans which are jointly administered by union and employer trustees. Even where the plan does not have union trustees, our unions are still involved in negotiating over and monitoring the employer plans.

In his August 25, 2015, Supplemental Declaration, Mr. Thompson continued:

> 1. [M]embers of some Nevada AFL-CIO affiliates receive wages below $8.25 per hour but also receive health benefits from their employer which qualify their employer to the lower minimum rate under the State Constitution. They work as cab drivers and casino dealers.
> 2. Unionized employers in this State compete constantly with non-union employers paying only the state minimum wage, particularly in the restaurant industry. If those non-union employers were allowed to lower wages to pay only the lower federal minimum wage, there would be large amounts of business lost by unionized employers, and hence losses to union members of paid hours worked, tips, and jobs, and losses in dues income to AFL-CIO affiliates.[6]

None of Mr. Thompson's explanations of the origin and purpose of the Minimum Wage Amendment indicates any intent to extend or otherwise change existing legal or equitable remedies or invalidate NRS 608.260's two-year statute

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[5] App. 18, ¶1.

[6] App. 21. *See also*, Thompson's 8/25/15 Second Supplemental Declaration in the Landry's Case, App. 22, which is identical to his Supplemental Declaration quoted above, except for its more detailed description of certain Las Vegas downtown casino workers at the conclusion of ¶1.

of limitations for back minimum wage. Indeed, the ***sole*** purpose identified by Mr. Thompson on behalf of the Amendment's drafters was to "level the playing field" between union and non-union employers. Section B of the Minimum Wage Amendment confirms this interpretation, referring to the right of employees claiming violations of the Minimum Wage Amendment to bring actions in which the employee "shall be entitled to ***all remedies available under the law or equity appropriate to remedy any violation***." (Emphasis added.) NRS 608.260 is an "available" and "appropriate" remedy for recovery of back minimum wage and there is no justification to supplant its two-year statute of limitations with NRS 11.220's four-year limitation for relief "not hereinbefore provided for ...." NRS 608.260 **hereinbefore provided** precisely the relief Perera now seeks.

B. PERERA'S CLAIM IS PURELY AND SIMPLY FOR BACK MINIMUM WAGE

Perera seeks back minimum wage, relief that remains precisely within the purview of the Nevada Labor Commissioner, even after adoption of the Minimum Wage Amendment. Thus, according to the Nevada Labor Commissioner's July 1, 2014, Biennial Report: "Resolution of wage disputes between employers and employees is the primary service provided by the Office of the Labor Commissioner. These disputes often relate to claims that an employer was not paid for all time worked, was not paid the appropriate overtime or was not paid

timely."[7] Perera claims he was not paid for all time worked. App. at p. 49, ¶¶ 14-16.

Although the District Court held that Perera did not have a private right of action under the provisions of Chapter 608 (App. at p. 9), Perera was told that "Western Cab may have violated Nevada's Minimum Wage laws." App. at p. 214. In his solicitation letter to Western Cab's drivers, Perera's attorney, Mr. Greenberg, wrote:

> I understand that you may have worked as a taxi driver for Western Cab. I believe Western Cab may have violated Nevada's Minimum Wage laws and may owe you and many other taxi drivers unpaid minimum wages. I believe many of the taxi drivers for Western Cab were earning, from the fares collected by customers, less than the $7.25 or $8.25 an hour currently required by Nevada's Minimum Wage law.... So if you are working a full 12 hour shift, and earning less than $80 or $90 a day ***without*** including your tips you may have a claim for unpaid minimum wages.[8]

Perera filed a minimum wage claim with the Labor Commissioner on October 19, 2012, almost two years before filing his lawsuit.[9] Perera sought to recover $8.25 an hour prior to receiving health benefits and $7.25 an hour after receiving health benefits.[10]

According to NAC 607.105, the Labor Commissioner would not accept his claim based on any act or omission "that occurred more than 24 months before the

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[7] App. at p. 401.
[8] App. at pp. 207-08.
[9] App. at p. 214.
[10] App. at pp. 206-208; 38.

date" when the claim was filed. Contrary to Perera's contention on page 8 of his Answer, this two-year limitation would include overtime claims arising under NRS 608.018 and all other wage claims filed with the Labor Commissioner.

III. NEVADA'S LABOR COMMISSIONER REMAINS RESPONSIBLE FOR SETTING THE STATE'S MINIMUM WAGE

Perera argues that NRS 608.260 is inapplicable to employee claims for back minimum wage under the Minimum Wage Amendment because the Labor Commissioner is not responsible for "setting" the minimum wage and that anyone who says otherwise is intentionally misleading the Court. *See, e.g.*, Perera's argument that "whatever the Labor Commissioner is empowered, or required, to do under NRS 608.250 is ***wholly irrelevant*** to this case or any employee making a claim created by [the Minimum Wage Amendment]" and "***Nowhere does the Nevada Constitution mention the Labor Commissioner***...." Answer, p. 4 (emphasis added). Perera's position is unsupportable.

Section A of the Minimum Wage Amendment specifically directs that Nevada's minimum wage be set annually by the Governor "***or the State agency designated by the Governor***...," and that the Governor or the designated agency determine adjustments to the minimum wage based on increases in the federal minimum wage, or, if greater, by the percentage increase in the CPI, but not over 3% for any one-year period. (Emphasis added.) The Minimum Wage Amendment acknowledges that the designated State actor – either the Governor or his designee,

now by designation of the Governor, the Labor Commissioner (App. at 457) -- is responsible for announcing the new minimum wage by April 1 of each year and disseminating a bulletin containing the announcement. Thus, Sec. A of the Minimum Wage Amendment states in pertinent part:

> A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits.... ***These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living.*** The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. ***No CPI adjustment for any one-year period may be greater than 3%.*** The Governor or ***the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with*** the Governor or ***the designated agency a request to receive such a notice*** but lack of notice shall not excuse noncompliance with this section....

(Emphasis added.)

The Minimum Wage Amendment necessarily imbues some discretion in the Governor or his designee in setting the Nevada minimum wage as there must be a determination whether the cumulative increase in the cost of living as announced by the CPI is greater than any percent increase in the federal minimum wage and

the Governor or his designee must adjust and then announce the minimum wage determination by bulletin by April 1 of each year, and make the bulletin available to those requesting it.[11] This designation of responsibility to the Governor or his designee, now the Nevada Labor Commissioner, was not left by the voters to employers, employees or litigants to individually determine for themselves, as Perera argues.

Moreover, a 2007 Attorney General Opinion states, "A review of the two tiers of the Nevada minimum wage must be conducted annually, and communicated to the public with a bulletin published by April 1st of each year." Attorney General Opinion No. 2007-01, March 23, 2007, App. p. 236. The Opinion further provides:

> For example, if on March 29, 2007, the federal minimum wage was raised to $5.85, the lower tier Nevada minimum wage would become $5.85, on that day. The Amendment does not contemplate a review of the minimum wage more than once per year. It specifically calls for a publication on April 1 of each year with an effective date of July 1. Because there is no review before April 1, the upper tier

[11] As an example, since the CPI adjustment for any one year period cannot be greater than 3%, it must be up to the Governor or his designee, now the Labor Commissioner, to set the increase in the minimum wage somewhere below 3%. There is no direction in the Minimum Wage Amendment whether this may be 2.9%, 2.75%, 2.2% or even 1% -- just that it be no greater than 3%. Recent history shows us that it is not at all beyond contemplation that the CPI may increase over 3% annually. *See, e.g.,*, the U.S. Department of Labor, Bureau of Labor Statistics' 10/15/15 Chart showing increases in the CPI exceeding 3% in 2000, 2005, 2006, 2008, 2011. App. 25. Thus, the District Court erred when it concluded that "the Minimum Wage Amendment establishes a two-tiered minimum wage floor that is ***automatically*** adjusted upward without administrative discretion." App. at p. 7.

would remain at $6.15 because it is higher than the federal minimum wage. Any potential increase to the upper tier would be accomplished through the annual review conducted the following April 1 with the effective date of any increase being the following July 1.

. . . .

Further, no increase in the federal minimum wage is necessary to trigger a review or adjustment based on the cost of living. The disjunctive "or" requires one occurrence or the other but not necessarily both. *See Anderson, supra.*

. . . .

The CPI for December 31, 2004, is to be used as the base rate. The "cumulative" increase refers to the requirement that the year 2004 be used as a base with the addition of the increases to the CPI that may occur in subsequent years. *Black's Law Dictionary*, 343 (5th ed. 1979), defines "cumulative" as follows: "Additional; heaping up; increasing; forming an aggregate. The word signifies that two things are to be added together, instead of one being a repetition or in substitution of the other." Thus, the "cumulative increase in the cost of living" would be the adding together of the CPI increases from 2004 forward to form an aggregate increase in the CPI between the current year and 2004. *See Del Papa, supra.*

App. at pp. 232-34.

The Attorney General concluded:

. . . Therefore, the annual review would not be reviewing the increase of CPI from year to year but rather the total increase from 2004 forward compared to the total increase in the federal minimum wage.

The Amendment calls for the comparison of the amount of federal increase to the change in the CPI. As the federal increase is expressed in monetary terms and the change in CPI is expressed in points, a direct comparison cannot be made between monetary amounts and CPI points. Therefore, in order to do a comparison, the amounts must be converted to a similar basis, i.e. percentage change.

Using our earlier example of a seventy cent increase in the federal minimum wage on March 29, 2007, the change from $5.15 to $5.85 would be a 13.6% increase in the federal minimum wage.

The Consumer Price Index (All Urban Consumers, U.S. City Average), is calculated using 1982 as a base year, with the amount assigned to it of 100. The CPI identifies the increase in the cost of living using the baseline as the starting point. Pursuant to the Bureau of Labor Statistics, as of December 31, 2004, the CPI was 190.3. *See* http://data/bls.gov. The CPI as of December 31, 2006, was 201.8, i.e., an increase of 11.5 points over December 31, 2004. http://data/bls.gov. This 11.5 point increase from 2004 represents a 6% increase.

At the first April 1 review after the implementation of the federal increase – the seventy cents would presumably be added to the Nevada minimum wage because the 13.6% increase in the federal minimum is larger tha[n] the 6% increase in the CPI. In subsequent years, unless there was an additional increase in the federal minimum wage, there would not be an increase to the minimum wage until the CPI increase from base year 2004 to that reviewing year was greater than the percentage change in the increase to the federal minimum wage.

. . . .

Under Scenario 1, if the federal minimum wage did not increase by April 1, 2007, a comparison of the 0% change to the federal minimum wage would be compared to the 6% change in the CPI to determine any adjustment, up to a maximum 3%, with the adjusted Nevada minimum wage rate effective July 1, 2007.

. . . .

If either tier of the current Nevada minimum wage is less than the increased federal wage, that tier of the Nevada minimum wage must be raised to the federal level on the effective date established by federal law. For purposes of the April 1, 2008 review, the percentage of the federal minimum wage increase would be compared to the CPI percentage increase, to determine any adjustment to the two tiers of the Nevada minimum wage that would become effective on July 1, 2008.

. . . .

> Any increase in the federal minimum wage must take effect on the date established in the law. If either tier of the current Nevada minimum wage is less than the increased federal wage, that tier of the Nevada minimum wage must be raised to the federal level on the effective date established by federal law. A review of the two tiers of the Nevada minimum wage must be conducted annually, and communicated to the public with a bulletin published by April 1st of each year. During the review, a comparison must be made between the amount of increases, expressed as percentages, in the federal minimum wage over $5.15 per hour and the cumulative increase in the CPI from December 31, 2004. Any adjustment to the two tier minimum wage becomes effective July 1st of the same year.

App. at pp. 235-36.

In conformity with the Minimum Wage Amendment, the Nevada Labor Commissioner most recently declared the State's Minimum Wage by the April 1, 2015 Annual Bulletin.[12] Also, the Nevada Labor Commissioner's July 1, 2014, Biennial Report to the Governor and the Legislature Pursuant to NRS 607.080, states:

> **Minimum Wage Calculation**
>
> . . . .
>
> ***The Office of the Labor Commissioner is the agency designated by the Governor to make the minimum wage calculation each year and publish the bulletin announcing the rates.*** This is a duty this office takes very seriously as we understand the impact the determination of minimum wage has on the Nevada economy.
>
> In 2014, the minimum wage rates for the State of Nevada did not increase from the year before. Presently, minimum wage in

[12] App. 23.

> Nevada is $7.25 for workers offered qualified health insurance and $8.25 for workers without employer-provided health insurance.[13]

(Emphasis added.)

There is nothing in the Minimum Wage Amendment that makes its enforcement irreconcilable with NRS 608.260's two year statute of limitation. The Minimum Wage Amendment does **not** represent "relief... not hereinbefore provided for" and it is not properly subjected to the four-year catch-all statute of limitations, NRS 11.220.

IV. NRS 608.260 IS AN AVAILABLE AND APPROPRIATE STATUTE OF LIMITATIONS AS TO PERERA'S CLAIMS AND THERE IS NO NEED TO TURN TO NEVADA'S CATCH-ALL STATUTE, NRS 11.220

Perera's First Amended Complaint alleges:

> Pursuant to Article 15, Section 16, of the Nevada Constitution the named plaintiff and the class members were entitled to an hourly minimum wage for every hour that they worked for defendant and the named plaintiff and the class members were often not paid such required minimum wages.[14]

Perera then demands a judgment for minimum wage owed in "such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to, the plaintiff and the class members...." App. at p. 57. This relief is "the difference between the amount paid to the employee and the amount of the minimum wage" set forth in NRS 608.260. The difference between the amount

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[13] App. at p. 401 (emphasis added).
[14] App. at p. 55, ¶14.

paid to the employee and the amount of the minimum wage as described in NRS 608.260 is the "back pay" referred to in the Minimum Wage Amendment.

The Minimum Wage Amendment states in part at subsection B:

> An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to ***all remedies available under the law or in equity appropriate to remedy any violation of this section***, including but not limited to back pay, damages, reinstatement or injunctive relief.

(Emphasis added.)

Application of NRS 608.260's two-year statute of limitations is "available" and "appropriate" in an employee's suit for non-payment of minimum wage. NRS 11.190 provides for statutes of limitations for actions "other than for the recovery of real property" "***unless further limited by a specific statute***..." NRS 608.260 is a **specific statute** which provides a statute of limitations for the recovery of the "difference between the amount paid to the employee and the amount of the minimum wage." NRS 11.220 provides for a four-year statute of limitations for an action for relief "***not hereinbefore provided for***..." NRS 11.220 is inapplicable as an action for relief (to recover unpaid minimum wage) is **specifically statutorily** "hereinbefore provided for."

In *State Farm Mutual Automobile Insurance Company v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972), *citing* a California decision, *Automobile Ins. Co. v. Union Oil Co.*, 193 P.2d 48, 50-51 (Cal. App. 1948), this Court explained,

"'[*I*]***t is the object of the action***, rather than the theory upon which recovery is sought(,) ***that is controlling***.'"[15] (Emphasis added.) *State Farm* thus concluded that the action to recover under an uninsured motorist clause for injuries incurred as a result of a collision sounded in tort and, therefore, the two-year statute of limitations was applicable and started to run from the date the injuries were incurred. *Id.*

This Court has applied the same reasoning in other cases. For example, in *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 320-21, 130 P.3d 1280, 1282, 1286-87 (2006), this Court addressed which Nevada statute of limitations applied to private actions for relief under the federal Telephone Consumer Protection Act and held that NRS 11.190 (setting a two-year limitation on actions on a statute for a penalty or forfeiture) applied to the claim.[16] 122 Nev. at 327-28, 130 P.3d at 1286-87. *Accord Blotzke v. Christmas Tree, Inc.*, 88 Nev. 449, 450, 499 P.2d 647 (1972), where this Court found the gravamen of the action to recover damages for personal injuries was in tort and was to be so treated in considering the bar of limitations.

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[15] In *Hartford Insurance Group v. Statewide Appliances, Inc.*, 87 Nev. 195, 197, 484 P.2d 569, 571 (1971), this Court said the term "action" referred to the nature or subject matter and not to what the pleader said it was. The subject matter of Perera's Complaint is minimum wage.

[16] Perera's second claim for relief alleges a violation of NRS 608.040. App. at p. 57. His attorney admits that a two-year statute of limitations applies to that cause of action. App. at p. 417.

Federal courts in Nevada have applied the same analysis of the "object of the action" to their decisions on the applicable statute of limitations. *See Campos v. New Direction Equipment Company, Inc.*, 2009 WL 114193, at *2-3 (D. Nev. Jan. 16, 2009), where the U.S. District Court held that Nevada's two-year statute of limitations for an action to recover damages for injuries to a person applied to a strict product liability claim[17]; *Hernandez v. Washoe County*, 2009 WL 146502, at *2 (D. Nev. Jan. 20, 2009), where the federal district court held that the two-year personal injury statute of limitations, rather than the catch-all provided in NRS 11.220 applied to a Section 1983 action; *Wager v. Frehner Construction Co., Inc.*, 2011 WL 6940963, at *1 (D. Nev. Apr. 11, 2011), where the U.S. District Court found all claims resulting from a construction accident were personal injury claims and fell within the two-year statute of limitations and not NRS 11.220's catch-all limitation as plaintiff argued.

Minimum wage did not exist in the common law, but is a creature of statute, or now, a creature of statute and a Constitutional amendment in Nevada. The Minimum Wage Amendment addresses precisely the ***same object of the action*** as NRS 608.260 – recovery of back minimum wage. The recovery of the difference between the amount paid to the employee and the amount of the minimum wage is

[17] Perera contends that Western Cab "has no actual defense given the strict liability nature of the claims at issue." Answer, p. 3. Under *Campos*, a two-year statute of limitations would apply.

exactly the remedy demanded by Perera in this case.[18] The theory upon which recovery is sought is not controlling in Nevada; it is the object of the action that counts and, here, the object of Perera's action is back minimum wage or back pay. Thus, *Tyus v. Wendy's of Las Vegas, Inc.*, 2015 WL 1137734, at *2-3 (D. Nev. Mar. 13, 2015), concludes that NRS 608.260, the two-year statute of limitations "to recover the difference between the amount paid to the employee and the amount of the minimum wage," applied to a claim under the Minimum Wage Amendment as it:

> does not necessarily and directly conflict with the Minimum Wage Amendment, which would make it irreconcilably repugnant. Rather, the statutory provision can be construed in harmony with the constitution. Therefore, although the Minimum Wage Amendment is silent on a limitations period, the Court finds that this silence does not impliedly repeal the two-year statute of limitations period found in NRS 608.260. Accordingly, the Court dismisses with prejudice all wage claims accruing more than two years before Plaintiffs filed suit.

The Labor Commissioner has been designated by the Governor to set the two-tier wage rate referred to in the Minimum Wage Amendment. App. at 457. Attorney General Opinion No. 2005-04 states:

> The minimum wage changes proposed by Question No. 6, though materially different in wage outcome, applicability and civil court remedy, essentially create a new method of calculating the wage rate and ***do not attempt to alter the underlying current statutory basis for administrative enforcement of the new wage by the Labor Commissioner***. By providing for a higher minimum wage and a more extensive civil court remedy, the people intended to strengthen an

[18] Perera First Amended Complaint, App. at 56-57.

> employee's ability to assert his right to the minimum wage. The current administrative enforcement jurisdiction of the Labor Commissioner is well-suited to serve this general purpose, and it merely strengthens what the proposed amendment seeks to guarantee [sic].

App. at p. 142 (emphasis added).

When Perera filed his claim with the Labor Commissioner in October 2012, he was aware of the two-tier minimum wage. App. at 206-208. He sought $8.25 an hour prior to March 24, 2011, when he started to receive health benefits and then sought $7.25 an hour after that date. App. 207-208. He knew more than two years before he filed his lawsuit the two tiers of the Minimum Wage Amendment.

There is no reason to disregard the statutory wage and hour scheme of Chapter NRS 608. The two-year limit of NRS 608.260 is consistent with NRS 608.115's requirement that employers maintain records of wages for a 2-year period.

V. PERERA'S CASES DO NOT SUPPORT HIS ARGUMENT THAT IN ALL BUT EXCEPTIONAL CIRCUMSTANCES COURTS AROUND THE COUNTRY HAVE APPLIED A CATCH-ALL STATUTE OF LIMITATIONS TO CONSTITUTION-BASED CLAIMS WITHOUT FIRST DETERMINING WHETHER THERE IS AN ANALOGOUS OR CORRESPONDING STATUTE OF LIMITATIONS

Perera's cases do not actually support his argument that in all but a few exceptional cases, courts in general "apply a jurisdiction's 'catch-all' statute of limitations for constitutional claims when the jurisdiction has not otherwise expressly provided a statute of limitations for such claims." Answer, p. 12. In

fact, even Perera's cases prove Western Cab's point – just as when considering statute-based claims for which there is no specified limitations period, courts considering claims based on a constitutional right which does not provide a specific limitations period, search for a corresponding or analogous statute and apply the jurisdiction's catch-all limitation ***only in the absence of a corresponding or analogous statute***.

First, Perera's reliance on *White Pine Lumber Co. v. City of Reno*, 106 Nev. 778, 801 P.2d 1370 (1990), is completely unjustified. In *White Pine*, a landowner sued alleging that the City of Reno's requirement that the landowner dedicate a separate parcel of land for use by the city as a condition of approval of a condominium project constituted a wrongful taking. The district court applied the four-year catch-all statute of limitations, NRS 11.220 ("An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued"). This Court reversed, directing application of the 15-year limitation of NRS 40.090 applicable to actions for adverse possession. In reaching this decision, this Court applied the general rule preferring application of the analogous or corresponding statute of limitations before turning to the catch-all statute:

> A majority of courts that have considered the issue have applied the adverse possession statute rather than the 'catch all' provision, to 'takings' claims. (Citations omitted.)

> In *Frustuck v. City of Fairfax*, 212 Cal. App.2d 345, 374, 28 Cal. Rptr. 357, 374-75 (1963), cited by this court with approval in *Alper v. Clark County*, 93 Nev. 569, 571 P.2d 810 (1977), the court applied this majority rule. The *Frustuck* court reasoned that the landowner's right of recovery grows out of his title to the land, and thus the landowner should have a right to bring the action until he has lost title to the land by virtue of adverse possession. *Id.*, 212 Cal.App.2d at 374, 28 Cal. Rptr. at 374-75.

108 Nev. at 780, 601 P.2d at 1371. *Alper v. Clark County,* 93 Nev. 569, 571 P.2d 810 (1977), discussed *supra* in *White Pine*, does not support Perera's position, but instead expressly rejects application of the "catch all" statute to an inverse condemnation action, also relying on the County's express waiver, promising not to assert any prescriptive rights in the property at issue.

Next, Perera recites a list of cases he describes as proving that in every case that his counsel could find, the courts applied the jurisdiction's catch-all statute to constitutionally-based claims. That is not even facially true, since those courts first searched for an analogous statute of limitations before turning to a catch-all statute. For example, in Perera's first case, *Ho v. University of Texas at Arlington*, 984 S.W.2d 672, 687 (Tex. App. 1998), the Court applied Texas's four-year catch-all or "residual" statute because "Ho's constitutional claims ***are not analogous to any of those listed in the one and two-year limitation statutes***." (Emphasis added.) *See also, id.* ("we cannot rely on the federal cases to support a finding that an equal protection claim under the Texas Constitution is ***analogous*** to a personal injury claim, and therefore, subject to the two-year statute of limitations" (emphasis

added)); and at p. 686 ("***If***, after characterizing the plaintiff's action, ***there is no corresponding action expressly listed within the statutes, then the residual four-year statute of limitations applies***" (emphasis added)).

Lindner v. Kindig, 826 N.W.2d 868, 874 (Neb. 2013), also cited by Perera for the same proposition, "potentially applied" what it calls the "4-year catchall statute of limitations" in a case brought by a taxpayer seeking a judicial declaration that a municipal ordinance creating an offstreet parking district was unconstitutional. It is not surprising that the Nebraska Supreme Court found no "corresponding" or "analogous" statute for such a claim. *Lindner* remanded for further proceedings to address when the plaintiff's claim had actually accrued.

The history of the decision in *Pauk v. Board of Trustees of City University of New York*, 464 N.Y.S.2d 953 (N.Y. Sup.Ct. 1983), *order affirmed as modified, Pauk v. Board of Trustees of City University of New York*, 488 N.Y.S.2d 685 (N.Y.A.D. 1985), *aff'd,* 506 N.Y.S.2d 308 (N.Y.A.D. 1986), defeats Perera's argument. In fact, while New York's catch-all statute of limitations might have been in play for a time, the New York courts ultimately determined that although the plaintiff, a terminated professor, could not have brought his breach of contract claim in his original administrative suit for reinstatement, because all of his claims arose out of essentially the same or related facts and sought essentially the same

relief, Pauk had no separate claim. He was barred from proceeding further based on the administrative body's rejection of his position.

Next, Perera's reliance on *Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir. 1980), fails as the case was overruled by *Van Strum v. Lawn*, 940 F.2d 406 (9th Cir. 1991). *Marshall* concluded that the four-year catch-all statute of limitations applied to claims for alleged discrimination by a black owner of a small business. But, *Van Strum* then reversed, holding that the two-year statute of limitations for personal injuries applied, with the constitutional basis of the claim no impediment. Relying on the U.S. Supreme Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), applying the two-year personal injury statute of limitations to claim brought under 42 U.S.C. §1983, the Ninth Circuit concluded that the two-year statute for personal injuries was ***most analogous*** and applicable to constitutionally-based claims for alleged racial discrimination:

> In *Wilson*, the Supreme Court addressed the question of the appropriate statute of limitations to be applied to §1983 actions. Congress has not established a specific time limitation for §1983, but instead directs adoption of state limitations if they are not inconsistent with federal law. 41 U.S.C. §1988. *Wilson* determined that, in choosing the relevant state limitation, all §1983 claims should be characterized in the same way, regardless of the varying factual circumstances and legal theories presented in each case. Furthermore, *Wilson* found that the state statute of limitations for personal injury was the choice that best effectuated §1983's objectives.
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> .... Actions under §1983 and those under *Bivens* are identical save for the replacement of a state actor under §1983 by a federal actor under *Bivens*. Like §1983 actions, the purposes of *Bivens*

> actions are best served through a uniform, easily applicable limitations period that is unlikely to discriminate against interests protected by the Constitution. Moreover, the rationale for applying the statute of limitations for personal injury applies with even greater force to *Bivens* actions, which come solely from the provisions of the Constitution protecting personal rights.[19]

Van Strum, 940 F.2d at 408-409.

Finally, Perera's statement that "[e]very analogous case" that could be found by his counsel, "except one" – *Sheffer v. U.S. Airways*, 2015 WL 3458192 (D.

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[19] In 1990 Congress enacted 28 U.S.C. §1658, stating at subsection (a): "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of enactment of this section may not be commenced later than 4 years after the cause of action accrues." *See* discussion in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004), concluding that a "cause of action 'aris[es] under an Act of Congress enacted' after December 1, 1990 – and therefore is governed by §1658's 4-year statute of limitations – if the plaintiff's claim against the defendant was made possible by a post-1990 enactment. That construction best serves Congress's interest in alleviating the uncertainty inherent in the practice of borrowing state statutes of limitations while at the same time protecting settled interests." Perera's construction of the Minimum Wage Amendment as uprooting employers' "settled expectations" of a two-year statute of limitations for back minimum wage is upset by his reading into the Minimum Wage Amendment a rejection of NRS 608.260's applicability to employees previously excluded by NRS 608.250(2) from applicability of the minimum wage. There is no justification for doing so given the Minimum Wage Amendment's reference in Subsection B to "remedies available in law or in equity appropriate to remedy any violation of this section, including but not limited to back pay...," a remedy addressed by NRS 608.260.

Nev., 2015)[20] – has adopted a jurisdiction's "catch-all" statute of limitations for constitutional claims when the jurisdiction has not otherwise provided, is wrong in that, among other cases, it ignores all of the decisions of the U.S. District Court of Nevada which have applied the 2-year limitation contained in NRS 608.260 to claims brought under the Minimum Wage Amendment, *e.g.*, *Tyus v. Wendy's of Las Vegas, Inc.*, 2015 WL 1137734, at *3 (D. Nev. 2015) ("although the Minimum Wage Amendment is silent on a limitations period, the Court finds that this silence does not impliedly repeal the two-year statute of limitations period found in NRS 608.260"); *Hanks v. Briad Restaurant Group, LLC*, 2015 WL 4562755, at *6-7 (D. Nev. July 27, 2015) ("the Court finds that the Minimum Wage Amendment's silence does not impliedly repeal the two-year statute of limitations found in section 608.260 and that the two-year limitation period applies to minimum wage claims brought under the amendment"); *McDonagh v. Harrah's Las Vegas, Inc.*, 2014 WL 2742874, at *4 (D. Nev. June 17, 2014) ("the court finds that the constitutional provision was not intended to change this two-year statute of limitations").

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[20] The July 14, 2015, decision in *Sheffer v. U.S. Airways, Inc.*, 2015 WL 4276239 (D. Nev. July 13, 2015), declined reconsideration of the Court's June 1, 2015, application of the 3-year statute of limitations applicable to actions upon a statute, NRS 11.190(3)(a), as announced in *Sheffer v. U.S. Airways, Inc.*, 2015 WL 3458192 (D. Nev. June 1, 2015). By the second *Sheffer* decision, however, U.S. District Judge Robert C. Jones offered plaintiff consideration of a request to certify the question to the Nevada Supreme Court.

In *Mengelkamp v. List*, 88 Nev. 542, 545-46, 501 P.2d 1032, 1034 (1972), this Court held that a statute containing age limitations for candidates for state office was not impliedly repealed by a constitutional amendment granting 18-year-olds the right to vote. Perera cites *Livadas v. Bradshaw*, 512 U.S. 107 (1994), in a footnote on page 6 of his Answer for the proposition that a labor union can waive an employee's state law labor protections. However, in *Livadas*, the United States Supreme Court held that the California Labor Commissioner's policy of not enforcing a wage penalty statute for union employees was preempted by federal labor law. *Id.* at 110. The Commissioner treated employees who were represented by unions differently from employees who were not. *Id.* at 110-12, 126. Here, Thompson states that the only purpose of the two-tier minimum wage is to treat union and non-union employers differently. App. 18, 21.

Perera's cases do not support his position that claims based on constitutional provisions or amendments are subject to state catch-all statutes of limitations when there is a corresponding or analogous state statute of limitations. There is nothing more corresponding or analogous than NRS 608.260's two-year statute of limitations for statutory back minimum wage to Perera's claim for constitutional back minimum wage.

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VI. CLARIFICATION BY WRIT IS NECESSARY TO CORRECT THE CONTINUING CONFUSION IN THE STATE'S TRIAL COURTS AS TO THE STATUTE OF LIMITATIONS APPLICABLE TO CLAIMS UNDER THE MINIMUM WAGE AMENDMENT

Since Western Cab's writ petition was filed, additional matters have come to its attention demonstrating the confusion in the State's trial courts warranting this Court's intervention. For example, on August 24, 2015, District Judge Herndon entered an order in Case No. A-12-668502-C, Barbara Gilmour, Plaintiff, v. Desert Cab, Inc., Defendant, in which he applied the two-year statute of limitations as an "available" and "appropriate" remedy as to plaintiff's claim for back minimum wages. App. 24, p. 3.

As to other issues under the Minimum Wage Amendment, the question of whether an employee must 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, is now before the Nevada Supreme Court in Case Nos. 68770 (*State of Nevada, ex rel. Office of the Labor Commissioner v. Hancock*); 68754 (*Kwayisi v. Wendy's of Las Vegas*); and 68845 (*Hanks v. Briad Restaurant Group*).

VII. CONCLUSION

Clarification of the present dispute by application of NRS 680.260's two year statute of limitations to all claims for back minimum wage under Nevada law is the proper result to clarify this frequently occurring issue. For example, in

construing the authority of a district judge sitting in the family court, this Court instructed that "Constitutional interpretation utilizes the same rules and procedures as statutory interpretation" and that "the interpretation of a ... constitutional provision will be harmonized with other statutes." *Landreth*, *supra*, 251 P.3d at 166, *citing We the People Nevada, supra*, 124 Nev. at 881, 192 P.3d at 1170.

Perera's arguments reject this approach and accuse Western Cab of ignoring the "constitutional nature of the claims at issue." But, it is Perera who ignores the fact that despite the "constitutional nature" of the basis for his claim for back minimum wage, the Minimum Wage Amendment contains no statute of limitations, but authorizes employees seeking relief to bring actions for "***all remedies available under the law or in equity appropriate*** to remedy any violation" of the Amendment. (Emphasis added.) The most reasonable, analogous and corresponding limitation is contained at NRS 608.260 – the two-year statute for claims for back minimum wage -- and that two-year limitation is reasonably applied to claims for back minimum wage brought by employees such as Perera,

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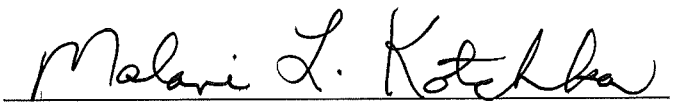
who were not subject to the minimum wage by operation of former NRS 608.250(2). The Court should now clarify this issue by writ relief.

HEJMANOWSKI & McCREA, LLC



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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)94), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) as it is 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 37(a)(7) because, excluding parts of the brief excepted by NRAP 32(a)(7)(C), it does not exceed 6,986 words.

Finally, I hereby certify that I have read this Amicus Brief, and to be best of my knowledge, information, and belief, it is not frivolous or interposed for any proper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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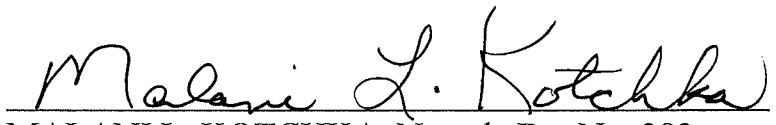

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 23rd day of November, 2015, to the following:

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And a true and correct copy of the foregoing **PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** was served via first class, postage-paid U.S. Mail on this 23rd day of November, 2015, to the following:

The Honorable Linda Marie Bell
District Court Judge
Eighth Judicial District Court of Nevada
200 Lewis Avenue, #3B
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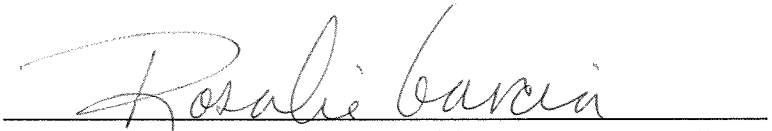

An Employee of Hejmanowski & McCrea LLC