IN THE SUPREME COURT OF THE STATE OF NEVADA

MDC RESTAURANTS, LLC, A NEVADA LIMITED LIABILITY COMPANY; LAGUNA RESTAURANTS LLC, A NEVADA LIMITED LIABLITY COMPANY; AND INKA LLC, A NEVADA LIMITED LIABILITY COMPANY,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK AND THE HONORABLE TIMOTHY WILLIAMS, DISTRICT JUDGE,

Respondents,

and

PAULETTE DIAZ, AN INDIVIDUAL; LAWANDA GAIL WILBANKS, AN INDIVIDUAL; and CHARITY FITZLAFF, AN INDIVIDUAL, ALL ON BEHALF OF THEMSELVES AND ALL SIMILARLY-SITUATED INDIVIDUALS,

Real Parties in Interest.

Case No. 68523

Eighth Judicial District Court Case No. A-14-701633-C

District Court Dept. No. 16
Honorable Timothy C. Williams

COLLINS KWAYISI, AN INDIVIDUAL, Appellant, vs. WENDY'S OF LAS VEGAS, INC., AN OHIO CORPORATION; AND CEDAR ENTERPRISES, INC., AN OHIO CORPORAITON, Respondents.	**Case No. 68754** United States District Court, District of Nevada, Case No. 2:14-cv-00729-GMN-VCF Honorable Gloria M. Navarro
THE STATE OF NEVADA, OFFICE OF THE LABOR COMMISSIONER; AND SHANNON CHAMBERS, NEVADA LABOR COMMISSIONER IN HER OFFICIAL CAPACITY Appellants, vs. CODY C. HANCOCK, AN INDIVIDUAL, Respondent.	**Case No. 68770** First Judicial District Court Case No. 14 OC 00080 1B District Court Dept. No. 2 Honorable James E. Wilson, Jr.
ERIN HANKS, Appellant, vs. BRIAD RESTAURANT GROUP, L.L.C., A NEW JERSEY LIMITED LIABILITY COMPANY, Respondent.	**Case No. 68845** United States District Court, District of Nevada, Case No. 2:14-cv-00786-GMN-PAL Honorable Gloria M. Navarro

RESPONDENT BRIAD RESTAURANT GROUP, L.L.C.'S ANSWERING BRIEF AND ANSWER TO WRIT OF PETITION;

RESPONDENTS WENDY'S OF LAS VEGAS, INC.'S AND CEDAR ENTERPRISES, INC.'S ANSWERING BRIEF AND ANSWER TO WRIT OF PETITION;

AND

PETITIONERS MDC RESTAURANTS, LLC'S, LAGUNA RESTAURANTS LLC'S, AND INKA LLC'S REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Briad Restaurant Group, L.L.C. is a privately-held company and no publically traded company owns 10% or more of Briad Restaurant Group, L.L.C.'s stock. There are no other known interested parties other than those participating in this case.

2. Wendy's of Las Vegas, Inc. is a privately-held foreign corporation and no publically traded company owns 10% or more of Wendy's of Las Vegas, Inc.'s stock. There are no other known interested parties other than those participating in this case.

3. Cedar Enterprises, Inc. is a privately-held domestic corporation and no publically traded company owns 10% or more of Cedar Enterprises, Inc.' stock. There are no other known interested parties other than those participating in this case.

4. MDC Restaurants, LLC, is a privately-held company and no publically traded company owns 10% or more of MDC Restaurants, LLC's stock. There are no other known interested parties other than those participating in this

case.

5. Laguna Restaurants, LLC, is a privately-held company and no publically traded company owns 10% or more of Laguna Restaurants, LLC's stock. There are no other known interested parties other than those participating in this case.

6. Inka, LLC, is a privately-held company and no publically traded company owns 10% or more of Inka, LLC's stock. There are no other known interested parties other than those participating in this case.

Dated: December 14, 2015

Respectfully submitted,

/s/ Montgomery Y. Paek
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I. INTRODUCTION

The plain language of the Minimum Wage Amendment, Nev. Const. art. XV, § 16, ("MWA") states that employers must provide or offer health insurance to their employees and pay the federal minimum wage or, alternatively, pay a dollar more per hour. In fact, not only are provide and offer used synonymously in the MWA, but the MWA further defines "offering" as "making health insurance available." For nearly a decade, the only authority interpreting the MWA, has been the Nevada Labor Commissioner whose regulations also echo that the MWA requires that health insurance be "offer[ed]" or "ma[de] available." Thus, employers' long history of reliance on these regulations also implicates violations of due process for any retroactive change which would be contrary to the plain language of the MWA and the regulations.

Further, the intent and purpose of the MWA is clear: employers who seek out health insurance plans and make those plans available for their employees are subject to one minimum wage rate whereas employers who take no action and do not make health insurance available for their employees are subject to another. The benefit of the MWA for the employees is equally as obvious. They will either have a low-cost insurance option available to them that they otherwise may not have been able to obtain on their own, or they will be paid a dollar more per hour.

Appellants in *Erin Hanks et al., v. Briad Restaurant Group, L.L.C.*, ("*Hanks*"), and *Collins Kwayisi et al., v. Wendy's of Las Vegas et al*. ("*Kwayisi*"), and Real Parties in Interest in *Paulette Diaz et al., v. MDC Restaurants et al*., ("*Diaz*"), (collectively "Plaintiff-Appellants"), originally filed their complaints using "provide" and "offer" synonymously as well. However, when discovery revealed that Respondents Briad Restaurant Group, L.L.C.; Wendy's of Las Vegas, Inc; and Cedar Enterprises, Inc. and Petitioners MDC Restaurants, LLC; Laguna Restaurants, LLC; and Inka, LLC (collectively "Defendant-Respondents") had indeed *offered* health insurance, Plaintiff-Appellants changed their arguments and painted a wildly different picture by dreaming up a completely different requirement into the MWA – that employees must be "enrolled" in high-end insurance plans. This, of course, is not what the plain language of the MWA says, is not what the MWA intended, and is completely nonsensical.

Accordingly, there is only one logical outcome of the issue presently before the Court. The unambiguous language of the MWA, the implementing regulations, and every other source and policy confirm that health insurance is provided within the meaning of the MWA when an employer makes health insurance available via offering health insurance to its employees.

II. FACTS AND PROCEDURE

A. NRAP 5 Certified Questions in *Kwayisi* and *Hanks*.

On April 30, 2015, Plaintiff-Appellants in the underlying matter to *Kwayisi*[1], filed a Motion for Partial Summary Judgment alleging that under the MWA's lower-tier rate, the word "provide" should be interpreted as requiring an employee to be "enrolled" in health insurance rather than its plain-language meaning of "offering" or "making available." Consolidated Answer and Reply Brief Appx. ("CA") Vol. I, 001-021. The matter was fully briefed in *Kwayisi* Respondents' Response and *Kwayisi* Plaintiff-Appellants' Reply. CA Vol. I, 022-036; 037-055. Similarly, on September 8, 2015, Plaintiff-Appellants in the underlying matter to *Hanks*[2], filed a Motion for Partial Summary Judgment alleging their same "provide" means "enrolled" interpretation. CA Vol. I, 056-119.

On August 21, 2015 in *Kwayisi* and on September 15, 2015 in *Hanks*, the Federal district court certified a question of law regarding the meaning of "provide" under the MWA to this Court through NRAP 5. *Kwayisi* Appellant Appx. at 58-69; *Hanks* Appellant Appx. at 45-48 and 49-53. Thus, the Federal district court certified the following question to this Court in those cases:

> *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, § 16.*

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[1] *Tyus et al. v. Wendy's of Las Vegas, Inc. et al.*, United States District Court case number 2:14-cv-00729-GMN-VCF.

[2] *Hanks et al. v. Briad Restaurant Group, L.L.C.*, United States District Court case number 2:14-cv-00786-GMN-PAL.

(*Kwayisi* Appellant Appx. at 58-69; *Hanks* Appellant Appx. at 49-53) (Emphasis in original). On October 9, 2015, this Court issued an Order Accepting the Certified Question in both *Kwayisi* and *Hanks*. CA Vol. I, 120-125.

B. Petition for Writ in *Diaz et al., v. MDC Restaurants et al.* ("*Diaz*").

The factual and procedural history in *Diaz* is set forth in *Diaz* Petitioners' Petition for Writ of Mandamus or Prohibition and is incorporated herein. ***Diaz* Petition for Writ of Mandamus or Prohibition ("*Diaz* Petition") at pp. 2-12.** As with the NRAP 5 certified questions in *Kwayisi* and *Hanks*, the *Diaz* matter shares the same question regarding the meaning of "provide" under the MWA. ***Diaz* Petition at pp. 1-2.** (Emphasis added).

Based on this same question being presented, on November 13, 2015, this Court consolidated the *Diaz*, *Kwayisi, Hanks,* and *Hancock* matters and ordered a combined Answering brief be filed by Respondents in *Kwayisi* and *Hanks* and Reply brief by Petitioners in *Diaz*. CA Vol. I, 126-130.

III. LEGAL ARGUMENT

The MWA sets forth a very clear directive for Nevada employers paying minimum wage: if they provide health insurance to their employees, they may pay the federal minimum wage. Nev. Const. art. XV, § 16. Indeed, the parties agree that this is inherent in the plain language of the MWA. ***See* Diaz Answer at 6:3-17;** (Diaz Appx. at 45); CA Vol. I, 001-021 and 056-119. The disagreement

therefore, rests solely on what is meant by the word "provide." Defendant-Respondents take the position that the word provide, as used in the MWA, has its common place meaning "to make available." <http://www.merriam-webster.com/dictionary/provide>. An employer provides health insurance by subscribing to a health insurance plan that is made available to its employees. Plaintiff-Appellants, reject this common sense definition. Instead they argue, an employer does not "provide" health insurance within the meaning of the MWA, unless its employees actually choose to enroll in the health insurance plans provided by the employer.

Ultimately, Defendant-Respondents' position prevails for four key reasons: (1) the plain language of the MWA states that "provide" means to "offer" or "mak[e]. . . available"; (2) the regulations implementing the MWA also specifically state that employers need only "offer" or "make available" health insurance; (3) the "history, purpose, and policy" of the MWA does not support adding language for enrollment or acceptance; and (4) the retroactive effect of creating any enrollment or acceptance requirement would be a violation of due process.

A. The Plain Language of the MWA States That "Provide" Means to "Offer" or "Mak[e]. . . available."

When the words of a statute have a definite and ordinary meaning, the Court should not look beyond "the plain language of the statute, unless it is clear that this

meaning was not intended." *Harris Associates v. Clark Cnty. Sch. Dist*., 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003) (*citing State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001)); *see also Glover v. Concerned Citizens for Fuji Park*, 118 Nev. 488 (2002) (stating that "[i]t is well established that when the language of a statute is unambiguous, a court should give that language its ordinary meaning"), *overruled in part by Garvin v. Dist. Ct*., 118 Nev. 749 (2002). Here, the plain language of the MWA 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. 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.

Nev. Const. art. XV, § 16. These two sentences in the MWA are the complete and only reference to "provid[ing] health benefits." *Id*. The second sentence clarifies that "provides health benefits" is "offering health benefits" which "shall consist of making health insurance available to the employee." *Id*. Thus, the MWA's plain language uses the terms "provide[]", "offer[]" and "mak[e] health insurance available" as interchangeable synonyms in these two sentences. *Id*. Conversely, the MWA <u>has no language</u> regarding an employee actually "enroll[ing]" or "accept[ing]" any offered health benefits. *Id*. In fact, the MWA has no language

regarding any action by the "employee" whatsoever as the offering of health benefits only refers to the "employer" making health insurance available. Accordingly, the plain language of the MWA itself evinces that the legislature further defined "provide[]" as "offer[]" or "mak[e]. . . available."

Additionally, the plain language of the MWA indicates that these two sentences must be read together as they reference each other. No other sentences in the MWA state how health benefits are provided or offered. Instead, the first sentence above states "if the employer provides health benefits as described herein." *Id*. (Emphasis added). Then, the following sentence states the corollary of "[o]ffering health benefits within the meaning of this section shall consist of making health insurance available." *Id*. (Emphasis added). Thus, reading the two sentences together, the legislature clearly intended the phrase "provides health benefits" to be further "described" as "offering health benefits" which, within the meaning of Section A of the MWA, would be "making. . . available."

Under the MWA, if an employer provides health insurance for its employees, it may pay those employees the lower-tier minimum wage. The plain and ordinary meaning of the word "provide" is "to make available." *See infra*. Thus, if an employer makes health insurance available to its employees – in other words offers health insurance to its employees – it may pay the lower tier minimum wage. In addition to the plain language of the MWA cited above, the

common understanding of "provide" is to "offer" or "make available."

1. The dictionary definition of "provide" is also "to make available."

In an attempt to contort the very straight-forward directive of the MWA, Plaintiff-Appellants request that this Court adopt a nonsensical definition of the word "provide." Specifically, they assert that the word "provide" means that there must be some form of acceptance or assertion of control or possession by the person to whom a service or item is being provided. In other words, according to Plaintiff-Appellants, a service or item has not been provided unless the person for whom the service or item is intended actually uses or takes that service or item. In an effort to further this argument, Plaintiff-Appellants point out that "provide" is synonymous to "supply" or "furnish." However, at no point do they ever look to the actual definition of the word "provide" or even to the definitions of "supply" or "furnish." This is likely because, "provide," "supply," "furnish," and "offer" are all, in fact, synonymous with one another and none of them require any acceptance or control of possession by the party to whom the service or item is being provided, supplied, furnished, or offered. *See i.e.* <http://www.synonym.com/synonyms/provide>. Indeed, every single definition of the word "provide," including the definitions used by the sources Plaintiff-Appellants cite, in no way indicate that there must be some acceptance or action taken by the person for whom an item or service is being provided. For example, Plaintiff-Appellants

direct the Court to the online Meriam-Webster Dictionary's *Thesaurus* definition for the word provide. ***Diaz* Answer at 8:25-96; *Hanks* Opening Brief at 7:18-27; *Kwayisi* Opening Brief at 7:17-26**. However, that definition explains that there is no need for actual acceptance or use:

> **PROVIDE**
> to put (something) into the possession of someone for use or consumption <this luxury hotel provides all the comforts of home to well-heeled vacationers>

<http://www.merriam-webster.com/thesaurus/provide>. As the example sets forth, providing is the same as making available for use. If a "well-heeled vacationer" does not use or keep the towels, it doesn't mean the "comforts of home" weren't provided. The towels, like the health insurance at issue here, was there for the use or taking. It does not matter whether the towels were then actually used or taken. If the towels were available for use, they were provided – plain and simple. For example, if person A invites person B over for dinner and then prepares and offers person B dinner, person A has provided person B dinner regardless of whether person B eats the food provided. What matters is that dinner was made available. Another example would be city busses. A city may provide busses for its residents; however, just because a particular resident may choose not to take the bus that does not mean that resident can claim the city does not provide busses for his use.

Next, Plaintiff-Appellants completely glaze over the actual *dictionary*

definition of the word "provide." ***Diaz* Answer at 8:25-96; *Hanks* Opening Brief at 7:18-27; *Kwayisi* Opening Brief at 7:17-26**. The online Merriam-Webster Dictionary defines "provide" as follows:

> **Provide:**
> : to make (something) available : to supply (something that is wanted or needed)
> : to give something wanted or needed to (someone or something) : to supply (someone or something) with something
> . . .
> : to supply or make available (something wanted or needed) <provided new uniforms for the band>; *also* : afford <curtains provide privacy>
> : to make something available to <provide the children with free balloons>

<http://www.merriam-webster.com/dictionary/provide> (emphasis added). Thus, according to Plaintiff-Appellants own source, which they cite to but do not actually discuss in their briefing, the very first definition of the word "provide" is "to make available." *Id*. Nowhere in this definition is there a requirement that the person being provided an item or service must actually use or accept that item or service in order for it to be considered "provided."

Similarly, The Random House Dictionary of the English Language, 2nd ed., Unabridged, 1556 (1987) defines "provide" as "to make available." This is also true in the definition given by Black's Law Dictionary: "An act of furnishing or supplying a person with a product." <http://thelawdictionary.org/provide/> (Black's Law Dictionary Online). Thus, if a person furnishes or supplies a

product, they have made it available. There is no requirement that the supplied or furnished product is accepted or used or taken into possession by the offeree.

Another source, and one which arguably offers the most "ordinary and everyday meaning" of the word "provide," is Google. Indeed, there is no other definition of "provide" that is more "accessible, ordinary, or everyday" in today's world than that given by a simple internet search. Accordingly, a Google search of "provide definition" gives the following result:

> **pro·vide**
> *verb*
> 1. make available for use; supply.
> . . .
> 2. make adequate preparation for (a possible event).

<https://www.google.com/#q=provide>. If a Nevada voter or minimum wage worker were curious about the definition of the word provide, this is more than likely the definition they would locate first. Thus, it would be clear that this definition, like all the others, in no way requires acceptance or use by the person to whom a service or item is being provided.

To further belabor this point, yet another source that defines "provide" is Roget's II: The New Thesaurus. *Roget's II: The New Thesaurus. 3rd ed. Boston: Houghton Mifflin*, 1995. Therein, "provide" is defined as "[t]o make (something) readily available." *Id*., at 647, 701. Indeed, every single definition of the word "provide" is the same. It means to make available for use. There is no ambiguity

and there is no requirement of actual acceptance or use. The definition of the word "provide" is "to make available for use."

Plaintiff-Appellants attempt to dispute the common definitions of "provide" by making vague assertions about what they believe the Labor and Insurance Codes may imply via the interchanging use of the words "provide" and "offer." ***Diaz* Answer at 9:7–10:14; *Hanks* Opening Brief at 8:1-9:12; *Kwayisi* Opening Brief at 7:27-9-11.** The flaw in their premise, however, is that every single example they give of the word "provide" being used could easily be replaced with "make available" and even "offer" and the statutes would maintain the identical meaning. ***Id*., fn. 3.** For example, Plaintiff-Appellants cite NRS 608.156(1)'s language that "[i]f an employer provides health benefits for his or her employees, the employer shall provide benefits for the treatment of abuse of alcohol and drugs." *Id*. (Emphasis added). If "provide" is replaced by "offer" or "make available" in this sentence, NRS 608.156(1) still has the same meaning. On the other hand, if "provide" was replaced with a phrase consistent with Plaintiff-Appellant's arguments such as "has employees accept or enrolled in", it would lead to an absurd reading that any employees enrolled in health benefits must necessarily also be enrolled in the treatment for alcohol and drug abuse.

Further, Plaintiff-Appellants hypothesize that "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." ***Diaz*** **Answer at 9:7 – 10:14;** ***Hanks*** **Opening Brief at 8:1-9:12;** ***Kwayisi*** **Opening Brief at 7:27-9-11** (emphasis in original). Thus, Plaintiff-Appellants are asserting that the word "provide" in the Labor and Insurance Code context carries <u>*two*</u> meanings: first, it means employees must accept the described insurance; and second, the described insurance must make available coverage for certain treatments. This latter meaning of course completely contradicts their entire argument; however, carrying Plaintiff-Appellants' argument to its logical end and as discussed above, if the Court were to accept Plaintiff-Appellants' definition of the word "provide," if an employee does not obtain treatment for drug and alcohol abuse, then that employee could assert that his or her "employer-provided" insurance does not provide coverage for drug and alcohol abuse. Whether or not any treatment coverage was actually provided by an insurance plan, under Plaintiff-Appellants' argument, would depend on the individual employees personal needs and decisions. Such a construction is completely illogical.

Accordingly, as explained above, the plain language of the MWA is clear: if an employer makes insurance available to its employees, it may pay those employees the lower-tier minimum wage. It is that simple.

2. Plaintiff-Appellants' unreasonably restricted definition of the word "provide" renders the language of the MWA nugatory.

Whenever possible, statutes are construed "such that no part of the statute is rendered nugatory or turned to mere surplusage" or to "produce absurd or unreasonable results." *Albios v. Horizon Communities, Inc*., 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006); *Harris*, 119 Nev. at 642, 81 P.3d at 534.

As noted above, directly after setting forth that employers must "provide" insurance, the MWA very next sentence goes on to explain exactly what providing health insurance means by stating:

> 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.

Thus, the MWA uses the terms "provide" and "offer" synonymously. Further, this sentence on "offering" also clarifies what sort of insurance should be provided by the employer by setting a 10 percent of gross taxable income threshold. Thus, the use of the word "offering" is relevant and it is directly addressing whether an employer qualifies to pay the lower-tier minimum wage. To assert otherwise would be nonsensical and require that this sentence stating "offering. . . shall consist of making health insurance available" be rendered as meaningless.

Here, Plaintiff-Appellants have requested that this Court adopt a definition

of the word "provide" that is so restrictive that whether an employer offers insurance to its employees would have no bearing whatsoever on whether that employer is permitted to pay the lower-tier minimum wage. This is in complete contrast to the actual language of the MWA. Plaintiff-Appellants contest the obvious use of the word "offer" in the MWA by asserting that contract law is somehow relevant to the analysis. ***Diaz* Answer at 14:2-8; *Hanks* Opening Brief at 12:17-23; *Kwayisi* Opening Brief at 12:12-18**. Specifically, they assert that because there is an offer and acceptance in the formation of a contract, the drafters of the MWA must have contemplated that "provide" means the acceptance of the offered insurance:

> Offering those particular benefits is a predicate act; there must be an offer before one can accept those benefits, before those benefits can be provided. That is basic contract law: an offer must precede acceptance, and an acceptance is what constitutes provision.

Id. Contract law of course is in no way material to the MWA. Statutes are externally imposed standards, not negotiated terms of a contract. *Descutner v. Newmont USA Ltd*., 2012 WL 5387703, at *2 (D. Nev. Nov. 1, 2012). Indeed, the MWA does not discuss any action whatsoever that must be taken by the employee, let alone a meeting of the minds, consideration, acceptance, or even performance. Plaintiff-Appellants are essentially asserting that the MWA contemplates some portions of a contract – those which are convenient to their argument – because the word "offering" is used and therefore "acceptance is what constitutes provision."

Id. It is an entirely self-serving argument. If "acceptance" was so clearly the intent of the MWA, then it should have and would have been included in the text. Plaintiff-Appellants are essentially asking the Court to legislate from the bench and read into the MWA a clause that does not exist.

The MWA does not need to be expanded upon. The use of the word "offering" after the directive to "provide" insurance is an explanation of exactly what providing health insurance means. It is not hinting at pieces of contract law, it is not suggesting that "provide" means "acceptance," nor is it contemplating any action whatsoever by the employee. Plaintiff-Appellants are grasping for straws and there is no reason to deviate from the plain-language definition of the word "provide" for the purpose of conforming to contract law.

Next, Plaintiff-Appellants assert that "provide" and "offer" are not interchangeable because they are not linguistically synonymous. ***Diaz* Answer at 15:8-16-2; *Hanks* Opening Brief at 12:24-13:21; *Kwayisi* Opening Brief at 12:19-13:16**. This completely contradicts their own use of the words "provide" and "offer" in their pleadings and, additionally, avoids the fact that the definition of the word "provide" is "to make available." *See infra*. Moreover, as discussed above, "provide" and "offer" are in fact synonymous. <http://www.synonym.com/synonyms/provide>. Deaf to this reality, Plaintiff-Appellants assert that Defendant-Respondents "cannot point to instances where 'provide' and 'offer' are

used synonymously." ***Diaz* Answer at 15:8-16-2; *Hanks* Opening Brief at 12:24-13:21; *Kwayisi* Opening Brief at 12:19-13:16**. Of course, Defendant-Respondents have in fact pointed to numerous instances thoughout the briefing on this issue wherein "provide" and "offer" are used synonymously and interchangeably, one key instance being Plaintiff-Appellants' own pleadings. *See infra*. Moreover, Plaintiff-Appellants also define offering benefits as "making them available;" thus adding to the hypocrisy of their argument. ***Id.*** Several other examples include every single definition of the word "provide" and a review or the synonyms to the work "provide." <http://www.synonym.com/synonyms/provide>. In sum, it is quite simply basic English that "provide" and "offer" can and often are used interchangeably and "providing" insurance plainly means making insurance available.

Next, looking to the subject matter of the MWA – minimum wage and insurance – it is clear making insurance available to minimum wage employees was the goal. It was not to allow minimum wage employees to select their own rate of pay. Such a result would be completely contrary to the concepts of both minimum wage and insurance. Enrolling in insurance is a voluntary process. Minimum wage employees are free to choose, just as anyone else would be, which insurance they would like to select, if any. Employers cannot require their employees to enroll in their insurance. Indeed, if the MWA intended to mandate

that employees be enrolled in a company health insurance in order to be paid the lower-tier wage, it would be inherently discriminatory towards employees without other sources of insurance. For example, any employee who is not under the age of 26 and therefore cannot be covered by their parents' insurance – at no cost to themselves - would invariably earn less than their younger counterparts.[3] Similarly, an un-married employee who could not be on a spouse's insurance would also earn less. The result would be absurd and cause an obvious disparate impact against unmarried people over the age of 26 as they would never have an opportunity to have both free insurance and a dollar more per hour. Such a discriminatory impact is prohibited by numerous state and federal laws. Accordingly, this is not and could not be the purpose of the MWA. Rather, the MWA discusses "offering insurance" because that is its mandate to employers paying the lower-tier minimum wage - they must offer employees health insurance.

3. Plaintiff-Appellants' purported authority is inapposite to the instant matter.

Most likely aware that their argument requires the Court to ignore the plain

[3] Plaintiff-Appellants attempt to reverse this argument, which Defendant-Respondents made before the district courts, by asserting that if employers did not have to enroll their employees in insurance, it would cause employers to target and hire only employees who are unlikely to accept insurance, specifically persons under 26 and people on their spouse's insurance plan. ***Diaz* Answer at 17:7-9; *Hanks* Opening Brief at 15:2-4; *Kwayisi* Opening Brief at 14:23-25**. This argument fails as soon as it begins as there are numerous other laws, both federal and state, which would prohibit such practices. The MWA does not exist in a vacuum.

language of the MWA and the obvious directives therein, Plaintiff-Appellants make tenuous arguments based on inapposite authority that does not actually support their position. For example, in an effort to skew the clear definition of the word "provide," Plaintiff-Appellants make a tenuous argument regarding the word "furnish." ***Diaz* Answer at 11:1-21; *Hanks* Opening Brief at 9:13-10:8; *Kwayisi* Opening Brief at 9:12-21**. Specifically, they note that "furnish" is synonymous with "provide" and then cites to a criminal case wherein a prisoner was charged with furnishing a controlled substance to himself. ***Id***. Plaintiff-Appellants note that the Nevada Supreme Court stated that furnishing "calls for delivery by one person to another person." ***Id***. However, what Plaintiff-Appellants leave out is that the sentence goes on to say "you can't deliver to yourself." *State v. Powe, No. 55909*, 2010 WL 3462763, at *1 (Nev. July 19, 2010). Thus, this Court was in no way indicating that the words "provide" or "furnish" mean there must be some acceptance or use or ongoing possession by the person for whom an item or service is intended. Rather, the point of the statement was that a person cannot transfer something to themselves. *See id*.

Plaintiff-Appellants further rely on a case which makes a distinction between the use of the terms "state office" and "local governing body" in an effort to show that the MWA intended two entirely different meanings by using the words "provide" and "offer." ***Diaz* Answer at 12:3-13; *Hanks* Opening Brief at**

10:15-11:3; *Kwayisi* Opening Brief at 10:19-11:8. At issue in that case was the drafter's intent in Nev. Const. art. XV, § 3 by using different terms in addressing how term limits apply in state and local elections. *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1056 (2014), *reh'g denied* (Mar. 5, 2014). This is in no way analogous to the matter at hand. "Provide" and "offer" are not materially different terms. As discussed above, provide means to make available. By the very nature of the subject matter of the MWA, naturally an offer must occur. The two terms go hand in hand.

Next, in their briefing before the trial courts, Plaintiff-Appellants relied upon an Internal Revenue Service ("IRS") interpretation from 1976 of Treasury Regulation § 601.201(o)(3) which stands for the exact opposite of Plaintiff-Appellants' position. (*Diaz* Appx. at 50) CA Vol. I, 001-021 and 056-119. Specifically, at issue was whether applicants must be given copies of all comments on an application or allowed to inspect and copy materials on request. The IRS determined that the applicant must be given copies, "not merely given the opportunity to obtain them" and, therefore, "rather than adopting a strained reading of the word 'provide,' the regulation should be amended." Thus, the IRS was stating that as-written the regulation was indicating an "opportunity to obtain" is implied by the use of the word "provide."

A case which is actually on point and not cited to by Plaintiff-Appellants is

Lane v. State, 933 S.W.2d 504 (Tex. Crim. App., 1996). Therein, the court was asked to determine the meaning of the word "provide" as used in a statute that required the state to provide defense counsel with certain evidence, specifically, a recording. *Id*. The court reasoned that "provide" was capable of two meanings: "If the first definition is correct, then the statute merely requires that defense counsel be given access to a copy of the recording. On the other hand, if the second definition is correct, then actual delivery may be required." *Id*. After noting the lack of direction in the title, preamble, or emergency provisions tied to the statute, the court held that "[i]f the legislature had intended to require actual delivery, they could have used the word 'served,' 'given,' or 'delivered' instead of 'provide.' Given the object sought by the statute and the consequences of the differing constructions, we hold that the word 'provide' in § 3(a)(5) means to 'make available or furnish.' " *Id*.

Comparing *Lane* to this case, it is first worth noting that neither possible meaning of the "provide" required actual acceptance or use. It is a one-sided act and there is no obligation on the providee to make the act of "providing" by the provider complete. Defense counsel in *Lane* did not have to use, accept, or take possession of the recording under either scenario. Here, looking to the MWA, as with the statute in *Lane*, there is nothing within the statute to suggest that acceptance by the employee of employer benefits is required. Further, as will be

discussed in more detail below, the stated "history, purpose, and policy" of the MWA that Plaintiff-Appellants rely upon is *entirely* Plaintiff-Appellants' own musings and not based in any actual history, purpose, policy or facts. As such, if the object of the MWA was to pay the lower-tier wage only to employees who accepted and/or enrolled the insurance plans provided to them by their employers, it would have used words like "accept" or "enroll" and not "provide."

Accordingly, Plaintiff-Appellants have set forth no authority that demonstrates "provide" requires acceptance and enrollment and, to the contrary, all authority points to the conclusion that "provide" means "to make available."

4. Plaintiff-Appellants' pleadings use "provide" and "offer" interchangeably in their pleadings demonstrating that they themselves interpreted those terms as synonyms.

Plaintiff-Appellants contend throughout their briefing that "[a]n employer must do more than merely offer a [*sic*] health insurance to an employee in order to qualify for paying the employee the lower-tier wage." ***Diaz*** **Answer at 8:7-9;** ***Hanks*** **Opening Brief at 6:26-7:2;** ***Kwayisi*** **Opening Brief at 6:26-7:1**. However, this stance completely contradicts the entire basis of their lawsuits. First, in *Paulette Diaz et al. v. MDC Restaurants et al*., the allegations plainly set forth that the supposed violation of the MWA was due to an alleged failure to "offer" qualifying health insurance. (Diaz Appx. at 1-31 at ¶¶ 12, 25, 28, 31, 34 and 40). (Emphasis added). Indeed, there is no reference whatsoever to a failure

to enroll in the insurance plan. *Id*. This is further emphasized by the fact that the Plaintiff-Appellants also brought a cause of action under N.A.C. 608.102, which specifically sets forth that in order to comply with the MWA an employer must *offer* insurance, and then again asserted that it was the offer of insurance that matters by stating "[h]ealth insurance benefits provided and/or offered to Plaintiff and members of the Class and their dependents did not meet coverage requirements under Nev. Const. art. XV, § 16 and N.A.C. 608.102." (*Diaz* Appx. at 1-31 at ¶59) (emphasis added). Thus, Plaintiff-Appellants specifically used "provide" and "offer" interchangeably with one another.

Similarly, in *Latonya Tyus et al. v. Cedar Enterprises et al.*, the Plaintiff-Appellants made virtually identical allegations and asserted "Either the Companies simply do not offer benefit plans to Plaintiffs, or the plans offered do not meet constitutional coverage or cost requirements." (*Kwayisi* Appellant Appx. at 19-40 at ¶11) (emphasis added). As this sentence emphasizes, Plaintiff-Appellant's theory of their case rested on two allegations: either they were not *offered* insurance at all or the insurance they were *offered* was not sufficient under the MWA. Again, there is no reference whatsoever to the idea that they had to actually enroll in the insurance plans in order to be paid the lower-tier minimum wage. Rather, each individual plaintiff in that case set forth that the reason they were bringing this suit was entirely based on an alleged failure to *offer* satisfactory

plans. For example, at no point does named plaintiff Tyus, or any other plaintiff, allege that she should have been enrolled in the insurance plan offered to her or that she should have been given a choice between enrollment and the higher minimum wage. (*Kwayisi* Appellant Appx. at 19-40 at ¶¶ 26-30). The basis of the complaint was that the *offered* insurance was not sufficient. This entire "must be enrolled" argument is a fallback position created solely because it is now apparent that the insufficient insurance argument was baseless.

Finally, in *Erin Hanks, et al., v Briad Restaurant Group, L.L.C.*, at no point in time do Plaintiff-Appellants draw a distinction between "provide" and "offer" in their pleadings. Instead, all their allegations center on the alleged failure to "offer" qualified health insurance. (*Hanks* Appellant Appx. at 12-29 at ¶¶27-30). Again, Plaintiff-Appellants themselves understood that it was the *offer* of insurance that mattered. The above cited paragraphs are of course just a small sample of the numerous times Plaintiff-Appellants used the terms "provide" and "offer" interchangeably. A quick read of all three complaints below make clear that at no point did Plaintiff-Appellants actually think they had to enroll in the insurance plans. This is because this entire appellate issue is a superfluous after-thought created by Plaintiff-Appellants' counsel in a desperate attempt to save their claims now that each of their cases draws closer to an end due to discovery showing the plans provided were in fact compliant with the MWA. Plaintiff-Appellants'

assertion that the MWA instructs employers to not only make insurance available to their employees, but also enroll their employees in that insurance is completely contradictory to their own pleadings and their own use of the words "provide" and "offer." The plain language of the MWA is clear: if an employer makes insurance available to its employees, it may pay those employees the lower-tier minimum wage. It is that simple.

B. The Regulations Implementing the MWA also Specifically State that Employers Need Only "Offer" or "Make Available" Health Insurance.

Diaz Plaintiff-Appellants[4] request that this Court discard the regulations, which employers have been relying upon for approximately nine years, because they are "not based on a permissible construction of the [MWA]." ***Diaz* Answer at 23:1-9.** It is worth repeating, of course, that Plaintiff-Appellants themselves used these regulations in formulating their allegations for violations of the MWA and, additionally, brought causes of action under these regulations which they now claim are void. (*Diaz* Appx. at 1-31) (*Kwayisi* Appellant Appx. at 19-40) (*Hanks* Appellant Appx. at 12-29).

This about-face can only be attributed to the fact that regulations make it abundantly clear that employers who "offer" insurance to their employees qualify

[4] *Hanks* and *Kwayisi* Plaintiff-Appellants ignored the regulations entirely in their Opening Briefs despite the fact the issue was briefed at length before the Federal district court. CA Vol. I, 001-021 and 056-119.

to pay the lower-tier minimum wage. Specifically, NAC 608.102 states: "To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of NAC 608.100 . . . [t]he employer must offer a health insurance plan." NAC 608.102(1) (emphasis added). The regulation goes on to state that, "[t]he health insurance plan must be made available to the employee and any dependents of the employee." NAC 608.102(2) (emphasis added). It says absolutely nothing about requiring an employee to enroll in insurance. Rather, the directive is clear: employers must provide/make insurance available for their employees in order to pay the lower-tier minimum wage.

NAC 608.102 also makes clear that the Labor Commissioner understood that the definition of the word "provide" is "to make available." Moreover, the Labor Commissioner interpreted the MWA as a whole to require employers to offer insurance to their employees – not to require employees to enroll in insurance. The Court must give deference to this interpretation as long as it is "based on a permissible construction of the statute." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In other words, the agency interpretation is upheld unless it is arbitrary or capricious. *Deukmejian v. United States Postal Service*, 734 F.2d 460 (9th Cir.1984); *Lane v. U.S. Postal Serv.*, 964 F. Supp. 1435, 1437 (D. Nev. 1996). Here, as discussed above, interpreting the word "provide" to mean "to make

available" is consistent with every definition of the word. Therefore, there is no argument that the Labor Commissioner's interpretation of the MWA is or was arbitrary or capricious.

Next, NAC 608.102 is also due deference because it explains what sort of coverage must be included in the offered health insurance plan. Therefore, if the Court were to ignore NAC 608.102 or determine it is somehow inapplicable or void, there would be no guidance whatsoever on what sort of coverage must be included in the offered insurance. The result would be truly absurd. NAC 608.102 has been in place since 2007 and its directives have been essential in the interpretation of the MWA.

Another regulation that sets forth the requirements of the MWA is NAC 608.106 which further elaborates that the MWA is designed to incentivize offering insurance. Specifically, it sets forth that employees are free to decline the offered insurance:

> If an employee declines coverage under a health insurance plan that meets the requirements of NAC 608.102 and which is offered by the employer the employer must maintain documentation that the employee has declined coverage.

NAC 608.102 (emphasis added). It does not state that the employee will be paid the upper-tier wage if they decline insurance. Instead, it contemplates an offer of insurance, which employees are free to decline.

Finally, NAC 608.108 is yet another regulation that explains that it is the

offer of insurance that is relevant. NAC 608.108 clearly sets forth that the requirements for payment of the upper-tier minimum wage are as follows:

> If an employer does not offer a health insurance plan, or the health insurance plan is not available or is not provided within 6 months of employment, the employee must be paid at least the minimum wage set forth in paragraph (b) of subsection 1 of NAC 608.100 . . .

NAC 608.108 (emphasis added). Accordingly, since at least 2007, the express mandate to employers is that offering health insurance to their minimum wage employees qualifies them to pay below the upper-tier minimum wage.

Diaz Plaintiff-Appellants' only argument against this clear body of authority is that the regulations do not comport with their newly-proffered definition of the word "provide." Specifically, they assert that the regulations interfere with their legal rights and privileges and therefore must be ignored. ***Diaz* Answer at 23:1-9**. The regulations, of course, do no such thing. Rather, they are entirely consistent with the MWA as they specifically direct employers to either provide health insurance for their employees and pay the federal minimum wage or, alternatively, to pay a dollar more per hour. The "legal rights and privileges" afforded to employees is that they will either have an insurance option available to them that they otherwise may not have been able to obtain on their own, or they will be paid a dollar more per hour. This is exactly what the MWA states, directs, and imposes on employers. As such, there is no basis for ignoring the regulations. The regulations are a logical and permissible implementation of the MWA and they

should be deferred to as further evidence that the intent and purpose was to make insurance available to more Nevada employees.

C. The "History, Purpose, and Policy" of the MWA Does Not Support Adding Language for Enrollment or Acceptance.

Plaintiff-Appellants intertwine throughout the vast-majority of their arguments what they have deemed the "history, purpose, and policy" of the MWA. ***See i.e. Diaz* Answer at 16-20; *Kwayisi* Opening Brief at 13-16; *Hanks* Opening Brief at 14-15**. Those arguments, however, are nothing more than an unsupported diatribe about what they believe the MWA *ought* to be now that their actual theory of their case has not panned out. ***Id***. Specifically, they assert that the "context, sprit, intent, and purpose" of the MWA was to give employees the choice of enrolling in the insurance plan provided by their employer or being paid the higher tier minimum wage. The MWA, of course, discusses no such choice. Rather, as has been discussed at length herein, the MWA focuses entirely on the actions of the employer. Employers must either make insurance available for their employees or pay a dollar more per hour.

To detract from this mandate, Plaintiff-Appellants imply that making insurance available requires no effort on behalf of the employer. They rhetorically ask: why would any employer ever pay the full $8.25? But the answer is clear. Seeking out and contracting for insurance plans which meet both the low-cost and medical benefit coverage requirements of the MWA and regulations are very

laborious processes. Moreover, employers must then go through the additional process of offering that insurance to each and every new hire and ensuring that all of their minimum wage employees are aware that the employer's low-cost medical insurance option is available. Indeed, this is exactly what the MWA wanted employers to do. However, recognizing that not all employers have the resources to go through this process, the MWA offered the alternative option of paying a dollar more per hour.

Aware that this is in fact the directive of the MWA, Plaintiff-Appellants next argue that the MWA should still carry an additional requirement of enrollment because otherwise employers might offer plans that are "junk" or that have "near-worthless coverage." Although it is unclear how this would be avoided via enrollment; this fear is immediately quashed by simply looking to the regulations that Petitioner-Appellants now so desperately want to ignore. Specifically, NAC 608.102 sets forth clear requirements regarding what is meant by "health insurance." Indeed, as Plaintiff-Appellants are aware, Defendant-Respondents' plans meet those requirements.

Nonetheless, Plaintiff-Appellants attempt to confuse the Court by citing extensively to NRS 608.1555, NRS 689A, and NRS 689B. ***Diaz* Answer at 13:14-14:1; *Kwayisi* Opening Brief at 11:25-12:11; *Hanks* Opening Brief at 8:1-9:12; 12:3-16**. None of those statutes, however, are at all relevant to the matter presently

before the court and, additionally, they are also preempted by the Employee Retirement Income Security Act of 1974 ("ERISA") and/or completely irrelevant to the MWA. See 29 U.S.C. § 1144(a). For example, ERISA section 514(a) expressly "preempts all state laws that 'relate to' any employee benefit plan"; however, laws regulating insurance, banking, or securities are exempt. 29 U.S.C. § 1144(a); *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. Adv. Op. 83, 267 P.3d 771, 774 (2011) (*citing Cervantes v. Health Plan of Nevada*, 127 Nev. ——, ——, 263 P.3d 261, (2011)). A law "relates to" a covered employee benefit plan if it has a "reference to" or "connection with" it. *California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A. Inc.*, 519 U.S. 316, 324, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997). Here, Plaintiff-Appellants assert that NRS 608.1555 sets forth mandatory requirements for what must be included in health insurance. ***Diaz* Answer at 13:14-14:1; *Kwayisi* Opening Brief at 11:25-12:11; *Hanks* Opening Brief at 8:1-9:12; 12:3-16**. That statute states:

> Benefits for health care: Provision in same manner as policy of insurance. Any 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.

NRS 608.1555. Thus, it is directly referencing an employee benefit plan. It is hard to imagine a more clear-cut example of a statute that is preempted by ERISA. The other statutes cited by Plaintiff-Appellants are similarly faulty. Nonetheless, none

of the above referenced statutes have any bearing whatsoever on the definition of the word "provide." Accordingly, to the extent that Plaintiff-Appellants argue Defendant-Respondents are "wily employers" seeking to take advantage of an alleged "loophole" and not complying with these defunct statutes, those arguments must be discarded as red-hearings having no bearing on the matter at hand.

Next, Plaintiff-Appellants turn to the supposed "public understanding" of the MWA. ***Diaz* Answer at 16-20; *Kwayisi* Opening Brief at 13-16; *Hanks* Opening Brief at 14-15**. Specifically, they point to the ballot initiatives and the arguments made in support of and against the MWA at the time it was being considered by Nevada's voters. ***Id***. However, none of those sources make any mention of whether an employee must accept their employers' insurance plans or even how health insurance factors into the minimum wage rate whatsoever. Rather, the sole discussion is whether Nevada's minimum wage should be increased by a dollar more per hour and whether increasing the minimum wage is actually beneficial to minimum wage earners. There is no statement or even an implication that wages will be increased via an enrollment in insurance plans (which the MWA specifically states will cost employees up to 10% of their incomes). The only mention of healthcare at all is in the ballot initiative which states "[l]iving expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families." This in no way supports the supposition that employees need to

enroll in their employers' health insurance plans. It emphasizes that Nevadans wanted to make more low-cost health insurance options available to low-income earners – which is exactly what the MWA does. Indeed, if the actual purpose of the MWA was to just raise the minimum wage as Plaintiff-Appellants suggest, then it stands to reason that it then would have in fact just raised the minimum wage. There would be no directive to employers to seek out and make available health insurance option to their lowest paid workers in an effort to bring more health care options to that community.

Finally, *Diaz* Plaintiff-Appellants[5] discuss "contemporary notions" of the MWA by citing to a series of articles and press releases which were likely copied and pasted from one another. ***Diaz* Answer at 20:5-21:16**. None of these sources, however, are of any persuasive or controlling precedent whatsoever. Indeed, many of the citations were published before there was any clarification by the Labor Commissioner via the regulations; they all lack any indication of actual research into the MWA whatsoever; and none of the articles even clearly state that employees have to be enrolled in their employer's health insurance plans in order to be paid the lower tier minimum wage. Rather, Plaintiff-Appellants are yet again asking the Court to read beyond the text of particular statements in order to reach a

[5] Hanks and Kwayisi Plaintiff-Appellants do not make this argument in their opening brief despite raising the issue before the Federal district court. CA Vol. I, 001-021 and 056-119.

conclusion that is not supported by the MWA or any other authority.

Indeed, there is no "history, purpose, or policy" which justifies expanding the directive of the MWA to include actual enrollment in employer-provided health benefit plans. The language is clear, the purpose is clear, and Plaintiff-Appellants' arguments to the contrary are unsupported, irrational, and inconsistent with the clear directive of the MWA.

D. The Retroactive Effect of Creating any Enrollment or Acceptance Requirement Would be a Violation of Due Process.

Diaz Plaintiff-Appellants[6] urge the Court to ignore the above discussed regulations which specifically direct employers to make insurance available to their employees if they wish to continue paying the federal minimum wage. ***Diaz* Answer at 24-28**. If the Court were to take this approach, it would have to address the nine-years in which employers in Nevada have relied on those regulations. The United States Supreme Court has held that "a court is to apply the law in effect at the time it renders its decision" in the absence of manifest injustice or evidence of legislative intent to the contrary. *Bradley v. School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). Thus, in the event the Court agrees with Plaintiff-Appellants' argument, the constitutional concerns would be substantial. Specifically, when interpreting a statute, courts have long applied the " 'cardinal

[6] *Hanks* and *Kwayisi* Plaintiff-Appellants ignored the regulations entirely in their Opening Briefs despite the fact the issue was briefed before the Federal district court. CA Vol. I, 131-147.

principle' " that a fair construction which permits the court to avoid constitutional questions will be adopted. *United States v. Security Industrial Bank*, 459 U.S. 70, 78, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982) (*quoting Lorillard v. Pons*, 434 U.S. 575, 577, 98 S.Ct. 866, 868, 55 L.Ed.2d 40 (1978)); *Lowe v. S.E.C.*, 472 U.S. 181, ——, 105 S.Ct. 2557, 2562, 85 L.Ed.2d —— (1985). Where a statute may be construed to have either retrospective or prospective effect, a court will choose to apply the statute prospectively if constitutional problems can thereby be avoided. *In re Ashe*, 712 F.2d 864, 865–66 (3d Cir.1983), cert. denied, 465 U.S. 1024, 104 S.Ct. 1279, 79 L.Ed.2d 683 (1984); *Roth v. Pritikin*, 710 F.2d 934, 939–40 (2d Cir.), cert. denied, 464 U.S. 961, 104 S.Ct. 394, 78 L.Ed.2d 377 (1983). Resolution of the constitutional issue need not be certain; there need only be a "substantial doubt," *Security Industrial Bank*, 459 U.S. at 78, 103 S.Ct. at 412, or an indication that the constitutional question is "non-frivolous." *Ashe*, 712 F.2d at 865. *Accord Roth*, 710 F.2d at 939 ("[e]ven the spectre of a constitutional issue" is sufficient to construe the statute to provide for only prospective relief).

Here, retroactive application of Plaintiff-Appellants' "must be enrolled" argument could raise constitutional questions concerning both the Ex Post Facto Clause, U.S. Const., art. I, § 9, cl. 3, and the Due Process Clause of the Fifth Amendment. Therefore, the Court should select the construction that renders constitutional analysis unnecessary. However, in the event the Court does not and

agrees with Plaintiff-Appellants, the voiding of the Labor Commissioner's regulations would still have to be applied prospectively – not retroactively – as that voiding would constitute a new rule of law. Specifically, this Court has explained that there is no bright-line rule for determining whether a judicial decision sets forth a new rule of law. *Bejarano v. State*, 122 Nev. 1066, 1075,146 P.3d 265, 271(2006). However, the Court has consulted certain guidelines for determining when a rule is new. For example, a new rule of law is not generally created when a decision clarifies an existing rule or applies an established constitutional principle to a case and the case is akin to those considered in prior case law. *Coidwell v. State*, 118 Nev. 807, 819, 59 P.3d 463, 472 (2002). Conversely, a decision creates a new rule of law when it overrules precedent or disapproves of a practice sanctioned in prior cases, or overturns a longstanding practice uniformly approved by lower courts. *See Pellegrini v. State*, 117 Nev. 860, 885, 34 P.3d 519, 535-36 (2001). In the civil context, a new rule of law is also created when an issue of first impression whose resolution was not clearly foreshadowed is decided. *Breithaupt v. USAA Prop. & Cas. Ins. Co*., 110 Nev. 31, 35, 867 P.2d 402,405 (1994) (*citing Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)).

Here, whether the MWA requires actual enrollment in employer-provided insurance is in fact an issue of first impression. Moreover, the existing precedent is the MWA and its supporting regulations. Accordingly, the voiding of those

regulations and a new interpretation the MWA would be the creation of a new rule of law thus mandating prospective application.

IV. CONCLUSION

For the forgoing reasons, Defendant-Respondents respectfully request that the Court find that employers who offer their employees qualified health insurance are permitted under the MWA to pay those employees below the upper tier minimum wage.

Dated: December 14, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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

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

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

where the matter relied on is to be found.

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

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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On December 14, 2015, I served the within document(s):

RESPONDENT BRIAD RESTAURANT GROUP, L.L.C.'S ANSWERING BRIEF AND ANSWER TO WRIT OF PETITION;

RESPONDENTS WENDY'S OF LAS VEGAS, INC.'S AND CEDAR ENTERPRISES, INC.'S ANSWERING BRIEF AND ANSWER TO WRIT OF PETITION;

AND

PETITIONERS MDC RESTAURANTS, LLC'S, LAGUNA RESTAURANTS LLC'S AND INKA LLC'S, REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

☒ By **United States Mail** – a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, Nevada addressed as set forth below.

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/s/ Erin J. Melwak
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