IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, *ex rel.* OFFICE OF THE LABOR COMMISSIONER; and SHANNON CHAMBERS in her official capacity as Labor Commissioner of Nevada,

Appellants,

v.

CODY C. HANCOCK, an individual,

Respondent.

AND RELATED MATTERS

Supreme Court Case No. 68770
(Consolidated with Case Nos. 68523, 68845, and 68754)

AMICI CURIAE'S BRIEF IN SUPPORT OF THE POSITION THAT TIPS ARE PROPERLY INCLUDED AS GROSS TAXABLE INCOME FROM THE EMPLOYER

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, counsel of record for Amici Curiae certifies that the following are persons or entities described in NRAP 26.1(a) that must be disclosed.

1. Fertitta Group, Inc., a Delaware corporation, owns 100% of Amici Landry's Inc.
2. Landry's Inc., a Delaware corporation, owns 100% of Amici Bubba Gump Shrimp Co. Restaurants, Inc., Claim Jumper Acquisition Company, LLC, Landry's Seafood House – Nevada, Inc., Landry's Seafood House – Arlington, Inc., Bubba Gump Shrimp Co. Restaurants, Inc., Morton's of Chicago/Flamingo Road Corp. and Bertolini's of Las Vegas, Inc.
3. Amici Nevada Restaurant Services, Inc. d/b/a Dotty's, is a private, closely held corporation with no company owning 10% or more of the stock.

These representations are made so the judges of the Court may evaluate possible disqualification or recusal.

JACKSON LEWIS P.C.

DATED: December 23, 2015.

/s/ Elayna J. Youchah

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Claim Jumper Acquisition Co., LLC, Landry's Inc., Landry's Seafood House – Nevada, Inc., Landry's Seafood House – Arlington, Inc., Bubba Gump Shrimp Co. Restaurants, Inc., Morton's of Chicago/Flamingo Road Corp. and Bertolini's of Las Vegas, Inc. (collectively, "Landry's"), and Nevada Restaurant Services, Inc. d/b/a Dotty's ("Dotty's" with Landry's, "Amici"), seek to participate as Amici Curiae in Supreme Court Case Number 68770. Amici submit this Brief in Support of the Position that Tips are Properly Included as Gross Taxable Income from the Employer in compliance with NEV. R. APP. P. 29, and filed their Notice of Written Consent of All Parties on December 23, 2015, concurrent with this brief.

As employers in Nevada subject to Article 15, Section 16 of the Nevada Constitution (the "Amendment" or "MWA"), Amici have an interest in this appeal. In addition, Amici are defendants in several cases pending in the Eighth Judicial District Court, and are plaintiffs in a matter pending in the Federal District Court for the District of Nevada where the Minimum Wage Amendment's interpretation is the central issue.[1]

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[1] *Williams v. Claim Jumper Acquisition Co., LLC*, A-14-702048 and *Lopez v. Landry's Inc.*, A-14-706449 (now consolidated); *Nagy-Szakal v. Nevada Restaurant Services, Inc.*, A-15-716354-C and *Niedecker v. Nevada Restaurant Services, Inc.*, A-15-713709-C (now consolidated); *Landry's Inc., et al v. Sandoval, et al.*, 2:15-cv-1160-GMN. Claim Jumper is also the real party in interest in a Writ proceeding pending with the Court, Docket 66629, which will resolve the MWA's applicable statute of limitations.

This Brief addresses whether tips are included as "gross taxable income from the employer." Nev. Const. Art. 15, § 16(A); Dkt. Stmt. Issue 2, ¶ 9. Amici's Brief will contribute to the resolution of this issue by addressing the meaning of "gross taxable income from the employer" based on a position not shared by Appellants or Respondents. While Amici contend the district court erred in excluding tips as "gross taxable income from the employer," their argument is not based on the Regulations in NAC 608. Rather, this Brief addresses the fundamental legal distinction between *income* and *wages*, the district court's failure to consider this distinction when it defined the term *from*, and federal law, which includes tips as gross taxable income from the employer.

II. INTRODUCTION

Issue number 2 in Appellant's appeal concerns the third sentence in Section 16(A) of the MWA, which reads: "Offering health benefits within the meaning of this section shall consist of making health insurance available . . . 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." The issue that arises from this sentence is whether tips are properly included as "gross taxable income from the employer."

Tips must be included in this calculation for several reasons. The phrase at issue uses the word *income*, which is a distinct from *wage*. Wages are "[t]he amount which an employer agrees to pay an employee for the time the employee

has worked, computed in proportion to time" and commissions. NRS 608.012. Income, however, is broader and while it includes wages, it also includes tips, gratuities, service charges and other forms of compensation. *Terry v. Sapphire*, 130 Nev. Adv. Rep. 87, 336 P.3d 951 (2014); 26 U.S.C. § 61. Thus, as Nevada and federal law recognize, both wages and tips are income, but tips are not wages. The district court ignored this legal distinction, and erred by effectively replacing the word *income* with the word *wages* in the third sentence of the MWA.

Further, the district court applied an unreasonably restrictive meaning to the phrase "from the employer." By concluding tips are not "from the employer" because they are "from the customer," the district court ignored the various meanings of the word *from*. *From* can mean several things depending on context, such as "because of" or "attributable to." An interpretation that gives meaning to "from the employer" that also gives meaning to all words in the phrase "gross taxable income" must be employed to ensure no phrase or word of the MWA is either superfluous or rendered a nugatory.

Finally, federal law establishes that tips are part of an employee's "gross taxable income." *See* 26 U.S.C. § 32 ("earned income" means "wages, salaries, tips, and other employee compensation"); 26 U.S.C. § 3231 ("tips . . . constitute compensation"); 26 U.S.C. § 6054 ("tips" earned "in the course of employment by an employer" are compensation that must be reported as income). These code

sections further support that tips are earned by virtue of employment by an employer. *Id.*; *see also Rihn v. Franchise Tax Bd.*, 131 Cal. App. 2d 356, 361, 280 P.2d 893, 896 (1955) ("employee could not have received the tips if the employer had not put him in the way of getting them, and we may conclude that the tips were an advantage received ***from the employer***") (Emphasis added.) That tips are part of "gross taxable income" cannot be seriously debated. That absent the employment relationship an employee would not receive tips also cannot be seriously debated. Clearly, including tips in "gross taxable income from the employer" is consistent with federal law, gives meaning to the term "income" while recognizing the legal distinction between *income* and *wages*, and is consistent with the plain meaning of "from" as it appears in the context of the MWA.

III. LEGAL STANDARD FOR INTERPRETING TEXT

The Nevada Supreme Court has repeatedly explained the interpretive process must "begin with the text," itself. *Strickland v. Waymire*, 126 Nev. Adv. Rep. 25, 235 P.3d 605, 608 (2010). The text "must . . . not be read in a way that would render words or phrases superfluous or make a provision nugatory." *Blackburn v. State*, 129 Nev. Adv. Rep. 8, 294 P.3d 422, 426 (2013); *Strickland*, 235 P.3d at 610 (rejecting interpretation that left "'actually' with no job at all, which our rules do not allow"). Similarly, it "is a mistake to divorce the debate

over the meaning of words from their context." *Strickland*, 730 P.2d at 609.

Further, a constitutional provision "cannot be dissected into individual words, each one being thrown onto the anvil of dialectics to be hammered into a meaning which has no association with the words from which it has . . . been separated." *Blackburn*, 294 P.3d at 427. Thus, "the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." *Orr Ditch and Water Co. v. Justice Ct.*, 64 Nev. 138, 146, 178 P.2d 558, 562 (1947) (rejecting facially reasonable interpretation based on context). Thus, if an interpretation is reasonable in isolation, but unreasonable when considered in the provision as a whole, the interpretation should be rejected. *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, LLC*, 127 Nev. Adv. Rep. 5, 249 P.3d 501, 505-07 (2011); *Orr*, 64 Nev. at 151, 178 P.2d at 565.

IV. TIPS ARE "GROSS TAXABLE INCOME FROM THE EMPLOYER"

A. The District Court Ignored the Distinction Between "Income" and "Wages" Thereby Rendering the Phrase "Gross Taxable Income" and Other Aspects of the MWA Irrelevant

Income and wages are distinct legal terms. *Cent. Ill. Public Serv. Co. v. United States*, 435 U.S. 21, 25 (1978) ("the two concepts – income and wages – obviously are [different]," as "[w]ages usually are income, but many items qualify as income and yet clearly are not wages"); NRS 608.012 (defining wages). Income is a broad term that includes tips, gratuities, wages, commissions, service charges,

and other forms of compensation. *Terry*, 336 P.3d at 952; 26 U.S.C. § 61 (defining gross income). Distinct from the broad term "income," "wages" are "[t]he amount which an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time" and commissions. NRS 608.012; *Evans v. Wal-Mart Stores, Inc.*, 2:10-cv-1224 JCM-VCF, 2014 U.S. Dist. LEXIS 96003 *9-10, (D. Nev. July 15, 2014) (distinguishing "wages" from other sources of income or compensation). Thus, *wages* are a subset of income, which also includes *tips* and *gratuities*. *Cent. III*, 435 U.S. at 25; *Terry*, 336 P.3d at 952.

1. Section 16(A) of the MWA Recognizes and Uses the Distinct Legal Concepts of *Income* and *Wages*

Section 16(A) of the MWA provides, in relevant part:

> Each employer shall pay a ***wage*** to each employee of not less than the hourly rates set forth in this section . . . . 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***. 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 . . . . ***Tips or gratuities*** received by employees shall not be credited as being any part of or offset against the ***wage*** rates required by this section.

(Emphasis added.) As the above shows, the MWA uses the words "wage," "income," and "tips," each for a different reason and each so that term can be given its proper meaning. This is no mistake or coincidence.

Each time the MWA uses the word "wages" the use is consistent with NRS 608.012. The MWA's first sentence reads, in part: "Each employer shall pay a wage to each employee[.]" This phrase is true to the definition found in NRS 608.012 (the "amount which an employer agrees to pay an employee . . . computed in proportion to time"). Similarly, the MWA's fourth sentence states, "These rates of wages shall be adjusted by the amount of increases in the federal minimum wage[.]" The final sentence of the MWA is consistent with NRS 608.012, stating: "Tips or gratuities . . . shall not be credited as being any part of or offset against the *wage rates* required by this section." (Emphasis added.) Thus, the drafters of the MWA clearly understood how to use the term "wage," ensure that term remained defined consistent with long standing Nevada law, and distinguished wages from other forms of remuneration, such as tips, that comprise an employee's total "gross taxable income."

Critically, the MWA's third sentence makes a deliberate choice and uses the distinct term *income*, referring to "gross taxable income," not "gross taxable wages." Like the MWA's final sentence, which ensure that minimum *wages* under Nevada law cannot be comprised in any part by tips, this third sentence ensures, through definition, what is to be considered when comparing an employee's total gross income to the cost of insurance premiums. By using the phrase "gross taxable *income*" instead of "gross taxable *wages*" the MWA conspicuously signals

that the comparison between insurance premium and an employee's earnings is to be based on the broader concept—income—rather than the narrow concept—wages. This distinction cannot be discarded as folly. Rather, this "seemingly deliberate change in terminology" must be given effect, especially when the use of income and wages comports with each terms' legal meaning. *Strickland*, 235 P.3d at 609; *Terry*, 336 P.3d at 952 (noting distinction between wages and income); NRS 608.012 (defining "wages").

In sum, the language of the MWA demonstrates the deliberate use of *wages* and income. The word *wage* is repeatedly and correctly used to reference the amount an employee is paid for each hour worked. In addition, the MWA correctly notes *tips* are not part of minimum *wages* under Nevada law. In contrast, the MWA's third sentence identifies "gross taxable income" as the proper comparative measure against insurance premium costs, and does so without excluding tips as done in the final sentence of the Amendment. Thus, to give proper meaning to all terms appearing in the MWA, tips, which are part of an employee's *income*, must be included as "gross taxable income from the employer."

2. The District Court Failed to Attribute Meaning to the Phrase "Gross Taxable Income"

The district court erred by treating *income* and *wages* as interchangeable terms, thereby rendering the word "income," irrelevant or insignificant.

Strickland, 235 P.3d at 610 (the canons of construction hold an interpretation must "prevent any clause, sentence or word from being superfluous, void or insignificant"); *Orr*, 64 Nev. at 146, 178 P.2d at 562 (the "court may not, in order to give effect to particular words, virtually destroy the meaning"). In fact, under well-established interpretive rules, the MWA's deliberate change in terminology from wage to income cannot simply be ignored. *Strickland*, 235 P.3d at 609.

The district court limited the phrase "gross taxable income" to the employee's hourly wages. Order at 5:5-7. But, the MWA does not state "gross taxable *wages* from the employer." Nevertheless, to support its conclusion, the district court explained that "there are no particular difficulties in determining an employee's gross taxable income that comes *from the* employer, as this figure must be reported . . . as part of the employee's . . . annual W-2 form, along with the employee's income from tips and gratuities." *Id.* at 5:12-15 (italics in original). This assertion does nothing to establish why *tips* would not be income.

Indeed, referencing IRS Form W-2 undermines the district court's conclusion as the Form aggregates the employee's "wages, tips, [and] other compensation" as income from a single employer. Dept. of Treasury, 2015 General Instructions for Form W-2.[2] An employer uses the Form to report all income earned from the employee over the course of the year to establish *income*

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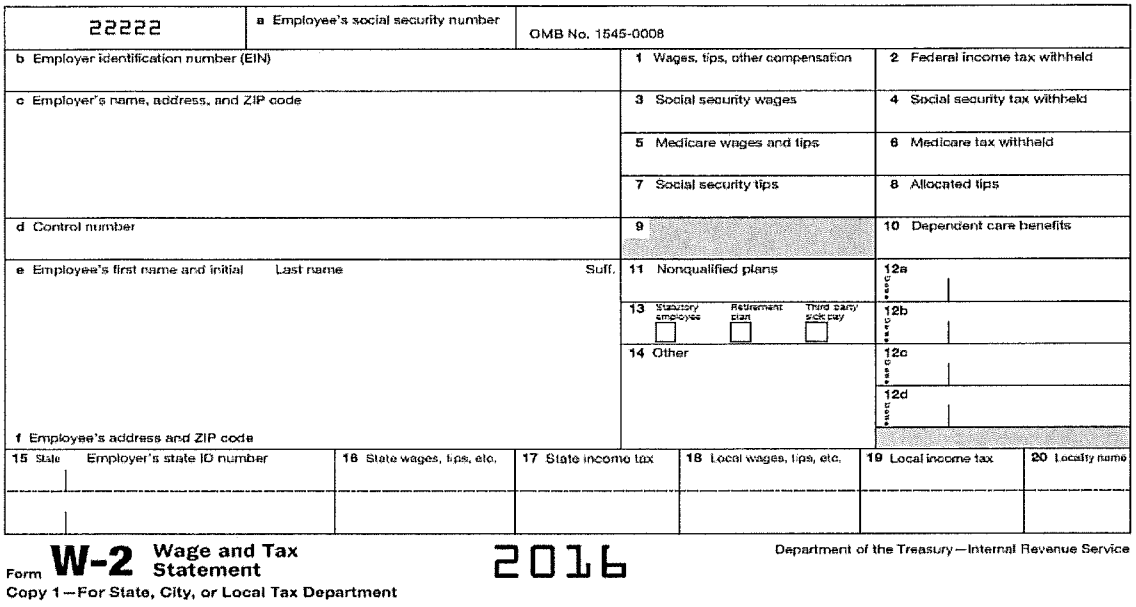
[2] *Available at* https://www.irs.gov/pub/irs-pdf/iw2w3.pdf; *see also* Form W-2, Wage and Tax Statement, *available at* https://www.irs.gov/uac/About-Form-W2.

for federal tax purposes. *See* Box 1.



22222	a Employee's social security number	OMB No. 1545-0008		
b Employer identification number (EIN)		1 Wages, tips, other compensation	2 Federal income tax withheld	
c Employer's name, address, and ZIP code		3 Social security wages	4 Social security tax withheld	
		5 Medicare wages and tips	6 Medicare tax withheld	
		7 Social security tips	8 Allocated tips	
d Control number		9	10 Dependent care benefits	
e Employee's first name and initial Last name Suff.		11 Nonqualified plans	12a	
		13 Statutory employee / Retirement plan / Third-party sick pay	12b	
		14 Other	12c	
			12d	
f Employee's address and ZIP code				

15 State Employer's state ID number	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

Form **W-2** Wage and Tax Statement 2016 Department of the Treasury—Internal Revenue Service

Copy 1—For State, City, or Local Tax Department

The Form W-2's treatment of wages *and* tips as *income* from a specific employer is therefore consistent with including tips in the "gross taxable income from the employer" appearing in the third sentence of the MWA.

B. The District Court Incorrectly Defined the Term "From" as Used in the Phrase "Gross Taxable Income From the Employer

Interpretive principles demand that words and phrases be given meaning and that the meaning should be derived "from accompanying words" and consistent with the text as a whole. *Orr*, 64 Nev. at 146, 178 P.2d at 561-62 ("the meaning of a word may be known from accompanying words"); *Blackburn*, 294 P.3d at 425-26 (text should "not be read in a way that would render words or phrases superfluous"). Particularly relevant for present purposes, "a statute cannot be dissected into individual words . . . to be hammered into a meaning which has no

association with the words from which it has been separated." *Blackburn*, 294 P.3d at 426. But, this is what the district court did when it applied a rigid definition of "from" that does not account for and is inconsistent with the MWA's surrounding phrases and context.

The word *from* has various meanings depending on context. For example, *from* can indicate "source or origin," "agent or instrumentality," or "a starting point."[3] *From* can also mean "because of something," be "used as a function word to indicate the starting point of an activity" or be "used to show the cause or the reason why something happens."[4] As applied to the MWA, when *from* is replaced with its definitional phrases, it reads: "gross taxable income because of the employer," "gross taxable income by reason of the employer," or "gross taxable income from working for the employer." Each of these phrases embrace *income* as defined by law, which includes tips *and* wages as being from the employer.

These definitions should be applied to the MWA. They are consistent with the canons of interpretation noted above and give full meaning to the phrase "from the employer," while also giving meaning and significance to the MWA's use of "gross taxable income." *Strickland*, 235 P.3d at 609 (noting the significance of the "seemingly deliberate change in terminology"); *Blackburn*, 294 P.3d at 425-26

[3] Macmillan Dictionary, Macmillan Publishers Limited 2009-2015, *available at* http://www.macmillandictionary.com.

[4] Merriam-Webster, Dictionary, *available at* http://www.merriam-webster.com/dictionary; Oxford Dictionaries, American English, *available at* http://www.oxforddictionaries.com/us/definition/american_english/from.

(interpretation should not render portions of the text as irrelevant or insignificant).

In fact, as cited above, in California, the Court of Appeal long ago explained that "[t]he employee could not have received the tips if the employer had not put him in the way of getting them, and we may conclude that the tips were an advantage received ***from the employer***." *Rihn*, 131 Cal. App. 2d at 361, 280 P.2d at 896 (emphasis added) (further noting "tips [are] taxable income under the Internal Revenue Act").[5] Similarly, "[w]here gratuities are customarily received by an individual in the course of his work from persons other than his employer, such gratuities shall, subject to the provisions of this paragraph, be treated as wages received ***from his employer***." *Gladstone Cab Co. v. Donnelly*, 30 Ill. 2d 465, 471, 197 N.E.2d 3, 6 (Sup. Ct. Ill. 1964) (emphasis added).

The district court simply did not consider these points. And, in seeking to give effect to the phrase "from the employer," the district court violated fundamental canons of interpretation through an interpretation that makes the

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[5] The allowance of tips is benefit allowed at the employer's discretion. *See, e.g.*, Pete Wells, New York Times, *Danny Meyer Restaurants to Eliminate Tipping*, Oct. 14, 2015, *available at* http://www.nytimes.com/2015/10/15/dining/danny-meyer-restaurants-no-tips.html?_r=0; John L. Smith, Las Vegas Review Journal, *A tip-free restaurant might shake up Las Vegas*, Nov. 6, 2015, *available at* http://www.reviewjournal.com/opinion/columns-blogs/john-l-smith/tip-free-restaurant-might-shake-las-vegas; Michael Bauer, SF Gate, *Bar Agricole and Trou Normand nix tipless models*, Oct. 14, 2015 (noting the employers moved back to allowing tips because employees preferred the model), *available at* http://insidescoopsf.sfgate.com/blog/2015/10/14/bar-agricole-and-trou-normand-nix-tipless-models/.

legally distinct term "income" irrelevant or insignificant. *Orr*, 64 Nev. at 146, 178 P.2d at 562. However, defining *from* to mean "a starting point," "because of something," or the "reason why something happens" is consistent with the term's ordinary meaning, gives significance to the term *income*, is consistent with the MWA's context, and is logical when considered in association with which it cannot be separated.

C. Including Tips as Income is Consistent with Federal Law

Interpreting "gross taxable income from the employer" to include tips is consistent with federal law. *Cent. Ill. Public Serv.*, 435 U.S. at 25 ("decided cases have made the distinction between wages and income and have refused to equate the two in withholding or similar controversies"). While Nevada law, like federal law, recognizes that income and wages are distinct concepts, Nevada law provides no definition of "gross taxable income" because Nevada has no income tax. Nev. Const. Art. 10, § 1(9); Opening Brief at 10:210-11:24. Thus, federal law is particularly relevant for considering what is meant in Section 16(A) of the MWA.

The Federal Tax Code defines "gross income" as including, among other things, "compensation for services, including fees, commissions, fringe benefits, and similar items[.]" 26 U.S.C. § 61(a)(1). In further detailing what constitutes gross income, the IRS, pursuant to 26 C.F.R. § 31.6051-2 developed the Form W-2, which establishes that *wages* and *tips* are compensation *from an employer* for

purposes of federal tax withholdings. *Supra* § IV.A.2. In addition, the Tax Code repeatedly defines and includes "tips" as a form of "income." *See* 26 U.S.C. § 32(c)(2)(A) ("earned income" means "***wages***, salaries, ***tips***, and other employee compensation[.]") (emphasis added); 26 U.S.C. § 3231 (providing that "tips" are compensation qualifying as taxable income to the employee); 26 U.S.C. § 6053 ("[e]very employee who, in the course of his employment by an employer, receives in any calendar month tips which are . . . compensation . . . shall report all such tips in one or more written statements furnished to his employer").

Considering Nevada has no state law defining "gross taxable income," the MWA's use of the phrase "gross taxable income from the employer" is clearly a phrase borrowed from federal law. Federal law, which includes tips as part of "gross taxable income" attributable to an employer, should be considered persuasive. Federal law is even more compelling when Nevada law, consistent with federal law, already recognizes that *income, wages,* and *tips* are distinct concepts. *Terry*, 336 P.3d at 952 (noting income obtained through tips and services charges, as opposed to an hourly wage).

III. CONCLUSION

Nevada law recognizes that *income* and *wages* are distinct legal concepts. Income includes wages *and* tips, among other sources of compensation. Section 16(A) of the MWA uses each of these legal terms correctly and distinctly. The

phrase "from the employer" is no barrier applying the correct definition to *income* as it is used in the MWA as tips are certainly obtained "because of" the employer and including tips is consistent with the MWA's choice of the phrase "gross taxable income." The district court's interpretation is inconsistent with these points and tips must therefore be included as "gross taxable income from the employer."

JACKSON LEWIS P.C.

Dated: December 23, 2015

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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:

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

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

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

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

[**XX**] Does not exceed 15 pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate 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.

Dated: December 23, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Jackson Lewis P.C. and that on this 23rd day of December, 2015, I caused to be served a true and correct copy of the above and foregoing **AMICI CURIAE'S BRIEF IN SUPPORT OF THE POSITION THAT TIPS ARE PROPERLY INCLUDED AS GROSS TAXABLE INCOME FROM THE EMPLOYER** via the Court's Case Management and Electronic Case Filing (CM/ECF) system and U.S. Mail, postage prepaid, properly addressed to the following:

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