

1 **IN THE SUPREME COURT OF NEVADA**

2
3 BOULDER CAB, INC.)

4 Petitioners,)

5 vs.)

6
7 THE EIGHTH JUDICIAL DISTRICT)
8 COURT of the State of Nevada, in and)
9 For the County of Clark, and THE)
HONORABLE TIMOTHY C. WILLIAMS)
District Judge,)

10 Respondents,)

11 and)
12)

13 DAN HERRING,)

14 Real party in interest)
15)

Docket No. Electronically Filed
District Court Oct 08 2015 09:04 a.m.
Case No.: A-13-00153-0
Tracie K. Lindeman
Clerk of Supreme Court

16 **PETITION FOR WRIT OF MANDAMUS**

17
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1 **N.R.A.P Rule 26.1 Disclosure**

2 Pursuant to NRAP 26.1 the undersigned counsel of record certifies that Petitioner
3 Boulder Cab Inc., has no parent corporation and no publicly held company owned
4 10 percent or more of its stock.
5

6 The undersigned counsel of record further certifies that he is the only
7 attorney that has appeared for Petitioner Boulder Cab, Inc. in the proceedings in
8 District Court and in this court and that he has appeared since January 8, 2014
9 through the law firm of Winner and Carson.
10
11

12 DATED this 7 day of October, 2015.

13 **WINNER & CARSON, P.C.**

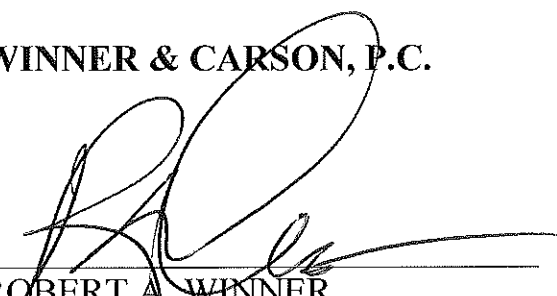
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1 I.

2 **RELIEF SOUGHT**

3
4 Pursuant to NRAP 21, NRS 34.160, NRS 34.170 NRS 34.190 NRS 34.330,
5 NRS 34.340, Petitioner Boulder Cab Inc. (Boulder) seeks this court's resolution by
6
7 Writ of Mandamus, or alternatively Writ of Prohibition, of a seriously, costly and
8 too frequently occurring issue in Nevada: Did the taxicab driver exemption from
9 minimum wage law repeal on November 28, 2006, or does public policy require
10 prospective application of the Thomas v. Nevada Yellow Cab Corporation, 130
11 Nev. Adv. Op. 52 (2014) ?
12

13
14 Petitioner, Boulder requests this court issue a writ compelling the Honorable
15 Timothy C. Williams, Eighth Judicial District Judge, to vacate his September 4,
16 2015 Order denying prospective application of the Thomas v. Nevada Yellow
17 decision.
18

19 II.

20 **ISSUE PRESENTED**

21
22 Retroactive application of Thomas v. Nevada offends public policy because
23 of reasonable reliance by the parties on the old law and substantial inequities
24 resulting by retroactive application. Article XV Section 16 of the Nevada
25 Constitution did not clearly repeal NRS 608.250 (2), the cab driver exemption.
26

27 //
28

Should the Thomas vs. Nevada Yellow Cab Corporation, 130 Nev. Adv. Op. 52 (2014) decision rendered by this Honorable Court on June 26, 2014 apply prospectively?

III.

STATEMENT OF FACTS

On November 11, 2013, a real party in interest Dan Herring filed suit in the Eighth Judicial District Court demanding back pay for minimum wage on behalf of himself and a punitive class of Boulder taxicab drivers relying on the 2006 minimum, wage amendment, Art. XV, Sec. 16 of the Nevada Constitution. In response to a Motion to Dismiss, Plaintiff sought and received a stay of the case until the Supreme Court ruled on the Thomas v. Yellow Cab case.

1. On June 1, 2015, Plaintiff filed an Amended Complaint, seeking punitive damages, in addition to back pay, penalties and attorney fees. PA001-009
2. On July 17, 2015, Boulder filed a Motion to Dismiss/Motion for Summary Judgment. PA010-059
3. Herring filed an Opposition on August 6, 2015 to the Motion to Dismiss/Motion for Summary Judgment. PA060-118
4. Boulder replied on August 14 2014 to the opposition. PA119-131
5. On September 4, 2015 the court filed its Order denying Boulder's Motion to Dismiss/Motion for Summary Judgment, finding the cab driver

1 exemption NRS 608.250(2) from minimum wage ended on November
2 28, 2006. PA132-134
3

4 **IV.**

5 **STANDARDS FOR WRIT RELIEF**

6 A Writ of Mandamus is available “to compel the performance of an act that
7 the law requires as a duty resulting from an ‘office, trust or station’ or to control an
8 arbitrary or capricious exercise of discretion.” Int’l Game Tech., Inc. v. Second
9 Judicial Dist. Court, 124 Nev. 193, 197, 179P.3d 556, 558 (2008); NRS 34.160.
10

11 There is no adequate and speedy remedy at law available. This writ poses an
12 important issue of law requiring clarification. ANSE, Inc. v. Eighth Judicial Dist.
13 Court, 124 Nev. 862, 867, 192 P.3d 738, 742 (2008). This is an important issue of
14 law with statewide impact requiring clarification and because an appeal from the
15 final judgment would not constitute an adequate and speedy legal remedy, given
16 the urgent need for resolution, Petitioners respectfully request that this Honorable
17 Court entertain the merits of the Petition.
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20

21 State v. Eighth Judicial District Court, 130 Nev. Adv. Opp. 41, 351 P.3d 736,
22 740 (2015). A writ appropriately granted when “an important issue of law needs
23 clarification in consideration of a sound judicial economy and administration militate
24 in favor of granting the petition. International Gaming Connect, 124 Nev. at 197.
25 Also see Imperial Credit Corp. v. Eighth Judicial District Court, 130 Nev. Adv. Op.
26 59, 330 P.3d 862 (2014). A critical issue of law requires clarification in that Boulder
27
28

1 Cab is subject to extensive litigation and discovery, among other similarly situated
2 parties throughout the state, based on reasonable reliance of the old law as existed
3 prior to June 26 of 2014, the date of the Thomas decision. The long standing practice
4 in the taxicab industry of compensating drivers by a percentage of the book, the
5 reliance on the existing law, as well as the apparent continuation of the minimum
6 wage exemption for cab drivers by the labor commissioner suggest prospective
7 application . The substantial inequities that are visited upon Boulder, to be subject to
8 back pay, penalties, attorney fees, and punitive damages while other cab companies
9 are exempt from past damages because of collective bargaining, further underscores
10 prospective application.
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15 V.

16 **STATEMENT OF REASONING AND BACKGROUND FOR THE**
17 **ISSUANCE OF THE WRIT**
18
19

20 Courts in Nevada, and elsewhere, consider the effect of retroactive application
21 of a new law. This should be especially true when a statute has been impliedly
22 repealed, by voter initiative. Courts examine the reasonable reliance of parties on the
23 old law, the effect of a retroactive application, and substantial inequitable results if so
24 applied. Breithautt v. USAA, 110 Nev. 31 867 P.2d 402 (1994)
25
26

27 In determining whether a new rule of law should be limited to
28 prospective application, the courts have considered three factors: (1)

1 “the decision to be applied non retroactively must establish a new
2 principal of law, either by overruling clear past precedent on which
3 litigants may have relied, or by deciding an issue of first impression
4 whose resolution was not clearly foreshadowed;” (2) the court must
5 “weigh the merits and demerits in each case by looking to the prior
6 history of the rule in question, its purpose and effect, and whether
7 retrospective operation will further or retard its operation;” (3) courts
8 consider whether retroactive application “could produce substantial
9 inequitable results.”(cases cited) 867 P.2d at 405

10 Also see Hustead v. Farmers Insurance, 90 Nev. 354, 526 P.2d 1116 (1974),
11 Ziglinski v. Farmers insurance, 93 Nev. 23 (1977) Duke v. Duke, 98 Nev. 148
12 (1982), Schoels v. State, 115 Nev. 33, 36 (1999) Nunez-Reyes v. Holder, 646 F.3rd
13 684 (9th Circuit 2011).

14 “The overruling of a judicial construction of a statute generally will not
15 be given retroactive effect.” Breithautte 867 P.2d at 406. The unique facts
16 surrounding NRS 608.250(2) repeal should, likewise, not be given retroactive
17 effect.

18 **A. The Nature of the Taxicab Business**

19 The exemption from minimum wage for taxi drivers has been the law in
20 Nevada for decades, NRS 608.250(2). The vast majority of cab drivers make more
21 than minimum wage. Traditionally, compensation for cab drivers was not an hourly
22 rate, but a commission or percentage of the book. PA022. By law, Boulder has to
23 install cab meters in its cabs, which records the amount of the fare based on miles and
24 time. It also records the initial trip charge and any other fees necessary for Boulder
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1 to pay its lawful trip charges or fees to the airport. Each trip is recorded on the trip
2 sheet, which includes its start, stop and total fare. The total fare, or “book” is what’s
3 on the meter. Boulder, like all other cab companies, pays a percentage of the book
4 the driver generates for himself and Boulder. Boulder splits the book 50/50 with the
5 driver, after expenses (trip charges, gas). PA023. Cab drivers, by Nevada regulation
6 cannot work more than 12 hours NAC 706.549. The percentage of the book as
7 compensation for cab drivers is necessary because of the nature of the work.
8 Boulder, in complying with Nevada law, must purchase and outfit the cab, insure it,
9 pay taxes, worker’s compensation and other necessary expenses in order to put a cab
10 on the road. PA036, PA037, PA039. We are not Uber.

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14
15 Once Boulder hands the keys to a cab driver, Boulder has very little control
16 over the cab driver. A cab driver is, in essence, a separate and independent business
17 while he’s on the road for up to 12 hours. PA038, PA039. The percentage
18 commission compensation encourages cab drivers to look for work and generate
19 rides and therefore revenue. The cab driver makes money for himself as well as the
20 company. It encourages hustle and discourages inactivity. If you don’t make efforts
21 to find rides, you won’t make revenue. Because of the significant investment it had
22 to make before the cab is put on the road, Boulder has an interest in the cab driver
23 generating more revenue, too. The cab driver exemption from the minimum wage is
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1 based on the nature of the business, and not because cab drivers make less than
2 minimum wage. PA022-024
3

4 **B. Boulder Reasonably Relied on NRS 608.250**

5 Although the minimum wage amendment passed in 2006, and it clearly raised
6 the minimum wage, Boulder Cab reasonably relied on the clear past precedent of cab
7 driver exemption. The minimum wage amendment did not mention cab drivers, nor
8 did it mention NRS 608.250. Furthermore, the notices Boulder received from the
9 Labor Commissioner, still seem to exempt cab drivers even after the minimum wage
10 amendment took effect. PA021, PA022, PA026, PA039.
11

12
13 Boulder prays this court rule that the new law occurred when the Thomas
14 decision was published. The Thomas court essentially declared NRS 608.250(2)
15 unconstitutional, even though it had been on the legislative books for decades. It was
16 only because of legal analysis done by the majority in Thomas that declared the cab
17 driver exemption irreconcilably repugnant to the minimum wage amendment.
18

19
20 The law of retroactive versus prospective in Nevada considers the clear past
21 precedent and the reasonable reliance by Boulder on the cab driver exemption as to
22 the nature of compensating cab drivers. The minimum wage amendment implied
23 repeal could not have been foreshadowed by Boulder. Candidly, the Thomas
24 majority found a repugnancy between the two, but three honorable justices dissented,
25 finding the amendment and statute could be harmonized. Further, the District Court
26
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28

1 judges that had considered the amendment versus cab driver exemption had almost
2 unanimously harmonized the two and did not find irreconcilable repugnancy between
3 the amendment and the statute. Respectfully, if learned jurists can struggle and
4 disagree on the effect of the amendment on the statute and its clarity, how can a cab
5 owner know that the amendment clearly repealed the statutory exemption?
6

7
8 **C. Retroactive Application Capriciously Punishes Boulder in Discovery**

9 While Boulder allowed its cab drivers to work up to a 12 hour shift, many did
10 not, because of the vagaries of demand within Boulder's certificated area. PA021.
11 Boulder never tracked the hours of the cab drivers (except for monitoring the 12
12 hours, maximum) until the Thomas decision. PA026. Since Thomas, the instant case
13 has been moving forward, and Plaintiff has been inundating Boulder with discovery
14 requests for the hours per shift. The trip sheets, generated pursuant to compliance
15 with Nevada law have been offered to Plaintiff's counsel as a way to get a rough
16 estimate as to the hours worked. PA038, PA039. We had never tracked, prior to
17 Thomas, the hours any driver worked as the exemption under 608.250 seemed to still
18 exist. PA029, PA028, PA026. Furthermore, the length of the shift wasn't necessarily
19 important in calculating driver compensation, nor taxes for the IRS, nor trip charges
20 to be remitted to the Nevada Taxicab Authority. PA036, PA038. Retroactive
21 application of the Thomas decision turns the entire cab industry on its head in trying
22 to find the hours that may or may not have been worked in a particular shift by a cab
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1 driver. PA039, PA021, PA022. We've provided Plaintiff's attorney our computer
2 data showing revenue generated and number of shifts, but there's no information on
3 hours of the shift. That must be done by a tedious process of looking at each and
4 every trip sheet generated for each driver on each shift to get a rough estimate of the
5 length of the shift. The merits and demerits of applying retroactive versus
6 prospective application of Thomas demonstrates an injustice in trying to efficiently
7 recreate shift hours and undue a long standing process relied upon by Boulder if the
8 Thomas decision is given retroactive application.

12 **D. Retroactive Operation Will Produce Substantial Inequitable Results**

13 Boulder has been subjected to substantial inequities already, having to endure
14 and trying to comply with discovery requests and orders in this litigation. As noted,
15 the compensation of cab drivers has been done at all cab companies in Clark County
16 in roughly the same manner for decades. Some of the larger cab companies have
17 collective bargaining agreements. PA040. Unions represent drivers in these larger
18 companies and have through collective bargaining negotiated compensation and
19 insurance benefits, among other things. PA039, PA040. By virtue of the agreements,
20 for insurance and compensation negotiated by the unions, those standards had a
21 rippling effect throughout the cab industry. Medium and smaller size cab companies
22 in Clark County had to compensate the drivers and provide insurance benefits like

1 those the unions negotiated at the larger companies PA025, like Frias' five
2 companies. PA014.

3
4 A retroactive application of the Thomas decision necessarily requires Boulder
5 to be subjected to this litigation, trying to comply with discovery, back wages,
6 penalties and punitive damages for merely compensating a driver in the same manner
7
8 as larger unionized companies like the Frias companies. PA004-006 Pursuant to the
9 minimum wage amendment, Frias' Companies are exempt from the minimum wage
10 law. PA058. Boulder Cab is facing back pay, penalties and punitive damages for
11
12 relying on the prior law while the Frias Companies, don't. What purpose or public
13 policy mandates that Boulder should be subjected to substantial inequitable results by
14
15 a Thomas retroactive application? Clearly a prospective application of Thomas
16 would help minimize the inequities visited on Boulder when compared to the
17
18 unionized companies.

19 **E. The Thomas Opinion(s)**

20
21 Thomas vs. Nevada Yellow Cab Corporation, 130 Nev., Adv. Op. 52 (2014)
22 ruled the taxicab exemption unconstitutional.

23
24 The majority opinion noted the state legislature does not have the power to
25 enact laws conflicting with the Constitution. Id at 521. Harmonizing the amendment
26 and the statutory exemptions would "run afoul of the principal of constitutional
27 supremacy" Id at 521. The Nevada Constitution controls over any conflicting
28

1 statutory provision. Id at 521. If the legislature could change the constitution by an
2 ordinary enactment, no longer would the constitution be superior. Id at 522. “In this
3 case, the principal of constitutional supremacy prevents the Nevada legislature from
4 creating exceptions to the rights and privileges protected by Nevada’s constitution.”
5 Id at 522.
6

7
8 The Nevada legislature did not create exceptions to the Nevada constitution.
9 Rather, taxicab drivers were exempt from minimum wage. The exemptions were
10 based on policy decisions made by the legislature. The statutory exemptions under
11 NRS 608.250(2) had existed for many decades. Until the Thomas decision, this
12 statute was the law in Nevada. The voter initiative never mentioned cab drivers,
13 NRS 608.250, nor any language restructuring the “entire legislative scheme”
14 Thomas, at 253 (dissent). The Thomas majority found the statute irreconcilably
15 repugnant with the constitutional amendment. Three learned justices did not
16 (dissent). As the voter initiative neither expressly nor impliedly mentioned NRS
17 608.250, or the existing exceptions to minimum wage, it was only through legal
18 analysis could the majority find it “unconstitutional”. The Thomas decision should
19 be prospective in its application.
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24 In considering the effect of constitutional amendments upon existing
25 statutes, the rule is that the statute will continue in effect unless it is
26 completely inconsistent with the plain terms of the constitution.
27 ***Implied repeals of statutes by later constitutional provisions is not
28 favored and the courts require that in order to produce a repeal by
implication the repugnancy between the statute and the constitution

1 must be obvious or necessary. Pursuant to this rule, by any fair course
2 of reasoning the statute can be harmonized or reconciled with the new
3 constitutional provision, then it is the duty of the court's to do so."
4 (Cases cited) (emphasis added) In Re Advisory Opinion. 132 So. 2d
5 163, 169 (1961)

6 The Thomas opinion(s) alone demonstrates prospective application is
7 appropriate. This court's sudden invalidation/striking of NRS 608.250(2) makes
8 prospective the only fair and equitable application. There was no express repeal of
9 NRS 608.250. Had the minimum wage amendment declared "no exceptions" an
10 implied repeal of NRS 608.250 would have clearly occurred.

11
12 Implied repeals are not favored. If an existing statute (like NRS 680.250) is
13 impliedly repealed by a constitutional amendment, courts have found that the intent
14 to repeal must be clear. It must be completely inconsistent with the plain terms of the
15 constitutional amendment. The repugnancy of the statute through the constitutional
16 amendment must be obvious. Case law directs our courts to harmonize or reconcile
17 the constitution and the statute by any fair course of reasoning. In Re Advisory
18 Opinion, (supra); Also cited in Thomas, at 522 (dissent)

19
20
21 Respectfully, the Thomas majority justices and those in dissent put forth
22 informed and reasoned application of the law and the facts before them. Before
23 Thomas, other honorable and seasoned District Court Judges (State and Federal)
24 harmonized the statute and amendment, finding no implied repeal.
25
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Respectfully, NRS 608.250 (which is presumed constitutional) was valid and in effect until this court ruled otherwise in June 2014. Respectfully, a retroactive application of Thomas, invalidating NRS 608.250 (2) unduly punishes a small cab owner for reasonably relying on the statute's continued existence, the Labor Commission's notices and the traditional, union sanctioned manner of compensating cab drivers by commission, or a percentage.

VI.

CONCLUSION

Most cab drivers made more than minimum wage. No cab driver went to work under any misapprehension that compensation would be anything other than commission, or a percentage. Requiring Boulder to track driver hours after the Thomas decision (to insure minimum wage) is fair.

Considering the long standing statute, history of the industry, Boulder's reasonable reliance on the old law, and the substantial inequities already occurring, Boulder prays this court rule the repeal of NRS 608.250(2) effective June 26, 2014.

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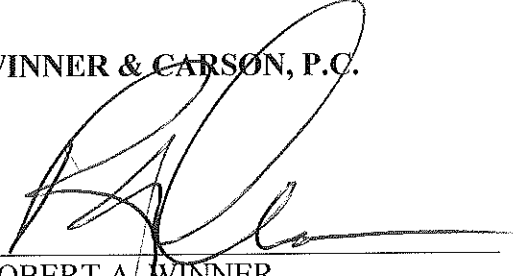
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1 Based on the foregoing points and authorities, Petitioners respectfully
2 request that this Honorable Court grant the Petition for Writ of Mandamus.

3
4 DATED this 7 day of October, 2015.

5
6 **WINNER & CARSON, P.C.**

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14 *Attorney for Petitioners*
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1 **AFFIDAVIT OF ROBERT A. WINNER**

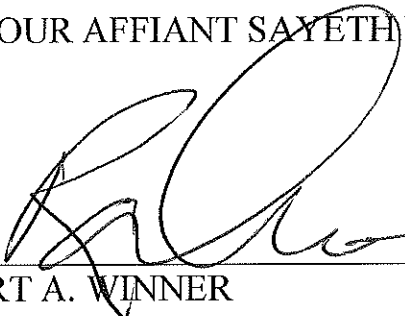
2 STATE OF NEVADA)
3)ss:
4 COUNTY OF CLARK)

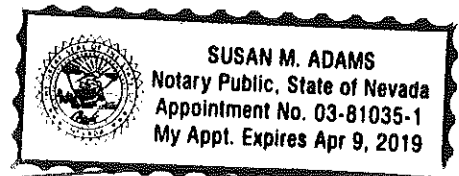
5 I, ROBERT A. WINNER, being first duly sworn under penalty of perjury,
6 deposes and says:


7
8 1. Affiant is the Attorney for BOULDER CAB, INC., Petitioners, and
9 testifies as follows:

10 2. Affiant verifies that the facts and statements within the Petition are
11 true and correct.

12
13 FURTHER YOUR AFFIANT SAYETH NAUGHT.

14 
15
16
17 _____
18 ROBERT A. WINNER



19
20 
21 Notary Public in and for said 10/7/15 Date
22 Clark County, Nevada

Certificate of Compliance with N.R.A.P Rule 28.2

I hereby certify that this Petition 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 type face using 14 point Times New Roman typeface in Microsoft Word 2013.

I further certify that this Petition 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 proportionately spaced, has a typeface of 14 points or more and contains 3839 words.

Finally, I hereby certify that I have read this Petition, 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 Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Petition 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.

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1 I understand that I may be subject to sanctions in the event that the
2 accompanying Petition is not in conformity with the requirements of the Nevada
3 Rules of Appellate Procedure.
4

5 DATED this 7 day of October, 2015.

6 WINNER & CARSON, P.C.

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