IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

BOULDER CAB, INC.

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Clark; and THE HONORABLE TIMOTHY C. WILLIAMS, District Judge,

Respondents,

and

DAN HERRING,

Real Party in Interest.

Case No.: 68949

Clark County District Court Case A691531

WESTERN CAB COMPANY'S AMICUS BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF MANDAMUS AND SUPPORTING REVERSAL OF THE DISTRICT COURT'S DECISION

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that Amicus Western Cab Company has no parent corporation and no publicly held company owns 10% or more of its stock.

The undersigned counsel of record further certifies that she is the only attorney who has appeared for Amicus Curiae Western Cab Company in related proceedings in the District Court and in this Court, and that she appeared since January 2015 through the law firm of Hejmanowski & McCrea, LLC, and previously through the law firm Lionel Sawyer & Collins.

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BRIEF OF AMICUS CURIAE

I. IDENTITY OF AMICUS AND ISSUES PRESENTED

Amicus Western Cab Company is another cab company like Petitioner Boulder Cab Co. who was affected by this Court's decision on the Minimum Wage Amendment in *Thomas v. Yellow Cab Corporation*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014). Western Cab is filing this brief pursuant to NRAP 29. The issues are: (1) whether the Court's determination of implied repeal of NRS 608.250(2) by *Thomas v. Yellow Cab Corporation*, published June 26, 2014, requires application of the Minimum Wage Amendment, Art. XV, Sec. 16, as to employees formerly excluded by NRS 608.250(2) to be prospective from the date of the *Thomas* decision; and (2) in the alternative, whether the Minimum Wage Amendment is preempted by federal labor law, the National Labor Relations Act.

II. WHERE IMPLIED REPEAL IS REQUIRED TO CLARIFY A STATUTE, A CONSTITUTIONAL AMENDMENT, OR BOTH, THE COURT'S CLARIFICATION SHOULD APPLY FROM THE DATE OF THE COURT'S DECISION, NOT ENACTMENT OF THE LAW THAT REQUIRED CLARIFICATION

In July and August 2015, Danny Thompson, the Executive Secretary-Treasurer of the Nevada AFL-CIO, filed three declarations in federal court. Appendix 1 through 3. In these declarations, Thompson declared that the Nevada AFL-CIO "is comprised of over 120 local unions with over 200,000 members in Nevada." Appendix 1. He states that the AFL-CIO drafted the Minimum Wage

Amendment "in conjunction with our lawyers at the law firm of McCracken, Stemerman & Holsberry." Appendix 1. He declared:

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

Appendix 1. Thompson further said:

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

Appendix 2 (emphasis added). Finally, Thompson declared:

> [M]embers of some Nevada AFL-CIO affiliates receive wages below $8.25 per hour but also receive health benefits from their employer which qualify their employer to the lower minimum rate under the State Constitution. These include those working as new hires at a number of Las Vegas downtown casinos belonging to Culinary Workers Union Local 226, as its contracts at eight facilities call for such rates for certain benefitted workers hired recently: Binion's, Four Queens, Fremont, Main Street, Plaza, Las Vegas Club, Dupars and Golden Gate

2. Unionized employers in this State compete constantly with non-union employers paying only the state minimum wage, particularly in the restaurant industry. If those non-union employers were allowed to lower wages to pay only the lower federal minimum wage, there would be large amounts of business lost by unionized employers, and hence losses to union members of paid hours worked, tips, and jobs, and losses in dues income to AFL-CIO affiliates.

Appendix 3.

The Minimum Wage Amendment is now located at Art. 15, Sec. 16, of the Nevada Constitution and states:

Payment of minimum compensation to employees.

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

excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. 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.

B. The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.

C. As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.

D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section.

NRS 608.250 also addressed the state's minimum wage, providing:

Establishment by Labor Commissioner; exceptions; penalty.

1. Except as otherwise provided in this section, the Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State. The Labor Commissioner shall prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless the Labor Commissioner determines that those increases are contrary to the public interest.

2. The provisions of subsection 1 do not apply to:

(a) Casual babysitters.

(b) Domestic service employees who reside in the household where they work.

(c) Outside salespersons whose earnings are based on commissions.

(d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 days of agricultural labor in any calendar quarter of the preceding calendar year.

(e) Taxicab and limousine drivers.

(f) Persons with severe disabilities whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation.

3. It is unlawful for any person to employ, cause to be employed or permit to be employed, or to contract with, cause to be contracted with or permit to be contracted with, any person for a wage less than that established by the Labor Commissioner pursuant to the provisions of this section.

NRS 608.250 was not mentioned in the Amendment and leading up to the *Thomas* decision, trial courts sitting in Nevada interpreted the provisions of the Minimum Wage Amendment and NRS 608.250(2) as not wholly incompatible, ruling that both survived the Minimum Wage Amendment, with taxicab and

limousine drivers not deemed to have been included in the Minimum Wage Amendment's directives. In *Lucas v. Bell Trans*, 2009 WL 2424557, at *8 (D. Nev. Jun. 24, 2009), District Judge Jones concluded by a reasoned decision that the Minimum Wage Amendment did not repeal NRS 608.250(2)'s exceptions:

> [T]his Court cannot conclude that there is no other reasonable construction of the Amendment than that it repealed NRS 608.250. The Amendment made absolutely no reference to NRS 608.250. The focus of the Amendment was the actual minimum wage. And the Amendment's definition of "employee" is not in conflict with NRS 608.250's exceptions, which include limousine drivers. As a result, this Court holds that the Amendment did not repeal NRS 608.250 or its exceptions. Because the NWHL[1] expressly states that it does not apply to taxicab and limousine drivers, the Limousine Plaintiffs cannot sue for a violation of unpaid minimum wages under Nevada law. NRS 608.250(e).

Moreover, in its permanent regulations, the Labor Commissioner said in NAC 608.115(2) that, "If an employer pays an employee by salary, piece rate or any other wage rate except for a wage rate based on an hour of time, the employer shall pay an amount that is at least equal to the minimum wage when the amount paid to an employee in a pay period is divided by the number of hours worked by the employee during the period. This subsection does not apply to an employee who is exempt from the minimum wage requirement pursuant to NRS 608.250." In the 4/3 opinion of the majority, *Thomas* rejected precisely Judge Jones' reasoning, concluding that in fact the Minimum Wage Amendment and NRS

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[1] NWHL was defined by Judge Jones as the Nevada Wage and Hour Law. 2009 WL 2424557, at *5.

608.250(2) were "irreconcilably repugnant," with the statute "impliedly repealed by the constitutional amendment." 327 P.3d at 521.

In the past, the Court had regularly held that statutes were presumed constitutional and a party challenging them was required to clearly demonstrate invalidity. *See Martinez v. Maruszcak*, 123 Nev. 433, 448-49, 168 P.3d 720, 730 (2007), *cited* by the dissent in *Thomas*, which additionally noted that the concept of "implied repeal is disfavored in Nevada." *Thomas.*, 130 Nev. Adv. Op. at 522, *citing Presson v. Presson*, 38 Nev. 203, 208, 147 P. 1081, 1082 (1915); *W. Realty Co. v. City of Reno*, 63 Nev. 330, 344, 172 P.2d 158, 165 (1946) ("'Where express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute...'"); and *In re Advisory Op. to Governor*, 132 So.2d 153, 169 (Fla. 1961) ("Implied repeals of statutes by later constitutional provisions [are] not favored and... in order to produce a repeal by implication the repugnancy between the statute and the Constitution must be obvious or necessary.").

The problem here is that if distinguished Justices Paraguirre, Gibbons and Saitta together with U.S. District Judge Jones did not find it clear that the Minimum Wage Act had repealed NRS 608.250(2), how could the owners of business enterprises or ordinary individuals be reasonably expected to have acted in conformity with the Minimum Wage Amendment in 2006 and immediately undertaken to pay casual babysitters, domestic service employees residing in the

household, outside salespersons earning commissioners, certain agricultural employees, taxicab drivers, and certain persons with severe disabilities the new minimum wage? Thus, the dissent explained:

> Because the Amendment and NRS 608.250 both address minimum wage, I would attempt to harmonize these provisions.... Reading NRS 608.250 and the Amendment together, an ambiguity becomes readily apparent. Namely, it is unclear whether the Amendment raises the minimum wage without altering NRS 608.250(2)'s exemptions or whether it impliedly repeals the exemptions, as the majority concludes. Both of these interpretations of the Amendment appear reasonable. As a result, I would conclude that the Amendment is ambiguous and must be interpreted in light of its history and public policy. [Citation omitted.]
>
> Since 1965, ... NRS Chapter 608... has governed employment compensation, wages, and hours for employees in Nevada. NRS 608.250(1) authorizes the Labor Commissioner to "establish by regulation the minimum wage which may be paid to employees in private employment with the State." "Taxicab and limousine drivers" are not entitled to this minimum wage....
>
> ....
>
> Moreover, the provision's title, "Raise the Minimum Wage for Working Nevadans," does not hint at any intended alteration of the NRS 608.250(2) exemptions.... Similarly, the condensed ballot question ... made no mention of changing the group of employees entitled to the minimum wage.... At the very least, if the Amendment was intended to repeal the NRS 608.250(2) exemptions, the arguments regarding the Amendment would have mentioned NRS Chapter 608, but they do not.... Therefore, I would conclude that the Amendment was only intended to raise the minimum wage amount, rather than abolish long-standing exemptions from the group of employees entitled to the minimum wage.

327 P.3d at 523-24. Indeed, according to Thompson, who drafted the Minimum Wage Amendment, the purpose of the Minimum Wage Amendment was to level the playing field between non-union employers and unionized employers. Appendix 1-3.

Western Cab does not raise the dissent's reasoning to reach a different result in that case, but to illustrate the unfairness of applying the Court's 2014 decision in *Thomas* retroactively to 2006. This unfairness is grounded in fundamental due process. For example, in *Pressler v. City of Reno*, 118 Nev. 506, 511-12, 50 P.3d 1096, 1099 (2002), this Court concluded that a city employee was employed according to the terms of the charter in effect at the time he accepted his employment and that he was not converted into an at-will employee by a subsequent change.

As to the Minimum Wage Amendment, employers such as cab companies had no way of knowing in 2006 that they were not only immediately expected to begin paying the new minimum wage to employees excepted by NRS 608.250(2), but that other statutory obligations, such as record-keeping obligations, still ostensibly governed by NRS 608.115 (requiring at subsection (2) that "[r]ecords of wages must be maintained for a 2-year period following the entry of information in the record") had also been implicated.

If changes to a statutory system of such widespread effect as the laws governing employment are to be effected by implied repeal, the implied repeal should run from no earlier than the date of the judicial decision impliedly repealing the former law and not from the date of the unclear and controversial statute or amendment being relied upon. *See, e.g., People ex rel. Rice v. Graves*, 273 N.Y.S. 582, 588 (N.Y.A.D. 1934), explaining that when judicial precedent is overruled, it is as if it never existed as opposed to when a statute is repealed, it still operates as to matters arising before the date of its repeal:

> "The overruling of a precedent is not the abolition of an established rule of law; it is the denial that the supposed rule of law has ever existed. The precedent is so treated not because it has made bad law, but because it has never in reality made any law at all. It has not conformed to the requirements of legal efficacy. Hence it is that the overruling of a precedent, unlike the repeal of a statute, has retrospective operation. The decision is pronounced to have been bad ab initio. **A repealed statute, on the contrary remains valid and applicable as to matters arising before the date of its repeal.** The overruling of a precedent is analogous not to the repeal of a statute, but to the judicial rejection of a custom as unreasonable or as otherwise failing to conform to the requirements of customary law."

(Citations omitted and emphasis added.)

Thomas impliedly repealed NRS 608.250(2) on June 26, 2014, not in 2006 upon adoption of the Minimum Wage Amendment. It is unfair and violative of fundamental due process to hold employers responsible for knowing in 2006 what the Minimum Wage Amendment would be interpreted as meaning in 2014. The

Minimum Wage Amendment should operate as to the excluded employees of NRS 608.250(2) as effective as of June 26, 2014, and not before.

III. THE MINIMUM WAGE AMENDMENT IS PREEMPTED BY FEDERAL LABOR LAW, THE NATIONAL LABOR RELATIONS ACT

The U.S. Constitution, art. IV, cl. 2, provides, "This Constitution and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article 15, § 16(A) states that if an employer provides health benefits, the minimum wage is $5.15 an hour. If an employer does not provide health benefits, the rate is $6.15 an hour. The purpose of the Minimum Wage Amendment **to help level the playing field between non-union employers and unionized employers** is preempted by the National Labor Relations Act.

In *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60 (2008), the United States Supreme Court addressed a California statute which prohibited several classes of employers who received state funds from using the funds "to assist, promote, or deter union organizing." *Id.* at 62. The issue was whether this law was preempted by federal law mandating that certain zones of labor activity be unregulated. The Court found that although the National Labor Relations Act ("NLRA") contained no express preemption provision, Congress implicitly mandated two types of preemption as necessary to implement federal labor policy.

Id. at 65. The first, *Garmon* preemption, was intended "to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Id.* at 65 (citation omitted). *Garmon* preemption forbids the states to regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. *Id.*

According to the Nevada AFL-CIO, the Minimum Wage Amendment is intended to change the market system between unionized and non-unionized companies. Thompson said:

> Unionized employers in this State compete constantly with non-union employers paying only the state minimum wage, particularly in the restaurant industry. If those non-union employers were allowed to lower wages to pay only the lower federal minimum wage, there would be large amounts of business lost by unionized employers, and hence losses to union members of paid hours worked, tips, and jobs, and losses in dues income to AFL-CIO affiliates.

Appendix 2. Clearly, the Minimum Wage Amendment regulates activity that the NLRA protects, prohibits, or arguably protects or prohibits.

The second type of preemption, known as *Machinists* preemption, forbids both the National Labor Relations Board and the states to regulate conduct that Congress intended be unregulated because the conduct should be controlled by the free play of economic forces. *Brown*, 554 U.S. at 65. *Machinists* preemption is based on the premise that "'Congress struck a balance of protection, prohibition and laissez-faire in respect to union organization, collective bargaining, and labor

disputes.'" *Id.* (citation omitted). The *Brown* Court held that California's law was preempted under *Machinists* because it regulated within a zone protected and reserved for market freedom. *Id.* Here, the Minimum Wage Amendment which "helped increase the compensation of AFL-CIO members in Nevada and helps level the playing field between non-union employers and unionized employers" is a law within a zone protected and reserved for market freedom.

The *Brown* Court found that the legislative purpose of California's law was not the efficient procurement of goods and services but the furtherance of a labor policy. *Id.* at 70. The Court further found that the law permitted use of state funds for select employer advocacy activities that promoted unions. *Id.* at 71. Here, the purpose of the Minimum Wage Amendment is the furtherance of a labor policy. According to Thompson, the Nevada AFL-CIO drafted the Minimum Wage Amendment to help increase the compensation of AFL-CIO members in Nevada and to help level the playing field between non-union employers and unionized employers. Thus, the State of Nevada, through the Minimum Wage Amendment, is engaged in furtherance of a labor policy which violates federal preemption.

The *Brown* Court found:

> The statute also imposes deterrent litigation risks. Significantly, AB 1889 authorizes not only the California Attorney General but also any private taxpayer—including, of course, a union in a dispute with an employer—to bring a civil action against suspected violators for "injunctive relief, damages, civil penalties, and other appropriate equitable relief." § 16645.8. Violators are liable to the State for three

> times the amount of state funds deemed spent on union organizing. §§ 16645.2(d), 16645.7(d), 16645.8(a). Prevailing plaintiffs, and certain prevailing taxpayer intervenors, are entitled to recover attorney's fees and costs, § 16645.8(d), which may well dwarf the treble damages award. Consequently, a trivial violation of the statute could give rise to substantial liability. Finally, even if an employer were confident that it had satisfied the recordkeeping and segregation requirements, it would still bear the costs of defending itself against unions in court, as well as the risk of a mistaken adverse finding by the factfinder.

Id. at 72. Here, the MWA also imposes deterrent litigation risks. A trivial violation could give rise to substantial liability because although a back pay award may be miniscule, "an employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs." Article 15, § 16(B).

In *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 609 (1986), Golden State Transit sought to renew its franchise to operate taxicabs in the City of Los Angeles. While the franchise renewal application was pending, Golden State's labor contract with its drivers expired and the drivers went on strike. *Id.* at 609-610. After Teamster representatives argued against renewal of Golden State's franchise because of the pendency of the labor dispute, the City decided not to extend the franchise. The United States Supreme Court found that *Machinists* preemption precluded state and municipal regulation "concerning conduct that Congress intended to be unregulated." *Id.* at 614. The Court said:

> The Court recognized in *Machinists* that "'Congress has been rather specific when it has come to outlaw particular economic weapons.'" 427 U.S., at 143, 96 S. Ct. at 2555, quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 498, 80 S. Ct. 419, 421, 4 L. Ed. 2d 454 (1960), and that Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance "'between the uncontrolled power of management and labor to further their respective interests.'" (Citations omitted.)

Id. at 614. Use of a Minimum Wage Amendment to level the playing field between non-union employers and unionized employers is a form of economic pressure which is supposed to be unregulated.

Fort Halifax Packing Company, Inc. v. Coyne, 482 U.S. 1 (1987), concerned a Maine statute which required a one-time severance payment when an employer closed its business. In addressing the federal labor law preemption issue, the United States Supreme Court held that when a regulation such as the Maine statute provided protections to individual union and non-union workers alike, it neither encouraged nor discouraged the collective bargaining processes that were the subject of the National Labor Relations Act and it was not preempted. *Id.* at 20-21. Here, the two-tiered minimum wage floor was designed by the AFL-CIO to level the playing field between union and non-union companies. That is **not** a minimal employment standard such as the one addressed in *Fort Halifax*. The Maine statute applied equally to union and non-union employees. Here, the AFL-CIO states that the Minimum Wage Amendment does **not** apply equally to union and non-union workers and that the entire purpose of the two-tiered floor is to favor

union employees and union companies. Therefore, the Minimum Wage Amendment is preempted by the National Labor Relations Act.

In *Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497, 498 (9th Cir. 1995), a county in California passed an ordinance which required all employers to pay prevailing wages to their employees on private industrial construction projects costing over $500,000. The ordinance provided that employees could sue for unpaid wages if they had not been paid a prevailing wage. *Id.* at 499. The Ninth Circuit addressed both *Garmon* and *Machinists* preemption and said the *Bragdon* case involved *Machinists* preemption, a zone protected and reserved for market freedom. The Ninth Circuit analyzed the hourly wages and benefits required by the ordinance and concluded that the ordinance affected the bargaining process in a much more invasive and detailed fashion than the isolated statutory provision of *Fort Halifax*. *Id.* at 502. The Court specifically said this ordinance was very different from a minimum wage law applicable to **all employees** guaranteeing a minimum hourly wage. *Id.* In *Bragdon*, the Ninth Circuit concluded that the ordinance in that case substituted "the free-play of **political forces** for the free-play of **economic forces** that was intended by the National Labor Relations Act." *Id.* at 504 (emphasis added).

The ordinance in *Bragdon* like the Minimum Wage Amendment here is more properly characterized as an example of "an interest group deal in public-

interest clothing." *Id.* at 503. Here, the AFL-CIO, which is an interest group, drafted a constitutional amendment whose purpose was a prohibited one under federal labor law to level the playing field between union and non-union companies. The states are forbidden from operating in this arena because federal labor law governs the playing field between union and non-union companies. The AFL-CIO has sought to substitute the free-play of political forces for the free-play of economic forces that was intended by the National Labor Relations Act.

In *520 South Michigan Avenue Associates v. Shannon*, 549 F.3d 1119, 1121 (7th Cir. 2008), Unite Here Local 1, a labor union, had joined together with the State of Illinois to dismiss a declaratory judgment action challenging an amendment to a state labor law. The original One Day Rest In Seven Act provided for a twenty-four hour rest period in a calendar week and a 20-minute meal period every day. The Amendment provided for hotel room attendants to have two 15-minute paid rest breaks and one 30-minute meal period in each work day. *Id.* at 1122.

The Seventh Circuit Court of Appeals began its analysis with the supremacy clause and quoting from *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724, 738 (1985), said:

> In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue. Pre-emption may be either express or implied, and is compelled

> whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.

Id. at 1124.

The Seventh Circuit cited the *Brown* case and held that the Attendant Amendment was preempted by *Machinists*. *Id.* at 1126. Illinois and the Union argued that the Amendment was a minimum labor standard and was not preempted by the National Labor Relations Act. *Id.* The Seventh Circuit, in reliance on *Metropolitan Life,* held that minimum state labor standards affect union and non-union employees equally and neither encourage nor discourage the collective bargaining processes that are the subject of the National Labor Relations Act. *Id.* at 1127. Quoting from the *Brown* decision, the Seventh Circuit found that judicial concern had focused on the nature of the activities which the states had sought to regulate rather than on the method of regulation adopted. *Id.* at 1129. The Court cited *Bragdon* and relied on the Ninth Circuit's conclusion that the ordinance in that case was very different from the minimum wage law applicable to **all employees** guaranteeing a minimum hourly wage. *Id.* at 1132. The Seventh Circuit said:

> Additionally, while on its face this law applies to union and non-union employers equally, the statute's narrow application equates more to a benefit for a bargaining unit than an individual protection.

Id. at 1133. Similarly here, the Minimum Wage Amendment equates more to a benefit for the AFL-CIO and bargaining units than an individual protection.

In *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 283 (1986), Wisconsin maintained a list of every person or firm found by judicially enforced orders of the National Labor Relations Board to have violated the National Labor Relations Act in three separate cases within a five-year period. State procurement agents were statutorily forbidden to purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators. *Id.* at 283-84. In 1982, Wisconsin placed Gould on its list of labor law violators and told Gould that it would enter into no new contracts with the company for three years, until 1985. *Id.* at 285.

The United States Supreme Court found that through the National Labor Relations Act, Congress largely displaced state regulation of industrial relations. *Id.* at 286. The Court said:

> Because "conflict is imminent" whenever "two separate remedies are brought to bear on the same activity," . . . the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or **judicial remedies** for conduct prohibited or arguably prohibited by the Act.

Id. (Emphasis added.) Here, the MWA provides a judicial remedy for "leveling the playing field between non-union employers and unionized employers" which is prohibited or arguably prohibited by the National Labor Relations Act. The MWA adds a remedy to those prescribed by the National Labor Relations Act.

The *Gould* Court found that judicial concern had necessarily focused on the nature of the activities which States have sought to regulate rather than on the method of regulation. *Id.* at 287. The Court held to allow a State to grant a remedy, which has been withheld from the National Labor Relations Board, only accentuates the danger of conflict because the range and nature of those remedies that are or are not available is a fundamental part of the comprehensive system established by Congress. *Id.* Through the MWA, Nevada is granting a remedy to level the playing field between non-union and union companies which has been withheld from the National Labor Relations Board.

Wisconsin argued that it was exercising its spending power rather than its regulatory power but the Supreme Court found that was a distinction without a difference because a debarment statute served plainly as a means of enforcing the National Labor Relations Act. *Id.* Here, the Minimum Wage Amendment by requiring a higher minimum wage if health benefits at a certain cost are not provided serves plainly as a means of adding a remedy in organized labor's quiver which the National Labor Relations Act does not grant.

In *Rolf Jensen & Associates, Inc. v. Eighth Judicial District Court*, 128 Nev. Adv. Op. 42, 282 P. 3d 743, 745 (2012), the Nevada Supreme Court held that Mandalay Resorts' state law contractual indemnity claim against a consultant was preempted by the Americans with Disabilities Act of 1990. The Court said:

> The preemption doctrine emanates from the Supremacy Clause of the United States Constitution, pursuant to which state law must yield when it frustrates or conflicts with federal law . . . . The doctrine is comprised of two broad branches: express and implied preemption. . . . Express preemption occurs, as its name suggests, when Congress "explicitly states that intent in a statute's language." . . . Implied preemption arises, in contrast, "[w]hen Congress does not include statutory language expressly preempting state law." . . .
>
> Implied preemption contains two sub-branches: field and conflict preemption. . . . Field preemption applies "when congressional enactments so thoroughly occupy a legislative field, or touch a field in which the federal interest is so dominant, that Congress effectively leaves no room for states to regulate conduct in that field." . . . Conflict preemption, or obstacle preemption, as it is often times called, occurs when "federal law actually conflicts with any state law." . . .
>
> As we have explained:
>
> > Conflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress' objectives.
>
> . . . This petition involves conflict preemption. More precisely, this petition concerns whether, in view of the ADA's purpose and intended effects, Mandalay's state law claims pose an obstacle to the accomplishment of Congress's objectives in enacting the ADA.

282 P.2d at 746 (citations omitted). The Court concluded that the ADA intended to prevent discrimination stemming from neglect and indifference. Thus, Mandalay's indemnification claim against the consultant was deemed to weaken owners' incentive to prevent violations of the ADA and therefore would conflict

with the ADA's purpose and intended effects. *Id.* at 748. *Accord Painter's Local Union No. 567 v. Tom Joyce Floors, Inc.*, 81 Nev. 1, 4-5, 398 P.2d 245, 246-47 (1965); *Nanopierce Technologies, Inc. v. Depository Trust and Clearing Corp.*, 123 Nev. 362, 168 P.3d 73 (2007), where the Court held that claims for misrepresentation were preempted by the Securities Exchange Act; *Marcoz v. Summa Corp.*, 106 Nev. 737, 801 P.2d 1346 (1990), where the Court held that an employee's allegation of bad faith termination for the purpose of saving or reducing an employer's obligation for future contributions to an employee's retirement plan was preempted by ERISA; *Union Pacific Railroad Co. v. Harding*, 114 Nev. 545, 958 P.2d 87 (1998), where the Court held that the Federal Railway Labor Act preempted the railway's indemnity and contribution claims. The Minimum Wage Amendment is **not** a minimum labor standard applying equally to unionized and non-unionized employers and is preempted by the National Labor Relations Act.

IV. CONCLUSION

The Court's clarification of the Minimum Wage Amendment and NRS 608.250(2)(e) in *Thomas v. Yellow Cab* should apply from the date of the Court's decision, June 26, 2014, not enactment of the Minimum Wage Amendment that required the clarification. NRS 608.250(2)(e) was not impliedly repealed until June 26, 2014. Furthermore, since the AFL-CIO who drafted the Minimum Wage

Amendment states that its purpose is to level the playing field between non-union employers and unionized employers, the Minimum Wage Amendment is preempted by federal labor law, the National Labor Relations Act.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)94), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) as it is prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font size and Times New Roman.

I further certify that this brief complies with the page or type volume limitations of NRAP 37(a)(7) because, excluding parts of the brief excepted by NRAP 32(a)(7)(C), it does not exceed 5,997 words.

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

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **WESTERN CAB COMPANY'S AMICUS BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF MANDAMUS AND SUPPORTING REVERSAL OF THE DISTRICT COURT'S DECISION** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 19th day of October, 2015, to the following:

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The Honorable Timothy C. Williams
District Court Judge
Eighth Judicial District Court of Nevada
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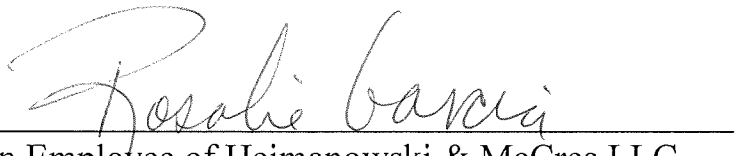

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