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 COURT JUDGE,

Respondents,

and

DAN HERRING,

Real Party in Interest,

Case No.: 68949

Dist. Ct. No.: A-13-691551-C
Dept. No. XVI

PROGRESSIVE LEADERSHIP ALLIANCE OF NEVADA'S *AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTY IN INTEREST'S ANSWERING BRIEF AND SUPPORTING AFFIRMANCE OF THE DISTRICT COURT'S DECISION

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N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

Dated this 22nd day of January, 2016.

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I. ISSUE PRESENTED

Whether the District Court erred in finding that this Court's decision in *Thomas v. Nevada Yellow Cab Corp.*,130 Nev. Adv. Op. 52, 327 P.3d 518 (2014) is not appropriate for extraorindary, prospective-only application.

II. INTEREST OF THE AMICUS CURIAE

The Progressive Leadership Alliance of Nevada ("PLAN") was founded in 1994 to advocate for, among other things, economic justice for low-wage employees and the working poor in Nevada. PLAN played an role in the passage of the Minimum Wage Amendment ultimately at issue in this writ petition, both in 2004 and 2006, and is a coalition member supporting passage of a 2016 ballot measure regarding the state minimum wage. PLAN members also testify before the Nevada State Legislature on matters of minimum wage law, on behalf of minimum wage workers and the economically-disadvantaged. PLAN is keenly aware of the remedial, pro-employee intent of the Minimum Wage Amendment, and recognizes that rulings regarding the Amendment potentially affect tens—if not hundreds—of thousands of workers in Nevada.

III. ARGUMENT

The question before this Court is a straightforward one: Are the equitable considerations here significant enough to disregard the widely-accepted norm of applying civil judicial decisions both retroactively and prospectively? Put another way, should Petitioner get away scot-free after years of withholding wages from its employees? Petitioner is not in an enviable position here, legally or otherwise. After unlawfully withholding wages for almost a decade, they have finally been asked to pay the bill. The courts have not been kind to their defense of pre-existing statutory minimum wage exception that was always likely to be ruled superseded by the subsequent amendment to the state constitution. Petitioner took a gamble, essentially, that their weak version of the interplay of constitution and statutes

would survive judicial scrutiny; it has not. Because *Thomas* did not establish a new rule of law, and because severe inequities will result if *Thomas* is given prospective-only application, PLAN supports Real Party in Interest Dan Herring ("Herring") in requesting that this Court deny Petitioner's writ petition.

A. The *Thomas* Decision Was Clearly Foreshadowed, And Retroactive Application Will Not Produce Inequitable Results

As a preliminary matter, the general rule is that "judicial decisions will apply retroactively." *City of Bozeman v. Peterson*, 227 Mont. 418, 420, 739 P.2d. 958, 960 (1987), *overruled* to the extent *Peterson* permitted prospective application of judicial decisions regarding constitutional rules in criminal proceedings by *State v. Waters*, 296 Mont. 101, 987 P.2d 1142 (1999). *See also Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 596, 790 P.2d 242, 251 (1990) ("[U]nless otherwise specified, an opinion in a civil case operates retroactively as well as prospectively."); *Truesdell v. Halliburton Co., Inc.*, 754 P.2d 236, 239 (Alaska 1988) ("In civil cases, retroactivity is the rule, and pure prospectivity is the exception."). This rule is especially strong in matters of constitutional interpretation, for reasons made clearly and persuasively by Justice Scalia in his concurrence in *American Trucking Association, Inc. v. Smith*, 496 U.S. 167, 110 S. Ct. 2323 (1990):

> [P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be. The very framing of the issue that we purport to decide today—whether our decision in *Scheiner* shall "apply" retroactively—presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is.
>
> Such a view is contrary to that understanding of "the judicial Power," U.S. Const., Art. III, § 1, which is not only the common and traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures,
>
> To hold a governmental Act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it; and when, as in this case, the constitutionality of a state statute is placed in issue, the

> question is not whether some decision of ours "applies" in the way that a law applies; the question is whether the Constitution, as interpreted in that decision, invalidates the statute.
>
> Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense.

Id., 496 U.S. at 201 (Scalia, J., concurring) (internal citations omitted; emphasis in original).

But if the Court is to entertain the question of whether *Thomas* is to be applied prospectively only, the factors in *Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 110 Nev. 31, 867 P.2d 402 (1994), which have been briefed at length in other filings now before the Court in this matter, control the analysis. Petitioner misses the boat entirely by focusing on how expensive its wage withholding may ultimately be for the company. *See* Petition at 10-12, 14-15. Though an unfortunate result of their failed legal ploy, this is not a defense to liability or an argument for prospectivity. For their part, *Amicus Curiae* Sun Cab, Inc. agrees that retroactivity is the norm. *See Amicus Curiae* Sun Cab, Inc. Br. at 18.

This Court's opinion in *Thomas* was neither groundbreaking nor unexpected. The old statutory minimum wage scheme explicitly excluded "taxicab and limousine drivers" from the minimum wage requirements. *See* N.R.S. 608.250(2)(e). The Minimum Wage Amendment, enacted in 2006, mandates that "each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section." *See* Nev. Const. art. XV, § 16(A). The Amendment goes on to exempt only "an employee who is under eighteen 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 days." *See* Nev. Const. art. XV, § 16(C).

Taxicab drivers have never been exempt from the Amendment's minimum wage requirement. That exemption dissolved the moment the Amendment was

enacted. *Thomas* reached a natural and unremakrable conclusion: The Nevada Constitution mandates a certain hourly wage to all but a very narrow subset of employees, and that subset does not include taxicab drivers. Thus, the statutory taxicab driver exemption was superseded in its entirety. Petitioner overcomplicates the issue before the Court. As Herring discusses, Nevada's Attorney General announced that after the passsage of the Amendment, taxicab drivers would no longer be exempt from the minimum wage. *See* Real Party in Interest Appx. at 58. At least one Nevada state court that addressed the issue a full year before this Court in *Thomas* reached the same conclusion. *See Murray v. A Cab Taxi Service*, Eighth Judicial District Court, A-12-669926 (Feb. 11, 2013). Counsel to *Amicus* Sun Cab, Littler Mendelson, starting in 2006 and continuing to the date of this brief, has warned its clients and the public that "taxicab and limousine drivers…will no longer be exempt from the minimum wage."[1] If Petitioner is to be believed, they were caught off guard and wholly unaware by this Court's opinion in *Thomas*. They are not to be believed, however.

Substantial inequitable results will not befall Petitioner if this Court does not extend the extraordinary exception of prospective application to its ruling in *Thomas*. It is difficult to imagine a scenario where the defendant in a civil case was more "on notice" of the unlawfuness of its conduct. What happened to Petitioner happnes all the time: it set a course, and wagered against a finding of liability. Now it has lost. When courts declare a defendant's theory of defense to be a loser—with no intervening new law—the defendant cannot bank on prospectivity as insurance policy. Petitioner here has been unlawfully withholding wages and bolstering its

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[1] Rick D. Roskelley, *The Nevada Constitutional Minimum Wage*, https://www.littler.com/nevada-constitutional-minimum-wage (Nov. 16, 2006) (accessed on Jan. 20, 2016).

bottom line for nearly a decade. It cannot be rewarded now for taking that abysmal risk by being absolved of the liability by this Court.

Indeed, if *Thomas* is given prospective application, Herring and those like him will suffer a great inequity. The taxicab drivers were not a party to Petitioner's unwise gamble; they were its victims. What Herring and his colleagues demand now is recovery of those wages which were owed to them all along.

B. The Minimum Wage Amendment Is A Remedial Provision, Not A Pro-Employer Provision

The Minimum Wage Amendment altered, and largely replaced, Nevada's fundamental law on minimum wage, and was designed to function (and to be interpreted) in a remedial manner.[2] *See Thomas*, 327 P.3d at 522 ("Respondents also argue that, despite the intent expressed by the text of the Amendment, the voters actually intended to merely raise the minimum wage, not to create a new minimum wage scheme. But respondents do not adequately explain their basis for deriving such intent."). Accordingly, prospective application of *Thomas*, which would result in a windfall for Petitioner and other similarly situated employers, would fly in the face of the Amendment and its purpose.

The ballot materials that came with the 2004 and 2006 initiative that became the Amendment set forth the Amendment's remedial animus and intended broad impact. They begin by noting that "[l]iving expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families." *See* State

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[2] This Court, in *Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951 (2014), *reh'g denied* (Jan. 22, 2015), described N.R.S. 608.250 as a "remedial statute," in a manner that indicated it would liberally interpret and enforce the rights and protections it provided. *Id*. at 954. There is no reason, therefore, to think that where a popularly-enacted constitutional amendment providing even greater protections for the same beneficiaries—minimum wage workers—the Court's vigilance in this regard would not be substantially increased.

of Nevada Statewide Ballot Questions, Question No. 6 (Secretary of State 2006) at 31.[3] That is as true today as it was a decade ago when the Amendment was proposed. Yet Petitioner's pleas would allow it to escape unscathed after shorting its employees of *all* of their hourly wages for nearly 10 years. That would leave the drivers deprived of years of hourly compensation the Amendment plainly entitled them to.

The written arguments both for *and against* the Amendment given to the voters clearly stated that if the measure passed, wages would go up. *Id.* at 31-34. The proponents, for example, began, "All Nevadans will benefit from a long-overdue increase in the state's minimum wage through a more robust economy, a

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[3] The title of the actual ballot initiative itself was "RAISE THE MINIMUM WAGE FOR WORKING NEVADANS." *See* State of Nevada Statewide Ballot Questions, Question No. 6 (Secretary of State 2006) at 35. The initiative further stated that the "people of the State of Nevada hereby make the following findings and declare their purpose in enacting this Act as follows:"

1. No full-time worker should live in poverty in our state.
2. Raising the minimum wage is the best way to fight poverty. By raising the minimum wage form [sic.] $5.15 to $6.15 an hour, a full-time worker will earn an additional $2,000 in wages. That's enough to make a big difference in the lives of low-income workers to move many families out of poverty.
3. For low-wage workers, a disproportionate amount of their income goes toward cost of living expenses. Living expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families.
4. In our state, 6 out of 10 minimum wage earners are women. Moreover 25 percent of all minimum wage earners are single mothers, many of whom work full-time.
5. At $5.15 an hour, minimum wage workers in Nevada make less money than they would on welfare. When people choose work over welfare, they become productive members of society and the burden on Nevada taxpayers is reduced.
6. Raising the minimum wage from $5.15 an hour to $6.15 an hour affirms Nevadan's beliefs that we value work, especially the difficult jobs performed by hotel maids, childcare workers, and nursing home employees. We need to make sure the workers who are the backbone of our economy receive fair paychecks that allow them and their families to live above the poverty line.

See id.

decreased taxpayer burden and stronger families." *Id.* at 31. The initiative's opponents' also operated on the premise of higher wages in positing that "the most credible economic research over the last 30 years has shown that minimum wage hikes hurt, rather than help, low-wage workers." *Id.* at 32. The opponents continued that under the Amendment, "wages paid in Nevada must, from now on, exceed the federal minimum wage by about $1 an hour." *Id.* at 33. Although the proponents and opponents disagreed about the measure's policy and fiscal impact, they both emphatically agreed that, as proposed, the Amendment would mean an *increase* in take-home pay among Nevada's lowest-income workers.

For those like Herring, who subsisted with *no hourly wage at all* and who received *no* benefit from the Amendment as their employers avoided the Amendment's clear mandates, none of that occurred. It is very difficult to argue that the public understanding of the Amendment was that the drivers and all other *formerly*-exempt hourly workers in Nevada would fail to see their lots improve, while the hourly wage bill of Petitioner would continue on at a zero baseline until a court ruled otherwise. That would be not merely an absurd result, but a positively grotesque one.

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IV. CONCLUSION

Judicial decisions are applied retroactively, unless extraordinary equitable principles demand a purely prospective application. Here, Petitioner can show no such equitable principles. Fully aware of the risk, Petitioner hoped for shelter under a moribund minimum wage exemption, a gamble it lost. Amicus Curiae PLAN supports Real Party in Interest, and joins him in respectfully requesting the Court to deny Petitioner's Petition for Writ of Mandamus or Prohibition.

Respectfully submitted this 22nd day of January, 2016.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, size 14, Times New Roman.

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 2,748 words.

3. Finally, I hereby certify that I have read this 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 N.R.A.P. 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 this 22nd day of January, 2016.

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CERTIFICATE OF SERVICE

STATE OF NEVADA, COUNTY OF CLARK

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Clark, State of Nevada My business address is 3556 E. Russell Road, 2nd Floor, Las Vegas, Nevada 89120-2234.

On January 22, 2016, I served true copies of the following document(s) described as **PROGRESSIVE LEADERSHIP ALLIANCE OF NEVADA'S *AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTY IN INTEREST'S ANSWERING BRIEF AND SUPPORTING AFFIRMANCE OF THE DISTRICT COURT'S DECISION** on the interested parties in this action as follows:

BY CM/ECF: Pursuant to N.E.F.R., the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on January 22, 2016, at Las Vegas, Nevada.

By: */s/ Dannielle R. Fresquez*
Dannielle R. Fresquez, an Employee of
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