IN THE SUPREME COURT OF NEVADA

NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION' Petitioners,	Electronically Filed Oct 13 2015 11:21 a.m. Tracie K. Lindeman Clerk of Supreme Court
vs.	Sup. Ct. No.
THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and For the County of Clark, and THE HONORABLE RONALD J. ISRAEL District Judge, Respondents,	Case No.: A-12-661726-C
and	Dept. No.: XXVIII
CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Real Parties in Interest.	

PETITION FOR WRIT OF MANDAMUS

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TABLE OF AUTHORITIES

I.

RELIEF REQUESTED BY PETITIONERS

An Order directing District Court Judge Ronald J. Israel to rule that the Thomas vs. Nevada Yellow Cab Corporation, 130 Nev., Adv. Op. 52 (2014) decision rendered on June 26, 2014 by this Honorable Court only applies prospectively.

II.

ISSUE PRESENTED

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

III.

STATEMENT OF FACTS

1. On January 6, 2015, Petitioners filed the Motion to Dismiss. See Petitioners' Appendix **PA001-041.**
2. On January 23, 2015, Real Parties in Interest filed their Opposition to the Motion to Dismiss. See Petitioners' Appendix **PA042-056**.
3. On January 27, 2015, Real Parties in Interest filed their Supplement to their Opposition. See Petitioners' Appendix **PA057-066**.

4. On February 10, 2015, the Honorable Judge Ronald J. Israel denied the Motion to Dismiss. See Petitioners' Appendix **PA145-146**.
5. Currently there are numerous similar cases in Clark County District Court involving allegations of violation of the 2006 Constitutional Minimum Wage Amendment prior to the *Thomas* decision. The names and cases numbers are the following: *Melaky Tesema vs. Lucky Cab Co*. Case No. A-12-660700-C; *Barbara Gilmore vs. Desert Cab, Inc.* Case No. A-12-668502-C; *Michael Murray vs. A Cab Taxi Service, LLC* Case No. A-12-669926-C; *Neal Golden vs. Sun Cab Inc.*, Case No. A-13-678109-C; *Dan Herring vs. Boulder Cab, Inc.*, Case No. A-13-691551-C; *Laksiri Perera vs. Western Cab Company* Case No. A-14-707425-C.
6. The case of *Michael Sargeant vs. Henderson Taxi* Case No. A-15-714136-C was filed on February 19, 2015 after the *Thomas* decision; however, it involves similar allegations of violation of the 2006 Constitutional Minimum Wage Amendment prior to the *Thomas* decision.

IV.

STATEMENT OF REASONING FOR THE ISSUANCE OF A WRIT

A Writ of Mandamus is available "to compel the performance of an act that the law requires as a duty resulting from an 'office, trust or station' or to control an arbitrary or capricious exercise of discretion." Int'l Game Tech., Inc. v. Second

Judicial Dist. Court, 124 Nev. 193, 197, 179P.3d 556, 558 (2008); NRS 34.160. There is no adequate and speedy remedy at law available. This writ poses an important issue of law requiring clarification. ANSE, Inc. v. Eighth Judicial Dist. Court, 124 Nev. 862, 867, 192 P.3d 738, 742 (2008). This is an important issue of law with statewide impact requiring clarification and because an appeal from the final judgment would not constitute an adequate and speedy legal remedy, given the urgent need for resolution, Petitioners respectfully request that this Honorable Court entertain the merits of the Petition.

One of the central tenants in common law, is that individuals and entities be made aware and provided with clear and unambiguous notices of laws so they can comport their conduct to those existing laws. When two (2) conflicting laws regarding the same subject matter are in existence at the same time, it creates uncertainty and ambiguity for individuals and entities regarding which law to follow. This major problem is compounded when an enforcement agency, such as the Office of Nevada Labor Commissioner, itself is operating under the same uncertainty and ambiguity as employers. Hence, on June 26, 2014 this Honorable Court for the first time clarified the law with respect to the Minimum Wage Amendment in Nevada. It is Petitioners' strong contention that the *Thomas* decision was intended **to only apply prospectively**. There are currently numerous similar cases involving allegations of violation of the 2006 Constitutional Minimum Wage Amendment prior to the

Thomas decision on June 26, 2014. Those cases including the instant matter will encounter long, arduous and protracted likely class action litigation which will undoubtedly and unnecessarily consume tremendous judicial resources and costs. In the instant matter, Real Parties in Interest are seeking class action certification. See Petitioners' Appendix **PA166-167**. Therefore this matter requires this Honorable Court to definitively rule that the *Thomas* decision only applies prospectively from June 26, 2014.

A. Real Parties in Interest Have No Claim For Minimum Wage Since The Application of The Thomas Decision is Prospective, Not Retroactive

In this case, on June 26, 2014, this Honorable Court decided the *Thomas* case and recognized in its decision, that at the time, there were two (2) conflicting laws regarding the same subject matter, namely NRS 608.250(2) and the 2006 Constitutional Minimum Wage Amendment. The Court also recognized that employers were put in the most impossible and unenviable position in choosing between which legal provision to follow, on the same exact subject matter. Following passage of the Nevada Minimum Wage Amendment in 2006, the statutory exemption for taxicab and limousine drivers remained. There was no express or implied repeal at that time and in the years following. In addition, the Nevada Labor Commissioner comported with NRS 608.250(2). Up until June 26, 2014, NRS 608.250(2) was the law that employers were following and it was reasonable to do so. Therefore, this Honorable Court decided, that from June 26,

2014 it would make clear to employers and employees in the State of Nevada what the current law on Minimum Wage would be moving forward. The decision is clear and speaks for itself.

There is nothing in the *Thomas* decision either directly or indirectly, that supports the proposition that a taxicab or limousine driver can now go back in time and pursue minimum wage claims against individual employers prior to June 26, 2014. Substantive statutes are presumed to only operate prospectively, unless it is clear that the drafters intended the statute to be applied retroactively. Landgraf v. USI Film Prods., 511 U.S. 244, 273 (1994); *PEBP*, 124 Nev. at 154, 179 P.3d at 553; Cnty. of Clark v. Roosevelt Title Ins. Co., 80 Nev. 530, 535, 396 P.2d 844, 846 (1964). (Cited in Sandpointe Apartments, LLC v. Eighth Judicial District Court, 129 Nev. Adv. Op. 87 Nov. 14, 2013). The presumption against retroactivity is typically explained by reference to fairness. *Landgraf*, 511 U.S. at 270.

As stated in *Sandpointe Apartments, LLC Id.* at page 18:

> The United States Supreme Court has explained that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. And, from this court's inception, it has viewed retroactive statutes with disdain, noting that such laws are "odious and tyrannical" and "have been almost uniformly discountenanced by the courts of Great Britain and the United States." *Milliken v. Sloat*, 1 Nev. 573, 577 (1865). Not surprisingly, once it is triggered, the presumption against retroactivity is given considerable force. *See1U.S. Fid. & Guar. Co. v. United*

> *States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other."). Thus, as we have observed, a statute will not be applied retroactively unless [(1)] the Legislature clearly manifests an intent to apply the statute retroactively, or [(2)] "it clearly, strongly, and imperatively appears from the act itself' that the Legislature's intent cannot be implemented in any other fashion. *PEBP*, 124 Nev. at 154, 179 P.3d at 553 (quoting *In re Estate of Thomas,* 116 Nev. 492, 495-96, 998 P.2d 560, 562 (2000)).

In this case, there was no intent or indication in the opinion by this Honorable Court to apply the *Thomas* decision retroactively. The implications of a retroactive legal effect are enormous and profound, especially considering the list of exemptions under NRS 608.250(2) that were completely eliminated by the *Thomas* decision which includes casual babysitters, domestic service employees, outside salespersons, agricultural employees, persons with severe disabilities and limousine and taxicab drivers.

Statutes are presumptively prospective only, *see* McKellar v. McKellar, 110 Nev. 200, 871 P.2d 296, 298 (1994) ("[t]here is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent or unless the intent of the legislature cannot otherwise be satisfied").

In this case, the *Thomas* decision provides affirmative support that Real Parties in Interest will not be able to go back in time and pursue minimum wage claims against Petitioners prior to June 26, 2014. This Honorable Court ruled, “The

text of the Minimum Wage Amendment, by enumerating specific exceptions that do not include taxicab drivers, **supersedes and supplants** the taxicab driver exception set out in NRS 608.250(2)." (Page 9 of *Thomas* decision) From the use of the present tense, the decision never intended for Real Parties in Interest to go back in time; otherwise, the majority of this Honorable Court would have clearly stated **"superseded and supplanted,"** the past tense, which would have entirely different implications. Real Parties in Interest became aware of the specific use of the present tense use of "supersedes" and "supplants" and filed a motion with this Honorable Court to "correct" its opinion, which this Honorable Court denied and ruled that the opinion shall stand as issued, providing further support that this Honorable Court never intended its decision to be used to pursue actions against Petitioners retroactively prior to June 26, 2014.

B. There Were Two (2) Conflicting Laws Regarding The Same Subject Matter

As stated in *Sandpointe Apartments, LLC Id.* at pages 8-9:

> The presumption against retroactivity is typically explained by **reference to fairness.** *Landgraf*, 511 U.S. at 270. As the Supreme Court has instructed, "[e]lementary considerations of fairness dictate that individuals should have an opportunity **to know what the law is** and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* at 265. Moreover, "[in a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Id.* at 265-66.

In this case, NRS 608.250(2) was the law that employers were following

until the *Thomas* decision. Following passage of the Nevada Minimum Wage Amendment in 2006, the statutory exemption for taxicab and limousine drivers remained on the books and effective (NRS 608.250(2)). There was no express or implied repeal at that time and in the years following. In 2009, Federal Judge Clive Jones was the first jurist to weigh in on the question of "implied repeal," interpreting Nevada law in the Lucas v. Bell Trans, 2009 WL 2424557 (D. Nev. 2009) case. His decision against "implied repeal," although not binding on this Honorable Court, was nonetheless the only statement of competent judicial authority on the Nevada law question, and remained so until *Thomas*. All during those years from 2006 until June 26, 2014, employers and employees followed the law as interpreted by Judge Jones, and were reasonable in doing so, since this Honorable Court had not spoken otherwise. In addition, the Nevada Labor Commissioner comported with that state of affairs, and continued to recognize NRS 608.250(2) by issuing "Rules to be Observed By Employers," dated November 13, 2012, where it specifically listed the exceptions to minimum wage, including taxicab drivers. See Petitioners' Appendix **PA036**. Therefore, Petitioners were following the law as it existed at the time, which was being enforced by the Office of Labor Commissioner and hence there were no violations of existing laws. This Honorable Court recognized this fact when it stated, "The Amendment's broad definition of employee and very specific exemptions

necessarily and directly conflict with the legislative exception for taxicab drivers established by NRS 608.250(2)(e). Therefore, the two are "irreconcilably repugnant,"… such that "both cannot stand,"… and the statute **is impliedly repealed** by the constitutional amendment." (Page 6 of *Thomas* decision) The majority did not state "the statute **was** impliedly repealed." This means that up until the *Thomas* decision, this Honorable Court believed there was a legitimate confusion among the public and employers, in that there were two (2) conflicting laws on the same subject matter requiring a conclusive decision that would establish precedent moving forward that would only apply prospectively. Nothing from the *Thomas* decision indicates that it granted Real Parties in Interest a right to pursue claims against Petitioners retroactively after the *Thomas* decision. Since there were no violations of existing laws, Real Parties in Interest have no claims against Petitioners upon which relief can be granted prior to June 26, 2014.

The *Thomas* decision made it clear that the exemptions under NRS 608.250(2) no longer apply. NRS 608.250(2) contained exemptions in effect since 1965, which employers reasonably and legitimately relied upon. The intent of the *Thomas* decision was **not to punish** Petitioners including other employers who reasonably and legitimately relied upon NRS 608.250(2) and the notices from the Office of Labor Commissioner. Rather, the intent of *Thomas* was to make one conclusive opinion on minimum wage law and to clarify the law prospectively.

This Honorable Court recently took the opportunity to cite to the *Thomas* decision, by specifically using the present tense language, which provides further support that this Honorable Court's decision had **prospective effect**.

In Terry v. Sapphire Gentlemen's Club, 130 Nev., Advance Opinion 87 (2014), at Page 6 this Honorable Court stated:

> … and though this court has recognized that the text of the Minimum Wage Amendment **supplants** that of our statutory minimum wage laws to some extent, see Thomas v. Nev. Yellow Cab Corp., 130 Nev. ___, ___, 327 P.3d 518, 522 (2014) (holding that "[t]he text of the Minimum Wage Amendment … **supersedes** and **supplants** the taxicab driver exception set out in NRS 608.250(2)")

The Nevada Department of Business and Industry which oversees the Nevada Office of Labor Commissioner, agrees that the application of *Thomas* is prospective, not retroactive. In its recent publication, The Business Advocate, it contained an article titled, "A Minimum Wage Guide for Nevada Employers," where it stated:

> While the constitutional amendment did not directly conflict with the exemptions outlined in NRS 608.250, its passage created some **uncertainty**. It was this uncertainty that the Nevada Supreme Court addressed this past summer in *Thomas v. Nevada Yellow Cab*, 130 Nev. Adv. Op. 52 (2014). In its opinion, the Nevada Supreme Court found that exemptions outlined in the Nevada Constitution supersede the exemptions previously provided for in NRS 608.250. The only individuals who are exempt from the payment of minimum wage, according to the Nevada Supreme Court, are those specifically outlined in the constitutional amendment.

> What does this decision mean for Nevada's employers? It means that **employers who have previously relied on the exemptions outlined in NRS 608.250** will be mandated to pay minimum wage to individuals not specifically exempted in the Nevada Constitution. See Page 7 of "A Minimum Wage Guide for Nevada Employers," Winter 2014 as Petitioners' Appendix **PA-038-039**.

In the article, the department that oversees the Labor Commissioner clearly admitted and publicly announced that employers reasonably and legitimately relied on the exemptions under NRS 608.250(2) prior to the *Thomas* decision. Petitioners were among those employers who reasonably and legitimately relied on the exemptions prior to the *Thomas* decision and thus should not be punished by having to defend alleged class action claims involving alleged conduct that occurred prior to the *Thomas* decision. Petitioners have been in compliance with the *Thomas* decision since June 26, 2014. See Affidavit of Gene Auffert, CEO and CFO as Petitioners' Appendix **PA041**.

C. A New Rule of Law Must Be Given Prospective Application

In Breithaupt v. USAA Property and Casualty Insurance Company, 110 Nev. 31, 867 P.2d 402 (1994), at page 405 this Honorable Court followed the three part test in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971) on whether a new rule of law should be limited to prospective application. In determining whether a new rule of law should be limited to prospective application, courts have considered three factors: (1) "the decision to

be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed," (2) the court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation;" and (3) courts consider whether retroactive application "could produce substantial inequitable results."

In this case, the *Thomas* decision was a landmark decision which established a new principle of law that NRS 608.250(2)(e), which was in existence since 1965, was no longer to be followed. This issue was of first impression, which was not clearly foreshadowed by similar cases prior to the *Thomas* decision. The *Thomas* decision was not rendered to punish Petitioners including other employers who reasonably and legitimately relied upon NRS 608.250(2). Retroactive application would effectively punish Petitioners for alleged actions that occurred prior to the decision, which will not further the substantive nature of the *Thomas* decision, since the ruling is worded in present rather than in the past tense. This analysis would be entirely different had the *Thomas* decision been specifically worded to apply retroactively. However, the decision was worded in the present tense and meant to be applied prospectively. Furthermore, there will be substantial inequitable results of retroactively applying the *Thomas* decision in the numerous

referenced cases involving taxicab drivers, and by permitting casual babysitters, domestic service employees, outside salespersons, agricultural employees, persons with severe disabilities and limousine drivers to pursue likely class action litigation against their current or former employers for alleged conduct that allegedly occurred prior to the *Thomas* decision, when those employers had a reasonable and legitimate basis for relying on NRS 608.250(2) and the notices from the Office of Labor Commissioner.

D. This Honorable Court Denied Real Parties' in Interest "Motion to Correct" Its Opinion

Counsel for Real Parties in Interest has admitted that *Thomas* is not retroactive by filing the "Motion to Correct" and seeking from this Honorable Court to change its written opinion to include past tense terminology so that it would be retroactive, and exclude key present tense words. See Petitioners' Appendix **PA147-153**. On October 17, 2014, Petitioners filed their Opposition to "Motion to Correct," and persuasively argued that the *Thomas* decision was meant to only apply prospectively, not retroactively. See Petitioners' Appendix **PA154-163**. On October 27, 2014, this Honorable Court denied Real Parties' in Interest "Motion to Correct," and ruled that the opinion "shall stand as issued." See Petitioners' Appendix **PA164-165**. This provides further support that this Honorable Court never intended its decision to be used to pursue actions against Petitioners or similarly situated employers, retroactively prior to June 26, 2014.

This was a compelling decision to deny the "Motion to Correct," and was a clear pronouncement by this Honorable Court indicating, that its decision was to be **only** applied prospectively. If this Honorable Court had intended its landmark decision on minimum wage in *Thomas* to have a retroactive effect upon Petitioners, as argued in the "Motion to Correct," this Honorable Court would have certainly granted the "Motion to Correct," and changed the language from the current present tense, to past tense as specifically requested. However, this Honorable Court refused to change the wording of its opinion, which is profound and compelling. This Honorable Court's decision to deny the "Motion to Correct," is a clear and authoritative evidence that the *Thomas* decision only applies prospectively and thus Real Parties in Interest have no claim upon which relief can be granted.

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V.

CONCLUSION

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

DATED this 13th day of October, 2015.

YELLOW CHECKER STAR
TRANSPORTATION CO. LEGAL DEPT.

/s/ Tamer B. Botros

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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 4,076 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 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.

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

DATED this 13th day of October, 2015.

YELLOW CHECKER STAR
TRANSPORTATION CO. LEGAL DEPT.

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 13th, 2015, service of the foregoing, **PETITION FOR WRIT OF MANDAMUS** and **PETITIONERS' APPENDIX** was made by depositing same in the U.S. mail, first class postage, prepaid, addressed as follows:

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