

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 11:22 a.m.
 Tracie K. Lindeman
 Sup. Ct. No. Clerk of Supreme Court
 Case No.: A-12-661726-C

vs.)

Dept. No.: XXVIII

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,)

and)

CHRISTOPHER THOMAS, and)
 CHRISTOPHER CRAIG,)
 Real Parties in Interest.)

PETITIONERS' APPENDIX

MARC C. GORDON, ESQ.
 Nevada Bar No. 001866
 TAMER B. BOTROS, ESQ.
 Nevada Bar No. 012183
**YELLOW CHECKER STAR
 TRANSPORTATION CO. LEGAL DEPT.**
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 NEVADA STAR CAB CORPORATION

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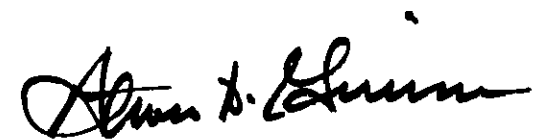
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CLERK OF THE COURT

1 **MTN**
 2 MARC C. GORDON, ESQ.
 3 GENERAL COUNSEL
 4 Nevada Bar No.1866
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 16 NEVADA YELLOW CAB CORPORATION
 17 NEVADA CHECKER CAB CORPORATION and
 18 NEVADA STAR CAB CORPORATION

DISTRICT COURT

CLARK COUNTY, NEVADA

15 CHRISTOPHER THOMAS, and)
 16 CHRISTOPHER CRAIG,)
 17 Individually and on behalf of others similarly)
 18 situated,)
 19 Plaintiffs,)
 20 vs.)
 21 NEVADA YELLOW CAB CORPORATION,)
 22 NEVADA CHECKER CAB CORPORATION,)
 23 and NEVADA STAR CAB CORPORATION)
 24 Defendants.)

Case No.: A-12-661726-C
Dept. No.: XXVIII

DEFENDANTS' MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)

24 COMES NOW, NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB
 25 CORPORATION, and NEVADA STAR CAB CORPORATION, by and through their undersigned
 26 counsel of record, MARC C. GORDON, ESQ., and TAMER B. BOTROS, ESQ., and hereby respectfully
 27 file their Motion to Dismiss Pursuant to NRCP 12(b)(5).
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This Motion is made and based upon the pleadings and papers on file herein, and such oral argument of counsel as may be heard.

DATED this 6th day of January, 2015.

**YELLOW CHECKER STAR
TRANSPORTATION CO. LEGAL DEPT.**

/s/ Tamer Botros

MARC C. GORDON, ESQ.
GENERAL COUNSEL
Nevada Bar No. 001866
TAMER B. BOTROS, ESQ.
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5225 W. Post Road
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Attorneys for Defendants
NEVADA YELLOW CAB CORPORATION
NEVADA CHECKER CAB CORPORATION and
NEVADA STAR CAB CORPORATION

1 **NOTICE OF MOTION**

2 TO: CHRISTOPHER THOMAS, Plaintiff

3 TO: CHRISTOPHER CRAIG, Plaintiff

4 TO: LEON GREENBERG, ESQ., Plaintiffs' counsel

5 TO: DANA SNIEGOCKI, ESQ., Plaintiffs' counsel

6
7 **PLEASE TAKE NOTICE** that the undersigned will bring the foregoing Motion on for hearing in
8 the above-entitled Court at the Clark County Courthouse, Las Vegas, Nevada, in Dept. No. XXVIII, on the
9 10 day of February, 2015 at the hour of 9 : 0 0 a.m., or as soon thereafter as counsel may be
10 heard.
11

12 DATED this 6th day of January, 2015.

13 **YELLOW CHECKER STAR**
14 **TRANSPORTATION CO. LEGAL DEPT.**

15 /s/ Tamer Botros

16 MARC C. GORDON, ESQ.

17 GENERAL COUNSEL

18 Nevada Bar No. 001866

19 TAMER B. BOTROS, ESQ.

20 ASSOCIATE COUNSEL

21 Nevada Bar No. 012183

22 5225 W. Post Road

23 Las Vegas, Nevada 89118

24 Attorneys for Defendants

25 NEVADA YELLOW CAB CORPORATION

26 NEVADA CHECKER CAB CORPORATION and

27 NEVADA STAR CAB CORPORATION
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1 I.

2 FACTS

- 3 1. On May 11, 2012, Plaintiffs, who were taxicab drivers, filed a Complaint naming Defendants
4 and alleged violations of the Minimum Wage law.
5
- 6 2. On August 14, 2012, this Honorable Court granted Defendants' Motion to Dismiss.
7
- 8 3. On September 6, 2012, Plaintiffs filed the Notice of Appeal.
9
- 10 4. On October 8, 2013, Oral Arguments were conducted before the Nevada Supreme Court.
11
- 12 5. On June 26, 2014, the Nevada Supreme Court rendered its decision.
13
- 14 6. On October 14, 2014, Plaintiffs filed Motion to "Correct" Nevada Supreme Court's Opinion of
15 June 26, 2014. See Motion attached hereto as Exhibit 1.
16
- 17 7. On October 17, 2014, Defendants filed their Opposition to Motion to "Correct." See Opposition
18 attached hereto as Exhibit 2.
19
- 20 8. On October 27, 2014 the Supreme Court Denied Plaintiffs' Motion to "Correct" and ruled that
21 the wording of the opinion shall stand as issued. See Order attached hereto as Exhibit 3.
22
- 23 9. On November 4, 2014, the Nevada Supreme Court issued the Remittitur.
24
- 25 10. On November 5, 2014, Plaintiffs filed their First Amended Complaint alleging violations of
26 Minimum Wage law, malicious and/or fraudulent and/or oppressive conduct, stating that
27 Defendants made "no effort to seek any judicial declaration of their obligation," conversion, and
28 seeking damages of alleged violations from November 28, 2006.

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II.

LEGAL ARGUMENT

A. Plaintiffs Have No Claim For Minimum Wage Since The Application of The Thomas Decision is Prospective, Not Retroactive

NRCP 12(b)(5) states as follows:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (5) **failure to state a claim upon which relief can be granted.**

In this case, on June 26, 2014, the Nevada Supreme 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 taxi and limo 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 605.250(2) was the law that employers were following and it was reasonable to do so. Therefore, the Nevada Supreme 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 driver, or anyone who was previously exempted under NRS 608.250(2), 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

1 intended the statute to be applied retroactively. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994);
2 *PEBP*, 124 Nev. at 154, 179 P.3d at 553; *Cnty. of Clark v. Roosevelt Title Ins. Co.*, 80 Nev. 530, 535,
3 396 P.2d 844, 846 (1964). (Cited in *Sandpointe Apartments, LLC v. Eighth Judicial District Court*, 129
4 Nev. Adv. Op. 87 Nov. 14, 2013). The presumption against retroactivity is typically explained by
5 reference to fairness. *Landgraf*, 511 U.S. at 270.

7 Statutes are presumptively prospective only, see *McKellar v. McKellar*, 110 Nev. 200, 871 P.2d
8 296, 298 (1994) ("[t]here is a general presumption in favor of prospective application of statutes unless
9 the legislature clearly manifests a contrary intent or unless the intent of the legislature cannot otherwise
10 be satisfied").

12 In this case, the *Thomas* decision provides affirmative support that Plaintiffs will not be able to
13 go back in time and pursue minimum wage claims against Defendants prior to June 26, 2014. The Court
14 ruled, "The text of the Minimum Wage Amendment, by enumerating specific exceptions that do not
15 include taxicab drivers, **supersedes and supplants** the taxicab driver exception set out in NRS
16 608.250(2)." (Page 9 of *Thomas* decision) From the use of the present tense, the decision never intended
17 for Plaintiffs to go back in time; otherwise, the majority of the Supreme Court would have clearly stated
18 **"superseded and supplanted,"** the past tense, which would have entirely different implications.
19 Plaintiffs became aware of the specific use of the present tense use of **"supersedes"** and **"supplants"** in
20 the *Thomas* decision and on October 14, 2014, filed a "Motion to Correct" with the Nevada Supreme
21 Court to "correct" its opinion. See Exhibit 1.

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1 **B. The Supreme Court Denied Plaintiffs’ “Motion to Correct” Its Opinion**

2 Plaintiffs’ counsel has admitted that *Thomas* is not retroactive by filing the “Motion to Correct”
3 and seeking from Supreme Court to change its written opinion to include past tense terminology so that
4 it would be retroactive, rather than prospective, as it currently is. See Exhibit 1. On October 17, 2014,
5 Defendants filed their Opposition to Motion to “Correct,” and persuasively argued that the *Thomas*
6 decision was meant to only apply prospectively, not retroactively. See Exhibit 2. On October 27, 2014,
7 the Supreme Court denied Plaintiffs’ “Motion to Correct,” and ruled that the opinion “shall stand as
8 issued.” See Exhibit 3. This provides further support that the Court never intended its decision to be
9 used to pursue actions against Defendants or similarly situated employers, retroactively prior to June 26,
10 2014. This was a compelling decision by the Supreme Court to deny Plaintiffs’ “Motion to Correct,”
11 and was a clear pronouncement by the Court indicating, that their decision was to be **only** applied
12 prospectively. If the Supreme Court had intended its landmark decision on minimum wage in *Thomas*,
13 to have a retroactive effect as argued by Plaintiffs’ Counsel in his “Motion to Correct,” the Supreme
14 Court would have certainly granted Plaintiffs’ “Motion to Correct,” and changed the language from the
15 current present tense, to past tense as specifically requested by Plaintiffs’ Counsel. However, the Court
16 refused to change the wording of its opinion, which is profound and compelling. The Court’s decision
17 to deny Plaintiffs’ “Motion to Correct,” is a clear, recent and authoritative evidence that the *Thomas*
18 decision only applies prospectively and thus Plaintiffs have no claim upon which relief can be granted.
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1 **C. There Were Two (2) Conflicting Laws Regarding The Same Subject Matter**

2 NRS 608.250(2) was the law that employers were following until the *Thomas* decision.

3 Following passage of the Nevada Minimum Wage Amendment in 2006, the statutory exemption for taxi
4 and limo drivers remained on the books and effective (NRS 608.250(2)). There was no express or
5 implied repeal at that time and in the years following. In 2009, Federal Judge Clive Jones was the first
6 jurist to weigh in on the question of “implied repeal,” interpreting Nevada law in the *Lucas* case. His
7 decision against “implied repeal,” although not binding on the Nevada Supreme Court, was nonetheless
8 the only statement of competent judicial authority on the Nevada law question, and remained so until
9 *Thomas*. All during those years from 2006 until June 26, 2014, employers and employees followed the
10 law as interpreted by Judge Jones, and were reasonable in doing so, since the Supreme Court had not
11 spoken otherwise. In addition, the Nevada Labor Commissioner comported with that state of affairs,
12 and continued to recognize NRS 608.250(2) by issuing “**Rules to be Observed By Employers,**” dated
13 November 13, 2012, where it specifically listed the exceptions to minimum wage, including taxicab
14 drivers. See attached Exhibit 4. Therefore, Defendants were following the law as it existed at the time,
15 which was being enforced by the Office of Labor Commissioner and hence there were no violations of
16 existing laws. The Supreme Court recognized this fact when it stated, “The Amendment’s broad
17 definition of employee and very specific exemptions necessarily and directly conflict with the legislative
18 exception for taxicab drivers established by NRS 608.250(2)(e). This clearly indicates that there were
19 two (2) conflicting laws regarding the same subject matter and hence the Supreme Court ruled that both
20 laws could not operate. Therefore, the two are “irreconcilably repugnant,”... such that “both cannot
21 stand,”... and the statute **is impliedly repealed** by the constitutional amendment.” (Page 6 of *Thomas*
22 decision) The majority did not state “the statute **was** impliedly repealed.” This means that up until the
23 *Thomas* decision, the Supreme Court believed there was a reasonable and legitimate confusion amongst
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1 the public and employers, in that there were two (2) conflicting laws on the same subject matter
2 requiring a conclusive decision that would establish precedent moving forward. Nothing from the
3 decision indicates that it granted Plaintiffs a right to pursue claims against Defendants retroactively after
4 the Thomas decision. Since there were no violations of existing laws, Plaintiffs have no claims against
5 Defendants upon which relief can be granted.
6

7 The Thomas decision made it clear that the exemptions under NRS 608.250(2) no longer applies.
8 NRS 608.250(2) contained exemptions in effect since 1965, which employers reasonably and
9 legitimately relied upon. The intent of the Thomas decision was not to punish Defendants including
10 other employers who reasonably and legitimately relied upon NRS 608.250(2). Rather, the intent of
11 Thomas was to make one conclusive opinion on minimum wage law and to clarify the law
12 prospectively. The implications of a retroactive legal effect are enormous and profound, especially
13 considering the list of exemptions under NRS 608.250(2) that were completely wiped away by the
14 Thomas decision. The decision was not meant to have a retroactive effect. Despite Plaintiffs' "Motion
15 to Correct," the Supreme Court purposefully did not indicate, imply or even hint that their decision
16 meant that a taxicab driver or anyone who was previously exempted under NRS 608.250(2), can now go
17 back in time and pursue minimum wage claims against individual employers prior to June 26, 2014. The
18 reason is one of fundamental fairness as stated in Landgraf, Id at 511 U.S. at 270. Furthermore, the
19 Court also recognized that employers were put in the most impossible and unenviable position in
20 choosing between which legal provision to follow, on the same exact subject matter. The Court **did not**
21 want to punish employers when they were following the same law that was being enforced by the Office
22 of Labor Commissioner.
23

24 The Supreme Court recently took the opportunity to cite to the Thomas decision, by specifically
25 using the present tense language, which provides further support that their decision had **prospective**
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1 **effect.** In Terry v. Sapphire Gentlemen’s Club, 130 Nev., Advance Opinion 87, at Page 6 the Court
2 stated:

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

7 The Nevada Department of Business and Industry agrees that the application of Thomas is
8 prospective, not retroactive. In its recent publication, The Business Advocate, it contained an article
9 titled, “A Minimum Wage Guide for Nevada Employers,” where it stated:

10
11 While the constitutional amendment did not directly conflict with the exemptions
12 outlined in NRS 608.250, its passage created some **uncertainty**. It was this uncertainty
13 that the Nevada Supreme Court addressed this past summer in Thomas v. Nevada Yellow
14 Cab, 130 Nev. Adv. Op. 52 (2014). In its opinion, the Nevada Supreme Court found that
15 exemptions outlined in the Nevada Constitution supersede the exemptions previously
16 provided for in NRS 608.250. The only individuals who are exempt from the payment of
17 minimum wage, according to the Nevada Supreme Court, are those specifically outlined
18 in the constitutional amendment.

19 What does this decision mean for Nevada’s employers? It means that **employers who**
20 **have previously relied on the exemptions outlined in NRS 608.250** will be mandated
21 to pay minimum wage to individuals not specifically exempted in the Nevada
22 Constitution. See Page 7 of “A Minimum Wage Guide for Nevada Employers” Winter
23 2014 attached hereto was Exhibit 5.

24 The Supreme Court recognized that prior to June 26, 2014, employers were reasonably and legitimately
25 relying on NRS 608.250, and that there was confusion about which law employers must follow and
26 hence, decided to make a definitive ruling moving forward that would apply prospectively, not
27 retroactively. Defendants have been in compliance with the Thomas decision since June 26, 2014. See
28 Affidavit of Gene Auffert, CEO and CFO attached hereto as Exhibit 6. Therefore, Defendants
respectfully request this Honorable Court to grant Defendants’ Motion to dismiss, because Plaintiffs do
not have a claim upon which relief can be granted.

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III.

CONCLUSION

Based on the foregoing points and authorities, Defendants respectfully request that this Honorable Court grant Defendants' Motion to Dismiss.

DATED this 6th day of January, 2015.

**YELLOW CHECKER STAR
TRANSPORTATION CO. LEGAL DEPT.**

/s/ Tamer Botros _____

MARC C. GORDON, ESQ.
GENERAL COUNSEL
Nevada Bar No. 001866
TAMER B. BOTROS, ESQ.
ASSOCIATE COUNSEL
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5225 W. Post Road
Las Vegas, Nevada 89118
NEVADA YELLOW CAB CORPORATION
NEVADA CHECKER CAB CORPORATION and
NEVADA STAR CAB CORPORATION

1 **CERTIFICATE OF ELECTRONIC SERVICE**

2 Pursuant to Rule 9 of Nevada Electronic Filing and Conversion Rules, I hereby certify that on
3 the 6th day of January, 2015, service of the foregoing **DEFENDANTS’ MOTION TO DISMISS**
4 **PURSUANT TO NRCP 12(b)(5)** made this date by electronic service as follows:
5

6 Leon Greenberg, Esq.
7 Dana Sniegocki, Esq.
8 Leon Greenberg Professional Corporation
9 2965 South Jones Blvd, Suite E4
10 Las Vegas, Nevada 89146
11 leongreenberg@overtimelaw.com
12 dana@overtimelaw.com
13 Attorneys for Plaintiffs
14 CHRISTOPHER THOMAS
15 CHRISTOPHER CRAIG
16

17 /s/ Tamer Botros
18 For **Yellow Checker Star**
19 **Transportation Co. Legal Dept.**
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EXHIBIT 1

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Oct 14 2014 03:39 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

CHRISTOPHER THOMAS and
CHRISTOPHER CRAIG,
Individually and on behalf of others
similarly situated,

Appellants,

vs.

NEVADA YELLOW CAB
CORPORATION, NEVADA
CHECKER CAB CORPORATION,
NEVADA STAR CAB
CORPORATION,

Respondents,

Sup. Ct. No. 61681

Dist. Ct No.:A-12-661726-C

Dept. No. XXVIII

APPELLANTS' MOTION TO CORRECT
OPINION OF JUNE 26, 2014 AND STAY
REMITTITUR

Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Appellants

1 Appellants, Christopher Thomas and Christopher Craig, hereby
2 file this motion seeking to correct this Court’s Opinion of June 26, 2014, by
3 removing any present tense language that can be interpreted as directing such
4 Opinion is only to be applied prospectively.

5
6 **NATURE OF RELIEF SOUGHT**

7
8 The holding of the Court’s Opinion of June 26, 2014 is not in
9 dispute. What is sought by this motion is a correction to the present tense
10 language of two sentences, and three words, of the Opinion which, if
11 uncorrected, will be the subject of further litigation, and a further appeal to this
12 Court, over whether such Opinion’s application is only prospective. These two
13 sentences, with the requested corrected language in brackets and removed
14 words struck through, are set forth below:

15
16 We hold that the district court erred because the text of the
17 Minimum Wage Amendment, by clearly setting out some
18 exceptions to the minimum wage law and not others, ~~supplants~~
19 [supplanted] the exceptions listed in NRS 608.250(2). Opinion,
20 page 2; 327 P.3d at 520.

21
22 The text of the Minimum Wage Amendment, by enumerating
23 specific exceptions that do not include taxicab drivers, ~~supersedes~~
24 [superceded] and ~~supplants~~ [supplanted] the taxicab driver
25 exception set out in NRS 608.250(2). Opinion, page 9; 327 P.3d
26 at 522.

1 **WHY THE RELIEF REQUESTED SHOULD BE GRANTED**

2 The relief requested is sought to conserve judicial resources and
3 promptly secure for the appellants, and many thousands of other employees in
4 the Nevada taxicab industry, the relief afforded to them by the Court’s Opinion
5 of June 26, 2014. Appellants’ counsel is aware of six other pending litigations
6 involving taxi driver plaintiffs seeking minimum hourly wages, including one
7 currently on appeal to this Court, *Gilmore v. Desert Cab, Inc.* No. 62905. *See,*
8 Ex. “A” ¶ 1. This case, the *Gilmore* appeal, and all of those other cases,
9 involve the identical issue resolved by this appeal, the entitlement of taxi
10 drivers to the minimum hourly wage specified by Nevada’s Constitution.

11 This litigation has been most vigorously contested, as evidenced by
12 respondents’ recently denied, and wholly specious, Petition for Rehearing. *See,*
13 Order of September 24, 2014. Despite the speciousness of any claim that the
14 Court’s Opinion of June 26, 2014 only has prospective application, it seems
15 virtually certain that respondents in this case, and one or more defendants in the
16 other taxi driver minimum wage cases, will insist on litigating that issue. They
17 will do so based upon the foregoing enumerated language. If that language is
18 not modified as requested they will insist it establishes that, under the Court’s
19 June 26, 2014 Opinion, the Minimum Wage Amendment has not “superceded”
20 and “supplanted” the exceptions set out in NRS 608.250(2) as of the
21 Amendment’s effective date but only “supercedes” and “supplants” them as of
22 the date of such Opinion. *See,* Ex. “A” ¶ 2.

23 **THE COURT SHOULD STAY REMITTITUR**
24 **TO CORRECT ITS OPINION**

25 Pursuant to NRAP Rule 41(a)(1) this Court is to issue remittitur of this
26 case on October 20, 2014, unless it enlarges the time for it to do so by
27 appropriate Order. It is submitted that the Court should suitably enlarge the
28 time for its remittitur to issue so it can consider and rule upon this motion

1 before it relinquishes jurisdiction over this appeal.

2

3 Dated this 14th day of October, 2014.

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/s/ Leon Greenberg
Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Appellant

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EXHIBIT "A"

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IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER THOMAS and
CHRISTOPHER CRAIG,
Individually and on behalf of others
similarly situated,

Appellants,

vs.

NEVADA YELLOW CAB
CORPORATION, NEVADA
CHECKER CAB CORPORATION,
NEVADA STAR CAB
CORPORATION,

Respondents,

Sup. Ct. No. 61681
Dist. Ct No.:A-12-661726-C
Dept. No. XXVIII

Declaration

Leon Greenberg, an attorney duly licensed to practice law in the State of Nevada, hereby affirms, under penalty of perjury, that:

1. I am counsel for the appellants in this case. I am also counsel for the plaintiffs in the following six other cases that also involve claims for unpaid minimum hourly wages allegedly owed to taxi cab driver employees pursuant to the Nevada Constitution: *Murray v. A Cab Taxi Service LLC*, Eighth Judicial District Court, Case No. A-12-669926-C; *Herring v. Boulder Cab, Inc.*, Eighth Judicial District Court, Case No. A-13-691551-C; *Tesema v. Lucky Cab Co.*, Eighth Judicial District Court, Case No. A-12-660700-C; *Golden v. Sun Cab, Inc.*, Eighth Judicial District Court, Case No. A-13-678109-C; *Perera v. Western Cab Company*, Eighth Judicial District Court, Case No. A-14-707425-C and *Gilmore v. Desert Cab, Inc.*, appeal pending, Nevada Supreme Court No. 62905. In all of these cases, except *Perera* which has yet to be served,

1 defendants have asserted that taxi cab drivers are not subject to the minimum
2 wage protections of Nevada’s Constitution, an issue resolved by this appeal.

3 2. I have engaged in discussions about the Court’s Opinion of June 26,
4 2014 with several of the counsel representing defendants in the cases
5 enumerated in paragraph 1. Such counsel have advised me that defendants in
6 those cases believe that the Court’s Opinion of June 26, 2014 has only
7 prospective application. They claim to base that belief upon the Opinion’s use
8 of the present tense “supercede” and “supplant,” and not the past tense of those
9 words, in its discussion of how the Nevada Constitution has overridden the
10 exceptions set out in NRS 608.250(2). Based upon those conversations it is my
11 belief that defendants in some, or all, of such cases, and in this case as well,
12 intend to argue that the Court’s Opinion of June 26, 2014 found the Nevada
13 Constitution “supercedes” and “supplants” the exceptions set out in NRS
14 608.250(2) only as of the date of such Opinion and not as of its enactment date.

15
16
17 Dated this 14th day of October, 2014.

18
19
20 */s/ Leon Greenberg*
21 Leon Greenberg, Esq. (Bar # 8094)
22 A Professional Corporation
23 2965 S. Jones Blvd., Suite E-3
24 Las Vegas, Nevada 89146
25 (702) 383-6085
26 Attorney for Appellant
27
28

EXHIBIT 2

IN THE SUPREME COURT OF NEVADA

CHRISTOPHER THOMAS, and)
CHRISTOPHER CRAIG,)
Individually and on behalf of others)
similarly situated,)

Petitioners,)

vs.)

NEVADA YELLOW CAB)
CORPORATION, NEVADA CHECKER)
CAB CORPORATION NEVADA STAR)
CAB CORPORATION)

Respondents.)

Electronically Filed
Oct 17 2014 09:59 a.m.
Tracie K. Lindeman
Clerk of Supreme Court
Sup. Ct. No. 61681

Case No.: A-12-661726-C
Dept. No.: XXVIII

**RESPONDENTS' OPPOSITION TO MOTION TO CORRECT OPINION
OF JUNE 26, 2014 AND STAY REMITTITUR**

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NEVADA YELLOW CAB CORPORATION
NEVADA CHECKER CAB CORPORATION
NEVADA STAR CAB CORPORATION

1 **ARGUMENT**

2 **A. Appellants’ “Motion to Correct” Is Time Barred Under NRAP**
3 **40(a)(1).**

4
5 NRAP 40(a)(1) states in pertinent part:

6 Unless the time is shortened or enlarged by order, a petition for
7 rehearing may be filed within 18 days after the filing of the court’s
8 decision under Rule 36.

9
10 First, Appellants’ “Motion to Correct,” is pre-mature and inappropriate
11 procedurally, since it is essentially requesting that this Honorable Court step into
12 the shoes of the District Court, and determine trial court issues prior to this matter
13 being remanded – issues that have neither been briefed, argued or ruled upon by
14 the District Court Judge as part of the continuing litigation following remand.
15

16
17 Second, Appellants so-called “Motion to Correct,” an unknown procedure
18 under NRAP, is time barred. This Motion to Correct should in effect be construed
19 as a Petition for Re-Hearing, since what Appellants are seeking would significantly
20 alter the *Thomas* decision and thus requires a rehearing. The *Thomas* decision was
21 rendered on June 26, 2014. Pursuant to NRAP 40(a)(1), Appellants had until July
22 14, 2014 to file their “Motion to Correct.” Instead, Appellants filed their “Motion
23 to Correct,” on October 14, 2014 and thus are time barred. Therefore, Respondents
24 respectfully request that this Honorable Court deny Appellants’ Motion to Correct
25 Opinion of June 26, 2014 and Stay Remittitur.
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1 **B. Appellants Are Seeking to Change This Honorable Court's Opinion**
2 **in Thomas.**

3
4 On June 26, 2014, this Honorable Court decided the Thomas case. The
5 Court recognized in its decision, that at the time, there were two (2) conflicting
6 laws regarding the same subject matter dealing with occupational exemptions,
7 namely NRS 608.250(2) and the 2006 Constitutional Minimum Wage Amendment.
8 Following passage of the Nevada Minimum Wage Amendment in 2006, the
9 statutory occupational exemption for taxi and limo drivers remained in NRS
10 608.250(2). There was no express or implied repeal at that time and in the years
11 following. In addition, the Nevada Labor Commissioner acted in accord with NRS
12 608.250(2) until June 26, 2014, by recognizing the taxi driver occupational
13 exemption in NRS 608.250(2). Thus, until June 26, 2014, NRS 608.250(2) was the
14 law that employers were following in Nevada, and were reasonable in doing so.
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19 The Court then decided in Thomas, that from June 26, 2014 it would make
20 clear to employers and employees in the State of Nevada what the current law on
21 Minimum Wage occupational exemptions would be moving forward. The decision
22 speaks for itself. Appellants now seek at this very late date to have this Court
23 change its opinion, in order to enable Appellants and others to pursue minimum
24 wage claims retroactively.
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1 Thomas is a landmark decision in Nevada pertaining to minimum wage
2 occupational exemptions. The decision as released and published several months
3 ago, June 26, 2014, must stand with no corrections or changes, allowing this matter
4 to be remanded to District Court for continuing proceedings (please recall that this
5 case was dismissed at its inception pursuant to Respondents successful Motion to
6 Dismiss - there still remains the stages of pleadings, class action certification,
7 discovery and trial to take place in the trial court upon remand). Therefore,
8 Respondents respectfully request the Court deny Appellants' Motion to Correct
9 Opinion of June 26, 2014 and Stay Remittitur.
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13 **C. The Thomas Decision Was Meant to Only Apply Prospectively, Not**
14 **Retroactively.**
15

16 There is nothing in the Thomas decision, either directly or indirectly, express
17 or implied, that supports the proposition that a taxicab driver, or any other
18 occupational category formerly exempt under NRS 608.250(2), can now go back
19 years in time and pursue minimum wage claims against individual
20 employers. Laws and court decisions are presumed to only operate prospectively,
21 unless an intent to apply retroactively is made clear. Landgraf v. USI Film Prods.,
22 511 U.S. 244, 273 (1994); PEBP, 124 Nev. at 154, 179 P.3d at 553; Cnty. of Clark
23 v. Roosevelt Title Ins. Co., 80 Nev. 530, 535, 396 P.2d 844, 846 (1964). (Cited in
24 Sandpointe Apartments, LLC v. Eighth Judicial District Court, 129 Nev. Adv. Op.
25
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1 87 Nov. 14, 2013); McKellar v. McKellar, 110 Nev. 200, 871 P.2d 296, 298 (1994)

2 ("[t]here is a general presumption in favor of prospective application of statutes
3 unless the legislature clearly manifests a contrary intent or unless the intent of the
4 legislature cannot otherwise be satisfied"). This presumption against retroactivity
5 is typically explained by reference to fairness. *Landgraf*, 511 U.S. at 270.
6

7
8 In this case, the implications of a retroactive legal effect are profound,
9 considering the lengthy list of occupational exemptions under NRS 608.250(2) that
10 were completely wiped away by the Thomas decision. If this Honorable Court
11 were to grant Appellants' Motion, it would mean that other previously exempt
12 occupations such as casual babysitters, domestic service employees, outside
13 salespersons, agricultural employees, persons with severe disabilities, and limo
14 drivers can now go back possibly years in time and file minimum wage claims in
15 District Court.
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19 The Thomas decision provides compelling affirmative support that it was not
20 intended to allow Appellants and other previously exempt occupations under NRS
21 608.250(2) to be able to go back years in time pursuing minimum wage claims.
22 This Court ruled, "The text of the Minimum Wage Amendment, by enumerating
23 specific exceptions that do not include taxicab drivers, **supersedes and supplants**
24 the taxicab driver exception set out in NRS 608.250(2)." (Page 9 of Thomas
25 decision, emphasis added). From the use of the present tense, the *Thomas*
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1 decision never intended for Appellants to go back in time; otherwise, the majority
2 of the Supreme Court would have clearly stated “**superseded and supplanted,**”
3 the past tense, which would have entirely different implications.
4

5 NRS 608.250(2) was the law that employers were following until the
6 Thomas decision issued on June 26, 2014. Following passage of the Nevada
7 Minimum Wage Amendment in 2006, the statutory occupational exemptions for
8 taxi and limo drivers (and others) remained on the books and effective pursuant to
9 NRS 608.250(2). There was no express or implied repeal at that time or in the
10 years following. In 2009, federal District Judge Robert Clive Jones was the first
11 jurist in Nevada to weigh in on the question of “implied repeal,” of NRS
12 608.250(2), interpreting Nevada law in the Lucas case. His decision against
13 “implied repeal,” although not binding on the Nevada Supreme Court, was
14 nonetheless the only statement of competent judicial authority on the Nevada law
15 question, and remained so until Thomas. All during those years from 2006 until
16 June 26, 2014, employers and employees followed the law as interpreted by Judge
17 Jones, and were reasonable in doing so since the Supreme Court had not spoken
18 otherwise. Moreover, the Nevada Labor Commissioner agreed with that state of
19 affairs, and continued to recognize the occupational exemptions of NRS
20 608.250(2) until Thomas. The Supreme Court recognized this fact in Thomas
21 when it stated, “The Amendment’s broad definition of employee and very specific
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1 exemptions necessarily and directly conflict with the legislative exception for
2 taxicab drivers established by NRS 608.250(2)(e). Therefore, the two are
3 “irreconcilably repugnant,”... such that “both cannot stand,... and the statute **is**
4 **impliedly repealed** by the constitutional amendment.” (Page 6 of *Thomas*
5 decision; emphasis supplied). The majority did not state “the statute **was** impliedly
6 repealed,” in 2006 by the Nevada Minimum Wage Amendment. Thus, this Court
7 is recognizing the legal quandary due to two (2) conflicting laws in force and in
8 effect on the same subject matter since 2006. That quandary moved the majority
9 in *Thomas* to issue a conclusive decision that would resolve the conflict going
10 forward. Nothing in the language of *Thomas* indicates that it meant to grant
11 Appellants a right to pursue minimum wage claims retroactively.

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14
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16 In Stokes v. Aetna Casualty and Surety Company, 232 So. 2d 328
17 (La.App.1970), (cited with approval in Klosterman v. Cummings, 476 P.2d 14, 86
18 Nev. 684 (Nev., 1970), that court said: ‘We conclude, therefore, that the question
19 of retroactive or prospective application of civil law changes must be determined
20 in the light of (1) extent of reliance on previous legislation or judicial decision, (2)
21 the reasonableness of such reliance, (3) the degree of hardship resulting from a
22 retroactive application of the change, (4) the public interest in the stability of the
23 social institutions involved, if any, and (5) the purpose and intent of both the new
24 and old rule.’

1 In this case, prior to June 26, 2014, there was no Nevada Supreme Court
2 decision on this matter and Respondents, including other employers in Nevada,
3 were reasonably and legitimately relying on NRS 608.250(2). That reliance was
4 reasonable, since NRS 608.250(2) remained the law until the Thomas decision.
5
6 The degree of hardship resulting from a retroactive application will be enormous
7 and profound, since many employment sectors listed under NRS 608.250(2) were
8 reasonably and legitimately relying on that law during all that time.
9

10
11 If retroactive application were to take place, Respondents and those other
12 employment sectors would be unjustly punished for following the same law that
13 the Nevada Labor Commissioner was following and enforcing all those years.
14 Instead, the Thomas decision rightfully and reasonably makes it clear that NRS
15 608.250(2) no longer applies, and hence there are no occupational exemptions
16 under that statute in the State of Nevada after June 26, 2014.
17
18

19 The occupational exemptions contained in NRS 608.250(2) had been in
20 effect in Nevada since 1965. Employers and government agencies reasonably and
21 justifiably relied upon those occupational exemptions until Thomas. The intent of
22 the Thomas decision was not to punish Respondents or other employers who in
23 good faith reasonably and lawfully relied upon NRS 608.250(2). Rather, the intent
24 of Thomas was to issue a conclusive opinion on minimum wage law that would
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1 resolve the conflict between two existing laws, and apply that resolution on a going
2 forward basis after June 26, 2014.

3
4 **CONCLUSION**

5 Based on the foregoing points and authorities, Respondents respectfully
6 request that this Honorable Court deny Appellants' Motion to Correct Opinion of
7 June 26, 2014 and Stay Remittitur.
8

9 DATED this 16th day of October, 2014.

10
11 YELLOW CHECKER STAR
12 TRANSPORTATION CO. LEGAL DEPT.

13 *Marc C. Gordon*

14
15 _____
16 MARC C. GORDON, ESQ.
17 GENERAL COUNSEL
18 Nevada Bar No. 001866
19 TAMER B. BOTROS, ESQ.
20 ASSOCIATE COUNSEL
21 Nevada Bar No. 012183
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CERTIFICATE OF SERVICE

The undersigned certifies that on October 16th, 2014, service of the foregoing, **RESPONDENTS' OPPOSITION TO MOTION TO CORRECT OPINION OF JUNE 26, 2014 AND STAY REMITTITUR** was made by depositing same in the U.S. mail, first class postage, prepaid, addressed as follows:

Leon Greenberg, Esq.
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
Attorney for Appellants

/s/ Sheila Robertson
For **Yellow Checker Star**
Transportation Co. Legal Dept.

EXHIBIT 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER THOMAS; AND
CHRISTOPHER CRAIG,
INDIVIDUALLY AND ON BEHALF OF
OTHERS SIMILARILY SITUATED,

Appellants,

vs.

NEVADA YELLOW CAB
CORPORATION; NEVADA CHECKER
CAB CORPORATION; AND NEVADA
STAR CAB CORPORATION,

Respondents.

No. 61681

FILED

OCT 27 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

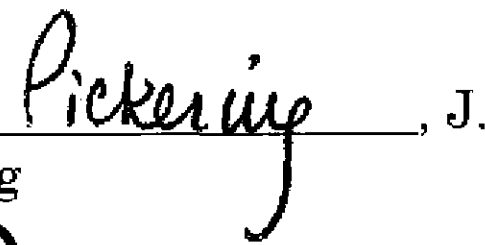
ORDER

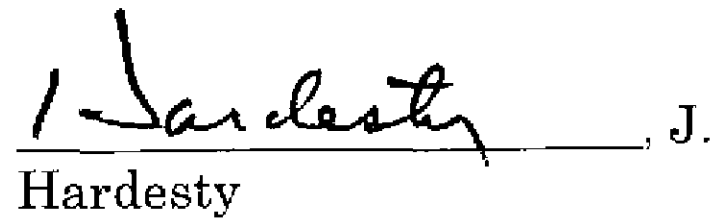
This court issued an opinion in this matter on June 26, 2014. Appellants have filed a motion to correct the opinion by changing three words from present tense to past tense, and also request that this court stay issuance of the remittitur, which was due to issue October 20, 2014. Respondents have filed an opposition to the motion, and appellants have filed a reply. No good cause appearing, we deny the motion to the extent it requests changes to the wording of the opinion; the opinion shall stand as issued. We grant the motion to the extent that the remittitur was not

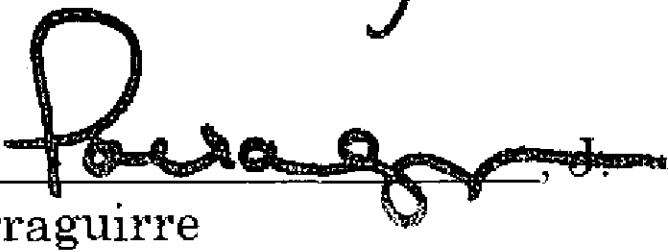
issued while this court considered the motion. As we have now ruled on the motion, we direct the clerk to issue the remittitur forthwith.

It is so ORDERED.

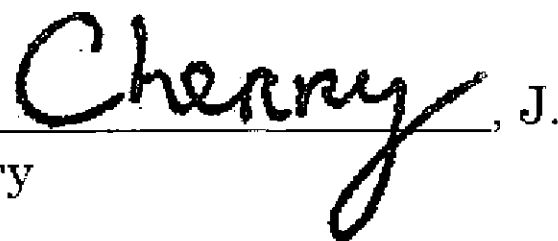

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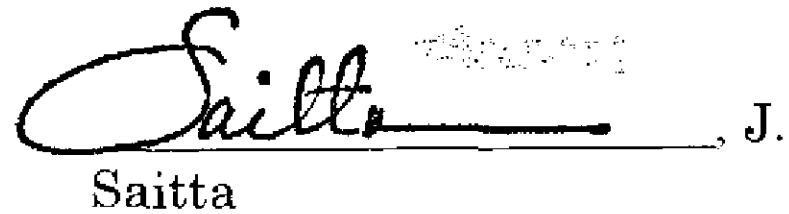

Pickering


Hardesty


Parraguirre


Douglas


Cherry


Saitta

cc: Hon. Ronald J. Israel, District Judge
Leon Greenberg Professional Corporation
Marc C. Gordon
Tamer B. Botros
Eighth District Court Clerk

EXHIBIT 4

RULES TO BE OBSERVED BY EMPLOYERS

EVERY EMPLOYER SHALL POST AND KEEP CONSPICUOUSLY POSTED IN OR ABOUT THE PREMISES WHEREIN ANY EMPLOYEE IS EMPLOYED THIS ABSTRACT OF THE NEVADA WAGE AND HOUR LAWS (NRS 608)

PLEASE NOTE: Every person, firm, association or corporation, or any agent, servant, employee or officer of any such firm, association or corporation, violating any of these provisions is guilty of a misdemeanor.

The legislature hereby finds and declares that the health and welfare of workers and the employment of persons in private enterprises in this state are of concern to the state and the health and welfare of persons required to earn their livings by their own endeavors require certain safeguards as to hours of service, working conditions and compensation therefor.

1. Discharge of employee: Whenever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately.
2. Quitting employee: Whenever an employee resigns or quits his employment, the wages and compensation earned and unpaid at the time of his resignation or quitting must be paid no later than the day on which he would have regularly been paid or 7 days after he resigns or quits, whichever is earlier.
3. An employer shall not employ an employee for a continuous period of 8 hours without permitting the employee to have a meal period of at least one-half hour. No period of less than 30 minutes interrupts a continuous period of work.
4. Every employer shall authorize and permit covered employees to take rest periods, which, insofar as practicable, shall be in the middle of each work period. The duration of the rest periods shall be based on the total hours worked daily at the rate of 10 minutes for each 4 hours or major fraction thereof. Authorized rest periods shall be counted as hours worked, for which there shall be no deduction from wages.
5. Effective July 1, 2010 each employer shall pay a wage to each employee of not less than \$7.25 per hour worked if the employer provides health benefits, or \$8.25 per hour if the employer does not provide health benefits. Offering health benefits means 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. Tips or gratuities received by employees shall not be credited as being any part of or offset against the minimum wage rates.
6. A part of wages or compensation may, if mutually agreed upon by an employee and employer in the contract of employment, consist of meals. In no case shall the value of the meals consumed by such employee be computed or valued at more than 35 cents for each breakfast actually consumed, 45 cents for each lunch actually consumed, and 70 cents for each dinner actually consumed.
7. An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee whose wage rate is less than 1 1/2 times the minimum rate prescribed pursuant to the Constitution of the State of Nevada: (a) Works more than 40 hours in any scheduled week of work; or (b) Works more than 8 hours in any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee whose wage rate is 1 1/2 times or more than the minimum rate prescribed pursuant to the Constitution, works more than 40 hours in any scheduled week of work.

The above provisions do not apply to: (a) Employees who are not covered by the minimum wage provisions of the Constitution (b) Outside buyers; (c) Employees in a retail or service business if their regular rate is more than 1 1/2 times the minimum wage, and more than half their compensation for a representative period comes from commissions on goods or services, with the representative period being, to the extent allowed pursuant to federal law, not less than one month; (d) Employees who are employed in bona fide executive, administrative or professional capacities; (e) Employees covered by collective bargaining agreements which provide otherwise for overtime; (f) Drivers, drivers' helpers, loaders and mechanics for motor carriers subject to the Motor Carrier Act of 1935, as amended; (g) Employees of a railroad; (h) Employees of a carrier by air; (i) Drivers or drivers' helpers making local deliveries and paid on a trip-rate basis or other delivery payment plan; (j) Drivers of taxicabs or limousines; (k) Agricultural employees; (l) Employees of business enterprises having a gross sales volume of less than \$250,000 per year; (m) Any salesman or mechanic primarily engaged in selling or servicing automobiles, trucks or farm equipment; and (n) A mechanic or workman for any hours to which the provisions of subsection 3 or 4 of NRS 338.020 apply.

8. Every employer shall establish and maintain records of wages for the benefit of his employees, showing for each pay period the following information for each employee: (a) Gross wage or salary; (b) Deductions; (c) Net cash wage or salary; (d) Total hours employed in the pay period by noting the number of hours per day; (e) Date of payment.

9. Wages must be paid semimonthly or more often.

10. Every employer shall establish and maintain regular paydays and shall post a notice setting forth those regular paydays in 2 conspicuous places. After an employer establishes regular paydays and the place of payment, the employer shall not change a regular payday or the place of payment unless, not fewer than 7 days before the change is made, the employer provides the employees affected by the change with written notice in a manner that is calculated to provide actual notice of the change to each such employee.

11. It is unlawful for any person to take all or part of any tips or gratuities bestowed upon his employees. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves.

12. An employer may not require an employee to rebate, refund or return any part of his or her wage, salary or compensation. Also, an employer may not withhold or deduct any portion of such wages unless it is for the benefit of, and authorized by written order of the employee. Further, it is unlawful for any employer who has the legal authority to decrease the wage, salary or compensation of an employee to implement such a decrease unless:

(a) Not less than 7 days before the employee performs any work at the decreased wage, salary or compensation, the employer provides the employee with written notice of the decrease; or

(b) The employer complies with the requirements relating to the decrease that are imposed on the employer pursuant to the provisions of any collective bargaining agreement or any contract between the employer and the employee.

13. All uniforms or accessories distinctive as to style, color or material shall be furnished, without cost, to employees by their employer. If a uniform or accessory requires a special cleaning process, and cannot be easily laundered by an employee, such employee's employer shall clean such uniform or accessory without cost to such employee.

*For additional information or exceptions, contact the Nevada State Labor Commissioner: Carson City 775-687-4850 or Las Vegas 702-486-2650
TOLL FREE: 1-800-992-0900 Ext. 4850 Internet: www.LaborCommissioner.com*

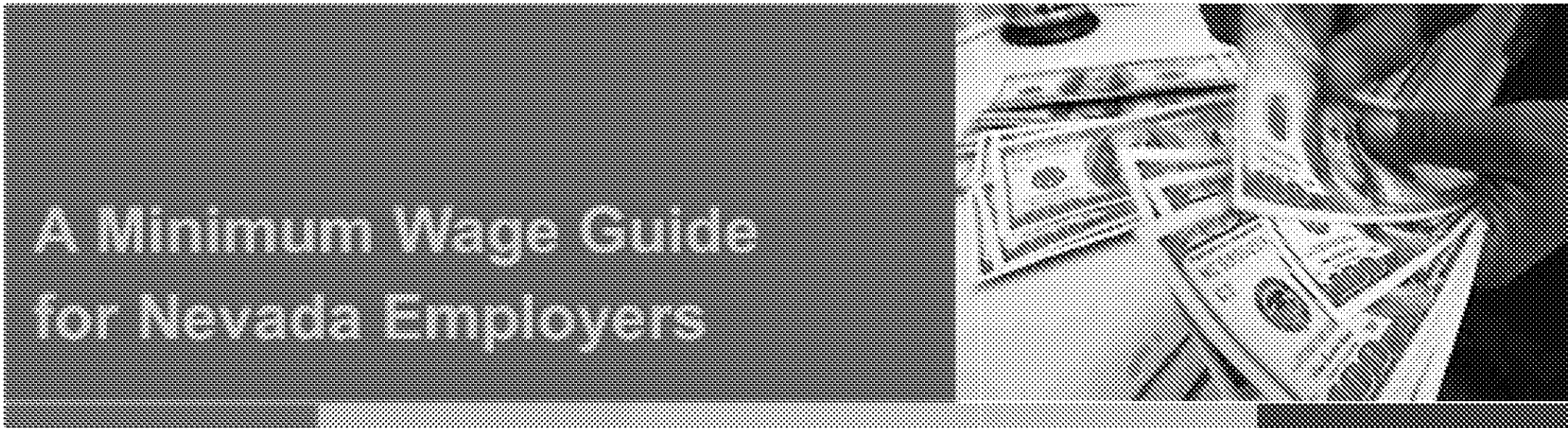
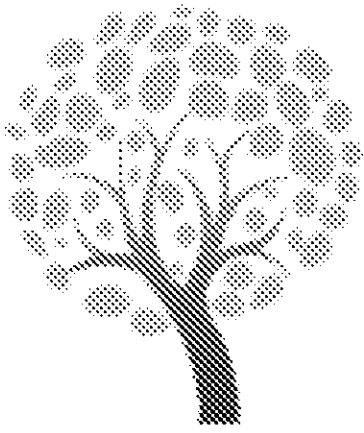
BRIAN SANDOVAL
Governor
State of Nevada

THORAN TOWLER
Nevada Labor Commissioner

BRUCE BRESLOW
Director
Nevada Department of Business & Industry

REVISED 11-13-2012

EXHIBIT 5



Increasing the minimum wage has been a hot topic since President Obama proposed raising the federal minimum wage from \$7.25 to \$10.10 per hour in his 2014 State of the Union Address. While the President and his supporters claim that increasing the minimum wage would ultimately benefit the economy, with no associated job loss, opponents of the plan refute those claims and declare an increase would harm small business and result in the loss of hundreds of thousands of jobs.

The debate is likely to move closer to home this spring if a bill, currently being deliberated, is indeed introduced for consideration during the upcoming state legislative session. While those discussions and debates will be taking place in Carson City, and around dinner tables and places of business throughout the state, the Office of the Labor Commissioner continues to implement existing statutes and regulations governing Nevada's minimum wage and overtime.

A recent Supreme Court ruling issued earlier this year clarified who is entitled

to receive minimum wage. In order to help employers avoid the pitfalls and potential penalties associated with noncompliance, we've outlined a few of the basics concerning minimum wage in Nevada. For specific issues or questions not covered, we recommend contacting the Labor Commissioner's Office, referring directly to the language of applicable statutes and regulations or consulting with an attorney familiar with wage and hour laws.

Unique Two-Tiered System

In 2006, Nevada voters gave final approval for an amendment to the Nevada Constitution which permitted employers to pay one dollar less than the minimum wage indexed for inflation if they provided qualified health insurance to their employees. The result was a unique two-tiered minimum wage system.

Each year, at the direction of the Governor, Nevada's Labor Commissioner conducts an annual review of the minimum wage to determine if an increase is required. The wage is adjust-

ed by the amount of increases in the federal minimum wage, or, if greater, by the cumulative increase in the cost of living. A bulletin is published each year on April 1 outlining any changes to the minimum wage to be in effect the following July.


The current minimum wage in Nevada, which was put into effect July 2010, is \$7.25 per hour if an employer offers qualified health benefits, \$8.25 per hour if they do not.


Minimum Wage Exclusions


In addition to a two-tiered system, the Constitutional amendment provided that individuals under the age of 18, those employed by a non-profit for after-school or summer employment and those employed as trainees for a period of not more than 90 days were not entitled to receive minimum wage.


Prior to the amendment, Nevada law provided for other exemptions to the payment of minimum wage, specifically, NRS 608.250 exempted

Continued, page 7

 **P2 / Access to Capital:**
New Market Tax Credit Program

 **P4 / News You Can Use:**
Cyber security, Free legal services and more

 **P5 / Ask an Expert:**
Social Media and your business

 **P6 / Resource Partner**
Spotlight: Rural Nevada Development Corp.

six categories of individuals: (1) casual babysitters; (2) domestic service employees who reside in the household; (3) outside salespersons whose earnings are based on commissions; (4) certain agricultural employees; (5) taxicab and limousine drivers; and (6) certain persons with severe disabilities.

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.

"Qualified" Health Insurance

State law outlines what is required of health insurance provided by an employer to be considered "qualified" in order to pay the lower tier minimum wage to their employees. Among other requirements outlined in NAC 608.102, including coverage for certain health care expenses, the cost of the premium for the health insurance plan paid by the employee must not exceed 10 percent of the gross taxable income of the employee paid by an employer. In addition, the insurance must be made available to the employee's dependents and the waiting period cannot exceed 6 months.

If an employer does not offer a health insurance plan, or the health insurance plan is not available or not provided within 6 months, the employee must be paid at least minimum wage until the employee is eligible or the plan become available. An employer is required to maintain documentation in the event that an employee declines qualified health insurance.

The passage and implementation of the Affordable Care Act, a federal health insurance mandate outside of Nevada's jurisdiction, adds an additional burden on employers related to offering health insurance benefits to employees. Although it is likely that an employer offering a qualifying plan under the Affordable Care Act will often also qualify to pay the lower minimum wage rate, a separate analysis under Nevada law and the Act should be done to ensure compliance with the requirements under both.

Regulatory Review

Rulemaking workshops were conducted earlier this year to solicit comments on Nevada's unique minimum wage structure and give the public an opportunity to provide input on existing regulation to ensure the best interest of Nevada's workers. Testimony provided at the initial workshops and any workshops that may be conducted in the future will assist the Labor Commissioner in determining if an amendment to the existing regulations should be proposed. Until that formal process concludes, one thing is clear: a little education will go a long way to ensure Nevada's employers are familiar with their obligations and responsibilities to their employees under law.

Minimum Wage Resources

Statutes and regulations governing minimum wage

NRS 608- www.leg.state.nv.us/NRS/NRS-608.html

NAC 608- <http://www.leg.state.nv.us/NAC/NAC-608.html>

2014 Minimum Wage Bulletin

www.laborcommissioner.com/min_wage_overtime/2014%20Annual%20Bulletin%20-%20Minimum%20Wage.pdf

Supreme Court Advisory Opinion

www.leg.state.nv.us/division/legal/weblawcd/SCop/130/130NevAdvOpNo52.html

Nevada Office of the Labor Commissioner

www.laborcommissioner.com

EXHIBIT 6

1 AFFIDAVIT OF EUGENE AUFFERT, CEO and CFO OF YELLOW CHECKER STAR
2 TRANSPORTATION

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

6 I, Eugene Auffert, being first duly sworn, depose and says:

- 7 1. I am the Chief Executive Officer (CEO) and Chief Financial Officer (CFO) of Yellow
8 Checker Star Transportation (hereinafter "YCS").
- 9 2. I have been CEO and CFO of YCS since the year 2008.
- 10 3. The facts set forth in this affidavit are known to me personally, or are based upon my
11 information and belief, and if called to do so, I would competently testify under oath
12 regarding the same.
- 13 4. After the Thomas decision was rendered on June 26, 2014, I ensured that YCS' payroll
14 department was in compliance with the decision.
- 15 5. Since June 26, 2014, YCS has been in compliance with the Thomas decision.

16 I declare under penalty of perjury under the laws of the State of Nevada that the above
17 information is true and correct.

18 DATED this 2nd January, 2015.

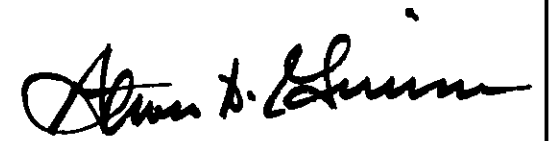
19 Eugene Auffert
20 EUGENE AUFFERT

21 SUBSCRIBED AND SWORN to before me

22 this 2nd day of January, 2015.

23 Sheila Robertson
24 NOTARY PUBLIC





CLERK OF THE COURT

1 **OPPM**
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7
8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 CHRISTOPHER THOMAS, and)
11 CHRISTOPHER CRAIG, Individually and)
on behalf of others similarly situated,)

12 Plaintiffs,)

13 vs.)

14 NEVADA YELLOW CAB)
CORPORATION, NEVADA)
15 CHECKER CAB CORPORATION, and)
16 NEVADA STAR CAB)
CORPORATION,)

17 Defendants.)

Case No.: A-12-661726-C

Dept.: XXVIII

RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS

18
19 Plaintiffs, by and through their attorney, Leon Greenberg Professional
20 Corporation, submit this memorandum of points and authorities in response to
21 defendants' motion to dismiss.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **SUMMARY OF RESPONSE**

24 **DEFENDANTS' ASSERTION THAT THE SUPREME COURT'S DECISION**
25 **IN THIS CASE HAS NO CURRENT APPLICATION IS FRIVOLOUS**

26 Like the apocryphal ostrich that sticks its head in the sand to avoid an
27 unpleasant reality, defendants latch upon the Supreme Court Opinion's use of the
28 "present voice" or "active" tense of certain verbs as creating a previously unknown
form of "future conduct only" precedent. Defendants even more preposterously assert

1 that this new and revolutionary view of the law is properly divined in a *sub silentio*
2 fashion from the Nevada Supreme Court’s Opinion, which makes no comment
3 whatsoever on limiting its decision only to future conduct.

4 Defendants’ argument, based entirely upon the Nevada Supreme Court
5 Opinion’s use of the present tense, or active voice, verbs “supercedes” and “supplants”
6 (and not the past tense, and passive voice, “superceded” and “supplanted”), is not only
7 without support, it is not even logically consistent. The Opinion also, as is traditional,
8 interchangeably uses the past and present tense and active and passive verb forms in
9 its same critical discussions. It states that when a statute, in this case the taxi driver
10 minimum wage exemption of NRS 608.250(2), “is irreconcilably repugnant” to a
11 constitutional amendment it is “deemed to have been impliedly repealed.” Under
12 defendants’ own reasoning this past tense and passive voice verb form renders a
13 “future conduct only” reading of the Opinion impossible. But, just like an ostrich with
14 its cranium buried in the sand, defendants ignore this branch of the Opinion and the
15 resulting illogic of their completely frivolous argument.

16 ARGUMENT

17 I. DEFENDANTS MISREPRESENT WHAT CONSTITUTES 18 A “RETROACTIVE” APPLICATION OF A LAW AND NO 19 “RETROACTIVE” APPLICATION OF LAW ISSUE IS EVEN 20 ARGUABLY PRESENT IN THIS CASE

21 A. The “retroactive application of law” jurisprudence that 22 defendants rely upon concerns the application of a new statutory 23 obligation to conduct taking place *prior* to such statute’s effective 24 date, a situation not present in this case.

25 1. Nevada’s Minimum Wage Constitutional Amendment 26 became effective on November 28, 2006 and plaintiffs’ 27 claims only concern conduct taking place after that date.

28 Defendants’ brief, at page 5, states that “[f]ollowing the passage of the
Nevada Minimum Wage [Constitutional] Amendment in 2006, the statutory exemption
[from Nevada’s minimum wage] for taxi and limo [sic] drivers remained” and that
“[t]here was no express or implied repeal [of such exemption] at that time and in the
years following.” Defendants cite no authority for these remarkable conclusions, that

1 the constitutional amendment remained ineffective for taxi drivers until the Nevada
2 Supreme Court's Opinion was issued, except for their wholly self serving,
3 unsupported, and illogical reading of that Opinion.

4 Amendments to Nevada's Constitution become "effective upon the canvass of
5 the votes by the supreme court." *Tovinen v. Rollins*, 560 P.2d 915, 916-917 (Nev. Sup.
6 Ct. 1977). Article 15, Section 16, of the Nevada Constitution, creating new minimum
7 wage rights for Nevada's employees, was enacted by the voters in the 2006 general
8 election and became effective on November 28, 2006. *See*, N.R.S. § 293.395(2).

9 Article 15, Section 16, of the Nevada Constitution, and all of its terms, became
10 the law of Nevada as of its effective date of November 28, 2006, not on the date of the
11 Supreme Court's Opinion on June 26, 2014. Plaintiffs are not making any claims
12 against defendants involving conduct occurring prior to that effective date. The only
13 "prospective application" of Article 15, Section 16, of the Nevada Constitution is its
14 application *after* November 28, 2006: "As a general rule, a constitutional amendment
15 is to be given *only prospective application from its effective date* unless the intent to
16 make it retrospective clearly appears from its terms." *Tovinen*, 560 P.2d at 917
17 (emphasis added).

18 **2. Every court decision cited by defendants concerns whether to**
19 **impose a new legal obligation to events occurring prior to the**
effective date of a new statute, an issue not present in this case.

20 Every case cited by defendants in support of their motion involves whether to
21 "retroactively" apply a new law to conduct taking place *prior* to its effective date, an
22 issue not present in this case. *See, Pub. Emps.' Benefits Program v. Las Vegas Metro.*
23 *Police Dep't (PEBP)*, 179 P.3d 542, 553–54 (Nev. Sup. Ct. 2008) ("A statute has
24 retroactive effect when it takes away or impairs vested rights acquired under existing
25 laws, or creates a new obligation, imposes a new duty, or attaches a new disability, *in*
26 *respect to transactions or considerations already past.*")(emphasis provided). Every
27 other authority cited by defendants, just as in *PEBP*, involves whether to apply a
28 statute to conduct taking place *prior* to such statute's enactment and specified effective

1 date. *See, Landgraf v. USI Films Products*, 511 U.S. 244, 273 (1994) (Conduct taking
2 place *prior* to Civil Rights Act of 1991's enactment not subject to its provisions);
3 *County of Clark v. Roosevelt Title Insurance*, 396 P.2d 844, 846 (Nev. Sup. Ct. 1964)
4 (Statute could not revive right to redeem land taken by county for tax lien when that
5 right had expired *prior* to the statute's enactment); *Sandpointe Apts. v. Eighth Jud.*
6 *Dist. Ct.*, 313 P.3 849 (Nev. Sup. Ct. 2013) (Statute limiting mortgage deficiency
7 judgments not applicable to foreclosures or trustees sales taking place *prior* to statute's
8 effective date) and *McKellar v. McKellar*, 871 P.2d 296, 298 (Nev. Sup. Ct. 1994)
9 (Statute abolishing period of limitations to collect child support arrearage does not
10 create right to collect arrearage barred by limitations period in effect *prior* to statute's
11 enactment).

12 Defendants mislead this court by citing precedents dealing with the application
13 of new statutes to conduct taking place *before* such statutes' effective dates. Such
14 precedents have no application to this case, which solely involves conduct taking place
15 *after* the effective date of Article 15, Section 16, of the Nevada Constitution, which
16 was November 28, 2006.

17 **II. DEFENDANTS' ARGUMENT THAT THE SUPREME COURT'S**
18 **OPINION ONLY APPLIES TO "FUTURE CONDUCT" HAS NO**
19 **SUPPORT AND IS CONTRARY TO FUNDAMENTAL**
20 **PRINCIPLES OF LAW**

21 **A. Defendants' assertion that the Nevada Supreme Court has**
22 **directed that its Opinion only be applied to conduct taking**
23 **place after its publication on June 26, 2014 is baseless.**

24 **1. The argument the language of the Opinion directs a**
25 **"future conduct only" application of its holding is**
26 **completely without merit and unsupported.**

27 Defendants assert that the Supreme Court's Opinion has no application to
28 conduct taking place prior to its issuance on June 26, 2014 because of its use of the
present tense and active voice verbs "supercedes" and "supplants" and not the past
tense and passive voice verb forms of "superceded" and "supplanted." They offer no
explanation of why the tense and active voice verb form of these two words, in an

1 Opinion that makes no mention of limiting its application to only future conduct, are
2 significant. Nor do they explain why the interchangeable use in the Opinion of the
3 past tense and passive voice verb form should be ignored in evaluating defendants'
4 argument, *e.g.*, the Opinion also uses the "past" tense in the exact fashion defendants
5 assert would indicate it has a current, and not just future conduct, application:

6 But when a statute "is irreconcilably repugnant" to a constitutional amendment,
7 the statute *is deemed to have been impliedly repealed* by the amendment."
8 *Mengelkamp v. List*, 88 Nev. 542, 545–46, 501 P.2d 1032, 1034 (1972)....
9Therefore, the two [NRS 608.250(2)(e) and the Nevada Constitution] are
10 "irreconcilably repugnant," *Mengelkamp*, 88 Nev. at 546, 501 P.2d at 1034,
11 such that "both cannot stand," *W. Realty Co. v. City of Reno*, 63 Nev. 330, 344,
12 172 P.2d 172, 165 (1946), and the statute [NRS 608.250(2)(e)] *is impliedly*
13 *repealed* by the constitutional amendment. 327 P.3d at 521 (emphasis
14 provided).

15 Defendants insist that the Opinion's "is impliedly repealed" language is strictly
16 and literally construed in respect to temporal effect. Under the approach urged by
17 defendants the Opinion only effected the statute's "repeal" it speaks of, and the
18 creation of the plaintiffs' rights under Nevada's Constitution, at the "is" or present
19 time, even though "repealed" is a past tense verb, *e.g.*, the repeal only occurred upon
20 the date of the Opinion's publication, June 26, 2014. They ignore that the Opinion
21 also expressly states that the rule of law it was enforcing requires that such a statute "is
22 deemed to *have been* impliedly repealed," a choice of words that can *only* be strictly
23 construed, under defendants' approach, to an event taking place *in the past* ("have
24 been"). Perhaps in their reply defendants will argue that there is a "scorecard" that
25 must be taken in applying their approach to reading judicial opinions, and in this case
26 four "present" and "active" tense verbs outscore one "passive" and "past" tense verb.
27 They certainly can cite no precedents giving any guidance on how to apply their novel
28 method of reading judicial opinions.

29 Defendants' self-invented method of reading judicial opinions, by literally
30 applying some, but not all, the verb tenses, and using those that they cherry pick to
31 determine if there is a current or only future conduct holding, is not only absurd, it is
32 unworkable. The Nevada Supreme Court, as do all courts, interchangeably uses the

1 “active” and “passive” verb voice styles, the technically “past” and “present” verb
2 forms, in the language of their opinions. The use of the present and past tense of
3 “supercedes” and “superceded” appears in *State v. Connery*, 661 P.2d 1298, 1301
4 (Nev. Sup. Ct. 1983) (“...we hold that NRAP 4(b) supersedes NRS 177.066...” with
5 the Nevada Supreme Court using, as in this case, the present tense and the West
6 reporter in the headnotes and summary using the past tense. *Connery*, despite its use
7 of the present tense “supercedes,” did not make a “future conduct only” ruling but
8 applied its supersession finding to the procedural rule presented and to the controversy
9 before it, and by doing so denied defendant the relief it sought. *See, also, Jacobson v.*
10 *Estate of Clayton*, 119 P.3d 132, 134 (Nev. Sup. Ct. 2005) using “supercedes” and
11 “superceded,” present and past tenses, active and passive verb styles, interchangeably
12 and applying its supersession finding to the controversy before it and not just to future
13 cases (Stating in first paragraph “We conclude that *Bodine* is **superseded** by the
14 Legislature's 1971 amendment of NRS 140.040...” and in last paragraph under the
15 “Conclusion” heading “The current language of NRS 140.040(3) **supersedes** this
16 court's decision in *Bodine*...). *See, also, Goldman v. Clark*, 1 Nev. 607, 611 (1866)
17 (Holding that if Nevada’s Constitution, “by its own terms exempts a homestead from
18 forced sale” it would “**supercede**” contrary provisions of prior statute “[b]ut if the
19 Constitution did not take effect in regard to homesteads, until the legislature passed
20 the required law, then the old act was not **superseded** until the new one went into
21 effect.”)

22 **2. That the Nevada Supreme Court would take the**
23 **radical step of issuing a “future conduct only”**
holding in a completely *sub silentio* fashion is absurd.

24 “The general rule that judicial decisions are given retroactive effect is basic in
25 our legal tradition.” *See, Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 978 (Cal.
26 Sup. Ct. 1989), citing *Linkletter v. Walker*, 381 U.S. 618, 622 (1965) (“At common
27 law there was no authority for the proposition that judicial decisions made law only for
28 the future”, citing 1 Blackstone, Commentaries 69 (15th ed. 1809)). As discussed,

1 *infra*, in the Twentieth Century, the common law rule prohibiting judicial decisions
2 from only making “future law” was slightly relaxed, in exceptional circumstances,
3 none of which are present in this case. The idea the Nevada Supreme Court engaged
4 in such an exceptional “future law only” ruling through a cryptic tea leaf reading of its
5 stylistic choice to use, in some places but not others, active voice and present tense
6 verbs in an Opinion, is preposterous. No decision, from any jurisdiction, has ever
7 made such a “future law only” ruling in that *sub silentio* fashion.

8 It is also preposterous to hold that the Nevada Supreme Court’s order rejecting
9 plaintiffs’ pre-emptive motion to change the Opinion’s verbs to their past tense forms
10 was affirming, again *sub silentio*, such a “future conduct only” holding. Just like the
11 Opinion itself, such order makes no mention of such a “future conduct only” holding.
12 Rather, the Supreme Court was refusing to dignify the absurd arguments now being
13 raised by defendants in this Court with even an acknowledgment that they deserved a
14 response. It was confident it could stand by its stylistic choices of language and that
15 this Court was competent enough to know that if the Supreme Court was making such
16 a remarkable, and previously unheard of, “future conduct only” ruling, the Opinion
17 would so state expressly and unmistakably. Presumably it was also hoping that
18 members of the State Bar would show enough respect to the judicial process to not
19 raise such a frivolous argument upon its remittitur of this case, a hope that has now
20 been dashed.

21 **B. This case does not present the very narrow sort of situation**
22 **where a “future conduct only” application of the Nevada**
23 **Supreme Court’s Opinion would potentially be proper.**

24 As discussed in *Linkletter, Newman*, and every other case dealing with the issue,
25 the common law, since its inception, has always commanded the application of court
26 decisions to the immediate controversies and parties before it. Under the traditional
27 common law view, courts *never* issued “future conduct only” decisions when a party’s
28 past conduct had been found to violate a legal duty. This was because the common
law view was that court decisions were not “making” the law but simply “declaring”

1 what the law had always been, *See, Newman*, 48 Cal 3d 978-80, discussing the origins
2 of the “rule of retroactivity” exemplified in Chief Justice Rehnquist’s observation that
3 “[t]he principle that statutes operate only prospectively, while judicial decisions
4 operate retrospectively, is familiar to every law student” *citing and quoting United*
5 *States v. Security Industrial Bank* 459 U.S. 70, 79 (1982).

6 Defendants seek to apply a grossly corrupted version of the “prospective
7 application” of certain decisions, such as in *Linkletter*, involving new *judicially*
8 *created rights* or that *overrule prior judicial precedents*. In *Linkletter*, the United
9 States Supreme Court declined to grant retroactive force to its decision in *Mapp v.*
10 *Ohio*, 367 U.S. 643 (1961), which overruled prior Supreme Court precedents on the
11 application of the Fourth Amendment’s exclusionary rule to state criminal
12 prosecutions. 381 U.S. at 637-38. Such a retroactive application would have
13 invalidated countless convictions that were completely valid under prior United States
14 Supreme Court precedents and created an untenable situation.

15 The decision in *Linkletter* and similar “prospective” or “law only for the future”
16 cases do not involve, and are inapplicable to, situations, such as this case, where a
17 party’s rights are created by the express language of a newly enacted statute or
18 constitutional provision. They are inapplicable because the parties whose conduct is
19 governed by those new statutes and constitutional provisions ***have notice of the***
20 ***language of those new laws and are aware that they disregard the same at their***
21 ***peril***. Defendants can cite to no “future conduct only” ruling that any court has ever
22 made in respect to any new voter or legislatively enacted law that displaces a prior law
23 or judicial precedent. *See, Jacobson*, and every other decision the Nevada Supreme
24 Court has issued where a prior judicial precedent or legislative or constitutional
25 enactment has been found to be superseded by a subsequently enacted statute or
26
27
28

1 constitutional amendment.¹ That no such decisions exist does not seem to stop
2 defendants from believing they are entitled to such a decision in this case.

3
4 **C. Even if this case was of the type where a “future conduct only”**
5 **application of the Nevada Supreme Court’s Opinion could**
6 **potentially be proper, the relevant circumstances do not justify**
7 **such a “future conduct only” application.**

8 As already discussed, the sort of “future conduct only” effect that defendants
9 seek from the Nevada Supreme Court’s Opinion is impossible. Such a “future conduct
10 only” limitation on a judicial decision has *never* been utilized or allowed in *any* case
11 involving a new voter or legislatively enacted and expressly conferred statutory or
12 constitutional right. Such rulings have only been utilized in the very narrow area of
13 “judicially created” law, where a jurisdiction’s highest court has recognized previously
14 unknown, and otherwise unknowable, rights or set aside prior judicial precedents. Yet
15 even if this Court were to disagree with the foregoing fundamental legal principle, and
16 consider whether a “future conduct only” application of the Supreme Court’s Opinion
17 was appropriate, it would have to reject any such application.

18 While, as discussed in *Sierra Club v. San Joaquin Local Agency* 21 Cal 4th 489,
19 509-10 (Cal. Sup. Ct. 1999), citing and quoting *Newman*, there are “narrow
20 exceptions” to the common law rule forbidding “future conduct only” rulings, such as
21 was done in *Linkletter*, they require the demonstration that “considerations of fairness
22 and public policy [that] are so compelling in a particular case that, on balance, they
23 outweigh the considerations that underlie the basic rule.” Such an examination looks
24 to whether application of a Court’s decision to events occurring prior to its publication
25 creates “an unusual hardship” because a substantial “detrimental reliance” or “vested
26 right” was created by or rested upon an overturned rule of law. *Id.*

27 ¹ Diligent research by plaintiffs’ counsel has likewise failed to find a reported
28 case from any jurisdiction where a “future conduct only” ruling was issued in such
circumstances.

1 Defendants present no support for their assertion that the sort of exceptional
2 circumstances discussed in *Sierra Club* and *Newman* are present. Nor would any
3 prior judicial decision support finding them to be so present and that the Supreme
4 Court's Opinion should be given the "future conduct only" application requested by
5 defendants. The decision in *Isbell v. County of Sonoma*, 21 Cal.3d 61, 74-75 (Cal.
6 Sup. Ct. 1978) is illustrative. *Isbell* found that the Fourteenth Amendment's due
7 process protections rendered California's statutory confession of judgment procedures
8 void. *Id.* Given the massive number of judgments entered under those procedures,
9 most or almost all of which presumably did involve legitimate debts that were owed,
10 *Isbell* declined to vacate *en mass* all prior judgments so entered by all California
11 creditors despite their now discovered constitutional infirmity. *Id.* Nonetheless, it
12 granted such judgment debtors the benefit of the rule of law it announced by holding
13 they could seek hearings to void those judgments at which the creditor would have the
14 burden of showing compliance with its holding. *Id.*

15 The sort of "future conduct only" ruling defendants urge this Court to apply to
16 the Supreme Court's Opinion goes far beyond the very narrow, and exceptionally
17 justified, temporal limitations applied in *Isbell* and similar cases. Nor do defendants
18 present any justification for imposing any sort of restriction on the temporal scope of
19 the Opinion.

20 Defendants were well aware of the "absolute" language of Article 15, Section 16, of
21 the Nevada Constitution. The Nevada Attorney General's opinion, 05-04 Op. Atty
22 Gen. (2005), issued before November 28, 2006, put the defendants and the entire
23 Nevada taxi industry on notice that they would be subject to Article 15, Section 16.
24 Nor do, or can, defendants argue such constitutional amendment's language, read in
25 isolation, fails to confer the rights claimed by the plaintiffs. Rather they argued that
26 *another law*, the previously enacted statute NRS 608.250, must be read together with
27 the constitutional amendment and that under such a coordinated reading the rights
28 claimed by the plaintiffs do not exist.

1 Defendants seem to believe they are entitled to some sort of special treatment, or
2 excuse from liability, because the Nevada Supreme Court rejected their arguments on a
3 “coordinated” reading of Article 15, Section 16, of the Nevada Constitution and NRS
4 608.250. That certain Nevada taxi industry employers managed to convince some, but
5 not all, lower court jurists of the correctness of that argument is irrelevant.² Until a
6 final decision was issued on such argument by the Nevada Supreme Court, defendants
7 had no right to take shelter in it, irrespective of it being embraced by certain lower
8 court jurists or an administrative agency (and defendants’ assertion that the
9 administrative agency dealing with Nevada’s labor laws, the Nevada Labor
10 Commissioner, agreed with their argument is absolutely false).³

11 Defendants’ claim imposing a pre-June 26, 2014 liability upon them for their
12 drivers’ unpaid minimum wages would be unfair and a punishment is sheer hubris. It
13 is defendants that are attempting to seek an unfair and unjust enrichment at the
14 expense of their taxi drivers by avoiding a very modest liability for the very small
15 minimum hourly wage they are required to pay those hardworking employees. The
16 reality is that defendants come before this Court as litigants with unclean hands who
17 knew their actions could violate Nevada’s Constitution and chose to accept that risk.

18
19 ² On February 11, 2013, Judge Kenneth Cory of this Court, in *Murray v. A Cab*
20 *Taxi Service*, Case No. A-12-669926-C, in a decision made over four months *prior* to
21 the Nevada Supreme Court’s Opinion, rejected those arguments and adopted the
22 holding ultimately expressed in that Opinion.

23 ³ Defendants mislead the Court by claiming the Nevada Labor Commissioner
24 stated that NRS 608.250 still exempted taxi cab drivers from all minimum wage
25 requirements after the effective date of Article 15, Section 16, of the Nevada
26 Constitution. The sole support they cite for that claim is a 2012 document, Ex. “4” of
27 their moving papers. The discussion in that document about drivers of taxicabs refers
28 to their exemption from Nevada’s overtime pay requirements, not Nevada’s
Constitutional Minimum Wage. The Nevada Labor Commissioner took no position
on defendants’ argument that a coordinated reading of NRS 608.250 and the Nevada
Constitution exempted taxi drivers from all minimum wage requirements prior to the
Nevada Supreme Court’s Opinion.

1 Defendants could have, but did not, seek a declaratory ruling years ago on their
2 obligations under Article 15, Section 16, of Nevada’s Constitution. They could have
3 done so immediately after the passage of the constitutional amendment by bringing an
4 NRCPC Rule 23 class action proceeding, just like this case, that would have bound all
5 of their taxi driver employees. Pending a final ruling in such a proceeding, they could
6 have deposited into escrow all amounts that might be due to their drivers and avoided
7 the imposition of any punitive damages, future penalties or interest on such unpaid
8 amounts. They consciously chose not to do so. Having made that decision,
9 defendants cannot complain about the liabilities that they now must reckon with. The
10 only victims of unfair treatment in this case are defendants’ taxi drivers, who for years
11 have been denied the most modest minimum hourly wage payments from defendants
12 that the Nevada Constitution commands.

13 If this Court still has doubts about denying defendants’ request for a “future
14 conduct only” application of the Supreme Court’s Opinion, it should also review
15 *Hansen v. Harrah’s*, 675 P.2d 394 (Nev. Sup. Ct. 1984). *Hansen* further illustrates the
16 complete fallaciousness of the idea the Supreme Court’s Opinion has no application to
17 conduct occurring prior to its publication. *Hansen* created, through judicial
18 recognition of Nevada’s public policy, a tort cause of action for the retaliatory
19 discharge of an employee who files a worker’s compensation claim. No such cause of
20 action was authorized in the text of any Nevada statute, the creation of such a cause of
21 action was an exception to Nevada’s well established “employment at will” law, and
22 the creation by judicial recognition of such a cause of action had been rejected by
23 some other state courts. 675 P.2d at 396. Nonetheless, even though the employer
24 defendants in *Hansen* had no express advance notice that such a cause of action
25 existed as an exception to the “employment at will” law of Nevada, the Nevada
26 Supreme Court exposed the defendant/employers in that case to a *current* liability for
27 compensatory damages. *Hansen* both created a new cause of action and allowed
28 liability for that newly recognized caused of action to be imposed on the defendants’

1 *prior* conduct, it did not merely determine the defendants’ future legal obligations.

2 *Hansen* also details the limited circumstances under which the Nevada
3 Supreme Court will make a “future conduct only” holding. It limited the branch of its
4 holding that an employer could be liable for punitive damages claims for the newly
5 recognized wrongful discharge tort it created to future cases. It did so because the
6 purpose of punitive damages is to punish and deter reprehensible conduct that violates
7 the law. 675 P.2d at 397. Such purpose would not have been advanced by allowing
8 punitive damages in *Hansen* since the employer defendants had no reason to believe
9 their conduct was illegal. *Id.* It did *not* impose any “future conduct only” limitation
10 on the *Hansen* plaintiffs’ ability to recover compensatory damages on such newly
11 recognized tort claim. *Id.*

12 It is impossible to reconcile the very sound and well grounded approach taken
13 by the Nevada Supreme Court in *Hansen* with the application of the Nevada Supreme
14 Court’s Opinion being urged by the defendants. Unlike the defendants in *Hansen*,
15 defendants in this case had every reason to believe their conduct was in violation of
16 the plain language of Article 15, Section 16, of Nevada’s Constitution, as ultimately
17 found by the Supreme Court in this case. Such a conclusion by defendants was
18 absolutely required by any isolated reading of such constitutional provision and in
19 2005 the Nevada Attorney General publicly opined that such conclusion was correct.
20 If a party, as in *Hansen*, can be liable for damages as a result of their conduct
21 occurring *prior* to the Nevada Supreme Court’s creation of a new cause action, one not
22 set forth expressly in any written law, defendants in this case must be liable for their
23 conduct occurring prior to June 26, 2014, which conduct was indisputably in violation
24 of any “isolated” reading of Article 15, Section 16, of Nevada’s Constitution.⁴

25 /

26
27 ⁴ Plaintiffs do not concede that, as in *Hansen*, defendants should be excused
28 from liability for punitive damages in this case. That issue should be addressed by the
Court at a future date if the parties are unable to resolve this litigation cooperatively.

1 **CONCLUSION**

2 Wherefore, for all the foregoing reasons, the defendants' motion should be
3 denied in its entirety.

4
5 Dated: January 23, 2015

6
7 Respectfully submitted,

8 /s/ Leon Greenberg
9 Leon Greenberg, Esq. (Bar # 8094)
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CERTIFICATE OF MAILING

The undersigned certifies that on January 23, 2015, she served the within:

RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

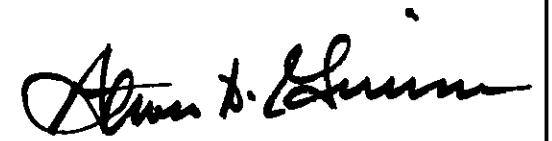
by court electronic service to:

TO:

Marc C. Gordon, Esq.
General Counsel
Yellow Checker Star Transportation Co.
Legal Dept.
5225 W. Post Road
Las Vegas, NV 89118

/s/ Dana Sniegocki

Dana Sniegocki



CLERK OF THE COURT

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CORPORATION, NEVADA)
15 CHECKER CAB CORPORATION, and)
NEVADA STAR CAB)
16 CORPORATION,)
17 Defendants.)

Case No.: A-12-661726-C

Dept.: XXVIII

SUPPLEMENT TO
PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS
CONSISTING OF NEWLY
ISSUED AUTHORITY

Hearing Date: February 10, 2015
Hearing Time: 9:00 a.m.

18
19 Plaintiffs, by and through their attorney, Leon Greenberg Professional
20 Corporation, submit this supplement to plaintiffs' response to defendants' motion to
21 dismiss consisting of newly issued authority .

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **ON JANUARY 27, 2015, THE NINTH CIRCUIT COURT**
24 **OF APPEALS CONFIRMED THAT THE OPINION ISSUED**
25 **BY THE NEVADA SUPREME COURT IN THIS CASE**
26 **DOES NOT HAVE A "FUTURE CONDUCT ONLY" EFFECT**

27 Annexed as Ex. "A" is a copy of the United States Court of Appeals for the
28 Ninth Circuit's decision in *Greene v. Executive Coach & Carriage*, No. 12-17306
(argued January 14, 2015, decision issued January 27, 2015). *Greene* involved the
exact issue raised in defendants' motion to dismiss: Whether the Nevada Supreme

1 Court's opinion in this case applied to conduct prior to its publication on June 26,
2 2014. It absolutely rejected that baseless argument raised in this case by defendants:

3 The district court erred in dismissing Greene's claim under the Nevada
4 Minimum Wage Amendment, embodied in Article 15, § 16 of the Nevada
5 Constitution. *See Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518,
6 522 (Nev. 2014) (holding that the Nevada Minimum Wage Amendment,
7 which contains no taxicab and limousine exception, "supersedes and
8 supplants the taxicab driver exception set out in [Nevada Revised Statutes
9 §] 608.250(2)"). Because the repeal of § 608.250(2) occurred in 2006
10 when the amendment was ratified, we reject Executive Coach and
11 Carriage's ("Executive") retroactivity argument. Greene does not allege
12 that he is owed wages for hours worked prior to 2006. We therefore
13 reverse the district court's dismissal of the minimum wage claim.
14 Ex. "A", p. 2, ¶ 1.

15 In respect to the post-opinion order issued by the Nevada Supreme Court in this
16 case, declining to revise the "supercedes" and "supplants" (present tense) language of
17 the opinion, the Ninth Circuit Court of Appeals, at oral argument, found the same to be
18 irrelevant. In its colloquy with counsel for Executive Coach, who insisted that such
19 post-opinion order indicated that the opinion was intended to have only "future
20 conduct" application, the Ninth Circuit Court of Appeals stated the following
21 (transcribed from the video of such argument online at
22 http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000006947):

23 Starting at time count 10:54:

24 Mr. Lovato (counsel for Executive Coach): The Amendment did not
25 repeal any law. It was the Nevada Supreme Court in *Thomas* that implied
26 the repeal of the law.

27 Justice Friedland: Well, the Amendment was passed in 2006, correct?

28 Mr. Lovato: It was passed in 2006.

Justice Friedland: And so you're saying it didn't actually do anything in
2006...it didn't do anything until now?

1 Mr. Lovato: Well it did what it says. It can only be interpreted by the
2 public for what it actually states. There's no question that it does not
3 expressly repeal any other laws, and it makes no reference to any other
4 laws.

5
6 Justice Friedland: But, the Nevada Supreme Court has now said that it
7 did, and you're saying it didn't do it in 2006? There was just, like, this
8 vacuum for eight years?

9
10 Mr. Lovato: The Nevada Supreme Court has not held that the Minimum
11 Wage Amendment effectuated a repeal in 2006, in fact it said to the
12 contrary where it used present tense language and...

13
14 Justice Friedland: But they're just interpreting the law in the present
15 tense, saying this is what the law means, right?

16
17 Mr. Lovato: But, yeah, I think we can take the Nevada Supreme Court for
18 what its saying when the issue is pointedly raised by way of a motion
19 before it [referring to the post-opinion motion and resulting order at Ex. 3
20 of defendants' moving papers], requesting that [present tense] language
21 be changed so that it is clearly retroactive.

22
23 Justice Friedland: But, maybe that's because it's so silly to think that
24 when you say that this is what the law means it doesn't need to be
25 changed because obviously it's interpreting what the law means.

26 Ending count time: 12:09

27
28 As Justice Friedland astutely observed, the Nevada Supreme Court's post-

1 opinion order was, as stated in plaintiffs' memorandum already submitted to the Court,
2 refusing to dignify the "silly" argument now made by defendants about the use of
3 "supercedes" and "supplants" and not "superceded" and "supplanted." It declined to
4 amend that language on that basis, not because it was confirming such "silly" and
5 absurd argument about its opinion having only a "future conduct" application.

6 **CONCLUSION**

7 Wherefore, for all the foregoing reasons, defendants' motion to dismiss should
8 be denied in its entirety.

9
10 Dated: January 27, 2015

11
12 Respectfully submitted,

13 /s/ Leon Greenberg
14 Leon Greenberg, Esq. (Bar # 8094)
15 A Professional Corporation
16 2965 S. Jones Blvd., Suite E-3
17 Las Vegas, Nevada 89146
18 (702) 383-6085
19 Attorney for Plaintiffs
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CERTIFICATE OF MAILING

The undersigned certifies that on January 27, 2015, she served the within:

SUPPLEMENT TO PLAINTIFFS'
RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS
CONSISTING OF NEWLY ISSUED
AUTHORITY

by court electronic service to:

TO:

Marc C. Gordon, Esq.
General Counsel
Yellow Checker Star Transportation Co.
Legal Dept.
5225 W. Post Road
Las Vegas, NV 89118

/s/ Dana Sniegocki

Dana Sniegocki

EXHIBIT "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 27 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT G. GREENE, AKA Robert A.
Greene,

Plaintiff - Appellant,

v.

EXECUTIVE COACH & CARRIAGE, a
Nevada corporation,

Defendant - Appellee.

No. 12-17306

D.C. No. 2:09-cv-00466-GMN-
RJJ

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, Chief District Judge, Presiding

Argued and Submitted January 14, 2015
San Francisco California

Before: M. SMITH, NGUYEN, and FRIEDLAND, Circuit Judges.

Robert Greene (“Greene”) appeals from the dismissal of his minimum wage claim, entry of summary judgment on another wage-and-hour claim, and denial of leave to amend his complaint. We have jurisdiction under 28 U.S.C. §1291. We

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

review the district court's interpretation of state law de novo, *Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1055 (9th Cir. 1997), and its denial of leave to amend for abuse of discretion, *Ventress v. Japan Airlines*, 603 F.3d 676, 680 (9th Cir. 2010).

We reverse and remand.

1. The district court erred in dismissing Greene's claim under the Nevada Minimum Wage Amendment, embodied in Article 15, § 16 of the Nevada Constitution. *See Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 522 (Nev. 2014) (holding that the Nevada Minimum Wage Amendment, which contains no taxicab and limousine exception, "supersedes and supplants the taxicab driver exception set out in [Nevada Revised Statutes §] 608.250(2)"). Because the repeal of § 608.250(2) occurred in 2006 when the amendment was ratified, we reject Executive Coach and Carriage's ("Executive") retroactivity argument. Greene does not allege that he is owed wages for hours worked prior to 2006. We therefore reverse the district court's dismissal of the minimum wage claim.

2. The district court erred in granting summary judgment on Greene's claim under Nevada Revised Statute § 608.016. First, we assume, without deciding, that there is a private right of action to bring this claim, because Executive does not argue otherwise. *See Cal. Alliance of Child & Family Servs. v. Allenby*, 589 F.3d 1017, 1020 n.5 (9th Cir. 2009) (holding that because the

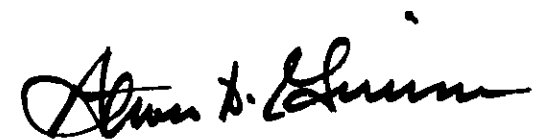
existence of a private right of action is not jurisdictional, the issue of whether a private right of action exists may be deemed waived if not raised). Second, the district court erred in finding that § 608.016 does not apply to commission-based pay arrangements. Regardless of how § 608.012 defines wages, they still must be paid “for each hour the employee works.” Nev. Rev. Stat. § 608.016. We therefore reverse the district court’s entry of judgment on this claim.

3. The court abused its discretion in denying Greene’s motion for leave to amend the complaint. It had already found good cause and granted Greene leave to amend, but the court’s order, issued on June 21, 2011, set the deadline for amendment on a date that had already passed—June 15, 2011. That is a deadline with which Greene of course *could not* have complied. Nevertheless, Greene attempted to amend promptly on June 21, 2011, the date the ruling was issued, but his request was denied. We reverse, and on remand Greene will be allowed to file an amended complaint.¹ *See United States v. Henderson*, 241 F.3d 638, 646 (9th Cir. 2001), *as amended* (holding that it is an abuse of discretion to “rule[] in an

¹ We note, however, that the proposed amended complaint would result in an overlap between the instant action and *Schemkes v. Jacob Transp. Servs., LLC*, No. 2:11-cv-00355-JAD-NJK (D. Nev.). Greene may not maintain identical claims against the same defendant in separate lawsuits, *see Adams v. Cal. Dep’t Health Servs.*, 487 F.3d 684, 688 (9th Cir. 2007), but of course how these cases are managed—if Greene continues to maintain his Fair Labor Standards Act claims in both cases—is best left to the district court.

irrational manner”). For the same reason, we reverse the district court’s imposition of sanctions on Greene, which was predicated on the conclusion that Greene’s effort to amend his complaint was frivolous.

REVERSED AND REMANDED.



CLERK OF THE COURT

ROPP

MARC C. GORDON, ESQ.
GENERAL COUNSEL

Nevada Bar No.1866

TAMER B. BOTROS, ESQ.

ASSOCIATE COUNSEL

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NEVADA CHECKER CAB CORPORATION and

NEVADA STAR CAB CORPORATION

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, and
CHRISTOPHER CRAIG,
Individually and on behalf of others similarly
situated,

Plaintiffs,

vs.

NEVADA YELLOW CAB CORPORATION,
NEVADA CHECKER CAB CORPORATION,
and NEVADA STAR CAB CORPORATION

Defendants.

)
) Case No.: A-12-661726-C

)
) Dept. No.: XXVIII

)
) Date of Hearing: February 10, 2015

)
) Time of Hearing: 9:00 a.m.

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION

COMES NOW, NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION, by and through their undersigned counsel of record, MARC C. GORDON, ESQ., and TAMER B. BOTROS, ESQ., and hereby respectfully file their Reply to Plaintiffs' Opposition.

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I.

FACTS

1. On January 6, 2015, Defendants filed the Motion to Dismiss.
2. On January 23, 2015, Plaintiffs filed their Opposition to the Motion to Dismiss.
3. On January 27, 2015, Plaintiffs filed their Supplement to their Opposition.
4. Defendants have recently discovered that the Barbara Gilmore vs. Desert Cab, Inc., case, Supreme Court No. 62905, District Court No. A-12-668502-C, has been appealed to the Nevada Supreme Court and Leon Greenberg, Esq., is seeking to have the Nevada Supreme Court rule that the Thomas decision applies retroactively. See Mr. Greenberg's Opening Brief attached hereto as Exhibit 1.
5. Counsel on behalf of Desert Cab, Inc., Jeffrey A. Bendavid, Esq., has filed an Answering Brief. See Answering Brief attached hereto as Exhibit 2.
6. Mr. Greenberg also filed a Reply Brief. See Mr. Greenberg's Reply Brief attached hereto as Exhibit 3.
7. Based on the most recent review of the Nevada Supreme Court's Appellate Case Management website, the Barbara Gilmore vs. Desert Cab, Inc., case has not yet been scheduled for oral arguments. See Nevada Supreme Court's Appellate Case Management website printout attached hereto as Exhibit 4.
8. Given this newly discovered information, Defendants are respectfully seeking a stay of the entirety of the Thomas case, until the Nevada Supreme Court renders a decision in the Barbara Gilmore vs. Desert Cab, Inc., case.

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II.

LEGAL ARGUMENT

A. The Issue of Whether The *Thomas* Decision is Prospective or Retroactive is Now Before the Nevada Supreme Court in *Barbara Gilmore vs. Desert Cab, Inc.*

As stated in Maheu v. Eighth Judicial District, 88 Nev. 26, 493 P.2d 709, at 725 (1972) (quoting Landis v. North American Co., 299 U.S. 248, 254-55 (1936))

The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with the economy of time and effort for itself, for counsel, and for litigants.

Also, according to Mikulich v. Carner, 68 Nev. 161, 168, 228 P.2d 257, at 260 (1951), when actions with common questions of law or fact are pending, Nevada courts can make “orders concerning the proceedings to avoid delay or unnecessary costs.”

In this case, Defendants recently discovered that Mr. Greenberg is seeking from the Nevada Supreme Court a ruling in the Gilmore matter, that the Thomas decision be applied retroactively. See attached Exhibit 1. The Gilmore matter involves a common question of law, which was briefed in Defendants’ Motion to Dismiss regarding whether the Thomas decision applies retroactively or prospectively from June 26, 2014. Mr. Greenberg is seeking a ruling from the Nevada Supreme Court on that very same question of law in the Gilmore matter. To conserve judicial resources and unnecessary costs, Defendants are respectfully requesting that this Honorable Court **stay the entirety of the Thomas case**, until the Nevada Supreme Court renders a decision on whether the Thomas decision applies retroactively or prospectively. If the Nevada Supreme Court elects not to decide the issue of whether the Thomas decision applies retroactively or prospectively, at such appropriate time, Defendants will seek putting their Motion to Dismiss, back on calendar for hearing, since all of the written briefs have been filed and submitted to this Honorable Court.

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III.

CONCLUSION

Based on the foregoing points and authorities, Defendants respectfully request that this Honorable Court stay the entirety of the *Thomas* case, until the Nevada Supreme Court renders a decision in the *Gilmore* matter.

DATED this 6th day of February, 2015.

**YELLOW CHECKER STAR
TRANSPORTATION CO. LEGAL DEPT.**

/s/ Tamer B. Botros

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NEVADA YELLOW CAB CORPORATION
NEVADA CHECKER CAB CORPORATION and
NEVADA STAR CAB CORPORATION

1 **CERTIFICATE OF ELECTRONIC SERVICE**

2 Pursuant to Rule 9 of Nevada Electronic Filing and Conversion Rules, I hereby certify that on
3 the 6th day of February, 2015, service of the foregoing **DEFENDANTS' REPLY TO PLAINTIFFS'**
4 **OPPOSITION**, was made this date by electronic service as follows:

5
6 Leon Greenberg, Esq.
7 Dana Sniegocki, Esq.
8 Leon Greenberg Professional Corporation
9 2965 South Jones Blvd, Suite E4
10 Las Vegas, Nevada 89146
11 leongreenberg@overtimelaw.com
12 dana@overtimelaw.com
13 Attorneys for Plaintiffs
14 CHRISTOPHER THOMAS
15 CHRISTOPHER CRAIG

16
17 /s/ Tony Fera
18 For **Yellow Checker Star**
19 **Transportation Co. Legal Dept.**
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EXHIBIT 1

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Nov 03 2014 10:37 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

BARBARA GILMORE, Individually and)
on behalf of others similarly situated,)
Appellant,)
vs.)
DESERT CAB, INC.,)
Respondent.)

Sup. Ct. No. 62905
Dist. Ct. No: A-12-668502-C

APPELLANT’S OPENING BRIEF

Leon Greenberg, Esq.
Leon Greenberg Professional Corporation
2965 South Jones Boulevard - Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Appellant

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JURISDICTIONAL STATEMENT..... 1

STATEMENT OF ISSUES PRESENTED. 1

STATEMENT OF THE CASE. 1

STATEMENT OF FACTS..... 2

SUMMARY OF ARGUMENT..... 2

APPLICABLE STANDARD OF REVIEW. 3

ARGUMENT..... 3

I. THE DISTRICT COURT’S DECISION MUST BE REVERSED IN LIGHT OF THIS COURT’S OPINION IN *THOMAS V. NEVADA YELLOW CAB CORPORATION*. 3

II. THIS COURT SHOULD EXPRESSLY ADVISE THE DISTRICT COURT THAT THE HOLDING IN *THOMAS V. NEVADA YELLOW CAB CORPORATION* IS NOT LIMITED TO CONDUCT TAKING PLACE AFTER JUNE 26, 2014..... 4

A. Appellee and the Nevada taxi industry have indicated that they intend to argue *Thomas* only creates the rights recognized by this Court for conduct taking place after June 26, 2014..... 4

B. This Court will conserve judicial resources, and forestall another appeal, by expressly advising the district court that Article 15, Section 16 of the Nevada Constitution created the rights recognized in *Thomas* as of November 28, 2006 and not as of the date of the *Thomas* Opinion..... 4

C. The claim that the rights recognized in *Thomas* arose only on the date of the *Thomas* Opinion, and not on the date that Article 15, Section 16 of the Nevada Constitution otherwise became effective, is specious..... 6

CONCLUSION. 9

Certificate of Compliance With N.R.A.P Rule 28.2. 10

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N.R.S. § 608.250(1).. 1

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Murray v. A Cab Taxi Service LLC,
Eighth Judicial District Court, A-12-669926-C. 5

*Pub. Emps.' Benefits Program v. Las Vegas Metro.
Police Dep't*,
179 P.3d 542, (Nev. Sup. Ct. 2008) 6

Sanchez v. Wal Mart Stores, Inc.,
221 P.3d 1276, 1280 (2009). 3

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Eighth Judicial District Court, A-12-660700-C. 5

Thomas v. Nevada Yellow Cab Corp.,
130 Nev. Adv. Op. 52, 372 P.3d 518 (2014). 2-5

Tovinen v. Rollins,
560 P.2d 915, (Nev. Sup. Ct. 1977). 6

Other Authorities

Article 15, Section 16 of the Nevada Constitution 4

Nevada Attorney General's opinion, 05-04 Op. Atty Gen. (2005).. 8

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal because it is an appeal of a final judgment.

The Order of Dismissal constituting a final judgment was entered by the District Court in this case on February 25, 2013 and Notice of Entry of the same served by mail on February 26, 2013. The Notice of Appeal was served and filed on March 28, 2013.

STATEMENT OF ISSUES PRESENTED

This appeal presents the following issues:

(1) Whether the Nevada Constitution, Article 15, Section 16, requires the payment of an hourly minimum wage to employees working as taxi drivers in Nevada even though such employees are exempted from Nevada’s statutory minimum wage requirement, NRS 608.250(1), by N.R.S. 608.250(2)(e).

STATEMENT OF THE CASE

This case was commenced on September 17, 2012 in the Eighth Judicial District Court. The appellant, Barbara Gilmour (hereinafter “appellant” or “Taxi Drivers”) allege the appellee, Desert Cab, Inc. (hereinafter “appellee” or “Desert”) failed to compensate their taxi driver employees with the minimum hourly wage required by the Nevada Constitution. Appellant’s Class Action Complaint alleged Desert failed to pay her and a class of similarly situated Taxi Drivers the minimum hourly compensation required by Nevada’s Constitution. AA 01-06.¹

Desert moved the district court to dismiss this case pursuant to Nev. R. Civ. P. 12(b)(5), for failure to state a claim upon which relief could be granted. That motion was argued before the district court on January 16, 2013 and, by an order signed on February 23, 2013, and entered by the clerk of the district court

¹ Referenced page numbers of Appellant’s Appendix are referred to as “AA.”

1 on February 25, 2013, such motion was granted. AA 09-11.

2 **STATEMENT OF FACTS**

3 Appellant was employed by Desert as a taxi cab driver in Clark County,
4 Nevada. She claims Desert has, at certain times, failed to pay her the minimum
5 hourly compensation required by Article 15, Section 16 of the Nevada
6 Constitution. AA 04. Desert has not disputed that it failed to pay its Taxi
7 Drivers employees the minimum hourly compensation specified in the Nevada
8 Constitution.

9 **SUMMARY OF ARGUMENT**

10 The issues raised by this appeal have been conclusively resolved, against
11 Desert, by this Court's Opinion in *Thomas v. Nevada Yellow Cab Corp.*, 130
12 Nev. Adv. Op. 52, 372 P.3d 518 (2014). As *Thomas* made clear, Article 15,
13 Section 16 of the Nevada Constitution (the "Nevada Constitutional Minimum
14 Wage"), requires the payment of the minimum hourly wage specified therein to
15 taxi driver employees irrespective of the terms of NRS 608.250(2)(e) or any
16 other Nevada statute. As this appeal raises no other issues of fact or law besides
17 those raised and resolved in *Thomas*, the district court's decision must be
18 reversed and this case remanded to the district court for further proceedings.

19 The Court, in its Order reversing and remanding this case, should
20 expressly advise the district court that *Thomas* does not establish the rights
21 recognized therein only as of June 26, 2014, the date of the *Thomas* Opinion.
22 While the relief, if any, that the Taxi Drivers are entitled to in this case, or in
23 *Thomas*, is unknown, the availability of such relief is not properly limited to
24 claims accruing after June 26, 2014. Such relief, to the extent it is otherwise
25 warranted, should be available from the effective date of Article 15, Section 16
26 of the Nevada Constitution, which was November 28, 2006. Judicial efficiency
27 will be significantly advanced by such an express advisement, as the appellees
28 in *Thomas* have already announced that they will continue to oppose the Taxi

1 Drivers' claims on the basis that the *Thomas* decision has no application to
2 conduct taking place prior to June 26, 2014.

3 **APPLICABLE STANDARD OF REVIEW**

4 This Court reviews a decision by the district court to dismiss under Nev.
5 R. Civ. P. 12(b)(5) under a "rigorous appellate review" standard. *See, Sanchez*
6 *v. Wal Mart Stores, Inc.*, 221 P.3d 1276, 1280 (Nev. 2009). The plaintiff's
7 factual allegations must be accepted as true and dismissal is improper if those
8 allegations sufficiently allege the elements of the claims asserted. *Id.* In
9 reviewing the district court's dismissal order, every reasonable inference is
10 drawn in the plaintiff's favor. *Id.*

11 **ARGUMENT**

12 **I. THE DISTRICT COURT'S DECISION MUST BE** 13 **REVERSED IN LIGHT OF THIS COURT'S OPINION** 14 **IN *THOMAS V. NEVADA YELLOW CAB CORPORATION***

15 This appeal presents the identical issue of law resolved by this Court in
16 *Thomas v. Nevada Yellow Cab Corporation*. It presents no other issues and the
17 district court rested its determination on the reasoning rejected not once, but
18 twice, by this Court in *Thomas*. *See, Thomas, Order of September 24, 2014*,
19 unanimously denying petition for rehearing. Indeed, the district court in this
20 case cited, and expressly adopted, the "findings, analysis and decision" of the
21 now reversed district court decision in *Thomas*. AA 10.

22 The district court in this case, as in *Thomas*, erred by failing to properly
23 recognize, understand, and apply, the language and meaning of Article 15,
24 Section 16 of the Nevada Constitution and the doctrine of constitutional
25 supremacy. There is no further briefing on the error of the district court's
26 decision that is needed or from which this Court could benefit. This Court's
27 opinion in *Thomas* completely disposes of all of the issues raised by this appeal
28 and mandates that the district court's decision be reversed and this case
remanded to the district court for a determination of the merits of the Taxi

1 Drivers' claims.

2 **II. THIS COURT SHOULD EXPRESSLY ADVISE THE DISTRICT**
3 **COURT THAT THE HOLDING IN *THOMAS V. NEVADA YELLOW***
4 ***CAB CORPORATION* IS NOT LIMITED TO CONDUCT TAKING**
5 **PLACE AFTER JUNE 26, 2014**

6 **A. Appellee and the Nevada taxi industry have indicated**
7 **that they intend to argue *Thomas* only creates the**
8 **rights recognized by this Court for conduct taking**
9 **place after June 26, 2014.**

10 This litigation is one of seven known lawsuits brought against Nevada
11 taxi cab driver employers seeking unpaid minimum wages pursuant to Article
12 15, Section 16 of the Nevada Constitution. *See, Appellants' Motion to Correct*
13 *Opinion*, filed October 14, 2014 in *Thomas*.² Copy at AA 12-18. Counsel for
14 more than one of those employers have advised appellant's counsel that they
15 intend to argue this Court's Opinion in *Thomas* only creates a right to minimum
16 wages for taxi drivers under Nevada's Constitution for work performed after the
17 date of such opinion, June 26, 2014. AA 18. Counsel for the *Thomas*
18 appellees have already expressly advised this Court that they intend, upon
19 remand of *Thomas* to the district court, to make that exact argument to the
20 district court. AA22-27.

21 **B. This Court will conserve judicial resources, and forestall**
22 **another appeal, by expressly advising the district court**
23 **that Article 15, Section 16 of the Nevada Constitution**
24 **created the rights recognized in *Thomas* as of November**
25 **28, 2006 and not as of the date of the *Thomas* Opinion.**

26 In four of the seven known litigations involving the rights of Nevada taxi
27 driver employees under Article 15, Section 16 of the Nevada Constitution the
28 defendant taxi companies sought to dismiss such claims, based upon the
arguments rejected by this Court in *Thomas*. Yet in three of those four cases the

² By Order issued on October 27, 2014 this Court denied such motion, seeking to change three words in the *Thomas* Opinion from present tense to past tense. Such Order did not opine on whether the holding in *Thomas* did, or did not, apply to conduct taking place prior to June 26, 2014.

1 district court erred and granted such motions to dismiss.³ Given this history,
2 the probability of further error by the district court in one or more of these
3 litigations is substantial unless this Court expressly declares that the rights
4 recognized in *Thomas* were effective as of November 28, 2006.

5 The Nevada taxi industry, in response to these cases, has elected to
6 engage in litigation tactics that will serve no purpose except to delay the
7 progress of these cases and consume the limited time and resources of the
8 counsel for the taxi drivers. Those tactics will also unduly burden this Court
9 and the district court. Such tactics are already documented before this Court,
10 where appellees in *Thomas* made a completely specious petition for rehearing.
11 Such petition intentionally *excluded* any request that this Court declare the
12 rights recognized by *Thomas* were only effective as of the date of the *Thomas*
13 opinion. The *Thomas* appellees sought to *not* have this Court rule on that issue
14 so they could litigate it in the district court and subject appellants' counsel to
15 another appeal to this Court over such issue.

16 This Court may, or may not, choose to address in this appeal the
17 completely frivolous contention that the rights secured by Article 15, Section 16
18 of the Nevada Constitution, and recognized in *Thomas*, were only effective as of
19 the date of the *Thomas* opinion. In event that this Court declines to exercise its
20 discretion to address that issue, a further appeal to this Court over that issue,
21 and a substantial waste of judicial resources, is extremely probable.

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24 ³ In addition to this case and the *Thomas* case the district court dismissed
25 such claims in *Tesema v. Lucky Cab Co.*, Eighth Judicial District Court, A-12-
26 660700-C, Order of February 14, 2013 (such order revoked and those claims
27 reinstated after the *Thomas* opinion by order of September 8, 2014). The only
28 district court decision pre-dating *Thomas*, and making the correct finding as
made by this Court in *Thomas*, is the decision in *Murray v. A Cab Taxi Service
LLC*, Eighth Judicial District Court, A-12-669926-C, entered on February 11,
2013, rehearing denied by order entered on May 2, 2013.

1 **C. The claim that the rights recognized in *Thomas* arose**
2 **only on the date of the *Thomas* Opinion, and not on the**
3 **date that Article 15, Section 16 of the Nevada**
4 **Constitution otherwise became effective, is specious.**

5 Amendments to Nevada’s Constitution become “effective upon the
6 canvass of the votes by the supreme court.” *Tovinen v. Rollins*, 560 P.2d 915,
7 916-917 (Nev. Sup. Ct. 1977). Article 15, Section 16, of the Nevada
8 Constitution was enacted by the voters in the 2006 general election and became
9 effective on November 28, 2006. *See*, N.R.S. § 293.395(2). Appellant is not
10 making any claims against appellee involving conduct occurring prior to that
11 effective date.⁴ The proper prospective application of Article 15, Section 16, of
12 the Nevada Constitution is its application *after* November 28, 2006: “As a
13 general rule, a constitutional amendment is to be given *only prospective*
14 *application from its effective date* unless the intent to make it retrospective
15 clearly appears from its terms.” *Tovinen*, 560 P.2d at 917 (emphasis added).

16 This case does not present any retroactive application of law issue. *See*,
17 *Pub. Emps.’ Benefits Program v. Las Vegas Metro. Police Dep’t*, 179 P.3d 542,
18 553–54 (Nev. Sup. Ct. 2008) (“A statute has retroactive effect when it takes
19 away or impairs vested rights acquired under existing laws, or creates a new
20 obligation, imposes a new duty, or attaches a new disability, *in respect to*
21 *transactions or considerations already past.*”)(emphasis provided). No
22 retroactive application of law issue is raised in respect to appellee’s, or any
23 other taxi cab employer’s, conduct occurring after November 28, 2006, neither
24 in this case nor in any of the other pending taxi driver litigations.

25 The argument that the Nevada Constitution imposed no obligation upon
26 taxi driver employers prior to this Court’s Opinion in *Thomas* is tantamount to a
27 claim that there is no legal obligation to comply with *any* duty imposed by the

28 ⁴ The statute of limitations applicable to the appellants’ claims is not
before this Court and no request is made for the Court to consider that issue.

1 text of Nevada’s Constitution until that duty is enforced by the Nevada Supreme
2 Court. Such assertion is contrary to the fundamental principles of our system of
3 justice and close to a millennium of common law whereby courts are required to
4 make substantive, and not merely future conduct, rulings about the civil legal
5 rights of the parties. *See Linkletter v. Walker*, 381 U.S. 618, 622 (1965) (“At
6 common law there was no authority for the proposition that judicial decisions
7 made law only for the future”, citing 1 Blackstone, Commentaries 69 (15th ed.
8 1809)). Embracing the revolutionary view, urged by the Nevada taxi industry,
9 that “a new law imposes no consequences on violators until its effectiveness is
10 confirmed by the Supreme Court of Nevada,” would encourage, and reward,
11 lawbreakers.

12 The argument that *Thomas* has no application to conduct taking place
13 prior to such Opinion’s release seeks to apply a grossly corrupted version of the
14 “prospective application” of certain decisions, such as in *Linkletter*, involving
15 new *judicially created rights* or that *overrule prior precedents*. In *Linkletter*
16 the United States Supreme Court declined to grant retroactive force to its
17 decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), which overruled prior Supreme
18 Court precedents on the application of the Fourth Amendment’s exclusionary
19 rule to state criminal prosecutions. 381 U.S. at 637-38. The decision in
20 *Linkletter* and similar cases do not involve, and are inapplicable to, situations
21 where a parties’ rights are created by the express language of a newly enacted
22 statute or constitutional provision. They are inapplicable because the parties
23 whose conduct is governed by those new statutes and constitutional provisions
24 ***have notice of the language of those new laws and are aware that they***
25 ***disregard the same at their peril.***

26 The Nevada taxi industry was well aware of the “absolute” language of
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28

1 Article 15, Section 16, of the Nevada Constitution.⁵ They have not, and do not,
2 argue such constitutional amendment's language, read in isolation, fails to
3 confer the rights claimed by the taxi drivers. They argued to the district court,
4 and this Court, that *another law*, the previously enacted statute NRS 608.250,
5 must be read together with the constitutional amendment and that under such a
6 coordinated reading the rights claimed by the appellants do not exist. The
7 Nevada taxi industry cannot claim any unfair prejudice as a result of this
8 Court's rejection of their arguments.⁶

9 This Court's decision in *Hansen v. Harrah's*, 675 P.2d 394 (Nev. Sup. Ct.
10 1984), illustrates the complete fallaciousness of the claim *Thomas* has no
11 application to conduct occurring prior to its publication. *Hansen* created,
12 through judicial recognition of Nevada's public policy, a tort cause of action for
13 the retaliatory discharge of an employee who files a worker's compensation
14 claim. No such cause of action was authorized in the text of any Nevada statute,
15 the creation of such a cause of action was an exception to Nevada's well
16 established "employment at will" law, and the creation by judicial recognition
17 of such a cause of action had been rejected by some other state courts. 675 P.2d
18 at 396. Nonetheless, even though the employer defendants in *Hansen* had no
19 express advance notice that such a cause of action existed as an exception to the
20 "employment at will" law of Nevada, this Court imposed a *current* liability for
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22 ⁵ They were also aware of the Nevada Attorney General's opinion, 05-04
23 Op. Atty Gen. (2005), issued before November 28, 2006, opining that the
24 Nevada taxi industry employers would be subject to Article 15, Section 16.

25 ⁶ The Nevada taxi industry employers could have promptly sought a
26 judicial declaration of their obligations after November 28, 2006 and arranged
27 to pay into escrow, pending the issuance of such a declaration, the disputed
28 sums now found to be owed to their taxi driver employees. They declined to do
so and now seek to profit from their failure to comply with the law by not
having to pay any such sums accruing prior to June 26, 2014.

1 compensatory damages upon the defendant employers. *Hansen* both created a
2 new cause of action and imposed liability for that newly recognized claim on
3 the defendants' *prior* conduct, it did not merely determine the defendants' future
4 legal obligations.

5 It is impossible to reconcile the very sound and well grounded approach
6 taken by this Court in *Hansen* with the application of *Thomas* being argued by
7 the Nevada taxi industry. If a party, as in *Hansen*, is liable for damages as a
8 result of their conduct occurring *prior* to this Court's creation of a new cause
9 action, one not set forth expressly in any written law, appellee in this case must
10 be liable for its conduct occurring prior to June 26, 2014, which conduct was
11 indisputably in violation of any "isolated" reading of Article 15, Section 16, of
12 Nevada's Constitution. In its Order reversing and remanding this appeal this
13 Court should so state.

14 15 CONCLUSION

16
17 Wherefore, for all the foregoing reasons, the Order and Judgment
18 appealed from should be reversed in its entirety and this Court should also
19 expressly hold that its Opinion in *Thomas* is not limited to conduct taking place
20 after June 26, 2014.

21 Dated: October 29, 2014

22 Respectfully submitted,

23
24 /s/ Leon Greenberg
25 Leon Greenberg, Esq. (Bar # 8094)
26 A Professional Corporation
27 2965 S. Jones Blvd., Suite E-3
28 Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Appellant

CERTIFICATE OF MAILING

The undersigned certifies that on the October 30, 2014, she served the within:

Appellant's Opening Brief

by electronic service :

TO:

Moran Law Firm
630 South 4th Street
Las Vegas, NV 89101

Attention: Jeffrey Bendavid

/s/ Sydney Saucier

Sydney Saucier

EXHIBIT 2

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BARBARA GILMORE,
Individually and on behalf of others
similarly situated,

Appellant,

vs.

DESERT CAB, INC.,

Respondent.

Supreme Court Case No. 62905

District Court Case No.: A-12-668502-C

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Clerk of Supreme Court

RESPONDENT, DESERT CAB, INC.'S ANSWERING BRIEF

/s/Jeffery A. Bendavid

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Attorney for Respondent

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 **BARBARA GILMORE,**
3 Individually and on behalf of others
4 similarly situated,

Supreme Court Case No.: 62905

5 Appellant,

6 vs.

7 **DESERT CAB, INC.,**

8 Respondent.
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12 **RESPONDENT, DESERT CAB, INC.'S NRAP 26.1 DISCLOSURE**

13 The undersigned counsel of record certifies that the following are persons
14 and entities as described in *NRAP26.1(a)*, and must be disclosed. These
15 representations are made in order that the Justices of this Court may evaluate
16 possible disqualification or recusal.

- 17 1. Parent corporations – No such corporation.
18 2. Publicly held company owning 10% of Respondent's stock – No such
19 corporation.
20 3. Respondent's Law Firm – Moran Brandon Bendavid Moran
21 4. Pseudonym – None

22 /s/Jeffery A. Bendavid

23 **JEFFERY A. BENDAVID, ESQ.**

24 Nevada Bar No. 6220

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Attorney for Respondent

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I. JURISDICTIONAL STATEMENT

Respondent, Desert Cab, Inc. (“Respondent”) objects to Appellant, Barbara Gilmore’s (“Appellant”) statement of jurisdiction. Appellant contends that this Court has jurisdiction over this appeal because it is a final appeal.¹ However, this Court does not have jurisdiction over Appellant’s self-created “Second” Issue on Appeal identified as part of Appellant’s Argument since Appellant’s alleged “issue” was never raised, argued, or addressed before the District Court and the District Court never made a final judgment on this issue.²

II. ISSUES PRESENTED

Respondent does not object to Appellant’s First Issue on Appeal. However, Respondent objects to Appellant’s self-created “Second” Issue on Appeal identified as part of Appellant’s Argument. Appellant lacks standing to assert this “issue” on appeal since Appellant’s alleged “issue” was never raised, argued, or addressed before the District Court.

III. COMBINED STATEMENT OF THE CASE AND FACTS

On September 17, 2012, Appellant, on behalf of herself and those similarly situated, filed a Complaint against Respondent in the Eighth Judicial District

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¹ See Appellant’s Opening Brief at 1.

² See *infra*.

1 Court for Clark County, Nevada.³ Appellant's Complaint alleged that while
2 employed by Respondent as a taxicab driver she was not paid minimum wage in
3 the amount required by Article 15, Section 16 of Nevada's Constitution (the
4 ("Minimum Wage Amendment").⁴
5

6 Based on this simple allegation, Appellant's Complaint asserted two (2)
7 Claims for Relief.⁵ Appellant's First Claim for Relief sought all relief permitted
8 her by Nevada's Minimum Wage Amendment, including, but not limited to
9 equitable relief, compensatory damages, and an award for punitive damages.⁶
10

11 Appellant's Second Claim for Relief alleged that Respondent failed to pay
12 Appellant certain unpaid wages owed Appellant at the time of her separation from
13 employment by Respondent.⁷ Based on this allegation, Appellant asserted her
14 Second Claim of Relief pursuant to *NRS 608.040* and further alleged that
15 Respondent violated *NRS 608.020* or *608.030* and therefore, Appellant was
16 entitled all such relief afforded her under these statutes.⁸
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25 ³ See Appellant's Appendix at 01.

26 ⁴ See *Id.* at 02.

27 ⁵ See *Id.* at 04-06.

28 ⁶ See *Id.* at 04.

⁷ See *Id.* at 05.

⁸ See *Id.* at 05-06.

1 In response to Appellant's Complaint, Respondent filed its Motion to Dismiss
2 Appellant's Complaint pursuant to *N.R.C.P. 12(b)(5)*.⁹ Respondent's Motion to
3 Dismiss established that Appellant's Complaint failed to state any claims upon
4 which relief could be granted since Appellant failed to provide sufficient factual
5 allegations demonstrating her claims for relief.¹⁰ Further, Respondent's Motion to
6 Dismiss demonstrated that Respondent's Complaint failed to state any claim upon
7 which relief could be granted since *NRS 608.250(2)(e)* expressly excluded taxi
8 drivers from Nevada's minimum wage laws.¹¹

12 On January 13, 2013, the District Court held a hearing on Respondent's
13 Motion to Dismiss.¹² After hearing oral arguments, the District Court granted
14 Respondent's Motion to Dismiss.¹³ On February 23, 2013, the District Court
15 executed the Order Granting Respondent's Motion to Dismiss and subsequently,
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21 ⁹ *See Respondent's Appendix at 1.* Since Appellant never contacted
22 Respondent's counsel to discuss and agree on the submission of a Joint
23 Appendix as required *NRAP 30(a)*, Respondent is forced to submit a separate
24 Appendix. Wherever possible, Respondent has referenced Appellant's Appendix
25 as required by *NRAP 30(b)(4)*.

26 ¹⁰ *See Id. at 6-14.* Prior to having any opportunity or obligation to admit or deny
27 any allegations present in Appellant's Complaint. Accordingly, Respondent
28 objects to Appellant's declaration that Respondent never "denied" that
Respondent did not pay Appellant the required minimum wage.

¹¹ *See Id. at 6-12.*

¹² *See Appellants' Appendix at 09.*

¹³ *See Id. at 09-11.*

1 the Order was entered on February 25, 2013.¹⁴ Thereafter, Appellant filed this
2 Appeal.

3 4 IV. STANDARD OF REVIEW

5 The Supreme Court of Nevada reviews orders granting a motion to dismiss for
6 failure to state a claim *de novo*.¹⁵ On appeal, the Court accepts the plaintiff's
7 factual allegations as true and then makes a determination whether the relevant
8 allegations are legally sufficient to satisfy the elements of the claim asserted.¹⁶
9

10 11 V. SUMMARY OF THE ARGUMENT

12 Appellant's Appeal, and in particular, Appellant's Opening Brief relies
13 entirely on the Court's prior decision rendered in *Thomas v. Nevada Yellow Cab*
14 *Corporation*.¹⁷ In *Thomas*, this Court held that the constitutional supremacy of
15 Nevada's Minimum Wage Amendment required the implied repeal of *NRS*
16 *608.250(2)(e)* and therefore, Nevada's Minimum Wage Amendment "supersedes
17 and supplants" the taxi drivers exception provided by *NRS 608.250(2)(e)*.¹⁸
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20 Appellant's Opening Brief contends that her Appeal is identical to the appeal
21 addressed in *Thomas* and therefore, the District Court's decision in this matter
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25 ¹⁴ *See Id.*

26 ¹⁵ *See Pack v. LaTourette*, 128 Nev. Adv. Rep. 25 * 5-6, 277 P.3d 1246, 1248
(May 31, 2012) (citation omitted).

27 ¹⁶ *See Id.*

28 ¹⁷ *See Appellant's Opening Brief at 2-3.*

¹⁸ 130 Nev. Adv. Op. 52, *9, 372 P.3d 518 (2014).

1 must be reversed.¹⁹ At the same time, Appellant also seeks an “advisement” (i.e.,
2 a “Declaration”) from this Court declaring that the decision in *Thomas* somehow
3 established that any relief afforded Appellant, and in truth, all subsequent taxi
4 drivers, is available from the November 28, 2006 effective date of Nevada’s
5 Minimum Wage Amendment.²⁰

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8 Appellant’s arguments on appeal fail. First, Appellant’s appeal is not identical
9 to the appeal addressed in *Thomas*. Respondent’s Motion to Dismiss identified
10 issues and asserted specific legal arguments not addressed by the Court in
11 *Thomas*.²¹ As such, Appellant’s Appeal must be reviewed and addressed on its
12 merits and not as a casualty of *Thomas* as argued by Appellant.
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15 Second, Appellant absolutely has no standing to seek or obtain an
16 “advisement” from this Court regarding the retroactive application of *Thomas*.²²
17 Appellant is precluded as a matter of Nevada law from seeking such relief on
18 appeal as neither Appellant nor Respondent identified, raised, or argued this issue
19 before the District Court as part of the proceedings concerning Respondent’s
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26 ¹⁹ See Appellant’s Opening Brief at 2 and at 3-4.

27 ²⁰ See *Id.* at 2 and at 6-8.

28 ²¹ See *infra*.

²² See *Id.*

1 Motion to Dismiss.²³ Further, Appellant has not identified any legal support for
2 obtaining such an “advisement” from the Court.²⁴

3
4 Third, Appellant’s argument, improperly asserted as a “Second” Issue on
5 Appeal, that the proper application of the Court’s decision in *Thomas* is as of the
6 November 28, 2006 effective date of Nevada’s Minimum Wage Amendment is
7 not supported by the Court’s actual holding in *Thomas*.²⁵ Further, the legal
8 references relied on by Appellant, which supposedly demonstrates Appellant’s
9 argument, actually operates to establish that the application of *Thomas*, as
10 provided by the Court, must only occur from the Court’s July 26, 2014 date of
11 decision in order to avoid the unjust and unfair retroactive application against
12 Respondent.²⁶

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16 As such, the District Court was correct to grant Respondent’s Motion to
17 Dismiss since Appellant failed to state any claim against Respondent upon which
18 they could recover.
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26 ²³ *See Id.*

27 ²⁴ *See Id.*

28 ²⁵ *See Id.*

²⁶ *See Id.*

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VI. ARGUMENT

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A. The District Court's Decision Is Not Identical and Need Not Be Reversed In Light of This Court's Opinion in *Thomas v. Nevada Yellow Cab Corporation*.

Appellant's First Issue on Appeal relies solely on Appellant's declaration that this matter is "identical" to the matter addressed by this Court in the previous case of *Thomas v. Nevada Yellow Cab Corporation*.²⁷ However, Appellant fails to demonstrate exactly how this matter is "identical."²⁸ Instead, Appellant merely declares that *Thomas* "completely disposes of all of the issues raised by this appeal."²⁹

Without question, this Court in *Thomas* held that Nevada's Minimum Wage Amendment to the Constitution, Article 15, Section 16, implicitly repealed the exception for taxi drivers provided in Nevada's minimum wage statute, *NRS 608.250(2)(e)*.³⁰ However, the Court, in deciding *Thomas*, did not consider arguments raised and addressed by the District Court in this matter.³¹

In particular, Respondent's Motion to Dismiss specifically relied on the similar facts in the Nevada Supreme Court's prior case of *Mengelkamp v. List* to demonstrate that no evidence could show that Nevadans who voted to raise the

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²⁷ See Appellant's Opening Brief at 3.

²⁸ See *Id.*

²⁹ *Id.*

³⁰ See *Thomas*, 130 Nev. Adv. Op. 52 at *3 and at *9.

³¹ See *Id.*

1 amount of Nevada's minimum wage also intended to abolish the specific
2 categories of individuals already exempted by *NRS 608.250(2)*.³² Although this
3 Court referenced *Mengelkamp* in *Thomas*, this Court only relied on *Mengelkamp*
4 for the principal that a statute "irreconcilably repugnant" to a constitutional
5 amendment is deemed to have been impliedly repealed by the amendment.³³ This
6 Court did not analyze *Thomas* against the arguments and facts in *Mengelkamp* nor
7 was it obligated to do so since it does not appear that such an issue or analysis
8 occurred in *Thomas* either on appeal or before the District Court.³⁴

9 Unlike *Thomas*, Respondent's raised this matter and asserted this argument
10 before the District Court³⁵, which demonstrates plainly that this matter is not
11 "identical" to *Thomas* as concluded by Appellant.

12 In *Mengelkamp*, a 19-year old Nevada citizen challenged the validity of
13 *NRS 218.010*, which in part, required a candidate for Nevada office to be 21-years
14 old.³⁶ The individual challenging *NRS 281.010* "suggested" that *NRS 218.010*
15 was repealed by implication when Nevadans voted in 1971 to amend the Nevada
16 Constitution to grant 18-year olds the right to vote.³⁷ The Court dismissed this

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25 ³² See Respondent's Appendix at 6-11.

26 ³³ *Thomas*, 130 Nev. Adv. Op. 52 at *5.

27 ³⁴ See *Id.*

28 ³⁵ See Respondent's Appendix at 6-11.

29 ³⁶ See, 88 Nev. 542, 544-45, 501 P.2d 1032, 1034 (1972).

30 ³⁷ *Id.* at 545-46.

1 “suggestion” since it could not say that voters somehow intended to abolish the
2 age requirements for holding office when they allowed 18-year-olds to vote.³⁸

3 Specifically, the Court stated:
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5 We cannot say that members of the public who cast their ballots to
6 allow 18-year-olds to vote thereby manifested intent to abolish age
7 requirements theretofore imposed on candidates for state office.³⁹

8 Here the Court’s determination in *Mengelkamp* also applies, as no evidence
9 exists that Nevadans who voted to raise the amount of Nevada’s minimum wage
10 in the Amendment somehow also intended to abolish the specific categories of
11 individuals already exempted from receiving Nevada’s minimum wage by *NRS*
12 *608.250(2)*.⁴⁰ Unlike this matter, *Thomas* never considered whether the voters
13 intended through the Minimum Wage Amendment to abolish specifically the
14 *exceptions of NRS 608.250(2)*.⁴¹ Instead, *Thomas* only addressed whether
15 Respondent’s adequately demonstrated whether the voters intended only to raise
16 the minimum wage and not “create a new minimum wage scheme.”⁴²
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20 Appellant’s Complaint evidences this reality. Appellant’s Complaint asserted
21 two (2) separate claims for relief.⁴³ Appellant’s First Claim for Relief sought all
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25 ³⁸ *Id.* at 546.

26 ³⁹ *Id.*

27 ⁴⁰ *See Respondent’s Appendix at 6-11.*

28 ⁴¹ *See, 130 Nev. Adv. Op. 52 at *5-6.*

⁴² *See Id.*

⁴³ *See Appellant’s Appendix at 01-06.*

1 relief permitted her by Nevada's Minimum Wage Amendment, including, but not
2 limited to equitable relief, compensatory damages, and an award for punitive
3 damages.⁴⁴ However, Appellant's Second Claim for Relief specifically sought all
4 relief afforded her under *NRS 608.040* because of Respondent's alleged violations
5 of *NRS 608.020* or *608.030*.⁴⁵
6

7
8 Had Nevada's Minimum Wage Amendment and this Court's decision in
9 *Thomas* intended to "create an entirely new minimum wage scheme," then
10 Appellant had no need and more importantly, could not rely on alleged violations
11 of *NRS 608.020* and *NRS 608.030* to recover against Respondent.⁴⁶ Those
12 statutes, along with *NRS 608.250*, would be impliedly repealed by Nevada's
13 Minimum Wage Amendment had Nevada's Minimum Wage Amendment and this
14 Court's decision in *Thomas* truly intended to "create an entirely new minimum
15 wage scheme." Obviously, Appellant does not contend such intent exists since
16 Appellant specifically relied upon other statutes in Chapter 608 to recover against
17 Respondent that apparently remain in effect and enforceable despite Nevada's
18 Minimum Wage Amendment and this Court's decision in *Thomas*.⁴⁷
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26 ⁴⁴ *See Id. at 04.*

27 ⁴⁵ *See Id. at 05-06.*

28 ⁴⁶ *See supra.*

⁴⁷ *See Id.*

1 As such, this matter is not identical to *Thomas* as issues and arguments not set
2 forth in *Thomas* were raised before the District Court as demonstrated above.⁴⁸
3 Accordingly, the Court should now consider such issues and arguments in this
4 appeal and not summarily dismiss them because of *Thomas* as argued by
5 Appellant.
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7
8 **B. Appellant Is Precluded by Nevada Law from Seeking an “Advisement”**
9 **From the Court and From Arguing That the Holding in *Thomas v.***
10 ***Nevada Yellow Cab Corporation* Is Not Limited to Conduct Taking**
11 **Place After June 26, 2014.**

12 Appellant’s “Second” Issue on Appeal is not an actual Assignment of Error on
13 Appeal.⁴⁹ Instead, Appellant improperly seeks an “advisement” from the Court
14 determining that the Court’s previous holding in *Thomas* applies as of the date the
15 Nevada Supreme Court canvassed the votes for Nevada’s Minimum Wage
16 Amendment.⁵⁰

17 Appellant seeks this “advisement” because Appellant’s counsel allegedly was
18 informed by “Counsel for more than one” taxicab company⁵¹ that they “intend to
19 argue” that the holding in *Thomas* “only creates a right to minimum wage for taxi
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26 ⁴⁸ See *supra*.

⁴⁹ See Appellant’s Opening Brief at 4-6.

27 ⁵⁰ See *Id.* at 6 (citing *Tovinen v. Rollings*, 560 P.2d 915, 916-917 (1977)).

28 ⁵¹ Strangely, Appellant does not identify any specific allegation that
Respondent’s counsel made such a statement. See *Id.*

1 drivers . . . after the date of such opinion, June 26, 2014.”⁵² Based on this
2 allegation, Appellant proceeds to provide a dissertation on the events that have,
3 have not, or may occur in *Thomas* after the Court’s decision⁵³ and legal argument
4 as to why this “intended” argument is without merit.⁵⁴

5
6 Regardless, Appellant has asserted these arguments and in reality, her
7 “Second” Issue on Appeal improperly to this Court in this appeal. Nevada law
8 expressly precludes any appellant from asserting any argument or issue not raised
9 below in the District Court.⁵⁵ In fact, the Nevada Supreme Court has determined
10 that an appellant’s failure to assert any argument or issue in the District Court
11 before an appeal constitutes a waiver of this argument or issue on appeal.⁵⁶

12
13 Here, Appellant is precluded from raising her “Second” Issue on appeal and
14 asserting her arguments in support thereof, because she never raised the issue or
15 asserted any arguments concerning the date Nevada’s Minimum Wage
16 Amendment took effect at any time before the District Court.⁵⁷ Neither
17 Appellant’s Complaint nor her Opposition to Respondent’s Motion to Dismiss
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23 ⁵² *Id.* at 4.

24 ⁵³ *See Id.* at 4-5.

25 ⁵⁴ *See Id.* at 5-6.

26 ⁵⁵ *See Peot v. Peot*, 92 Nev. 338, 390, 551 P.2d 242, 244 (1976). *See also, Heidt v. Heidt*, 108 Nev. 1009, 1011, 842 P.2d 723, 725 (1992); and *State of Washington v. Bagley*, 114 Nev. 788, 792, 963 P.2d 498, 501 (1998).

27 ⁵⁶ *See Kahn v. Morse & Mowbray*, 121 Nev. 464, 480, n.24, 117 P.3d 227, 238, n.24 (2005) (citing *Bagley*, 114 Nev. at 792).

28 ⁵⁷ *See Respondent’s Appendix at 48-65.*

1 identified, considered, raised, or asserted any allegation, claim, or argument
2 regarding the effective date of Nevada's Minimum Wage Amendment.⁵⁸ Further,
3 Respondent's Motion to Dismiss never raised this issue as grounds for dismissing
4 Appellant's Complaint.⁵⁹

6 As such, Nevada law precludes Appellant from raising her "Second" Issue on
7 appeal and all of the arguments related thereto since Appellant never raised this
8 issue and certainly never made any of her arguments asserted as part of her
9 "Second" Issue on Appeal before the District Court.

12 In addition, Appellant's "Second" Issue on Appeal fails to provide any legal
13 reference or authority allowing this Court to provide Appellant "advice" on how
14 to proceed in response to an issue that does not yet exist.⁶⁰ Appellant is required
15 to "cogently argue, and present relevant authority," supporting her issues on
16 appeal.⁶¹ Here, Appellant has not met this required burden since her Opening
17 Brief fails to provide a single reference demonstrating that this matter was raised,
18 argued, and resolved before the District Court.⁶² In addition, Appellant has not
19 provided any reference of Nevada law that permits her in any way to request,
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25 ⁵⁸ See Appellant's Opening Brief at 1-2.

26 ⁵⁹ See Respondent's Appendix at 1-13.

27 ⁶⁰ See Appellant's Opening Brief at 4-5.

28 ⁶¹ *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 330, n.38, 130 P.3d
1280, 1288, n.38 (2006) (citations omitted). See also, NRAP 28(a)(9).

⁶² See Appellant's Opening Brief at 4-5.

1 obtain, or argue for “advice” or a determination from this Court of an issue that
2 was not addressed below in the District Court, and also as admitted by Appellant,
3 may only become an issue in an entirely different case.⁶³
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5 In truth, the only support provided by Appellant is her self-serving
6 declaration that if the Court declines to address Appellant’s request for an
7 “advisement,” a further appeal is probable at the loss of judicial resources.⁶⁴
8 Appellant, of course, offers no legal citation or support that allows this Court to
9 provide such an “advisement.”⁶⁵ More importantly, Appellant fails to provide
10 any legal reference that permits Appellant to raise this issue without first being
11 addressed and determined before the District Court, for any reason, let alone the
12 alleged loss of judicial resources.⁶⁶
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16 Appellant provides no legal reference because none exists. First, the Nevada
17 Supreme Court does not consider speculative or “probable” arguments in the
18 future and Appellant has not offered any reference justifying or authorizing
19 otherwise.⁶⁷ Instead, *NRAP 3A(a)* expressly only permits Appellant standing to
20 make an appeal if she was aggrieved by an appealable judgment or order.
21 Appellant’s Opening Brief concedes that her “Second” Issue on Appeal does not
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26 ⁶³ *See Id.*

⁶⁴ *See Id. at 5.*

27 ⁶⁵ *See Id.*

28 ⁶⁶ *See Id.*

⁶⁷ *See Id.*

1 arise from an appealable judgment or order.⁶⁸ As such, neither an alleged waste
2 of judicial resources nor any other ground permits Appellant to receive an
3 “advisement” on an issue that was not addressed below in the District Court and,
4 on an issue upon which Appellant never received an adverse judgment or order.⁶⁹

5
6 Second, Appellant’s “Second” Issue on Appeal has no merit because
7 Respondent never made a claim or argued at any time that the rights recognized
8 in *Thomas* arose only on the date of the *Thomas* Opinion, and not on the effective
9 date of the Article 15, Section 16, of the Nevada Constitution.⁷⁰ To begin with,
10 the “rights” recognized in *Thomas* did not exist at the time the District Court, on
11 February 25, 2013, granted Respondent’s Motion to Dismiss Appellant’s
12 Complaint.⁷¹ This Court did not decide *Thomas* until 2014.⁷² Thus, it was
13 impossible for Respondent’s to have asserted such a “claim” for Appellant to
14 appeal.
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19 Consequently, neither Respondent nor Appellant ever asserted any “claim”
20 that the “rights” provided by *Thomas* arose only on the date of the *Thomas*
21 Opinion and not on the effective date of Nevada’s Minimum Wage Amendment.⁷³
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25 ⁶⁸ See *Id.* at 4.

26 ⁶⁹ See *supra*.

27 ⁷⁰ See Respondent’s Appendix at 48-65.

28 ⁷¹ See *Id.*

⁷² See, 130 Nev. Adv. Op. 52 at *1.

⁷³ See *supra*.

1 Therefore, Appellant has no standing to raise such an alleged "claim" as an
2 appealable issue in this matter.

3 Of course, Appellant's counsel, who was also counsel for the appellant in
4 *Thomas*, has recognized the absence of this issue. Here, for the second time,
5 Appellant's counsel attempts to circumvent the entire appellate process and have
6 this Court address the issue of the effective date of Nevada's Minimum Wage
7 Amendment's implicit repeal of the taxicab driver exemption without any District
8 Court proceeding or determination. Essentially, Appellant's counsel is attempting
9 to refine and re-litigate this Court's decision in *Thomas* through this Appeal.
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13 As admitted in Appellant's Opening Brief, Appellant's counsel already
14 attempted to obtain from this Court a "correction" of this Court's opinion in
15 *Thomas* without any legal right to do so determining the effective date of
16 Nevada's Minimum Wage Amendment. This Court denied this attempt. Now,
17 Appellant's counsel disguised as Appellant's "Second" Issue on Appeal, is
18 attempting to obtain the same "correction" that this Court denied in *Thomas*.
19 Appellant's counsel cannot succeed as this matter does not concern itself with this
20 "issue" and Appellant has no standing to raise this issue on appeal. Therefore,
21 this Court must not consider Appellant's "Second" Issue on Appeal.
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1 C. The Nevada's Supreme Court Decision in *Thomas v. Nevada Yellow*
2 *Cab Corporation* Expressly Limits Conduct Taking Place After June
3 26, 2014.

4 Notwithstanding the above and in the event that this Court elects to consider
5 Appellant's self-concocted "Second" Issue on Appeal, Appellant does not
6 demonstrate the absence of an issue of retroactivity as concluded in Appellant's
7 Opening Brief.⁷⁴ Specifically, Appellant first contends in her Opening Brief that
8 this matter does not present "any retroactive application of law" since Nevada's
9 Minimum Wage Amendment became effective on November 28, 2006, or the
10 date that the Nevada Supreme Court canvassed the votes.⁷⁵ Therefore, Appellant
11 incorrectly concludes that no issue remains regarding the retroactive application
12 of the Court's decision in *Thomas*, which impliedly repealed *NRS 608.250*.⁷⁶
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16 As is the case with Appellant's entire argument on this issue, neither *Thomas*
17 nor this matter ever raised the issue or challenged in any way the effective date of
18 Nevada's Minimum Wage Amendment.⁷⁷ More importantly, the Court in
19 *Thomas* considered only a single issue - whether Nevada's Minimum Wage
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26 ⁷⁴ See Appellant's Opening Brief at 6.

27 ⁷⁵ See *Id.*

28 ⁷⁶ See *Id.*

⁷⁷ See 130 Nev. Adv. Op. 52. See generally, also, Respondent's Appendix at 1-13.

1 Amendment repealed the taxi drivers exception as provided in *NRS*
2 *608.250(2)(e)*.⁷⁸

3
4 Contrary to Appellant's Opening Brief, the Court in *Thomas* expressly
5 recognized the simultaneous existence of Nevada's Minimum Wage Amendment
6 and the prior enacted exception for taxi drivers to Nevada minimum wage laws as
7 expressed in *NRS 608.250(2)(e)*.⁷⁹ Thus, prior to the Court's decision in *Thomas*,
8 employers of taxicab drivers were lawfully permitted not to pay Nevada's
9 minimum wage pursuant to *NRS 608.250(2)(e)*.
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12 Only the Court's analysis in *Thomas* determined that these two (2) laws could
13 no longer coexist (*i.e.*, be harmonized), since Nevada's Minimum Wage
14 Amendment failed to identify taxicab drivers as a specific exception to the new
15 definition of "employee" prescribed by Nevada's Minimum Wage Amendment.⁸⁰
16 Therefore, the Court held that *NRS 608.250(2)(e)* was "irreconcilably repugnant"
17 to Nevada's Minimum Wage Amendment.⁸¹ Consequently, this Court in *Thomas*
18 held that the constitutional supremacy of Nevada's Minimum Wage Amendment
19 required the implied repeal of *NRS 608.250(2)(e)* and therefore, Nevada's
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26 ⁷⁸ See, *130 Adv. Op. 52 at *3-6*.

27 ⁷⁹ See *Id.*

28 ⁸⁰ See *Id. at *9*.

⁸¹ *Id. at *6*.

1 Minimum Wage Amendment “supersedes and supplants” the taxi drivers
2 exception provided by *NRS 608.250(2)(e)*.⁸²

3
4 Never did this Court in *Thomas* declare that *NRS 608.250(2)(e)* did not exist
5 prior to or because of Nevada’s Minimum Wage Amendment.⁸³ Never did this
6 Court in *Thomas* declare that implied repeal of *NRS 608.250(2)(e)* retroactively
7 applied to the effective date of Nevada’s Minimum Wage Amendment.⁸⁴

8
9 Instead, the implied repeal of *NRS 608.250(2)(e)* was accomplished only by
10 the Nevada’s Supreme Court holding in *Thomas* and not by the effectuation of
11 Nevada’s Minimum Wage Amendment.⁸⁵ As such, both existed side by side until
12 *Thomas*, wherein the Court held that Nevada’s Minimum Wage Amendment
13 impliedly repealed *NRS 608.250(2)(e)*.⁸⁶

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16 The Court’s use of the present tense in *Thomas* in two (2) distinct instances
17 cements the reality that the implied repeal of *NRS 608.250(2)(e)* was never
18 intended to occur from the effective date of Nevada’s Minimum Wage
19 Amendment. First, in determining that *NRS 608.250(2)(e)* was “irreconcilably
20 repugnant” to Nevada’s Minimum Wage Amendment, the Court expressly stated
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25 ⁸² *Id.* at *9.

26 ⁸³ *Id.* at *6-9.

27 ⁸⁴ *See Id.*

28 ⁸⁵ *Id.* at *9 (“supersedes and supplants the taxicab drivers exception set out in
NRS 608.250(2)”).

⁸⁶ *See Id.*

1 in *Thomas* that *NRS 608.250(2)(e)* “is impliedly repealed.”⁸⁷ In other words, the
2 Court, using the present tense statement “is impliedly repealed,” appropriately
3 concluded and declared that going forward from its decision in *Thomas*, *NRS*
4 *608.250(2)(e)* could no longer be used by employers of taxi drivers to avoid
5 paying Nevada’s minimum wage.⁸⁸ Any other ruling would unjustly penalize an
6 entire industry and possibly lead to calamitous results for some of the cab
7 companies.
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10 Had the Court, which it was free to do, made use of the past tense statement,
11 “was impliedly repealed,” then the Court would have indicated that it deemed
12 *NRS 608.250(2)(e)* repealed as of the effective date of Nevada’s Minimum Wage
13 Amendment. The Court in *Thomas* made no such past tense statement.⁸⁹
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16 Second, the Court in *Thomas* declared, “the Minimum Wage Amendment, by
17 enumerating specific exceptions that do not include taxi drivers, supersedes and
18 supplants the taxicab driver exception set out in *NRS 608.250(2)*.”⁹⁰ Again, the
19 Court in *Thomas* made use of the present tense plainly indicating that Nevada’s
20 Minimum Wage Amendment, prospectively from *Thomas*, “supersedes and
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25 ⁸⁷ *Id.* at *6.

26 ⁸⁸ *See Id.* *See also, e.g., United States v. Jackson*, 480 F.3d 1014, 1019 (9th Cir.
27 2007) (use of verb tense is significant) (“words used in the present tense
include the future as well as the present”) (citations and quotations omitted).

28 ⁸⁹ *See Id.*

⁹⁰ *Id.* at *9. (Emphasis Added).

1 supplants” *NRS 608.250(2)*.⁹¹ As before, the Court in *Thomas* had the ability to
2 make use of the past tense, “superseded and supplanted,” and elected instead to
3 make use of the present tense.⁹²
4

5 Appellant’s Opening Brief makes no argument regarding the Court’s use of
6 the present tense in *Thomas*.⁹³ Nonetheless, the *Thomas* Court’s election to make
7 use of the present tense plainly demonstrates the Court’s intention only to hold
8 *Thomas* and the implied repeal of *NRS 608.250(2)(e)* effective prospectively from
9 the Court’s decision rendered on July 26, 2014.⁹⁴ As such, the effective date of
10 Nevada’s Minimum Wage Amendment does not determine in any way the
11 Court’s implied repeal of *NRS 608.250(2)(e)* pursuant to *Thomas* or the date for
12 determining when the employers of taxi drivers were required to pay Nevada’s
13 minimum wage.
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18 In addition, Appellant’s reliance on the Court’s decision in *Hansen v.*
19 *Harrah’s* has no merit and the actual application of *Hansen* supports the
20 prospective application only from the date of the Court’s decision in *Thomas*.
21 Appellant’s Opening Brief declares that *Hansen* somehow “illustrates the
22 complete fallaciousness of the claim that *Thomas* has no application” to conduct
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26 ⁹¹ *See Id.*

27 ⁹² *Id.*

28 ⁹³ *See generally, Appellant’s Opening Brief.*

⁹⁴ *See supra.*

1 that occurred prior thereto⁹⁵ However, the Court's decision in *Hansen* is
2 distinguishable and in fact supportive of such a claim. In *Hansen*, the Court first
3 considered "whether Nevada should adopt the public policy exception to the at-
4 will employment rule recognizing as a proper cause of action retaliatory discharge
5 for filing a workmen's compensation claim."⁹⁶ As an exception to Nevada's
6 common law at-will employment rule, the Court in *Hansen* adopted, as a common
7 law claim in tort, a claim for retaliatory discharge for an injured person's
8 wrongful discharge in response to that injured person's filing of a worker's
9 compensation claim.⁹⁷

10 Unlike *Hansen*, neither *Thomas* nor this matter is concerned with the
11 application of Nevada's common law at-will employment rules or any other
12 common law rules or claims.⁹⁸ Further, *Hansen*, unlike *Thomas*, never concerned
13 itself with the application of a decision by the Nevada Supreme Court implicitly
14 repealing a Nevada statute.⁹⁹ Instead, the Court in *Hansen* made use of its
15 exclusive power to create a common law claim in tort to support Nevada's public
16 policy of protecting injured workers.¹⁰⁰ Accordingly, the Court's decision in
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25 ⁹⁵ *Id.* at *8.

26 ⁹⁶ *Hansen v. Harrah's*, 100 Nev. 60, 62, 675 P.2d 394, 396 (1984).

27 ⁹⁷ *See Id.* at 64-65.

28 ⁹⁸ *See generally*, 130 Nev. Adv. Op. 52, and Appellant's Opening Brief at 8-9.

29 ⁹⁹ *See*, 100 Nev. at 63-65.

30 ¹⁰⁰ *See Id.* at 64-65.

1 *Hansen* to create a new common law claim in tort for retaliatory discharge has no
2 application or influence on the application of the Court's decision in *Thomas*
3 implicitly repealing *NRS 608.250* because of Nevada's Minimum Wage
4 Amendment.
5

6 Appellant also contends that the Court in *Hansen* "imposed a current liability"
7 on the employer in *Hansen* based on that employer's "prior conduct" even though
8 the employers in *Hansen* had no advance notice of the newly created common
9 law claim for retaliatory discharge.¹⁰¹ Appellant's declaration actually is contrary
10 to the Court's decision in *Hansen*.
11
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13 First, the Court in *Hansen* never imposed any liability on any party.¹⁰²
14 Instead, the Court in *Hansen*, after creating an entirely new common law claim in
15 tort, specifically remanded the matter to the District Court without imposing any
16 liability whatsoever on any party.¹⁰³
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19 Second, the Court in *Hansen* expressly considered whether punitive damages
20 were available to a party who prevails on the newly created claim for retaliatory
21 discharge.¹⁰⁴ In *Hansen*, the Court found that punitive damages were available to
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26 ¹⁰¹ *Appellant's Opening Brief at 8-9.*

27 ¹⁰² *See, 100 Nev. at 65.*

28 ¹⁰³ *See Id.*

¹⁰⁴ *See Id.*

1 a party prevailing on such a claim, but not in that case.¹⁰⁵ Although not discussed
2 in Appellant's Opening Brief, the Court in *Hansen* specifically found that the
3 imposition of punitive damages "would be unfair" since the Court determined it
4 was impossible for employers to know beforehand that their conduct was now,
5 because of *Hansen*, actionable in Nevada.¹⁰⁶ The Court in *Hansen* therefore
6 determined that these same unknowing employers could not be punished for such
7 conduct.¹⁰⁷ As such, the Court in *Hansen* expressly held that if the employees in
8 *Hansen* prevailed in trial, they still were prohibited from obtaining an award of
9 punitive damages against their employers.¹⁰⁸

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13 It is the Court's analysis of the "Second" Issue in *Hansen* that actually
14 supports the prospective application of *Thomas* only from the date of decision.
15 Like the employers in *Hansen*, Respondent, as an employer of Appellant, a
16 taxicab driver, had no knowledge prior to *Thomas* that its reliance on the taxicab
17 driver exception set out in *NRS 6082.250(2)(e)* to not pay minimum wage was no
18 longer valid.¹⁰⁹ Appellant's Opening Brief declares that Respondent had such

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¹⁰⁵ *See Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See Id.*

¹⁰⁸ *See Id.*

¹⁰⁹ *See supra.*

1 “knowledge,” but fails to reference any facts or allegations demonstrating such
2 alleged knowledge.¹¹⁰

3 Like the employers in *Hansen*, Respondent had no possibility of knowing that
4 that taxicab driver exception to Nevada’s minimum wage laws was going to be
5 found years later, “irreconcilably repugnant” because of this Court’s decision in
6 *Thomas*.¹¹¹ To date, four (4) sessions and five (5) special sessions of Nevada’s
7 Legislature convened and closed since the 2006 enactment of Nevada’s Minimum
8 Wage Amendment.¹¹² None of those sessions enacted any law repealing *NRS*
9 *608.250* or recognized the possible conflict or “irreconcilable repugnancy” of this
10 statute in light of the passage and enactment of Nevada’s Minimum Wage
11 Amendment.
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16 Further, Nevada’s Labor Commissioner, until this Court’s decision in *Thomas*,
17 identified, recognized, and enforced all of the exceptions to Nevada’s minimum
18 wage laws as set forth in *NRS 608.250*. Finally, as recognized in Appellant’s
19 Opening Brief, at least six other District Courts, and in one instance, the United
20 States District Court for Nevada, previous to *Thomas*, held that the taxicab driver
21 exception provided by *NRS 608.250* remained enforceable despite Nevada’s
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27 ¹¹⁰ See Appellant’s Opening Brief at 6-7.

28 ¹¹¹ See *supra*.

¹¹² 74th through 77th Sessions and 23rd through 27th Special Sessions.

1 Minimum Wage Amendment.¹¹³ In other words, every branch of Nevada's
2 government recognized for nearly eight (8) years after the passage and enactment
3 of Nevada's Minimum Wage Amendment that employers of taxi drivers were still
4 exempt from paying Nevada's minimum wage. As such, it was impossible for
5 Respondent, as an employer of taxi drivers such as Appellant, to have any
6 knowledge that their alleged failure to pay Nevada's minimum was somehow
7 unlawful and actionable prior to this Court's decision in *Thomas*.¹¹⁴
8
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10
11 As a result, the retroactive application of the Court's decision in *Thomas*, as
12 in *Hansen*, would be completely unjust and unfair to Respondent since it was
13 impossible for Respondent to know that *NRS 608.250(2)(e)* was "irreconcilably
14 repugnant" to Nevada's Minimum Wage Amendment.¹¹⁵ Such "irreconcilable
15 repugnancy" only arose by operation of this Court's decision *Thomas*.
16
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18 Consequently, applying *Thomas* retroactively against Respondent, as argued
19 for by Appellant, would unjustly punish Respondent in the same manner as the
20 employers in *Hansen*. Therefore, as in *Hansen*, the Court's decision in *Thomas*
21 should not apply to Respondent so that Respondent would not be unfairly
22 punished by the Court's implied repeal of *NRS 608.250(2)(e)*.¹¹⁶
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27 ¹¹³ See Appellant's Opening Brief at 4-5.

¹¹⁴ *Accord, Hansen, 100 Nev. at 65.*

¹¹⁵ *See Id.*

¹¹⁶ *See Id.*

1 Thus, the Court's decision in *Hansen* fails to support Appellant's argument on
2 appeal. Further, the Court's determination in *Hansen* that it would be unfair to
3 employers to be subject to punitive damages where they had no prior indication
4 that their conduct was actionable, demonstrates the Court's willingness to
5 consider the effect of its decision on those parties, who like Respondent had
6 engaged in lawful business practices until the Court's decision to repeal.¹¹⁷
7
8

9 **VII. CONCLUSION**

10 Pursuant to the arguments provided above, the District Court did not error
11 in any way by granting Respondent's Motion to Dismiss Appellant's Complaint.
12 Appellant failed to provide any arguments or assignments of error on appeal that
13 concern Respondent's actual Motion to Dismiss.
14
15

16 Based upon the foregoing, Respondent respectfully requests that this
17 Honorable Court uphold the District Court's Order Granting Respondent's
18 Motion to Dismiss Appellant's Complaint.
19

20 DATED this 1st day of December, 2014.

21 /s/Jeffery A. Bendavid
22 **JEFFERY A. BENDAVID, ESQ.**
23 Nevada Bar No. 6220
24 **MORAN BRANDON BENDAVID MORAN**
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27 (702) 384-8424
28 *Attorney for Respondent*

¹¹⁷ See *Id.*

1 **VIII. CERTIFICATE OF COMPLIANCE PURSUANT TO N.R.A.P. 28.2**

2 1. I hereby certify that this brief complies with the formatting requirements
3 of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
4 requirements of NRAP 32(a)(6) because this brief, including footnotes, has been
5 prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in
6 Times New Roman 14-point;
7

8 2. I further certify that this brief complies with the page limit and/or type-
9 volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief
10 exempted by NRAP 32(a)(7)(A)(ii) and (C), is proportionately spaced, has a
11 typeface of 14 points or more, and only contains 6,218 words, including footnotes
12 and quotations.
13

14 3. I further certify that I have read this Respondent's Answering Brief,
15 and to the best of my knowledge, information, and belief, it is not frivolous or
16 interposed for any improper purpose.
17

18 4. Finally, I certify that this brief complies with all applicable Nevada Rules
19 of Appellate Procedure, in particular NRAP 28(e)(1), which requires every
20 assertion in the brief regarding matters in the record to be supported by a reference
21 to the page and volume number, if any, of the transcript or appendix where the
22 matter relied on is to be found.
23
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1 I understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the Nevada
3 Rules of Appellate Procedure.
4

5 DATED this 1st day of December, 2014.

6
7 /s/Jeffery A. Bendavid

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EXHIBIT 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jan 12 2015 02:20 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

BARBARA GILMORE, Individually and)
on behalf of others similarly situated,)
Appellant,)
vs.)
DESERT CAB, INC.,)
Respondent.)

Sup. Ct. No. 62905

Dist. Ct. No: A-12-668502-C

APPELLANT'S REPLY BRIEF

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A. While this Court need not, in this appeal, address the application of Article 15, Section 16, of Nevada’s Constitution to conduct taking place prior to the June 26, 2014, release of the *Thomas* Opinion, it should do so. 5

B. Desert’s claim that *Thomas* did not, by its language, cover conduct occurring prior to June 26, 2014, and that *Thomas* should not be applied to past conduct, lacks any support. 6

C. Even if it could be proper to limit the application of *Thomas* to conduct occurring after June 26, 2014, Desert proffers no reason for limiting its application in that fashion. 10

CONCLUSION. 13

Certificate of Compliance. 14

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<i>Sierra Club v. San Joaquin Local Agency</i> 21 Cal 4 th 489 (Cal. Sup. Ct. 1999).....	9

**IN REPLY TO RESPONDENT’S JURISDICTIONAL
STATEMENT AND STATEMENT OF ISSUES PRESENTED**

Respondent Desert Cab Inc. (“Desert”) asserts that Appellant Barbara Gilmore (“Gilmore”) has improperly attempted to create a “Second Issue on Appeal” over which this Court does not have jurisdiction. Desert insists this Court cannot consider Gilmore’s request (her alleged “Second Issue”) that it make clear *Thomas v. Nevada Yellow Cab Corporation*, 130 Nev. Adv. Op. 52, 372 P.3d 518 (2014), applies to employer conduct taking place after the effective date of Article 15, Section 16 of the Nevada Constitution and not just after the issuance of the *Thomas* Opinion on June 26, 2014.

Desert cites no support for its assertion the Court lacks the jurisdiction to confirm the rights recognized in *Thomas* apply to all conduct taking place after the effective date of Article 15, Section 16 of the Nevada Constitution. Instead Desert argues that Gilmore cannot properly make such a request because no such request was presented to the District Court. Desert ignores that it was impossible to present any such request to the District Court as *Thomas* was decided *after* this appeal ensued and the District Court had relinquished jurisdiction over this case

This Court is the master of its own decisions. The American system of jurisprudence has historically, on appropriate occasions, involved explicit directives from superior judicial tribunals to lower courts on how to effectuate the rule of law enunciated in appellate opinions. That was done most famously in *Brown v. Board of Education*, 349 U.S. 294, 300-01 (1955) (Directing district courts to retain continuing jurisdiction over cases challenging segregation and to institute appropriate remedies “with all deliberate speed” that comply with *Brown*’s determination that such segregation was unconstitutional.) While this Court need not issue any statement, as part of this appeal, on the temporal scope of

its Opinion in *Thomas*, the argument that it lacks the jurisdiction to do so is specious.

ARGUMENT

I. **DESERT'S CLAIM THAT IN THIS CASE THE DISTRICT COURT RELIED UPON ARGUMENTS NOT CONSIDERED IN *THOMAS V. NEVADA YELLOW CAB* IS SPECIOUS**

Desert insists *Thomas* did not consider this Court's holding in *Mengelkamp v. List* 88 Nev. 542, 544-45, 501 P.2d 1032, 1034 (1972) and the District Court in this case, in reliance upon *Mengelkamp*, based its ruling upon Desert's argument "that no evidence could show that Nevadans who voted to raise the amount of Nevada's minimum wage also intended to abolish the specific categories of individuals already exempted by NRS 608.250(2)." Respondent's answering brief, p. 7-8.

There is nothing in the District Court's decision in this case, which was drafted by Desert's counsel, to distinguish its reasoning from that of the District Court in *Thomas*. Such decision cites the District Court decision in *Thomas* for support and does not cite to *Mengelkamp*. While it does make the finding that the "purpose and effect" of the minimum wage constitutional amendment was to raise the minimum wage for only those persons *not* excluded from Nevada's statutory minimum wage, NRS 608.250, it makes no finding on the "intent" of Nevada's voters.

In any event, *Thomas* did reach the argument now raised by Desert, that there is no evidence of "intent" by the voters of Nevada to apply the constitutionally mandated minimum wage to persons, such as taxi drivers, exempted from the existing minimum wage coverage of NRS 608.250. It expressly rejected any such examination in light of the clear language of the constitutional amendment:

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. It would be impossible, for instance, to identify and query every Nevadan who voted in favor of the provision—and it is not even clear that such a survey would reveal the true intentions of those voters....

To seek the intent of the provision's drafters or to attempt to aggregate the intentions of Nevada's voters into some abstract general purpose underlying the Amendment, contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation. *See generally, District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (interpreting the Second Amendment by seeking the original public understanding of the text, with majority and dissent disagreeing on content of public understanding). "The issue ought to be not what the legislature," or, in this case, the voting public, "meant to say, but what it succeeded in saying." Lon L. Fuller, *Anatomy of the Law* 18 (Greenwood Press 1976). 327 P.3d at 522.

Desert's argument that this case and this appeal vary from the issues considered, and resolved by, this Court in *Thomas* has no basis whatsoever.

II. DESERT'S CLAIM THAT *THOMAS* DID NOT RESOLVE WHETHER NEVADA'S VOTERS INTENDED TO ABOLISH THE "EXCEPTIONS OF NRS 608.250(2)" IS NOT INTELLIGIBLY ARTICULATED AND RAISES AN IRRELEVANCY

Desert's brief, at pages 9, line 13 through page 10, line 22, states:

Unlike this matter, *Thomas* never considered whether the voters intended through the Minimum Wage Amendment to abolish specifically the *exceptions of NRS 608.250(2)*. Instead, *Thomas* only addressed whether Respondent's [sic] adequately demonstrated whether the voters intended only to raise the minimum wage and not "create a new minimum wage scheme."

Appellant's Complaint evidences this reality. Appellant's Complaint asserted two (2) separate claims for relief. Appellant's First Claim for Relief sought all relief permitted her by Nevada's Minimum Wage Amendment, including, but not limited to equitable relief, compensatory damages, and an award for punitive damages. However, Appellant's Second Claim for Relief specifically sought all relief afforded her under *NRS 608.040* because of Respondent's alleged violations of *NRS 608.020* or *608.030*.

Had Nevada's Minimum Wage Amendment and this Court's decision in *Thomas* intended to "create an entirely new minimum wage scheme," then Appellant had no need and more importantly, could not rely on alleged violations of *NRS 608.020* and *NRS 608.030*

to recover against Respondent. Those statutes, along with *NRS 608.250*, would be impliedly repealed by Nevada's Minimum Wage Amendment had Nevada's Minimum Wage Amendment and this Court's decision in *Thomas* truly intended to "create an entirely new minimum wage scheme." Obviously, Appellant does not contend such intent exists since Appellant specifically relied upon other statutes in Chapter 608 to recover against Respondent that apparently remain in effect and enforceable despite Nevada's Minimum Wage Amendment and this Court's decision in *Thomas*. (Italics in original, footnotes omitted).

The foregoing assertions are unclear and to the extent that they intend to address anything, which is presumably whether NRS 608.250(2) has been abolished and the status of the plaintiffs' claims under NRS 608.030 and 608.040, they set forth no coherent argument.

Whether NRS 608.250(2) has been "abolished" is not germane to this appeal nor was it germane to *Thomas*. Neither Gilmore nor the plaintiffs in *Thomas* asserted any claims under NRS 608.250. This Court's Opinion in *Thomas* rested upon the supremacy of the Nevada Constitution and the constitutional amendment's broad language granting minimum wage rights to all employees, except for its specific exclusions which did not include taxi drivers. 327 P.3d at 521-22. While *Thomas* discusses the result as an "implicit repeal" of NRS 608.250(2) by the constitutional amendment, the issue presented in *Thomas*, and this case, was whether the plaintiffs had enforceable rights arising under the constitution, not whether NRS 608.250(2) was "abolished."

Desert's argument in respect to Gilmore's claims under NRS 608.030 and 608.040, as best as can be understood, seems to be that because Gilmore is making *other* claims under NRS Chapter 608 *all* of her claims are dependent upon her status (or lack of status) as a person entitled to the minimum wage under NRS 608.250. Such cryptic and unexplained argument is without merit. These two statutes, NRS 608.030 and 608.040, grant employees certain monetary damages when their employer fails to pay all of the wages due the employee promptly upon

the termination of their employment. Gilmore's claims under those statutes are derivative of her claim that she was entitled to minimum wages under Nevada's Constitution, such wages being unpaid at the time of her termination of employment with Desert. Those claims have no asserted, or actual, relationship to NRS 608.250.

III. DESERT SPECIOUSLY ARGUES THAT NEVADA'S CONSTITUTION CONFERRED NO MINIMUM WAGE RIGHTS UPON TAXI DRIVERS UNTIL JUNE 26, 2014, THE DATE OF THE *THOMAS* DECISION

A. While this Court need not, in this appeal, address the application of Article 15, Section 16, of Nevada's Constitution to conduct taking place prior to the June 26, 2014, release of the *Thomas* Opinion, it should do so.

Desert fallaciously asserts it would be improper for the Court to address in this appeal whether Article 15, Section 16, of Nevada's Constitution extends rights to taxi driver employees for conduct occurring prior to June 26, 2014, the date of the *Thomas* Opinion. While Gilmore concedes this Court need not address, in this appeal, that issue, Desert proffers no compelling reason why this Court should, in the exercise of discretion, refuse to do so. Desert proffers no such compelling reason because none exists.

Desert, and the rest of the Nevada taxi industry, as a litigation tactic, seek to defer a ruling on when taxi drivers' minimum wage rights became actionable under Nevada's Constitution for as long as possible. In their view, the longer this Court takes to affirm that the rights granted to taxi drivers under Article 15, Section 16, of Nevada's Constitution became effective on November 28, 2006, the better. Until such time as this Court so rules, the taxi industry can implore the District Court Judges to find no such rights existed until the *Thomas* Opinion's issuance on June 26, 2014. If it is successful, it can then force counsel for the taxi drivers to appeal, again, to this Court. If it is unsuccessful, it can also seek to

appeal such issue to this Court. By doing so it will delay its day of reckoning and avoid having to pay any unpaid minimum wages owed to any taxi drivers in the interim.

Resolving the taxi industry's completely specious claim that *Thomas* has no effect on conduct occurring prior to June 26, 2014 will conserve judicial resources. It will put an end to those claims being presented to the District Court and forestall the need for any future appeal to this Court on that issue. Desert's assertion that there is no basis to believe any judicial resources will be conserved by making such a ruling is belied by the conduct of the defendant-respondent in *Thomas*. Such defendant, upon remittitur from this Court, has renewed its motion to dismiss in the District Court in *Thomas* solely on the basis that this Court's Opinion in *Thomas* has no application to conduct occurring prior to its issuance on June 26, 2014. *See*, Eighth Judicial District Court, *Thomas v. Nevada Yellow Cab*, Case # A-12-661726-C, motion to dismiss filed on January 6, 2015. Until this issue is addressed by this Court there is every reason to believe Desert, upon remittitur, and every other Nevada taxi driver employer subject to a similar lawsuit, will seek dismissal from the District Court on the same basis.

B. Desert's claim that *Thomas* did not, by its language, cover conduct occurring prior to June 26, 2014, and that *Thomas* should not be applied to past conduct, lacks any support.

Desert asserts that *Thomas* has no application to conduct taking place prior to its issuance on June 26, 2014 because of its use of the present tense and active voice verbs "supercedes" and "supplants" and not the past tense and passive voice verb forms of "superceded" and "supplanted." It offers no explanation of why the tense and active voice verb form of these two words, in an Opinion that makes no mention of limiting its application to future conduct, are significant. Nor does it

explain why the interchangeable use in *Thomas* of the past tense and passive voice verb form should be ignored in weighing Desert’s argument on this point, *e.g.*, *Thomas* also uses the “past” tense in the exact fashion Desert asserts would indicate it has a current, and not just future conduct, application (“...and the statute [NRS 608.250(2)(e)] is impliedly *repealed* by the constitutional amendment.”) 327 P.3d at 521 (emphasis provided). Desert simply insists, without citation to any supportive authority whatsoever,¹ that such present tense and active voice verb forms refer to a “supersession” and “supplanting” taking place on the date of the publication of the *Thomas* Opinion and not on November 28, 2006, the effective date of Article 15, Section 16, of Nevada’s Constitution.

Desert’s nonsensical attribution of significance to the non-exclusive usage of present tense verbs in *Thomas*, and the Opinion’s use, in part, of an “active” and not “passive” verb voice style, is amply demonstrated by this Court’s other decisions. The use of the present and past tense of “supercedes” and “superceded” appears in *State v. Connery*, 661 P.2d 1298, 1301 (Nev. Sup. Ct. 1983) (“...we hold that NRAP 4(b) supersedes NRS 177.066...”) with this Court using, as in *Thomas*, the present tense and the West reporter in the headnotes and summary using the past tense. *Connery*, despite this Court’s use of the present tense “supercedes,” did not make a “future conduct only” ruling but applied its supersession finding to the procedural rule presented and to the controversy before it, and by doing so denied defendant the relief it sought. *See, also, Jacobson v.*

¹ It cites to *United States v. Jackson*, 480 F.3d 1014, 1019 (9th Cir. 2007) for the proposition that the “use of verb tense is significant” and “words used in the present tense include the future as well as the present.” *Jackson* concerned the use of present tense language in statutes. It does not suggest such tense determines, or is relevant to determining, if a judicial decision has only future impact.

Estate of Clayton, 119 P.3d 132, 134 (Nev. Sup. Ct. 2005) using present and past tenses, active and passive verb styles, interchangeably and applying its supersession finding to the controversy before it and not just to future cases (Stating in first paragraph “We conclude that *Bodine* is **superseded** by the Legislature's 1971 amendment of NRS 140.040...” and in last paragraph under the “Conclusion” heading “The current language of NRS 140.040(3) **supersedes** this court's decision in *Bodine*...). *See, also, Goldman v. Clark*, 1 Nev. 607, 611 (1866) (Holding that if Nevada’s Constitution, “by its own terms exempts a homestead from forced sale” it would “**supercede**” contrary provisions of prior statute “[b]ut if the Constitution did not take effect in regard to homesteads, until the legislature passed the required law, then the old act was not **superseded** until the new one went into effect.”)

Setting aside the irrelevancy of the active (and at times passive) voice and present (and at times past) verb tense used in *Thomas*, *Desert* presents not one iota of support for its contention that applying *Thomas* only to future conduct would be proper. It does not refute, as explained in Gilmore’s Opening Brief, that such “future conduct only” decisions are an extraordinary Twentieth Century jurisprudential development unknown under the common law and limited almost without exception to situations where *judicially created law* is overturned by a subsequent judicial decision. *See, Linkletter v. Walker*, 381 U.S. 618, 622 (1965). Nor does *Desert* dispute that a “future conduct only” ruling has never been made when this Court determines that a new voter or legislatively enacted law displaces a prior law or judicial precedent. *See, Jacobson* and every other Opinion this Court has issued where a prior judicial precedent or legislative or constitutional enactment has been found to be superseded by a subsequently enacted statute or

constitutional amendment.² The idea this Court in *Thomas*, in a completely cryptic and not expressly stated fashion deviated from this rule, is, kindly stated, without any sound basis.

Desert also cites no precedent from Nevada or any other jurisdiction supporting its assertion *Thomas* is properly applied only to conduct occurring after its publication. It fails to do so because no such precedents exist. *See, Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 978 (Cal. Sup. Ct. 1989), citing *Linkletter* (“The general rule that judicial decisions are given retroactive effect is basic in our legal tradition.”) While, as discussed in *Sierra Club v. San Joaquin Local Agency* 21 Cal 4th 489, 509-10 (Cal. Sup. Ct. 1999), citing and quoting *Newman*, there are “narrow exceptions” to the rule, they require the demonstration of “considerations of fairness and public policy [that] are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule.” Such an examination looks to whether application of a Court’s decision to events occurring prior to its publication creates “an unusual hardship” because a substantial “detrimental reliance” or “vested right” was created by or rested upon an overturned rule of law. *Id.*

Desert presents no support for its assertion that the sort of exceptional circumstances discussed in *Sierra Club* and *Newman* are present. Nor would any prior precedent support holding them to be so present and that *Thomas* should be given the “future conduct only” application requested by Desert. The decision in *Isbell v. County of Sonoma*, 21 Cal.3d 61, 74-75 (Cal. Sup. Ct. 1978) is illustrative. *Isbell* found that the Fourteenth Amendment’s due process protections

² Diligent research by Gilmore’s counsel has likewise failed to find a reported case from any jurisdiction where a “future conduct only” ruling was issued in such circumstances.

rendered California’s statutory confession of judgment procedures void. *Id.* Given the massive number of judgments entered under those procedures, most or almost all of which presumably did involve legitimate debts that were owed, *Isbell* declined to vacate *en mass* all prior judgments so entered despite their now discovered constitutional infirmity. *Id.* Nonetheless, it granted such judgment debtors the benefit of the rule of law it announced by holding they could seek hearings to void those judgments at which the creditor would have the burden of showing compliance with its holding. *Id.* The sort of “future conduct only” ruling Desert urges this Court to apply to *Thomas* goes far beyond the very narrow, and exceptionally justified, temporal limitations applied in *Isbell* and similar cases.

C. Even if it could be proper to limit the application of *Thomas* to conduct occurring after June 26, 2014, Desert proffers no reason for limiting its application in that fashion.

Desert argues that this Court’s decision in *Hansen v. Harrahs*, 675 P.2d 394, 397 (1984) provides no guidance in this case because it dealt with the recognition of new common law rights, not voter or legislatively enacted laws. As already discussed, Desert’s assertion *Thomas*, or other decisions dealing with the supersession of voter or legislatively enacted laws, can properly be given “future conduct only” application is completely specious. But even if this Court were to allow the “future conduct only” application of *Thomas* or similar supersession decisions, *Hansen* is highly relevant because it illustrates the very limited use of “future conduct only” decisions by this Court.

As Desert helpfully points out, *Hansen*’s “future conduct only” ruling was limited to punitive damages claims for the newly recognized wrongful discharge tort it created. It limited that branch of its decision because the purpose of

punitive damages is to punish and deter reprehensible conduct that violates the law. 675 P.2d at 397. Such purpose would not be advanced by allowing punitive damages in *Hansen* since the employer defendants had no reason to believe their conduct was illegal. *Id.* It did not impose any “future conduct only” limitation on the *Hansen* plaintiffs’ ability to recovery compensatory damages on such newly recognized tort claim. *Id.*

Unlike the defendants in *Hansen*, Desert had every reason to believe its conduct was in violation of the plain language of Article 15, Section 16, of Nevada’s Constitution, as found ultimately by *Thomas*. Such a conclusion by Desert was absolutely required by any isolated reading of such constitutional provision and the Nevada Attorney General publicly opined that such conclusion was correct.³ That Desert choose to believe its conduct was lawful, under a coordinated reading of Article 15, Section 16, of Nevada’s Constitution and NRS 608.250, is irrelevant. Nor does the fact one or more trial court judges agreed with Desert’s argument provide a basis to excuse Desert from liability for the minimum wage compensation it owes its taxi drivers that pre-dates *Thomas*. Desert does not cite a single precedent that would support excusing it from such liability and granting it such an excuse would be contrary to the approach taken by this Court in *Hansen*.⁴

³ Nevada Attorney General’s opinion, 05-04 Op. Atty Gen. (2005), issued before November 28, 2006, concluded that all Nevada taxi industry employers would be subject to Article 15, Section 16.

⁴ Gilmore does not concede that, as in *Hansen*, Desert should be excused from liability for punitive damages. She does acknowledge that under *Hansen* whether Desert should be exposed to any punitive damages liability involves different considerations than Desert’s liability for the unpaid minimum wages owed to its taxi drivers.

Desert supports its claim that it should be excused from any minimum wage payment liability prior to June 26, 2014 by making inaccurate and unsupported assertions about how Nevada's Labor Commissioner⁵ and "every branch of Nevada's government"⁶ recognized that taxi drivers were subject to no state minimum wage standards prior to *Thomas*. In the same baseless fashion Desert insists "it was impossible" for it, prior to *Thomas*, to know its actions were contrary to law and that it would be "unfairly punished" if it were forced to pay the minimum wages owed to its taxi drivers for their work prior to June 26, 2014.

Desert's claim imposing a pre-June 26, 2014 liability upon it for its drivers' unpaid minimum wages would "unfair" and a "punishment" is sheer hubris. It is Desert that is attempting to seek an "unfair" and unjust enrichment at the expense of its taxi drivers by avoiding a very modest liability for the very small minimum hourly wage it is required to pay those hardworking employees. Nor can, or does, Desert present itself to the Court as anything other than a litigant with unclean hands who knew its actions could violate Nevada's Constitution and chose to accept that risk. Desert and Nevada's other taxi cab driver employers, could have, but did not, seek a declaratory ruling years ago on their obligations under Article

⁵ Desert's assertions about the position taken by the Nevada Labor Commissioner are not documented by anything in the record. Desert cites to nothing in the record, nor anything else, supporting its assertion that the Nevada Labor Commissioner took a position supportive of Desert's incorrect view of the law. That the Nevada Labor Commissioner, in the exercise of its discretion, declined to prosecute Desert or other Nevada taxi cab driver employers for violations of Article 15, Section 16, of Nevada's Constitution is irrelevant.

⁶ This assertion completely ignores the published opinion of then Attorney General Brian Sandoval, *id.*

15, Section 16, of Nevada's Constitution.⁷ It chose not to do so and now seeks to avoid paying those minimum wages it should have paid, but refused to pay, in the first instance. The only victims of unfair treatment in this case are Desert's taxi drivers, who for years have been denied the most modest minimum hourly wage payments from Desert that Nevada's Constitution commands.

CONCLUSION

Wherefore, for all the foregoing reasons, the Order and Judgment appealed from should be reversed in its entirety and this Court should also expressly hold that its Opinion in *Thomas* is not limited to conduct taking place after June 26, 2014.

Dated: January 7, 2015

Respectfully submitted,

/s/ Leon Greenberg
Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Appellant

⁷ The class action procedure invoked by Gillmore as a plaintiff in this case under NRCP Rule 23 could have been equally as easily invoked by Desert as a plaintiff to seek a binding decision against a certified class of its taxi driver employees as defendants.

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

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point Times New Roman typeface in wordperfect.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 4036 words.

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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated January 8, 2015

/s/ Leon Greenberg
Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
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(702) 383-6085
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on the January 8, 2015, she filed the forgoing Appellant's Reply Brief through the electronic filing system of the Nevada Supreme Court. Service was accomplished by the Clerk as follows:

TO:

Moran Law Firm
630 South 4th Street
Las Vegas, NV 89101

Attention: Jeffrey Bendavid

/s/ Sydney Saucier

Sydney Saucier

EXHIBIT 4

The Supreme Court
of Nevada

Appellate Case Management System

C-Track, the browser based CMS for Appellate Courts

Cases

Case Search

Participant Search

Disclaimer: The information and documents available here should not be relied upon as an official record of action.

Only filed documents can be viewed. Some documents received in a case may not be available for viewing. Some documents originating from a lower court, including records and appendices, may not be available for viewing.

For official records, please contact the Clerk of the Supreme Court of Nevada at (775) 684-1800.

Case Information: 62905

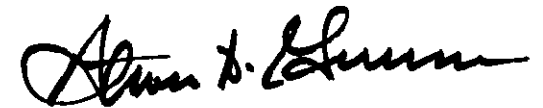
Short Caption:	GILMORE VS. DESERT CAB	Classification:	Civil Appeal - General - Other
Lower Court Case(s):	Clark Co. - Eighth Judicial District - A668502	Case Status:	Briefing Completed/To Screening
Disqualifications:		Panel Assigned:	Panel
Replacement:			
To SP/Judge:		SP Status:	Exempt
Oral Argument:		Oral Argument Location:	
Submission Date:		How Submitted:	

+ Party Information

Docket Entries

Date	Type	Description	Pending?	Document
04/01/2013	Filing Fee	Filing fee due for Appeal.		
04/01/2013	Notice of Appeal Documents	Filed Notice of Appeal. Appeal docketed in the Supreme Court this day.		13-09523
04/01/2013	Notice/Outgoing	Issued Notice to Pay Supreme Court Filing Fee. No action will be taken on this matter until filing fee is paid. Due Date: 10 days.		13-09526
04/01/2013	Notice/Outgoing	Issued Notice to File Case Appeal Statement/Civil. Due date: 10 days.		13-09529
04/01/2013	Filing Fee	E-Payment \$250.00 from Leon M. Greenberg		
04/01/2013	Notice/Outgoing	Issued Notice of Referral to Settlement Program. This appeal may be assigned to the settlement program. Timelines for requesting transcripts and filing briefs are stayed. Docketing Statement due: 20 days.		13-09571
04/02/2013	Settlement Notice	Issued Notice: Exemption from Settlement Program		13-09568
04/03/2013	Transcript Request	Filed Certificate of No Transcript Request.		13-09819
04/17/2013	Docketing Statement	Filed Docketing Statement.		13-11302
05/16/2013	Motion	Filed Appellant's Motion to Stay Appeal Briefing.		13-14484
		Filed Order Granting Motion to Stay		

06/26/2013	Order/Procedural	Briefing Schedule. Briefing in this appeal is stayed pending further order of this court.	13-19198
07/02/2014	Order/Procedural	Filed Order Reinstating Briefing and Directing Appellant to File Case Appeal Statement. Opening Brief due: 30 days. Case Appeal Statement due: 5 days.	14-21624
07/03/2014	Notice of Appeal Documents	Filed Case Appeal Statement.	14-21849
07/25/2014	Motion	Filed Appellant's and Respondent's Joint Motion to Reinstate Stay of Appeal Briefing	14-24304
08/04/2014	Motion	Filed Motion of Appellant for an Extension of Time to File their Opening Brief Pursuant to MRAP Rule 31(D)(3)	14-25302
08/04/2014	Notice/Outgoing	Issued Notice Motion/Stipulation Approved. Opening brief due: September 2, 2014.	14-25319
08/06/2014	Order/Procedural	Filed Order Granting Motion to Stay Briefing Schedule.	14-26029
10/03/2014	Order/Procedural	Filed Order Reinstating Briefing. Opening Brief due: 30 days.	14-32916
11/03/2014	Brief	Filed Appellant's Opening Brief	14-36217
11/03/2014	Appendix	Filed Appellant's Appendix.	14-36218
12/01/2014	Brief	Filed Respondent, Desert Cab, Inc.'s Answering Brief.	14-39164
12/01/2014	Appendix	Filed Respondent, Desert Cab, Inc.'s Appendix.	14-39165
12/24/2014	Motion	Filed Stipulation for an Extension of Time to File the Reply Brief	14-42049
12/24/2014	Notice/Outgoing	Issued Notice - Stipulation Approved. Reply Brief due: January 30, 2015.	14-42051
01/12/2015	Brief	Filed Appellant's Reply Brief.	15-01215
01/12/2015	Case Status Update	Briefing Completed/To Screening.	



CLERK OF THE COURT

1 **ORDER**
2 LEON GREENBERG, ESQ., SBN 8094
3 DANA SNIEGOCKI, ESQ., SBN 11715
4 Leon Greenberg Professional Corporation
5 2965 South Jones Blvd- Suite E4
6 Las Vegas, Nevada 89146
7 (702) 383-6085
8 (702) 385-1827(fax)
9 leongreenberg@overtimelaw.com
10 dana@overtimelaw.com
11 Attorneys for Plaintiffs

9 DISTRICT COURT

10 CLARK COUNTY, NEVADA

11 CHRISTOPHER THOMAS, and
12 CHRISTOPHER CRAIG, Individually and on
13 behalf of others similarly situated,

14 Plaintiffs,

15 vs.

16 NEVADA YELLOW CAB CORPORATION,
17 NEVADA CHECKER CAB CORPORATION,
18 and NEVADA STAR CAB CORPORATION,

19 Defendants.

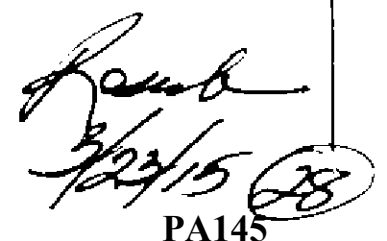
CASE NO. A-12-661726

DEPT. NO. XXVIII

Hearing Date: February 10, 2015
Hearing Time: 9:00 a.m.

20 **ORDER DENYING DEFENDANTS' MOTION TO DISMISS**

21
22 Defendants filed their Motion to Dismiss Pursuant to NRCP 12(b)(5) on January 6, 2015.
23 Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss was filed on January 23, 2015. On
24 January 27, 2015, Plaintiffs filed a "Supplement to Plaintiffs' Response In Opposition To Defendants'
25 Motion To Dismiss Consisting of Newly Issued Authority." Defendants thereafter filed their Reply to
26 Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss on February 6, 2015. Such Reply
27 also sought a stay of all proceedings in this case until the Nevada Supreme Court rendered a decision in
28



PA145

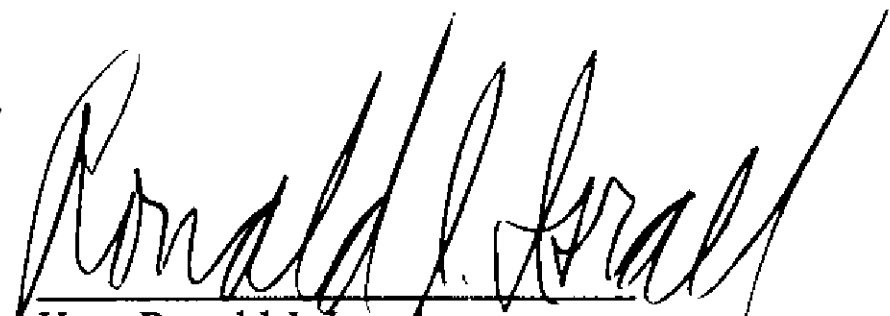
1 the case of Gilmore v. Desert Cab, Inc., Supreme Court No. 62905, currently pending before the Nevada
2 Supreme Court. This matter, having come before the Court for hearing on February 10, 2015, with
3 appearances by Tamer B. Botros, Esq., on behalf of all Defendants, and Leon Greenberg, Esq., on behalf
4 of all Plaintiffs, and following the arguments of such counsel, and after due consideration of the parties'
5 respective briefs, and all pleadings and papers on file herein, and good cause appearing, therefore

7 **IT IS HEREBY ORDERED:**

8 Defendants' Motion to Dismiss Pursuant to NRCP 12(b)(5) is **DENIED** in its entirety. The legal
9 argument put forth in Defendants' Motion to Dismiss that the Nevada Supreme Court's Opinion in the
10 appeal in this case was not intended to have retroactive application to conduct pre-dating that Opinion is
11 rejected. This Court does not view the actions of the Nevada Supreme Court in this case as supporting
12 such argument. Defendants to file an Answer to the First Amended Complaint within 10 days of notice
13 of entry of this order being electronically filed. Defendants' request to stay all proceedings in this case
14 until the Nevada Supreme Court issues a decision in Gilmore v. Desert Cab, Inc., Supreme Court No.
15 62905 is also **DENIED**.

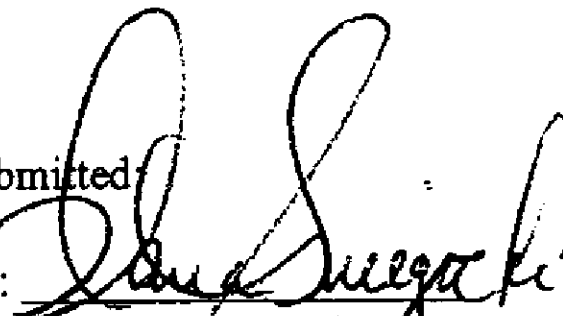
18 **IT IS SO ORDERED.**

19 Dated this 24 day of ^{March} ~~February~~, 2015.

20 
21 Hon. Ronald J. Israel
22 District Court Judge

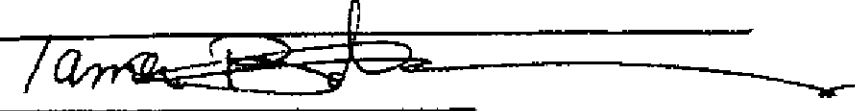
23 Submitted

24 By:

25 
26 Leon Greenberg, Esq.
27 Dana Sniegocki, Esq.
28 LEON GREENBERG PROF. CORP.
2965 s. Jones Blvd., Ste. E-4
Las Vegas, NV 89146
Attorney for Plaintiffs

Approved as to form and content:

By:

24 
25 Marc C. Gordon, Esq.
26 Tamer B. Botros, Esq.
27 YELLOW CHECKER STAR
28 TRANSPORTATION CO. LEGAL DEPT.
5225 W. Post Road
Las Vegas, Nevada 89118
Attorneys for Defendants

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Oct 14 2014 03:39 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

CHRISTOPHER THOMAS and
CHRISTOPHER CRAIG,
Individually and on behalf of others
similarly situated,

Appellants,

vs.

NEVADA YELLOW CAB
CORPORATION, NEVADA
CHECKER CAB CORPORATION,
NEVADA STAR CAB
CORPORATION,

Respondents,

Sup. Ct. No. 61681

Dist. Ct No.:A-12-661726-C

Dept. No. XXVIII

APPELLANTS' MOTION TO CORRECT
OPINION OF JUNE 26, 2014 AND STAY
REMITTITUR

Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Appellants

1 Appellants, Christopher Thomas and Christopher Craig, hereby
2 file this motion seeking to correct this Court’s Opinion of June 26, 2014, by
3 removing any present tense language that can be interpreted as directing such
4 Opinion is only to be applied prospectively.

5
6 **NATURE OF RELIEF SOUGHT**

7
8 The holding of the Court’s Opinion of June 26, 2014 is not in
9 dispute. What is sought by this motion is a correction to the present tense
10 language of two sentences, and three words, of the Opinion which, if
11 uncorrected, will be the subject of further litigation, and a further appeal to this
12 Court, over whether such Opinion’s application is only prospective. These two
13 sentences, with the requested corrected language in brackets and removed
14 words struck through, are set forth below:

15
16 We hold that the district court erred because the text of the
17 Minimum Wage Amendment, by clearly setting out some
18 exceptions to the minimum wage law and not others, ~~supplants~~
19 [supplanted] the exceptions listed in NRS 608.250(2). Opinion,
20 page 2; 327 P.3d at 520.

21
22 The text of the Minimum Wage Amendment, by enumerating
23 specific exceptions that do not include taxicab drivers, ~~supersedes~~
24 [superceded] and ~~supplants~~ [supplanted] the taxicab driver
25 exception set out in NRS 608.250(2). Opinion, page 9; 327 P.3d
26 at 522.

1 **WHY THE RELIEF REQUESTED SHOULD BE GRANTED**

2 The relief requested is sought to conserve judicial resources and
3 promptly secure for the appellants, and many thousands of other employees in
4 the Nevada taxicab industry, the relief afforded to them by the Court’s Opinion
5 of June 26, 2014. Appellants’ counsel is aware of six other pending litigations
6 involving taxi driver plaintiffs seeking minimum hourly wages, including one
7 currently on appeal to this Court, *Gilmore v. Desert Cab, Inc.* No. 62905. *See,*
8 Ex. “A” ¶ 1. This case, the *Gilmore* appeal, and all of those other cases,
9 involve the identical issue resolved by this appeal, the entitlement of taxi
10 drivers to the minimum hourly wage specified by Nevada’s Constitution.

11 This litigation has been most vigorously contested, as evidenced by
12 respondents’ recently denied, and wholly specious, Petition for Rehearing. *See,*
13 Order of September 24, 2014. Despite the speciousness of any claim that the
14 Court’s Opinion of June 26, 2014 only has prospective application, it seems
15 virtually certain that respondents in this case, and one or more defendants in the
16 other taxi driver minimum wage cases, will insist on litigating that issue. They
17 will do so based upon the foregoing enumerated language. If that language is
18 not modified as requested they will insist it establishes that, under the Court’s
19 June 26, 2014 Opinion, the Minimum Wage Amendment has not “superceded”
20 and “supplanted” the exceptions set out in NRS 608.250(2) as of the
21 Amendment’s effective date but only “supercedes” and “supplants” them as of
22 the date of such Opinion. *See,* Ex. “A” ¶ 2.

23 **THE COURT SHOULD STAY REMITTITUR**
24 **TO CORRECT ITS OPINION**

25 Pursuant to NRAP Rule 41(a)(1) this Court is to issue remittitur of this
26 case on October 20, 2014, unless it enlarges the time for it to do so by
27 appropriate Order. It is submitted that the Court should suitably enlarge the
28 time for its remittitur to issue so it can consider and rule upon this motion

1 before it relinquishes jurisdiction over this appeal.

2

3 Dated this 14th day of October, 2014.

4

5

6

/s/ Leon Greenberg
Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Appellant

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EXHIBIT "A"

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IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER THOMAS and
CHRISTOPHER CRAIG,
Individually and on behalf of others
similarly situated,

Appellants,

vs.

NEVADA YELLOW CAB
CORPORATION, NEVADA
CHECKER CAB CORPORATION,
NEVADA STAR CAB
CORPORATION,

Respondents,

) Sup. Ct. No. 61681
) Dist. Ct No.:A-12-661726-C
) Dept. No. XXVIII

) Declaration

Leon Greenberg, an attorney duly licensed to practice law in the State of Nevada, hereby affirms, under penalty of perjury, that:

1. I am counsel for the appellants in this case. I am also counsel for the plaintiffs in the following six other cases that also involve claims for unpaid minimum hourly wages allegedly owed to taxi cab driver employees pursuant to the Nevada Constitution: *Murray v. A Cab Taxi Service LLC*, Eighth Judicial District Court, Case No. A-12-669926-C; *Herring v. Boulder Cab, Inc.*, Eighth Judicial District Court, Case No. A-13-691551-C; *Tesema v. Lucky Cab Co.*, Eighth Judicial District Court, Case No. A-12-660700-C; *Golden v. Sun Cab, Inc.*, Eighth Judicial District Court, Case No. A-13-678109-C; *Perera v. Western Cab Company*, Eighth Judicial District Court, Case No. A-14-707425-C and *Gilmore v. Desert Cab, Inc.*, appeal pending, Nevada Supreme Court No. 62905. In all of these cases, except *Perera* which has yet to be served,

1 defendants have asserted that taxi cab drivers are not subject to the minimum
2 wage protections of Nevada’s Constitution, an issue resolved by this appeal.

3 2. I have engaged in discussions about the Court’s Opinion of June 26,
4 2014 with several of the counsel representing defendants in the cases
5 enumerated in paragraph 1. Such counsel have advised me that defendants in
6 those cases believe that the Court’s Opinion of June 26, 2014 has only
7 prospective application. They claim to base that belief upon the Opinion’s use
8 of the present tense “supercede” and “supplant,” and not the past tense of those
9 words, in its discussion of how the Nevada Constitution has overridden the
10 exceptions set out in NRS 608.250(2). Based upon those conversations it is my
11 belief that defendants in some, or all, of such cases, and in this case as well,
12 intend to argue that the Court’s Opinion of June 26, 2014 found the Nevada
13 Constitution “supercedes” and “supplants” the exceptions set out in NRS
14 608.250(2) only as of the date of such Opinion and not as of its enactment date.

15
16
17 Dated this 14th day of October, 2014.

18
19
20 /s/ Leon Greenberg
21 Leon Greenberg, Esq. (Bar # 8094)
22 A Professional Corporation
23 2965 S. Jones Blvd., Suite E-3
24 Las Vegas, Nevada 89146
25 (702) 383-6085
26 Attorney for Appellant
27
28

1 **ARGUMENT**

2 **A. Appellants’ “Motion to Correct” Is Time Barred Under NRAP**
3 **40(a)(1).**

4
5 NRAP 40(a)(1) states in pertinent part:

6 Unless the time is shortened or enlarged by order, a petition for
7 rehearing may be filed **within 18 days** after the filing of the court’s
8 decision under Rule 36.

9
10 First, Appellants’ “Motion to Correct,” is pre-mature and inappropriate
11 procedurally, since it is essentially requesting that this Honorable Court step into
12 the shoes of the District Court, and determine trial court issues prior to this matter
13 being remanded – issues that have neither been briefed, argued or ruled upon by
14 the District Court Judge as part of the continuing litigation following remand.

15
16 Second, Appellants so-called “Motion to Correct,” an unknown procedure
17 under NRAP, is time barred. This Motion to Correct should in effect be construed
18 as a Petition for Re-Hearing, since what Appellants are seeking would significantly
19 alter the Thomas decision and thus requires a rehearing. The Thomas decision was
20 rendered on June 26, 2014. Pursuant to NRAP 40(a)(1), Appellants had until July
21 14, 2014 to file their “Motion to Correct.” Instead, Appellants filed their “Motion
22 to Correct,” on October 14, 2014 and thus are time barred. Therefore, Respondents
23 respectfully request that this Honorable Court deny Appellants’ Motion to Correct
24 Opinion of June 26, 2014 and Stay Remittitur.
25
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1 **B. Appellants Are Seeking to Change This Honorable Court’s Opinion**
2 **in Thomas.**

3
4 On June 26, 2014, this Honorable Court decided the Thomas case. The
5 Court recognized in its decision, that at the time, there were two (2) conflicting
6 laws regarding the same subject matter dealing with occupational exemptions,
7 namely NRS 608.250(2) and the 2006 Constitutional Minimum Wage Amendment.
8 Following passage of the Nevada Minimum Wage Amendment in 2006, the
9 statutory occupational exemption for taxi and limo drivers remained in NRS
10 608.250(2). There was no express or implied repeal at that time and in the years
11 following. In addition, the Nevada Labor Commissioner acted in accord with NRS
12 608.250(2) until June 26, 2014, by recognizing the taxi driver occupational
13 exemption in NRS 608.250(2). Thus, until June 26, 2014, NRS 608.250(2) was the
14 law that employers were following in Nevada, and were reasonable in doing so.
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19 The Court then decided in *Thomas*, that from June 26, 2014 it would make
20 clear to employers and employees in the State of Nevada what the current law on
21 Minimum Wage occupational exemptions would be moving forward. The decision
22 speaks for itself. Appellants now seek at this very late date to have this Court
23 change its opinion, in order to enable Appellants and others to pursue minimum
24 wage claims retroactively.
25
26
27
28

1 Thomas is a landmark decision in Nevada pertaining to minimum wage
2 occupational exemptions. The decision as released and published several months
3 ago, June 26, 2014, must stand with no corrections or changes, allowing this matter
4 to be remanded to District Court for continuing proceedings (please recall that this
5 case was dismissed at its inception pursuant to Respondents successful Motion to
6 Dismiss - there still remains the stages of pleadings, class action certification,
7 discovery and trial to take place in the trial court upon remand). Therefore,
8 Respondents respectfully request the Court deny Appellants' Motion to Correct
9 Opinion of June 26, 2014 and Stay Remittitur.
10
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12

13 **C. The Thomas Decision Was Meant to Only Apply Prospectively, Not**
14 **Retroactively.**
15

16 There is nothing in the Thomas decision, either directly or indirectly, express
17 or implied, that supports the proposition that a taxicab driver, or any other
18 occupational category formerly exempt under NRS 608.250(2), can now go back
19 years in time and pursue minimum wage claims against individual
20 employers. Laws and court decisions are presumed to only operate prospectively,
21 unless an intent to apply retroactively is made clear. Landgraf v. USI Film Prods.,
22 511 U.S. 244, 273 (1994); PEBP, 124 Nev. at 154, 179 P.3d at 553; Cnty. of Clark
23 v. Roosevelt Title Ins. Co., 80 Nev. 530, 535, 396 P.2d 844, 846 (1964). (Cited in
24 Sandpointe Apartments, LLC v. Eighth Judicial District Court, 129 Nev. Adv. Op.
25
26
27
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1 87 Nov. 14, 2013); McKellar v. McKellar, 110 Nev. 200, 871 P.2d 296, 298 (1994)
2 ("[t]here is a general presumption in favor of prospective application of statutes
3 unless the legislature clearly manifests a contrary intent or unless the intent of the
4 legislature cannot otherwise be satisfied"). This presumption against retroactivity
5 is typically explained by reference to fairness. *Landgraf*, 511 U.S. at 270.
6

7
8 In this case, the implications of a retroactive legal effect are profound,
9 considering the lengthy list of occupational exemptions under NRS 608.250(2) that
10 were completely wiped away by the Thomas decision. If this Honorable Court
11 were to grant Appellants' Motion, it would mean that other previously exempt
12 occupations such as casual babysitters, domestic service employees, outside
13 salespersons, agricultural employees, persons with severe disabilities, and limo
14 drivers can now go back possibly years in time and file minimum wage claims in
15 District Court.
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19 The Thomas decision provides compelling affirmative support that it was not
20 intended to allow Appellants and other previously exempt occupations under NRS
21 608.250(2) to be able to go back years in time pursuing minimum wage claims.
22 This Court ruled, "The text of the Minimum Wage Amendment, by enumerating
23 specific exceptions that do not include taxicab drivers, **supersedes and supplants**
24 the taxicab driver exception set out in NRS 608.250(2)." (Page 9 of Thomas
25 decision, emphasis added). From the use of the present tense, the *Thomas*
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1 decision never intended for Appellants to go back in time; otherwise, the majority
2 of the Supreme Court would have clearly stated “**superseded and supplanted,**”
3 the past tense, which would have entirely different implications.
4

5 NRS 608.250(2) was the law that employers were following until the
6 Thomas decision issued on June 26, 2014. Following passage of the Nevada
7 Minimum Wage Amendment in 2006, the statutory occupational exemptions for
8 taxi and limo drivers (and others) remained on the books and effective pursuant to
9 NRS 608.250(2). There was no express or implied repeal at that time or in the
10 years following. In 2009, federal District Judge Robert Clive Jones was the first
11 jurist in Nevada to weigh in on the question of “implied repeal,” of NRS
12 608.250(2), interpreting Nevada law in the Lucas case. His decision against
13 “implied repeal,” although not binding on the Nevada Supreme Court, was
14 nonetheless the only statement of competent judicial authority on the Nevada law
15 question, and remained so until Thomas. All during those years from 2006 until
16 June 26, 2014, employers and employees followed the law as interpreted by Judge
17 Jones, and were reasonable in doing so since the Supreme Court had not spoken
18 otherwise. Moreover, the Nevada Labor Commissioner agreed with that state of
19 affairs, and continued to recognize the occupational exemptions of NRS
20 608.250(2) until *Thomas*. The Supreme Court recognized this fact in *Thomas*
21 when it stated, “The Amendment’s broad definition of employee and very specific
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1 exemptions necessarily and directly conflict with the legislative exception for
2 taxicab drivers established by NRS 608.250(2)(e). Therefore, the two are
3 “irreconcilably repugnant,”... such that “both cannot stand,... and the statute **is**
4 **impliedly repealed** by the constitutional amendment.” (Page 6 of *Thomas*
5 decision; emphasis supplied). The majority did not state “the statute **was** impliedly
6 repealed,” in 2006 by the Nevada Minimum Wage Amendment. Thus, this Court
7 is recognizing the legal quandary due to two (2) conflicting laws in force and in
8 effect on the same subject matter since 2006. That quandary moved the majority
9 in *Thomas* to issue a conclusive decision that would resolve the conflict going
10 forward. Nothing in the language of *Thomas* indicates that it meant to grant
11 Appellants a right to pursue minimum wage claims retroactively.

12 In Stokes v. Aetna Casualty and Surety Company, 232 So. 2d 328
13 (La.App.1970), (cited with approval in Klosterman v. Cummings, 476 P.2d 14, 86
14 Nev. 684 (Nev., 1970), that court said: ‘We conclude, therefore, that the question
15 of retroactive or prospective application of civil law changes must be determined
16 in the light of (1) extent of reliance on previous legislation or judicial decision, (2)
17 the reasonableness of such reliance, (3) the degree of hardship resulting from a
18 retroactive application of the change, (4) the public interest in the stability of the
19 social institutions involved, if any, and (5) the purpose and intent of both the new
20 and old rule.’

1 In this case, prior to June 26, 2014, there was no Nevada Supreme Court
2 decision on this matter and Respondents, including other employers in Nevada,
3 were reasonably and legitimately relying on NRS 608.250(2). That reliance was
4 reasonable, since NRS 608.250(2) remained the law until the *Thomas* decision.
5

6 The degree of hardship resulting from a retroactive application will be enormous
7 and profound, since many employment sectors listed under NRS 608.250(2) were
8 reasonably and legitimately relying on that law during all that time.
9

10 If retroactive application were to take place, Respondents and those other
11 employment sectors would be unjustly punished for following the same law that
12 the Nevada Labor Commissioner was following and enforcing all those years.
13 Instead, the *Thomas* decision rightfully and reasonably makes it clear that NRS
14 608.250(2) no longer applies, and hence there are no occupational exemptions
15 under that statute in the State of Nevada after June 26, 2014.
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19 The occupational exemptions contained in NRS 608.250(2) had been in
20 effect in Nevada since 1965. Employers and government agencies reasonably and
21 justifiably relied upon those occupational exemptions until *Thomas*. The intent of
22 the *Thomas* decision was not to punish Respondents or other employers who in
23 good faith reasonably and lawfully relied upon NRS 608.250(2). Rather, the intent
24 of *Thomas* was to issue a conclusive opinion on minimum wage law that would
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1 resolve the conflict between two existing laws, and apply that resolution on a going
2 forward basis after June 26, 2014.

3
4 **CONCLUSION**

5 Based on the foregoing points and authorities, Respondents respectfully
6 request that this Honorable Court deny Appellants' Motion to Correct Opinion of
7 June 26, 2014 and Stay Remittitur.
8

9 DATED this 16th day of October, 2014.

10
11 YELLOW CHECKER STAR
12 TRANSPORTATION CO. LEGAL DEPT.

13 *Marc C. Gordon*

14 _____
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CERTIFICATE OF SERVICE

The undersigned certifies that on October 16th, 2014, service of the foregoing, **RESPONDENTS' OPPOSITION TO MOTION TO CORRECT OPINION OF JUNE 26, 2014 AND STAY REMITTITUR** was made by depositing same in the U.S. mail, first class postage, prepaid, addressed as follows:

Leon Greenberg, Esq.
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
Attorney for Appellants

/s/ Sheila Robertson
For **Yellow Checker Star**
Transportation Co. Legal Dept.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER THOMAS; AND
CHRISTOPHER CRAIG,
INDIVIDUALLY AND ON BEHALF OF
OTHERS SIMILARLY SITUATED,
Appellants,

vs.

NEVADA YELLOW CAB
CORPORATION; NEVADA CHECKER
CAB CORPORATION; AND NEVADA
STAR CAB CORPORATION,
Respondents.

No. 61681

FILED

OCT 27 2014

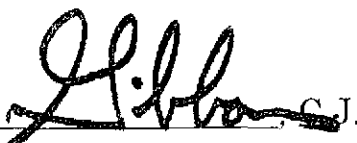
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

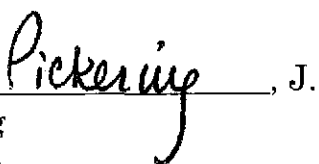
ORDER

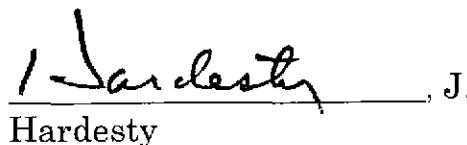
This court issued an opinion in this matter on June 26, 2014. Appellants have filed a motion to correct the opinion by changing three words from present tense to past tense, and also request that this court stay issuance of the remittitur, which was due to issue October 20, 2014. Respondents have filed an opposition to the motion, and appellants have filed a reply. No good cause appearing, we deny the motion to the extent it requests changes to the wording of the opinion; the opinion shall stand as issued. We grant the motion to the extent that the remittitur was not

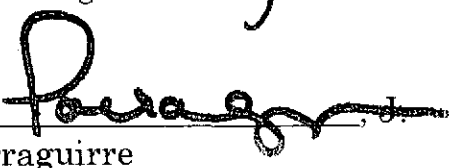
issued while this court considered the motion. As we have now ruled on the motion, we direct the clerk to issue the remittitur forthwith.

It is so ORDERED.

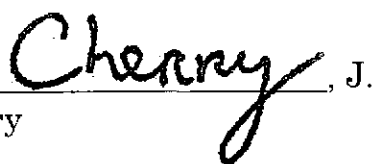

Gibbons, C.J.

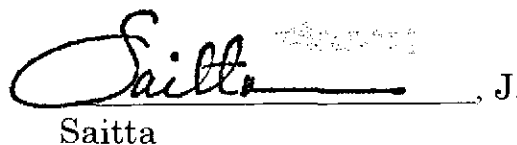

Pickering, J.


Hardesty, J.

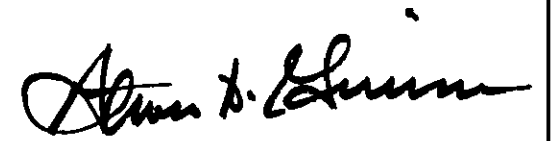

Parraguirre, J.


Douglas, J.


Cherry, J.


Saitta, J.

cc: Hon. Ronald J. Israel, District Judge
Leon Greenberg Professional Corporation
Marc C. Gordon
Tamer B. Botros
Eighth District Court Clerk



CLERK OF THE COURT

1 **NOTM**
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7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 CHRISTOPHER THOMAS, and)
CHRISTOPHER CRAIG, Individually)
10 and on behalf of others similarly)
situated,)
11 Plaintiffs,)
12 vs.)
13 NEVADA YELLOW CAB)
14 CORPORATION, NEVADA)
CHECKER CAB CORPORATION, and)
15 NEVADA STAR CAB)
CORPORATION,)
16 Defendants.)

Case No.: A-12-661726-C

Dept.: XXVIII

**RE-NOTICE OF MOTION TO
CERTIFY CLASS ACTION
PURSUANT TO NRCP RULE
23(B)(3)**

17
18 PLEASE TAKE NOTICE THAT the undersigned is re-noticing plaintiffs'
19 previously filed **MOTION TO CERTIFY CASE AS A CLASS ACTION**
20 **PURSUANT TO NRCP RULE 23(B)(3)**, which was filed on June 10, 2015 and
21 argued on July 14, 2015 and removed from the Court's calendar by its Minute Order of
22 August 19, 2015, for decision before the Hon. Ronald Israel, on
23 10-27-15, 2015, at the hour of 9:00A.

24 Dated: September 23, 2015

25 Leon Greenberg Professional Corporation

26 By: /s/ Leon Greenberg
Leon Greenberg, Esq.
27 Nevada Bar No.: 8094
2965 South Jones Boulevard - Suite E3
28 Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Plaintiff

PROOF OF SERVICE

The undersigned certifies that on September 23, 2015, she served the within:

**RE-NOTICE OF MOTION TO
CERTIFY CLASS ACTION PURSUANT
TO NRCP RULE 23(B)(3)**

by court electronic service to:

TO:

Marc C. Gordon, Esq.
Tamer Botros, Esq.
General Counsel
Yellow Checker Star Transportation Co.
Legal Dept.
5225 W. Post Road
Las Vegas, NV 89118

/s/ Dana Sniegocki

Dana Sniegocki