IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

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.

Case No.: 68975

Clark County District Court Case A664726

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

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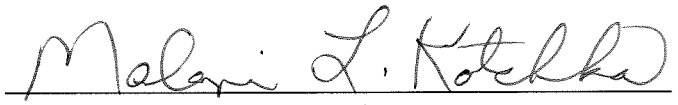
NRAP 26.1 DISCLOSURE

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

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

HEJMANOWSKI & McCREA, LLC



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BRIEF OF AMICUS CURIAE

I. IDENTITY OF AMICUS AND ISSUES PRESENTED

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

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

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

Nevada." Appendix 1. He states that the AFL-CIO drafted the Minimum Wage Amendment "in conjunction with our lawyers at the law firm of McCracken, Stemerman & Holsberry." Appendix 1. He declared:

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

Appendix 1. Thompson further said:

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

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

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

Four Queens, Fremont, Main Street, Plaza, Las Vegas Club, Dupars and Golden Gate.

Appendix 3.

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

Payment of minimum compensation to employees.

A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.

NRS 608.250 was not mentioned in the Amendment and leading up to the *Thomas* decision, trial courts sitting in Nevada interpreted the provisions of the Minimum Wage Amendment and NRS 608.250(2) as not wholly incompatible, ruling that both survived the Minimum Wage Amendment, with taxicab and limousine drivers not deemed to have been included in the Minimum Wage Amendment's directives. In *Lucas v. Bell Trans*, 2009 WL 2424557, at *8 (D. Nev. Jun. 24, 2009), District Judge Jones concluded by a reasoned decision that the Minimum Wage Amendment did not repeal NRS 608.250(2)'s exceptions:

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

Moreover, in its permanent regulations, the Labor Commissioner said in NAC 608.115(2) that, "If an employer pays an employee by salary, piece rate or any other wage rate except for a wage rate based on an hour of time, the employer shall pay an amount that is at least equal to the minimum wage when the amount

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

paid to an employee in a pay period is divided by the number of hours worked by the employee during the period. This subsection does not apply to an employee who is exempt from the minimum wage requirement pursuant to NRS 608.250." In the 4/3 opinion of the majority, *Thomas* rejected precisely Judge Jones' reasoning, concluding that in fact the Minimum Wage Amendment and NRS 608.250(2) were "irreconcilably repugnant," with the statute "impliedly repealed by the constitutional amendment." 327 P.3d at 521.

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

The problem here is that if distinguished Justices Parraguirre, Gibbons and Saitta together with U.S. District Judge Jones did not find it clear that the Minimum Wage Act had repealed NRS 608.250(2), how could the owners of business enterprises or ordinary individuals be reasonably expected to have acted in conformity with the Minimum Wage Amendment in 2006 and immediately undertaken to pay casual babysitters, domestic service employees residing in the household, outside salespersons earning commissioners, certain agricultural employees, taxicab drivers, and certain persons with severe disabilities the new minimum wage? Thus, the dissent explained:

> Because the Amendment and NRS 608.250 both address minimum wage, I would attempt to harmonize these provisions.... Reading NRS 608.250 and the Amendment together, an ambiguity becomes readily apparent. Namely, it is unclear whether the Amendment raises the minimum wage without altering NRS 608.250(2)'s exemptions or whether it impliedly repeals the exemptions, as the majority concludes. Both of these interpretations of the Amendment appear reasonable. As a result, I would conclude that the Amendment is ambiguous and must be interpreted in light of its history and public policy. [Citation omitted.]
>
> Since 1965, ... NRS Chapter 608... has governed employment compensation, wages, and hours for employees in Nevada. NRS 608.250(1) authorizes the Labor Commissioner to "establish by regulation the minimum wage which may be paid to employees in private employment with the State." "Taxicab and limousine drivers" are not entitled to this minimum wage....
>
> ....
>
> Moreover, the provision's title, "Raise the Minimum Wage for Working Nevadans," does not hint at any intended alteration of the

> NRS 608.250(2) exemptions.... Similarly, the condensed ballot question ... made no mention of changing the group of employees entitled to the minimum wage.... At the very least, if the Amendment was intended to repeal the NRS 608.250(2) exemptions, the arguments regarding the Amendment would have mentioned NRS Chapter 608, but they do not.... Therefore, I would conclude that the Amendment was only intended to raise the minimum wage amount, rather than abolish long-standing exemptions from the group of employees entitled to the minimum wage.

327 P.3d at 523-24. Indeed, according to Thompson, who drafted the Minimum Wage Amendment, the history and public policy of the Minimum Wage Amendment was to level the playing field between non-union employers and unionized employers. Appendix 1-3. He never mentions the exemptions in NRS 608.250. Appendix 1-3.

Western Cab does not raise the dissent's reasoning to reach a different result in that case, but to illustrate the unfairness of applying the Court's 2014 decision in *Thomas* retroactively to 2006. This unfairness is grounded in fundamental due process. Employers such as cab companies had no way of knowing in 2006 that they were not only immediately expected to begin paying the new minimum wage to employees excepted by NRS 608.250(2), but that other statutory obligations, such as record-keeping obligations, still ostensibly governed by NRS 608.115 (requiring at subsection (2) that "[r]ecords of wages must be maintained for a 2-year period following the entry of information in the record") had also been implicated.

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

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

(Citations omitted and emphasis added.)

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

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

III. THE MINIMUM WAGE AMENDMENT IS VOID FOR VAGUENESS PURSUANT TO THE DUE PROCESS CLAUSES OF THE U.S. AND NEVADA CONSTITUTIONS

Nevada's Minimum Wage Amendment and related Regulations are also barred by the Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution and Art. I, Sec. 8(5) of the Nevada Constitution, both of which establish that there shall be no deprivation of life, liberty or property without due process of law. Nevada's Minimum Wage Amendment and related NAC additions all amount to violations of fundamental due process because they do not give fair notice of what is required or prohibited under them or provide reasonable standards for compliance, thereby encouraging arbitrary and discriminatory enforcement. *Sheriff, Washoe County v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486-87 (2002), *citing Sheriff v. Martin*, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983). ("A statute is void for vagueness if it fails to define the criminal offense with sufficient definiteness that a person of ordinary intelligence cannot understand what conduct is prohibited and if it lacks specific standards, encouraging arbitrary and discriminatory enforcement. The Supreme Court has also held that a facial-vagueness challenge is appropriate when the statute implicates constitutionally protected conduct or if the statute 'is impermissibly vague in all of its applications.'").

What are "health benefits"? To entitle an employer to pay $1 less per hour as minimum wage, would it suffice to outfit the front desk or break room with a bottle of aspirin and some bandages and anti-bacterial soap? Or, is there more required such as health insurance coverage that might provide $2,000 of yoga or meditation classes annually? In *Eaves v. Board of Clark County Commissioners*, 96 Nev. 921, 924-25, 620 P.2d 1248, 1250 (1980), this Court held that an ordinance prohibiting individuals from working as an escort or social companion was void for vagueness. Certainly "health benefits" is void for vagueness.

Moreover, the Minimum Wage Amendment does not authorize any person, board, entity or division of the State government to enforce, administer, or regulate what is meant by "health benefits." Neither the drafter, the voters, the Legislature nor the Governor delegated power to the Labor Commissioner to enforce or regulate the Minimum Wage Amendment's "health benefits" provisions. *See Tate v. State of Nevada Board of Medical Examiners*, 131 Nev. Adv. Op. 67 (2015). Thus, to the extent that the Labor Commissioner has done so, the Labor Commissioner has denied due process to those burdened or benefitted by the Minimum Wage Amendment.

IV. THE MINIMUM WAGE AMENDMENT IS PREEMPTED BY ERISA

Generally, the law of preemption is "grounded in the Constitution's command that federal law 'shall be the supreme Law of the Land.'" *St. Louis Effort for Aids v. Huff*, 782 F.3d 1016, 1021 (8th Cir. 2015), *quoting In re Aurora Dairy Corp. Organic*

Milk Mktg. & Sales Practices Litig., 621 F.3d 781, 791 (8th Cir. 2010) (*quoting* U.S. Const. Art. VI, cl. 2). The U.S. Constitution's Supremacy Clause invalidates state laws that "interfere with, or are contrary to federal law." *Missouri Ins. Coalition v. Huff*, 947 F.Supp.2d 1014, 1019 (E.D. Mo. 2013), *quoting Qwest Corp. v. Minn. Pub. Utils. Comm'n*, 684 F.3d 721, 726 (8th Cir. 2012). The Supremacy Clause applies where, among other situations, "there is an actual conflict between state and federal law" such that "compliance with both federal and state regulations is a physical impossibility... or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citations omitted). Preemption can either be express or implied. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 n. 6 (2000).

There is no definition of "health benefits" or "health insurance" or "premiums" in the Minimum Wage Amendment itself. The AFL-CIO, through Thompson's declaration, states:

> We are very active in the health benefits arena within Nevada and have developed expertise in this arena as many unionized employers provide health benefits through plans which are jointly administered by union and employer trustees. Even where the plan does not have union trustees, our unions are still involved in negotiating over and monitoring the employer plans.

Appendix 1.

Although the Amendment did not authorize the Governor, Labor Commissioner, or any other agency or officer to establish or create "health benefits"

regulations, the Nevada Labor Commissioner nevertheless undertook that task, establishing regulations at NAC 608.100-.108, each with reference to Art. 15, Sec. 16. NAC 608.102 adds a regulation dictating the type of health care an employer must offer to "qualify to pay an employee" the lower minimum wage rate, stating:

> **NAC 608.102 Minimum wage: Qualification to pay lower rate to employee offered health insurance.** (Nev. Const. Art. 15, §16; NRS 607.160, 608.250). To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of NAC 608.100 an employer must meet each of the following requirements:
>
> 1. **The employer must offer a health insurance plan** which:
>
> (a) Covers those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213 and any federal regulations relating thereto, if such expenses had been borne directly by the employee; or
>
> (b) Provides health benefits pursuant to a Taft-Hartley trust which:
>
> (1) Is formed pursuant to 29 U.S.C. § 186(c)(5); and
>
> (2) **Qualifies as an employee welfare benefit plan**:
>
> (I) Under the guidelines of the Internal Revenue Service; or
>
> (II) **Pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.**
>
> 2. The health insurance plan must be made available to the employee and any dependents of the employee. The Labor Commissioner will consider such a health insurance plan to be available to the employee and any dependents of the employee when:
>
> (a) An employer contracts for or otherwise maintains the health insurance plan for the class of employees of which the employee is a member, subject only to fulfillment of conditions required to complete the coverage which are applicable to all similarly situated employees within the same class; and
>
> (b) The waiting period for the health insurance plan is not more than 6 months.

> 3. The share of 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 attributable to the employer under the Internal Revenue Code, as determined pursuant to the provisions of NAC 608.104.

(Emphasis added.)

Moreover, NAC 608.108 addresses the employer's requirement to pay wages at the higher rate, adding burdens and benefits beyond the language of the 2006 Constitutional amendment:

> **NAC 608.108. Minimum wage: Requirements for payment at higher rate; modification of term of waiting period.** (Nev. Const. Art. 15, §16; NRS 607.160, 608.250). If an employer does not offer a health insurance plan, or the health insurance plan is not available or is not provided within 6 months of employment, the employee must be paid at least the minimum wage set forth in paragraph (b) of subsection 1 of NAC 608.100 until such time as the employee becomes eligible for and is offered coverage under a health insurance plan that meets the requirements of NAC 608.102 or until such a health insurance plan becomes effective. The term of the waiting period may be modified in a bona fide collective bargaining agreement if the modification is explicitly set forth in such agreement in clear and unambiguous terms.

The Minimum Wage Amendment and Labor Commissioner's embellishments to it are all preempted by ERISA, a comprehensive federal regulatory regime concerning private employer sponsored health plans. 29 U.S.C. §1144(a). In fact, ERISA regulates most non-wage benefits provided to employees, from retirement savings to welfare benefits, including health insurance. 29 U.S.C. §§ 1002, 1003. The term "employee welfare benefit plans" is defined broadly to include the "vast majority of healthcare benefits that an employer extends to its employees." *Retail*

Industry Leaders Ass'n v. Fielder, 475 F.3d 180, 190 (4th Cir. 2007) (*citing* 29 U.S.C. §1002(1)). ERISA does not mandate employers to provide employees with any specific benefits, but creates "various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility" that apply to the benefit plans selected. *Shaw v. Delta Air Lines*, 463 U.S. 85, 91 (1983).

ERISA's primary purpose is to "provide a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). Congress broadly preempts State legislation to accomplish this purpose: ERISA preempts ['a]ny and all State laws insofar as they may now or hereafter ***relate*** to any 'employee benefit plan'" covered by ERISA. 29 U.S.C. §1144(a), ERISA §514(a) (emphasis added). In fact, ERISA's preemption is one of the broadest in the law:

> ***ERISA's preemption clause is 'deliberately expansive,'*** *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46, 107 S.Ct. 1549, 1551-52, 95 L.Ed.2d 39 (1987) , and 'contains ***one of the broadest preemption clauses ever enacted by Congress***.' *Greaney* [*v. Western Farm Bureau Life. Ins. Co.*] , 973 F.2d [812], at 817 [(9th Cir. 1992)] (citations omitted). The preemption clause states that the provisions provided by ERISA 'shall supersede any and all State laws insofar as they may now or hereinafter relate to any employee benefit plan...' 29 U.S.C. § 1144(a). Interpreting ERISA's preemption clause, the Supreme Court has instructed that 'relates to' is to be given its broad common-sense meaning.' *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985). Therefore, a state cause of action relates to an ERISA benefit plan if operation of the law impinges on the function of an ERISA plan. *Id.*

Spain v. Aetna Life Ins. Co., 11 F.3d 129, 131 (9th Cir. 1993) (per curiam), *cert. denied*, 62 U.S.L.W. 3705 (U.S. Apr. 25, 1994) (No. 93-1390) (emphasis added); *see*

also, Tawse v. DHL Airways, 2005 WL 1563208, at *1 (N.D. Ill. Jun. 8, 2005), *quoting Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) ("Because neither of these [state law] claims can be decided without 'reference to' the plan, they are clearly superseded by ERISA"). By preempting state employee benefit laws, ERISA is intended "to minimize the administrative and financial burden of complying with conflicting directives from States or between States and the Federal Government" and to reduce "the tailoring of plans and employer conduct to the peculiarities of each jurisdiction." *Ingersoll-Rand, id.* Thus, the scope of ERISA's "relates to" preemption language is to be read as broadly as possible. The U.S. Supreme Court has suggested that a state law "relates to" an ERISA plan "if it has a ***connection with or reference to*** such a plan." *Shaw*, 463 U.S. at 97 (emphasis added). NAC 608.102 requires that a plan be created. Nevada's Minimum Wage Amendment has created precisely the conflict ERISA's preemption language was meant to avoid.

The U.S. Supreme Court has determined "relate to" language to preempt state laws that have a "connection with" or "a reference to" employee benefits plans. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.,* 519 U.S. 316 (1997). In considering the nature and impact of state laws on ERISA plans, courts often find that state laws have an impermissible

"connection with" ERISA if they **require employers to have health plans**, dictate the specific benefits that must be provided through those plans and/or impose certain reporting requirements that differ from ERISA's requirements. *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 546 F.3d 639, 655-56 (9th Cir. 2008). Here, in order to qualify for the lower minimum wage, NAC 608.102 requires an employer to have a health plan which meets certain state requirements.

Another preemption test is to ask whether Congress would have anticipated that a type of state law would be preempted. *Fielder,* 475 F.3d at 191. This intent is to be inferred by "look[ing] 'to the objectives of the ERISA statute' as well as 'to the nature and effect of the state law on ERISA plans.'" *Id.* (*quoting California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 325 (1997). State laws that "mandate employee benefit structures or their administration" are preempted by ERISA. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658 (1995). State regulations of employer provision of employee benefits conflict with Congress' intent that ERISA establish uniform, national regulation of employee benefit plans. *Id.* at 657-58.

Thus, a state statutory scheme will not be saved from ERISA preemption if its underlying purpose is a preempted one. For example, in *American Med. Sec., Inc. v. Bartlett*, 111 F.3d 358 (4th Cir. 1997), the Maryland Insurance Commissioner had established a minimum attachment point for stop-loss insurance policies. *Id.* at 630.

While the Fourth Circuit recognized that the insurance regulation was "superficially" within a field traditionally regulated by the State, the court looked beyond the "carefully drafted" regulation to find that the "purpose and effect" was to force insurance companies to provide health benefits. *Id.*, at 363. Thus, the insurance regulations were preempted. *Id.*, at 363-65. Similarly, in *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180, 185 (4th Cir. 2007), the Fourth Circuit looked beyond a statute's language to find a preempted purpose (quoting the State Senate President's comments in floor debate that the legislation would "require ... [certain] employers to provide [health insurance'"); *id.* at 194 (describing the legislative fiscal service's note that the legislative intent was to "require[e] Wal-Mart to increase healthcare spending"). Similarly, Nevada's Minimum Wage Amendment and related NAC Regulations authorizing employers to pay lower wages when they offer "health benefits," is intended to encourage employers to offer some kind of "health benefits," and to level the playing field between nonunion and union companies. Appendix 1-3.

In *Standard Oil Company of California v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), the Hawaii Prepaid Health Care Act required employers to provide their employees with a comprehensive prepaid healthcare plan. When Hawaii sought to enforce the Act, Standard Oil filed an action seeking declaratory and injunctive relief. The Ninth Circuit found:

> Section 3 of ERISA, 29 U.S.C. s 1002, defines "employee welfare benefit plan" broadly as any plan or program maintained by an employer or employee organization to provide medical, surgical or hospital care or benefits. ERISA s 514(a), 29 U.S.C. s 1144(a), provides that ERISA supersedes or preempts all state laws which "relate to any employee benefit plan." The district court held that ERISA preempts the Hawaii law, that the Hawaii law does not fit into any exemptions from ERISA coverage, and that preemption is constitutional.

Id. at 763. Hawaii argued that because its statute required employers to provide benefits, the benefit plans were outside the scope of ERISA's coverage. *Id.* at 763-64.

The Court disagreed and found:

> At the time ERISA was enacted, all private plans were voluntary as opposed to mandated by state law and ERISA itself does not require employers to provide plans. **We cannot agree, however, with Hawaii's contention that Congress intended to exempt plans mandated by state statute from ERISA's coverage**. Congress did distinguish between plans established or maintained by private employers for private employees and plans established or maintained by government entities for government employees. Such government plans are exempt. ERISA ss 3(1), 3(32), 4(b)(1), 29 U.S.C. ss 1002(1), 1002(32), 1003(b)(1). *See Feinstein v. Lewis*, 477 F. Supp. 1256 (S.D.N.Y. 1979). Private plans are not. The plans which Hawaii would require of private employers are not government plans. **There is no express exemption from ERISA coverage for plans which state law requires private employers to provide their employees**. The legislative history convincingly demonstrates a broad congressional preemptive intent. See the discussion in the district court opinion in *Hewlett-Packard*, *supra*, at 1298-1300. *See also Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980, 981, 98 S. Ct. 1630, 56, L.Ed.2d 72 (1978); *Delta Air Lines, Inc. v. Kramarsky*, 485 F. Supp. 300 (S.D.N.Y. 1980). The plans envisioned under the Hawaii statute are therefore not rendered outside the

> definition of employee welfare benefit plans simply because Hawaii has attempted to make them mandatory.

Id. at 764 (emphasis added). The Ninth Circuit held that the broad preemption of all other compulsory plans prevents State experimentation with other types of programs. *Id.* at 765.

The Court also found that the Hawaii statute was based on the employer-employee relationship common to ERISA. *Id.* The Ninth Circuit concluded:

> Finally, Hawaii argues that the preemption language of s 514(a) of ERISA, 29 U.S.C. s 1144(a), is not broad enough to encompass the Hawaii Act. That section of ERISA provides generally that the Act shall supersede "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" not otherwise exempted in the Act. Appellants in the district court argued that since ERISA was concerned primarily with the administration of benefit plans, its provisions were not intended to prevent the operation of laws like the Hawaii Act pertaining principally to benefits rather than administration. There is, however, nothing in the statute to support such a distinction between the state laws relating to benefits as opposed to administration. As the district court pointed out, the language of the statute provides that ERISA shall supersede "any and all State laws" and that does not mean "some but not all the State laws." 442 F. Supp. at 707.

Id. Here, ERISA supersedes any and all State laws including the Minimum Wage Amendment and regulations insofar as they relate to "health benefits" and any employee benefit plan. Clearly, the references to health insurance and NAC 608.102(1)'s requirement that the employer "**must offer a health insurance plan**" relates to an employee benefit plan.

The Nevada Supreme Court addressed ERISA preemption in *Marcoz v. Summa Corporation*, 106 Nev. 737, 801 P.2d 1346 (1990). This Court began by stating that it was well established that the breadth of ERISA preemption was unique among federal statutes. 801 P.2d at 1349. The Court noted the Supreme Court's consistency in maintaining an expansive construction of ERISA preemption and quoting from *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), said, "'The court noted that the Act (ERISA) was designed to occupy fully the field of employee benefit plans and to establish it "as exclusively a federal concern."'" *Id.* at 1349. This Court continued, "The intent was to prohibit employers from discharging or harassing their employees in order to prevent them from obtaining their statutory or plan-based rights and was designed to protect the employment relationship." *Id.* at 1350. This Court said, "We are persuaded that the legislative history of ERISA, the expansive nature of Section 1144(a), the explicit language of § 1140, and the weight of authority all support the conclusion that claims of purposeful denial of ERISA benefits are preempted." *Id.* at 1354.

In *Cervantes v. Health Plan of Nevada, Inc.*, 127 Nev. Adv. Op. 70, 263 P.3d 261 (2012), the Nevada Supreme Court concluded that a plaintiff's claim for negligence against a managed care organization under a state statute was preempted by ERISA, explaining that the breadth of the "reference to" prohibition reaches laws if they have an ***impermissible connection*** with an ERISA plan, ***even if the***

challenged law does not itself reference ERISA or an ERISA plan, as where statutes mandate employee benefit structures:

> ***Even when a law does not reference an ERISA plan, it is preempted if it has an impermissible connection with an ERISA plan.*** [*California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325, 117 S.Ct. 832, 136 L.Ed.2d 971 (1997).] ***In cases in which it considered whether a state law has a forbidden connection to ERISA plans, the United States Supreme Court has consistently found statutes that 'mandate[] employee benefit structures or their administration' are preempted by ERISA section 514(a).*** [*New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657-58,115 S.Ct. 1671, 131 L.Ed.2d 695 (1995)] (holding that ERISA section 514(a) does not preempt a New York statute requiring a surcharge on commercial insurers and health management organizations); *see also FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990) (holding a Pennsylvania statute that precluded reimbursement to an ERISA plan operator from the beneficiary in the event of recovery from a third party to be preempted by ERISA section 514(a)); [*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 203 (1983)] (holding that ERISA preempts state laws regulating benefit plans that prohibit discrimination based on pregnancy and that require specific benefits be paid); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981) (finding that New Jersey could not prohibit plans from setting off workers' compensation payments against employees' retirement compensation against employees' retirement benefits or pensions)....

263 P.3d at 266 (emphasis added); *see also, Inland Empire Chapter of Associated General Contractors of America v. Dear*, 77 F.3d 296, 300 (9th Cir. 1996) (a law "relates to" an employee benefit plan if it "has a connection with or reference to such a plan").

Cervantes specifically noted that in applying ERISA section 514(a), the Ninth Circuit in *Operating Engineers Wealth & Welfare v. J.W.J. Contracting Co.*, 135 F.3d 671, 678 (9th Cir. 1998), read "connection with ERISA plans" broadly, examining, for example, "whether the state law requires the establishment of a separate employee benefit plan to comply with the law," or "whether the state law regulates certain ERISA relationships, including the relationships between an ERISA plan and employer and, to the extent an employee benefit plan is involved, between the employer and the employee." *Id.*

The Minimum Wage Amendment and the Labor Commissioner's related Regulations affect, alter or impact the health benefits offered by Nevada private employers, such as Petitioners and Western Cab. The Minimum Wage Amendment and NAC Regulations illegally compel employers to change the administration of their ERISA-governed plans and/or create separate and independent plans and they thereby encroach on ERISA's purview, subjecting employers to uncertainty and cost, substantively changing health benefits, reporting and administration requirements, creating inconsistencies with ERISA and frustrate the intent of the U.S. Congress to establish uniform national regulation of employee benefit plans and healthcare. In conclusion, the Minimum Wage Amendment and Regulations related to it are preempted by ERISA.

V. THE ACA PREEMPTS THE MINIMUM WAGE AMENDMENT

The ACA was enacted on March 23, 2010, and amended ERISA to establish new requirements for group health plans and insurers. Among other things, the ACA requires employers with 50 or more full-time employees to offer employee health-care plans which provide certain additional minimum levels of coverage to plan participants and beneficiaries. *Christian and Missionary Alliance Foundation, Inc. v. Burwell*, 2015 WL 437631, *1 (M.D. Fla. 2015); 26 U.S.C. §§4980H(a) & (c)(2), 5000A(f)(2). In many instances, Congress authorized the Department of Health and Human Services to supply further detail as to what was required. *Id.*

The ACA greatly expanded federal involvement in health insurance oversight and regulation, introducing a variety of new federal minimum standards. The Supremacy Clause of the U.S. Constitution, Art. VI, explicitly provides that "the Laws of the United States... shall be the supreme law of the land." Preemption can occur expressly, as where Congress states that a law preempts state laws, or by implication, where logical deduction based on the text of the federal law precludes enforcement of a state law. Under the ACA, federal law does not "preempt any State law that does not prevent application of the provisions of" the ACA. 42 U.S.C. §18041(d). However, Nevada's Minimum Wage Act does not define "health benefits" and NAC Chapter 608 does not address "health insurance" in terms of the ACA. Thus, the Minimum Wage Amendment and related Regulations may prevent

application of the provisions of the ACA and the uncertainty created by the Amendment and related Regulations requires application of federal preemption.

It was the objective of Congress in enacting the ACA to "expand minimum essential health coverage nationwide through the individual mandate." *Coons v. Lew*, 762 F.3d 891, 901 (9th Cir. 2014) (declaring Arizona's Health Care Freedom Act preempted by ACA based on its express exemption of the individual mandate, an issue specifically covered by the ACA). Here, Nevada's Minimum Wage Amendment draws a distinction in hourly wages based on whether or not an employer provides "health benefits." Then, without authorization, the Nevada Labor Commissioner has tried to give meaning to "health benefits," without reference to ERISA or ACA requirements and thereby interfering with ERISA and the ACA. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96, 103 (1992) ("The question of whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone..... A state law... is preempted if it interferes with the methods by which the federal statute was designed to reach [its] goal." (internal quotation marks omitted)).

Conflict preemption occurs when compliance with both federal and state laws is impossible or when a state law stands as an obstacle to the accomplishment and execution of and execution of the full purposes and objectives of Congress. *St. Louis Effort*, 996 F.Supp.2d at 802-03; *see also*, *St Louis Effort*, 782 F.3d at 1024-25

(plaintiffs were likely to succeed on merits of their claim that state law provisions regulating advice and information that organizations could provide were preempted by the ACA). Where the state's law makes the operation of the federal statutory scheme "more difficult or onerous" and thus "run afoul of the ACA's purpose," the state law is subject to preemption. *Id.,* at 803. Nevada's Minimum Wage Amendment is so vague and uncertain that it is literally impossible for an employer to understand what is meant by "health benefits" and the unauthorized provisions of the Administrative Code do not remedy the matter other than to clarify that they are addressing precisely the same matters addressed by Congress in ERISA and the ACA. As a result, the Minimum Wage Amendment and related regulations are preempted by the ACA.

VI. CONCLUSION

Amicus Western Cab supports Petitioners' request for writ relief clarifying that the Minimum Wage Amendment applies prospectively from June 26, 2014, and not from November 28, 2006. This clarification is necessary lest Nevada employers and employees be unfairly burdened with having determined that the Minimum Wage Amendment, with no mention of invalidation of NRS 608.250(2), impliedly repealed NRS 608.250(2). In addition, Western Cab urges that the Court

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consider whether the Minimum Wage Amendment's dependence on "health benefits" is void for vagueness or preempted by ERISA and/or the ACA.

DATED: October 22, 2015.

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CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page or type volume limitations of NRAP 37(a)(7) because, excluding parts of the brief excepted by NRAP 32(a)(7)(C), it does not exceed 6,717 words.

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

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **WESTERN CAB COMPANY'S AMICUS BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF MANDAMUS AND SUPPORTING REVERSAL OF THE DISTRICT COURT'S DECISION** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 22nd day of October, 2015, to the following:

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And a true and correct copy of the foregoing **WESTERN CAB COMPANY'S AMICUS BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF MANDAMUS AND SUPPORTING REVERSAL OF THE DISTRICT COURT'S DECISION** was served via first class, postage-paid U.S. Mail on this 22nd day of October, 2015, to the following:

The Honorable Ronald J. Israel
District Court Judge
Eighth Judicial District Court of Nevada
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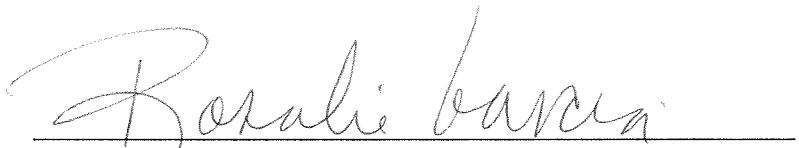

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