IN THE SUPREME COURT OF NEVADA

NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, NEVADA STAR CAB CORPORATION, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and For the County of Clarki, and THE HONORABLE RONALD J. ISRAEL, District Judge, Respondents, AND CHRISTOPHER THOMAS and CHRISTOPHER CRAIG, Real Parties in Interest	Sup. Ct. No. 68975 Dist. Ct No.:A-12-661726-C Dept. No. XXVIII

RESPONDENTS ANSWERING BRIEF

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ISSUE PRESENTED

Petitioners Nevada Yellow Cab Corporation, Nevada Checker Cab Corporation and Nevada Star Cab Corporation ("YCS") implore this Court to find that its prior decision in this case renders only declaratory ("prospective") relief. Granting YCS's petition would contravene the very foundation of our legal system which since its creation has required courts grant damages remedies, not just prospective relief, to injured parties. No precedent, from any common law jurisdiction, would support this Court now deciding to limit its prior Opinion in this case to only the future conduct of YCS.

YCS asserts writ relief should be granted because it had no basis to believe it violated Nevada's Constitution and it would now be inequitable to make it pay for the damages caused by such violations. Such claim, even if legally tenable, has no factual support. YCS was not an innocent party but a sophisticated business entity that elected to ignore a known risk of liability. It was aware of the liability imposed by Nevada's Constitution at least as early as 2008 when it first sought, unsuccessfully, to have its taxi drivers' union waive its drivers' minimum wage rights. Respondents' Appendix ("RA") p. 11. Such awareness of its liability was also easily obtainable by YCS since March 2, 2005, the date of the Nevada Attorney General's official opinion stating that taxi drivers would be covered by the then proposed Nevada Constitution's minimum wage amendment enacted in 2006. RA p. 32-42. The law firm of Littler Mendelson, the "largest law firm in the United States devoted exclusively to representing management in employment and labor law matters," publicly advised employers in 2006 that Nevada taxi drivers must be paid minimum wages pursuant to Nevada's Constitution.[1] RA p. 6-9. Ironically, the Littler firm is now counsel to amicus curiae Sun Cab Inc. and argues that the advice it gave its clients and other employers in 2006 had no valid

[1] www.littler.com/files/press/pdf/15281.pdf viewed on December 24, 2015.

basis.

The conduct of YCS was not that of an innocent party acting with an honest, good faith, belief based upon prior binding precedent or an accepted and widely established general legal doctrine. It was the conduct of an informed party who now asks this Court to hold that it is "better to ask forgiveness than permission." If it had promptly sought "permission," a judicial declaration of its liability under Nevada's Constitution, it would have received the Opinion in this case years earlier and already paid the accrued minimum wages at issue. Instead it now asks this Court to grant it "forgiveness" and let it evade the same liability it would have been forced to honor if it had forthrightly sought such "permission."

When its union declined to waive the minimum wage protections of Nevada's Constitution YCS made a conscious decision *not* to seek a judicial determination of its supposedly uncertain legal responsibility to pay those minimum wages. Instead it decided to wait to be sued on those claims and defend itself in this litigation. It even prevailed in the district court on its defense, which was ultimately rejected by this Court. YCS is in the same position as every other defendant who succeeds in the district court and who suffers a reversal of fortune upon appeal to this Court. No basis exists in law or equity to grant its petition.

ARGUMENT

I. THIS COURT'S PRIOR OPINION DID NOT DIRECT THAT ITS HOLDING ONLY APPLY TO FUTURE CONDUCT

YCS asserts that this Court's Opinion in this case has no application to conduct taking place prior to its issuance on June 26, 2014 because it uses 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 such a "future conduct only" limitation should be divined from an Opinion that never discusses limiting its application to future conduct. Nor does YCS acknowledge the Opinion also uses the past tense and passive voice verb form

in the manner YCS asserts would indicate it has a current, and not just future conduct, application:

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

YCS argues the Opinion only effected the statute's "repeal" it speaks of, and the creation of respondents' rights under Nevada's Constitution, at the "is" or the Opinion's present date, June 26, 2014, even though "repealed" is a past tense verb. YCS ignores that the Opinion also expressly states that such a statute "is deemed to *have been* impliedly repealed," a choice of words that can *only* be strictly construed to an event taking place *in the past* ("have been").

This Court, as do all courts, interchangeably uses the "active" and "passive" verb voice styles and "past" and "present" verb forms. In *State v. Connery,* 661 P.2d 1298, 1301 (1983), this Court used, as in this case, the present tense ("...we hold that NRAP 4(b) supersedes NRS 177.066...") and did not make a "future conduct only" ruling but applied its supersession finding to the controversy before it. *See, also*, *Jacobson v. Estate of Clayton*, 119 P.3d 132, 134 (Nev. Sup. Ct. 2005) using "supercedes" and "superceded," 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 and *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.")

The idea this Court intended its Opinion in this case apply only prospectively,

based upon the verb forms YCS cites, is absurd. Equally absurd is YCS's assertion such prospective application is divined from this Court's denial of respondents' motion to remove such "present tense" language from its Opinion to eliminate this specious argument. This Court need not reformat the language of its Opinions to preempt baseless interpretations of those Opinions. It is quite capable of casting aside such interpretations, as it did in the subsequent appeal in *Gilmore v. Desert Cab, Inc.*, Appeal No. 62905, NV. Sup. Ct. Decision of April 16, 2015. RA p. 14. *Gilmore,* presenting the exact same taxi driver minimum wage claim as in this case, made this exact same "present tense" language and "future conduct only" argument about the Court's Opinion in this case. RA p. 23-25. This Court rejected such arguments by reversing and remanding *Gilmore,* noting that Article 15, Section 16 of the Nevada Constitution had "implicitly repealed" (past tense) the taxicab driver minimum wage exemption of NRS 608.250(2)(e) and such issue was resolved by its Opinion in this case. RA p. 14.

II. YCS MISREPRESENTS WHAT CONSTITUTES A "RETROACTIVE" APPLICATION OF A LAW AND NO "RETROACTIVE" APPLICATION OF LAW ISSUE IS EVEN ARGUABLY PRESENT IN THIS CASE

A. The "retroactive application of law" jurisprudence that YCS relies upon concerns the application of a new statutory obligation to conduct taking place *prior* to such statute's effective date, a situation not present in this case.

1. Nevada's Minimum Wage Constitutional Amendment became effective on November 28, 2006 and respondents' claims only concern conduct taking place after that date.

YCS's petition, at page 7, states that "[f]ollowing [the] passage of the Nevada Minimum Wage [Constitutional] Amendment in 2006, the statutory exemption [from Nevada's minimum wage] for taxicab and limousine drivers remained" and that "[t]here was no express or implied repeal [of such exemption] at that time and in the years following." YCS cites no authority for these remarkable conclusions, that the constitutional amendment remained ineffective for taxi drivers until this

Court's Opinion was issued in this case.

Amendments to Nevada's Constitution become "effective upon the canvass of the votes by the supreme court." *Tovinen v. Rollins*, 560 P.2d 915, 916-917 (Nev. Sup. Ct. 1977). Article 15, Section 16, of the Nevada Constitution, creating new minimum wage rights, was enacted by the voters in the 2006 general election and became effective on November 28, 2006, not on the date of this Court's Opinion in this case, which was June 26, 2014. *See*, N.R.S. § 293.395(2).

Respondents are not making any claims against YCS involving conduct occurring prior to November 28, 2006. The only "prospective application" of Article 15, Section 16, of the Nevada Constitution is to events *after* November 28, 2006: "As a general rule, a constitutional amendment is to be given only prospective application from its effective date unless the intent to make it retrospective clearly appears from its terms." *Tovinen,* 560 P.2d at 917. In *Greene v. Executive Coach & Carriage*, 581 Fed. Appx. 550 (9th Cir. 2015), the United States Circuit Court of Appeals for the Ninth Circuit expressly rejected the argument that this Court's Opinion in this case presented any "retroactive" application of law issue to claims arising after 2006. That was because the Nevada Constitution's minimum wage amendment became effective in 2006, not as the date of this Court's Opinion in this case. *Id.*

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

Every case cited by YCS involves whether to "retroactively" apply a new law to conduct taking place *prior* to the new law's effective date, an issue not present in this case. *See*, *Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't (PEBP)*, 179 P.3d 542, 553–54 (Nev. Sup. Ct. 2008) ("A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, ***in respect to transactions or considerations already past***.")(emphasis provided).

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

YCS misleadingly cites precedents dealing with the application of new statutes to conduct taking place *before* such statutes' effective dates. Such precedents have no relevancy to this case, which solely involves conduct taking place *after* the effective date of Article 15, Section 16, of the Nevada Constitution.

III. NO BASIS EXISTS TO APPLY THIS COURT'S OPINION IN A PURELY PROSPECTIVE FASHION

A. No court has ever directed the "prospective" application of an "enforcement decision" validating the legal obligations imposed by a newly enacted statute or constitutional provision.

YCS has never argued that the text of Article 15, Section 16, of the Nevada Constitution, as enacted and effective on November 28, 2006, caused it to believe taxi drivers were exempt from such provision's minimum wage requirements. No such argument exists given Section 16's conferral of a minimum wage right to "each employee" of "each employer" and its failure to state that such right was not extended to taxi drivers. The entire basis of YCS's defense in this case was that **another, pre-existing statute,** NRS 608.250(2)(e), when read in conjunction with

the newly enacted Section 16, required a conclusion that Section 16 did not extend minimum wage rights to taxi drivers. If the earlier enacted NRS 608.250(e) had never existed the defense YCS raised in this case would never have existed. YCS's position is the same as any other party defending against the enforcement of a newly enacted state statute by arguing such new statute is void because it violates *another* controlling legal command (such as a superior federal statute or constitutional protection).

When a party defends a lawsuit brought under a newly enacted statutory or constitutional provision, and fails in that defense, such new legal obligation does not spring to life "prospectively" after such defense is rejected. Such legal obligation arose as of the date of the statute or constitutional provision's enactment. A defendant unsuccessfully contesting the validity of a newly enacted statutory or constitutional obligation is not relieved of that obligation during the "post enactment" to "final judicial enforcement ruling" period. YCS does not, and cannot, cite any decision, from any state or federal court, that has ever issued a purely prospective ruling absolving such a defendant from any present liability.

It would be anathema to our system of laws, and contrary to the fundamental principles of justice, to grant "prospective only" relief against a party, such as YCS, who waits to be sued for a liability imposed by a new statute or constitutional provision. YCS had advance notice of the impending legal obligation imposed in this case by the clear language of Section 16. YCS could have acted upon its belief Section 16 was inapplicable to taxi drivers by promptly seeking, upon such provision's enactment, a binding and final judicial declaration on that issue. Its failure to do so should not now be rewarded by granting it an almost eight year long period after Section 16's effective date for which it will face no liability.

Limiting this Court's Opinion to only future conduct would reward YCS for its evasion of Section 16. Such a decision would render it foolish for anyone to comply with the obligations imposed by a newly enacted law or affirmatively seek a

judicial declaration of their responsibilities under such a law. It would be far wiser to just wait until a final judgment was rendered in a lawsuit and *then* comply, as one would face no liability for conduct taking place prior to such a judgment.

B. The prospective application analysis urged by YCS, if applied by this Court, would require a denial of the writ.

YCS ignores that it would be contrary to the fundamental principles underlying our legal system, and our legal tradition, to have this Court apply its Opinion in a "prospective only" fashion. As discussed, *supra*, such a prospective only application has never occurred in a case rejecting a defense to a civil lawsuit brought under a newly enacted law and concerning post-enactment conduct, at least when such defense had never been previously ruled upon by the jurisdiction's highest court. Instead YCS urges this Court to grant YCS's request for a "prospective only" ruling under the very narrow, limited, and clearly inapplicable, circumstances under which such rulings are possible in civil cases.

"The general rule that judicial decisions are given retroactive effect is basic in our legal tradition." *See, Newman v. Emerson Radio Corp.,* 48 Cal. 3d 973, 978 (Cal. Sup. Ct. 1989), citing *Linkletter v. Walker*, 381 U.S. 618, 622 (1965) ("At common law there was no authority for the proposition that judicial decisions made law only for the future", citing 1 Blackstone, Commentaries 69 (15th ed. 1809)). This principal, commonly thought of as the "Blackstonian Doctrine," is embraced, without exception, by every State and our federal courts. *See, City of Bozeman v. Peterson*, 227 Mont. 418, 420, 739 P.2d. 958, 960 (1987) ("Generally, judicial decisions will apply retroactively"); *Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 596, 790 P.2d 242, 251 (1990) ("[U]nless otherwise specified, an opinion in a civil case operates retroactively as well as prospectively."); *Truesdell v. Halliburton Co., Inc.*, 754 P.2d 236, 239 (Alaska 1988) ("In civil cases, retroactivity is the rule, and pure prospectivity is the exception."); *Caperton v. A.T. Massey Coal Co. Inc.*, 680 S.E. 2nd 322 (Sup. Ct. West Virginia 2009) ("[a]s a general rule, judicial

decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases," *citing and quoting Crowe v. Bolduc*, 365 F.3d 86, 93 (1st Cir.2004) and discussing collected cases from 12 states that are all in accord).

As discussed in *Linkletter, Newman*, and every other case dealing with the issue, the common law has always commanded the application of court decisions to the immediate controversies and parties before it. Under the common law courts *never* issued "future conduct only" decisions when a party's 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" what the law had always been, *See*, *Newman*, 48 Cal 3d 978-80, discussing the origins of the "rule of retroactivity" and citing and quoting *United States v. Security Industrial Bank* 459 U.S. 70, 79 (1982).

To the extent that our modern legal system has allowed the "prospective application" of certain decisions it has been almost exclusively in the criminal law area, such as in *Linkletter*, involving new *judicially created constitutional rights* that *overrule prior judicial precedents*. In *Linkletter*, the United States Supreme Court declined to grant retroactive force to its decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), which overruled prior Supreme Court precedents on the application of the Fourth Amendment's exclusionary rule to state criminal prosecutions. 381 U.S. at 637-38. Such a retroactive application would have invalidated countless convictions that were completely valid under prior United States Supreme Court precedents and created an untenable situation.

As observed by the Supreme Court of Alabama "[i]n general, with regard to civil matters, prospective-only decision-making within the realm of constitutional law is disfavored." *Alabama State Docks Terminal Ry. v. Lyles,* 797 So.2d 432, 439 (2001). "Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion

that our interpretation of the Constitution in a particular decision could take prospective form does not make sense." *Id.*, citing and quoting *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 201, (1990) (Scalia, J., concurring).

The very rare civil cases where rulings have been made purely prospective are those involving judicially created law and when a jurisdiction's highest court has recognized previously unknown, and otherwise unknowable, rights or set aside prior judicial precedents. *Isbell v. County of Sonoma*, 21 Cal.3d 61, 74-75 (Cal. Sup. Ct. 1978) is illustrative. It found that the Fourteenth Amendment's due process protections 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 masse* all prior judgments so entered by all California creditors 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 YCS seeks goes far beyond the exceptionally justified, and very narrow, temporal limitations applied in *Isbell* and similar cases. As YCS and its amici acknowledge, this Court, in *Breithaupt v. USAA Property and Casualty Insurance Company* 867 P.2d 402 (1994), adopted the same three factor test, used in *Isbell* and by other courts, to weigh whether, and to what extent, a judgment in a civil case should only be applied to future cases:

> ....In determining whether a new rule of law should be limited to prospective application, courts have considered three factors: (1) the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the court must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation; and (3) courts consider whether retroactive application could produce substantial inequitable results. 867 P.2d at 405.

YCS can meet none of the three criteria justifying a prospective only application of this Court's Opinion in this case.

The first criterium, that the decision at issue "...must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed..." is not established. As discussed, *supra*, the principle of law at issue was not established by this Court's 2014 Opinion but by the 2006 amendment of Nevada's Constitution. This Court's Opinion, as it noted, was grounded not upon some new legal theory but upon the fundamental principle of constitutional supremacy established over two centuries ago in *Marbury v. Madison*, 5 U.S. 137 (1803).

YCS and its amici claim that the unpublished decision of a single federal district court judge in *Lucas v. Bell Trans.*, 2009 Westlaw 2424557 (D. Nev. 2009), constitutes "clear past precedent" upon which YCS was entitled to rely. Neither YCS nor its amici cite any support for the proposition that such a trial court decision, which sets no precedent except for the parties to that case, can fulfill this factor of the *Breithaupt* analysis. The impropriety of relying upon *Lucas* was confirmed by the decision in *Murray v. A Cab Taxi Service,* Eighth Judicial District Court, A-12-669926, minute order of January 17, 2013, final order entered February 11, 2013. RA p. 1, 43-48. *Murray* considered and rejected *Lucas* and adopted the precise analysis of this Court's Opinion in this case, also doing so 17 months before this Court's Opinion. *Id.* YCS's claim it reasonably relied upon *Lucas* as a controlling precedent is particularly specious as it *could have sought to create such a precedent in respect to itself* by initiating a judicial proceeding to determine the validity of its defense in this case. Instead it elected to do nothing.

Nor do the assertions of YCS and its amici that this Court's Opinion was "not clearly foreshadowed" have even a scintilla of support. Nevada's Attorney General publicly declared in 2005 that Nevada's Constitution in 2006 would be extending

minimum wage rights to taxi drivers. RA p. 36. The same firm and counsel representing amicus curiae Sun Cab, Rick Roskelley of Littler Mendelson, publicly advised their employer clients in 2006 that Nevada's new constitutional amendment extended minimum wage rights to taxi drivers. RA p. 8. YCS was concerned enough about the "foreshadowing" it had received about such a possible minimum wage responsibility that it sought, unsuccessfully, a waiver of the Nevada Constitution's minimum wage provision from its taxi drivers' union starting in 2008. RA p. 11. The single largest taxi cab operator in Las Vegas also sought, and received, such a waiver of the Nevada Constitution's minimum wage provisions from its employees' union in 2008. RA p. 2-3.

YCS's claim that the Nevada Labor Commissioner's public advisements to employers reasonably led it to believe taxi drivers were not entitled to minimum wages under Nevada's law is baseless. The official "Rules to be Observed by Employers" poster of the Nevada Labor Commissioner, at Petitioner's Appendix 036, states at Section 5 the exact same language of Nevada's Constitutional Amendment, specifying that "each employer shall pay a wage to each employee of not less than $7.25 an hour." That paragraph, advising Nevada employers of their minimum wage obligations, contains no exceptions for taxi drivers or any other employees.

Instead of following the clear advisement of Section 5 of such poster on Nevada's minimum wage requirements, YCS claims it relied upon Section 7 of the poster consisting of three paragraphs explaining the overtime pay provisions of Nevada law. The last of those three paragraphs in Section 7 then states that the "above provisions," meaning the overtime pay requirements explained in the preceding two paragraphs of Section 7, do not apply to certain employees, including taxicab drivers. That YCS chooses to misread that poster's advisements, and illogically construe the Section 7 overtime exemptions as a Section 5 minimum

wage exemption, does not constitute advice by the Nevada Labor Commissioner.[2]

Even if the Nevada Attorney General's 2005 Opinion did not exist, and the principal of constitutional supremacy was not controlling, YCS's argument that NRS 608.250(2)(e) created an exemption from all of Nevada's minimum wage requirements after 2006 was without foundation. The text of NRS 608.250(2) states that it excludes taxi drivers from the minimum requirements imposed by NRS 608.250(1), not the minimum wage requirements of *all* Nevada laws and statutes. YCS's claim that it reasonably believed NRS 608.250(2)(e) operated to exclude taxi drivers from the minimum wage requirements of a law *besides NRS 608.250,* in this case Nevada's Constitution, is based upon a wholly illogical application of NRS 608.250(2) and ignores the actual language of such statute.

Amici Sun Cab also introduces what it claims is evidence that the Nevada Labor Commissioner either believed "that NRS 608.250(2)'s exemptions remained binding" or was "uncertain" about the same and led taxi companies to "believe that their continued compliance with NRS 608.250(2) was proper." Sun Cab amicus, p. 6. It supports such assertion by referencing a two page declaration from Neal Golden, a plaintiff in *Golden v. Sun Cab, Inc.*, *doing business as Nellis Cab Co.,* Eighth Judicial District Court, A-13-678109-C. *Id.* Such declaration states that the Nevada Labor Commissioner took no action on Neal Golden's minimum wage claim against Sun Cab. *Id.* Counsel for amici Sun Cab fails to advise that the Nevada Labor Commissioner was aware of both the Nevada Attorney General's Opinion and pending, unnamed, federal litigation involving employee minimum wage rights under Nevada's Constitution. RA p. 4-5. Such office made a

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[2] YCS also claims that commentary in a Nevada Department of Business and Industry publication issued *after* this Court's *Thomas* Opinion establishes YCS had reasonably relied upon the Nevada's Labor Commissioner legal advice that taxi drivers need not be paid minimum wages under Nevada's Constitution. Such assertion is ridiculous. That office issued no such advice and sought the Attorney General's 2005 Opinion. RA p. 32.

determination to place Golden's complaint on "hold" in 2013 as a result. *Id.* That the Nevada Labor Commissioner, because other litigation was pending and as a matter of administrative efficiency, elected to place a taxi driver's minimum wage claim on hold did not provide any basis for taxicab companies to believe their drivers were exempt from Nevada's minimum wage requirements.

YCS and its amici vacuously insist that the second and third elements of the *Breithaupt* analysis, involving "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation" and "whether retroactive application could produce substantial inequitable results," weigh in favor of writ relief. The purpose of Article 15, Section 16 of Nevada's Constitution is to bestow upon all Nevada employees certain minimum wage rights as of its effective date. That purpose is not advanced by *denying* employees the minimum wages they earned *after* its effective date. That YCS and its amici are now complying, after this Court's Opinion, with Nevada's Constitutional minimum wage requirements, is irrelevant. It has no bearing on the need to remedy their violations of those requirements occurring *prior* to that Opinion.

The pleas of YCS and its amici that this Court's Opinion, if not applied in a purely prospective fashion, will "produce substantial inequitable results" are by far the most specious claims made in support of the writ. It is the hard working taxi drivers of YCS who will suffer a grievous and a "substantial inequitable result" if the writ is granted. YCS will abscond with the minimum wages that its taxi drivers are owed under Nevada's Constitution. No inequity to YCS will occur if YCS is forced to make good to those taxi drivers for the very modest minimum wages it should have already paid them.

YCS was aware of its duty to pay minimum wages under Nevada's Constitution and chose to ignore that duty or alternatively seek a final judicial determination confirming that duty. Its taxi drivers, through their labor union, also refused to relinquish their right to those minimum wages or trade that right for some

other sort of concession from YCS. In 2013 they engaged in a 60 day strike to, among other things, preserve that minimum wage right in their collective bargaining agreement. RA p. 12-13.

The claim of YCS and its amici that equitable considerations support writ relief is completely baseless. There is no evidence YCS would have conducted its business differently if this Court's Opinion had been issued years earlier. Nor does YCS present any evidence that it will now be unfair to YCS to pay the accrued minimum wages owed to its taxi drivers. Presumably YCS was profitable prior to this Court's 2014 Opinion. YCS could have also, once this litigation was commenced in 2012, paid into escrow any disputed minimum wage amounts or otherwise conformed its practices to eliminate any future minimum wage liability. Presumably YCS would have remained in business and profitable, albeit perhaps slightly less profitable, if it had been paying minimum wages to its taxi drivers starting in 2006. What YCS is demanding is not fairness but absolution, relief not grounded in equitable considerations but on YCS's desire to retain the small additional profit that it earned by violating Nevada's Constitution.

C. Granting the writ would conflict with this Court's rejection of prospective decision making in *Hansen v. Harrah's*

In *Hansen v. Harrah's*, 675 P.2d 394 (Nev. Sup. Ct. 1984), this Court created, through judicial recognition of Nevada's public policy, a tort cause of action for the retaliatory discharge of an employee who files a worker's compensation claim. No such cause of action was authorized in the text of any Nevada statute, the creation of such a cause of action was an exception to Nevada's well established "employment at will" law, and the creation by judicial recognition of such a cause of action had been rejected by some other state courts. 675 P.2d at 396. Nonetheless, even though the employer defendants in *Hansen* had no express advance notice that such a cause of action existed as an exception to the "employment at will" law of Nevada, this Court imposed upon them a *current* liability for compensatory damages. *Hansen* both created a new cause of action and allowed liability for that

newly recognized caused of action to be imposed on the defendants' *prior* conduct, it did not merely determine the defendants' future legal obligations.

This Court's decision and reasoning in *Hansen* cannot be reconciled with the claims of YCS and its amici that the Court's Opinion in this case should be purely prospective. The cause of action enforced by this Court in its Opinion is not a purely judicial, public policy, creation. It is affirmatively enshrined in Nevada's Constitution as an employee's primary legal right. *Hansen* created a new legal right solely by judicial action, a legal right rejected by courts in other jurisdictions and one constituting a rare exception to Nevada's otherwise well recognized and nearly universal "employment at will" rule. YCS had prior notice of the legal right asserted in this case with the Nevada Attorney General also affirmatively opining that such right did exist. The employer in *Hansen* had no basis whatsoever to presume the employee's right it violated even existed, much less access to any Nevada Attorney General's opinion confirming its existence.

Unlike the defendants in *Hansen*, YCS had every reason to believe its conduct was likely to be found in violation of the plain language of Nevada's written law, Article 15, Section 16, of Nevada's Constitution. No possible rationale exists for imposing liability upon the defendants *Hansen* but not upon YCS in this case for its conduct occurring prior to June 26, 2014.

D. Fidelity to the rule of law requires that this Court deny the writ despite the disagreement among the Justices in its Opinion.

Amicus curiae Sun Cab posits that denying the writ will "punish taxicab companies for lacking the foresight" to conclude as this Court did in its Opinion, a conclusion that "three Justices of this Court disagreed with in a 4-3 decision." This is completely untrue, as no taxicab company will be "punished for lacking the foresight" to conclude as did this Court in its Opinion. YCS and every other taxicab company, including Sun Cab if it had heeded the sage advice of its counsel, RA p. 8., was well aware of the liability imposed by this Court's Opinion prior to

that Opinion being issued. There is no "punishment" meted out by this Court's Opinion upon the taxicab companies. They are in the same position as any other defendant who chose to contest, unsuccessfully, their liability under a newly enacted law. Nor are they "punished" by this Court's Opinion being issued nearly eight years after their liability first accrued. If they had wanted a more prompt determination of their legal responsibilities they were free to request one and they scrupulously declined to do so.

Nor is it proper for this Court to be swayed by amicus curie's implicit plea that its Opinion, because it was arrived at over a dissent, should not be afforded the full weight of law and only applied prospectively. The enforcement of the law is the paramount duty of this Court. Its Opinion has settled the issue and dispensed with the taxicab industry's claims that they are not subject to the minimum wage provision of Nevada's Constitution. It cannot now deny that Opinion full legal weight because certain dissenting Justices disagreed with its conclusion.

The paramount need for courts to apply the rule of law was just reiterated by the United States Supreme Court in *DirectTV Inc. v. Imburgia*, Slip Opinion December 14, 2015. That case applied the Supreme Court's bitterly contested 5 to 4 decision in *AT&T Mobility LLC v. Concepcion,* 563 U. S. 333 (2011) to another case involving circumstances taking place prior to its issuance. The six justice majority opinion in *DirectTV* included two of the *Concepcion* dissenters and was written by one of those dissenters, Justice Breyer, who observed:

> No one denies that lower courts must follow this Court's holding in *Concepcion*. The fact that *Concepcion* was a closely divided case, resulting in a decision from which four Justices dissented, has no bearing on that undisputed obligation. Slip Opinion Page 5.

That this Court's Opinion was a divided one does not justify casting aside the full legal force it should, and does, possess.

CONCLUSION

Wherefore, for all the foregoing reasons, the petition should be denied in its entirety.

Dated: December 28, 2015

Respectfully submitted,

/s/ Leon Greenberg

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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 40(b)(3) 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 less than 5970 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 this December 28, 2015

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CERTIFICATE OF MAILING

The undersigned certifies that on December 28, 2015, she served the within:

RESPONDENTS' ANSWER AND
APPENDIX TO WRIT OF MANDAMUS

by court electronic service to

Marc C. Gordon, Esq.
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Las Vegas, NV 89118

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by depositing the same in the U.S. mail, first class postage, prepaid, addressed as follows:

The Honorable Ronald J. Israel
Regional Justice Center
Department 28
200 Lewis Avenue
Las Vegas, Nevada 89155

/s/*Sydney Saucier*

Sydney Saucier