IN THE SUPREME COURT OF THE STATE OF NEVADA

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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 COURT JUDGE,

Respondents,

And

CHRISTOPHER THOMAS and CHRISTOPHER CRAIG,

Real Parties in Interest,

Case No. 68975

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

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

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N.R.A.P. 26.1 DISCLOSURE

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

Dated this 22nd day of January, 2016.

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I. ISSUE PRESENTED

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

II. INTEREST OF THE AMICUS CURIAE

The Progressive Leadership Alliance of Nevada ("PLAN") was founded in 1994 to advocate for, among other things, economic justice for low-wage workers in Nevada. PLAN played an instrumental role in the passage of the Minimum Wage Amendment ultimately at issue in this writ petition, in 2004 and 2006. PLAN members have also regularly testified before the Nevada State Legislature on matters concerning the minimum wage, on behalf of minimum wage workers and the economically-disadvantaged. PLAN is keenly aware of the remedial, pro-employee intent of the Minimum Wage Amendment, and recognizes that rulings regarding the Amendment potentially affect tens—hundreds—of thousands of minimum wage workers in Nevada.

III. ARGUMENT

The question before this Court is a straightforward one: are the equitable considerations at play in this case significant enough to disregard the widely-accepted norm of applying civil judicial decisions both retroactively and prospectively? Petitioners do not find themselves in an enviable position. After unlawfully withholding wages from cab-driving employees for almost a decade, they have finally been asked to pay up. The courts have not been kind to Petitioners' defense of taking cover under a previous statutory minimum wage exemption that was fairly clearly superseded by the Minimum Wage Amendment. But Petitioners took a gamble that a constitutional amendment was subordinate to a statutory provision, and they lost. The relied on no guidance other than their own interpretation of the interplay between constitution and statute. They absconded

with years' worth of wages. It takes, actually, a good bit of *chutzpah* to come to this Court now and ask that all of that be forgiven, wiped away—all that money left in Petitioners' coffers—because they thought they had it right all along.

But because *Thomas* did not establish a new rule of law, and because enormous inequities will exist if that case is given prospective-only application, PLAN supports Real Parties in Interest in requesting that this Court deny the present writ petition.

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

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

> [P]rospective decision making is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be. The very framing of the issue that we purport to decide today—whether our decision in *Scheiner* shall "apply" retroactively—presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is.
>
> Such a view is contrary to that understanding of "the judicial Power," U.S. Const., Art. III, § 1, which is not only the common and traditional one, but which is the only one that can justify courts in

> denying force and effect to the unconstitutional enactments of duly elected legislatures,
>
> To hold a governmental Act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it; and when, as in this case, the constitutionality of a state statute is placed in issue, the question is not whether some decision of ours "applies" in the way that a law applies; the question is whether the Constitution, as interpreted in that decision, invalidates the statute.
>
> Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense.

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

But if the Court is to entertain the question of whether *Thomas* is to be applied prospectively only, the factors in *Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 110 Nev. 31, 867 P.2d 402 (1994), which have been briefed at length in other pleadings before the Court in this matter, control the analysis. Petitioners miss the boat entirely by analyzing *Thomas* as if it were a "substantive statute." *See* Petition at 8. For their part, *Amicus Curiae* Sun Cab, Inc. agrees that retroactivity is the norm. *See Amicus Curiae* Sun Cab, Inc. Br. at 18.

This Court's opinion in *Thomas* was neither groundbreaking nor unexpected; it was instead logical and easily foreseen. The old statutory minimum wage scheme explicitly excluded "taxicab and limousine drivers" from the minimum wage requirements. *See* N.R.S. 608.250(2)(e). The Minimum Wage Amendment, passed in 2006, mandates that "each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section." *See* Nev. Const. art. XV, § 16(A). The Amendment goes on to exempt only "an employee who is under eighteen years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety days." *See* Nev. Const. art. XV, § 16(C).

Taxicab drivers have never been exempt from the Amendment's minimum wage requirement. The old statutory exemption dissolved the moment the Amendment was passed. *Thomas* reached a natural and unremakrable conclusion: the constitution mandates a certain hourly wage to all but a very narrow subset of employees that does not include taxicab drivers, and the state constitution is supreme over all statutory provisions; thus, the statutory taxicab driver exemption was superseded.

Petitioners overcomplicate the issue before the Court. As Real Parties in Interest discuss, Nevada's Attorney General clearly announced that after the passsage of the Amendment, taxicab drivers would no longer be exempt from the minimum wage. *See* Real Parties in Interest Appx. at 36. The one Nevada state court to address the issue a year before this Court in *Thomas* reached the same conclusion. *See Murray v. A Cab Taxi Service*, Eighth Judicial District Court, A-12-669926 (Feb. 11, 2013). Counsel to *Amicus* Sun Cab, Littler Mendelson, starting in 2006 and continuing to the date of this brief, warned its clients and potential clients that "taxicab and limousine drivers … will no longer be exempt from the minimum wage."[1] If Petitioners and *amici* are to be believed, they are among the only entities to be caught off guard—entirely unawares—by this Court's opinion in *Thomas*. They are not to be believed.

No inequitable results will befall Petitioners if this Court does not extend the extraordinary exception of prospective application to its ruling in *Thomas*. It is difficult to imagine a scenario where the defendants in a civil case were more "on notice" of their unlawful behavior. What Petitioners attempted was something civil

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

defendants try all the time—they wagered their liability on a possible defense, and now they have lost their gamble. When courts declare a defendant's theory of defense to be a loser—with no intervening new law—the defendant cannot bank on prospectivity as an insurance policy. Petitioners have been unlawfully withholding wages and bolstering their bottom lines for nearly a decade; the bill is now due and owing.

Instead, if *Thomas* is given prospective application, Real Parties in Interest will suffer great inequity. Taxicab drivers were not a party to Petitioners' risky wager. They stood nothing to gain from and had no say in whether Petitioners adhered to the Amendment's clear mandates—until now. What drivers can hope for now is to recover the wages which were owed to them—stolen from them—all along. If *Thomas* is applied prospectively, Petitioners make a mockery of the law and retain all the rpofits of their conduct.

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

The Minimum Wage Amendment altered, and largely replaced, Nevada's fundamental law on minimum wage, and was designed to function (and to be interpreted) in a remedial manner.[2] *See Thomas*, 327 P.3d at 522 ("Respondents also argue that, despite the intent expressed by the text of the Amendment, the voters actually intended to merely raise the minimum wage, not to create a new minimum wage scheme. But respondents do not adequately explain their basis for

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

deriving such intent."). Accordingly, prospective application of *Thomas*, which would result in a windfall for Petitioners and other similarly situated employers, would fly in the face of the Amendment and its purpose.

The ballot materials that came with the 2004 and 2006 initiative that became the Amendment set forth the Amendment's remedial animus and intended broad impact. They begin by noting that "[l]iving expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families." *See* State of Nevada Statewide Ballot Questions, Question No. 6 (Secretary of State 2006) at 31.[3] That is as true today as it was a decade ago when the Amendment was

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

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

See id.

proposed. Yet Petitioners' pleas would allow them to escape unscathed after shorting their employees of *all* of their hourly wages for nearly 10 years. That would leave the drivers deprived of years of hourly compensation the Amendment plainly entitled them to.

The written arguments both for *and against* the Amendment given to the voters clearly stated that if the measure passed, wages would go up. *Id.* at 31-34. The proponents, for example, began, "All Nevadans will benefit from a long-overdue increase in the state's minimum wage through a more robust economy, a decreased taxpayer burden and stronger families." *Id.* at 31. The initiative's opponents' also operated on the premise of higher wages in positing that "the most credible economic research over the last 30 years has shown that minimum wage hikes hurt, rather than help, low-wage workers." *Id.* at 32. The opponents continued that under the Amendment, "wages paid in Nevada must, from now on, exceed the federal minimum wage by about $1 an hour." *Id.* at 33. Although the proponents and opponents disagreed about the measure's policy and fiscal impact, they both emphatically agreed that, as proposed, the Amendment would mean an *increase* in take-home pay among Nevada's lowest-income workers.

For those like Real Parties in Interest, who subsisted with *no hourly wage at all* and who never received any benefit from the Amendment as their employers skirted the Amendment's clear mandates and made off with their wages, none of that occurred. It is very difficult to argue that the public understanding of the Amendment was that the drivers and all other *formerly*-exempt hourly workers in Nevada would fail to see their lots improve, while the hourly wage bill of Petitioners would continue on at a zero baseline until a court told them otherwise. That is not merely an absurd result, it is positively grotesque.

The Amendment's drafters and the voters who approved it did *not* intend wages to stagnate or for the class of employees entitled to the minimum wage to

remain unduly limited. For Real Parties in Interest, if Petitioners are given a pass on what the Court has already deemed to be a violation of the Amendment, it will be as if the Minimum Wage Amendment were not passed until 2014, and years of hourly wages will be lost.

IV. CONCLUSION

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

Respectfully submitted this 22nd day of January, 2016.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 2,841 words.

3. Finally, I hereby certify that I have read this Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the Brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22nd day of January, 2016.

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CERTIFICATE OF SERVICE

STATE OF NEVADA, COUNTY OF CLARK

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

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

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

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

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

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