IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK; and THE HONORABLE LINDA MARIE BELL, District Judge,

Respondents,

and

LAKSIRI PERERA, IRSHAD AHMED, MICHAEL SARGEANT Individually and on behalf of others similarly situated,

Real Parties in Interest.

Case No.: _____

District Court Case No. A-14-707425-C

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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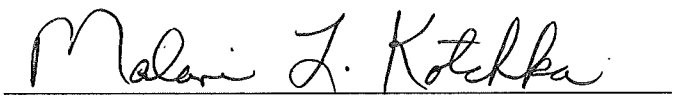
NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that Petitioner 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 Petitioner Western Cab Company in the 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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I. RELIEF SOUGHT

Pursuant to NRAP 21, NRS 34.160, NRS 34.170, NRS 34.190, NRS 34.330, NRS 34.340 and Article 6, Section 4 of the Nevada Constitution, Petitioner Western Cab Company ("Western Cab") seeks this Court's resolution by writ of mandamus or alternatively by writ of prohibition for four serious issues in Nevada employment law for which there is no plain, speedy and adequate remedy in the ordinary course of law:

(1) Is the Minimum Wage Amendment preempted by Federal Labor Law, the National Labor Relations Act?

(2) Is the Minimum Wage Amendment preempted by ERISA?

(3) Is the Minimum Wage Amendment void for vagueness pursuant to the due process clauses of the U.S. and Nevada Constitutions?

(4) Should fuel payments by taxicab drivers which can be made from their tips and vendor fees be deducted from their non-tip compensation before determining compliance with the Minimum Wage Amendment?

This Court is currently considering a number of minimum wage cases concerning: the statute of limitations, *Williams v. District Court (Claim Jumper Acquisition Co.),* Docket No. 66629, *MDC Restaurants, LLC v. District Court (Diaz)*, Docket No. 67631, *Western Cab Co. v. District Court (Perera)*, Docket No.

68796, *Nevada Yellow Cab Corp. v. District Court (Thomas)*, Docket No. 68975, *Boulder Cab, Inc. v. District Court (Dan Herring)*, Docket No. 68949; whether an employer must offer health insurance or whether an employee must be enrolled in health insurance, consolidated cases *MDC Restaurants v. District Court (Diaz)*, Docket 68523, *Kwayisi v. Wendy's of Las Vegas, Inc.*, Docket No. 68754, *State of Nevada v. Hancock*, Docket No. 68770, *Hanks v. Briad Restaurant Group, LLC*, Docket No. 68845; and whether gross taxable income under the Minimum Wage Amendment must exclude tips, *State of Nevada v. Hancock*, Docket No. 68770.

The constitutionality or federal preemption of the Minimum Wage Amendment should be decided before any of these other issues. In this Court's Order Granting Motions for Leave to file Amicus Briefs and Directing Answer in *Yellow Cab v. District Court (Thomas)*, Docket No. 68975, this Court said that as a matter of practice, it may decline to review constitutional issues not raised below. The Honorable Linda Marie Bell, Eighth Judicial District Court Judge, has heard and considered the constitutional and federal preemption issues which have been raised below. On December 1, 2015, she entered a Decision and Order in which she held that the Minimum Wage Amendment was not unconstitutional and was not preempted by federal law. App. at 6-8, 11-13. Since the District Court has now considered and ruled on these issues and since the constitutionality and federal preemption of the Minimum Wage Amendment should be decided before

ruling on interpretations of it, including the statute of limitations issue, this Court should grant this Petition and reverse the District Court's decision. Furthermore, the issue of whether Western Cab must deduct its drivers' payments for fuel from their total compensation, excluding tips and vendor fees, in determining whether it paid minimum wage pursuant to the Minimum Wage Amendment will fundamentally affect whether Western Cab has any liability to the plaintiffs and the definition of the class which Perera, Ahmed and Sargeant seek to represent.

II. ISSUES PRESENTED

(1) Is the Minimum Wage Amendment preempted by Federal Labor Law, the National Labor Relations Act?

(2) Is the Minimum Wage Amendment preempted by ERISA?

(3) Is the Minimum Wage Amendment void for vagueness pursuant to the due process clauses of the U.S. and Nevada Constitutions?

(4) Should fuel payments by taxicab drivers which can be made from their tips and vendors fees be deducted from their non-tip compensation before determining compliance with the Minimum Wage Amendment?

III. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

On October 19, 2012, Real Party in Interest Laksiri Perera ("Perera") filed a claim for minimum wage with the Nevada Labor Commissioner. App. at 281-83. He sought $7.25 an hour from March 25, 2011, when he began to receive health

insurance. App. at 282. On November 13, 2012, the Labor Commissioner told Perera it would close his claim if he failed to provide evidentiary support which countered Western Cab's payroll records. App. at 119. Perera did **not** claim that he was owed additional minimum wage because he paid for fuel.

On September 23, 2014, in response to a solicitation by his counsel Leon Greenberg (App. at 289), Perera filed a complaint in District Court against Western Cab alleging that Western Cab had failed to pay him minimum wage. App. at 30-35. On October 20, 2014, Perera amended his complaint. App. at 36-42. Western Cab filed a motion to dismiss (App. at 43-128) and Perera responded and filed a countermotion to amend his complaint yet again. App. at 129-205. In his motion to amend, Perera alleged that Western Cab forced him to pay from his own funds for all of the gasoline consumed by the taxi he drove. App. at 134, 166, ¶ 7.

In its opposition to Perera's countermotion to amend the complaint Western Cab said:

> While tips cannot be considered for the determination of the minimum wage in Nevada, tips can be used to pay for fuel. In regard to the payment for the driver's fuel, Western Cab followed the directions of the U.S. Department of Labor. The Department of Labor expressly told Western Cab that the cost of fuel could not be considered in the calculation of minimum wage. Exhibit 9. *See* Exhibit E, pp. 5-6, to Response. There is no requirement to pay for fuel in the Minimum Wage Amendment.

App. at 242, 257.

At the oral argument before the District Court on March 12, 2015, Western Cab explained that its drivers were paid 50% of the commissions or book and that 9% of the book, pursuant to an IRS agreement, was declared as tips. Tax withholding was done on the basis of the 9%. Anything over 9% was non-taxable. App. at 337.

At the same oral argument, Perera defined the issue as whether the payments for gas went below the minimum wage. The District Court defined the issue as whether the payments for gas should reduce the amounts of the driver's income when looking at whether they were being paid minimum wage. App. at 356.

Western Cab explained that it had a U.S. Department of Labor audit in 2012 and at that time it was paying for gas for all of its drivers. The Department of Labor told Western Cab that its payment for gas could not be considered in the minimum wage computation. The Department of Labor said that only the amounts shown on a payroll check could be considered for minimum wage compliance. App. at 356-57, 257. Therefore, Western Cab increased the compensation formula for its drivers from 30% of the book to 50% of the book so that the drivers could make more money and could pay for their own gas. App. at 357, 257.

Drivers have both declared and undeclared tips. They receive fees when they take customers to certain vendors and the vendors pay the fees. App. at 293-

99. All of those extra fees and tips can be used to pay for gasoline. App. at 357, 257.

The District Court entered a Decision and Order on June 16, 2015, and granted Perera's countermotion "as to his request for leave to amend his complaint to add a claim related to cab drivers being required to pay for fuel costs." App. at 17. The District Court said, "Therefore, when a taxicab driver brings a minimum wage claim, the taxicab driver brings that claim under the provisions of the Minimum Wage Amendment, not Chapter 608." App. at 21-22. The District Court concluded, "Mr. Perera seeks to add a ground for relief alleging that Western Cab requires Mr. Perera to pay for fuel costs, causing Mr. Perera's hourly wage to drop below the minimum wage. Finding no grounds to justify denial, Mr. Perera shall be freely granted leave to amend his Complaint." App. at 27.

On June 16, 2015, Perera filed a Second Amended Complaint in which he alleged:

> In or about January 2012, defendant started requiring the plaintiffs and the class members to pay from such plaintiffs' and class members' own, personal funds, 100% of the cost of the fuel consumed in the operation of the taxicabs they drove for the defendant. That fuel was essential for the operations of defendant's taxicab business and plaintiffs could not work for defendants unless they agreed to pay for that fuel from their personal funds. By requiring the plaintiffs and the class members to personally pay for the cost of such fuel the defendant was reducing the wages it actually paid the plaintiff and the class members to an amount below the minimum hourly wage required by Article 15, Section 16, of the Nevada Constitution. That was because after deducting from the "on the payroll records" wages

> paid by the defendant to the plaintiffs and the class members the cost of the taxicab fuel they were forced by the defendant to pay, the resulting "true" wage paid to such persons by the defendant was below the minimum hourly wage required by Article 15, Section 16, of the Nevada Constitution.

App. at 370-71.

Western Cab moved to dismiss the second amended complaint (App. at 374-43) and opposed Perera's countermotion to amend the complaint yet again. App. at 641-713. At the oral argument on August 27, 2015, Western Cab raised the issues that the Minimum Wage Amendment was preempted by ERISA and violated the due process clauses. App. at 619-27. On September 21, 2015, Western Cab submitted the declarations of Danny Thompson to the District Court and argued that the Minimum Wage Amendment was preempted by Federal Labor Law. App. 18.

In July and August 2015, Danny Thompson, the Executive Secretary-Treasurer of the Nevada AFL-CIO, filed three declarations in federal court. App. at 663-671. In these declarations, Thompson declared that the Nevada AFL-CIO "is comprised of over 120 local unions with over 200,000 members in Nevada." App. at 663. He states that the AFL-CIO drafted the Minimum Wage Amendment "in conjunction with our lawyers at the law firm of McCracken, Stemerman & Holsberry." App. at 664. 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.

App. at 664. 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.**

App. at 666-67 (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.
>
> 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.

App. at 669-70.

On October 8, 2015, at another oral argument before the District Court in opposition to Perera's motion to amend his complaint yet again, Western Cab argued that the proposed amendment was futile because the Minimum Wage Amendment was preempted by federal labor law. App. at 780-84. Western Cab once again raised the issue that the Minimum Wage Amendment did not require that Western Cab pay for gas or that gas payments be deducted from compensation. The only prohibited credit or offset in the Minimum Wage Amendment is tips and gratuities. App. at 790. There is no prohibition against the use of tips and vendor fees to pay for gas.

On December 1, 2015, the District Court entered a Decision and Order holding the Minimum Wage Amendment was not preempted by ERISA or unconstitutional pursuant to the due process clauses of the United States and Nevada Constitutions. App. at 5-8. The District Court also held that the Minimum Wage Amendment was not preempted by the National Labor Relations Act. App. at 11-12. Finally, although the District Court had earlier said that a taxicab driver's minimum wage claim was brought under the Minimum Wage Amendment and "not Chapter 608" (App. at 21-22), the District Court concluded, "When the power to enforce a labor law is not specifically delegated to another party, the

Labor Commissioner has the authority to create regulations regarding that law in order to enforce it. That precise procedure has been followed in the creation of NAC 608.102." App. at 8. The District Court concluded, "The Labor Commissioner has followed statutory procedures for interpreting the minimum wage amendment." App. at 13.

IV. THE MINIMUM WAGE AMENDMENT IS PREEMPTED BY FEDERAL LABOR LAW, THE NATIONAL LABOR RELATIONS ACT

The U.S. Constitution, art. IV, cl. 2, provides, "This Constitution and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article 15, § 16(A) states that if an employer provides health benefits, the minimum wage is $5.15 an hour. If an employer does not provide health benefits, the rate is $6.15 an hour. The purpose of the Minimum Wage Amendment **to help level the playing field between non-union employers and unionized employers** is preempted by the National Labor Relations Act.

In *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60 (2008), the United States Supreme Court addressed a California statute which prohibited several classes of employers who received state funds from using the funds "to assist, promote, or deter union organizing." *Id.* at 62. The issue was whether this law was preempted by federal law mandating that certain zones of labor activity be

unregulated. The Court found that although the National Labor Relations Act ("NLRA") contained no express preemption provision, Congress implicitly mandated two types of preemption as necessary to implement federal labor policy. *Id.* at 65. The first, *Garmon* preemption, was intended "to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Id.* at 65 (citation omitted). *Garmon* preemption forbids the states to regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. *Id.*

According to the Nevada AFL-CIO, the Minimum Wage Amendment is intended to change the market system between unionized and non-unionized companies. Thompson said:

> 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.**

App. at 666-67 (emphasis added). Clearly, the Minimum Wage Amendment regulates activity that the NLRA protects, prohibits, or arguably protects or prohibits.

The second type of preemption, known as *Machinists* preemption, forbids both the National Labor Relations Board and the states to regulate conduct that

Congress intended be unregulated because the conduct should be controlled by the free play of economic forces. *Brown*, 554 U.S. at 65. *Machinists* preemption is based on the premise that "'Congress struck a balance of protection, prohibition and laissez-faire in respect to union organization, collective bargaining, and labor disputes.'" *Id.* (citation omitted). The *Brown* Court held that California's law was preempted under *Machinists* because it regulated within a zone protected and reserved for market freedom. *Id.* Here, the Minimum Wage Amendment which "helped increase the compensation of AFL-CIO members in Nevada and helps level the playing field between non-union employers and unionized employers" is a law within a zone protected and reserved for market freedom.

The *Brown* Court found that the legislative purpose of California's law was not the efficient procurement of goods and services but the furtherance of a labor policy. *Id.* at 70. The Court further found that the law permitted use of state funds for select employer advocacy activities that promoted unions. *Id.* at 71. Here, the stated purpose of the Minimum Wage Amendment is the furtherance of a labor policy. According to Thompson, the Nevada AFL-CIO drafted the Minimum Wage Amendment to help increase the compensation of AFL-CIO members in Nevada and to help level the playing field between non-union employers and unionized employers. Thus, the State of Nevada, through the Minimum Wage

Amendment ("MWA"), is engaged in furtherance of a labor policy which violates federal preemption.

The *Brown* Court found:

> The statute also imposes deterrent litigation risks. Significantly, AB 1889 authorizes not only the California Attorney General but also any private taxpayer—including, of course, a union in a dispute with an employer—to bring a civil action against suspected violators for "injunctive relief, damages, civil penalties, and other appropriate equitable relief." § 16645.8. Violators are liable to the State for three times the amount of state funds deemed spent on union organizing. §§ 16645.2(d), 16645.7(d), 16645.8(a). Prevailing plaintiffs, and certain prevailing taxpayer intervenors, are entitled to recover attorney's fees and costs, § 16645.8(d), which may well dwarf the treble damages award. Consequently, a trivial violation of the statute could give rise to substantial liability. Finally, even if an employer were confident that it had satisfied the recordkeeping and segregation requirements, it would still bear the costs of defending itself against unions in court, as well as the risk of a mistaken adverse finding by the factfinder.

Id. at 72. Here, the MWA also imposes deterrent litigation risks. A trivial violation could give rise to substantial liability because although a back pay award may be miniscule, "an employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs." Article 15, § 16(B).

In *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 609 (1986), Golden State Transit sought to renew its franchise to operate taxicabs in the City of Los Angeles. While the franchise renewal application was pending, Golden State's labor contract with its drivers expired and the drivers went on

strike. *Id.* at 609-610. After Teamster representatives argued against renewal of Golden State's franchise because of the pendency of the labor dispute, the City decided not to extend the franchise. The United States Supreme Court found that *Machinists* preemption precluded state and municipal regulation "concerning conduct that Congress intended to be unregulated." *Id.* at 614. The Court said:

> The Court recognized in *Machinists* that "'Congress has been rather specific when it has come to outlaw particular economic weapons.'" 427 U.S., at 143, 96 S. Ct. at 2555, quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 498, 80 S. Ct. 419, 421, 4 L. Ed. 2d 454 (1960), and that Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance "'between the uncontrolled power of management and labor to further their respective interests.'" (Citations omitted.)

Id. at 614. Use of a Minimum Wage Amendment to level the playing field between non-union employers and unionized employers is a form of economic pressure which is supposed to be unregulated.

Fort Halifax Packing Company, Inc. v. Coyne, 482 U.S. 1 (1987), concerned a Maine statute which required a one-time severance payment when an employer closed its business. In addressing the federal labor law preemption issue, the United States Supreme Court held that when a regulation such as the Maine statute **provided protections to individual union and non-union workers alike**, it neither encouraged nor discouraged the collective bargaining processes that were the subject of the National Labor Relations Act and it was not preempted. *Id.* at 20-21. Here, the two-tiered minimum wage floor was designed by the AFL-CIO to

level the playing field between union and non-union companies. That is **not** a minimal employment standard such as the one addressed in *Fort Halifax*. The Maine statute applied equally to union and non-union employees. Here, the AFL-CIO states that the Minimum Wage Amendment does **not** apply equally to union and non-union workers and that the entire purpose of the two-tiered floor is to favor union employees and union companies. Therefore, the Minimum Wage Amendment is preempted by the National Labor Relations Act.

In *Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497, 498 (9th Cir. 1995), a county in California passed an ordinance which required all employers to pay prevailing wages to their employees on private industrial construction projects costing over $500,000. Like the MWA, the ordinance provided that employees could sue for unpaid wages if they had not been paid a prevailing wage. *Id.* at 499. The Ninth Circuit addressed both *Garmon* and *Machinists* preemption and said the *Bragdon* case involved *Machinists* preemption, a zone protected and reserved for market freedom. The Ninth Circuit analyzed the hourly wages and benefits required by the ordinance and concluded that the ordinance affected the bargaining process in a much more invasive and detailed fashion than the isolated statutory provision of *Fort Halifax*. *Id.* at 502. The Court specifically said this ordinance was very different from a minimum wage law applicable to **all employees** guaranteeing a minimum hourly wage. *Id.* In *Bragdon*, the Ninth Circuit

concluded that the ordinance in that case substituted "the free-play of **political forces** for the free-play of **economic forces** that was intended by the National Labor Relations Act." *Id.* at 504 (emphasis added).

The ordinance in *Bragdon* like the Minimum Wage Amendment is more properly characterized as an example of "an interest group deal in public-interest clothing." *Id.* at 503. Here, the AFL-CIO, which is an interest group, drafted a constitutional amendment whose purpose was a prohibited one under federal labor law to level the playing field between union and non-union companies. The states are forbidden from operating in this arena because federal labor law governs the playing field between union and non-union companies. The AFL-CIO has sought to substitute the free-play of political forces for the free-play of economic forces that was intended by the National Labor Relations Act.

The District Court's response that the MWA does not mention the AFL-CIO's intent (App. at 12) is irrelevant. The ordinance in *Bragdon* also did not mention the drafter's intent. However, it still was preempted because like the MWA, it involved a zone protected and reserved for market freedom. While the District Court said, "This case has no relation to collective bargaining or unionized employees," (App. at 12), that is **not true**. Western Cab is unionized and its chief negotiator states, "The Minimum Wage Amendment exerts pressure on Western

Cab, that it otherwise would not have had, to reach a collective bargaining agreement with the union on wages and health benefits." App. at 674.

Moreover, the MWA does show the AFL-CIO's intent on its face. In Section 16(B), the MWA states the minimum wage may be waived in a collective bargaining agreement but **not** in an agreement between an individual employee and an employer. The MWA also interferes with the National Labor Relations Act by stating that unilateral implementation of terms and conditions (even if they had previously been in a collective bargaining agreement) shall not constitute a waiver of the MWA. The MWA was drafted by unions and favors union employees. It clearly involves a zone protected and reserved for market freedom and thus is preempted by the National Labor Relations Act.

In *520 South Michigan Avenue Associates v. Shannon*, 549 F.3d 1119, 1121 (7th Cir. 2008), Unite Here Local 1, a labor union, had joined together with the State of Illinois to dismiss a declaratory judgment action challenging an amendment to a state labor law. The original One Day Rest In Seven Act provided for a twenty-four hour rest period in a calendar week and a 20-minute meal period every day. The Amendment provided for hotel room attendants to have two 15-minute paid rest breaks and one 30-minute meal period in each work day. *Id.* at 1122.

The Seventh Circuit Court of Appeals began its analysis with the supremacy clause and quoting from *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724, 738 (1985), said:

> In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue. Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.

Id. at 1124.

The Seventh Circuit cited the *Brown* case and held that the Attendant Amendment was preempted by *Machinists*. *Id.* at 1126. Illinois and the union argued that the Amendment was a minimum labor standard and was not preempted by the National Labor Relations Act. *Id.* The Seventh Circuit, in reliance on *Metropolitan Life,* held that minimum state labor standards affect union and non-union employees **equally** and neither encourage nor discourage the collective bargaining processes that are the subject of the National Labor Relations Act. *Id.* at 1127. Quoting from the *Brown* decision, the Seventh Circuit found that judicial concern had focused on the nature of the activities which the states had sought to regulate rather than on the method of regulation adopted. *Id.* at 1129. The Court cited *Bragdon* and relied on the Ninth Circuit's conclusion that the ordinance in that case was very different from the minimum wage law applicable to **all**

employees guaranteeing a minimum hourly wage. *Id.* at 1132. The Seventh Circuit said:

> Additionally, while on its face this law applies to union and non-union employers equally, the statute's narrow application equates more to a benefit for a bargaining unit than an individual protection.

Id. at 1133. Similarly here, the Minimum Wage Amendment equates more to a benefit for the AFL-CIO and bargaining units than an individual protection.

In *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 283 (1986), Wisconsin maintained a list of every person or firm found by judicially enforced orders of the National Labor Relations Board to have violated the National Labor Relations Act in three separate cases within a five-year period. State procurement agents were statutorily forbidden to purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators. *Id.* at 283-84. In 1982, Wisconsin placed Gould on its list of labor law violators and told Gould that it would enter into no new contracts with the company for three years, until 1985. *Id.* at 285.

The United States Supreme Court found that through the National Labor Relations Act, Congress largely displaced state regulation of industrial relations. *Id.* at 286. The Court said:

> Because "conflict is imminent" whenever "two separate remedies are brought to bear on the same activity," . . . the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from

> providing their own regulatory or **judicial remedies** for conduct prohibited or arguably prohibited by the Act.

Id. (Emphasis added.) Here, the MWA provides a judicial remedy for "leveling the playing field between non-union employers and unionized employers" which is prohibited or arguably prohibited by the National Labor Relations Act. The MWA adds a remedy to those prescribed by the National Labor Relations Act.

The *Gould* Court found that judicial concern had necessarily focused on the nature of the activities which States have sought to regulate rather than on the method of regulation. *Id.* at 287. The Court held to allow a State to grant a remedy, which has been withheld from the National Labor Relations Board, only accentuates the danger of conflict because the range and nature of those remedies that are or are not available is a fundamental part of the comprehensive system established by Congress. *Id.* Through the MWA, Nevada is granting a remedy to level the playing field between non-union and union companies which has been withheld from the National Labor Relations Board.

Wisconsin argued that it was exercising its spending power rather than its regulatory power but the Supreme Court found that was a distinction without a difference because a debarment statute served plainly as a means of enforcing the National Labor Relations Act. *Id.* Here, the Minimum Wage Amendment by requiring a higher minimum wage if health benefits at a certain cost are not

provided serves plainly as a means of adding a remedy in organized labor's quiver which the National Labor Relations Act does not grant.

On December 14, 2015, in *Direct TV, Inc. v. Imburgia*, 577 U.S. ___, 2015 WL 8546242 (Dec. 14, 2015), the United States Supreme Court said, "Lower court judges are certainly free to note their disagreement with a decision of this Court. But the 'Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.'" State courts are bound by federal law and the United States Supreme Court's interpretation of the preemptive force of the National Labor Relations Act and Congress' intent to allow the free play of market forces between union and non-union companies. States are **not allowed** to level the playing field between union and non-union companies.

In *Rolf Jensen & Associates, Inc. v. Eighth Judicial District Court*, 128 Nev. Adv. Op. 42, 282 P. 3d 743, 745 (2012), the Nevada Supreme Court held that Mandalay Resorts' state law contractual indemnity claim against a consultant was preempted by the Americans with Disabilities Act of 1990. This Court said:

> The preemption doctrine emanates from the Supremacy Clause of the United States Constitution, pursuant to which state law must yield when it frustrates or conflicts with federal law . . . . The doctrine is comprised of two broad branches: express and implied preemption. . . . Express preemption occurs, as its name suggests, when Congress "explicitly states that intent in a statute's language." . . . Implied preemption arises, in contrast, "[w]hen Congress does not include statutory language expressly preempting state law." . . .

> Implied preemption contains two sub-branches: field and conflict preemption. . . . Field preemption applies "when congressional enactments so thoroughly occupy a legislative field, or touch a field in which the federal interest is so dominant, that Congress effectively leaves no room for states to regulate conduct in that field." . . . Conflict preemption, or obstacle preemption, as it is often times called, occurs when "federal law actually conflicts with any state law." . . .
>
> As we have explained:
>
> > Conflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress' objectives.
>
> . . . This petition involves conflict preemption. More precisely, this petition concerns whether, in view of the ADA's purpose and intended effects, Mandalay's state law claims pose an obstacle to the accomplishment of Congress's objectives in enacting the ADA.

282 P.2d at 746 (citations omitted). This Court concluded that the ADA intended to prevent discrimination stemming from neglect and indifference. Thus, Mandalay's indemnification claim against the consultant was deemed to weaken owners' incentive to prevent violations of the ADA and therefore would conflict with the ADA's purpose and intended effects. *Id.* at 748. *Accord Painter's Local Union No. 567 v. Tom Joyce Floors, Inc.*, 81 Nev. 1, 4-5, 398 P.2d 245, 246-47 (1965); *Nanopierce Technologies, Inc. v. Depository Trust and Clearing Corp.*, 123 Nev. 362, 168 P.3d 73 (2007), where the Court held that claims for

misrepresentation were preempted by the Securities Exchange Act; *Marcoz v. Summa Corp.*, 106 Nev. 737, 801 P.2d 1346 (1990), where the Court held that an employee's allegation of bad faith termination for the purpose of saving or reducing an employer's obligation for future contributions to an employee's retirement plan was preempted by ERISA; *Union Pacific Railroad Co. v. Harding*, 114 Nev. 545, 958 P.2d 87 (1998), where the Court held that the Federal Railway Labor Act preempted the railway's indemnity and contribution claims. The Minimum Wage Amendment is **not** a minimum labor standard applying equally to unionized and non-unionized employers and employees and its stated goal to level the playing field between union and non-union companies is preempted by the National Labor Relations Act.

V. 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.

App. at 664.

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.**

(Emphasis added.)

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. App. at 663-64, 666-67, 669-70.

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. This 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 District Court said, "The Minimum Wage Amendment and NAC § 608.102 do not act immediately or exclusively upon ERISA plans, no[r] are ERISA plans essential to the laws' operation." App. at 6. However, that is not the test for ERISA preemption. This Court held that the test was whether the state law regulates certain ERISA relationships. Here, the MWA and the Regulations regulate certain ERISA relationships "to the extent an employee benefit plan is involved, between the employer and the employee."

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 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.

VI. 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.

The District Court cited *State v. Glusman*, 98 Nev. 412, 420, 651 P.2d 639, 644 (1982) (internal citation omitted), and said, "The criterion under which we examine the assertion of vagueness is whether the statute either forbids or requires the doing of any act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." App. at 7. Certainly men and women of common intelligence must necessarily guess as to the meaning of "health benefits."

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. 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.

VII. FUEL PAYMENTS BY TAXICAB DRIVERS WHICH CAN BE MADE FROM THEIR TIPS AND VENDORS FEES SHOULD NOT BE DEDUCTED FROM THEIR NON-TIP COMPENSATION BEFORE DETERMINING COMPLIANCE WITH THE MINIMUM WAGE AMENDMENT

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.**

(Emphasis added.) The Minimum Wage Amendment does **not** mention fuel payments by taxicab drivers.

Moreover, the declarations of Danny Thompson, who states that the AFL-CIO drafted the Minimum Wage Amendment, also do not mention fuel payments by taxicab drivers. The United States Department of Labor told Western Cab that its payments for fuel for the taxicab drivers could not be considered as a credit toward the payment of minimum wage. It told Western Cab that only the amounts on the employee's paycheck could be considered as minimum wage payments. Unless there is something in the law that requires "an offset against the wage rates required by this section" for fuel payments by the drivers, Perera should not be allowed to allege this offset in any amended complaint or conduct discovery on self-declared fuel payments of the drivers. There is also no Labor Commissioner regulation or any other state law or regulation that states that drivers' fuel payments should be deducted from the wages paid to the drivers to determine if minimum wage rates are met.

In the District Court's first Decision and Order, the District Court ordered that Perera could amend his complaint to allege that fuel payments should be deducted from his total compensation, excluding tips and vendor fees, to determine whether

Western Cab was making the correct minimum wage payments. App. at 17, 26, 27. In the District Court's second Decision and Order, the District Court held:

> Perera asserts that Western's method of calculating wages is incorrect. These calculations do not only impact Western's employees and former employees. These calculations also affect the Internal Revenue Service and the Social Security Administration. Perera seeks the Court's assistance in having Western correct any incorrect calculations that have been reported to the Internal Revenue Service and the Social Security Administration.
>
> Perera states a facially valid injunctive relief claim in his Second Amended Complaint. This properly places the case in District Court Adding Irshad Ahmed and Michael Sargeant with identical injunctive relief claims would not be futile. Therefore, this is not a valid ground for the court to deny Perera's countermotion to amend.

App. at 11. The District Court cites no legal authority for allowing Perera's complaint to be amended to allege that the drivers' fuel payments should be deducted from their total compensation, excluding tips and vendor fees, in determining minimum wage. Therefore, because there is no such legal authority, Western Cab respectfully requests that this Court reverse the District Court's decision to allow this amendment to Perera's complaint.

VIII. CONCLUSION

When Perera filed his minimum wage claim in 2012 with the Labor Commissioner, the Labor Commissioner found no merit to his claim. Prior to the *Thomas* decision, Western Cab believed it was exempt from the state minimum wage. *Lucas v. Bell Trans*, 2009 WL 2424557, at *5-7 (D. Nev. Jun. 24, 2009). The

U.S. Department of Labor told Western Cab that its payment for fuel could not be considered as a credit toward minimum wage and that only the amount on an employee's paycheck could be considered. In 2012 Western Cab changed its commission-based pay system to increase the drivers' compensation so that they could pay for their own gas.

On June 26, 2014, this Court held in *Thomas* that the statutory exemption for taxicab drivers in Nevada's minimum wage statute was impliedly repealed by the Minimum Wage Amendment. Although neither the Minimum Wage Amendment nor any other state statute or regulation addresses fuel payments by taxicab drivers, the District Court in 2015 allowed Perera to amend his complaint to allege that fuel payments should be deducted from the drivers' compensation, excluding tips and vendors fees, before determining whether Western Cab met its minimum wage obligations.

The District Court ignored Perera's admissions to the Labor Commissioner in 2012 and the Labor Commissioner's conclusion that Perera had correctly been paid. Although the District Court held that Perera's claim did not arise under Chapter 608, she held that the Labor Commissioner's Chapter 608 regulations on "health benefits" were constitutional. Despite Thompson's declarations in July and August 2015 that the sole purpose of the MWA was to level the playing field between union and non-union companies, the District Court held that the MWA was not preempted by the

National Labor Relations Act. The District Court further held that the MWA and the Labor Commissioner's Regulations were not preempted by ERISA and that "health benefits" was not void for vagueness. Western Cab respectfully requests that this Court grant its petition and reverse the District Court and find that the MWA is preempted by federal labor law and ERISA, that the MWA is void for vagueness and violates the due process clauses of the U.S. and Nevada Constitutions and that the MWA does not require that fuel payments made from tips and vendors fees be deducted from compensation, excluding those tips and vendors fees.

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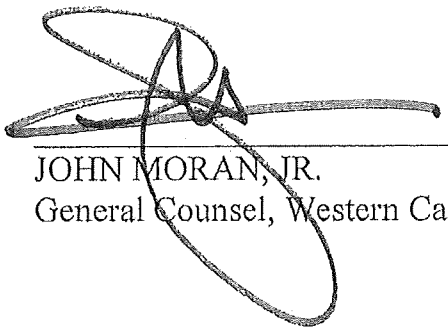
VERIFICATION

Under penalties of perjury, I, John Moran, Jr., General Counsel for Petitioner Western Cab Company, hereby declare that Western Cab Company is the petitioner named in the foregoing petition; that I know the contents thereof; that the information in the Petition is true of my own knowledge, except as to those matters stated on information and belief, and as to those matters I believe them to be true.



JOHN MORAN, JR.
General Counsel, Western Cab Company

CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 18th day of December, 2015, to the following:

Leon Greenberg, Esq.
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And a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** was served via first class, postage-paid U.S. Mail on this 18th day of December 2015, to the following:

The Honorable Linda Marie Bell
District Court Judge
Eighth Judicial District Court of Nevada
200 Lewis Avenue, #3B
Las Vegas, NV 89101

Rosalie Garcia
An Employee of Hejmanowski & McCrea LLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK; and THE HONORABLE LINDA MARIE BELL, District Judge,

Respondents,

and

LAKSIRI PERERA, IRSHAD AHMED, MICHAEL SARGEANT Individually and on behalf of others similarly situated,

Real Parties in Interest.

Case No.: _____

District Court Case No. A-14-707425-C

PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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