IN THE SUPREME COURT OF THE STATE OF NEVADA

Sup. Ct. No. 68796

WESTERN CAB COMPANY Petitioners, 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 and MICHAEL SARGEANT, Individually and on behalf of others similarly situated, Real Party in Interest	) Dist. Ct No.:A-14-707425-C)))) DOCKET 68408)))))))))))))

ANSWER OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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PRELIMINARY STATEMENT

Real parties in interest Laksiri Perera, Irshad Ahmed and Michael Sargeant file this brief in response to the brief of petitioner Western Cab Company for a writ of mandamus or prohibition vacating the portion of the Eighth Judicial District Court's Orders and Decisions of December 1, 2015 and June 16, 2016, of the Honorable Linda Marie Bell, (collectively the "District Court's Decision") rejecting petitioner's claims that Article 15, Section 16, of Nevada's Constitution imposing a minimum wage requirement (the "Minimum Wage Amendment" or "MWA") violated the United States Constitution and was preempted by federal law. Real parties in interest also file this brief in response to that portion of petitioner's brief that seeks to reverse the District Court's Decision that petitioner's requirement its taxi drivers pay for petitioner's taxis' fuel must be considered in determining whether the petitioner has violated the MWA.

SUMMARY

Petitioner's argument that the MWA is preempted by federal statutes, either the Employee Retirement Income Security Act ("ERISA") or the National Labor Relations Act (the "NLRA") share a common flawed foundation: neither of these statutes are remotely implicated by the MWA. The MWA in no fashion purports to or has the effect of regulating employee benefit plans or their structures (the purview of ERISA). Nor does it conflict with federal labor relations law (the purview of the NRLA). Nor are the terms of the MWA so vague as to render it violative of the due process provision of the United States Constitution.

The petitioner's arguments are substantively without merit. Yet even if they were accepted they provide no basis for the relief sought by petitioner, the voiding of the MWA in its entirety. The MWA, through its severance and preservation clause, requires the retention of whatever obligations it imposes that are *not* found void by a superior legal force. Petitioner's federal supremacy and due process

arguments attack the propriety of the MWA's "lower tier" minimum wage for employers who provide health insurance. Those arguments also assert it is improper for the MWA to recognize the power of collective bargaining agreements to waive its requirements. Assuming, *arguendo*, petitioner is correct in such arguments the solution is to void that "lower tier" minimum wage and waiver term. Such a result would leave the MWA's other obligations intact, as its severance clause commands, and require all employers to pay the "upper tier" hourly minimum wage of $8.25 an hour. There is no basis, and petitioner presents none, to void all of the obligations the MWA imposes, in their entirety, in the event the Court were to accept petitioner's supremacy and due process arguments.

Petitioner cites no support for its claim that its policy of forcing its taxi drivers to pay for their taxicab's fuel should be ignored for minimum wage compliance purposes. Rather it insists because the MWA "does not mention fuel payments by taxicab drivers" petitioner could require taxi drivers to pay those fuel charges, even when doing so results in those employees earning less than the hourly minimum wage required by the MWA. What petitioner did in this case, and seeks to have this Court legitimize, is any employer policy that forces an employee to pay *an employer's expenses* even when that policy results in the employee getting paid less than the minimum hourly wage required by the MWA. Granting the relief sought by petitioner on this point would, as a practical matter, destroy the MWA and render it null and void.

IN RESPONSE TO PETITIONER'S STATEMENT OF THE ISSUES PRESENTED

Petitioner's statement of the issues presented, in respect to its ERISA and NLRA preemption claims, and its due process claims, is accurate.

The remaining issue presented, is not, as petitioner claims, "[s]hould 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?" The issue presented, properly stated, is:

When an employer mandates that an employee pay expenses that are *required by the employer's business*, in this case for the fuel needed to run petitioner's taxicabs, are those expenses deducted from the employee's wages for the purpose of determining whether the minimum wage required by the MWA has been paid?

Real parties in interest do not concede that petitioner's statement of the reasons this Court should review its petition and determine its merits is accurate. They agree this Court should wisely exercise its discretion to reach the merits of the issues presented by writ petitions. Despite the frivolousness and gross illogic of petitioner's arguments, real parties in interest agree that an express finding by this Court confirming the completely meritless nature of the writ petition would be helpful and may help conserve significant judicial resources.

IN RESPONSE TO PETITIONER'S STATEMENT OF FACTS NECESSARY TO UNDERSTAND THE ISSUE PRESENTED

Most of the "facts" presented by petitioner are irrelevant. Many are untrue assumptions of petitioner that are not supported (or even implied) by the petitioner's record citations. Real parties in interest do not consume the Court's time in refuting all of the falsehoods and irrelevancies propounded by petitioner. They only respond, briefly, to two supposed "factual" assertions of petitioner:

- On the United States Department of Labor's "advice" to petitioner:

Petitioner asserts as a "fact" that "[t]he [United States] Department of Labor said [to petitioner] that only the amounts shown on a payroll check could be considered for minimum wage compliance." This statement, at page 5 of the petition, references PA[1] 356-57 and 257, involves multiple levels of hearsay. The reference to PA 356-57 is to the oral argument transcript of *petitioner's counsel* before the

[1] PA references are to the page numbers of Petitioner's Appendix.

District Court which petitioner now presents as establishing this "fact" even though it is an unsworn statement. Nor is there anything in the record even implying such counsel had personal knowledge of those assertions, meaning they involve multiple levels of hearsay. The reference to PA 257 is to petitioner's manager's sworn declaration, which further concludes that in requiring taxi drivers to pay for fuel "...Western Cab was complying with the directions of the U.S. Department of Labor." Such statement does not assert that the U.S. Department of Labor approved of that policy or even knew about it. It sets forth petitioner's conclusion that such policy complied with what petitioner has decided were that agency's "directions," there is no actual assertion such "directions" were given.

- On the statements of the Nevada AFL-CIO: The expressed goals of Danny Thompson, Executive Secretary Treasurer of the Nevada AFL-CIO, are manifestly irrelevant. That such organization seeks to achieve certain results from the MWA has no bearing on the questions presented by the petitioner.

ARGUMENT

I. ADOPTING THE PREEMPTION AND DUE PROCESS VIOLATION ARGUMENTS OF THE WRIT PETITION WOULD ONLY VOID THE "LOWER TIER" MINIMUM WAGE AND THE "COLLECTIVE BARGAINING AGREEMENT" WAIVER PROVISIONS OF THE MINIMUM WAGE AMENDMENT

Article 15, Section 16, subpart (D) of Nevada's Constitution states:

> If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section.

Petitioner's preemption and due process arguments assert that two provisions of the MWA, one in subpart (A) authorizing a lower ($7.25 an hour) minimum wage for certain employees provided with health insurance, and one in subpart (B) authorizing a full or partial waiver of the MWA's requirements as part of a "bona fide collective bargaining agreement," are invalid. Under petitioner's logic, if the

MWA contained neither provision it would pose no preemption or due process problems. If it required a single "unitary" minimum wage ($8.25 an hour for all employers without any lower tier minimum wage "health benefits" option), and contained no provision recognizing that its protections could be waived by certain collective bargaining agreements, it would not under petitioner's analysis violate ERISA, the NLRA, or be void for vagueness as a matter of due process.

As the District Court astutely observed, the severance and preservation clause, subpart (D) of the MWA, renders all of petitioner's arguments substantively meaningless. PA 12, 619-622. Acceptance of those arguments would impose a severance of the offending "health benefits" provision and impose a duty upon *all* employers to pay the "not void for vagueness" as a matter of due process (or void under ERISA) "higher tier" minimum wage rate of $8.25 an hour. *Id.*, PA 622 (District Judge Bell at oral argument: "....if there's a problem with federal preemption, I think that the solution is just to strike that portion of the amendment.") Similarly, if the NLRA preempts the "collective bargaining waiver" provision of the MWA that provision would also be inoperative, a fact irrelevant to this case that involves no collective bargaining agreement. PA 12.

Petitioner's brief is completely silent on this issue. When it was raised by the District Court at oral argument, counsel for petitioner insisted that a severance was not allowable because the MWA "is meaningless without the distinction of two rates of minimum wages" because the health benefits provision "is obviously central to the amendment." PA 621. Petitioner's counsel cited to *Sierra Pacific Power v. State Dept. of Taxation,* 338 P.3d 1244 (Nev. Sup. Ct. 2014) in support of that assertion, PA 620. The District Court found such assertion unconvincing. PA 621-22.

There is no support for petitioner's assertion that the MWA health benefit provision is "obviously central" to the MWA and that the MWA would be rendered

"meaningless" without that provision. As *Sierra Pacific Power* makes clear, this Court is obligated, whenever possible, to sever and render void "only the unconstitutional provisions" of a law and not laws in their entirety. *Id.,* 338 P.3d at 1247, citing *Rogers v. Heller*, 117 Nev. 169, 177, 18 P.3d 1034, 1039 (2001) and NRS 0.020(1). While an exception to that severance obligation exists when such a severance would result in an entire law deviating in effect from its purpose, as in *Sierra Pacific Power*, there is no basis to make such a finding in this case.

The purpose of the MWA is to provide a *constitutionally mandated* minimum wage standard for Nevada's employees, one not subject to legislative modification. The health benefit provision is a constitutionally proscribed option that employers can use to comply with that standard. It was *not* the purpose of the MWA. Voiding the MWA, and its constitutionally mandated minimum wage standard, *in toto*, because the health benefits compliance option it provides is constitutionally infirm, or void under federal supremacy, would be improper.

II. THE NATIONAL LABOR RELATIONS ACT DOES NOT PREEMPT THE NEVADA CONSTITUTION'S MINIMUM WAGE AMENDMENT

A. Petitioner's assertion that the MWA is a "labor policy" of the State of Nevada created for the purpose of assisting union members has no basis in reality.

Petitioner's argument that the MWA is completely preempted by the NLRA rests upon its claim that "[t]he purpose of the Minimum Wage Amendment is **to help level the playing filed between non-union and unionized employees...**" Petition, p. 10, emphasis in original. *See, also*, Petition, p. 12 "...the stated purpose of the Minimum Wage Amendment is the furtherance of a labor policy [to increase the compensation of AFL-CIO members in Nevada and level the playing field between union/non-union workers]."

This "stated purpose" of the MWA ascribed by the petitioner has no basis in reality. It certainly has none in the text or directives of the MWA itself. It is a

construction of petitioner resting solely upon certain statements by Danny Thompson, the leader of the Nevada AFL-CIO. While it is concievable such is the belief of Mr. Thompson, there is no basis to conclude that is the purpose of the MWA. Nor is such person's subjective beliefs, which are unknown since all that is in the record are unexamined comments by Mr. Thompson, germane to determining the purpose of the MWA.

The purpose of the MWA is apparent from its language and the legal obligations it commands. It places in Nevada's Constitution hourly minimum wage standards that apply equally to *all* Nevada employees within its specified coverage, union and non-union. It is the "minimum" or "starting point" of compensation that *all employers* in Nevada must recognize. Of course many employers, both union and non-union, agree through negotiation to pay compensation far in excess of that minimum standard. The MWA's recognition of a potential full or partial waiver of its obligations, through the terms of a negotiated collective bargaining agreement, is a concession to the superior force of the NLRA and the requirement that state law must yield to federal labor law. *See*, *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994) (Suggesting, relying upon other Supreme Court precedents, that labor unions can bargain away the state law protections conferred upon individual employees if they do so in a "clear and unmistakable" fashion).

B. The NLRA does not act to preempt the MWA except in the mind of petitioner, whose assertions are based upon its fabricated Nevada "labor policy" and its invention of an NLRA protected zone of "market freedom" that it claims has been intruded upon by the MWA.

As the United States Supreme Court has repeatedly held "where 'federal law is said to bar state action in fields of traditional state regulation, ... we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *California Div. Of Labor Standards Enforcement v. Dillingham*

Construction, 519 U.S. 316, 325 (1997) ("*Dillingham")*, quoting and citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Contrary to petitioner's assertions, the NLRA does not preempt every state regulation that intrudes upon "market freedom." Nor does it preempt state standards that influence what employers and employees may choose to negotiate through the NLRA's collective bargaining process. Petitioner cites not one scintilla of support for such assertions. If the NLRA did so every single subject involving employment that a State might seek to regulate, whether minimum wages, maximum hours of work, workplace safety, worker's compensation or unemployment insurance requirements, would be preempted by the NLRA since they would interfere with "market freedom." Petitioner also misrepresents the holding of the definitive United States Supreme Court precedent on the NLRA's preemption of State wage and hour laws, *Fort Halifax Packing Co. Inc., v. Coyne*, 482 U.S. 1 (1987), instead relying upon *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) which *Fort Halifax Packing* considered and found wholly inapplicable to the same. Petitioner also relies upon other earlier and/or non-controlling and inapplicable precedents which real parties in interest, out of respect for the Court's time, do not bother discussing.

Fort Halifax Packing conclusively disposes of petitioner's NLRA preemption argument. In that case a Maine statute required employers to pay all employees of certain sized businesses a specified amount of severance pay in the event of a plant closing. 482 U.S. 3-4, 26 MRSA 625-B. Employers were also free to negotiate contracts with their employees, either non-union or union, that provided for at least those minimum severance benefits. In rejecting the employer's claim such State law improperly intruded upon the NLRA's regulation

of the collective bargaining process, the Supreme Court concluded that such regulation of labor standards was within the traditional and proper police powers of the States and "...the law is not pre-empted by the NLRA, since its establishment of a minimum labor standard does not impermissibly intrude upon the collective-bargaining process." 482 U.S. at 22.

Petitioner argues *Fort Halifax* is irrelevant because "[h]ere, the AFL-CIO states that the Minimum Wage Amendment does **not** apply equally to union and non-union workers and the entire purpose of the two-tiered floor is to favor union employees and union companies." Brief, p. 15. Assuming*, arguendo*, such is the "statement" of the AFL-CIO, petitioner provides no explanation of why that statement (by a private, non-governmental actor) mandates this Court adopt such a conclusion. Or for that matter even why such statement is germane to answering the question raised, which is whether the MWA differentiates between union and non-union employees and by doing so runs afoul of the NLRA under *Fort Halifax.*

The answer to that question is clear. The MWA, contrary to petitioner's assertions, is a state labor law standard (minimum wages whereas *Fort Halifax* involved severance pay) that ***does apply equally to union and non-union employees.*** Absent an express waiver of its protections in a collective bargaining agreement, it has the exact same impact on union and non-union employees, the situation presented by *Fort Halifax.*

The only thing that arguably differentiates this case from *Fort Halifax* is the MWA's express recognition of a collective bargaining agreement's power to waive the MWA's state law protections. That issue was never reached in *Fort Halifax*. The Supreme Court addressed that issue seven years later, in *Livadas,* 512 U.S. at 125, relying upon its earlier precedents, *Lingle v. Norge Div. Of Magic Chef*, 486 U.S. 399, 409-10, fn 9 (1988) and *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983). While it is also arguable that such issue was not conclusively resolved

by *Livadas* either, its citation to *Lingle* and *Metropolitan Edison* establishes that such a waiver of state law rights was only possible if it was done by parties to a collective bargaining agreement in a "clear and unmistakable" fashion. *Id.* The MWA follows this directive from *Livadas.* It does not, as petitioner implies, automatically, routinely, or in any casual matter of fact fashion, allow any waiver of its protections by unionized employees. Completely consistent with *Livadas*, the MWA only allows such a waiver under Subpart (B) if it is set forth in "clear and unambiguous terms" in a collective bargaining agreement.

Instead of acknowledging the controlling force of *Fort Halifax*, petitioner engages in circular reasoning. It argues that because it feels that the MWA is being used to exert pressure upon it in its collective bargaining negotiations with its union the MWA contravenes the NLRA. Setting aside the accuracy of such assertion, it is, if true, wholly irrelevant. *Fort Halifax* recognized that state labor standards must, sometimes, influence collective bargaining and such circumstances poses no conflict with the NLRA:

> It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any state law that substantively regulates employment conditions. Both employers and employees come to the bargaining table with rights under state law that form a " 'backdrop' " for their negotiations..... ...."there is nothing in the NLRA ... which expressly forecloses all state regulatory power with respect to those issues ... that may be the subject of collective bargaining." *Id.*, 482 U.S. at 21-22, quoting and citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504-505 (1978).

In any event, as observed by the District Court, and as discussed, *supra*, if this Court were to find, despite the reasoning of *Livadas*, that the MWA cannot allow any waiver of its protections, by any collective bargaining agreement, under any circumstances, without running afoul of the NLRA, the solution is to sever and invalidate its waiver term, not the MWA in its entirety.

III. ERISA DOES NOT PREEMPT THE NEVADA CONSTITUTION'S MINIMUM WAGE AMENDMENT

A. ERISA preemption only arises when a State regulates the *content* of employee insurance or benefits, such as by *mandating* that insurance include particular provisions; such circumstances are not present in this case as the MWA imposes no mandates or regulations on the insurance or other benefits employers provide.

Petitioner's ERISA preemption argument rest upon a distortion of the holding of the controlling cases, such as *Shaw v. Delta Air Lines*, *Inc.*, 463 U.S. 85, 96-97 (1983) and *Dillingham,* 519 U.S. at 332-33*,* along with irrelevant citations to inapplicable lower court decisions. In doing so it seeks to have this Court adopt petitioner's specious arguments about what constitutes a "connection with or reference to" an ERISA plan sufficient to trigger ERISA preemption. Petitioner seeks to have this Court adopt an improper legal standard that would conclude, *ipso facto*, because the Nevada Constitution has language "referencing" employer provided health insurance, by merely mentioning health benefits in any context, it is preempted by ERISA.

Petitioner spins the concept of "connection with" or "reference to" in respect to ERISA plans and ERISA preemption on its head. It seeks to create an absurd reverse "Midas Touch" whereby ERISA preempts any regulation, of any State, that *merely confers some other wholly collateral and independent benefit on an employer whose ERISA plan meets certain standards.* Such State laws do not "relate" to any ERISA plan. Quite the contrary, it is the ERISA plan *that relates to the state law as the ERISA plan triggers the independent benefit the state law provides.* This Midas Touch preemption urged by petitioner would void all state laws that simply mention employee benefits but never regulate, constrict, expand, modify, or concern anything an ERISA plan*,* or an employer*,* may or may not choose to do in respect to employee benefits.

The actual language of the Supreme Court's decision in *Shaw*, free from

petitioner's distortions, makes clear the speciousness of petitioner's argument:

> A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. Employing this definition, the Human Rights Law, which prohibits employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy, and the Disability Benefits Law, which requires employers to pay employees specific benefits, clearly "relate to" benefit plans. *Id.*

As *Shaw* recognizes, "relates to" for ERISA preemption purposes means, of course, a State law or regulation that prohibits, limits, requires or in any fashion controls what an ERISA plan may or may not do. This need to apply *Shaw's* holding within such a framework, and the incorrectness of petitioner's reading of *Shaw* and other ERISA preemption cases, was discussed in detail in *New York State Conference of Blue Cross & Blue Shield Plans v. Traveler's Ins. Co.*, 514 U.S. 645, 655 (1995):

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere," *H. James, Roderick Hudson xli* (New York ed., World's Classics 1980). But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.

Traveler's rejected an assertion of ERISA preemption for a state law that imposed certain surcharges on hospital bills paid by non-Blue Cross/Blue Shield insurers. The argument such state law "related to" ERISA plans was far greater in *Traveler's* than in this case, as the ERISA plans were the predominate purchasers of insurance. *Traveler's* held such state law, despite its presumably substantial "indirect economic influence" on the insurance such ERISA plans would purchase, was not subject to ERISA preemption as it did not "bind plan administrators to any particular choice and thus function as a regulation of the ERISA plan itself." 514 U.S. at 659.

If the holding of *Traveler's* was not sufficient to resolve petitioner's specious assertions about ERISA preemption, the subsequent decision in *Dillingham* 519 U.S. at 332-33 (1997) unquestionably uncovers their barrenness.

Dillingham concerned California's public works laws that provided, among other things, that certain apprentices in "approved apprenticeship programs," who received ERISA plan benefits, could be paid lower wages on public works projects. 519 U.S. at 319. Apprentices enrolled in "unapproved" programs could not be paid that lower wage. *Id.* The Supreme Court unanimously rejected a claim of ERISA preemption of that California statutory scheme. *Id.*

In its analysis, the Supreme Court initially observed that the California statute "does not make reference to ERISA plans." 519 U.S. at 328. While the statute created a minimum wage scheme for public works apprentices that is dependent upon a properly funded "apprentice program," such program itself need not be an ERISA plan. 519 U.S. at 327-28. This is because such a program could be funded entirely from an employer's assets and the California statute imposed no requirement it be funded by an ERISA plan. *Id.*

Nevada's Constitution, in its provision allowing employers to pay a lower minimum wage, functions in entirely the same fashion as in *Dillingham*. While employers providing health insurance benefits may pay a lower minimum wage, there is no requirement such health insurance be provided through an ERISA plan. It could, as in *Dillingham*, be provided entirely from an employer's general funds and *not* from an ERISA plan.

In respect to the alternative argument in *Dillingham* that California's apprenticeship law was "connected with" an ERISA plan, because it had some sort of indirect economic effect on ERISA plans, *Dillingham*, as in *Traveler's* squarely rejected that argument:

> The prevailing wage statute alters the incentives, but does not dictate the choices, facing ERISA plans. In this regard, it is "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." *Travelers*, 514 U.S., at 668, 115 S.Ct., at 1683. We could not hold pre-empted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort. We thus conclude that California's prevailing wage laws and apprenticeship standards do not have a

"connection with," and therefore do not "relate to," ERISA plans. 519 U.S. at 334.

Petitioner's ERISA preemption argument is identical to the one made, and rejected, in *Dillingham*. While Nevada's Constitution may "alter the incentives" to employers and their ERISA plans, in respect to the employee benefits they choose to provide, they do not "dictate the choices" those plans may make.[2] Petitioner's claim of ERISA preemption is without merit and contrary to law.

IV. PETITIONER'S DUE PROCESS ARGUMENTS ARE SPECIOUS AND SUBSTANTIVELY IRRELEVANT

As discussed, *supra*, petitioner's due process attack on the Nevada Constitution's health benefits provision as being unconstitutionally vague, if granted, must result in the imposition of the "higher tier" minimum wage rate to all Nevada employees. Accordingly, such argument is substantively irrelevant.

The petitioner cites wholly inapplicable law, dealing with the burden of the State to adequately define criminal offenses, or its regulation of constitutionally protected conduct, *Sheriff, Washoe County v. Burdg*, 59 P.3d 484, 486-87 (Nev. 2002). Petitioner is not subject to any criminal prosecution in this case. Nor does it have any constitutionally protected right to pay its employees whatever it wishes.

A constitutional challenge to a statute being so vague as to violate due

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[2] Petitioner's argument on this point ventures beyond the boundaries of appropriate, effective, and perhaps even permissible, advocacy. At page 29 of its brief it states: "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." While that may be true for an employer to benefit from the MWA's "lower tier" minimum wage rate, the employer is not compelled to offer health benefits of any sort by the MWA. Similarly, at page 32 of its brief, it states: "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." (emphasis by petitioner). This sort of language appears intended to communicate something that is clearly untrue: That the MWA is requiring that an employer provide ("must offer") certain health insurance.

process protections requires a showing that the obligations it imposes are "so vague that men of common intelligence must guess at its meaning and differ as to its application." *Sheriff v. Martin*, 662 P.2d 634, 637 (Nev. 1983). While petitioner cites *Martin* with *Burdg* it offers no explanation of how the Nevada Constitution is too "vague" for it to understand its health benefits provision. It similarly attacks the NAC provisions issued to detail that provision's standards as too "vague."

Employers provide health insurance to employees. This is a traditional and known benefit which is now encouraged or required for many employers and employees by the Affordable Care Act. Indeed, the petitioner does not dispute it provided health insurance benefits to at least some of its taxi drivers, although the premiums it charged did afford it the privilege of paying the "lower tier" minimum wage. Nevada, by statute, NRS Chapter 689B and 689A, and at NRS 608.1555, provides statutory guidance as to the requirements for group health insurance and employer provided insurance generally. It also does so via regulations set forth at NAC 608.102.

The health insurance provision of Article 15, Section 16, of Nevada's Constitution refers to a known, and commonly understood, benefit. It certainly is not any more "vague" or constitutionally infirm than the concept of "due process" itself. Indeed, it is far less so. Petitioner does not even purport to meet the very high burden it must overcome in showing the presumption Article 15, Section 16's health insurance provision is valid. *See*, *Douglas Disposal Inc. v. Wee Haul, LLC*, 170 P.3d 508, 512 (Nev. 2007).

V. PETITIONER CANNOT BE ALLOWED TO SUBVERT THE MINIMUM WAGE ACT BY REQUIRING SEPARATE PAYMENTS FROM EMPLOYEES THAT REDUCE THEIR WAGES BELOW THE MINIMUM WAGE RATE

The District Court's Decision found a claim for a MWA violation was stated by Real Parties in Interest's allegations that (1) Petitioner required its taxi drivers to pay for the fuel consumed by petitioner's taxis; and (2) Such required payments,

when deducted from the wages paid by petitioner to those taxi drivers, reduced the wages actually received by those taxi drivers below the minimum rate required by the MWA. Petitioner presents a two and one-half page argument that the District Court's ruling on this point was erroneous, consuming a full page of that argument (single spaced) with a recital of the MWA and the District Court's Decision. It cites no precedent in support of its argument, attacks the District Court's failure to do so in its decision, and confines its argument to the succinct claim that neither the MWA, Danny Thompson of the AFL-CIO, nor any specific Nevada statute or regulation "...states that drivers' fuel payments should be deducted from the wages paid to the drivers to determine if minimum wage rates are met." Petitioner's Brief, p. 39.

The MWA commands every employer ***pay*** each employee the minimum amount per hour (the "MWA minimum") it specifies. Petitioner does not dispute such is the obligation of the MWA and that it cannot *deduct* from its taxi driver's wages a cost for fuel and pay a resulting cash wage less than the MWA minimum. Nor does petitioner assert an employer can pay an employee a cash amount equal to the MWA minimum and simultaneously require the employee to pay the employer *back* some or all of that cash amount. "Pay" within the meaning of the MWA requires an employee *actually receive* the MWA minimum.

Petitioner does not require its taxi drivers participate in a direct "cash pay back to the employer" arrangement for $1.00 an hour, $100 a day or for some other amount. Presumably it would acknowledge that such an arrangement would violate the MWA if it reduced the taxi driver's *received wages*, after the "cash pay back," to an amount below the MWA minimum. That petitioner requires its taxi drivers to make a "fuel pay back," and not a "cash pay back," by purchasing the fuel used by petitioner's taxi cabs, is an irrelevant difference in form and not substance. Except for insisting that the MWA does not mention anything about employees being

required to pay for fuel, petitioner offers no comprehensible, or any, explanation of how such a forced "fuel pay back" arrangement does not create the same violation of the MWA as a "cash pay back" arrangement.

It is well established that employers cannot be allowed to subvert or evade their minimum wage obligations by forcing employees to pay *the employer's necessary expenses*. *See, Arriaga v. Florida Pacific Farms, LLC,* 305 F.3d 1228, 1236 (11th Cir. 2002):

> The Growers contend that the FLSA [the Federal minimum wage law, the Fair Labor Standards Act] was satisfied because the Farmworkers' hourly wage rate was higher than the FLSA minimum wage rate and deductions were not made for the costs the Farmworkers seek to recover. The district court correctly stated that there is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear. An employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage. See 29 C.F.R. § 531.36(b). This rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during the employment. See id. § 531.35; *Ayres v. 127 Rest. Corp.,* 12 F.Supp.2d 305, 310 (S.D.N.Y.1998).

Petitioner's taxi cabs required fuel or petitioner's taxi cab business would cease operations. Requiring petitioner's taxi cab drivers to pay for that fuel, to the extent such payments when deducted from their wages reduced their actually paid wages below the MWA amount, violated the MWA. Such a violation occurred just as surely in that circumstance as if the petitioner had, in the first instance, paid the same "below MWA amount" in wages or had required a "cash pay back" in an amount equal to those fuel expenses.

CONCLUSION

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

Dated: February 25, 2016

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 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 5672 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 25th day of February 2016

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 25, 2016, she served the within:

ANSWER OF REAL PARTY IN INTEREST
TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

by court electronic service:

TO:
Malani Kotchka
HEJMANOWSKI & MCCREA LLC
520 S. 4th St., Suite 320
Las Vegas, NV 89101

And a true and correct copy of the foregoing ANSWER OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION was served via personal service on February 26, 2016, 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

/s/Sydney Saucier
Sydney Saucier