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.: 69408

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

PETITIONER'S REPLY TO RESPONSE OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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I. Writ Relief Is Needed.

Generally, writ relief is available upon demonstration that: (1) an eventual appeal does not afford "a plain, speedy and adequate remedy in the ordinary course of law," and (2) mandamus is needed to compel the performance of an act that the law requires or to control the district court's manifest abuse of discretion. NRS 34.160; NRS 34.170; *Tallman v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 117-18 (2015). However, mandamus relief may also issue within the discretion of this Court when petitions raise important issues of law in need of clarification, involve significant public policy concerns, and this Court's review would promote sound judicial economy. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Seventh Judicial District Court*, 132 Nev. Adv. Op. 6, 2016 WL 348036, *2, *citing Int'l Game Tech., Inc. v. Second Judicial District Court*, 122 Nev. 132, 142-43, 127 P.3d 1088, 1096 (2006).

In *Corporation of the Presiding Bishop*, this Court addressed a petition for writ relief "because it present[ed] a narrow legal issue concerning a matter of significant public policy, and its resolution [would] promote judicial economy." *Id.* There, the question was whether the State Engineer had improperly applied a statute retroactively, raising a "clear question of law." *Id.* In addition, the question

affected hundreds of parties who had contested Southern Nevada Water Authority's applications intended to pipe water from rural northern Nevada basins to Las Vegas, therefore making the matter one of "great public importance." Finally, this Court concluded that judicial economy would be served by "determining the proper application of a statute that plays an important role in a matter that has spanned 25 years and multiple adjudications." *Id.* Here, the adjudication of possible preemption of Nevada's Minimum Wage Amendment by federal law affects hundreds of thousands of Nevada wage earners and Nevada employers, small and large. As in *Corporation of the Presiding Bishop*, this Court's "discretionary intervention is warranted." *Id.*

The Court's intervention by writ in this case is urgently needed to alleviate massive and recurring confusion among employers, employees and the numerous State District Courts and federal District Courts called upon to administer the MWA. An appeal would not suffice given the confusion and urgency of the resulting situation. *Cote H. v. Eighth Judicial District Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) ("While an appeal generally constitutes an adequate and speedy remedy precluding writ relief, we have, nonetheless, exercised our discretion to intervene 'under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor granting of the petition."). *See also, State, ex rel. NDOT v.*

Eighth Judicial District Court, 132 Nev. Adv. Op. 10, 2016 WL 757509, *2 (2016) (even if NDOT had a plain, speedy, and adequate remedy in the form of an appeal of a judgment rendered against it in case against it for flooding damage, this Court determined to exercise its discretion and consider NDOT's writ petition "because the applicability of NRS 11.258 to NDOT raises an important legal issue in need of clarification" and "[f]urthermore, the interests of sound judicial economy and administration favor resolving th[e] writ petition"); *Manuela H. v. Eighth Judicial District Court*, 132 Nev. Adv. Op. 1, 365 P.3d 497, 501 (2016) (in case challenging district court order requiring mother to submit to drug testing, petition for writ review granted because the petitioner did not have an adequate legal remedy and her petition raised "an important issue of law that requires our clarification"); *Buckwalter v. Eighth Judicial District Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010) (writ review granted where the issue involved "an unsettled and potentially significant, recurring question of law..."). Western Cab urges this Court to consider its petition for writ of mandamus or prohibition as resolution of the issues presented is necessary to end the confusion affecting Nevada employers and employees.

II. <u>These Facts Are Necessary to Understand the Issues Presented</u>.

During the oral argument in *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014), this Court asked if there was anything to

suggest that the MWA's purpose was so limiting. The Nevada AFL-CIO and its affiliates "drafted [the MWA] in conjunction with our lawyers at the law firm of McCracken, Stemerman & Holsberry." App. at 663-64. The "purpose" of the MWA was explained:

> 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 standards inside Nevada, and we understand many outside Nevada fail such standards.

App. at 663-64. The AFL-CIO said:

> [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. They work as cab drivers and casino dealers.

App. at 666-67. Finally, the AFL-CIO concluded:

> 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 667. Thus, it is an undisputed fact that the two-tiered minimum wage was designed by the AFL-CIO to level the playing field between union and nonunion employers and to economically benefit union employees. If the lower tier was

severed from the MWA, as proposed by Perera, it would thwart the AFL-CIO's entire purpose in drafting the MWA.

III. Severance Would Undermine the Purpose of the MWA.

In his Response, Perera argues that the lower minimum wage provision of the MWA can be severed and the constitutionality of the MWA could be upheld. Response, pp. 4-6. Perera is wrong. In *Sierra Pacific Power v. State Dep't of Tax.*, 130 Nev. Adv. Op. 93, 338 P.3d 1244 (2014), the district court had held that the tax exemption for locally mined minerals violated the dormant Commerce Clause of the United State Constitution which prevented states from unlawfully discriminating against interstate commerce. 338 P.3d at 1245. In regard to severability, this Court held, "We conclude that NRS 372.270 is not severable because it is clear that the legislative intent of the statute was to protect local mines, and thus, the district court properly refused to extend the exemption to all mine and mineral proceeds." *Id.* at 1246.

Here, it is clear that the AFL-CIO's intent in drafting the MWA was to help level the playing field between nonunion employers and unionized employers by granting unionized employers a lower minimum wage because, "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 standards inside Nevada, and we

understand many outside Nevada fail such standards." App. at 664. The AFL-CIO said, "[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." App. at 666-67. Since it is clear that the intent of the MWA was to enable unionized employers to pay the lower tier minimum wage, the lower tier is not severable. Excising this provision would violate the intent of the drafters of the MWA.

In *Sierra Pacific Power*, this Court held:

> But a preference is not a mandate, and not all statutory language is severable. Before language can be severed from a statute, a court must first determine whether the remainder of the statute, standing alone, can be given legal effect, and whether preserving the remaining portion of the statute accords with legislative intent. . . . **For the latter reason, voter initiatives and enacted ballot measures undergo additional scrutiny before statutory language may be severed, as the court must consider the effect of severance on the purpose of a voter-enacted statute. . . .**
>
> . . . We therefore turn to whether severance would undermine the purpose of the statute.
>
> . . . .
>
> Because the legislative history clarifies that the narrowness of the exemption is essential to the purpose of the statute, we conclude that NRS 372.270 is not severable.

338 P.3d at 1247-48 (emphasis added). Here, the AFL-CIO's purpose in drafting the MWA is the two-tiered minimum wage which favors union employers and union employees. If this Court were to sever the lower tier, the MWA would not give

unionized employers the preference which was the purpose of its drafters. The MWA is not severable.

IV. The Minimum Wage Amendment is Preempted by Federal Labor Law, the National Labor Relations Act.

In *Tallman*, *supra*, 259 P.3d at 121, this Court found that nothing in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. at 333 (2011), "suggests that the FAA preemption principles it articulates do not apply broadly in other contexts, including state-law-based wage and hour claims." Similarly, the National Labor Relations Act's preemption principles apply to the two-tiered minimum wage designed by the AFL-CIO to level the playing field between union and nonunion companies.

In *Bechtel Construction, Inc. v. United Brotherhood of Carpenters & Joiners of America*, 812 F.2d 1220, 1225 (9th Cir. 1987), the union maintained that the California Approved Standards for minimum wage were nothing more than a minimum benefit provision protecting employees in general independent of the collective bargaining process. The Ninth Circuit held that despite the union's assertion, the Standards could not be minimum legal requirements if the lower wage rates could be negotiated with the approval of the Division of the Apprenticeship Standards. The court said, "A 'minimum' by definition cannot be undercut." *Id.* at 1226. Because the California requirements did not affect all workers equally, the Ninth Circuit held that they were preempted by federal labor law. *Id.* Here, too, the

two-tier minimum wage is not a true minimum. It affects and is designed to affect union and nonunion employees differently. App. at 674.

Perera relies primarily on *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987), in his Response. In *Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497, 501 (9th Cir. 1995), the Ninth Circuit said:

> The Court in *Fort Halifax* confirmed its holding in *Metropolitan Life* that the NLRA is concerned with ensuring an equitable bargaining process. The Court has thus made it clear, as it stated in *Metropolitan Life*, that "[n]o incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, *at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA*." *Metropolitan Life*, 471 U.S. at 754-55, 105 S. Ct. at 2397 (emphasis added).
>
> . . . [S]tate legislation, which interferes with the economic forces that labor or management can employ in reaching agreements, is preempted by the NLRA because of its interference with the bargaining process.

Id. at 501. Here, the AFL-CIO is quite candid that the purpose of the MWA is to interfere with economic forces and the bargaining process. The sole purpose according to the AFL-CIO is to level the playing field between union and nonunion employers. That is a prohibited goal because the National Labor Relations Act controls the economic forces that labor or management can employ in reaching agreements.

The MWA is not a true minimum wage act. It provides for a two-tiered system designed to level the playing field between union and nonunion companies.

The MWA is like the ordinance in *Bragdon* which set detailed minimum wage and benefit packages which varied from time to time as new averages were calculated. *Id.* at 502-03. The Ninth Circuit concluded in *Bragdon*:

> A precedent allowing this interference with the free-play of economic forces could be easily applied to other businesses or industries in establishing particular minimum wage and benefit packages. This could redirect efforts of employees not to bargain with employers, but instead, to seek to set minimum wage and benefit packages **with political bodies**. This could invoke defensive action by employers seeking to obtain caps on wages in various businesses or industries. This could be justified as an exercise of police power on community welfare grounds of lowering construction costs to attract business to the area or lowering costs to consumers so as to make products or services more available to the general public. **This substitutes the free-play of political forces for the free-play of economic forces that was intended by the NLRA.** [Emphasis added.]

Id. at 504. Here, instead of organizing and bargaining with employers, the AFL-CIO used political power, rather than economic power, to draft the MWA to help level the playing field for union companies. This substitutes the free-play of political forces for the free-play of economic forces that was intended by the NLRA.

In *Livadas v. Bradshaw*, 512 U.S. 107, 131 (1994), cited by Perera, the United States Supreme Court discussed *Fort Halifax,* stating:

> Most fundamentally, the Maine law treated all employees equally, whether or not represented by a labor organization. **All were entitled to the statutory severance payment, and all were allowed to negotiate agreements providing for different benefits**. Second, the minimum protections of Maine's plant closing law were relinquished not by the mere act of signing an employment contract (or collective-bargaining agreement) but only by the parties' express agreement on

> different terms, see *id.*, at 21, 107 S. Ct. at 2222-2223. (Emphasis added.)

Livadas determined that the California Labor Commissioner's policy was preempted by federal labor law. *Id.* at 132.

Similarly, in *McCollum v. Roberts*, 17 F.3d 1219, 1223 (9th Cir. 1994), the Court applied *Fort Halifax* and held that an Oregon law guaranteeing minimum rest periods only to nonunion employees discriminated against union workers and burdened the collective bargaining process without a legitimate purpose. Through the MWA, the State of Nevada is handing out benefits to unionized employees which opens it up to charges of pro-union discrimination. *See Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 65 (2008). The AFL-CIO says, "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 667.

McCollum addressed *Fort Halifax* and said, "The Supreme Court thus considered the statute in *Fort Halifax* to be like the health care law it approved in *Metropolitan*: a minimum labor standard applicable to union and nonunion members alike." *Id.* at 1223. *McCollum* concluded that because Oregon's regulatory scheme discriminated against union workers and burdened a collective bargaining process

without legitimate purpose, it was inconsistent with and therefore was preempted by the National Labor Relations Act. *Id.*

Here, the MWA is **not** intended to treat union and nonunion employees alike. The MWA "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)." App. at 664. Furthermore, "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. The MWA clearly intended to interfere with market forces and is preempted by federal labor law.

At issue in *Hawaii Pacific Health v. Takamine*, 2012 WL 6738548, at *4 (D. Haw. Dec. 31, 2012), was State of Hawaii's sick leave statute that applied only to employers with collective bargaining agreements. The U.S. District Court found:

> Although the statute draws no express distinction between unionized and nonunionized employees working for the same employer, it clearly applies only to employees working for employers that are parties to collective bargaining agreements. Even if an employer with a collective bargaining agreement has some employees not covered by that agreement, no party in the present case cites any authority suggesting that section 378-32(b)'s effect on some nonunionized employees at a company that also has some unionized employees somehow makes the statute a neutral minimum labor standard equally applicable to all employees. The statute is inapplicable to employees of employers

> without collective bargaining agreements. By restricting only employers with collective bargaining agreements, the statute impermissibly favors unions and employees over employers.

Id. at *4. Since the effect of the statute was to shift the balance of power with respect to bargaining for sick leave towards employees and unions, the court found that the statute tilted negotiations as to sick leave in the employees' favor and concluded that requiring "free passes" for unionized employees was not the same as implementing a minimum labor standard. *Id.* at *5. The court said the statute touched on terms bargained for and agreed to in collective bargaining agreements favoring employees and unions over employers. *Id.* at *5. Such targeting was preempted under *Machinists*. *Id.*

Here, unionized employers get a free pass under the MWA. Through the MWA, the State is attempting to regulate or prohibit private conduct in the labor-management field. "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 wage and health benefits." App. at 674. Therefore, Western Cab respectfully requests that this Court find that the MWA is preempted by federal labor law.

V. The Minimum Wage Amendment is Preempted by ERISA.

The AFL-CIO states, "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. The MWA sets standards for benefits in ERISA benefit plans. In *Spain v. Aetna Life Insurance Co.*, 11 F.3d 129, 131 (9th Cir. 1993), the court held that a state cause of action relates to an ERISA benefit plan if the operation of the law impinges on the function of an ERISA plan. Similarly, in *Ingersoll-Rand Company v. McClendon*, 498 U.S. 133, 142 (1990), the United States Supreme Court held that because neither of the state law claims could be decided without reference to the plan, they were clearly superseded by ERISA. Here, "the 10 percent of the gross income" provision of the MWA cannot be decided without reference to the plan which is required to be created by NAC 608.102. NAC 608.102 gives an employer two choices of the type of plan it must have. Thus, the MWA and the regulations relate to an employee benefit plan which is expressly preempted by ERISA.

In *Gobeille v. Liberty Mutual Insurance Company*, 136 S. Ct. 936 (2016), Vermont enacted a statute so it could maintain an all-inclusive health care database. The state law by its terms applied to health plans established by employers and regulated by ERISA. The district court found that although Vermont's scheme might have an indirect effect on health benefit plans, the effect was so peripheral that the regulation could not be considered an attempt to interfere with the administration or

structure of a welfare benefit plan. However, the United States Supreme Court disagreed and held that Vermont's law was preempted by ERISA.

The *Gobeille* Court said:

> Second, ERISA pre-empts a state law that has an impermissible "connection with" ERISA plans, meaning a state law that "governs . . . a central matter of plan administration" or "interferes with nationally uniform plan administration." *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001). A state law also might have an impermissible connection with ERISA plans if "acute, albeit indirect, economic effects" of the state law "force an ERISA plan to adopt a **certain scheme of substantive coverage** or effectively restrict its choice of insurers." *Travelers, supra*, at 668. When considered together, these formulations ensure that ERISA's express pre-emption clause receives the broad scope Congress intended while avoiding the clause's susceptibility to limitless application.

Id. at 943 (Emphasis added).

NAC 608.102 requires an employer to offer a health insurance "plan" which covers health care expenses deductible pursuant to federal income tax law or health care benefits provided pursuant to Taft-Hartley trusts which qualify as an employee welfare benefit plan under ERISA. Thus, Nevada law requires a health insurance plan to adopt a certain scheme of substantive coverage. The Supreme Court found that Vermont's law as applied to ERISA plans was preempted and concluded, "Either way, the uniform rule design of ERISA makes it clear that these decisions are for federal authorities, not for the separate States." *Id.*, at 945.

In *Hewlett-Packard Co. v. Barnes*, 571 P.2d 502, 504 (9th Cir. 1978), the Ninth Circuit found that ERISA preempted California's Knox-Keene Health Care

Service Plan Act of 1975 because Knox-Keene directly regulated employee benefit plans. The court said, "If California desires to regulate such employee benefit plans as part of its comprehensive health care service legislation, then California must ask Congress to make appropriate changes in ERISA." *Id.* at 505.

The AFL-CIO admits that a number of nonunion plans are reported to be failing such standard inside Nevada and many outside Nevada fail such standard. App. at 664. Nevada's laws NAC 608.102 and 608.108 relate to and require employers to offer a health insurance plan (employee benefit plan) which meets certain substantive requirements. Western Cab respectfully requests that this Court find that the MWA and NAC 608.100-608.108 are preempted by ERISA.

VI. The Minimum Wage Amendment is Void for Vagueness Under Well-Established Standards.

A statute or constitutional provision may be unconstitutionally void for vagueness under two different theories. First, it is impermissibly vague "if it... fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited." *State v. Castaneda*, 126 Nev. 478, 482, 245 P.3d 550, 553 (2010); *Silvar v. Eighth Judicial District Court*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006). Second, it is unconstitutionally vague if it "lacks specific standards" to guide its enforcement, so as "to prevent arbitrary and discriminatory enforcement." *Id.*; *City of Las Vegas v. 1017 South Main Corp.*, 110 Nev. 1227, 1232, 885 P.2d 552, 554 (1994) ("the First Amendment prohibits

the vesting of unbridled discretion in government officials"). Although the Minimum Wage Amendment is composed of 700+ words divided into four subsections, it fails under both standards as it provides no guidance whatsoever as to what must be provided for an employer to qualify for the lower of the minimum wage rates. In fact, all the MWA has to say on the very significant subject of "health benefits" appears in the second and third sentences of Subsection A, stating as follows:

> 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.... [Emphasis added.]

Despite this lack of clarity as to an employer's "health benefits" obligations, Section B of the MWA nonetheless calls for the imposition of serious repercussions against employers found to have violated its provisions, stating in pertinent part:

> B. .... An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who

prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.

Faced with serious sanctions for possible violation of the vague and uncertain terms of the MWA, it is hardly surprising that Nevada employers have challenged it for violating fundamental due process as unintelligible and vague. Perera's argument that the provision of "health insurance" is a "traditional and known benefit... now encouraged or required for many employers and employees by the Affordable Care Act" hardly supplies reasonable meaning to the words "health benefits" and "health insurance" as used in the MWA. Response, pp. 14-15. Would purchase of a health insurance policy insuring the employee and all his dependents for $10,000 in the event the employee were injured by a meteor qualify under the MWA? Indeed, were the meaning of "health benefits" or "health care" all so obvious there would be no reason for the U.S. Congress to have taken nearly 2,000 pages for codification of the Affordable Care Act.

Courts are not in a position to rewrite provisions of the Nevada Constitution under the guise of interpreting them. Thus, considering the meaning of another part of the MWA, the Attorney General has cited the Nevada Supreme Court for its position that it is 'not free to presume that the framers of the [initiative] and those who enacted it meant anything other than ***exactly what they said***." *Michael Tancheck*, 2007 Nev. Op. Atty. Gen. No. 1, *5 (2007) (emphasis added), *citing Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 26 P.3d 753, 759 (2001) (holding

that a statute which enacted "Pacific standard time" did not necessarily include application of daylight saving time as "Pacific standard time" was "by design and definition, one hour earlier than Pacific daylight saving time" and "[w]e are not free to presume that the framers of the durational limit and those who enacted it meant anything other than exactly what they said").[1]

The problem here is that unlike "Pacific standard time," the words "health benefits" and "health insurance" do not have any single precise legal meaning and their use in the MWA leaves Nevada employers without a reasonable understanding of how to proceed. This omission amounts to a classic violation of fundamental due process. *Dunphy v. Sheehan*, 92 Nev. 259, 262, 549 P.2d 332,

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[1] *Tancheck* addresses the MWA's adjustments in the minimum wage based on cumulative increases to the Consumer Price Index ("CPI"). The Attorney General noted that the MWA's use of the word "cumulative" did not imply an annual adjustment, in contrast to minimum wage laws in other states, but actually required an entirely different approach for Nevada:

> In our case, the plain meaning and utilization of the word 'cumulative' is to refer to the requirement that during the annual review, the percentage increase is not calculated on a year by year basis, but rather that the increase in the minimum wage be compared to the cumulative increase in the CPI. Therefore, the annual review would not be reviewing the increase of CPI from year to year but rather the total increase from 2004 forward compared to the total increase in the federal minimum wage.
>
> The Amendment calls for the comparison of the amount of a federal increase to the change in the CPI. As the federal increase is expressed in monetary terms and the change in CPI is expressed in points, a direct comparison cannot be made between monetary amounts and CPI points. Therefore, in order to do a comparison, the amounts must be converted to a similar basis, i.e. percentage change.

Id., *5-6.

334 (1976), *citing Connally v. General Construction Co.*, 269 U.S. 385 (1926) (because the financial disclosure provisions of Nevada's ethics in government law, the literal heart and soul of the law, were unconstitutionally vague, the law was unconstitutional in its entirety: "A statute which requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application violates the first essential of due process."); *see also*, *Sheriff of Washoe County v. Martin*, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983), *citing State v. Glusman*, 98 Nev. 412, 651 P.2d 639, 644 (1982) (even "if an enactment does not implicate constitutionally protected conduct, the court may strike it down as vague on its face only if it is impermissibly vague in all of its applications").

Illustrative of the problems raised by vague drafting of laws, *Zubarau v. City of Palmdale*, 121 Cal.Rptr.3d 172, 187-89 (Cal. App. 2011), struck an unintelligible ordinance which permitted construction of 75-foot-high vertical antennae while simultaneously limiting the height "of the active element of the antenna array" to 30 feet, explaining the problems raised in terms applicable to the confusion posed by the MWA's reference to "health benefits" and "health insurance":

> Our Supreme Court has discussed the void for vagueness concept as follows: '"a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application,

violates the first essential of due process of law.' (*Connally v. General Construction Co.*, (1926) 269 U.S. 385, 391.... '[A] law that is 'void for vagueness' not only fails to provide adequate notice to those who must observe its strictures, but also 'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.' (*Grayned v. City of Rockford* [(1972) 408 U.S. [104], 108-109... fn. omitted)... '[A] claim that a law is unconstitutionally vague can succeed *only* where the litigant demonstrates, not that it affects a substantial number of others, but that the law is vague as to her or 'impermissibly vague in *all of its applications.*' (*Hoffman Estates v. Flipside, Hoffman Estates*, (1982) 435 U.S. 489, 97-49..., italics added....)."

The California Supreme Court set 'a pair of principles endorsed by the United States Supreme Court as reliable guides for applying the doctrine in particular cases. The first principle is derived from the concrete necessity that abstract legal commands must be applied in a specific context.... The second guiding principle is the notion of *reasonable* specificity.' [Citation omitted; emphasis supplied.]

Notwithstanding that there are definitions of terms 'active element' and 'antenna array'..., City Zoning Ordinance section 95.03 B.1 remains uncertain. The parties have not set forth any comprehensible definition of the terms as they are used in that section, nor have they provided any logical meaning of the provision. Section 95.03 B of the City Zoning Ordinance refers to the installation of a 'single-pole or tower, roof or ground-mounted, television or amateur radio antaennae' that may be permitted so long as the height of the antennae does not exceed 75 feet 'measured from the grade to the highest point of the antenna.' Another restriction is that the '[m]aximum height of the active element of the antenna array shall be' 30 feet. The provision shifts inexplicably between singular and plural and does not define the terms in the context used.

The subject of the provision is a vertical 'single-pole or tower.' The height limitation is measured from the grade – presumably from the ground. The City zoning ordinance does not specify from where the height of the 'active element of the antenna' is to be measured, although the City states that it too must be measured from the ground. We are left to wonder about reconciling a height restriction of a vertical 'single-pole or tower' antenna of 75 feet with a 30-foot height restriction for the active element of antenna array for a vertical

> 'single-pole or tower' antenna. Without some further definitions of the terms in context, the language does not meet the test of 'reasonable specificity.' The City has not provided us with, nor can we discern, any circumstances under which the provision is sufficiently certain.
>
> * * * *
>
> Section 93.03 B.1 of the City Zoning Ordinance is too uncertain to avoid being viewed as fatally vague. Accordingly, that provision is impermissibly vague, and the trial court erred in denying Zubarau's request for a judgment declaring the provision unenforceable. It may well be that the City's intentions, whatever they may be, can be promulgated in an understandable and consistent manner. [Emphasis supplied.]

Western Cab's quandary is neither "specious" nor "substantively irrelevant" as Perera argues. "Health benefits" and "health insurance" as used in the MWA are not "commonly understood" and the MWA is fatally vague and unenforceable.

VII. Fuel Payments By Taxicab Drivers Should Not Be Deducted From Their Commissions Before Determining Minimum Wage Compliance.

Perera wants to recast Western Cab's last issue to state: "*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?*" Response, p. 3. This recasting of the issue is similar to Perera's counsel's argument in *Wynn Las Vegas, L.L.C. v. Baldonado*, 129 Nev. Adv. Op. 78, 311 P.3d 1179 (2013), in which the Court said:

> We take this opportunity to clear up any confusion surrounding this issue. *Alford* did not create a "direct-benefit" test, nor do we believe that *Moen* created such a test, either. *Moen* mentioned an employer's benefit in a passing remark; however, the benefit the court appeared to reference was the keeping of the employee tips. . . However, nothing in either opinion suggests that a "direct benefit" test should be imposed to determine whether a tip-pooling policy violates NRS 608.160. Further, if the *Moen* court intended to create the purported "direct benefit" test, we expressly reject it. Such a test is unworkable because every tip-pooling policy directly benefits the employer in some manner.

Id. at 1181-82. Perera's recasting of the issue to "required by the employer's business" is similar to the direct benefit test argued in *Baldonado*. Such a test is unworkable because any expense would be required by the employer's business.

The District Court defined the issue as whether the payments for gas should reduce the driver's "income" when looking at whether they were being paid minimum wage. App. at 356. "Income" and "wages" are different terms under the MWA. Wages are "[t]he amount which an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time" and "[c]ommissions owed the employee." NRS 608.012. While tips are part of income or compensation, they are not part of wages under the MWA. Requiring fuel costs to be paid from tips (including non-reported tips and vendor fees) is **not** the equivalent of requiring such costs to be paid from non-tipped wages or

commissions. While paying for fuel may reduce a driver's income, it does not reduce his wages.

In his Response, Perera cites only federal authority under the Fair Labor Standards Act as support for his argument that fuel costs must be deducted from non-tipped wages. None of his authority is applicable to this case. First, there is no Nevada law (constitution, statute or regulation) which holds this. Second, federal law allows tip credits and never addresses the cost of fuel. 29 CFR § 531.36 addresses deductions for "facilities", not fuel costs. Moreover, Western Cab does **not** make any deductions from drivers' wages to pay for fuel.

Arriaga v. Florida Pacific Farms, LLC, 305 F.3d 1228 (11th Cir. 2002), addressed pre-employment expenses under the Fair Labor Standards Act for non-tipped employees, not fuel costs. Finally, *Ayres v. 127 Restaurant Corp.*, 12 F. Supp. 2d 305 (S.D.N.Y. 1998), addressed whether certain required clothing was a uniform under the Fair Labor Standards Act and New York Labor Law. The MWA does not address facilities, pre-employment expenses or uniforms.

The MWA does not address the cost of fuel which can be and is paid from reported and **unreported tips** and vendors fees. There is no legal requirement that the cost of fuel be deducted from non-tipped wages in calculating whether minimum wage has been paid. In fact, NAC 608.120(3) requires that **all commissions** be used to meet the minimum wage requirement. Thus, there is no

legal authority that anything other than the drivers' commissions be used in deciding whether the minimum wage requirement is met.

Western Cab does **not** require its drivers to kick back any part of their "wages" and does not make any "wage deduction" for fuel. At the beginning of their shifts, the drivers are given a cab with a full tank of fuel. At the end of their shifts, the drivers return their cabs with a full tank of fuel. The driver employees keep 100% of all tips they receive. There is no evidence in this case that any driver's fuel payments exceeded his/her reported and unreported tips and vendor's fees. Western Cab believes that many of its drivers take an unreimbursed business expense deduction for fuel on their income tax returns. *Roberts v. C.I.R.*, 176 F.2d 221 (9th Cir. 1949).

Expenses are not deductions from wages. In *Enger v. Chicago Carriage Cab Corp.*, 812 F.3d 565, 567-69 (7th Cir. 2016), taxi drivers brought a class action suit against their taxi company employers and contended that the employers had violated the Illinois Wage Payment and Collection Act ("IWPCA") by improperly charging them to work and forcing them to bear their own operating expenses among other things. The IWPCA defined wages as compensation owed by the employer pursuant to an employment agreement between the parties. The drivers paid shift fees which were essentially lease payments to allow the driver to operate one of the taxis and earn income. The drivers also had to pay operating expenses which included fuel,

airport taxes, upkeep and sometimes insurance payments. *Id.* The drivers' only source of income was what they made in fares and tips from passengers. As a result, the drivers contended they often received less than minimum wage and for some shifts paid more for fees and expenses than they received from fares and tips. *Id.*

For purposes of their motion to dismiss, the taxi company employers conceded that the drivers would be considered employees under the IWPCA. *Id.* The Seventh Circuit found that the drivers' payment of fees and expenses was the consideration offered in exchange for the right to lease a cab and medallion under the parties' implicit agreement. *Id.* at 570. Although the drivers agreed to pay those fees and expenses, they were now attempting to use the IWPCA to re-write the terms of their employment agreement. *Id.* The court concluded, "In other words, the IWPCA exists to hold the employer to his promise under the employment agreement; by asking the judiciary to graft new terms into an employment contract without employer's consent, the drivers turn the IWPCA on its head." *Id.*

Here, in consideration for their commission wages, Western Cab's drivers agreed to pay for their own fuel expenses. Those expenses can be paid out of their tips and service fees and the MWA does not provide that such payment is illegal or that these expenses must be deducted from non-tip commission payments.

Western Cab's drivers are **not** poor non-tipped hourly wage earners like maids and janitors. They are paid commissions based on their fares and receive tips and

service fees from customers and vendors. Only a percentage of their fares are reported as tips pursuant to an agreement with the IRS. App. at 256-57.

Western Cab never receives a "kickback" from their drivers. The drivers receive and handle all of their own tips and service fees. Western Cab pays the drivers as wages commissions based on their fares. Western Cab makes no deductions from their wages other than for income tax and social security. Fuel payments by the drivers should not be deducted from their commissions before determining minimum wage compliance.

VIII. CONCLUSION

The only evidence on the purpose of the MWA are Thompson's affidavits. If the lower tier of the two-tiered Minimum Wage Amendment was severed, the entire law would deviate from its purpose. The MWA and NAC 608.100-608.108 are clearly superceded and preempted by ERISA.

The MWA does not define "health benefits" or "health insurance." It is void for vagueness and violates the due process clauses of the U.S. and Nevada Constitutions.

Finally, Western Cab does not deduct fuel costs from its drivers' commissions or wages paid to the drivers. The drivers do not pay Western Cab "back for fuel." The drivers buy the fuel and pay for their fuel from their tips and vendors fees.

Therefore, Western Cab respectfully requests that this Court grant its petition, reverse the District Court and find that the MWA (1) is preempted by federal labor law and ERISA, (2) is void for vagueness and violates the due process clauses of the U.S. and Nevada Constitutions, and (3) does not require that fuel payments made from tips and vendor's fees be deducted from commissions, excluding those tips and vendor's fees.

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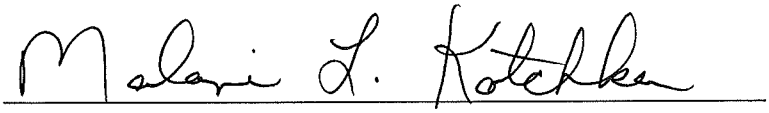
CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page or type volume limitations of NRAP 37(a)(7) because, excluding parts of the brief excepted by NRAP 32(a)(7)(C), it does not exceed 6,977 words.

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

HEJMANOWSKI & McCREA, LLC



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **PETITIONER'S REPLY TO PARTIES OF INTERESTS' RESPONSE TO WRIT OF MANDAMUS OR PROHIBITION** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 28th day of March, 2016, to the following:

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And a true and correct copy of the foregoing **PETITIONER'S REPLY TO PARTIES OF INTERESTS' RESPONSE TO WRIT OF MANDAMUS OR PROHIBITION** was served via first class, postage-paid U.S. Mail on this 28th day of March, 2016, to the following:

The Honorable Linda Marie Bell
District Court Judge
Eighth Judicial District Court of Nevada
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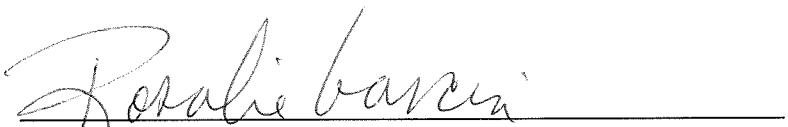

An Employee of Hejmanowski & McCrea LLC