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

MOTION OF AMICUS CURIAE FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING ON ERISA PREEMPTION

Amicus Curiae, A Cab, LLC, (hereinafter "A Cab") and Nevada Yellow Cab Corporation; Nevada Checker Cab Corporation; Nevada Star Cab Corporation (hereinafter collectively "YCS") hereby seek leave of this Court pursuant to NRAP 29(c) to file a Brief of Amicus Curiae in support of Petitioner Western Cab Company's (hereinafter "Western Cab") request that the Court rehear the pending matter on ERISA preemption. The Brief, including counsel's NRAP 26.1 Disclosure Statement, is attached hereto as Exhibit A.

I.

INTEREST OF THE AMICUS CURIAE

A Cab and YCS are cab companies doing business in Las Vegas. A Cab has approximately 230 drivers in its service, and YCS has over 1700 drivers in its service. These companies are affected in their business operations by the Minimum Wage

Amendment ("MWA") and its regulations. As Western Cab has argued, and the U.S. District Court for Nevada has found in at least one recent case, *Landry's, Inc. v. Sandoval*, 2017 WL 1181570 (D. Nev. Mar. 28, 2017), Nevada's MWA addresses employee benefit plans and is preempted by ERISA. It is the positions of A Cab and YCS that the MWA and its regulations unlawfully intrude on the comprehensive federal framework to the administration and regulation of employee benefit plans and are unenforceable. The conflict between the reasoning of the Court's March 16, 2017, Decision in this case and the U.S. District Court's March 28, 2017, Order in *Landry's Inc.*, is detrimental to A Cab's and YCS's businesses, business plans and to their employees. Clarification is essential to the State's business community.

II.

THE BRIEF OF AMICUS CURIAE WILL ASSIST THE COURT IN DETERMINING ISSUES REGARDING NEVADA'S MWA

The Brief of Amicus Curiae is desirable under NRAP 29(c)(2) because it will assist the Court in resolving the issues raised in this case as to the meaning and application of the State's Minimum Wage Amendment. The Brief meets all of the requirements of a helpful and desirable amicus brief. It presents information meriting judicial notice, addresses issues relevant to the Court's decision, including the impact of the Court's decision on Nevada employers and employees.

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III.

CONCLUSION

A Cab and YCS respectfully request that this Court grant their motion for leave to file the attached Brief of Amicus Curiae.

Dated this 5th day of May, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Rodriguez Law Offices, P.C., and that on the 5th day of May, 2017, I caused a true and correct copy of the foregoing MOTION OF AMICUS CURIAE FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING ON ERISA PREEMPTION to be served electronically to the following parties as listed on the CM/ECF list:

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A true and correct copy of the foregoing MOTION OF AMICUS CURIAE FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING ON ERISA PREEMPTION was served via first class, postage prepaid U.S. Mail on the 5th day of May, 2017, to the following:

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

/s/ Susan Dillow
An employee of Rodriguez Law Offices, P.C.

EXHIBIT A

EXHIBIT A

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

BRIEF OF AMICUS CURIAE:
A CAB, LLC;
NEVADA YELLOW CAB CORPORATION;
NEVADA CHECKER CAB CORPORATION; and
NEVADA STAR CAB CORPORATION
IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING ON ERISA PREEMPTION

Dated: May 5, 2017.

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

A Cab, LLC;

A Cab, LLC Employee Leasing Company;

Creighton J. Nady;

Esther C. Rodriguez, Esq. of Rodriguez Law Offices, P.C.;

Michael K. Wall, Esq. of Hutchinson & Steffen, LLC;

Nevada Yellow Cab Corporation;

Nevada Checker Cab Corporation;

Nevada Star Cab Corporation;

Marc C. Gordon, YCS General Counsel;

Tamer B. Botros, YCS Associate Counsel.

Dated: May 5, 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

INTEREST OF THE AMICUS CURIAE

A Cab, LLC (hereinafter "A Cab") and Nevada Yellow Cab Corporation; Nevada Checker Cab Corporation; Nevada Star Cab Corporation (hereinafter "YCS") requests this Court's reconsideration and reversal of its March 16, 2017, Decision that Nevada's MWA was not preempted by ERISA.

A Cab's and YCS's interests in this matter are as taxicab businesses. A Cab has existed since 2001, and now has over 230 drivers in its service. YCS has existed for 35 years, and now has over 1700 drivers in its service.

It is clear that a dispute exists between the Nevada Supreme Court and the U.S. District Court for Nevada as to the preemptive effect of ERISA with regard to Nevada's MWA. The issue impacts every employer and employee in Nevada. Thus, while this Court's March 16, 2017, Decision in *Western Cab Co. v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Op. 10, 390 P.3d 662, 669-70 (2017) concludes that there is no ERISA preemption with regard to the State's MWA, the U.S. District Court for the District of Nevada's March 28, 2017, Order in *Landry's, Inc. v. Sandoval*, 2017 WL 1181570, *9 (D. Nev. Mar. 28, 2017), reaches the opposite conclusion, explaining that the MWA and its related regulations promulgated by the Nevada Labor Commissioner "literally reference ERISA and involve defining insurance coverage," leading to the conclusion that the plaintiff businesses in that case had satisfactorily alleged "that the MWA and Regulations impact their uniform administration of health benefits under ERISA." *Id.*

As will be explained further below, it is A Cab's and YCS's positions that in providing explanation to cure the MWA's obvious vagueness through additions to Nevada Administrative Code, this Court's Decision in this case has proved precisely why the MWA is preempted by ERISA.

INTRODUCTION AND SUMMARY OF ARGUMENT

The MWA and associated Regulations of the Nevada Labor Commissioner all relate to employee benefit plans and are preempted by ERISA. The point is proved by the Court's reliance on the Nevada Administrative Code to supply meaning to the

MWA's term "health insurance," a topic strictly reserved to ERISA. With the conflict between this Court's March 16, 2017, Decision and U.S. District Court Judge Navarro's March 28, 2017, Order, Nevada's employers and employees are left confused as a legal scheme effecting every employer and employee in Nevada. Reconsideration of the Court's Decision is appropriate and necessary under such circumstances.

ARGUMENT

On March 16, 2017, this Court issued its Decision in this case. As to vagueness which would render a law violative of the U.S. and/or Nevada Constitutions and thus unenforceable, this Court explained, stating in pertinent part:

> The void-for-vagueness doctrine is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments." *Carrigan v. Comm'n on Ethics*, 129 Nev. 894, 899, 313 P.3d 880, 884 (2013); *see also Edwards v. City of Reno*, 103 Nev. 347, 350, 742 P.2d 486, 488 91987) (holding that vague laws violate the Due Process Clauses found in both the United States Constitution and the Nevada Constitution)…. 'A law may be struck down as impermissibly value for either of two independent reasons: (1) if it fails to provide a person of ordinary intelligence fair notice of what is prohibited; or (2) if it is so standardless that it authorizes or encourages seriously discriminatory enforcement.' [*quoting Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)….

Then, as to why the MWA and related portions of Nevada's Administrative Code supplied sufficient meaning to the term "health benefits," the Decision illustrates why the MWA has preempted federal law:

> Under the first test, Western alleges that the term 'health benefits' is so vague that a person of ordinary intelligence cannot understand what is prohibited. This argument is unpersuasive because 'health benefits' is defined in the text of the MWA itself. The MWA defines 'health benefits' as '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.' Nev. Const. art 15, §16(A).
>
> '"Health insurance," while not explicitly defined in the text of the MWA, is defined in the applicable portions of the Nevada Administrative Code. *See* NAC 608.102(1). To qualify for the lower minimum wage, the health insurance offered must either: (1) '[c]over [] those categories of health

> care expenses that are generally deductible by an employee on his individual federal income tax return' or (2) '[p]rovide [] health benefits pursuant to a Taft-Hartley trust.' *Id.* With the combined guidance of the MWA and NAC 608.102(1), any employer of ordinary intelligence should have adequate notice of what health benefits qualify it to pay the lower minimum wage. *See In re Discipline of Lerner*, 124 Nev. 1232, 1245, 197 P.3d 1067, 1077 (2008) (even if a term in law is vague when standing alone, we will not invalidate the law when the term's meaning is readily perceptible in light of existing authority)….

Id.

Had the MWA itself facially defined health insurance as covering health care expenses generally deductible on a federal income tax return or pursuant to a Taft-Hartley trust, it would have been preempted by ERISA. The mere fact that the MWA relies on additions to the Administrative Code to supply necessary definitions and terms does not relieve it of the fact that it addresses matters within the exclusive province of ERISA. Thus, U.S. District Judge Navarro explained the breadth of ERISA in the *Landry's* Order:

> ERISA applies where an 'employee benefit plan' is in place. [Citation omitted.] An employee benefit plan is defined by statute as 'an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.' 29 U.S.C. §1002(3). An 'employee welfare benefit plan' governed by ERISA is:
>
> > [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, scholarship funds, or prepaid legal services, or….
>
> *Id. §1002(1).*
>
> In determining the reach of ERISA preemption, 'the purpose of Congress is the ultimate touchstone.' *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 8 (1987). Section 514(a) of ERISA, 29 U.S.C. §1144, provides:
>
> > Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter related to any employee benefit plan

> described in section 1003(a) of this title and not exempt under section 1003(b) of this title.
>
> 29 U.S.C. § 1144(a). Accordingly, ***'[i]f a state law "relate[s] to … employee benefit plan[s]," it is pre-empted.***' *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987). [Emphasis added.]

Landry's, supra, 2017 WL 1181570, at *8-9.

Next, *Landry's* concluded that its plaintiff employers had stated a valid argument of preemption:

> Plaintiffs' SAC alleges that the MWA and Regulations 'are an unlawful intrusion on the comprehensive federal framework for the administration and regulation of employee benefit plans.' (SAC 55). Further, Plaintiffs allege that NAC 608.102 improperly 'dictates the type of health care a nonunionized employer must offer to "qualify to pay an employee" the lower tier minimum wage rate.' (*Id*.) Plaintiffs further allege that 'the Amendment and Regulations have impermissible "connection with" ERISA plans that interfere with the uniformity of plan administration' because they have 'radically impacted and altered the uniform administration of health benefits offered by Nevada's employers.' (*Id*., 56, 58). According to Plaintiffs' allegations, 'The Regulations also impermissibly impose administrative requirement on health benefits plans through the employer-plan sponsors not required by ERISA,' including 'a complex set of rules for determining whether employee share of premium of qualified health insurance exceeds 10 percent of gross taxable income' under NAC 608.104. (*Id*. 61) (internal quotation marks omitted).
>
> * * *
>
> [P]laintiffs have properly alleged an ERISA preemption claim. ***The MWA and its Regulations literally reference ERISA and involve defining insurance coverage***. The Court finds that the additional administrative requirements alleged by Plaintiffs are sufficient to survive dismissal on the pleadings. ***Plaintiffs satisfactorily allege that the MWA and Regulations impact their uniform administration of health benefits under ERISA. The optional nature of the MWA's two tiers does not mitigate the harms alleged***…. [Emphasis added.]

Id.

In its April 18, 2017, decision in *Coventry Health Care of Missouri v. Nevils*, ___ U.S. __, 137 S.Ct. 1190 (2017), the U.S. Supreme Court, per Justice Ginsburg, determined that the express preemption provisions of the Federal Employees Health Benefits Act (FEHBA) applied to state antisubrogation and antireimbursement laws for insurance. In reaching this decision, Justice Ginsburg cited other federal statutory schemes, including ERISA, in which Congress expressed its intent to preempt any and all state laws interfering with the federal scheme:

> Many other federal statutes preempt state law in this way, leaving the context-specific scope of preemption to contractual terms. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 *et seq.*, for example, preempts 'any and all State laws insofar as they … relate to any employee benefit plan.' §1144. And the Federal Arbitration Act (FAA), 9 U.S.C. §1 *et seq.*, limits the grounds for denying enforcement of 'written provision[s] in… contract[s]' providing for arbitration, thereby preempting state laws that would otherwise interfere with such contracts. §2. This Court has several times held that those statutes preempt state law, see, *e.g., Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. __, ___ ____, 136 S.Ct. 936, 942-947, 194 L. Ed.2d 20 (2016) (ERISA); *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 532-534, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012) (per curiam) (FAA)…. [1]

Because the Court's Decision in *Western Cab* concedes that meaning must be supplied to the MWA through reference to the Labor Commissioner's additions to the Administrative Code, NAC 608.102, and those additions address ERISA and employee

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[1] *Gobeille*, 136 S.Ct. at 947, held Vermont's statute requiring all health insurers to file reports with the State containing claims data and other "information relating to health care" preempted by ERISA:

> ERISA's express pre-emption clause requires invalidation of the Vermont reporting statute as applied to ERISA plans. The state statute imposes duties that are inconsistent with the central design of ERISA, which is to provide a single uniform national scheme for the administration of ERISA plans without interference form laws of the several States, even when those laws, to a large extent, impose parallel requirements.

benefits plans, the MWA has invaded the exclusive federal province of ERISA. For these reasons, reconsideration of the Court's March 16, 2017, decision in *Western Cab* in necessary and proper.

DATED this 5th day of May, 2017.

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ATTORNEYS CERTIFICATE OF COMPLIANCE

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 Word Perfect in Times New Roman and 14 point font size.

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 proportionally spaced, has a typeface of 14 points or more and contains 2,969 words.

FINALLY, I HEREBY CERTIFY that I have read this BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING ON ERISA PREEMPTION, 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 of the transcript or appendix where the matter relied on its to be found. 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.

DATED this 5th day of May, 2017.

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