No._____
(Clark County District Court No. A-14-701633-C)

In the Supreme Court of the State of Nevada

MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; AND INKA, LLC,

Defendants and Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT JUDGE

Respondents,

PAULETTE DIAZ; LAWANDA GAIL WILBANKS; SHANNON OLSZYNSKI; AND CHARITY FITZLAFF, all on behalf of themselves and all similarly-situated individuals,

Plaintiffs and Real Parties in Interest.

PETITION FOR WRIT OF MANDAMUS OR OTHER EXTRAORDINARY RELIEF

REQUEST FOR TEMPORARY STAY

Petition From an Order Deeming Petitioners' Health Benefits Plans Invalid Under Article XV, Section 16(A) of the Nevada Constitution

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NRAP 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.

Party	**Parent Corporation or Any Publicly Held Company Holding 10 % or More of Party's Stock**
MDC Restaurants, LLC	
Laguna Restaurants, LLC	
Inka, LLC	

Morris Polich & Purdy, LLC partners and associates have appeared for Petitioners in the District Court and are expected to appear in this Court.

The law firm of Littler Mendelson, P.C. previously represented MDC but withdrew from the case in 2015.

Dated: September 20, 2016 MORRIS POLICH & PURDY LLP

By: */s/ Nicholas M. Wieczorek*
Nicholas M. Wieczorek
Attorneys of Record for Defendants and Petitioners,
MDC RESTAURANTS, LLC;
LAGUNA RESTAURANTS, LLC;
and INKA, LLC

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I.

Primary Jurisdiction: Must employee complaints that an employer's health benefit plan does not qualify for payment of the lower-tier minimum wage under Article XV, Section 16 of the Nevada Constitution (the Minimum Wage Amendment or MWA) be brought, in the first instance, before the Labor Commission?

One District Court, in a reasoned decision, said "yes." *McLaughlin v. Deli Planet, Inc.,* No. A-14-703656-C; 5 App. 1026-1031.[1] Respondent court summarily said "no." A definitive answer as to primary jurisdiction is needed from this Court.

II.

Applicable Law: Regardless of whether it is the Labor Commission or the District Court that has primary jurisdiction, what legal standards govern the assessment of whether a health benefit plan qualifies for payment of the lower-tier minimum wage under the MWA ?

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[1] Record citations are to the volume and page of the six-volume appendix concurrently filed with this petition, as follows: [Volume] App. [Page #].

Here, the District Court completely ignored, in its final decision, the Labor Commission's standard for determining what constitutes a qualified health benefit plan under the MWA. That standard, set forth at NAC 608.102, tracks almost *verbatim* the Legislature's definition of what constitutes a qualifying health benefit plan for purposes of the employer's business tax deduction for purchasing employee health insurance. Notably, the Legislature's definition was adopted in 2005 – the year between the first and final votes on the MWA – with a consensus from *both* the business community and the drafters of the MWA. But the Labor Commission's statutory-based regulation counted for absolutely nothing below, as the District Court opted instead to measure the quality of Petitioners' plans under NRS 608.156, 689A and 689B. Which law governs? The legacy statutes relied upon by the District Court, or the contemporaneous statutes and regulations relied upon by Petitioners?

III.

Interpretation of NAC 608.102: Does the regulation require a qualifying plan to cover (1) *any* federally-deductible health care expenses; or (2) *all* federally-deductible health care expenses?

The Labor Commission's standard defines a qualifying health benefit plan under the MWA as one that covers

> "those categories of health care expenses that are generally deductible by employees on their individual federal income tax returns . . . ." NAC 608.102.

Does " those categories" mean *any* of those categories or *all* of those categories? Because the District Court's order is completely silent as to NAC 608.102, the District Court never said which interpretation was correct. Thus, regardless of who applies NAC 608.102 in the first instance, guidance is needed as to how that application works.

PETITION FOR WRIT OF MANDAMUS

MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; and INKA, LLC. ("Petitioners") allege:

PRELIMINARY ALLEGATIONS

1. This petition does not fall into any category of cases presumptively assigned to the Court of Appeals. NRAP 21(a)(1).

2. Petitioners own and/or operate, currently or in the past, twenty-eight restaurants throughout Nevada since November 28, 2006.[2] 1 App. 130 [MDC: 22 restaurants]; 1 App. 141 [INKA: 4 restaurants]; 1 App. 134 [Laguna: 2 restaurants].

3. Plaintiffs and real parties in interest are servers at Petitioners' Nevada-based restaurants. 1 App. 19-20.

4. The underlying dispute arises out of an amended class action complaint filed by Plaintiffs against Petitioners on June 5, 2014. 1 App. 17.

5. On July 27, 2016, the District Court granted plaintiffs' motion for partial summary judgment as to liability. 6 App. 1241. The District Court ruled that Petitioners' health benefits plans did not

[2] November 28, 2006 is when the MWA took effect. 4 App.713.

qualify for payment of less than the upper tier minimum wage between 2010 and 2015. 6 App. 1248.

STATEMENT OF FACTS

6. Under Nevada law, initiative petitions proposing to amend the Constitution must be passed by the voters in two succeeding elections. Nev. Const., art. XIX, § 2.4.

7. The MWA was first presented to the voters as Ballot Question No. 6 in the 2004 general election.

I. 2004: Voters Consider The Arguments Surrounding Ballot Question No. 6

A. What Voters Were Told – And Not Told – About Ballot Question No. 6.

8. The Secretary of State prepared a booklet "detailing the statewide questions that will appear on the 2004 General Election Ballot. The booklet contains 'Notes To Voters, a complete listing of the exact wording of each question, along with a summary, arguments for and against each question's passage, and, where applicable, a fiscal note." 4 App. 658. [3]

[3] The Nevada Legislative Counsel Bureau also maintains a copy of the 2004 pamphlet on its website at

9. From the 2004 booklet, we know the following:

10. The text of the question presented by Ballot Question No. 6 did not mention health insurance. Rather, the question presented to voters was, "Shall the Nevada Constitution be amended to raise the minimum wage paid to employees?" 4 App. 660.

11. Nothing in the title of Ballot Question No. 6 mentioned health insurance. Rather, the title of the Ballot Question was "Raise The Minimum Wage For Working Nevadans." 4 App. 659.

12. Nor did the "Findings and Purpose" section of Ballot Question No. 6 mention health insurance. 4 App. 664.

13. Nothing in the arguments for or against Ballot Question No. 6 mentioned health insurance. 4 App. 660-663.

14. And nothing in the "Explanation" accompanying Ballot Question No. 6 mentioned health insurance. Rather, the "Explanation" refers to "health benefits." 4 App. 660.

15. The "Explanation" states: "The amendment would require employers to pay Nevada employees $5.15 per hour if the employer provides health benefits, or $6.15 per hour worked if the employer does not provide health benefits." 4 App. 660.

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https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf

16. "Health benefits" also is the phrase used in the text of the measure. Section A states, in pertinent part:

> "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) 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.

B. The Ballot Question Does Not Specify The Type of Health Benefits That An Employer Must Provide To Qualify For Payment of the Lower-Tier Wage.

17. Thus, as written, the text of Ballot Question No. 6 specified only two elements of a qualified plan:

a. Who must be covered? Answer: the employee and the employee's dependents; and

b. At what cost to the employee? Answer: premiums not to exceed 10 percent of the employee's gross taxable

income from the employer.

18. As to the particular health benefits required for a qualified plan, the text of Ballot Question No. 6 and the accompanying 2004 voter pamphlet were completely silent.

C. The Ballot Booklet Contains a "Fiscal Note" Alerting Voters to the Amendment's Effect on the Modified Business Tax.

19. The "Fiscal Note" accompanying Ballot Question No. 6 stated that the financial impact of the MWA "cannot be determined." 4 App. 663.

20. However, the Fiscal Note pointed out that if passage of the amendment "results in an increase in annual wages paid by Nevada's employers, [then] revenues received by the State from the imposition of the Modified Business Tax would also increase." 4 App. 663.

21. In 2004, voters approved Ballot Question No. 6. Thus, under Nevada law, the proposed MWA was to be placed on the ballot in the next succeeding election, in 2006. In the interim, however, the Legislature took action.

II. 2005: The Legislature Defines A Qualified "Health Benefit Plan" Under the Modified Business Tax.

22. In 2005, shortly after the first passage of Ballot Question No. 6 in 2004, the Nevada Legislature addressed the Modified Business Tax. Henceforth, Nevada employers would be able to reduce their excise tax liability by providing health insurance or health benefits to their employees.

23. The healthcare deduction is allowed for certain amounts "paid by the employer for health insurance or a health benefit plan for its employees in the calendar quarter for which the tax is paid." N.R.S. 363A.135, subd. (1) [applicable to financial institutions and mining]; N.R.S. 363B.115, subd. (a) [applicable to other employers].

24. A qualifying "health benefit plan" is specifically defined under both N.R.S. 363A.135 and 363B.115 as one that covers:

> "those categories of health care expenses that are generally deductible by employees on their individual federal income tax returns pursuant to the provisions of 26 U.S.C. § 213 and any federal regulations pertaining thereto, if those expenses had been borne directly by those employees." N.R.S. 363A.135, subd. (4)(e); N.R.S. 363B.115, subd. (4)(e).

25. Thus, when voters finally said, in 2006, that a lower

minimum wage would be permissible if the employer provides "health benefits," the Legislature, in the previous year, had already defined what constitutes a "health benefit plan" for purposes of the employer's excise tax deduction for healthcare plans.

III. 2005: The Attorney General Interprets The Enforcement Provisions Of Ballot Question No. 6 As Preserving The Labor Commission's Enforcement Powers.

26. The Legislature was not the only branch of government acting in the interim between the initial and final passage of Ballot Question No. 6. The Attorney General weighed in as well.

27. The Labor Commissioner sought the Attorney General's opinion "regarding the potential effect of the amendment to the Nevada Constitution as proposed by the initiative placing Question No. 6, 'Raise the Minimum Wage For Working Nevadans Act,' on the 2004 General Election Ballot." Op.Atty.Gen., Opinion No. 2005-04 (March 2, 2005), 2005 WL 575568, *1.

28. One of the questions posed to the Attorney General by the Labor Commissioner pertained to the MWA's civil remedy.

29. The MWA's civil remedy states, in pertinent part:

"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." Nev.Const., art. XV, § 16.B.

30. The Labor Commissioner asked the Attorney General: "Does the language of section 16(B) of the proposed amendment specifically and exclusively vest the enforcement of the minimum wage provisions with the courts, so as to preempt the enforcement jurisdiction of the Labor Commissioner?" 2005 WL 575568 at *8.

31. The Attorney General concluded that the MWA's civil remedy "does not specifically and exclusively vest authority elsewhere or divest the Labor Commissioner of all of his jurisdiction." 2005 WL 575568 at * 9.

IV. November 7, 2006: Ballot Question No. 6 Passes.

32. The 2006 voter pamphlet contains virtually identical contents as to Ballot Question No. 6 as had previously appeared in the

2004 voter pamphlet. Compare 4 App. 657-666 [2004 pamphlet] with 4 App. 668-678 [2006 pamphlet].

33. Thus, just as in 2004, neither the text of the question nor the accompanying pamphlet told voters in 2006 what a qualifying health benefit plan would look like.

34. On November 7, 2006, an overwhelming majority of voters said "Yes" to Ballot Question No. 6: "Shall the Nevada Constitution be amended to raise the minimum wage paid to employees."

35. As certified by the Nevada Secretary of State, 68.71 percent of the voters said "Yes" and 31.29 percent of the voters said "No." [4]

36. The MWA became effective November 28, 2006 when this Court certified the election. 4 App. 713.

V. 2006-2007: The Labor Commission's Evolving Definitions Of A Qualified "Health Benefit Plan"

37. Immediately following the effective date of the MWA, the Labor Commissioner, on December 11, 2006, asked the Governor to approve emergency regulations. The regulations would address

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[4] See http://nvsos.gov/SOSelectionPages/results/2006StateWideGeneral/ElectionSummary.aspx

numerous issues under the MWA, including but not limited to the health benefit component. "We are being flooded with requests for interpretive guidance from employers and employees," the Labor Commissioner told the Governor. "Among the more common issues we are addressing are the nature of the insurance requirements. . . ." 4 App. 680. [5]

A. The Labor Commission's First Definition Under Emergency Regulations.

38. As originally published on November 29, 2006, the proposed emergency regulation stated that "The health insurance must be a policy, contract, certificate or agreement offered or issued by a carrier authorized by the Nevada Insurance Commissioner to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services or, in the alternative, any federally-approved self-funded plans established under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, except that medical discount plans as defined by NRS 695H.050 and workers compensation insurance do

[5] Historical documents related to the administrative regulations were exhibits to the Attorney General's opening brief in *State of Nevada v. Hancock,* No. 68770. The entirety of the Attorney General's brief, including the exhibits, was part of petitioners' opposition below. *See*, infra, Pet. at ¶¶ 53, 76.

not qualify as health insurance." 3 App. 621.

B. The Labor Commission's Second Definition Under Emergency Regulations.

39. As sent to the Governor on December 12, 2006, the definition was revised with additional language. Qualified health insurance, under the revised emergency regulation, must also "[c]ompl[y] with the requirements of NRS 608.1555 through NRS 608.1576." 4 App. 686.

40. NRS 608.1555 *et seq.* addresses health care in the employment context. NRS 608.1555 cross-references two insurance statutes pertaining to individual and group plans.

a. NRS 608.1555 states: "Any employer who provides benefits for health care to his or her employees shall provide the same benefits and pay providers of health care in the same manner as a policy of insurance pursuant to chapters 689A [individual plans] and 689B [group plans] of NRS."

b. NRS 608.156 states that "[i]f an employer provides health benefits for his or her employees, the employer shall provide benefits [with certain limitations] for the

expenses for the treatment of abuse of alcohol and drugs."

41. As discussed below, NRS 608.1555 and 608.156, and NRS 689A and 689B became the focal points of the underlying motion for partial summary judgment. It was these statutes – and not the Labor Commission's final regulations, discussed next – through which plaintiffs and the District Court measured the quality of Petitioners' plans under the MWA.

42. The Governor approved the emergency regulation on December 12, 2006. 4 App. 751. As an emergency regulation, it would expire on April 11, 2007. *Ibid.*

C. The Labor Commission's Third Definition Under Temporary Regulations

43. On February 2, 2007, the Labor Commissioner published a temporary regulation to replace the emergency regulation. 4 App. 726.

44. The temporary regulation eliminated the requirement that a health plan comply with NRS 608.1555 through NRS 608.1576.

45. Instead, under the temporary regulation, a "health benefit plan" was defined by reference to federal law. A health benefit plan,

under the temporary regulation, must meet one of the following requirements:

> "(a) The plan covers only those categories of health care expenses that are generally deductible by employees on their individual federal income tax returns pursuant to the provisions of 26 U.S.C. Sec. 213 and any federal regulations relating thereto, if those expenses had been borne directly by those employees; or
>
> (b) Provides health benefits pursuant to a Taft-Hartley trust which (i) Is formed pursuant to 29 U.S.C. Sec. 186(c)(5); and (ii) Qualifies as an employee welfare benefit plan under the Internal Revenue Service guidelines; or
>
> (c) Is a qualified employee welfare benefit plan pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001 et seq."
> 4 App. 727-728.

46. Within one week, on February 8, 2007, former Labor Commissioner Michael Tanchek appeared before the Senate Committee on Commerce and Labor. Commissioner Tanchek offered both oral and written testimony. 4 App. 690-710 [oral testimony

summarized in minutes]; 4 App. 712-725 [written testimony].

47. Commissioner Tanchek was not particularly fond of the emergency regulation approved by the Governor. "With the help of the Insurance Division," the Commissioner testified, "I was able to cobble together some language for the emergency regulation. I didn't like my solution then and I still don't like it. Fortunately, we have come [up]with what seems to be a pretty good approach since those early struggles." 4 App. 720.

48. "The preferred approach," Commissioner Tanchek emphasized, is to set understandable standards so the employers and employees can draw their own conclusions." 4 App. 720. As he explained, the definition stemmed from a consensus from both the business community *and the drafters of the amendment.*

> "The current approach is to adopt the standard used in the business tax provisions of NRS 363A and 363B. This has several advantages. We didn't need to 'reinvent the wheel.' It is a standard that is already in existence and with which employers are familiar. Employers know whether their insurance meets the standard. Since it is statutory, there is legislative history behind it. *Finally, we were able to get a good consensus for that approach from*

business and the drafters of the amendment." 4 App. 720; Emphasis added.

49. Following Commissioner Tanchek's testimony, hearings and workshops on the temporary regulations were held throughout the State of Nevada. See "Informational Statement" at https://www.leg.state.nv.us/register/2007Register/R055-07A.pdf

D. The Labor Commission's Final Definition Adopts The Legislature's 2005 Definition Of A Qualified Health Benefit Plan.

50. Following the notice and comment period, and with only minor stylistic changes, the definition of a qualified health plan appearing in the temporary regulation became the definition adopted in the permanent regulation. NAC 608.102.[6]

51. Thus, effective October 31, 2007, a qualified health plan under the MWA includes a plan that "[c]overs those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213

[6] The temporary regulation used the plural "employees" while the permanent regulation uses the singular "employee." Also, paragraph (a) of the temporary regulation concludes with "if those expenses had been borne directly by those employees." The permanent regulation states, "if such expenses had been borne directly by the employee. . . ."

and any federal regulations relating thereto, if such expenses had been borne directly by the employee. . . ." NAC 608.102(1).

52. As discussed below, it was NAC 608.102(1) through which Petitioners measured the quality of their health plans under the MWA.

53. Concurrent with the adoption of NAC 608.102, the Commissioner adopted related regulations that (1) use the word "offer" to describe an employer's obligation to qualify to pay the lower-tier minimum wage, NAC 608.100(1), and (2) provide that federal income tax laws be used to measure an employee's gross taxable income, when federal tax law deems tips as taxable income. NAC 608.100(1) and 608.104. The constitutionality of these other two regulatory provisions is currently before this Court in *State of Nevada v. Hancock,* No. 68770 argued April 4, 2016.

VI. 2010-2015: Petitioners Purchase Health Benefit Plans For Their Employees

54. The plans at issue were purchased by Petitioners for their employees between 2010 and 2015.

A. 2010-2013: The Starbridge Plan

55. Between 2010 and 2013, Petitioners purchased a

"Limited Benefit Sickness and Accident Plan" from Cigna Starbridge and administered by Connecticut General Life Insurance. 4 App. 781.

56. As shown in the plan's "Benefit Table," employees received benefits, within certain limitations, for doctor office visits, outpatient care, non-emergency care in an emergency room, wellness plans, prescription drugs, accidental death, inpatient care (illness), in-hospital surgery, maternity expenses and accidental coverage (injury). A $15 co-pay applied for each doctor office visit, and no deductible applied to maternity benefits, in-hospital surgeries and in-patient care. 4 App. 783.

57. The Starbridge plan documents state that it is "not a major medical plan." 2 App. 328. And employees were told that "although Starbridge benefits are more limited than a tradition major medical plan, Starbridge can still save you money on your everyday health needs." 2 App. 330.

58. MDC's Director of Human Resources testified that Mancha relied on Cigna to determine the validity of the plan under Nevada law. 1 App. 152.

59. In 2010, Cigna confirmed, in writing, that the Starbridge plan "is considered a Qualified Health Plan for the NV Minimum

Wage Law." 2 App. 318.

60. Effective December 31, 2013, the Starbridge plan ended and employees currently enrolled with Starbridge were automatically enrolled to a new plan with Transamerica. 2 App. 315.

61. On December 31, 20134, the Nevada Commissioner of Insurance issued a bulletin mandating that certain disclosures appear on supplemental or limited health insurance plans to "minimize consumer confusion" about whether those types of plans meet the requirements of ACA. 2 App. 320 The bulletin said nothing about whether those same plans would likewise be deemed non-qualified plans under the MWA.

B. 2014: The Transamerica Plan

62. For 2014, Petitioners purchased hospital indemnity insurance for their employees. The 2014 was administered by Transamerica Life Insurance Company. 4 App. 815

63. As shown in a table summarizing the 2014 plan, employees received, in addition to a daily hospital indemnity benefit, additional indemnity benefits for, among other charges, outpatient office visits, certain types of diagnostic tests, and prescription drugs. The dollar amount of the indemnity benefit depended on the specific

plan selected. 4 App. 815.

64. The 2014 plan documents specifically stated: "THIS IS NOT MAJOR MEDICAL INSURANCE AND IS NOT A SUBSTITUTE FOR MAJOR MEDICAL INSURANCE." 4 App. 815.

65. MDC spoke with its brokers to make sure it could offer the Transamerica plans in Nevada. 2 App. 295-296. The broker's assurances were verbal. 2 App. 296.

66. Transamerica itself, in response to a subpoena, stated that it does not offer health insurance plans, policies or products; rather, Transamerica "underwrites supplemental health insurance products including specifically group limited benefit hospital indemnity insurance." 3 App. 535.

67. By 2014, MDC saw that most of the employees were declining the company-provided insurance (and thus getting the higher minimum wage) because they could "do better" in Nevada's insurance marketplace. 2 App. 313.

C. 2015: The ACA Minimum Value Plan

68. For 2015, Petitioners purchased an "ACA Minimum Value Plan" for their employees. The 2015 plan was administered

by Key Benefit Administrators. 5 App. 892.

69. As shown in a table summarizing the 2015 plan, employees received benefits, with certain limitations, for primary care and specialist physician visits, lab and x-ray work, imaging work and emergency room visits. No deductibles applied to in-network services; a $15 co-pay applied for an in-network primary care physician visit, while a $25, $50, and $400 deductible applied to specialist visits, lab and x-ray work, and imaging and emergency room visits, respectively. 5 App. 893.

70. On April 2, 2015, the Nevada Commissioner of Insurance issued another bulletin similar to the one issued in 2013 regarding supplemental or limited benefit health insurance plans. *Supra,* ¶ 61. The 2015 bulletin addressed similar warnings, but in the context of hospital indemnity or other fixed indemnity insurance plans. 2 App. 323. And, like the 2013 bulletin, the 2015 bulletin said nothing about whether those same plans would likewise be deemed non-qualified plans under the MWA.

VII. MWA Cases Pending In This Court.

71. There are several MWA case pending in this Court. Petitioners are aware of the following. None involve the quality-of-plan issues presented here.

72. *Williams v. District Court,* No. 66629, filed 10/6/14. Statute of limitations. Argued *en banc* on 10/6/15.

73. *MDC Restaurants, LLC. v. District Court,* No. 67631, filed 3/23/15. Statute of limitations. Pending

74. *MDC Restaurants, LLC v. District Court,* No. 68523, filed 7/31/15. Meaning of "providing" and "offering" of health benefits. Argued *en banc* on 4/4/16.

75. *Kwayisi v. Wendy's of Las Vegas,* No. 68754, filed 9/3/15. Certified question from federal court: Whether an employee must actually enroll in health benefits offered by an employer before the employer may pay that employee the lower-tier minimum wage under the MWA. Argued *en banc* on 4/4/16.

76. *State Office of Labor Comm. v. Hancock,* No. 68770, filed 9/8/15. "1. Whether NAC 608.100(1) conflicts with the Nevada Constitution when is uses the word 'offer' to describe an employer's obligation to qualify to pay the lower-tier minimum wage? 2.

Whether NAC 608.104 conflicts with the Nevada Constitution by stating that federal income tax laws be used to measure an employee's gross taxable income, when federal tax laws deem tips as taxable income?" 3 App. 583. Argued *en banc* on 4/4/16

77. *Hanks v. Briad Restaurant Group, LLC,* No. 68845, filed 9/21/15. Certified question from federal court: same as *Kwayisi.* Argued *en banc* on 4/4/16.

78. On May 20, 2014, Petitioners were swept into this wave of litigation. 1 App. 1

STATEMENT OF THE CASE

I. The Pleadings.

79. Seeking back pay and other relief, Plaintiffs filed an amended class action complaint on June 5, 2014 against Petitioners. 1 App. 17. Plaintiffs alleged that the health benefit plans purchased for them by Petitioners were not qualifying plans under the MWA. 1 App. 23.

80. Plaintiffs alleged two claims for relief: (1) violations of Article XV, section 16 of the Nevada Constitution [the MWA]; and (2) violations of the MWA and NAC 608.102. 1 App. 26-27. As

noted above, NAC 608.102 adopts the statutory definition of a health benefit plan under the Modified Business Tax as passed by the Legislature in the intervening year between the two votes on Ballot Question No. 6.

81. The amended complaint does not challenge the legality of NAC 608.102. Rather, the amended complaint invokes NAC 608.102 as establishing the "coverage requirements" by which Petitioners' plans were to be measured. 1 App. 27.

82. As explained below, plaintiffs construe NAC 608.102 as prescriptive, not descriptive. In other words, plaintiffs interpret the regulation as requiring plans to cover *all* health care expenses that are federally deductible. The regulation, in plaintiffs' view, prescribes plans that will cover every conceivable health care expense that may be federally deductible, rather than generally describing plans that cover "generally deductible" health care expenses.

83. Petitioners' answer, filed July 22, 2014, denied that their health benefit plans were non-compliant. 1 App. 46-47.

II. The Motions For Partial Summary Judgment On Liability.

84. Plaintiffs' initial motion for partial summary judgment included an extensive submission by an expert who addressed two issues: (1) the standards that exist to determine what is "health insurance" under the MWA; and (2) whether Petitioners' plans met those standards. 1 App. 101.

85. Plaintiffs' use of an expert to opine on these legal issues prompted the District Court to deny, without prejudice, plaintiffs' initial motion for partial summary judgment and, concurrently, to grant Petitioners 45 days "to designate their own expert on the issue of Liability Regarding Defendants' Health Benefit Plans." The District Court signed this order on October 13, 2015. 1 App. 55.

86. On April 19, 2016, plaintiffs filed their renewed motion for partial summary judgment on liability. 1 App. 56.

87. Plaintiffs argued that Petitioners' plans "do not meet state law requirements for health insurance under N.R.S. Chapters 608, 689A, or 689B" and "do not meet administrative regulations governing the Minimum Wage Amendment under NAC 608.102." 1 App. 87.

88. As to Chapter 608, plaintiffs pointed out that Petitioners'

plans do not cover treatments for alcohol and drug abuse as required under N.R.S. 608.156. 1 App. 76-77; 79.

89. Plaintiffs also argued that "any" health insurance plan offered by Petitioners, "for any purpose," needed to comply with the coverage requirements of N.R.S. 689A and 689B. 1 App. 71 [citing N.R.S. 608.1555].

90. And as to the administrative regulation, plaintiffs contended that NAC 608.102 imposed a "very difficult and rigorous standard" that requires a qualifying plan to cover *any* federally-deductible health care expense than an employee "*could*" deduct on his federal tax return. 1 App. 85-86.

91. Petitioners' opposition, filed May 13, 2016, argued, among other things, that

c. NAC 608.102 cannot be construed as a prescriptive regulation that requires qualified plans to cover *any* health care expense that *could* be deductible by an employee, 1 App. 559-560; and

d. The alleged violation of NAC 608.102 needed to brought before the Labor Commissioner, 1 App. 560-563; and

e. Neither N.R.S. 689A or 689B provided the appropriate yardstick by which to measure Petitioners' plans.

92. In reply, plaintiffs characterized the regulation as "incommensurate with [the] Court's responsibility to interpret the Nevada Constitution." 6 App. 1163. Asserting that NAC 608.102 sets "an incredibly low bar," *ibid.*, plaintiffs argued that applying the regulation as interpreted by Petitioners "turns the Minimum Wage Amendment on its head. . . ." 6 App. 1164.

93. Plaintiffs also pointed out that the MWA has an express right of action, which belied Petitioners' argument that the dispute should have first been presented to the Labor Commissioner. 6 App. 1165-1168.

III. The Hearing.

94. At the hearing, the District Court grappled with the distinction between the health insurance provisions that appear in the Labor Code and the health insurance provisions that appear in the Insurance Code. 6 App. 1182.

95. Quickly honing in on a critical issue, the District Court asked, "What if there's a tension between a mandate of the Nevada

Legislature and rules and regulations offered by the insurance commission?" 6 App. 1192. "You know the answer to that," plaintiffs' counsel responded. "But I think we have to talk about it for the record," the district court replied. 6 App. 1192-1193.

96. "It appears to me," the District Court stated, "that the commissioner, for whatever reason, didn't follow the mandate of the Nevada legislature." 6 App. 1193. "How can the commissioner even deviate from the legislative mandate?" the District Court again asked. 6 App. 1194. "But, I mean, that's my question. When I see here how can – if you have a mandate by the State of Nevada, vis-à-vis the state senate, state assembly, and the governor signs off. . . . And said, look, this is – and here's our statutory scheme as to what has to be contained in insurance plans, how can the commissioner not follow that?" asked the District Court, yet again. 6 App. 1194.

97. Plaintiffs' counsel responded, "I can't answer that," then invited the District Court to consider NAC 608.102 "for whatever you think it's worth." 6 App. 1195.

98. Later, the District Court pointed that it is the Nevada Legislature "who defines what healthcare insurance is at the end of the day." 6 App. 1216.

99. And, plaintiffs' counsel noted, even in the absence of the Labor Code provision discussing health insurance, NRS 608.1555, the only statutes defining health insurance would be NRS 689A and 689B. "In the absence of 608.1555, if it never existed, we would still have to find out what health insurance means in the amendment. And the only place to look for that in state law is 689A and B." 6 App. 1224; emphasis added.

100. As to Petitioners' argument that complaints about the quality of their plans should be brought before the Labor Commissioner, the District Court replied, "But I can't buy that." 6 App. 1211.

IV. The Final Ruling

101. The District Court granted plaintiffs' motion for partial summary judgment on liability "because Defendants' health benefit plans offered and/or provided to Plaintiffs between 2010 and 2015 did not meet the requirements of health insurance under Nevada law." 6 App. 1247. Thus, "by virtue of the Plans they offered and/or provided, Defendants did not qualify to pay Plaintiffs and other employees less than the upper tier minimum hourly wage between 2010 and 2015." 6 App. 1248.

102. The order measures Petitioners' plans, for purposes of the MWA, under NRS chapters 608, 689A and 689B exclusively.

103. The order does not address Petitioners' argument that plaintiffs' minimum wage dispute belonged in front of the Labor Commissioner, and never mentions NAC 608.102

104. Plaintiffs served notice of entry of the order on July 27, 2016.

V. This Petition Is Timely

105. The issues presented are ones of first impression under Nevada law. They involve complex issues of jurisdiction and constitutional, statutory and regulatory interpretation. The record is over 1,200 pages.

106. In these circumstances, Petitioners have timely prepared and filed this Petition within 55 days of the District Court's order.

VI. Why Writ Relief Is Warranted.

107. Whether to consider a petition for extraordinary relief lies solely within this Court's discretion. *Smith v. District Court,* 107 Nev. 674, 677 (1991).

108. The "primary standard" guiding that discretion is the

"[t]he interests of judicial economy." *Smith v. District Court,* 113 Nev. 1343, 1345 (1997). The Court also considers whether there are important issues of law that require clarification, *Smith,* 113 Nev. at 1345, whether there are any disputed facts, *ibid.,* and whether the issues presented are dispositive. *Moore v. District Court,* 96 Nev. 415, 417 (1980).

109. Petitioners have no other plain, speedy and adequate remedy at law. *Horton v. District Court,* 123 Nev. 468, 474 (2007).

110. All of these factors weigh in favor of immediate appellate review. The questions presented are issues of first impression under Nevada law. If Petitioners' interpretation of NAC 608.102 is correct, the case is over and judicial economy would be served by resolving these definitional issues first before, as explained below, the district court and the parties expend scarce resources to, among other tasks, disseminate class notices.

STAY REQUEST

111. On March 29, 2016, the District Court certified this action as a class action and ordered the parties to confer regarding the form and content of a proposed notice to the class.

112. Currently before the District Court is the proposed Class Notice and Petitioners' response. On August 30, 2016, the District Court stated that it would defer consideration of whether to allow class notice to issue until this Court issues its opinion on the petitions discussed above at paragraphs 72, 73 and 74. Accordingly, the District Court ordered the parties to return for a status check on October 11, 2016.

113. Other aspects of the case, however, are still moving forward. This includes Phase II Discovery regarding damages.

114. As a result of the District Court's Order, additional litigation has been filed challenging the quality of health plans issued by Nevada businesses pursuant to the MWA. See, e.g., Tarvin v. Hof's Hut Restaurants, Inc. et al, Clark County District Court Case No. A-16-741541-C, filed August 11, 2016 (Defendants pay employees less than $8.25 per hour but do not provide and/or maintain qualified health benefits plan (s) for the benefit of Plaintiff and Class Members.)

PRAYER

WHEREFORE, Petitioners MDC Restaurants, LLC; Laguna Restaurants, LLC; and INKA, LLC, respectfully ask this Court to:

1. Issue a stay of all proceedings in the entire lawsuit pending below; and
2. Grant the Petition for A Writ of Mandamus, or Other Extraordinary Relief, and issue a ruling directing the District Court to vacate its July 27, 2016 order and enter a different order:
    a. Dismissing Plaintiffs' complaint without prejudice, or, in the alternative, referring Plaintiffs to the Labor Commission for initial consideration of their wage complaints; or
    b. Denying Plaintiffs' motion for partial summary judgment in its entirety and directing the District Court to evaluate Petitioners' plans under the plain meaning of NAC 608.102; and

3. Grant such other relief as may be just.

Dated: September 20, 2016 MORRIS POLICH & PURDY LLP

By: */s/ Nicholas M. Wieczorek*
Nicholas M. Wieczorek
Attorneys for Defendants and Petitioners,
MDC RESTAURANTS, LLC;
LAGUNA RESTAURANTS, LLC;
and INKA, LLC

VERIFICATION

I, Nicholas M. Wieczorek, declare as follows:

I am one of the attorneys for Petitioners. I have read the foregoing Petition for Writ of Mandamus and know its contents. The facts alleged in the Petition are within my own knowledge, and I know those facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Petitioners, verify this petition.

I declare, under the penalty of perjury of the laws of the State of Nevada, that the foregoing is true and correct and that this verification was executed on September 20, 2016 at Las Vegas, Nevada.

/s/ Nicholas M. Wieczorek
Nicholas M. Wieczorek

MEMORANDUM OF POINTS AND AUTHORITIES

I. Standard of Review.

Questions of constitutional interpretation are reviewed *de novo*. *Lawrence v. Clark County,* 127 Nev. __, 254 P.3d 606, 608 (2011).

The rules of statutory construction apply with equal force to the interpretation of a constitutional provision. *Halverson v. Secretary of State,* 124 Nev. 484, 488 (2008).

Statutory interpretation is an issue of law reviewed *de novo*. *JED Prop. v. Coastline RE Holdings NV Corp.,* 343P.3d 1239, 1240 (2015)

Administrative regulations are subject to the same rules of construction as statutes. *Meridian Gold Co. v. State ex rel. Department of Taxation,* 119 Nev. 630, 633 (2003).

II. *Primary Jurisdiction*: Plaintiffs' Wage Disputes Based On the Allegedly Unsatisfactory Quality of Petitioners' Health Benefit Plans Must First Be Brought Before the Labor Commission.

NRS 607.160 mandates that the Labor Commissioner "shall enforce *all* labor laws of the State of Nevada." NRS 607.160(1)(a);

emphasis added. That includes any claim by an employee that an employer has violated the minimum wage laws. NAC 608.100.

The MWA, on the other hand, confers jurisdiction to enforce the MWA in the District Courts. [1]

Where, as here, there are overlapping jurisdictions, primary jurisdiction steps in to coordinate the exercise of regulatory and adjudicatory responsibilities.

A. Primary Jurisdiction Principles.

Primary jurisdiction does not mean that a court lacks jurisdiction. *Clark v. Time Warner Cable,* 523 F.3d 1110, 1114 (9th Cir. 2008) ("A court's invocation of the [primary jurisdiction] doctrine

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[1] The MWA states:

> "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 an action to enforce this section shall be awarded his or her reasonable attorney's fees and costs." Nev. Const., Art. XV, § 16, para. (B).

does not indicate that it lacks jurisdiction."); *Syntek Semiconductor Co., Ltd. v. Microchip Technology Inc.,* 307 F.3d 775, 780 (9th Cir. 2002)("Primary jurisdiction is not a doctrine that implicates the subject matter jurisdiction of the federal courts.") [2] Rather, it is a "prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." *Syntek Semiconductor,* 307 F.3d at 780. As this Court succinctly put it, "Application of the doctrine is discretionary with the court." *Nevada Power Co.,* 120 Nev. at 962.

Legislative intent is key. Application of primary jurisdiction depends on the extent to which legislators intended the agency to have the "first word." *United States v. Culliton,* 328 F.3d 1074, 1082 (9th Cir. 2003). To paraphrase *Cuilliton,* to what extent did the Nevada Legislature, "in enacting a regulatory scheme, intend[] an administrative body to have the first word on issues arising in judicial proceedings." *Ibid.* "The particular agency deferred to must be one

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[2] Federal case law has guided this Court's consideration of primary jurisdiction issues. *Sports Form, Inc. v. Leroy's Horse and Sports Place,* 108 Nev. 37, 41 (1992); *Nevada Power Company v. Eight Judicial District,* 120 Nev. 948, 962 (2004).

that [the Legislature] has vested with the authority to regulate an industry or activity such that it would be inconsistent with the statutory scheme to deny the agency's power to resolve the issues in question." *Ibid.*

The desire for "uniformity of regulation" and the need for "initial consideration by a tribunal with specialized knowledge" are also important. *Nevada Power Co.,* 120 Nev. at 962. Thus, the doctrine is properly invoked where a claim is cognizable in court "but requires resolution of an issue of first impression, or of a particularly complicated issue that [the legislature] has committed to a regulatory agency." *Syntek Semiconductor,* 307 F.3d at 780.

The doctrine does not close the courthouse doors to plaintiffs. The court can either retain jurisdiction or dismiss the case without prejudice. *Reiter v. Cooper,* 507 U.S. 258, 268-269 (1993); *Blue Cross of California, Inc. v. Superior Court,* 180 Cal.App.4th 1237, 1260 (2009)(primary jurisdiction enables a court to make a "referral to the agency, staying further proceedings so as to give the parties a reasonable opportunity to seek an administrative ruling"; citing *Reiter*).

Lastly, primary jurisdiction cannot be waived. Allocating the

initial decisionmaking responsibility between an agency and a court is that significant. *Syntek Semiconductor,* 307 F.3d at 780 n.2 ("Although the parties did not raise the question of primary jurisdiction, we may do so *sua sponte.*); *Atlantis Exp., Inc. v. Standard Transp. Services, Inc.* 955 F.2d 529, 532 (8th Cir. 1992)("it is well established that the doctrine of primary jurisdiction is not waived by the failure of the parties to present it in the trial court or on appeal").

B. Why Primary Jurisdiction Rests With The Labor Commission In This Case.

1. The Key Definition Underlying Plaintiffs' Theories Of Relief Is Contained In the Commission's Regulations, Not the MWA.

The MWA's definition of what constitutes a qualified health benefit plan is incomplete. It states:

> "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." Nev. Const., Art. XV, § 16, para. B.

Only two questions are answered by this text:

(1) Who must be covered? Answer: the employee and the employee's dependents.

(2) At what cost to the employee? Answer: Not more than 10 percent of the employee's gross taxable income from the employer.

As to what the plan must otherwise look like, i.e., what benefits must be provided, the MWA is silent. That silence did not escape the attention of the Labor Commission (and probably the majority of Nevada's employers and employees). As former Labor Commissioner Tanchek stated in his written testimony to legislators shortly before the Commission's regulations became final, "The amendment doesn't say what [health insurance] is, just that the employer has to offer it in order to take advantage of the lower rate." 4 App. 719-720.

Accordingly, the Labor Commission discharged its statutory duty to enforce *all* of Nevada's labor laws, including the MWA, by promulgating the regulation at issue. Petitioners discuss the significance of the Labor Commission's effort in the sections below. For now, the key is this: the only contemporaneous law addressing

the quality of a qualifying health plan is found not in the MWA, but in the Labor Commission's regulations.

2. Because of the MWA's Definitional Gap, At Least One District Court Views These Types of Wage Disputes As Properly Brought Before The Labor Commission.

It was exactly this definitional gap that lead a different District Court to conclude that an employee's MWA claim should have been brought before the Labor Commission first. *McLaughlin v. Deli Planet, Inc.,* Clark County Dist.Ct., No. A-14-703656-C, at 5 App. 1026-1031.

In *McLaughlin,* Judge Kishner examined the plain language of the MWA and compared the amendment's text to the relief being sought. Judge Kishner concluded:

> "Unlike NAC 608.102, the Minimum Wage Amendment addresses the premium cost and not coverage requirements. [¶] Plaintiff is not challenging the premium costs he paid for Defendant's health insurance and he has not alleged that such costs exceeded 10 percent of his gross taxable income from Defendant. Instead, Plaintiff is only claiming that Defendant's health insurance did

> not provide sufficient coverage to pay less than the higher minimum wage rate. Such a claim, however, is not a claim for violation of the Minimum Wage Amendment. It is in reality a violation of the interpretation by the Labor Commissioner made under the governing regulations and clearly falls within the scope of the Labor Commissioner to interpret and provide remedies." 5 App. 1030.

Thus, at least one District Court views MWA claims based on the quality of the health plan as resting, in the first instance, within the jurisdiction of the Labor Commission. The District Court below thought otherwise. At a minimum, those differing viewpoints as to the overlapping jurisdictions underscore the need for review by this Court.

Moreover, as explained in the next section, the case for an initial administrative resolution is even stronger here than it was in *McLaughlin.*

3. Why This Is A More Compelling Case For the Labor Commission's Initial Exercise Of Jurisdiction Than *McLaughlin* and Other MWA Disputes Before This Court.

Unlike other MWA cases before this Court, plaintiffs are not

alleging that the Labor Commission's regulations are unconstitutional.[3] To the contrary, plaintiffs *embraced* the Commission's definitional regulation, NAC 608.102, expressly pleading a violation of the regulation. 1 AA 27 [Second Claim For Relief; 1 AA 22, 23 [alleging that plaintiffs Olszynski and Fitzlaff were offered a plan that was "not in compliance" with NAC 608.102 "as it did not cover those categories of health care expenses that are generally deductible by an employee on his/her individual federal income tax return. . . ."].

It does not matter that, as the case progressed, plaintiffs attempted to walk back their reliance on NAC 608.102. See, e.g., 6 App. 1194. (plaintiffs' counsel calling NAC 608.102 a "crazy standard" at the summary judgment hearing). Whether the regulation is "crazy" or not, plaintiffs never invoked the court's jurisdiction to do what only a court can do, that is, invalidate, in whole or in part, NAC 608.102.

Instead, plaintiffs crafted a lawsuit alleging the regulation as a basis for relief. That stands in stark contrast to *McLaughlin,* where the employee alleged a single claim for relief under the MWA that

[33] See, e.g., *State of Nevada v. Hancock,* No. 68770, argued *en banc* 4/4/16 [constitutionality of NAC 608.100(1) and 608.104]; Pet. at ¶ 76.

Judge Kishner construed as a *de facto* regulatory claim. 5 App. 1027 ["The Amended Complaint contained one claim for relief. That claim was an alleged violation of [the MWA]."] Here, there is no need to infer a regulatory claim. It is expressly pleaded.

Accordingly, while Petitioners' forum-based argument below was directed to the regulatory claim, 3 App. 560-563, the District Court implicitly expanded the argument to include the MWA claim as well.

The District Court's extrapolation did not stop there. At the hearing, the District Court posed a question that even Plaintiffs did not ask: is it really the Labor Commissioner's job to decide what is insurance? 6 App. 1211.[4] Petitioners' counsel, keenly aware of how plaintiffs' lawsuit was pleaded, replied that

> "this is not even the right place to be having this discussion. [¶] Under NAC 608.102, the only recourse for a party who thinks the plans aren't good enough is to file a complaint with the labor commissioner under the administrative code promulgations.

[4] "I'm wondering," the District Court stated, "if that's even the labor commissioner's – I don't know. But go ahead – to decide what is insurance and what is not insurance."

The Court: But I can't buy that." 6 App. 1211.

Thus, the District Court saw no room for the exercise of primary jurisdiction –it was a binary choice, with the private right of action embedded in the MWA *always* prevailing to the total exclusion of the Labor Commission's enforcement jurisdiction. 6 App. 1214. As explained below, this is a legally unsupportable view.[5]

4. Separate and Apart From *McLaughlin,* Every Policy Underlying Primary Jurisdiction Favors Initial Enforcement By The Labor Commission.

To the district court, the Labor Commission forfeited its plenary jurisdiction over this particular type of wage dispute because at least one of the claims emanates from the Constitution.

> "[R]egardless of whatever rules and regulations are promulgated by a labor commissioner, we have a mandate by the Nevada Constitution is that sets [sic] forth as follows, and understand this is Nevada Constitution, Article XV, Section 16.
> [¶]

[5] The final order does not address the forum issue raised in Petitioners' papers and at argument. The order does not even mention NAC 608.102.

> The labor commissioner can promulgate whatever rules he wants to promulgate. But that will never, under any form of legal analysis, trump the Constitution of the State of Nevada." 6 App. 1213, 1214.

That perspective was erroneous because going to the Labor Commission first does not "trump" the Constitution.

a. The Voters' and The Legislators' Intent.

The MWA does not vest sole and exclusive jurisdiction in the District Court for violations of the MWA. Under the plain language of the MWA, the employee is not required to file a lawsuit in the District Court. The employee "*may* bring an action against his or her employer in the courts of this State . . ." – not "*must*" bring an action in the courts of this State. Nev. Const., Art. XV, § 16, para. B. "May" is permissive, not mandatory. *In re Nevada State Engineer Ruling No. 5823,* __ Nev. __, 277 P.3d 449, 454 (2012). Textually, the MWA leaves ample room for the Labor Commission's historic and long-standing enforcement jurisdiction. Hence, under a plain reading

of the MWA, voters intended to keep the Labor Commission's enforcement jurisdiction intact.

Turning to the statutes, the Legislature has declared that the Labor Commission "[s]hall enforce all labor laws of the State of Nevada" whose enforcement is "not specifically and exclusively vested in any other officer, board or commission." NRS 607.160(1)(a) and (1)(a)(2). "All" admits of no exceptions. *Hoffman v. Arcelormittal Pristine Resources, Inc.*, 2011 WL 1791709 at *4 (W.D.Pa., May 10, 2011)("The word 'all' means what it states – 'all.'") Further, the MWA does not "specifically and exclusively" vest enforcement jurisdiction *anywhere*, much less another officer, board or commission.

Compare the Labor Commission's plenary enforcement authority what that of another agency, and one that the District Court asked about at the hearing. "Why," the District Court wondered, "is the labor commissioner involved in this and not the insurance commissioner?" 6 App. 1209.

The answer, for purposes of primary jurisdiction, is statutory. The Insurance Commissioner, unlike the Labor Commissioner, does not have plenary jurisdiction over "all" insurance laws in the State of

Nevada. Rather, the legislature prescribed a much narrower enforcement role for the Insurance Commission. The Legislature declared that the Insurance Commissioner's charge is to "[e]xecute the provisions *of this Code*" and "[e]nforce the duties imposed upon him or her *by this Code.*" NRS 679B.120; italics added. The MWA is not part of the Insurance Code.

Thus, as Petitioners' counsel pointed out at the hearing, "all I can tell you is at least historically following passage of the [MWA], the only office that weighed in on it was the labor commissioner." 6 App. 1211.

And weigh in it did. See Pet. at ¶¶ 37-51; discussion, *infra,* at p. 58, et seq.

Moreover, there is no indication that when the Labor Commission swiftly moved to define what constitutes a qualified health plan under the MWA, legislators said, "Stop. That's a question for the courts." [6] To the contrary – as one legislator remarked in

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[6] That not a peep was raised as to the Labor Commission's authority to define the elements of a qualified plan weighs against any inference that lawmakers viewed the MWA as displacing the Commission's enforcement jurisdiction, or that the Commission would be "trumping" the Constitution. See generally, *Harrison v. PPG Industries, Inc.,* 446 U.S. 578, 602 (1980)(Rehnquist, J., dissenting)("In a case where the construction of legislative language

response to Commissioner Tanchek's comments regarding the MWA and cost-of-living adjustments, "This [administrative effort] should be pursued *aggressively* to get a definitive answer for employers. . . ." 4 AA 692; emphasis added.

Legislators welcomed all efforts to assist the Labor Commission. 4 App. 709. There is no evidence that any legislator construed the Labor Commission's broad, statutory duty to enforce "all labor laws of the State of Nevada" as meaning all – except the MWA.

Thus, there is no indication in either the plain language of the MWA or in the legislative history behind the Labor Commission's regulatory efforts that Nevada lawmakers – whether voters or elected legislators – intended to completely displace the Labor Commission's enforcement authority. The District Court's contrary view was erroneous.

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such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night")

b. Administrative Expertise.

By statute, the Labor Commissioner is charged with knowledge of the entire corpus of Nevada labor law, including all laws pertaining to the payment of wages.

> "The Labor Commissioner shall inform himself or herself of all laws of the State for the protection of life and limb in any of the industries of the State, all laws regulating the hours of labor, the employment of minors, *the payment of wages* and all other laws enacted for the protection and benefit of employees." NRS 607.110; emphasis added.

No other board or commission bears such a heavy burden of expertise. And that expertise was on full display as the Commission worked through various formulations of what constitutes a qualified health plan, culminating in NAC 608.102. See Pet. at ¶¶ 37-51.

That the parties in this lawsuit disagree over how to apply NAC 608.102 merely underscores the problem with allowing plaintiffs to bypass the Labor Commission's expertise. How does the *Labor Commission* think Petitioners' plans fare under NAC 608.102? Because plaintiffs side-stepped the Labor Commission, neither the District Court, nor this Court, has the benefit of assessing how the

Labor Commission interprets this piece of its minimum wage regulations.

The result is a jurisdictional lacuna. On judicial review of a hearing officer's application of NAC 608.102, a court would benefit from a record reflecting the Commission's view while retaining its judicial power to reject an agency interpretation that is contrary to law. "Because of the agency's expertise, its view of a statute or regulation is entitled to great weight unless clearly erroneous or unauthorized. . . .particularly. . .where, as here, the quasi-legislative decisions of the Commission involve controversial issues that would entangle the courts in a political thicket." *Californians v. Fair Political Prac. Com'n.,* 61 Cal.App.4th 472, 484 (1998). But here, the Labor Commission never had a chance to apply its expertise to Petitioners' plans, thrusting this Court into a political thicket that would benefit from an administrative record.

c. Uniformity of Decision.

Vesting primary jurisdiction in the Labor Commission discourages judicial forum shopping.

As Petitioners pointed out to the District Court, "Plaintiffs' counsel has been shopping their NAC 608.102 'junk insurance' claim

around to various judicial departments and districts until they can identify the 'right' judge to believe the farfetched interpretations and in an effort to ultimately expand the requirements of the MWA." 3 App. 562. Sometimes the forum shopping works for plaintiffs. Sometimes it doesn't. *McLaughlin* at 4 App. 771-776.

But it should never occur in the first place. Only the Labor Commission has specialized knowledge of the historical, economic and policy factors underlying the adoption of NAC 608.102. As former Commissioner Tanchek told lawmakers, "We are the State enforcement agency for these types of issues and have been inundated with calls and questions from people seeking information." 4 App. 691.

That plaintiffs are fortunate enough to have retained competent counsel should not give them a pass from the administrative process. To the contrary, wouldn't the quality of administrative decision-making (and subsequent judicial review) be enhanced by able counsel focusing on one administrative forum rather than multiple judicial departments?

d. The Attorney General Concurs.

In the interim between the two votes on Ballot Question No. 6, the Attorney General concluded that the MWA did not displace the Labor Commission's enforcement authority. Op.Atty.Gen. Opinion No. 2005-04 (March 2, 2005), 2005 WL 575568, **8-9[7]. The Attorney General concluded that because the MWA's private right of action provides "for even greater relief" than the existing civil remedy provision at NRS 608.260[8], the MWA "would supplant and repeal by implication the existing civil remedy provision at NRS 608.260." *Id.* at *5. The implied repeal of a remedy is a far cry from the complete extinguishment of all enforcement jurisdiction.

Moreover, plaintiffs do not view NRS 608.260 as their civil remedy. They are not invoking NRS 608.260. Rather, plaintiffs' second claim for relief is based on NAC 608.102. 2 App. 27. And, as the Attorney General pointed out, the MWA does "not attempt to alter

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[7] While opinions of the Attorney General are not precedent, *Redl v. Secretary of State,* 120 Nev. 75, 80 (2004), they can, in certain circumstances, be "persuasive." *Whitehead v. Nevada Com'n on Judicial Discipline,* 110 Nev. 874, 880 fn. 6 (1994).

[8] NRS 608.260 addresses civil actions by employees to recover the difference between the minimum wage and amount paid. The statute has a two-year statute of limitations, with no provision for recovery of attorneys' fees.

the underlying current statutory basis for administrative enforcement of the new wage by the Labor Commissioner." 2005 WL 575568, *6.

What constitutes a "qualified health plan" was an important issue. It was vetted through an intensive regulatory process. In these circumstances, the integrity of the regulatory scheme dictates that the Labor Commission have the "first word" on whether Petitioners' plans qualify for payment of the lower-tier minimum wage.

Thus, on remand, the District Court should either dismiss plaintiffs' case without prejudice, or refer plaintiffs to the Labor Commission for initial consideration of their wage disputes.

III. *Applicable Law*: Even If The Labor Commission Did Not Have Primary Jurisdiction Over This Wage Dispute, The District Court's Sole and Exclusive Reliance On NRS 608.156, 689A and 689B Violated The Rule of Contemporaneous Construction.

A. Principles of Contemporaneous Construction.

Judicial examination of the MWA, or any constitutional text, requires the court to consider "first and foremost the original public understanding of constitutional provisions, not some abstract purpose underlying them." *Thomas v. Nevada Yellow Cab Corp.*, __ Nev. __,

327 P.3d 518, 522 (2014). That examination begins with the text of the provision.

Sometimes the text is ambiguous. Constitutional ambiguity arises where a provisions is "susceptible to two or more reasonable but inconsistent interpretations. . . ." *Strickland v. Waymire,* 126 Nev. 230, 234 (2010). Faced with ambiguous language, the court may then consider "the provision's history, public policy and reason to determine what the voters intended." *City of Sparks v. Sparks Mun. Ct.,* __ Nev. __, 302 P.3d 1118, 1126 (2013).

The historical examination, however, looks to a narrow time-frame: the period leading up to and after enactment of the provision. As this Court has repeatedly stated, "The goal of constitutional interpretation is to determine the public understanding of a legal text *leading up to and in the period after its enactment or ratification.*" *Ibid.*; emphasis added; *Strickland v. Waymire,* 126 Nev. 230, 234 (2010); *Pohlabel v. State,* __ Nev. __, 268 P.3d 1264, 1269 (2012); *City of Sparks,* 302 P.3d at 1126; see also *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008)("examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification" is a "critical tool of

constitutional interpretation").

When a court looks at this timeframe – the period "leading up to and after" the amendment's enactment – it is applying the rule of "contemporaneous construction." 6 Ronald D. Rotunda & John E. Nowak, 6 *Treatise On Constitutional Law* § 23.42 (4th ed.2008 & Supp. 2016), quoted approvingly in *Waymire,* 126 Nev. at 234 and *Thomas,* 327 P.3d at 522. "Contemporaneous construction of the Constitution is very relevant, and courts should give it great weight." 6 *Treatise On Constitutional Law* at § 23.42.

Here, there were two competing interpretations of what "health benefits" or "health insurance" ought to look like in order to qualify under the MWA for payment of the lower-tier minimum wage. In a nutshell, Petitioners relied upon NAC 608.102. Plaintiffs pointed to NRS 689A, 689B, 608.1555 and 608.156.[9]

The District Court's final order, however, does not even mention NAC 608.102. Instead, the District Court exclusively

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[9] NRS 689A addresses individual health insurance.

NRS 689B addresses group and blanket health insurance.

NRS 608.1555 makes NRS 689A and 689B applicable to "[a]ny employer who provides benefits for health care to his or her employees . . . ."

NRS 608.156 addresses expenses for treatment of abuse of alcohol and drugs in employer-provided health care plans.

applied NRS 689A, NRS 689B and NRS 608.156. 6 App. 1243-1248. As explained below, the District Court's complete disregard of NAC 608.102 violates the rule of contemporaneous construction in at least two ways.

B. Plaintiffs and the District Court Reach Back, Way Back, To Define The Contours of A Qualified Plan Under the MWA. That Is Not "Contemporaneous" Construction.

The frameworks for the laws invoked by plaintiffs and applied by the District Court were enacted in 1971 and 1983. These are legacy statutes.

The statutes addressing individual and group or blanket health insurance were first passed in 1971. NRS 689A (individual health insurance), Laws 1971, p. 1751; NRS 689B (group or blanket health insurance), Laws 1971, p. 1767. Many of the specific coverages identified by the District Court first appeared in the 1980's and 1990's. Some of the coverages were not required until *after* Ballot Question No. 6 finally passed on the second vote in 2006.[10]

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[10] These were the coverages for individual health insurance under NRS 689A relied upon by the District Court, 6 App. 1243-1244, and the year they were first required:

- ►Treatment for abuse of alcohol or drugs: Laws 1983, p. 2036.
- ►Hospice care: Laws 1989, p. 1032.

NRS 608.1555 makes the required coverages of NRS 689A and 689B applicable to health care plans offered by employers. NRS 608.1555 was enacted in 1985. Laws, 1985, p. 2097.

NRS 608.156 requires employer-provided health insurance plans to cover treatment for drug and alcohol abuse. It was enacted in 1983. Laws, 1983, p. 2044.

►Management and treatment of diabetes: Laws 1997, p. 742.

►Mental illness: Laws 1999, c. 576, §1.

►Cancer drugs: Laws 1999, p. 759.

►Prescription drugs: Laws 2001, c. 174, § 3, eff. Oct. 1, 2001.

►Clinical trials: Laws 2003, c. 515, § 1, eff. Jan 1, 2004.

►Continued medical treatment: Laws 2003, c. 497, § 9, eff. Oct 1, 2003.

There were the coverages for group or blanket health insurance under NRS 689B relied upon by the District Court, 6 App. 1244, and the year they were first required:

► Hospice care: Laws 1983, p. 1935

► Continued medical treatment: Laws 2003, c. 497, § 13, eff. Oct. 1, 2003.

► Certain inherited metabolic diseases: Laws 1997, p. 1526

► Management and treatment of diabetes: Laws 1997, p. 743.

► Prescription drugs for cancer treatment: Laws 1999, p. 760

► Clinical trials: Laws 2003, c. 515, §4, eff. Jan. 1, 2004

► Human papillomavirus vaccine: Laws 2007, c. 527, §5, eff. July 1, 2007

► Prostate cancer screening: Laws 2007, c. 527, § 5.5, eff. July 1, 2007

Not a single one of these health insurance laws was brought to the voters' attention as they deliberated the passage of Ballot Question No. 6. These health insurance laws appear nowhere in the text of the question. Nor do they appear in the ballot pamphlets that accompanied the 2004 and 2006 elections.[11] The pamphlets do not discuss, at all, the nature of the required health insurance.

While plaintiffs in the year 2014 may read Ballot Question No. 6 as incorporating eighteen statutes enacted some forty years earlier, there is no evidence that voters in 2004 and 2006 had that intent. The ballot argument, bereft of any mention of these provisions, belie such an intent. *In re Lance W.,* 37 Cal.3d 874, 888 fn. 6 (1985)(ballot arguments are "accepted sources from which [courts] ascertain the voters' intent and understanding of initiative measures"); *Legislature v. Deukmejian,* 34 Cal.3d 658, 673 fn. 14 (1983).

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[11] Pertinent portions of the 2004 election pamphlet are at 4 App. 657-666. The entire pamphlet is at https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf . Pertinent portions of the 2006 pamphlet are at 4 App. 668-677. The entire pamphlet is at https://nvsos.gov/Modules/ShowDocument.aspx?documentid=206

Nor can such an intent be bootstrapped onto the back of a legal presumption. While voters "should be presumed to know the state of the law in existence related to the subject matter upon which they vote," Op.Atty.Gen. Opinion No. 2005-04, 2005 WL 575568, *5, presumptions *always* cede to evidence. NRS 47.180. And the text of the MWA and the accompanying pamphlets is compelling evidence that voters did not intend the wholesale importation of these insurance statutes into Article XV, section 16 of the constitution. Charging the voters with an encyclopedic knowledge of Nevada's insurance laws in 2004 and 2006 is not a conclusive presumption. NRS 47.240 (defining conclusive presumptions).

What the voters did have by the time of the final vote, in 2006, was a *legislative definition* of a qualified health benefit plan on a related issue set up for voters' consideration on their first vote, in 2004. As discussed below, the Legislature took up that definitional issue in 2005 – the year between the first and second votes on the MWA – which the Labor Commission adopted in 2007, shortly after the final passage of the MWA. And *that* is the contemporaneous definition, reflected in NAC 608.102, that should have been applied by the District Court.

C. Voters Were Apprised Of the MWA's Impact On The Modified Business Tax. In 2005 – The Interim Year Between the First and Second Votes On the MWA – the Legislature Spells Out What A Qualified Health Plan Must Look Like For the Employer To Take The Modified Business Tax Deduction. *That* Is A Contemporaneous Construction.

The "Fiscal Note" accompanying the portion of the 2004 pamphlet discussing Ballot Question No. 6 states that the proposed amendment's financial impact "cannot be determined." 4 App. 663. The Fiscal Note does not refer to the increased cost of health insurance generally, or the specific health insurance statutes discussed above.

Instead, the 2004 Fiscal Note states: "In addition, if the proposal results in an increase in annual wages paid by Nevada's employers, revenues received by the State from the imposition of the Modified Business Tax would also increase." 4 App. 663.

Shortly after Ballot Question No. 6 passed in 2004, the Legislature addressed the Modified Business Tax.

What would that Modified Business Tax look like?

Would the employer get a healthcare deduction from its tax liability to the State of Nevada for providing a health benefit plan to its employees?

And, if so, what features would be required in the employer's health benefits plan?

Two statutes, both passed in 2005, answered those questions. NRS 363A.135 and 363B.115 authorizes employers to deduct from the total amount of reportable wages upon which Nevada's excise tax is levied "any amount authorized by this section that is paid by the employer for health insurance or a health benefit plan for its employees. . . ." The statutes define a qualifying "health benefit plan" as one that covers

> "those categories of health care expenses that are generally deductible by employees on their individual federal income tax returns pursuant to the provisions of 26 U.S.C. § 213 and any federal regulations relating thereto, if those expenses had been borne directly by those employees." NRS 363A.135(4)(e); NRS 363B.115(4)(e).[12]

Both statutes became effective July 1, 2005.

Thus, by the time of the second vote on the MWA, in 2006, there were

[12] NRS 363A.135 addresses the modified business tax for financial institutions and mining. NRS 363B.115 addresses the modified business tax for other employers.

► Legacy statutes from the '70s, '80s, '90s and 2000's defining health insurance generally; and

► Contemporaneous statutes, passed in 2005 shortly after the first vote on the MWA, defining qualifying health benefit plans specifically under the Modified Business Tax, which was expressly mentioned in the 2004 pamphlet.

Under a rule of contemporaneous construction, surely the 2005 statutes had to count for *something*. And they did, especially for the Labor Commission.

D. The Labor Commission Adopts The Legislature's Definition Of A Qualified Health Benefit Plan Immediately After The Second Vote On Ballot Question No. 6. *That* Is A Contemporaneous Construction.

Contemporaneous interpretation also looks to post-enactment statements. The window, as noted, is the period leading up to and after the provision's enactment. *Thomas,* 327 P.3d at 522; *Waymire,* 126 Nev. at 234. Ignoring the Labor Commission's extensive, post-enactment work on what constitutes a qualified health plan, culminating in NAC 608.102, violates the rule of contemporaneous construction.

The timeline is indisputable: The MWA became effective November 28, 2006. 4 App. 713; Pet. ¶ 36. The Labor Commission's temporary regulation tracking the language of NRS 363A.135(4)(e) and NRS 363B.115(4)(e) issued on February 2, 2007. 4 App. 726; Pet. ¶¶ 43-45. The final regulation took effect on October 31, 2007. Pet. ¶ 51. Thus, within two months after the effective date of the MWA, the Labor Commission had a statutory-based, working definition of what constitutes a qualified health plan that the District Court completely ignored. That is inconsistent with the rule of contemporaneous construction.

E. The Drafters Of The MWA Supported The Final Version of NAC 608.102. It Doesn't Get Much More Contemporaneous Than That.

If there was any residual doubt that voters intended the Labor Commission to come up with the template for defining a qualifying health plan, such doubt was put to rest on February 8, 2007, by Commissioner Tanchek's written testimony. Summarizing some of the background behind NAC 608.102, Commissioner Tanchek pointed out that the approach taken in NAC 608.102 had garnered a "good consensus" among both the business community and supporters of the MWA. Because NAC 608.102 tracked the definition that

qualified an employer's health benefit plans for a healthcare tax deduction, it was a "familiar" standard. "[W]e were able," Commissioner Tanchek testified, "to get a good consensus for that approach from business *and the drafters of the amendment*." 4 App. 720; emphasis added.

No one disputed the Commissioner's testimony. It is a resounding coda to a jurisdictional score that the District Court misread. In the end, NAC 608.102 and the Commission's efforts contemporaneous with the voting on the MWA, should not have been brushed aside.

IV. *Interpretation of NAC 608.102*: A Qualifying Plan Is Not Required To Cover Every Conceivable Federally-Deductible Healthcare Expense.

With NAC 608.102 as the measure for assessing whether Petitioners' plans qualified for payment of the lower-tier wage, the final question presented asks whose interpretation of NAC 608.102 was correct.

To recap: NAC 608.102 defines a qualifying health benefit plan under the MWA as one that covers

> "those categories of health care expenses that are

> generally deductible by employees on their individual federal income tax returns . . . ." NAC 608.102.

Plaintiffs read this language as requiring a qualifying plan to cover *all* federally-deductible health care expense. Petitioners read the language as requiring a qualifying plan to cover *any* federally-deductible health care expense. Plaintiffs' interpretation is incorrect for at least four reasons.

First, the language is descriptive, not prescriptive. It describes the qualifying categories, i.e., federally-deductible healthcare expenses, while not prescribing any specific category or categories. Which categories to cover is a function of what the insurance market offers and what the employer pays.

Second, interpreting the language as requiring any particular coverages (or, as construed by plaintiffs, "all" coverages) is inconsistent with the Labor Commission's decision to jettison the mandatory and specific health insurance coverages found at NRS 689A and 689B as the appropriate measure of a qualifying plan. Pet. at ¶¶ 39 - 45. Instead, the Commission chose a regulatory mandate that is broadly, not specifically, categorical. In lieu of expense-

specific standards, the Commission chose a more discretionary, market-oriented standard. Plaintiffs may not like that standard, but, as noted, plaintiffs have not challenged the legality of NAC 608.102.

Third, plaintiffs' interpretation of NAC 608.102 puts Ballot Question No. 6 is an entirely different perspective. The provision's title, "Raise the Minimum Wage For Working Nevadans," does not hint at any intent to also provide working Nevadans with virtually unlimited health insurance for *all* federally-deductible healthcare expenses. Nothing in the condensed ballot question, or the arguments for and against the initiative, tells voters that "Yes" means virtually unlimited health insurance for *all* federally-deductible healthcare expenses. Ballot Question No. 6 was not a healthcare initiative. It was a minimum wage initiative whose healthcare piece the voters left to be answered by the one body with plenary enforcement authority over *all* of Nevada's labor laws – the Labor Commission.

Lastly, plaintiffs' interpretation is unworkable. It foists upon trial judges, as Petitioners' counsel argued, the duty to check off "every test, every cost, every allocation" in a health benefit plan. 6 App. 1217. Moreover, counsel added, "there is probably no commercially available policy that meets [plaintiffs'] requirements."

6 App. 1221. Few, if any, Nevada employers could afford a plan that covers *every* federally-deductible healthcare expense.

To sum it all up: The Labor Commission should have the first word as to this minimum wage dispute. But if this case is to be tried, in the first instance, in court, then the Commission's efforts to define what voters left undefined in the MWA cannot be ignored. And the Commission's definition, which plaintiffs have not facially challenged, cannot be applied in a way that does violence to Article XV, section 16 of the Nevada Constitution.

CONCLUSION

For these reasons, Petitioners MDC Restaurants, LLC; Laguna Restaurants, LLC; and INKA, LLC respectfully ask this Court to

1. Issue a stay of all proceedings in the entire lawsuit pending below; and
2. Grant the Petition for A Writ of Mandamus, or Other Extraordinary Relief, and issue a ruling directing the District Court to vacate its July 27, 2016 order and enter a different order:
    a. Dismissing Plaintiffs' complaint without prejudice, or, in the alternative, referring Plaintiffs to the Labor

Commission for initial consideration of their wage complaints; or

b. Denying Plaintiffs' motion for partial summary judgment in its entirety and directing the District Court to evaluate Petitioners' plans under the plain meaning of NAC 608.102;

Dated: September 20, 2016 MORRIS POLICH & PURDY LLP

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ADDENDUM (NRAP 28(f))

NEV. CONST. ART. XV, §16

NRS 363 A. 135

NRS 363 B. 115

NRS 608.156

NRS 689A

NRS 689B

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Dated this 20 day of September, 2016

/s/ Nicholas M. Wieczorek
Nicholas M. Wieczorek

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