IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

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

Respondents,

and

PAULETTE DIAZ; LAWANDA GAIL WILBANKS; SHANNON OLSZYNSKI; AND CHARITY FITZLAFF, ALL ON BEHALF OF THEMSELVES AND ALL SIMILARLY-SITUATED INDIVIDUALS,

Real Party in Interest.

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Supreme Court Case No. 71289
District Court Case No. A-14-701633-C

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS' MDC RESTAURANTS, LLC, A NEVADA LIMITED LIABILITY COMPANY; LAGUNA RESTAURANTS LLC, A NEVADA LIMITED LIABLITY COMPANY; AND INKA LLC, A NEVADA LIMITED LIABILITY COMPANY PETITION FOR WRIT OF MANDAMUS OR OTHER EXTRAORDINARY RELIEF

Docket 71289 Document 2016-35495

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NRAP 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 judges of this court may evaluate possible disqualification or recusal.

1. Briad Restaurant Group, L.L.C. is a privately-held company and no publically traded company owns 10% or more of Briad Restaurant Group, L.L.C.'s stock. There are no other known interested parties other than those participating in this case.

2. Wendy's of Las Vegas, Inc., an Ohio Corporation and Cedar Enterprises, Inc. are privately-held companies. No publically traded company owns 10% or more of Wendy's of Las Vegas, Inc.'s stock and no publically traded company owns 10% or more of Cedar Enterprises, Inc.'s stock. There are no other known interested parties other than those participating in this case.

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3. Terrible Herbst, Inc. A Nevada Corporation d/b/a Terrible Herbst is a privately-held company and no publically traded company owns 10% or more of Terrible Herbst, Inc.'s stock. There are no other known interested parties other than those participating in this case.

Dated: November 14, 2016

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

BRIEF OF AMICI CURIAE

I. ISSUE DECIDED AND PRESENTED

Whether NRS 608.1555-608.1585 *et seq*. and Chapters NRS 689A and NRS 689B, incorporated by reference, govern the assessment of whether an employer offers "health benefits" for payment of the lower-tier minimum wage under Article XV, Section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or "MWA")?

II. INTEREST OF THE AMICI CURIAE

Pursuant to NRAP 29(a), Briad Restaurant Group, L.L.C., Wendy's of Las Vegas, Inc., Cedar Enterprises, Inc., and Terrible Herbst, Inc. ("Amici Curiae") seek to participate as Amici Curiae in the appeal proceeding in *MDC Restaurants, LLC. et al. v. Eight Judicial District Court for the State of Nevada,* Case No. 71289, on the issue of whether NRS 608.1555-608.1585 *et seq*. and Chapters NRS 689A and NRS 689B, incorporated by reference, govern the assessment of whether an employer offers "health benefits" for payment of the lower-tier minimum wage under the MWA .

All three amici curiae have the same interest in this case. Specifically, each of the amici curiae own or operate or provide administrative services to businesses in the state of Nevada and pay at least some of their employees the minimum wage pursuant to the MWA. Additionally, each of the amici curiae has been served with

lawsuits for alleged violations of the MWA. Pending in those cases are motions regarding the measure for qualified health insurance under the MWA. Those cases and motions are as follows:

- *Tyus et al. v. Wendy's of Las Vegas, Inc.* et al., D. Nev., Case No. 2:14-cv-00729-GMN-VCF, filed May 9, 2014. (Defendants' Motion for Summary Judgment, filed May 14, 2015).
- *Hanks et al. v. Briad Restaurant Group, LLC*, D. Nev., Case No. 2:14-cv-00786-GMN-PAL, filed May 19, 2014. (Defendant's Motion for Summary Judgment, filed August 20, 2015).
- *Ringo v. Terrible Herbst Inc. d/b/a/ Terrible Herbst*, Eighth Judicial District Court, Case No. A-14-704428-C, filed July 25, 2014 (Defendant's Motion for Summary Judgment, filed August 4, 2015)

Thus, the meaning of the term "health benefits" as used in the MWA directly implicates each of the amici curiae's potential liability, discovery obligations and business practices. These interests qualify proposed amici curiae to participate in this case.

It is the position of the amici curiae that the District Court erred in defining the term "health benefits" as used in the MWA by referencing the obligations contained in long dormant statutes which are clearly preempted by federal law, the Employee Retirement Income Security Act of 1974 as amended ("ERISA"). *See Attorney General, Opinion No. 84-17. Attorney General, Opinion No. 84-17, Employee Benefit Plans: NRS 608.156, NRS 608.157 and NRS 608.158 are preempted by federal law as to those employee benefit plans subject to ERISA*. This error is compounded by the fact that the Court below completely ignored the

best evidence of the public's intent: the post-enactment definition of health benefits codified in NAC 608.102 which stood unchallenged for almost nine years as the definitive guide as to the meaning of the key term of the MWA. The MWA does not reference nor incorporate NRS 608.1555-608.1585 *et seq*. or Chapters 689A and 689B. Indeed, had the MWA referenced or incorporated the above statutes, the MWA would be preempted.

III. INTRODUCTION

Plaintiffs and Real Party in Interests' attorneys have filed a multitude of lawsuits against Nevada business owners alleging violations of MWA for having followed the regulations enacted by the Nevada Labor Commissioner now almost 10 years ago. In this matter, and the matters where the amici curiae are parties, Real Party in Interest (and the plaintiffs in those cases) contend that health benefits under the MWA must be "comprehensive medical insurance" as defined by their own cobbled together interpretations of NAC 608.102; the Affordable Care Act; non-scholarly articles; "expert" opinions on matters of law. The District Court, selecting from the various options presented by the Real Party in Interest, opted instead to apply the requirements imposed on benefit plans offered by employers under NRS 608.1555-608.1585 *et seq*. The approach, however, is fatally flawed. Not only are NRS 608.1555-608.1585 *et seq*. not mentioned nor incorporated into the MWA's definition of health benefits, these statutes are unmistakably

preempted by ERISA as they seek to directly regulate employer sponsored welfare benefit plans. Therefore, for all the reasons set forth in Petitioner's Writ and expanded upon herein, the District Court's order must be overturned.

IV. FACTUAL BACKGROUND

Amici curiae adopt the Statement of Facts and Procedure set forth in Petitioner's Petition for Writ of Mandamus or Other Extraordinary Relief. Amici curiae add, however, that the argument of whether express ERISA preemption applies to the matter before the Court (as amici curiae assert that it does) was presented to the District Court below in the parties' extensive briefing on the issue. *See Defendants' Supplement to Defendants' Continued Motion to Stay Proceedings on Application for Order Shortening Time and Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefit Plans and Defendants' Countermotion to Strike Undisclosed Purported Expert and for Sanctions* (Sept. 10, 2015), Appendix at 001-033. Accordingly, ERISA preemption was presented to and considered by the District Court below in formulating its decision on Plaintiffs' Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefit Plans and therefore this argument should be addressed by this Court in its final decision on the issue.

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V. ARGUMENT

In their Petition for Writ of Mandamus, Petitioners advance two main arguments. First, they take the position that the Nevada Labor Commissioner has primary jurisdiction over the question of what constitute health benefits under the MWA. Second, they argue that the District Court erred in relying on NRS 608.1555-608.1585 *et seq*. and Chapters 689A and 689B to define this term. It is in support of this second proposition that the *Amici Curiae* address argument. Petitioners, aptly point out that none of the statutes upon which the District Court relied were mentioned, let alone incorporated by the MWA, Ballot Question 6, or the ballot argument. **Petitioner's Writ, at p. 63**. To expand on these arguments, amici curiae assert that not only were these statutes not incorporated into the MWA; but further, they *could not* be incorporated into the MWA due to express ERISA preemption. Indeed, this is the most likely explanation as to why neither the drafters of the MWA nor the Labor Commissioner reference or inporporate these statutes in the MWA or NAC 608.102. Therefore, in addition to all the reasons set forth in Petitioner's brief, the District Court's ruling must be overturned because: (1) NRS 608.1555-608.1585 *et seq*., including its incorporation of Chapters 689A and 689B, is expressly preempted by ERISA; and (2) if the Court were to adopt any of these statutes as the standard for "health benefits" under the MWA, then the MWA itself would also fall under ERISA's broad preemptive

scope.

A. NRS 608.1555-608.1585 *et seq.* is Expressly Preempted By ERISA

ERISA's express pre-emption clause pre-empts: "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). In interpreting this clause, the United States Supreme Court has set forth two categories of state laws that ERISA pre-empts. *Gobeille v. Liberty Mut. Ins. Co*., 136 S. Ct. 936, 943, 194 L. Ed. 2d 20 (2016) (*citing N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 655, 115 S. Ct. 1671, 1677, 131 L. Ed. 2d 695 (1995); and *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc*., 519 U.S. 316, 336, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (SCALIA, J., concurring)). First, ERISA pre-empts a state law, "[w]here a State's law acts immediately and exclusively upon ERISA plans ... or where the existence of ERISA plans is essential to the law's operation ..., that 'reference' will result in pre-emption." *Liberty Mut. Ins.,* 136 S. Ct. at 943 (*citing Dillingham*, at 325, 117 S.Ct. 832). Second, ERISA pre-empts a state law that has an impermissible "connection with" ERISA plans, meaning a state law that "governs ... a central matter of plan administration" or "interferes with nationally uniform plan administration." *Liberty Mut. Ins.,* 136 S. Ct. at 943 (*quoting Egelhoff v. Egelhoff*, 532 U.S. 141, 148, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001)). A state law also might have an impermissible connection

with ERISA plans if "acute, albeit indirect, economic effects" of the state law "force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers." *Liberty Mut. Ins.,* 136 S. Ct. at 943 (*quoting Travelers*, supra, at 668, 115 S.Ct. 1671)). When considered together, "these formulations ensure that ERISA's express pre-emption clause receives the broad scope Congress intended while avoiding the clause's susceptibility to limitless application." *Id*.

Here, NRS 608.1555 states:

> Benefits for health care: Provision in same manner as policy of insurance. 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 and 689B of NRS.

Further, NRS 608.156 states that employers which provide health benefits for their employees must provide benefits at a particular level for the treatment of alcohol and drug abuse. NRS 608.157 states the employers who provide health benefits for mastectomies must provide commensurate coverage for a certain number of prosthetic devices and reconstructive surgery. NRS 608.158 states that an employer must notify his or her employees when he or she will not be making a premium payment on health or life insurance provided to them as certificate holders under the employer's group policy.

Thus it is evident from the plain language of the statutes that both categories of express preemption apply. Indeed, the Attorney General unambiguously found

as much in *Attorney General, Opinion No. 84-17. Attorney General, Opinion No. 84-17, Employee Benefit Plans: NRS 608.156, NRS 608.157 and NRS 608.158 are preempted by federal law as to those employee benefit plans subject to ERISA*. Accordingly, NRS 608.1555-608.1585 *et seq*. is preempted by ERISA because: (1) it references ERISA plans, and (2) it has an impermissible connection with ERISA plans. More importantly, the statutes had been found clearly preempted prior to the drafting of the MWA in 2004 and its enactment in 2006. It is therefore, unreasonable to conclude that either the drafters of the MWA or the voters intended that they be used to give meaning to the term "health benefits."

1. NRS 608.1555-608.1585 *et seq*. Reference to ERISA Plans Results in its Preemption

Section 3 of ERISA, 29 U.S.C. § 1002, defines "employee welfare benefit plan" broadly as any plan or program maintained by an employer or employee organization to provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment." 29 U.S.C. § 1002(1); *see also* § 1002(3); *Standard Oil Co. of California v. Agsalud*, 633 F.2d 760, 763 (9th Cir. 1980), aff'd, 454 U.S. 801, 102 S. Ct. 79, 70 L. Ed. 2d 75 (1981). "Such employer-sponsored health insurance programs are subject to ERISA regulation, *see* § 4(a), 29 U.S.C. § 1003(a), and any state law imposing

requirements by reference to such covered programs must yield to ERISA." [1] *D.C. v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130–31, 113 S. Ct. 580, 584, 121 L. Ed. 2d 513 (1992).

Here, NRS 608.1555 imposes requirements on ERISA plans by reference and is therefore preempted for two reasons: (1) it acts immediately and exclusively on ERISA plans; and (2) the existence of an ERISA plan is essential to its operation.

a. *NRS 608.1555 Acts Immediately and Exclusively on ERISA Plans*

Where a State's law acts immediately and exclusively upon ERISA plans, that "reference" will result in pre-emption. *Dillingham Const., N.A., Inc*., 519 U.S. at 325. Specifically, state laws which are "specifically designed to affect employee benefit plans" are pre-empted under § 514(a). *Mackey v. Lanier Collection Agency & Serv., Inc*., 486 U.S. 825, 829, 108 S. Ct. 2182, 2185, 100 L. Ed. 2d 836 (1988) (*citing Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 46, 107 S. Ct. 1549, 1552, 95 L. Ed. 2d 39 (1987); *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 98, 103 S. Ct. 2890, 2900, 77 L. Ed. 2d 490 (1983)). For example, in *Mackey*, the United States

[1] The exemptions from ERISA coverage set out in § 4(b), 29 U.S.C. § 1003(b), do not limit the pre-emptive sweep of ERISA once it is determined that the law in question relates to a covered plan. *D.C. v. Greater Washington Bd. of Trade*, 506 U.S. 125, 131, 113 S. Ct. 580, 584, 121 L. Ed. 2d 513 (1992) (*citing Alessi v. Raybestos-Manhattan, Inc*., 451 U.S. 504, 525, 101 S.Ct. 1895, 1907, 68 L.Ed.2d 402 (1981)).

Supreme Court examined a Georgia statute which singled out ERISA employee welfare benefit plans for different treatment under state garnishment procedures. *Mackey*, 486 U.S. at 830. The Court held that the statute was pre-empted under § 514(a), explaining that the "state statute's express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach." *Id*. Indeed, the Court noted that it is "virtually taken […] for granted" that such a reference would result in preemption. *Id*.; *see also Greater Washington Bd. of Trade*, 506 U.S. at 130 (finding that statute specifically referred to welfare benefit plans regulated by ERISA and "on that basis alone is pre-empted.").

Here, NRS 608.1555 specifically references employer-provided employee health benefit plans regulated by ERISA. It states in relevant part:

> 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 and 689B of NRS.

NRS 608.1555. Accordingly, NRS 608.1555, by its own terms, applies only to health benefit plans offered by employers. These very plans fall expressly within the purview of employee welfare benefit plans exclusively regulated pursuant to Section 3 of ERISA. 29 U.S.C. § 1002. It is hard to imagine a more clear-cut example of a statute that acts immediately and exclusively upon ERISA plans. On this basis alone it is preempted.

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b. *The Existence of ERISA Plans is Essential to NRS 608.1555 Operation*

When the existence of ERISA plans is essential to a State's law's operation, that "reference" as well results in pre-emption. *Dillingham Const., N.A., Inc*., 519 U.S. at 325. This means that any state law imposing requirements by reference to employer-sponsored health insurance programs must yield to ERISA. *Greater Washington Bd. of Trade*, 506 U.S. at 130–31. This is true "even if the law is not specifically designed to affect such plans, or the effect is only indirect," *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 139, 111 S. Ct. 478, 482, 112 L. Ed. 2d 474 (1990), and even if the law is "consistent with ERISA's substantive requirements," *Metro. Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 739, 105 S. Ct. 2380, 2388, 85 L. Ed. 2d 728 (1985).

For example, in *Greater Washington Bd. of Trade*, the Supreme Court of the United States examined the District of Columbia Workers' Compensation Equity Amendment Act of 1990, which stated in relevant part:

> "Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter." D.C. Code Ann. § 36-307(a-1)(1) (Supp.1992).

Greater Washington Bd. of Trade, 506 U.S. at 127. The Court held that the District of Colombia statute was preempted by ERISA because the health insurance

coverage that the statute required employers to provide for eligible employees was measured by reference to "the existing health insurance coverage" provided by the employer which, in turn, was a welfare benefit plan under ERISA § 3(1).[2] Such employer-sponsored health insurance programs, the Court held, are subject to ERISA regulation, see § 4(a), 29 U.S.C. § 1003(a), and any state law imposing requirements by reference to such covered programs must yield to ERISA. *Id*.

Similarly, in *Ingersoll-Rand*, the Supreme Court of the United States held that that ERISA § 514(a) pre-empted a Texas common-law cause of action for wrongful discharge based on an employer's desire to avoid paying into an employee's pension fund. *Ingersoll-Rand Co.*, 498 U.S. at 139–40. Even though the employee sought no pension benefits, only "lost future wages, mental anguish and punitive damages" the Court held the claim pre-empted because it was "premised on" the existence of an ERISA-covered pension plan. *Id*., at 140. Specifically, the Court held, that because the existence of a pension plan was a critical factor in establishing liability under the State's wrongful discharge law, the cause of action relates not merely to pension benefits, but to the essence of the pension plan itself. *Id.*

Here, like the statutes, in *Greater Washington Bd. of Trade* and *Ingersoll-*

[2] The existing health coverage provided by the employer was found to be an ERISA governed plan because it involved a fund or program maintained by an employer for the purpose of providing health benefits for the employee "through the purchase of insurance or otherwise." *Id*., citing § 3(1), 29 U.S.C. § 1002(1).

Rand Co., existence of ERISA plans is essential to NRS 608.1555's operation. It required a specific benefit level for health insurance plans maintained by the employer. Specifically, NRS 608.1555 imposes the requirement that any employer sponsored health benefit plan or program provide the benefits, coverage and administrative protections of chapters 689A and 689B of NRS. As evidenced by the similarity in the language of the statute in *Greater Washington Bd. of Trade* and NRS 608.1555, such a requirement is impermissible. Accordingly, for this reason as well, it must yield to ERISA.

2. NRS 608.1555-608.1585 *et seq.*'s Impermissible Connection to ERISA Plans Results in Preemption

NRS 608.1555 has an impermissible connection to ERISA plans for three reasons: (1) NRS 608.1555 governs central matters of ERISA plan administration; (2) it interferes with national uniform ERISA plan administration; and (3) its indirect economic effects force ERISA plans to adopt a scheme of substantive coverage.

a. *NRS 608.1555 Governs Central Matters of ERISA Plan Administration*

ERISA regulates the administration of private employee benefits and pension plans and establishes standards relating to the administration of these plans, particularly with respect to disclosure, reporting, vesting of benefits, funding and the conduct of plan managers. *Agsalud*, 633 F.2d at 763. The Supreme Court

of the United States has repeatedly noted that these requirements are integral aspects of ERISA and are central to, and an essential part of, the uniform system of plan administration contemplated by ERISA. *Liberty Mut. Ins.*, 136 S. Ct. at 945 (*citing Dillingham*, 519 U.S., at 327, 117 S.Ct. 832; *Travelers*, 115 S.Ct. 1671; *Ingersoll–Rand*, 137, 111 S.Ct. 478; *Massachusetts v. Morash*, 490 U.S. 107, 113, 115, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989); *Metropolitan Life Ins. Co.,* 471 U.S. at 732). Any state law that enters a fundamental area of ERISA regulation and thereby counters the federal purpose is preempted. *Liberty Mut. Ins.*, 136 S. Ct. at 946.

For example, in *Egelhoff,* the United States Supreme Court struck down a Washington State law that bound ERISA plan administrators to a particular choice of rules for determining beneficiary status, requiring administrators to pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. *Egelhoff*, 532 U.S. at 121. The Court held that the statute implicated the payment of benefits, an area of core ERISA concern, because it bound "ERISA plan administrators to a particular choice of rules for determining beneficiary status[,] ... rather than [allowing administrators to pay the benefits] to those identified in the plan documents." *Id.* at 147.

Similarly, in *Liberty Mut. Ins.*, the United States Supreme Court struck down a Vermont statute that ordered health insurers, including ERISA plans, to report

detailed information about the administration of benefits in a systematic manner. *Liberty Mut. Ins.*, 136 S. Ct. at 946. The Court reasoned that the fact that reporting is a principal and essential feature of ERISA demonstrated that "Congress intended to pre-empt state reporting laws like Vermont's, including those that operate with the purpose of furthering public health." *Id*. Accordingly, the Court held that the law was a direct regulation of a fundamental ERISA function and it could not be saved by invoking the State's traditional power to regulate in the area of public health. *Id*.

Here, NRS 608.1555, like the statutes in *Liberty Mut. Ins.* and *Egelhoff*, implicates areas of core ERISA concern, including the funding, and the conduct of plan managers. NRS 608.1555 directs employers to "provide the same benefits and pay providers of health care in the same manner as a policy of insurance pursuant to chapters 689A and 689B of NRS." NRS 608.1555 (emphasis added). Thus, by its very terms it governs the payment and administration of benefits – a principle and essential feature of ERISA.

Further, by subjecting all employer-provided plans to the benefit and payment requirements of NRS 689A and NRS 689B, NRS 608.1555 directly implicates fundamental areas of ERISA regulation.[3] For example, NRS 689B.550,

[3] As will be discussed in more detail below, this is also why NRS 689A and NRS 689B cannot be read directly into the MWA regardless of NRS 608.1555 as doing so would cause the entire Amendment to be preempted by ERISA.

exactly like the state-statute at issue in *Egelhoff*, sets forth a specific set of rules plan administrators must follow for determining beneficiary status. *See Egelhoff*, 532 U.S. at 121. Similarly, NRS 689B.100 dictates the manner in which payments of benefits can be made. *See Egelhoff*, 532 U.S. at 148 (noting that payment of benefits is "a central matter of plan administration."). Other administrative requirements in the Chapter include:

- NRS 689B.026 (requiring insured to obtain approval of Insurance Commissioner that benefits are reasonable in relation to premiums charged; that policy is organized in fiscally sound manner; and rates are approved by division);
- NRS 689B.027 (instructing the Insurance Commissioner to adopt reporting requirements for insurers);
- NRS 689B.0285-0295 (setting forth mandatory complaint resolution procedures and reporting requirements);
- NRS 689B.030-0379 (setting forth mandatory coverage, administration of benefits, and payment requirements); and
- NRS 689B.038-048 (setting forth mandatory reimbursement and payment requirements).

Accordingly, NRS 608.1555 via it incorporation of NRS 689A and NRS 689B is setting forth requirements that are integral aspects of ERISA. As such, it is expressly preempted by ERISA.

b. *NRS 608.1555 Interferes with Nationally Uniform ERISA Plan Administration*

"Requiring ERISA administrators to master the relevant laws of 50 States

and to contend with litigation would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators—burdens ultimately borne by the beneficiaries." *Liberty Mut. Ins.*, 136 S. Ct. at 943–44 (*citing Egelhoff*, 121 S.Ct. 1322 (q*uoting Ingersoll–Rand Co.,* 498 U.S. at 142). To ensure this burden is minimalized, the United States Supreme Court has made clear that state statutes that mandate employee benefit structures or their administration have an impermissible connection with ERISA plans. *Dillingham*, at 325, 117 S.Ct. 839; *see also Shaw,* 463 U.S., at 97; *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990); *Alessi v. Raybestos-Manhattan, Inc*., 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981).

Following this directive, the Ninth Circuit in *Agsalud*, struck down a Hawaii statute that "require[d] employers in that state to provide their employees with a comprehensive prepaid health care plan." *Agsalud,* 442 F.Supp. at 696. The statute required that plan benefits include "a combination of features," and specifically "require[d] that the plans cover diagnosis and treatment of alcohol and drug abuse." *Id*. The statute also imposed "certain reporting requirements which differ[ed] from those of ERISA." *Id*. at 696. Based on those provisions, the Ninth Circuit emphasized that the statute "directly and expressly regulate[d] employers and the type of benefits they provide employees," and that it therefore "related to" ERISA plans under § 514(a). *Id*. The Court further noted that nothing in ERISA

supported creating a distinction between the state laws relating to benefits as opposed to administration. *Id*. Accordingly, the Court concluded that the statute impeded ERISA's goal of ensuring that "plans and plan sponsors would be subject to a uniform body of benefits law." *Id*.

Similarly, in *Shaw*, the Supreme Court of the United States held that the New York Human Rights Law, "which prohibit[ ] employers from structuring their employee benefit plans" in a particular manner and the New York's Disability Benefits Law, which required "employers to pay employees specific benefits," "relate[d] to" ERISA plans because they mandated employee benefit structures and administration, which necessarily interfered with ERISA's uniform regulatory regime. *Shaw,* 463 U.S. at 97–100; *see also Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 546 F.3d 639, 652 (9th Cir. 2008) (holding that ordinance that did not require any employer to provide specific benefits through an existing ERISA plan preserved ERISA's "uniform regulatory regime" and for that reason the ordinance was not preempted).

Here, like the statutes in *Agsalud* and *Shaw*, NRS 608.1555 mandates specific employee benefit structures and administration. As discussed above, it tells employers how they must provide and pay for ERISA plans. Further, by incorporating NRS 689A and NRS 689B, it set forth very specific benefit

requirements for various medical treatments.[4] Thus, NRS 608.1555 mandates both employee benefit structures and their administration in express conflict with ERISA's "uniform regulatory regime." Accordingly, for this reason as well, it is preempted.

c. *NRS 608.1555's Acute Indirect Economic Effects Forces ERISA Plans to Adopt a Scheme of Substantive Coverage*

In *Travelers*, the United States Supreme Court stated that "a state law might produce such acute, albeit indirect, economic effects as to force an ERISA plan to adopt a certain scheme of coverage or effectively restrict its choice of insurers" and for that reason it could be preempted. *Travelers Ins. Co*., 514 U.S. at 647. Here, NRS 608.1555's very direct economic effects on ERISA plans and its direct requirement for ERISA plans to adopt a scheme of substantive cover are very clear, as set forth above. Accordingly, it meets this basis for preemption as well because its economic effects force ERISA plans to adopt a scheme of substantive coverage directly, not just acutely. As such, for all the reasons set forth above, NRS 608.1555 is preempted by ERISA and cannot be the measure for insurance under the MWA.

[4] *See i.e.* NRS 689.0306 (requiring coverage for treatment received as part of a clinical study or trial); NRS 689B.0313 (requiring coverage for human papillomavirus vaccine); NRS 689B.0345 (requiring coverage for employee or member on leave without pay as result of total disability to be equal to or greater than the coverage otherwise provided by the policy); NRS 689B.0353 (requiring coverage for certain inherited metabolic diseases).

B. If the MWA Incorporates NRS 608.1555 or Chapters NRS 689A and NRS 689B, it is Expressly Preempted by ERISA

The District Court's order below specified that even if NRS 608.1555 could not be considered the measure for insurance under the MWA, Chapters NRS 689A and NRS 689B should still be the measure of insurance and those Chapters' substantive and administrative provisions should still apply. This, of course, cannot be the case. Specifically, if the Court were to incorporate NRS 608.1555 *et seq*. or Chapters NRS 689A and NRS 689B, independent of NRS 608.1555, as the requirements for "health benefits" under the MWA, the MWA itself would then run afoul of ERISA in the identical manner as NRS 608.1555 currently does.

This is because the MWA would impose on employers the same set of substantive and administrative requirements of NRS 608.1555 or Chapters NRS 689A and NRS 689B that render NRS 608.1555 or Chapters NRS 689A and NRS 689B preempted.[5]

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[5] The fact that employers do not have to provide ERISA plans under the provisions of the MWA and can instead pay a dollar more is irrelevant. The statute at issue in *Egelhoff* also had an opt-out provision and, in analyzing the irrelevance of that provision, the Court explained as follows:

> the burden that remains is hardly trivial. It is not enough for plan administrators to opt out of this particular statute. Instead, they must maintain a familiarity with the laws of all 50 States so that they can update their plans as necessary to satisfy the opt-out requirements of other, similar statutes. They also must be attentive to changes in the interpretations of those statutes by state courts. This "tailoring of

This is in contrast to the MWA's current requirement that employers who do not pay the extra dollar must provide "health benefits" which, pursuant to the Labor Commissioner's regulations, means insurance that "[c]overs those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return." NAC 608.102(1)(a).

The MWA itself does not necessitate the existence of an ERISA plan. It discusses "benefits" and "health insurance;" not a plan, fund or program. However, if "health benefits" under the MWA is read to incorporate NRS 608.1555 incorporating all of the requirements of NRS Chapter 689A and 689B, the MWA would be preempted as referring to and regulating employer welfare benefit plans. See, *Egelhoff*, 532 U.S. at 151

In contrast, the requirement under NAC 608.102 that "insurance must cover those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return" does not mandate any specific type coverage or the existence of a plan, trust or fund.. *See* 26 U.S.C. § 213. When there is nothing in a statute that guarantees that a certain level or kind of "intended benefits" will be provided or that a particular group of "intended ... beneficiaries" will be included, the statute does not conflict with ERISA. *Golden*

> plans and employer conduct to the peculiarities of the law of each jurisdiction" is exactly the burden ERISA seeks to eliminate.

Egelhoff, 532 U.S. at 151.

Gate Rest. Ass'n, 546 F.3d at 652. Accordingly, if the Court reads NRS 608.1555 or Chapters NRS 689A and NRS 689B or any other set of substantive and administrative requirements into the MWA, ERISA preemption will apply.

VI. CONCLUSION

The District Court's cobbled together definition of "health insurance" via application of NRS 608.1555-608.1585 *et seq*. and NRS 689A and NRS 689B, was wholly improper. Nothing in the plain language of the statute permits such an expansive regulatory scheme for employer-provided benefits. Further, NRS 608.1555-608.1585 *et seq*. is expressly preempted by ERISA and, further, if read into the MWA, it will cause the MWA to be expressly preempted by ERISA. The same is true for Chapters NRS 689A and 689B. Accordingly, this Court should overturn the District Court's order and find that qualified health insurance as required by the MWA is not defined via a compilation of NRS 608.1555-608.1585 *et seq*. and NRS 689A and NRS 689B.

Dated: November 14, 2016

Respectfully submitted,

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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 Microsoft Word 2010 in 14 point font size and Times New Roman.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief

regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada, 89169. On November 14, 2016, I served the within document:

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS' MDC RESTAURANTS, LLC, A NEVADA LIMITED LIABILITY COMPANY; LAGUNA RESTAURANTS LLC, A NEVADA LIMITED LIABLITY COMPANY; AND INKA LLC, A NEVADA LIMITED LIABILITY COMPANY PETITION FOR WRIT OF MANDAMUS OR OTHER EXTRAORDINARY RELIEF

☒ By **CM/ECF Filing** – Pursuant to N.E.F.R. the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 14, 2016, at Las Vegas, Nevada.

/s/ Erin J. Melwak
Erin J. Melwak

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