IN THE SUPREME COURT OF THE STATE OF NEVADA

MDC RESTAURANTS, LLC, a Nevada limited liability company; LAGUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company, 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 Court Judge, Respondents, vs. PAULETTE DIAZ, an individual; LAWANDA GAIL WILBANKS, an individual; SHANNON OLSZYNSKI, an individual; and CHARITY FITZLAFF, an individual, on behalf of themselves and all similarly-situated individuals, Real Parties in Interest.	Electronically Filed Feb 28 2017 02:37 p.m. Elizabeth A. Brown Clerk of Supreme Court **Case No. 71289** Eighth Judicial District Court Case No. A-14-701633-C District Court Dept. No. XVI **PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR OTHER EXTRAORDINARY RELIEF**

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I. INTRODUCTION.

As in the recent matters of first impression before this Court involving Article XV, Section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or "MWA") and its companion regulations, Real Parties in Interest ("Real Parties") seek to exaggerate the scope and intent of the law. *See, e.g., MDC Restaurants, LLC v. District Court*, 132 Nev. Adv. Op. 76, 383, P.3d 262 (2016) ("*Diaz I*"); *MDC Restaurants, LLC v. District Court*, No. 67631, 2016 WL 6902179 (Nov. 22, 2016) ("*Diaz II*"); *Perry v. Terrible Herbst, Inc.*, 132 Nev. Adv. Op. 75, 383 P.3d 2576 (2016). Here, Real Parties advocate the imposition of commercially unbearable burdens on Nevada employers that the MWA and its companion regulations do not require and which the drafters and voters never contemplated, considered, nor intended.

Real Parties devote a significant portion of their brief to discuss the health benefit plans the Petitioners provided to their employees and complain about what services the health benefit plans do not provide. Answer at pp. 4-18. Throughout, Real Parties' counsel includes a litany of personal and unfounded opinions that health benefit plans that have limitations and which are not "traditional comprehensive or major medical

insurance," as Real Parties' counsel defines them, are not "meaningful health insurance." Answer at pp. 8:12-14, 9:12-10:2. In fact, the health benefits plans the Petitioners offered to their employees include multiple benefits that most reasonable people would unquestionably find "meaningful." 3 PA 0553-0556.[1]

With respect to Petitioners' jurisdictional argument, Real Parties argue that the plain language of the MWA provides a private right of action and contend that the redress they seek is founded only on the MWA. In so asserting, Real Parties skew the MWA's plain language, disregard the salient provisions within NAC 608.0102 (which pertain to the type of health benefits a Nevada employer is to offer its employees if it chooses to pay its employees the lower excepted wage rate) and calculatedly overlook the very allegations in Real Parties' Amended Class Action Complaint. 1 PA 0017-0031.

Finally, Real Parties posit that, even though the MWA, the Nevada legislature, *i.e.,* the Senate Committee on Commerce and Labor, the drafters of the MWA, the Nevada Attorney General, the Labor Commissioner and interested business groups apparently never considered or discussed, Nevada Revised Statutes Chapters 608, 689A, and 689B during the enactment of the

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[1] Record citations are to the volume and page of Petitioners' six volume appendix filed with the petition, as follows: [Volume] PA [Page #].

MWA and the promulgation of its companion regulations, any health benefits plan offered pursuant to the MWA must comply with those Chapters and provide all the benefits set forth therein. There is simply no factual or logical basis for such a broad legal reference. The only requirements a Nevada employer must comply with in order to qualify to pay an employee the excepted wage rate are enumerated in NAC 608.102.

II. ARGUMENT.

1. Real Parties' Answer fails to demonstrate that the district court had jurisdiction to consider their particular claims.

In certain cases, the MWA confers jurisdiction to enforce its language in the district courts. Nev. Const., Art. XV, § 16, para. (B); Petition at 40:

> ... Offering health benefits within the meaning of this section shall consist of making health insurance available to 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. Cost., Art. XV, § 16, para. B.

Thus, the only questions the district court may consider regarding health benefit plans answered by this language are :

> (1) Who must be covered? *The employee and the employee's dependents.*
>
> (2) At what cost to the employee? *Not more than 10 percent of the gross taxable income from the employer.*

A Nevada employer must look to NAC 608.102 to answer the question "What

must a health benefit plan include?" Consequently, any claim related to *the type* of health benefit plans provided must be brought under NAC 608.102, not the MWA, and such claim falls within the jurisdiction of the Labor Commissioner. 4 PA 719-720 ("The [MWA] doesn't say what [health insurance] is, just that the employer has to offer it in order to take advantage of the lower rate."). To rebut this, Real Parties torture the language within the MWA to find an express right of action "that is pretty expansive" and argue, therefore, that their claims were appropriately raised in district court. Answer at 20:25-21:7. While it is true that the MWA includes an express right of action in which access to Nevada courts is established in order remedy claims of violations of its terms, that right is limited. The MWA only addresses who must be covered (an employee and the employee's dependents) and premium costs (not to exceed 10 percent of employee's gross taxable income), not coverage requirements.

Real Parties' Amended Class Action Complaint ("ACAC") undermines their contention that their claim regarding the type of health benefit plans offered arise under the MWA and not NAC 608.102. 1 PA 17-31, ¶¶ 8, 31, 34, 57-59. In those paragraphs, Real Parties allege that Petitioners failed to provide health insurance benefit plans in accordance with NAC 608.102, thus their claims arise from alleged violations of the NAC 608.102, not the MWA.

Thus Real Parties' claims related to the *type* or *quality* of the health benefit

plans Petitioners provided should have been brought before the Labor Commissioner prior to initiating the lawsuit. Had Real Parties not circumvented this procedure, the parties in this lawsuit would have been properly afforded the benefit of the Labor Commissioner's consideration of this element of the MWA regulations.

Finally, Real Parties further belabor this issue and question the Labor Commissioner's "historic expertise in health insurance regulation." Answer at 22:27-23:4. The Labor Commissioner does not have to be a subject matter expert in health insurance to determine whether an employer's proffered plan complies with the MWA or NAC 608.102. As noted below, three elements of Nevada law describe the quality and types of insurance a Nevada employer is to provide its employees for purposes of the MWA.

2. Contrary to Real Parties' assertion, NAC 608.102 is not "unworkable."

As this Court confirmed in *Diaz I*, "[t]o qualify to pay an employee the [lower-tier] minimum wage... [t]he employer must offer a health insurance plan" and the "health insurance plan must be made available to the employee and any dependents of the employee." *Diaz I, supra,* 383 P.3d at 265 (citing NAC 608.102(1) and NAC 608.102(2)). Further, the employer must offer a health insurance plan which:

(a) Covers 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 and any federal regulations relating thereto, if such expenses had been borne directly by the employee; or
>
> (b) Provides health benefits pursuant to a Taft-Hartley trust which:
>
> (1) Is formed pursuant to 29 U.S.C. § 186(c)(5); and
>
> (2) Qualifies as an employee welfare benefit plan:
> (I) Under the guidelines of the Internal Revenue Service; or
> (II) Pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

NAC 608.102(1).

26 U.S.C. § 213 (itemized deductions for tax expenses) sets forth a broad definition of the type of medical care expenses that are deductible on a federal tax return. 3 PA 0557-0559. It is indisputable that the medical care services specified in each of the Petitioners' health benefit plans include health care expenses that are "generally deductible" by an employee under 26 U.S.C. § 213.

Real Parties claim that the standard set forth in NAC 608.102 is "not good or workable," but contemporaneously contend that NAC 608.102(1)(a) mandates Nevada employers provide a qualifying plan that covers *all* federally-deductible health care expenses. In support, Real Parties cite IRS Publication No. 502 for Tax Year 2013 and suggest that within the publication the IRS went "to the trouble of

providing a near-comprehensive list of those categories of health services that are deductible," some of which Petitioners' plans do not purportedly include. Answer at 25:9-16. Such reasoning does not hold. For example, under the caption "What are Medical Expenses," the IRS Publication sets forth the exact description of health care expenses as 26 U.S.C. § 213 and Treasury Regulation 1.213. 2 PA 342-368, 560. Under the caption, "What Medical Expenses are Includible?" the documents list a series of examples, not "categories," of medical expenses that are deductible. The IRS Publication even states that the "list does not include all possible medical expenses" and lists as examples of deductible medical expenses lead-based paint removal for the home, legal fees, televisions, trips, tuition and medical conferences. *Id.* at 342-368. It is unimaginable that any insurance plan could cover every example in the IRS Publication and it requires a significant amount of wishful thinking to infer that the MWA and NAC 608.102 intended to have such services covered.

Real Parties essentially make the same policy argument here that they asserted before this Court in *Diaz I,* which this Court declined to adopt. In *Diaz I*, Real Parties contended that the terms "provides" (MWA) and "offer" (NAC 608.102) and the phrase "make available" (NAC 608.102) meant "enroll" and that employees had to enroll in their employers' health benefit plans before the employer could pay the lower wage rate. *Diaz I, supra,* 383 P.3d at 265. The

employees challenged NAC 608.102 on policy grounds and contended that if "provides" was interpreted to mean "offer," the purpose and benefits of the MWA were thwarted because employees would receive neither low-cost health insurance nor the raise in wages its passage promised. *Id.* at 266. This Court dismissed that policy argument:

> The stated purpose for that measure was to ensure that "workers who are the backbone of our economy receive fair paychecks that allow them and their families to live above the poverty line." *Id.* at 266-67 (citing Nevada Ballot Questions 2006, Nevada Secretary of State, Question No. 6, § 2(6).

As noted by this Court in *Diaz I*, the purpose of the MWA was to increase wages. It was not intended to ensure that Nevada employees received the most comprehensive medical coverage conceivable. Indeed, Ballot Question No. 6's title was "Raise the Minimum Wage for Working Nevadans," which infers nothing about working Nevadans receiving comprehensive medical insurance.

Last, Real Parties chide Petitioners for failing to seek prior clarification from the district court or Labor Commissioner regarding NAC 608.102. To be clear, Petitioners do not believe the provisions of the MWA or NAC 608.102 are vague or confusing, and this Court has in fact sustained Petitioners' interpretations of the MWA and its companion regulations. It is the Real Parties who have created nuances and ambiguities where none exist.

3. Under the principles of contemporaneous construction, the district court's exclusive reliance on Nevada Chapters 608, 689A, and 689B was erroneous.

Oddly, Real Parties appear to dispute Petitioners' reference to the doctrine of "contemporaneous construction" in their response. Answer at 27-33. In the underlying briefing in the district court, Real Parties confirmed that "if the Court determines that any confusion or ambiguity regarding the requirements of the [MWA] exist, it absolutely may look to the provision's history, public policy, and reason to determine what the voters and drafters intended." 6 PA 1170. Further, Real Parties endorsed the "general rule [] that courts should use the contemporaneous construction by those charged with drafting a provision, rather than post hoc construction." *Id.* Petitioners agree.

When faced with ambiguous language, a court may 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). Courts should use the contemporaneous construction by those charged with drafting a provision, rather than a post hoc construction. *See* 6 *Treatise on Const. L.* § 23.32 (cited favorably in *Strickland v. Waymire*, 126 Nev. Adv. Op. 25, 235 P.3d 605, 609 (2010)); 6 PA 1170. "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." *Strickland, supra,* 235 P.3d at 608; *City of Sparks,*

supra, 302 P.3d at 1126. A contemporaneous construction analysis is given great weight. 6 *Treatise on Const. L.* at § 23.42.

As Petitioners have detailed, the district court used statutes (NRS 608, 689A, 689B) invoked by Real Parties and their counsel that were enacted in 1971 and 1983. Petition at 61-69. None of those statutes were brought to the voters' attention at any time as they deliberated and voted on Ballot Question No. 6. Moreover, the goal behind Ballot Question No. 6 was not to ensure all Nevada employees received low-cost, comprehensive health insurance. The purpose of the initiative was to increase wages. *Diaz I, supra,* 383 P.3d at 266.

Petitioners set forth in detail how the principle of contemporaneous construction applies. Petition at 61-69. However, it is clear that when the district court acquiesced to Real Parties' declarations regarding the applicability of NRS 608, 689A, and 689B, it did so while at the same time disregarding the intent of the drafters of the MWA, the voters who enacted the MWA, the language in the ballot initiative, as well as the then-Labor Commissioner's efforts before, during, and after the MWA was enacted.

4. Real Parties' presumptions and conjecture are unavailing.

In their final argument, Real Parties contend:

> The easiest, and most appropriate way of resolving the question here is to presume that when the drafters of the Amendment required "health insurance" be provided to employees to whom the employer desired to pay the

> lower-tier minimum wage rate, the drafter knew (1) that "health insurance" was and remains a highly-regulated insurance product under a vast array of state and federal laws, especially including the Nevada Revised Code; (2) that the "insurance" being required as part of the Amendment was being provided by an employer to employees, thus bringing it within the ambit of NRS Chapters 689A and 689B; (3) that because the Amendment is remedial and proposes certain flow to minimum wage employees in Nevada, the insurance so offered would be substantive, usable, worthwhile insurance of the kind required by those code chapters; and (4) employers would have a choice to provide this kind of health insurance or simply go ahead and pay the upper tier. Answer at 35.

This is a lot of "presumption" to reach the so-called "easiest and most appropriate way" to resolve the question of what constitutes health insurance. The problem with Real Parties' presumptions is that they are, in fact, presumptions unsupported by any facts.

The drafters of the MWA and the Nevada legislature were aware of the Labor Commissioner's companion regulations, including the regulations specifying what health insurance must cover, and found the Labor Commissioner's efforts to define what the MWA left undefined appropriate. There is no reason to presume otherwise.

III. CONCLUSION.[2]

Petitioners request the Court grant their Petition for Writ of Mandamus or

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[2] Petitioners choose not to respond to the amici briefing as the arguments set forth in the briefing are fully developed.

Other Extraordinary Relief and issue a ruling directing the district court to vacate its July 27, 2016 order and enter a different order; or dismiss the underlying complaint with prejudice and refer the Plaintiffs in the underlying action to the Labor Commissioner for initial consideration of their wage complaint; or deny Real Parties' motion for summary judgment and direct the district court to evaluate Petitioners' plans under the plain meaning of NAC 608.102.

Respectfully submitted this 22 day of February, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify I have read this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Word in Times New Roman style at a font size of 14.

2. 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 does not exceed 15 pages.

3. I further certify, this reply brief and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify 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 transcript or appendix where the matter relied upon may be found. I understand I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 28 day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Morris Polich & Purdy LLP, and that on this 28 day of February, 2017, I served a true and correct copy of the foregoing **PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR OTHER EXTRAORDINARY RELIEF** via electronic means by operation of the court' s electronic filing system, upon each party to this case who is registered as an electronic case filing user with the clerk.

Debbie Simons

An Employee of Morris Polich & Purdy LLP