In the
Supreme Court of the State of Nevada

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NEVADA YELLOW CAB CORPORATION; NEVADA CHECKER CAB CORPORATION; and STAR CAB CORPORATION,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE RONALD J. ISRAEL, DISTRICT JUDGE,

Respondents,

and

CHRISTOPHER THOMAS; and CHRISTOPHER CRAIG,

Real Parties in Interest.

Case No.: 74166

Eighth Judicial District Court
Case No.: A-12-661726-C

Real Parties In Interest's Answering Brief

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N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

DATED this 31st day of October, 2017.

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I. INTRODUCTION

Real Parties in Interest (collectively, "Mr. Thomas") will put Petitioners' (collectively, "Yellow Cab") argument in its best light. Sanded and polished, Yellow Cab is asking this Court to establish a safe harbor defense to liability for minimum wage deficiencies under article XV, section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or the "MWA"). That is the gravamen of the Petition, if not precisely articulated. The problem is that when the issue is clearly described, Yellow Cab offers absolutely no legitimate basis in law or equity for this Court even to consider establishing such a defense for underpayment under the MWA.

Already in this case, in *Thomas v. Nevada Yellow Cab Corp*., 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014) ("*Thomas I*"), this Court ruled that the statutory exceptions to minimum wage law were repealed by the enactment of the MWA, and that taxi-cab drivers were entitled to minimum wages. Later, in *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 132 Nev. Adv. Op. 77, 383 P.3d 246 (2016) ("*Thomas II*"), the Court—in the firmest possible statement of constitutional

supremacy and judicial authority—held that its *Thomas I* decision was retroactive, meaning that it was the law of Nevada from its effective date. In this case, which may yet reach *Thomas III* status, Yellow Cab seeks an exception to both those previous cases—and to both liability and retroactivity.[1] The persuasive burden for Yellow Cab to achieve this must be pretty high; it is a pretty rare thing for a state high court, in successive published opinions, to make a definitive constitutional interpretation and then clearly order its retroactivity, only to open an extra-textual escape hatch thereafter which would render both those decisions effectively defunct, at least as to Yellow Cab itself. As will be seen below, however, Yellow Cab does not present much in the way of argument or analysis that supports granting the relief it seeks.

Apart from the good-faith defense argument, there is nothing to the other contentions in the Petition that *all* of Yellow Cab's defenses

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[1] There was actually another intervening writ, in which Yellow Cab asked for a stay of proceedings below and which this Court disposed of summarily. *See Yellow Cab Corp. v. District Court*, Nev. Sup. Ct. Case No. 67664, and Real Parties In Interest's Appendix ("RPIA") 000020-21. This is, therefore, the third writ petition filed by Yellow Cab in this action.

being struck; that simply did not happen.[2] Pet. at 13, 15, 17. Answering the operative Second Amended Complaint below, Yellow Cab included *twenty-eight* affirmative defenses. RPIA at 000009-13. The district court has now struck *four* of them. RPIA at 000003-6. Three of those had to do with the application of the MWA to taxicab drivers at all, of which the district court stated that they "have all been resolved by the Nevada Supreme Court's decisions in this case." RPIA at 000005.[3] A further affirmative defense—Yellow Cab's tenth, pled against potential punitive damages—was not struck, but the district court ruled that if Yellow Cab asserted reliance upon "advice of counsel" as its shield, inquiry in discovery by Mr. Thomas would be proper or that defense, too, would be struck.[4]

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[2] This is an instance in which Petitioner should have waited until the order of the district court was available for this Court's consideration prior to filing its writ petition. The order now in hand, the Court would be justified in denying further consideration of the Petition entirely, if only because its actual terms belie its description by Petitioner.

[3] Here, the district court refers to *Thomas I* and *Thomas II*.

[4] There is nothing about "automatic … punitive damages" in the district court's order. In fact, the district court already made a ruling in 2015, on a motion by Yellow Cab, that punitive damages would be a fit

(continued on next page)

The only affirmative defense at issue in this Petition, and its sole rationale, is Yellow Cab's twenty-seventh:

> Defendants followed the law that was being enforced by the Nevada Labor Commissioner.

RPIA at 000013. This is what Yellow Cab wants to argue to the jury. But upon motion by Mr. Thomas, the district court struck this defense, stating:

> An employer's liability for unpaid minimum wages owed pursuant to the terms of the MWA is not excused by their compliance, in good faith or otherwise, with the policies or practices of the Nevada Labor Commissioner or any other government agency or officer. Nor is an employer's liability for unpaid minimum wages…subject to any other defense based upon a good faith belief they had complied with the MWA's minimum wage payment requirements or their knowledge or lack of knowledge of [those] requirements.

RPIA at 000004.

The district court has it correct. There is nothing in the MWA permitting any such defense. There is nothing in Nevada law elsewhere

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subject for resolution, or consideration by the jury, only after evidence had been developed—an entirely normal and correct decision. RPIA at 000017-19. Yellow Cab made a further motion to strike Mr. Thomas's punitive damages claim, which was heard by the district court on October 24, 2017, which again denied the motion (order pending as of this writing).

that does so, either, and it would not matter if there was. As the district court pointed out, referring to this Court's decisions already in this action, "the MWA imposes a liability that supersedes the requirements of Nevada's statutes and is only subject to the limitations expressly set forth in the MWA itself." RPIA at 00004. No such limitation is apparent.

Even if this Court were somehow inclined to create an extra-textual good faith reliance defense to minimum wage underpayment pursuant to the Nevada Constitution, this case provides a poor context for establishing it. Yellow Cab has not and cannot demonstrate reliance on any administrative regulation, contested agency case, or written directive, and it neither sought nor received a declaration of its rights either from the Labor Commissioner or the courts. In fact, it has little more to claim it "relied" upon than what it characterizes as "pervasive confusion at the Office of the Labor Commissioner" regarding the application of the MWA to taxi-cab drivers, whatever that means, and a federal court case in which the judge made what turned out be an incorrect prediction of state law. Pet. at 18. This is no basis for creating, from whole cloth, a safe harbor defense to minimum wage

requirements. Lacking either a textual or an equitable basis for granting extraordinary writ relief, the Court should deny the Petition.

II. LEGAL ARGUMENT

A. Standard Of Review

Mr. Thomas' motion below was to strike certain of Yellow Cab's affirmative defenses—at this stage of the proceedings, essentially a motion for partial judgment on the pleadings. Under N.R.C.P. 12(c), a district court may grant a motion for judgment on the pleadings when the material facts of the case "are not in dispute and the. movant is entitled to judgment as a matter of law." N.R.C.P. 12(c); *Bonicamp v. Vazquez*, 120 Nev. 377, 379, 91 P.3d 584, 585 (2004). Because an order granting a motion for judgment on the pleadings presents a question of law, this Court will review such an order *de novo*. *Lawrence v. Clark Cnty.*, 127 Nev. 390, 393, 254 P.3d 606, 608 (2011).

B. There Exists No Good Faith Reliance Defense For Violation Of The MWA

Indisputably, there is no textually-demonstrable good faith reliance defense to an employer's minimum wage obligations under Nevada law of the type Yellow Cab urges upon this Court. In fact, the opposite appears to be true; an employer would have a very hard time

finding any justification in law for underpaying the state's minimum wage.

The MWA itself begins quite unambiguously: "Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section." Nev. Const. art. XV, §16(A). The commanding "shall" is crystal clear. Further sections of the MWA provide for extremely broad remedial measures to enforce the measure's terms, a mandatory fee-shifting provision, and a nearly all-inclusive definition of "employees" covered by its terms. Further, the MWA makes clear that no employer or employee may waive its provisions by way of individual agreement; the rights afforded employees in the provision may only be waived in the context of a bona fide collective bargaining agreement, and only then if "the waiver is explicitly set forth in such agreement in clear and unambiguous terms." Nev. Const. art. XV, §16(B). Even that waiver possibility is further circumscribed in the MWA: "Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section." *Id.*

The MWA appears to embody both a strong public policy that employees shall receive (and employers shall pay) the minimum hourly wages it establishes, and vigorous enforcement mechanisms for ensuring employer compliance. This is not fertile ground for finding cause to establish a safe harbor for minimum wage underpayment.

Nevada's statutory law, for what it may be worth in considering this issue, does not offer Yellow Cab any support, either. N.R.S. 608.005, the legislative declaration acting as a preamble to the Nevada Labor code, begins, "The Legislature hereby finds and declares that the health and welfare of workers and the employment of persons in private enterprise in this State are of concern to the State and that the health and welfare of persons required to earn their livings by their own endeavors require certain safeguards as to hours of service, working conditions and compensation therefor." N.R.S. 608.005.

N.R.S. 608.016 states that "Except as otherwise provided in N.R.S. 608.0195, an employer shall pay to the employee wages for each hour the employee works." N.R.S. 608.016. This is known, in labor law, as an "all-hours provision," meaning that an employer must pay the agreed-upon rate of wages for every hour worked by an employee, and it

provides remedy for what is often called gap-time. Not many states have this kind of provision, neither is it a feature of the federal Fair Labor Standards Act; it is a hallmark of statutory regimes that emphasize and prioritize, as public policy, the fundamental importance of workers being paid for the work they perform for employers.

Furthermore, Nevada's Labor Code demands immediate payment of the wages due a terminated employee (*see* N.R.S. 608.020) and prompt payment of employees who resign or quit (*see* N.R.S. 608.030), each carrying stiff penalties for delay or nonpayment by employers (*see* N.R.S. 608.040-050). The Code sets the manner and timing of wage payments, and provides for mandatory notices of any employer action affecting workers' compensation (*see* N.R.S. 608.060-130). N.R.S. 608.190 says that "A person shall not willfully refuse or neglect to pay the wages due and payable when demanded as provided in this chapter, nor falsely deny the amount or validity thereof or that the amount is due with intent to secure for the person, the person's employer or any other person any discount upon such indebtedness, or with intent to annoy, harass, oppress, hinder, delay or defraud the person to whom such indebtedness is due." N.R.S. 608.190. All of these statutory

provisions evince a very strong policy in this state favoring payment to employees for wages due, with absolutely no detectable murmur of defense to underpayment of wages, much less a defense that states the employer simply did not believe it had to pay the wages called for by law.

Even the former minimum wage statutes, some or all of which have been superseded or repealed by enactment of the MWA, hold out no hope for Yellow Cab here. N.R.S. 608.250(3) says "[i]t is unlawful for any person to employ, cause to be employed or permit to be employed, or to contract with, cause to be contracted with or permit to be contracted with, any person for a wage less than that established by the Labor Commissioner pursuant to the provisions of this section." N.R.S. 608.250(3). No wiggle room there, that subsection is even less flexible than the collective bargaining language later enacted through the MWA.

There just is not much for Yellow Cab to point to in any legal provision touching upon the payment of wages in Nevada that can support the idea of a good faith reliance defense to minimum wage noncompliance. Conversely, the scales seem quite heavily weighted in

the other direction, towards a near-complete insistence that Nevada workers merit full protection when it comes to payment for the work they perform.

In sum, the MWA exists to establish the pertinent wage rates and to *remedy* violations of its terms, not to *excuse* them. Yellow Cab can characterize this as "strict liability" if it wants, it does not really matter. The point is that any support for a safe harbor defense here at the very least will not be located in any existing Nevada law.

C. There Is No Authority For Creating A Good Faith Reliance Defense For Violation Of The MWA

Proposed *amici curiae* Western Cab Company and A Cab (collectively, "Amici") think they are helping Yellow Cab's cause. They are not.[5] In fact, far from establishing the point, Amici's citation to the good faith reliance defense contained in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 259, is the best argument for denying the writ.

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[5] Amici raise two arguments that do not merit much consideration. The first is a contention that Nevada civil procedure does, indeed, permit the pleading of affirmative defenses. The point is conceded, insofar as any defendant may raise, subject to judicial scrutiny, any defense permitted at law. The second is an apparent due process argument regarding strict liability that seems, by and large, to be a *non-sequitur*.

The FLSA is a *federal statute*. The good faith reliance defense to certain FLSA violations was *enacted by Congress*, and is embodied in a statutory text, for all to see, read, and interpret. In other words, at the first hurdle Yellow Cab and Amici stumble: this Court is not about to establish, by judicial fiat, a good faith reliance defense that excuses Nevada employers from mandatory minimum wage requirements where no legislative or textual authority exists at all, and where the clear weight of law and policy is in favor of holding employers to state wage laws. FLSA section 259 *is part of the overall structure of the Act itself*, as enacted by Congress; it is not some judicially-created, post-enactment sop to employers who have broken the law and now desperately want to escape liability. 29 U.S.C. § 259. Certainly, this Court has resorted to considering the text and interpretations of the FLSA in answering particular legal questions arising in the context of Nevada wage law; there is nothing unusual about that. *See, e.g., Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 955–57 (2014). But examining the FLSA's definition of "employee" for help in establishing an appropriate legal test in state law, for example, is very different from writing into Nevada law a provision like section 259,

which neither the Nevada Legislature nor the people acting in their legislative capacity have seen fit to enact.

Furthermore, the FLSA's good faith reliance defense itself is defined very narrowly, with specific requirements for a defendant trying to take advantage of its safe harbor. A defendant must plead and prove that the FLSA violation was "was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged." 29 U.S.C. § 259.

But employers cannot simply claim that they "sensed" or had some understanding that a particular agency was unclear or incorrect about the meaning of governing law. Good faith reliance requires *much* more than that. By enacting section 259, "Congress intended to exonerate only those who relied upon formal rulings." *Murphy v. Miller Brewing Co.*, 307 F. Supp. 829, 838 (E.D. Wis. 1969). Moreover, not only must an employer show such it received such guidance and that it was of a nature rising to the level of something that could be reasonably relied

upon as a governing interpretation of law, it must also show that it actually relied upon that guidance. *De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295, 1313 (N.D. Ga. 2008).

Many employers raise the section 259 defense, only to fail because they cannot make these showings. *See Renfro v. City of Emporia, Kan.*, 732 F. Supp. 1116 (D. Kan. 1990) (oral opinion of agency insufficient, must have been formal, written opinion); *Spring v. Washington Glass Co.*, 153 F. Supp. 312 (W.D. Pa. 1957) (letter received by employer from an investigation supervisor of the Wage and Hour Division was not such a regulation, order, ruling, approval or interpretation of agency permit good faith reliance defense); *Reich v. IBP, Inc.*, 820 F. Supp. 1315 (D. Kan. 1993) (no defense for employer's alleged reliance on written interpretive bulletins issued by Department of Labor, because bulletins were general in nature and did not address employer's particular situation); *Pilkenton v. Appalachian Regional Hospitals, Inc.*, 336 F. Supp. 334 (W.D. Va. 1971) (neither an agency memorandum nor an oral conversation constituted a "written interpretation" by the Wage & Hour Division).

Again, these decisions arise from direct interpretation of statutory

provisions enacted by Congress. They are not judicial inventions untethered to demonstrable textual authority. Far from urging adoption of a good faith reliance defense to the MWA, FLSA section 259 demonstrates that such a defense cannot be created under the circumstances presented by this Petition. 29 U.S.C. § 259.

D. Even If This Court Had Every Desire To Create A Good Faith Reliance Defense For Violation Of The MWA, Yellow Cab Has No Basis For Claiming It

The problem for Yellow Cab, beyond the fact there is no safe harbor defense and no basis for creating one, is that it comes to this Court with precisely *none* of the things that in the FLSA context serve as markers of potential good faith reliance in not paying its taxi-cab drivers the required minimum wage. It has no contemporary written guidance from the Nevada Labor Commissioner; it has no opinion in a contested case where it was (or was not) a party; it has no letter ruling. It does not even have the sort of things that courts have said are not enough to make out a safe harbor defense—an oral ruling, a memorandum, or a bulletin. It has nothing.

What does Yellow Cab present as support? That "there was no express or implied repeal (of the taxi-cab exception) at that time and in

the years following" enactment of the MWA." Pet. at 16. This is demonstrably false, and insufficient as a basis for reliance anyway. "In addition," Yellow Cab continues, "the Nevada Labor Commissioner comported with N.R.S. 608.250(2)." *Id.* It is not clear what this means. Does Yellow Cab have a formal written ruling on this issue from the period between 2006 and 2014? It certainly has not produced one, after five years of litigation in this action. One cannot come to this Court asking to be forgiven for years of noncompliance with wage payment laws and say, simply, that the taxi-cab drivers' exception "was the law that employers and families were following and it was reasonable to do so." *Id.* That does not even qualify as argument, much less evidence supporting an exception from liability for violation of the MWA.

Neither does the Nevada Department of Business & Industry's ("B & I") newsletter article on the *Thomas I* decision do anything for Yellow Cab. First, the article post-dates *Thomas I*, and therefore cannot be said to have been relied upon by anyone. Second, it's a *newsletter*, not a directive or formal ruling, and it comes not from the Nevada Labor Commissioner but from B & I—an important point, given that FLSA section 259(b) lists specifically the agencies whose rulings might, in the

right circumstances, provide a basis for good faith reliance, and even the most definitive-seeming advice from other federal agencies or offices has been found insufficient in the absence of rulings by the designated agency. *See* 29 U.S.C. § 259; *De Leon-Granados*, 581 F. Supp. 2d at 1313 ("Even if Defendants had properly presented evidence of such reliance, such reliance would offer no safe harbor under 29 U.S.C. § 259 because Guidance Letter 23-01 was written by the Assistant Secretary of the Employment and Training Administration, not the Administrator of the Wage and Hour Division of the Department of Labor, as is expressly required under section 259.").

Perhaps the closest Yellow Cab comes to showing anything they might have relied upon is its discussion of the unreported District of Nevada case *Lucas v. Bell Trans*, 2009 WL 2424557 (D. Nev. June 24, 2009). But anyone with knowledge of the law and its processes is aware that federal courts sitting in diversity and facing a state law issue upon which the highest court in the state has not yet ruled, are able to offer relief to the parties before it but is only attempting to *predict* what this Court, for example, would do in the same context. *See Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542 (9th Cir. 1989)

("[W]hen we decide a claim that involves a novel question of state law, it is the rule in this circuit that we must try to predict how the highest state court would decide the issue."); *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 401 F. Supp. 2d 1120, 1128 (D. Nev. 2005) ("If the state has not addressed the particular issue, a federal court must use its best judgment to predict how the highest state court would resolve it using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.").

The question for this Court, if it is prepared to countenance Yellow Cab's writ request at all, is what reliance value should be assigned an inaccurate federal court decision on a matter of state law? It cannot seriously be maintained, however, that—failing every other category of reliance necessary for meeting the statutory defense found in FLSA section 259—the unpublished *Lucas* decision provides the get-out-of-paying-wages-free card for Yellow Cab, and that the meaning and effectiveness of the MWA was somehow tolled between June, 2009 and this Court's opinion in *Thomas I* in 2014. And that, in the end, is what Yellow Cab is left with.

E. Retroactivity and *Thomas II*

It is a bit strange that Yellow Cab does not mention *Thomas II* in its brief. Not only is the question and analysis of retroactivity presumably close enough conceptually to have some bearing on the present issue, no matter who the parties were in *Thomas II*, it actually was Yellow Cab itself, *in this very case*, who brought that writ petition. And it cannot be that Yellow Cab is somehow hazy on the potential overlap in arguments concerning these matters. Entire, lengthy sections of the Petition brief here are lifted directly, word for word and paragraph for paragraph, from Yellow Cab's briefs in *Thomas II*. *Cf.* Pet. 16-21 with RPIA at 00028-29, 000032-35.

The briefs and argument are essentially the same here as in *Thomas II*. Yellow Cab is even still peddling the same affidavit from a friendly former Deputy Labor Commissioner that it included in its Petitioner's Appendix in 2016. PA at 0091-92.[6] Yellow Cab is simply

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[6] On October 18, 2017, the Discovery Commissioner for the Eighth Judicial District court quashed Yellow Cab's subpoenas and proposed depositions of the current and former Nevada Labor Commissioners. RPIA at 000043 (order pending). It is unclear yet whether Yellow Cab will make good on its stated intention to depose Governor Brian

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repurposing those arguments and seeking some other way out of their predicament. We have all seen this movie before, in other words, and the remake does not much improve upon the original.

One would be hard-pressed to find a more resolute statement of constitutional supremacy, the separation of powers, and judicial authority than *Thomas II*. *See Thomas II*, 383 P.3d at 249–52. It would be more than a little strange for the Court to have spoken so firmly in response to Yellow Cab's arguments for prospective-only application of *Thomas I*—that *Lucas* reached a different conclusion, that the Labor Commissioner never prosecuted Yellow Cab, etc.—only now to allow those same arguments to prevail in the much less-promising context of whole-cloth creation of an affirmative defense to liability. If the Court was inclined to credit Yellow Cab's good faith reliance arguments, it seems likely it would have done so in *Thomas II*, where it had choices to make regarding at least arguably competing case law. Here there is none of that.

The result here is not in great doubt. The Court is unlikely to

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Sandoval.

write the law that Yellow Cab and Amici are asking for; that is the job of the Legislature, or the people of Nevada by initiative. The writ cannot be granted in any other manner, because offering to allow Yellow Cab to argue their affirmative defense would be encouraging a type of jury nullification. The Court cannot say that taxi-cab drivers are required to be paid minimum wages under the MWA, and that such is and has always been the case since enactment, but that Yellow Cab is allowed to ask the jury not to apply the law of Nevada. There is nowhere for Yellow Cab to turn, and Petition is due for prompt denial.

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III. CONCLUSION

Based upon the foregoing, the Court should deny the Petition or, in the alternative, decline to exercise its discretion to consider it further.

DATED this 31st day of October, 2017.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Answer complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface, size 14, Century Schoolbook.

2. I further certify that this Answer complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Answer exempted by N.R.A.P. 32(a)(7)(C), it contains 4,396 words.

3. Finally, I hereby certify that I have read this Answer, 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 Answer complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the Answer 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 Answer is not in conformity with the requirements of

the Nevada Rules of Appellate Procedure.

DATED this 31st day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2017, a true and correct copy of this completed **REAL PARTIES IN INTEREST'S ANSWERING BRIEF** upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By: */s/ Dannielle Fresquez*
Dannielle Fresquez, an Employee of
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