IN THE SUPREME COURT OF THE STATE OF NEVADA

Sup. Ct. No. 68796

WESTERN CAB COMPANY Petitioners, vs. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK, and THE HONORABLE LINDA MARIE BELL, District Judge, Respondents, and LAKSIRI PERERA, Individually and on behalf of others similarly situated, Real Party in Interest	) Dist. Ct No.:A-14-707425-C

ANSWER OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

SUMMARY 1

IN RESPONSE TO PETITIONER'S STATEMENT OF THE ISSUE PRESENTED 1

IN RESPONSE TO PETITIONER'S STATEMENT OF FACTS NECESSARY TO UNDERSTAND THE ISSUE PRESENTED 2

IN RESPONSE TO PETITIONER'S STATEMENT OF THE STANDARDS FOR WRIT RELIEF 2

ARGUMENT 3

I. THE NEVADA LABOR COMMISSIONER DOES NOT "ESTABLISH" THE MINIMUM WAGE REQUIRED BY NEVADA'S CONSTITUTION AND REAL PARTY IN INTEREST'S CLAIMS HAVE NO CONNECTION TO NRS 608.250 3

II. PETITIONER'S ASSERTION THAT THE DISTRICT COURT CREATED A FOUR YEAR STATUTE OF LIMITATIONS FOR EMPLOYEES EXEMPT FROM NRS 608.250 AND RELEGATED ALL OTHER EMPLOYEES TO THE TWO YEAR STATUTE OF LIMITATIONS OF NRS 608.260 IS A BASELESS FABRICATION 5

III. PETITIONER'S ARGUMENT THAT THE STATUTE OF LIMITATIONS IS EQUAL TO THE MINIMUM TWO YEAR RECORD RETENTION REQUIREMENT OF NRS 608.115 IS WITHOUT MERIT 7

A. Petitioner's "rational" basis argument to apply a two year statute of limitations based upon the two year record retention period of NRS 608.115 is "irrational" as many employee wage claims have a statute of limitations far exceeding two years 7

B. Real party in interest's claims must be afforded a statute of limitations commensurate with their status as constitutional claims without regard to the Legislature's policy concerns. 8

C. Petitioner misrepresents the precedents it cites in support of its "records retention" based statute of limitations claim. 9

IV. PETITIONER'S ARGUMENTS ABOUT "IMPLIED REPEAL" AND "SEVERABILITY" OF NRS 608.260 ARE LARGELY INCOMPREHENSIBLE AND COMPLETELY IRRELEVANT 10

V. THE DISTRICT COURT CORRECTLY APPLIED A FOUR YEAR STATUTE OF LIMITATIONS TO REAL PARTY IN INTEREST'S CLAIMS 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

U.S. Supreme Court Cases

Livadas v. Bradshaw
512 U.S. 107 (1994) 6

Wilson v. Garcia
471 U.S. 261 (1985) 13

Federal Statutes

National Labor Relations Act, 29 U.S.C. § 151 et. seq 6

Federal Cases

Barajas v. Bermudez
43 F.3d 1251, (9th Cir. 1994) 9, 10

Marshall v. Kleppe
637 F.2d 1217 (9th Cir. 1980) 13

Nevada Supreme Court Cases

Alper v. Clark County
571 P.2d 810 (1977) 12

Thomas v. Nevada Yellow Cab,
327 P.3d 1518 (2014) . . . . . *passim*

White Pine Lumber Co. v. City of Reno
801 P.2d 1370 (1990) 11

State Statutes

NRS Chapter 609 6

NRS §11.190(3)(a) 8

NRS §11.220 . . . . . 1, 8, 11, 12

NRS §608.018 8

NRS §608.117 7

NRS §608.250 . . . . . 1, 3, 4, 6, 7, *passim*

NRS §608.250(1) . . . . . 2, *passim*

NRS §608.250(2) . . . . . 2, *passim*

NRS §608.260 . . . . . 1, 3-5, *passim*

Other Authorities

Article 15, Section 16 of the Nevada Constitution 1, 2, 4, 6, 7

California Labor Code Section 1197.5(h) 9

Ho v. University of Texas
984 S.W.2d 672 (Tex. Court of App. 1998) 12

Jones v. Tracy School District
611 P.2d 441 (Cal. 1980) 9

Linder v. Kindig,
285 Neb. 386 (Neb. Sup. Ct. 2013) 12

Pauk v. Board of Trustees of City University of New York,
1983, 119 Misc.2d 663, affirmed as modified on other grounds 111 A.D.2d 17,
affirmed 68 N.Y.2d 702 (N.Y. Ct. Appeals 1986) 12

Peles v. LaBounty,
153 Cal.Rptr. 571 (Ct.App.1979) 12

Sheffer v. U.S. Airways,
2015 WL 3458192
rehearing at 2015 WL 4276239 (Dist. Nev. 2015), ... 12

PRELIMINARY STATEMENT

Real party in interest Laksiri Perera files this brief in response to the brief of petitioner Western Cab Company for a writ of mandamus or prohibition vacating the portion of the Eighth Judicial District Court's Orders and Decisions of June 16, 2015 and August 27, 2015, of the Honorable Linda Marie Bell, applying the four year "catch all" statute of limitations specified by NRS 11.220 to the claims made in this case under Article 15, Section 16, of Nevada's Constitution for unpaid minimum wages.

SUMMARY

Petitioner's entire argument, from its formulation of the issue presented by its petition through its entire analysis of the questions of law presented, ignores the ***constitutional nature*** of the claims at issue. Petitioner does so because recognition of the direct constitutional, and not statutory or common law, basis of those claims mandates a conclusion that the District Court acted correctly and the request for writ relief must be denied.

Setting aside that the petitioner's entire analysis is rendered baseless by its failure to recognize the constitutional status of the claims at issue, such analysis is also entirely illogical. It relies upon a statutory provision, NRS 608.260, setting forth a two year statute of limitations, that ***by its own express terms is uniquely and expressly limited to claims arising under NRS 608.250.*** Yet no claims are made in this case, or can even be made by real party in interest, under NRS 608.250. Petitioner is seeking a result, and relief, that this Court can only grant by ignoring the expressly limited scope of the statute upon which petitioner relies.

IN RESPONSE TO PETITIONER'S STATEMENT OF THE ISSUE PRESENTED

The issue presented is not, as petitioner asserts, "[w]hether the two-year statute of limitations for back minimum wages, NRS 608.260, governs the claims

of plaintiffs who were previously excepted from minimum wage by NRS 608.250(2)?" Petitioner constructs this falsehood of the issue presented, and converts the real party in interest's claim into a legally non-existent generic claim for "back minimum wages," in an attempt to ignore the constitutional nature of such claim. Such issue statement also sets forth the additional falsehood that NRS 608.250(2) functioned to "except" such persons from the "minimum wage" requirements of ***any law*** when, by its express language, it only functions as an exception to the requirements of NRS 608.250(1) and no other law's "minimum wage" requirements.

The issue presented, properly stated, is:

What is the statute of limitations for a claim made under Article 15, Section 16 of Nevada's Constitution as authorized by subparagraph B thereof?

The District Court properly answered this question by finding such statute of limitations to be four years.

IN RESPONSE TO PETITIONER'S STATEMENT OF FACTS NECESSARY TO UNDERSTAND THE ISSUE PRESENTED

Most of the "facts" presented by petitioner are irrelevant and some are inaccurate or untrue. Petitioner in such statement, as it does throughout its petition, improperly asserts that NRS 608.260 universally "provides a two-year limitation for back minimum wages," ignoring its very language stating that it ***only*** applies to claims brought under NRS 608.250. Given the abject irrelevancy of the alleged "facts" presented by petitioner in such statement the Court need not concern itself with the other inaccuracies and untruths set forth therein.

IN RESPONSE TO PETITIONER'S STATEMENT OF THE STANDARDS FOR WRIT RELIEF

Real party in interest does not concede that petitioner's statement of the standard for writ relief is accurate. It agrees this Court should wisely exercise its discretion to reach the merits of the issues presented by writ petitions. Despite the

frivolousness and gross illogic of petitioner's arguments, real party in interest would welcome a resolution by this Court of the merits of the issue raised by the petition. Such a resolution would encourage petitioner to seek an appropriate and cooperative resolution of the parties' underlying dispute, for which petitioner has no actual defense given the strict liability nature of the claims at issue.

The District Court Judge's decision in this case was correct, unlike the decisions arrived at by other District Court Judges on this issue, and as a result real party in interest takes no position as to whether the petition in this case should proceed to a resolution on its merits. Real party in interest does believe a final resolution of such issue by this Court would be in the interests of numerous litigants in other cases and conserve significant judicial resources.

ARGUMENT

I. THE NEVADA LABOR COMMISSIONER DOES NOT "ESTABLISH" THE MINIMUM WAGE REQUIRED BY NEVADA'S CONSTITUTION AND REAL PARTY IN INTEREST'S CLAIMS HAVE NO CONNECTION TO NRS 608.250

Petitioner well understands that the two year statute of limitations it seeks to invoke in this case, set forth in NRS 608.260, only applies to claims arising under NRS 608.250.[1] The only way for it to overcome the express limitation in the scope of NRS 608.260 is to have this Court hold that plaintiffs claims actually arise under NRS 608.250. In furtherance of that goal it simply insists, without explanation, that:

> According to NRS 608.250 the Labor Commissioner "establishes" the minimum wage, which now applies to all Nevada employers and employees

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[1] NRS 608.260 begins by stating that its specification of remedies and statute of limitations is only applicable to violations of NRS 608.250: "If any employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner **pursuant to the provisions of NRS 608.250**...," (emphasis added).

as a result of this Court's decision in *Thomas*. Petition, pages 10-11. Petitioner offers no explanation for this statement or a citation to any portion of *Thomas* so holding or supporting such a conclusion. NRS 608.250 does not now, and never has, applied to real party in interest or other taxi drivers. Petitioner demands the Court hold otherwise because only by transmuting real party in interest's claim under Nevada's Constitution into a claim under NRS 608.250 can the two year statute of limitations provided by NRS 608.260 apply.

The truth is that whatever the Labor Commissioner is empowered, or required, to do under NRS 608.250 is wholly irrelevant to this case or any employee making a claim created by Article 15, Section 16 of Nevada's Constitution ("Section 16"). Nowhere does the Nevada Constitution mention the Labor Commissioner or NRS 608.250. Nor does NRS 608.250 mention the Nevada Constitution. Petitioner offers no explanation of how the minimum wage required by the Nevada Constitution can be "established" by the Labor Commissioner through NRS 608.250 when neither are mentioned in the Constitution. It just insists that such is the case in a 78 word long rambling sentence containing a completely inappropriate appendix citation:

> Because the minimum wage in Nevada is still set and announced by the Nevada Labor Commissioner and has been since June 25, 2007 (App. 17, p. 458), the District Court's distinction between employees previously excepted from receipt of minimum wage under NRS Chapter 608.250(2) is inapplicable and the two-year limitation of NRS 608.260 should be applied in all back minimum wage cases, whether or not brought by employees previously excepted from the minimum wage under NRS 608.250. Petition, page 18.

The foregoing appendix citation is to the one page "labor law poster" or "abstract of Nevada wage and hour laws" distributed yearly by the State of Nevada to employers who are required to post the same in their workplaces. It sets forth certain information about Nevada's minimum hourly wage and other wage and

hour requirements. It says nothing about the Nevada Labor Commissioner "setting" Nevada's minimum hourly wage rate and petitioner's citation is completely improper.

The minimum wage required to be paid by the Nevada Constitution is completely self-executing and specified therein and adjusted automatically pursuant to the Nevada Constitution's terms. It is not modified, determined or in anyway "established" by any statute or government official. While the Nevada Constitution commands the Governor or "the State agency designated by the Governor" to "**publish** a bulletin by April 1 of each year **announcing** the adjusted rates" such rates are not "established" by the Governor, the Labor Commissioner, or any state official.

The hourly minimum wage rate established by the Nevada Constitution is an exact wage rate specified therein, as modified by increases in the federal minimum wage and with the Consumer Price Index creating a maximum yearly increase of 3%. Such increases automatically becomes effective on July 1st of every year as a matter of law without any action by any state official. The Governor (either personally or through his designee) is charged with the non-discretionary duty of "publishing" that rate and has no control over that rate and wholly lacks any ability to "set" or change that rate. If the Governor neglected his Constitutional obligation to publish such rate it would still be the supreme law of Nevada and easily ascertainable by any interested party or Court.

II. PETITIONER'S ASSERTION THAT THE DISTRICT COURT CREATED A FOUR YEAR STATUTE OF LIMITATIONS FOR EMPLOYEES EXEMPT FROM NRS 608.250 AND RELEGATED ALL OTHER EMPLOYEES TO THE TWO YEAR STATUTE OF LIMITATIONS OF NRS 608.260 IS A BASELESS FABRICATION.

Petitioner attempts to bolster its argument by asserting that the District Court has created a monstrously unfair and unjust dual two year/four year statute of limitations system for the minimum wage claims of Nevada's employees. Its

fabrication of such assertion in a 71 word sentence is barely comprehensible, much less explained:

> *Thomas's* invalidation of the exceptions from the minimum wage in NRS 608.250(2) recognized the voters' intent to bring additional Nevada employees into the minimum wage fold and that goal would not be well-served by confusing the limitations for back-wage claims with two applicable periods- two years for workers previously covered by NRS 608.250 and four years for workers covered as a result of NRS 608.250(2)'s invalidation by *Thomas.* Petition, pages 14-15.

There is nothing in *Thomas*, in the District Court's decision in this case, in NRS 608.250, or Article 15, Section 16 of Nevada's Constitution, that would create the foregoing "confusing" result of "two applicable" statute of limitations insisted upon by petitioner. The minimum wage rights provided under Article 15, Section 16 of Nevada's Constitution, and its four year statute of limitations, are, by such Section's express language, conferred on every Nevada employee, except for a limited group of workers under the age of 18 exempted by its express text.[2] That is the holding of *Thomas.* *See*, 372 P.3d at 521 ("The Minimum Wage Amendment expressly and broadly defines employee, exempting only certain groups.... ....the text necessarily implies that all employees not exempted by the Amendment, including taxicab drivers, must be paid the minimum wage set out in the

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[2] Article 15, Section 16 of Nevada's Constitution does not cover employees under 18 years of age employed by certain non-profits for after-school or summer employment or as trainees. This very small portion of Nevada's teenage labor force between the ages of 14 and 17 (NRS Chapter 609 almost entirely prohibits other than domestic household or farm employment of those younger that 14) only enjoy the minimum wage protections of NRS 608.250 (as they did previously, having always been subject to NRS 608.250). While Article 15, Section 16 also allows a union collective bargaining agreement to waive its minimum wage protections that same waiver may be applicable to the minimum wage rights conferred by NRS 608.250. *See*, *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994) (Discussing other Supreme Court precedents and suggesting that under federal supremacy and the National Labor Relations Act, 29 U.S.C. § 151 et. seq., a labor union can waive an individual employee's state labor law protections if it does so in a "clear and unmistakable" fashion).

Amendment.")

The rights granted by Article 15, Section 16 of Nevada's Constitution, and its four year statute of limitations, do *not* inure only to those employees previously, and still, exempt from NRS 608.250(1) by operation of NRS 608.250(2). Petitioner's claim the District Court decision held otherwise, and its decision would only confer a four year statute of limitations upon "NRS 608.250(2) exempt employees" such as taxi drivers, is a complete, utter, and baseless fabrication. The "confusing" result of "two applicable" minimum wage statute of limitations periods for Nevada workers that petitioner sets forth as a parade of horribles is totally phantasmal.

III. PETITIONER'S ARGUMENT THAT THE STATUTE OF LIMITATIONS IS EQUAL TO THE MINIMUM TWO YEAR RECORD RETENTION REQUIREMENT OF NRS 608.115 IS WITHOUT MERIT

A. Petitioner's "rational" basis argument to apply a two year statute of limitations based upon the two year record retention period of NRS 608.115 is "irrational" as many employee wage claims have a statute of limitations far exceeding two years.

Consistent with the rest of its arguments, petitioner insists, without citation to any supporting authority of any kind, that "[i]t is also more rational that the limitation of actions [under Nevada's Constitution] match the record retention period for employment records." Petition page 15. While it would certainly help limit petitioner's liability to real party in interest for this Court to find a "rational" basis for so concluding, petitioner offers no explanation for why such a finding should be made. The two year records retention requirement of NRS 608.117 is not a statute of limitations of any sort. Nor are employers prohibited from maintaining employee records for a *longer* period of time than the two years it requires.

Unable to actually provide any truthful basis for its assertion a two year statute of limitations is "rational" petitioner, in a 64 word sentence, makes a clearly false assertion that absent the District Court's decision such a two year statute of

limitations applies to all wage claims:

> As a result, there is no reason to turn to the four-year catchall statute of limitations, NRS 11.220, when the two-year statute of limitations provided in NRS 608.260 for recovery of back wages serves the purpose of preserving a harmonious worker benefits statutory scheme, with two-year limits applicable to all wage claims and to employers' obligations to preserve wage and other employment related records. Petition pages 19-20.

There is no "two year limit applicable to all wage claims." Such statement is a complete fabrication by petitioner and it cites no support for such assertion. Wage claims under NRS 608.250 for the minimum wages required by that statute are subject to a two year statute of limitations, which is specially provided for in NRS 608.260. Wage claims arising under NRS 608.018 for overtime wages are subject to the general three year statute of limitations of NRS 11.190(3)(a) for all claims arising under statute. Wages sought pursuant to written or oral contracts are subject to the respective four or six year statute of limitations applicable to breach of contract claims as specified in NRS 11.190.

B. Real party in interest's claims must be afforded a statute of limitations commensurate with their status as constitutional claims without regard to the Legislature's policy concerns.

As correctly found by the District Court, real party in interests claims are constitutional and as a result garner a four year statute of limitations, as do all claims arising under Nevada's Constitution. Nevada's Legislature cannot act, either explicitly or implicitly, to limit the rights afforded by Nevada's Constitution. *See, Thomas*, 327 P.3d at 522 ("...the principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution.") This Court cannot find a "rational" basis to limit real party in interest's rights under Nevada's Constitution to a two year period simply because Nevada's Legislature has dictated a two year employee record retention period. Indeed, the principles of constitutional supremacy, as *Thomas* so acutely recognized, absolutely prohibit such a finding.

C. Petitioner misrepresents the precedents it cites in support of its "records retention" based statute of limitations claim.

Petitioner misrepresents *Jones v. Tracy School District,* 611 P.2d 441, 443-44 (Cal. 1980) as somehow supporting its "records retention" based statute of limitations claim. It does not. *Jones* did not involve a constitutional claim or even a statutory claim for which no statute of limitations was expressly provided. In *Jones* the statute at issue, California Labor Code Section 1197.5, at subsection (h), expressly provided that "A civil action to recover wages under subdivision (a) [barring sex discrimination in pay] may be commenced no later than two years after the cause of action occurs." 611 P.2d at 443. The issue in *Jones* was whether that language, requiring "commencement" of an action within two years also barred "recovery" of back pay damages for a period exceeding two years prior to commencement. The employee alleged it did not. *Id. Jones* held such language clearly did bar a back pay recovery for more than such two year period, relying on the statute's expressly stated limitation period for commencement of actions and the wealth of contrary authority:

> Appellant asserts that the language of subdivisions (b), (e), (f) and (g) of section 1197.5, awarding back pay without apparent time limitation, demonstrates a legislative intent to provide for recovery of all back wages. Nonetheless, in cases involving similarly worded antidiscrimination statutes, it has been held that recovery is limited by the period of the applicable statute of limitations. 611 P.2d at 444.

Contrary to petitioner's assertions, *Jones* did not adopt a "records retention" based statute of limitations rule and it provides no support for petitioner's argument.

Petitioner's reliance upon *Barajas v. Bermudez,* 43 F.3d 1251, 1260 (9th Cir. 1994) is similarly misplaced. *Barajas* involved the "borrowing" of a state statute of limitations when a federal statute set forth no statute of limitations. 43 F.3d 1251. It rejected a one-year statute of limitations, based upon the district court's analysis of Arizona law, as inadequate to effectuate the goals of Congress in enacting the Agricultural Worker Protection Act. 43 F.3d at 1260. It also rejected

the district court's analysis as to the Arizona state law issue presented and concluded Arizona's three year contract statute of limitations should apply. *Id.*

While *Barajas* discussed the AWPA's record retention requirement in its analysis, it did not base its decision on that point and arrived at its holding by recognizing its "...paramount duty is to effectuate the federal policies embodied in the AWPA statutory scheme." *Id.* The "...one-year statute of limitations is inappropriate because migrant and seasonal workers, who often move from state to state to participate in harvests and who may reside in any given state for only a month or two at a time, are particularly unlikely to be able to assert their rights in a short time-frame or to have their interests taken into consideration in state law provisions." *Id.* *Barajas* actually supports the opposite result from the one urged by petitioner and holds that this Court should be guided by its "paramount duty" to effectuate the *constitutional nature* of the real party in interest's rights. It would do so by utilizing, as did the District Court, the four year statute of limitations applicable to claims arising under Nevada's Constitution.

IV. PETITIONER'S ARGUMENTS ABOUT "IMPLIED REPEAL" AND "SEVERABILITY" OF NRS 608.260 ARE LARGELY INCOMPREHENSIBLE AND COMPLETELY IRRELEVANT

Petitioner's argument that the "severance" doctrine requires this Court to apply NRS 608.260's two year statute of limitations to real party in interest's claims under Nevada's Constitution is nonsensical. There is no "severance" to apply to the terms of NRS 608.260. Its language expressly limits its application to claims arising under NRS 608.250. It still retains such application that now, as a practical matter, is only of significance to the small portion of Nevada's teenage workforce exempted from the Nevada Constitution's minimum wage requirements. What petitioner's "severance" argument actually seeks, in true Orwellian fashion, is not the preservation of such statute but its "expansion" and application to something its express language prohibits, to claims *not* arising under NRS 608.250.

Similarly, while *Thomas* speaks of "implied repeal" its use of that language was not in "repeal" of NRS 608.250 but simply the superceding, for the purposes of Nevada's constitutional minimum wage, of the minimum wage exemptions contained in such statute. *Thomas* rested not upon an "repeal" of NRS 608.250 but the supremacy of Nevada's Constitution in such matters, as it states in its second to last sentence: "The text of the Minimum Wage Amendment, by enumerating specific exceptions that do not include taxicab drivers, supersedes and supplants the taxicab driver exception set out in NRS 608.250(2)." 372 P.3d at 522.

Petitioner's arguments about "implied repeal," as confusing, disjointed, and incomprehensible as they may be, are, just like all of their other arguments about NRS 608.250, wholly irrelevant. NRS 608.250 retains its legal force, greatly reduced in scope as a pragmatic matter by the superior force of Nevada's Constitution, as recognized by *Thomas*. There is no "implied" or other "repeal" of NRS 608.250 that exists or is germane to real party in interest's claims.

V. THE DISTRICT COURT CORRECTLY APPLIED A FOUR YEAR STATUTE OF LIMITATIONS TO REAL PARTY IN INTEREST'S CLAIMS

In the event no specific statute of limitations is otherwise provided for a particular claim, Nevada provides for a four year statute of limitations. *See*, NRS 11.220. Neither Nevada's Statutes nor its Constitution set forth any expressly specified statute of limitations for civil claims arising under Nevada's Constitution. This Court has conclusively determined such time limit for at least one form of constitutionally based civil claim. In *White Pine Lumber Co. v. City of Reno*, 801 P.2d 1370, 1371-72 (Nev. Sup. Ct. 1990) , the Court held that, by default, a claim under the Nevada Constitution against a municipality for inverse condemnation would have, absent other considerations, been subject to the four year "catch all" statute of limitations provided for in NRS 11.220. It found other considerations compelled it to apply the 15 year statute of limitations for inverse condemnation, as

constitutional claims against governmental actors should not be subject to a statute of limitations shorter than that applicable to private parties (the adverse possession limitations period of NRS 40.090) who commit the same conduct. 801 P.2d at 1371. In the earlier case of *Alper v. Clark County*, 571 P.2d 810, 813 (1977), the Court recited, without dispute, the logic of applying the four year NRS 11.220 statute of limitations to claims generally arising under Nevada's Constitution, although it decided *Alper* on other grounds.

Every analogous case that real party in interest's counsel has located, except one,[3] has adopted a jurisdiction's "catch-all" statute of limitations for constitutional claims when the jurisdiction has not otherwise expressly provided a statute of limitations for such claims. *See*, *Ho v. University of Texas,* 984 S.W.2d 672, 687 (Tex. Court of App. 1998) (Applying Texas "catch all" statute of limitations to claim originating directly from state constitution when no other statute of limitations was expressly applicable); *Linder v. Kindig*, 285 Neb. 386, 393 (Neb. Sup. Ct. 2013) (Applying Nebraska "catch all" statute of limitations); *Pauk v. Board of Trustees of City University of New York*, 1983, 119 Misc.2d 663, affirmed as modified on other grounds 111 A.D.2d 17, affirmed 68 N.Y.2d 702 (N.Y. Ct. Appeals 1986) (Applying New York "catch all" statute of limitations) and *Marshall v. Kleppe*, 637 F.2d 1217, 1223-24 (9th Cir. 1980) (Applying California's four year "catch all" statute of limitations to a constitutional claim and not

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[3] The only clearly contrary holding was in *Sheffer v. U.S. Airways*, 2015 WL 3458192, rehearing at 2015 WL 4276239 (Dist. Nev. 2015), applying the three year statute of limitations for claims arising under statute, and not the "catch all" four year statute of limitations, to Nevada Constitutional minimum wage claims. At rehearing it cited to *Peles v. LaBounty*, 153 Cal.Rptr. 571, 573 (Ct.App.1979), as supporting that conclusion. Finding such support in *Peles* is open to question. *Peles* did not evaluate whether the California "catch all" statute of limitations should apply to California constitutional claims, commenting at footnote 3 that even under that longer statute of limitations the plaintiff's claim would be barred.

California's general three year "action pursuant to a statute" statute of limitations period)[4].

CONCLUSION

Wherefore, for all the foregoing reasons, the petition should be denied.

Dated: October 22, 2015

Respectfully submitted,

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[4] *Marshall* dealt with a federal constitutional claim. Its continuing applicability to federal constitutional claims, at least for cases brought in the federal courts, is questionable in light of *Wilson v. Garcia*, 471 U.S. 261 (1985) and subsequent decisions applying *Wilson,* a 42 U.S.C. § 1983 case, to direct claims under the United States Constitution. Such subsequent precedents are irrelevant to the analysis in *Marshall* in respect to claims arising under a state constitution.

CERTIFICATE OF SERVICE

The undersigned certifies that on October 22, 2015, she served the within:

ANSWER OF REAL PARTY IN INTEREST
TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

by court electronic service:

TO:
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Honorable Linda Marie Bell
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/s/ *Sydney Saucier*
Sydney Saucier