IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK; and THE HONORABLE LINDA MARIE BELL, district court judge,

Respondents,

and

LAKSIRI PERERA, IRSHAD AHMED, and MICHAEL SARGEANT, individually and on behalf of others similarly situated,

Real Parties in Interest,

Case No. 69408

Dist. Ct. No.: A-14-707425-C

PROGRESSIVE LEADERSHIP ALLIANCE OF NEVADA'S *AMICUS CURIAE* BRIEF IN SUPPORT OF 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 7th day of March, 2016.

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By: */s/ Bradley Schrager, Esq.*

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I. INTEREST OF THE AMICUS CURIAE

The Progressive Leadership Alliance of Nevada ("PLAN") was founded in 1994 to advocate for, among other things, economic justice for low-wage workers in Nevada. PLAN played an instrumental role in the passage of the Minimum Wage Amendment ultimately at issue in this writ petition, in 2004 and 2006. PLAN members have also regularly testified before the Nevada State Legislature on matters concerning the minimum wage, on behalf of minimum wage workers and the economically-disadvantaged. PLAN is keenly aware of the remedial, pro-employee intent of the Minimum Wage Amendment, and recognizes that rulings regarding the Amendment potentially affect tens—hundreds—of thousands of minimum wage workers in Nevada.

II. ARGUMENT

Amicus will address two arguments put forward by Petitioner Western Cab Company ("Petitioner," or "Western Cab"), that Nev. Const. art. XV, sec. 16 (the "Minimum Wage Amendment," or the "Amendment") is preempted by ERISA or, apparently in the alternative, that the Minimum Wage Amendment is void for vagueness based upon the Due Process Clause of the United States Constitution. Neither of these hail-mary theories has any merit whatsoever.

A. <u>The Minimum Wage Amendment Is Not Preempted By ERISA</u>

Petitioner does not appear to understand ERISA or ERISA preemption.

More to the point, Petitioner fails to grasp—or willfully misrepresents—the nature of the Amendment itself. In combination, these misconstructions sink any argument regarding ERISA preemption.

"[The] question of whether a federal law preempts state law is one of congressional intent, and that Congress' purpose is the 'ultimate touchstone." *Brandner v. UNUM Life Ins. Co. of America*, 152 F. Supp. 2d 1219, 1223 (D. Nev. 2001). In its rush to seize upon the ERISA language that Section 514(a) "preempts all state laws that 'relate to' any employee benefit plan," however, Petitioner makes a gargantuan leap of legal logic and misses the import of that section entirely, as well as its lengthy history of interpretation by courts—including this Court. Only a modest research effort reveals that "ERISA was passed by Congress in 1974 to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits." *Massachusetts v. Morash*, 490 U.S. 107, 112 (1989). "In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds." *Id.* ERISA is, primarily, a pension-and-benefits protection statute, and its primary concern is not with health insurance made available by an employer through a private third-party insurer under state law—that is an area left, appropriately, to the states—but with self-funded or self-insured benefits plans that

may include health benefits, so that those promised benefits are administered and paid out to qualified employees in a uniform manner overseen by federal courts.

As this Court has stated, "We cannot believe that [ERISA] regulates bare purchases of health insurance where, as here, the purchasing employer neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits." *See Turnbow v. Pacific Mutual Life Ins. Co.*, 104 Nev. 676, 678, 765 P.2d 1160, 1161 (1988), citing *Taggart Corp. v. Life and Health Benefits Administration*, 617 F.2d 1208, 1211 (5th Cir. 1980).

Petitioner reads the basic application of ERISA preemption far too broadly. This Court has stated, in the ERISA context, that "absent a clear and manifest intent of Congress, there is a presumption that federal laws do not preempt the application of state or local laws regulating matters that fall within the traditional police powers of the state, including health and safety matters." *Cervantes v. Health Plan of Nevada, Inc.*, 263 P.3d 261, 265 (Nev. 2011). While the text of ERISA states that it "preempts all state laws that 'relate to' any employee benefit plan," such "sweeping 'relate[d] to' language cannot be read with uncritical literalism," and that "United States Supreme Court noted that if the statute's 'relate[d] to' language is taken to extend to the furthest reaches imaginable, Congress's words of limitation would hold no meaning." *Id.*

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As this Court stated in *Mack*,

> State laws that 'relate to any employee benefit plan' are preempted by ERISA. In the context of ERISA, "[t]he words 'relate to' must be interpreted broadly to effectuate Congress' purpose of 'establish[ing] pension plan regulation as exclusively a federal concern. While there is no concrete rule to determine whether a state law is preempted by ERISA, the United States Court of Appeals for the Second Circuit provided some guidance in *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2d Cir.1989), when it stated that
>
> > [W]e find that laws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee. Those that have not been preempted are laws of general application—often traditional exercises of state power or regulatory authority—whose effect on ERISA plans is incidental.

Mack v. Estate of Mack, 125 Nev. 80, 98, 206 P.3d 98, 110 (2009) (certain internal quotations omitted, and emphasis added). The Minimum Wage Amendment does not "provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee." Further, there is no pension plan at issue in the Amendment, or in the case below from which this writ petition arises. There is no ERISA conflict, and no ERISA preemption.

Furthermore, if more were needed, Petitioner's ERISA preemption argument is derailed utterly by the simple fact that paying less than $8.25 per hour to employees, and providing health insurance in order to do so, is <u>entirely optional</u> under the Minimum Wage Amendment. No one forces Petitioner or any other Nevada employer to submit themselves to the Nevada statutory regime governing

health insurance in this context. They choose to submit themselves to the Amendment's requirements, in their desire to pay the lower-tier wage.

ERISA is in place to avoid "bind[ing] ERISA plan administrators to a particular choice of rules" per state law, in derogation of federal regulation. *See Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147, 121 S.Ct. 1322, 1327 (2001). But where a statutory "scheme does not force employers to provide any particular employee benefits or plans, to alter their existing plans, or even to provide ERISA plans or employee benefits at all," ERISA can have no preemptive effect on the state law in question. *See WSB Elec., Inc. v. Curry*, 88 F.3d 788, 793 (9th Cir.1996). *See also Keystone Chapter, Associated Builders & Contractors, Inc. v. Foley*, 37 F.3d 945, 960 (3d Cir.1994)("Where a legal requirement may be easily satisfied through means unconnected to ERISA plans, and only relates to ERISA plans at the election of the employer, it affects employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan.") (emphasis added). Here, not only does the Minimum Wage Amendment in this context operate "at the election of the employer," there is no record available—or substantiated claim by Petitioner—that we are even talking about ERISA plans in the first instance.

Even the Hawaii case which Petitioner cites does not support its preemption position. In *Standard Oil Co. v. Agsalud*, 633 F.2d 760 (9th Cir.1980), the Court of

Appeals found preemption of a statute "because it required employers to have health plans, and it dictated the specific benefits employers were to provide in those plans." *See Golden Gate Restaurant Association v. City and County of San Francisco*, 546 F.3d 639, 655 (9th Cir.2008). And the benefits plan at issue in *Agsalud* was a "self-funded health care plan, governed by ERISA." *Agsalud*, 633 F.3d at 763. In contrast, the Minimum Wage Amendment does not require any employer to have or offer any to have any plan at all; it requires plans if the employer wishes to pay a lower minimum hourly wage.

"[N]othing in the language of ERISA suggests that Congress sought to displace general health care regulations." *Cervantes*, 263 P.3d at 266. Nevada employers subject themselves to Nevada law regarding health insurance when they attempt to qualify to pay less than $8.25 per hour to their employees. there is, quite literally, not a single scenario in which Nevada's Minimum Wage Amendment is in danger of being preempted by ERISA.

B. <u>The Minimum Wage Amendment Is Not Void For Vagueness</u>

The entirety of Petitioner's due process argument is that the term "health benefits" in the Minimum Wage Amendment is impermissibly vague, and therefore the Amendment itself is void. Petitioner misses both the actual practical ramifications of its own argument—that only the lower-tier wage would be invalidated if its argument is correct—and the clear direction of the text of the

Amendment itself. The Amendment, as to health benefits, is neither vague nor does it demand anyone guess regarding its requirements.

> The Minimum Wage Amendment states expressly,
>
> Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits **as described herein**, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide **such benefits**.

Nev. Const. art. XV, sec. 16(A)(emphasis added).

> The very next sentence of the constitutional provision states,
>
> Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer.

Id. In other words, the "health benefits" required in order for an employer to pay an employee below the upper-tier minimum hourly wage under the state constitution must, as described therein, be 1) health insurance; 2) made available to the employee and the employee's dependents; and 3) may not cost the employee more than 10% of the employees gross taxable income from the employer. "health benefits," therefore, are described in detail. No one can fail to understand that health insurance (especially health insurance provided by an employer) is itself the subject of precise definition and regulation in both state and federal law. The Amendment demands that employers who want to pay less in wages must comply with the common requirements facing any employer who wants to provide health insurance to its employees: N.R.S. 608.1555– 608.1576; N.R.S. Chapter 689A; and

N.R.S. Chapter 689B. This is not terribly difficult to understand, and certainly does not rise to the level of feigned confusion Petitioner acts out in its brief.

Affecting ignorance is not the same as detecting impermissible and unconstitutional vagueness. In answer to Petitioner's absurd rhetorical questions, no, setting out anti-bacterial soap or an aspirin is not the same as providing the lawful, comprehensive health insurance mandated by constitutional and statutory law, for purposes of withholding a dollar in wages for every hour an employee works.

III. CONCLUSION

For the foregoing reasons, *amicus* supports Real Party in Interests' arguments, and urges this Court to deny the present writ petition.

Respectfully submitted this 7th day of March, 2016.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Brief 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, Times New Roman.

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 1,889 words.

3. Finally, I hereby certify that I have read this 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 N.R.A.P. 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.

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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.

Dated this 7th day of March, 2016.

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CERTIFICATE OF SERVICE

STATE OF NEVADA, COUNTY OF CLARK

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Clark, State of Nevada My business address is 3556 E. Russell Road, 2nd Floor, Las Vegas, Nevada 89120-2234.

On March 8, 2016, I served true copies of the following document(s) described as **PROGRESSIVE LEADERSHIP ALLIANCE OF NEVADA'S *AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST'S ANSWERING BRIEF AND SUPPORTING AFFIRMANCE OF THE DISTRICT COURT'S DECISION** on the interested parties in this action as follows:

BY CM/ECF: 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 under the laws of the State of Nevada that the foregoing is true and correct.

Executed on March 8, 2016, at Las Vegas, Nevada.

By: */s/ Dannielle R. Fresquez*
Dannielle R. Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO,
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