EXHIBIT 1

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IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY, Petitioner, 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, IRSHAD AHMED, MICHAEL SARGEANT Individually and on behalf of others similarly situated, Real Parties in Interest.	**Case No.: 69408** District Court Case No. A-14-707425-C

PETITIONER'S PETITION FOR REHEARING ON ERISA PREEMPTION

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Pursuant to NRAP 40(c)(2)(A) and (B), Petitioner Western Cab Company ("Western") moves this Court to rehear this matter on ERISA preemption because the Court has overlooked a material question of law in the case and has overlooked a statute, regulation or decision directly controlling a dispositive issue in the case.

In its March 16, 2017 Opinion, this Court disagreed that the MWA was preempted by ERISA. Western's arguments concerning ERISA preemption are set forth on pages 23-36 of its December 18, 2015 Petition for Writ of Mandamus or Prohibition. In *Landry's, Inc. v. Sandoval*, Case No.: 2:15-cv-1160-GMN-PAL, March 28, 2017, (Exhibit 1), 2017 WL 1181570, at *9 (D. Nev. Mar. 28, 2017), Judge Navarro found that in determining the reach of ERISA preemption, "'the purpose of Congress is the ultimate touchstone' *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 8 (1987)" and in reliance on *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987), if a state law relates to employee benefit plans, it is preempted. Exhibit 1, p. 16. The Court found:

> . . . that Plaintiffs have properly alleged an ERISA preemption claim. **The MWA and its regulations literally reference ERISA and involve defining insurance coverage.** . . . The optional nature of the MWA's two tiers does not mitigate the harms alleged in Plaintiffs' SAC. Accordingly, claim one survives Defendant and Intervenor's Motions to Dismiss.

Id., Exhibit 1, p. 17 (emphasis added). Western has alleged that the MWA and its regulations are an unlawful intrusion on the comprehensive federal framework to the

administration and regulation of employee benefit plans. The MWA and its regulations literally reference ERISA and involve defining insurance coverage. Western requests that the Court consider Judge Navarro's Order and rehear the ERISA preemption issue.

Respectfully submitted,

HEJMANOWSKI & McCREA, LLC

/s/ Malani L. Kotchka

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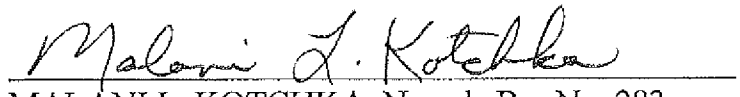
CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition 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) as it is prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman.

I further certify that this Petition complies with the page or type volume limitations of NRAP 40(b)(3) because it does not exceed 10 pages or 294 words.

Finally, I hereby certify that I have read this Petition for Rehearing on ERISA Preemption 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 Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 40(a)(2). I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

HEJMANOWSKI & McCREA, LLC



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **PETITIONER'S PETITION FOR REHEARING ON ERISA PREEMPTION** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 3rd day of April, 2017, to the following:

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And a true and correct copy of the foregoing **PETITIONER'S PETITION FOR REHEARING ON ERISA PREEMPTION** was served via first class, postage-paid U.S. Mail on this 3rd day of April 2017, to the following:

The Honorable Linda Marie Bell
District Court Judge
Eighth Judicial District Court of Nevada
200 Lewis Avenue, #3B
Las Vegas, NV 89101

Rosalie Garcia
An Employee of Hejmanowski & McCrea LLC

EXHIBIT 1

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LANDRY'S, INC. *et al.*,

Plaintiffs,

vs.

BRIAN SANDOVAL *et al.*,

Defendants.

Case No.: 2:15-cv-1160-GMN-PAL

ORDER

Pending before the Court are three Motions to Dismiss Plaintiffs Landry's, Inc.; Bubba Gump Restaurants, Inc.; Claim Jumper Acquisition Company, LLC's (collectively, "Plaintiffs'") Second Amended Complaint ("SAC"). The first Motion to Dismiss was filed by Defendants Governor Brian Sandoval ("Governor" or "Sandoval") and Labor Commissioner Shannon Chambers ("Labor Commissioner" or "Chambers"), and the second was filed by Defendant Nevada Insurance Commissioner Barbara Richardson ("Insurance Commissioner" or "Richardson")[1] (collectively, "Defendants"). (ECF Nos. 54, 55). Intervenor Nevada State Federation of Labor, AFL-CIO ("Intervenor") filed the third Motion to Dismiss. (ECF No. 76). All three motions are fully briefed.

I. BACKGROUND

This case arises as a challenge to the Nevada Minimum Wage Amendment, Article 15, Section 16 of the Nevada Constitution ("Minimum Wage Amendment" or "MWA") and its

[1] Originally, Amy L. Parks was the party to this suit in her official capacity as Acting Insurance Commissioner. However, upon the appointment of Richardson as Nevada Insurance Commissioner, she was automatically substituted for Parks under Federal Rule of Civil Procedure ("FRCP") 25(d). (*See* Richardson Mot. to Dismiss ("MTD") 2 n.1, ECF No. 55). Accordingly, the Clerk of the Court shall substitute Barbara Richardson for Amy L. Parks.

Further, Richardson's Motion to Dismiss also joined and concurred with Sandoval and Chambers' Motion to Dismiss. (Richardson MTD 2:7–10).

related Regulations, Nevada Administrative Code ("NAC") Chapter 608.100–108 (the "Regulations"). (SAC ¶ 1, ECF No. 50). The Minimum Wage Amendment was a ballot initiative enacted after voter approval in two general elections, 2004 and 2006. (*Id.* ¶ 22–25).

Plaintiffs' SAC focuses on the following language from the MWA:

> 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. 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.

Nev. Const. art. 15, § 16(A). From the MWA, Plaintiffs allege that "Nevada's Labor Commissioner began issuing regulations . . . found in NAC 608.100 through 608.108." (SAC ¶ 29). These Regulations include further specification regarding the health benefits that qualify under the Nevada Wage Amendment. (*Id.* ¶¶ 30–32). Plaintiffs also allege that the Labor Commissioner enforces the Amendment while relying on the "Nevada Division of Insurance to determine whether an insurance plan offered by an employer 'qualifies' as a health insurance [plan] under the two-tier minimum wage system established by the Minimum Wage Amendment." (*Id.* ¶ 35).

On June 19, 2015, Plaintiffs filed their Complaint in this Court, which they amended as a matter of course on July 15, 2015. (ECF Nos. 1, 17). Defendants filed two Motions to Dismiss (ECF Nos. 25, 27) asserting, *inter alia*, that Plaintiffs lacked standing. On March 31, 2016, the Court granted Defendants' Motions, explaining that Plaintiffs' allegations regarding pending lawsuits were not sufficient to establish concrete injury, as required under standing doctrine. (Order 6:1–21, ECF No. 47). The Court then allowed Plaintiff leave to file a SAC. (*Id.* 6:22–7:1). Plaintiffs timely filed their SAC, which alleges four causes of action: (1) Declaration that ERISA Preempts the Amendment and Regulations, under ERISA

§ 502(A)(3); (2) "Declaration Pursuant to 42 U.S.C. § 1983 that the Governor's Delegation of Authority to Promulgate the Regulations and Enforce the Regulations and Amendment Deprives Plaintiffs of Rights Secured by the Due Process Clause of the United States Constitution"; (3) "Declaration Pursuant to 42 U.S.C. § 1983 that the Regulations Are Unconstitutional Because They Exceed the Labor Commissioner's and the Insurance Commissioner's Authority and Thus Violate Plaintiffs' Right to Due Process Under the United States Constitution"; and (4) "Declaration Pursuant to Pursuant to 42 U.S.C. § 1983 that the Amendment and Regulations Violate Due Process Protected by the Fifth and Fourteenth Amendments to the United States Constitution." (SAC ¶¶ 52–104, ECF No. 50). On May 31, 2016, Defendants brought their Motions to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF Nos. 54, 55).

On August 16, 2016, the Court granted Intervenor's Motion to Intervene. (ECF No. 79). The next day, Intervenor filed its Motion to Dismiss (ECF No. 76), along with its Complaint against Plaintiffs (ECF No. 77).

II. LEGAL STANDARD

A. 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits motions to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). When subject matter jurisdiction is challenged, the burden of proof is placed on the party asserting that jurisdiction exists. *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (holding that "[t]he party seeking to invoke the court's jurisdiction bears the burden of establishing that jurisdiction exists"). Accordingly, courts will presume a lack of subject matter jurisdiction until the plaintiff proves otherwise in response to the motion to dismiss. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

A motion to dismiss under Rule 12(b)(1) may be construed in one of two ways. *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). It may be described as "facial," meaning that it attacks the sufficiency of the allegations to support subject matter jurisdiction. *Id.* Alternatively, it may be described as "factual," meaning that it "attack[s] the existence of subject matter jurisdiction in fact." *Id.*

When, as here, a court considers a 'facial' attack made pursuant to Rule 12(b)(1), it must consider the allegations of the complaint to be true and construe them in the light most favorable to the plaintiff. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989).

B. 12(b)(6)

Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on which it rests, and although a court must take all factual allegations as true, legal conclusions couched as a factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule 12(b)(6) "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.*

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). "However, material which is properly submitted as part of the

complaint may be considered." *Id.* Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *E.g.*, *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1123–24 (9th Cir. 2002). On a motion to dismiss, a court may also take judicial notice of "matters of public record." *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if a court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. Fed. R. Civ. P. 12(d).

If the court grants a motion to dismiss for failure to state a claim, leave to amend should be granted unless it is clear that the deficiencies of the complaint cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant to Rule 15(a), the court should "freely" give leave to amend "when justice so requires," and in the absence of a reason such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

III. DISCUSSION

In the instant Motions to Dismiss, Defendants seek to dismiss Plaintiffs' claims for lack of standing, along with being barred by the Eleventh Amendment, legislative immunity, or statute of limitations, and failure to state a claim.

A. Standing

"[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As such, to survive a

motion to dismiss, a plaintiff bears the burden of alleging sufficient facts to show the existence of each of three elements. *Id.*

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560–61 (internal quotation marks and citations omitted). The Supreme Court recently further explained the terms particularized and concrete: "Particularized" means the injury "must affect the plaintiff in a personal and individual way," while "concrete" means "it must actually exist[;] . . . 'real' and not 'abstract.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

When analyzing a motion to dismiss for lack of standing, courts must accept the allegations in the complaint as true and construe the complaint in favor of the complaining party. *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). Indeed, at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice" because on a motion to dismiss, courts "presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (citing *Lujan*, 504 U.S. at 561). While the Ninth Circuit in *Maya* differentiated between the standard for dismissal due to standing compared with a 12(b)(6) dismissal under the standards of *Twombly* and *Iqbal*, the Court nonetheless clarified: "This is not to say that [a] plaintiff may rely on a bare legal conclusion to assert injury-in-fact." *Id.*

Plaintiffs' SAC asserts the following injury:

> (1) increased administrative costs of offering a separate health insurance plan in Nevada apart from the ERISA-governed, Affordable Healthcare Act ("ACA") compliant plan they offer nationally, (2) paying $8.25 per hour to their employees

> rather than the $7.25 otherwise required, and (3) harm to their reputation and business goodwill in the eyes of their employees and the public based on their inability to comply with the vague, unconstitutional laws.

(SAC ¶ 5). Plaintiffs explain that their injury stems from "a false choice imposed by the preempted and unconstitutionally adopted Amendment and Regulations . . . between incurring certain liability and sanctions under these challenged laws or paying $1.00 more to each minimum wage earner in Nevada." (*Id.* ¶ 45, 51). Defendants argue that the SAC "suffers from the same fatal flaws as the First Amended Complaint . . . [and] Plaintiffs have alleged no new facts demonstrating standing." (Sandoval-Chambers MTD 2:13, 5:27, ECF No. 54).

The Court finds that Plaintiffs' alleged increased administrative costs are sufficient to confer standing. Plaintiffs assert that they "must alter their ERISA-governed health plans and the administration of those plans in Nevada to comply with state law." (SAC ¶ 48). Then, "[t]his alteration causes (1) an increase in administrative costs and (2) an increase in the cost of funding separate healthcare plans in Nevada that impose more stringent requirements and cost more than the ERISA-governed, ACA-compliant plans Plaintiffs offer nationally." (*Id.*). None of the three motions to dismiss address Plaintiffs' injury of increased administrative costs. Accepted as true and construed in favor of Plaintiffs, Plaintiffs are personally suffering an added cost. Such an alleged cost is real, not abstract. As such, the Court finds that this injury is sufficiently particularized and concrete. Further, the injury is causally connected and redressable by a favorable ruling from the Court because if the Court finds the MWA is preempted by ERISA, then Plaintiffs will no longer need to pay the alleged increased administrative costs to satisfy the MWA's allegedly more stringent requirements. Accordingly, the Court finds that Plaintiffs have sufficiently asserted standing in their SAC.[2]

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[2] Richardson argues that "Plaintiffs' failure to establish the causal connection between the injury they allege and the Insurance Commissioner is particularly conspicuous." (Richardson MTD 6:11–12). However, the presence of one party with standing assures that the controversy before the Court is justiciable. *See Dep't of Commerce v.*

B. Eleventh Amendment

Defendants argue that Plaintiffs' suit is barred by the Eleventh Amendment. (Sandoval-Chambers MTD 14:8–19); (Richardson MTD 7:22–8:10). Further, they argue that the *Ex Parte Young* exception is not applicable here. (Sandoval-Chambers MTD 14:20–16:28); (Richardson MTD 8:11–10:4).

"The Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (internal quotation marks omitted). While a state may waive its immunity, Nevada has explicitly refused to waive its immunity to suit under the Eleventh Amendment. Nev. Rev. Stat. § 41.031(3); *O'Connor v. State of Nev.*, 686 F.2d 749, 750 (9th Cir. 1982), *cert denied*, 459 U.S. 1071 (1982). Thus, as a general rule, "relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Id.* (internal quotation marks omitted). "And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Id.* at 101–02.

However, in *Ex Parte Young*, 209 U.S. 123 (1908), the Supreme Court held that "a suit challenging the constitutionality of a state official's action is not one against the State." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 102. In other words, the Eleventh Amendment immunity doctrine does not bar suits "brought in federal court against state officials in their official capacities for prospective injunctive relief to prevent future violations of federal law." *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 255 (8th Cir. 1995); *see also Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 71 (1989). "[S]uch an officer must have some

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U.S. House of Representatives, 525 U.S. 316, 330 (1999); *Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297, 303–05 (1983). Because the Court has found standing regarding Plaintiffs' administrative costs, the Court need not examine standing in particular to Defendant Richardson.

connection with the enforcement of the [allegedly unconstitutional] act." *Ex Parte Young*, 209 U.S. at 157. This connection with enforcement can be virtue of the official's office, and need not be "declared in the same act which is to be enforced." *Id.* However, it "must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Los Angeles Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (citing *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992)). *Ex Parte Young* dictates that "the officers of the state must be cloaked with a duty to enforce the laws of the state and must threaten or be about to commence civil or criminal proceedings to enforce an unconstitutional act." *Snoeck v. Brussa*, 153 F.3d 984, 987 (9th Cir. 1998)

The exception from *Ex Parte Young* does not apply to claims in which "state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 104. As such, courts "must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Id.*

Defendants Sandoval and Chambers first argue that "Plaintiffs' second and third claims for relief which are based entirely upon whether the Governor or Labor Commissioner is authorized by state law to adopt the regulations in question" allege only state law violations. (Sandoval-Chambers MTD 15:17–19). Defendants also contend that "Plaintiffs do not allege an action by any state official that could serve as the cardinal justification to strip a state official of the immunity guaranteed by the Eleventh Amendment." (*Id.* 16:11–13). Moreover, Defendants argue that the alleged decision on unpaid wages (*see* SAC ¶ 86) was not an enforcement of the MWA in violation of federal law; rather, the decision merely implies that the "Labor Commissioner is requiring employers to pay the higher standard wage of $8.25 per

hour . . . [but] [e]nforcing state law requiring that an employer pay minimum wage is not in contradiction of federal law because it is expressly permitted by federal law." (*Id.* 16:20–26).

Defendant Richardson further emphasizes that as the Insurance Commissioner, she "has no power or connection to the enforcement of the challenged laws, much less any power to threaten or 'commence civil or criminal proceedings to enforce an unconstitutional act.'" (Richardson MTD 9:22–24). Richardson cites to *Snoeck*, stressing that the Ninth Circuit found if a state administrative entity has no enforcement power under Nevada law, then "it has no connection to the enforcement of the challenged law as required under *Ex Parte Young*." *Snoeck*, 153 F.3d at 987.[3] Defendant Sandoval also makes this same argument, claiming that as Governor, his connection to enforcement is solely "based upon his status as the chief executive of Nevada and the general duty of his office to enforce the laws of the state." (Sandoval-Chambers MTD 17:15–16). He argues that Nevada law specifically "charges the Labor Commissioner as the state official with the authority to enforce the commands of the minimum wage amendment." (*Id.* 17:21–24) (citing Nev. Rev. Stat. 607.160; Nev. Rev. Stat. 607.170; Nev. Rev. Stat. 608.270; Op. Nev. Att'y Gen. 2005-04 (March 2, 2005)).

Plaintiffs respond that each of their claims allege "a violation of a federal law only and each seek a prospective injunction prohibiting state officials from interfering with federally protected rights." (Pls.' Resp. 23:15–16, ECF No. 68). Plaintiffs examine each claim as to how it relates to federal law. Specifically, their second claim "seeks to enjoin the Governor who continues his delegation of authority to the Labor Commissioner to enforce the MWA through impermissibly adopted Regulations based on concepts not found in the MWA all in violation of Plaintiffs' rights arising out of the Due Process Clause of the U.S. Constitution." (*Id.* 23:19–23). Similarly, their third claim also asserts a constitutional due process issue based on the

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[3] The *Snoeck* Court found this lack of enforcement was particularly important because a different entity was expressly charged with enforcement. *Id.* at 987.

Labor and Insurance Commissioners' alleged continuing "exercise [of] authority (including, in the case of the Labor Commissioner, the authority to bring criminal charges) granted only to the State's Judicial Branch." (*Id.* 24:1–6). Ultimately, Plaintiffs explain that, if successful, their suit will:

> enjoin the Governor's continued improper grant of authority to the Labor Commissioner to enforce the MWA through Regulations the Labor Commissioner has and had no authority to adopt or enforce, and will enjoin the Labor Commissioner from seeking ad hoc advice from the Insurance Commissioner who has no authority to interpret the MWA or language in the Regulations, all of which impedes, interfere with, and deprives Plaintiffs of federally protected rights.

(*Id.* 24:12–17). They assert that their claims are violations of federal law with only injunctive damages sought, so the *Ex Parte Young* exception applies, and the Eleventh Amendment does not bar the suit. (*Id.* 24:18–25:6).

Plaintiffs additionally argue that because "the Governor is the only government official mentioned anywhere in the MWA . . . [he] clearly has a connection with the law sufficient to be named a defendant." (*Id.* 17 n.19). They allege that he has "approved the Regulations" and "formally or informally" delegated "functions of rule-making and enforcement to the Labor Commissioner and Insurance Commissioner." (*Id.*) (citing SAC ¶ 70, 72).

The Court finds that the Labor Commissioner is the only proper party to this suit. Neither the Governor nor the Insurance Commissioner have any "connection to the enforcement" of challenged law. *Snoeck*, 153 F.3d at 987. The Governor's only role regarding the MWA is: "The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1." Nev. Const. art. 15, § 16(A). Merely publishing a bulletin hardly seems to be a connection to the enforcement of the MWA. Further, *Ex Parte Young* specifically explains that suit cannot be brought against a governor simply because "as the executive of the state, [he] was, in a general sense, charged with the execution of all its laws." *Ex Parte Young*, 209

U.S. at 157. *Ex Parte Young* rested on a legal fiction that a state official enforcing an unconstitutional law is no longer a representative of the state, removing his Eleventh Amendment immunity. *See Cardenas v. Anzai*, 311 F.3d 929, 935 (9th Cir. 2002). Without a particular connection to enforcement of the challenged act, this exception cannot apply as the state official simply becomes a representative of the state again, and the suit is barred by the Eleventh Amendment. Similarly, the Insurance Commissioner's alleged role as advisor to Labor Commissioner does not suffice as a connection to enforcement. Just as in *Snoeck*, where a non-party entity was expressly charged with enforcement, here, the Labor Commissioner is expressly charged with enforcement of all labor laws under NRS § 607.160. Accordingly, the Court finds that Sandoval and Richardson do not have a sufficient connection to enforcement, and Plaintiffs' suit as to these Defendants is barred by the Eleventh Amendment. Because claim two solely relates to Governor Sandoval's actions regarding the Regulations, the Court dismisses claim two with prejudice.

The inquiry does not conclude here, though, as the Labor Commissioner may only be sued under *Ex Parte Young* if the claims are violations of federal law, not state law. *See Pennhurst State Sch. & Hosp.*, 465 U.S. at 104. However, because Plaintiffs specifically bring their claims under ERISA and 42 U.S.C. § 1983 for violations of due process and equal protection, the Court finds that Plaintiffs have sufficiently alleged violations of federal law.

C. Legislative Immunity

Next, Defendant[4] asserts, "To the extent that Plaintiffs' claims are based upon the adoption of the regulations, rather than specific adverse enforcement action, the claims are barred by the absolute privilege of legislative immunity." (MTD 19:11–13). The Court finds

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[4] "Defendant" hereafter refers to Labor Commissioner Chambers, as she is the remaining Defendant. Similarly, "MTD" hereafter refers to what was previously called the "Sandoval-Chambers MTD." (*See* ECF No. 54).

that legislative immunity bars claim three that promulgating the Regulations exceeded the Labor Commissioner's authority.

Local government officials are entitled to legislative immunity for their legislative actions, whether those officials are members of the legislative or the executive branch. *Bogan v. Scott-Harris*, 523 U.S. 44, 54–55 (1998). This immunity extends both to claims for damages and claims for injunctive relief. *Supreme Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732–33 (1980). Whether an act is legislative depends not on defined categories of government acts but on "the character and effect" of the particular act at issue. *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984). Moreover, the question of the intent of the individual defendants is strictly off-limits in the legislative immunity analysis; as instructed by the Supreme Court, whether the officials' actions were legislative must be "stripped of all considerations of intent and motive." *Bogan*, 523 U.S. at 55; *see also Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

The Court considers four factors in determining whether an act is legislative in its character and effect: "(1) whether the act involves ad hoc decisionmaking, or the formulation of policy; (2) whether the act applies to a few individuals, or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation." *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003) (citation and internal quotation marks omitted). The first two factors are largely related, as are the last two factors, and they are not mutually exclusive. *Kaahumanu*, 315 F.3d at 1220; *San Pedro Hotel v. City of Los Angeles*, 159 F.3d 470, 476 (9th Cir. 1998).

Defendant argues that all four factors weigh in favor of granting the Labor Commissioner legislative immunity for promulgating the Regulations. (MTD 19:28–20:24). Plaintiffs respond that "legislative immunity does not apply when a state official acts in violation of the United States Constitution or federal law." (Pls.' Resp. 25:11–12). Essentially,

Plaintiffs contend that because the Labor Commissioner did not have authority under the MWA to make regulations, then "such actions are outside the sphere of legitimate legislative activity." (*Id.* 25:23). The Regulations, Plaintiffs argue, were made "based on an exercise of power by the Executive Branch of Nevada State government that was not granted legitimately." (*Id.* 26:26–27). Plaintiffs further argue, "Neither the Governor nor the Labor nor the Insurance Commissioners may grant to themselves authority which the MWA expressly reserves to the courts." (*Id.* 27:2–4). For this proposition, Plaintiffs cite Nev. Const. Art., 15 § 16(b), which states that employees claiming violations may bring them in court. (*Id.* 27:4–6).

The Court disagrees that the Labor Commission did not have authority to make the Regulations. Despite no specifics regarding regulations in the MWA, NRS § 607.160 specifically states:

> 1. The Labor Commissioner:
> (a) Shall enforce all labor laws of the State of Nevada:
> (1) Without regard to whether an employee or worker is lawfully or unlawfully employed; and
> (2) The enforcement of which is not specifically and exclusively vested in any other officer, board or commission.
> (b) May adopt regulations to carry out the provisions of paragraph (a).

Nev. Rev. Stat. § 607.160(1). The Court finds this statutory language sufficient to supply the Labor Commissioner with the authority to establish the challenged regulations. The mere fact that the MWA allows employees to bring claims in court does not preclude the Labor Commissioner from enforcing labor violations pursuant to the MWA under her authority to enforce Nevada's labor laws. Further, the Court agrees with Defendant's analysis of the four factors demonstrating that the promulgation of the Regulations constituted legislative activity. The Regulations were not ad hoc, but rather, they formulated policy pursuant to the requirements of the Nevada Administrative Procedures Act ("Nevada APA"), and they apply to the public at large. The Regulations are formally legislative in nature, as they were approved

through the Nevada APA process. Finally, they bear the hallmarks of traditional legislation, as they were formally codified in the Nevada Administrative Code. Accordingly, the Court finds that the Labor Commissioner had legislative immunity to promulgate the Regulations. The Court dismisses claim three with prejudice.[5]

D. Failure to State a Claim

1. Claim One – ERISA Preemption

Defendant does not argue that Plaintiff failed to state a claim for ERISA preemption. (*See* MTD 22:2–25:7) (arguing only failure to state § 1983 claims). However, Intervenor's Motion to Dismiss contends that "Section 16 is not preempted by ERISA Preemption." (Intervenor MTD 4:2–16, ECF No. 76).

ERISA applies where an "employee benefit plan" is in place. *See Dist. of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 127 (1992). An employee benefit plan is defined by statute as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C. § 1002(3). An "employee welfare benefit plan" governed by ERISA is:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, scholarship funds, or prepaid legal services, or . . .

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[5] While Defendant argues that the statute of limitations bars the Complaint (*see* MTD 21:3–22:1), the Court finds no merit in this argument regarding the remaining two claims for ERISA preemption and § 1983 equal protection violation. Plaintiffs argue, and the Court agrees, that these are alleged "ongoing violations," and therefore, the statute of limitations is not applicable. (Pls.' Resp. 27:24). The cases cited by Defendant do not convince the Court otherwise. *See, e.g.*, *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180 (9th Cir. 2010) (employee action for benefits that is inapplicable to the present case); *McDougal v. Cty. of Imperial*, 942 F.2d 668, 674–75 (9th Cir. 1991) (finding a continuing impact but not a continuing violation, wherein the former is not actionable, but the latter would have been).

Id. § 1002(1).

In determining the reach of ERISA preemption, "the purpose of Congress is the ultimate touchstone." *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 8 (1987). Section 514(a) of ERISA, 29 U.S.C. § 1144, provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a). Accordingly, "[i]f a state law 'relate[s] to . . . employee benefit plan[s],' it is pre-empted." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987).

Plaintiffs' SAC alleges that the MWA and Regulations "are an unlawful intrusion on the comprehensive federal framework for the administration and regulation of employee benefit plans." (SAC ¶ 55). Further, Plaintiffs allege that NAC 608.102[6] improperly "dictates the type of health care a nonunionized employer must offer to 'qualify to pay an employee' the lower tier minimum wage rate." (*Id.*). Plaintiffs further allege that "the Amendment and Regulations have impermissible 'connection with' ERISA plans that interfere with the uniformity of plan administration" because they have "radically impacted and altered the uniform administration of health benefits offered by Nevada's employers." (*Id.* ¶ 56, 58). According to Plaintiffs' allegations, "The Regulations also impermissibly impose administrative requirements on health

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[6] NAC 608.102 requires the employer seeking to pay the lower rate under the MWA to 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).

benefits plans through the employer-plan sponsors not required by ERISA," including "a complex set of rules for determining whether employee share of premium of qualified health insurance exceeds 10 percent of gross taxable income" under NAC 608.104. (*Id.* ¶ 61) (internal quotation marks omitted).

Intervenor argues that "[i]t is entirely the employer's choice" because "an employer may fully discharge its obligations under Section 16 by paying the higher wage rate." (Intervenor MTD 4:7–8). Intervenor asserts that because of the two-tier option, the MWA functions as "an indirect economic influence" which does not "bind plan administrators," and therefore, does not impact ERISA. (*Id.* 4:10–16).

The Court finds that Plaintiffs have properly alleged an ERISA preemption claim. The MWA and its Regulations literally reference ERISA and involve defining insurance coverage. The Court finds that the additional administrative requirements alleged by Plaintiffs are sufficient to survive dismissal on the pleadings.[7] Plaintiffs satisfactorily allege that the MWA and Regulations inpact their uniform administration of health benefits under ERISA. The optional nature of the MWA's two tiers does not mitigate the harms alleged in Plaintiffs' SAC. Accordingly, claim one survives Defendant and Intervenor's Motions to Dismiss.

2. Claim Four – Equal Protection Violation under § 1983

Lastly, Defendant argues that claim four fails "to establish a violation of the Equal Protection Clause of the Fourteenth Amendment based upon a distinction between employers whose employees are covered by a Collective Bargaining Agreement and those who are not." (MTD 24:12–14).[8]

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[7] The Court notes that this determination does not opine on the merits of the ERISA preemption claim, but rather, the Court only finds that this claim survives a Rule 12(b)(6) challenge.

[8] For this claim, the pertinent part of the MWA states:

> The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause requires the government to treat all similarly situated persons alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (citing *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990)); *see also Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1047 (9th Cir. 2002). Disparate government treatment will survive rational basis scrutiny "as long as it bears a rational relation to a legitimate state interest." *Patel v. Penman*, 103 F.3d 868, 875 (9th Cir. 1996). In order to state a claim for an equal protection violation, a plaintiff must plead facts that, if true, would show that the governing body acted irrationally and in a manner "unrelated to the achievement of any combination of legitimate purposes." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

Plaintiffs' SAC alleges:

> The Amendment draws irrational, arbitrary, and discriminatory distinctions between employers whose employees are covered by Collective Bargaining and employers whose employees are not covered by Collective Bargaining by allowing employers who negotiate Collective Bargaining Agreements with unions to be exempt from the requirements of the Amendment and, by extension, therefore, the Regulations. The Amendment, and by extension the Regulations, thereby discriminates between certain types of trades, workforces, and businesses, requiring increased costs of doing business in the state for some employers over others without a fair and substantial relation to the object of the law.

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collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms.

Nev. Const. art. 15, § 16(B).

(SAC ¶ 95). Defendant argues that there are "several plausible [rational] reasons" for the collective bargaining distinction, "including the idea that a collective bargaining unit protects the interests of union members with employers better than an ad hoc negotiation between an employer and employee." (MTD 24:26–25:1).[9] Additionally, as Intervenor's Motion to Dismiss points out, "Opt-outs for collective bargaining are not new or unusual." (Intervenor MTD 7:9–10). Intervenor cites to *Livadas v. Bradshaw*, 512 U.S. 107, 131–32 (1994) for the proposition that "although state and local labor standards laws must be applied equally to employees engaged in collective bargaining and those who are not, these laws may have explicit allowances for an employer and employees to come to a different deal through collective bargaining." (*Id.* 7:11–14). The *Livadas* Court emphasized that these "narrowly drawn opt-out provisions" were permissible when the "union-represented employees [also] have the full protection of the minimum standard." *Livadas*, 512 U.S. at 131.

Plaintiffs respond that the MWA was drafted by Intervenor "to disadvantage the group burdened by the law, non-unionized employers." (Pls. Resp. 32:12–13). Citing *Romer v. Evans*, 517 U.S. 620, 632 (1996), Plaintiffs argue, "A law drafted by a special interest group that is designed to burden a specific group—and benefit that same special interest group—is a classification the Equal Protection Clause was intended to prevent." (*Id.* 32:13–15). Specifically, "[b]urdening this disadvantaged group [of non-unionized employers] for no reason other than to benefit the drafters of the Amendment is not rational." (*Id.* 32:21–22).[10]

The Court finds Plaintiffs' argument unavailing. The Court may uphold a law under equal protection for any conceivable rational basis. The basis suggested by Defendant and

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[9] Intervenor similarly suggests as the rational basis: "Through collective bargaining, employees have greater ability to obtain better conditions of employment than employees have acting alone." (Intervenor MTD 7:27–8:1).

[10] Plaintiffs' Response to Intervenor's Motion to Dismiss included a substantially similar (if not word-for-word identical) argument regarding the sufficiency of its equal protection claim. (Pls.' Resp. to Intervenor MTD 18:14–20:4, ECF No. 83).

Intervenor regarding the benefit in bargaining power for employees covered by a collective bargaining agreement is sufficient. The MWA does not present the same concern regarding "animus" as the Supreme Court found in *Romer*. Moreover, the Court finds that the MWA's opt-out provision is narrowly drawn. Unionized employees maintain the protection of the federal minimum wage standard, and such distinctions regarding collective bargaining have been upheld by the Supreme Court previously. *See Livadas*, 512 U.S. at 131. Accordingly, the Court dismisses Plaintiffs' equal protection claim. Claim four is dismissed with prejudice.

IV. CONCLUSION

IT IS HEREBY ORDERED that the Clerk of the Court shall substitute Barbara Richardson for Defendant Amy L. Parks.

IT IS FURTHER ORDERED that Defendants Sandoval and Chambers' Motion to Dismiss (ECF No. 54) is **GRANTED in part, DENIED in part.**

IT IS FURTHER ORDERED that Defendant Richardson's Motion to Dismiss (ECF No. 57) is **GRANTED.**

IT IS FURTHER ORDERED that Intervenor's Motion to Dismiss (ECF No. 76) is **GRANTED in part, DENIED in part.**

IT IS FURTHER ORDERED that Defendants Sandoval and Richardson are dismissed. Claims two, three, and four are dismissed with prejudice. Claim one remains against Defendant Chambers.

DATED this 28 day of March, 2017.

Gloria M. Navarro, Chief Judge
United States District Court

EXHIBIT 2

EXHIBIT 2

Malani Kotchka

From: efiling@nvcourts.nv.gov
Sent: Monday, April 03, 2017 5:05 PM
To: Malani Kotchka
Subject: Your filing, Re: 69408 - Original Proceeding - Post-Judgment Petition, was filed subject to acceptance No. 69408.

RECEIPT OF ELECTRONIC DOCUMENT SUBMITTED FOR FILING

Docket Number:	69408
Case Category:	Original Proceeding
Submitted by:	Malani L. Kotchka
Date Submitted:	Apr 03 2017 05:02 p.m.
Document Category:	Post-Judgment Petition
Document Title:	Petitioner's Petition for Rehearing on ERISA Preemption
Filing Status:	**Filed subject to acceptance**

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EXHIBIT 3

EXHIBIT 3

Rosalie Garcia

From: efiling@nvcourts.nv.gov
Sent: Tuesday, April 04, 2017 2:44 PM
To: Rosalie Garcia
Subject: Rejection of Electronic Document. No. 69408.

Docket Number:	69408
Case Category:	Original Proceeding
Submitted by:	Malani L. Kotchka
Date Submitted:	Apr 03 2017 05:02 p.m.
Date Rejected:	Apr 04 2017 02:44 p.m.
Note from Clerk:	This petition for rehearing can only be filed by order of the court. Thank you. sy
Document Category:	Post-Judgment Petition
Document Title:	Petitioner's Petition for Rehearing on ERISA Preemption
Filing Status:	**Rejected**

null

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IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY,

Petitioner,

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, IRSHAD AHMED, MICHAEL SARGEANT Individually and on behalf of others similarly situated,

Real Parties in Interest.

Case No.: 69408

District Court Case No. A-14-707423-C

Electronically Filed
Apr 06 2017 08:18 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

MOTION TO FILE PETITION FOR REHEARING ON ERISA PREEMPTION

Pursuant to NRAP 27(a), Petitioner Western Cab Company ("Western") requests that this Court order its Petition for Rehearing on ERISA Preemption,

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Docket 69408 Document 2017-11430

Exhibit 1, to be filed with this Court. This motion is based on the accompanying Memorandum of Points and Authorities.

Respectfully submitted,

HEJMANOWSKI & McCREA, LLC

/s/ Malani L. Kotchka
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Attorneys for Petitioner
Western Cab Company

MEMORANDUM OF POINTS AND AUTHORITIES

April 3, 2017 was the 18th day after the filing of this Court's Decision of March 16, 2017, within which a party could seek rehearing. *See* NRAP 40(a)(1). Pursuant to NRAP 40(a)(1), Western filed its Petition for Rehearing on Fuel Costs at 2:48 p.m. The total words of that Petition were 2,455.

After Western had filed its Petition for Rehearing on Fuel Costs, Western's counsel became aware of a decision by Judge Navarro regarding ERISA preemption. Because Western wanted to get this decision before this Court and to request rehearing on the ERISA issue as well, Western filed a second Petition for Rehearing

on ERISA Preemption. Exhibit 1. The total words of that Petition were 294. Exhibit 1. That Petition was filed on April 3, 2017, subject to acceptance. Exhibit 2.

On April 4, 2017, the Clerk of the Nevada Supreme Court refused to file that Petition and said that it could only be filed if this Court ordered it to be filed. Exhibit 3. When considered together, the petitions total 2749 words. Since together the Petitions do not exceed the 4,667 words provided in NRAP 40(b)(3) and since both were filed within the 18 days provided by NRAP 40(a)(1), Western respectfully requests that this Court order the Petition for Rehearing on ERISA Preemption, attached hereto as Exhibit 1, to be filed with the Clerk.

Respectfully submitted,

HEJMANOWSKI & McCREA, LLC

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Attorneys for Petitioner
Western Cab Company

CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **MOTION TO FILE PETITION FOR REHEARING ON ERISA PREEMPTION** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 5th day of April, 2017, to the following:

Leon Greenberg, Esq.
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And a true and correct copy of the foregoing **MOTION TO FILE PETITION FOR REHEARING ON ERISA PREEMPTION** was served via first class, postage-paid U.S. Mail on this 5th day of April 2017, to the following:

The Honorable Linda Marie Bell
District Court Judge
Eighth Judicial District Court of Nevada
200 Lewis Avenue, #3B
Las Vegas, NV 89101

An Employee of Hejmanowski & McCrea LLC