

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 THE BOARD OF REVIEW FOR THE
4 NEVADA DEPARTMENT OF
5 EMPLOYMENT, TRAINING AND
6 REHABILITATION, EMPLOYMENT
7 SECURITY DIVISION; AND THE
8 ADMINISTRATOR OF THE NEVADA
9 DEPARTMENT OF EMPLOYMENT,
10 TRAINING AND REHABILITATION,
11 EMPLOYMENT SECURITY DIVISION,

12 Petitioner,

13 *vs.*

14 THE SECOND JUDICIAL DISTRICT
15 COURT OF THE STATE OF NEVADA,
16 IN AND FOR THE COUNTY OF
17 WASHOE, and the HONORABLE
18 SCOTT FREEMAN, DISTRICT JUDGE,

19 Respondent.

20 *and,*

21 McDONALD'S OF KEYSTONE,

 Real Party in Interest.

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Feb 19 2016 08:43 a.m.
Case No. 69499 Tracie K. Lindeman
Clerk of Supreme Court
District Court No. CV15-00671

22 **REPLY IN SUPPORT OF**
23 **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

24 **TO: THE SUPREME COURT OF THE STATE OF NEVADA**

25 The Nevada Department of Employment, Training and
26 Rehabilitation's Employment Security Division (ESD), through its counsel, Joseph

1 L. Ward, Jr., Esq., respectfully submits this reply as allowed by this Court's Order
2 entered herein on January 13, 2016. This Reply is in support of ESD's Petition for
3 Writ and follows the outline of the Opposition.

4 I. INTRODUCTION

5 The applicable authority compels the relief sought. The district court
6 cannot be ousted of something it never had.¹

7 II. STATEMENT OF FACTS

8 This dispute "rages" (Opposition, 2, l. 10), because McDonald's keeps
9 knocking on a closed jurisdictional door. Claimant Jessica Gerry (Gerry),
10 McDonald's employee, initiated the underlying Chapter 612 NRS proceedings.
11 She was a party to the underlying administrative proceedings. Regardless of
12 whether Gerry actively participated at the hearing before the referee, she remained
13 a party. If ESD's Board of Review had reversed the referee's decision, Gerry
14 would have likely exercised her rights as an aggrieved party. *See* NRS 612.530.

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16 ¹ Addressing fn 2 of the Opposition, the Motion to Dismiss (Exhibit 2) was brought
17 on behalf of the "Respondent." The "Respondent" in the caption is encompassing.
18 In any event, "a challenge to a court's subject matter jurisdiction is not waivable ...
19 and can be raised at any time..." *Holdaway-Foster v. Brunell*, 130 Nev. Adv. Op.
20 51, 330 P.3d 471, 474 (2014). The *Tait* case out of California, inappropriately
relied upon by McDonald's, addressed the "Rooker-Feldman doctrine" in federal
court, which "protect[s] state judgments from collateral attack in federal courts."
Tait v. Asset Acceptance, LLC, CV 12-9532 FMO FFMX, 2013 WL 3811767, at
*4 (C.D. Cal. July 22, 2013).

McDonald's attachment of an exhibit, that included Gerry's name, did not make Gerry a party. *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 448, 874 P.2d 729, 735 (1994) (explaining that a person who is not served with process and does not make an appearance in the district court is not a party to that action). Chapter 612 of NRS does not define "party." So reference to the Nevada Administrative Procedure Act is appropriate. "NRS 233B.035 defines '[p]arty' as 'each person ... named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any contested case.'" *Washoe County v. Otto*, 128 Nev. Adv. Op. 40, 282 P.3d 719, 726 (2012) and see NRS 233B.039(3)(a) ("3. The special provisions of ... (a) Chapter 612 of NRS for ... judicial review ... prevail over the general provisions of this chapter.")²

III. ISSUE

Did McDonald's noncompliance with the naming requirement of NRS 612.530(1) preclude the district court from exercising jurisdiction?

IV. STANDARD FOR ISSUING

The district court lacks subject matter jurisdiction. *Matter of Two Minor Children*, 95 Nev. 225, 228, 592 P.2d 166, 168 (1979). An important issue

² Naming Gerry as a defendant would have made her a party, a respondent/defendant, in the judicial review proceeding. Responding defendants are respondents.

1 of law may need clarification. *State v. Second Judicial District Court*, 118 Nev.
2 609, 614, 55 P.3d 420, 423 (2002).

3 V. ARGUMENT

4 A. Standard of Review

5 McDonald's cites to *Rosequist v. Int'l Ass'n of Firefighters Local*
6 *1908*, 118 Nev. 444, 49 P.3d 651 (2002), arguing that ESD makes a "facial attack."
7 ESD's motion to dismiss (Exhibit 2), must be looked at within the context of
8 Chapter 612 of NRS. Aggrieved parties seeking judicial review of ESD Board of
9 Review decisions must name "any ... party to the proceedings before the Board of
10 Review." NRS 612.530(1). McDonald failed to do this. As correctly noted in
11 *Rosequist*, "A motion to dismiss is properly granted when there is a lack of subject
12 matter jurisdiction on the face of the complaint." *Rosequist, supra*, 118 Nev. at
13 448, 49 P.3d at 653.

14 B. McDonald's Petition for Judicial Review 15 (Exhibit 1) Failed to Satisfy the NRS 612.530(1) Jurisdictional Requirement.

16 As a jurisdictional threshold for securing judicial review, NRS
17 612.530(1) requires petitioners to include as defendants all persons who were
18 parties to the administrative proceedings. An "independent clause" can stand on its
19 own. Reading NRS 612.530(1), "in which action" after the comma refers back to
20 and **depends upon** the "action" as initially addressed. Based on the plain language
21 of NRS 612.530(1), and reading the statute as a whole, McDonald's was required

1 to timely make Gerry a defendant. *See Mangarella v. State*, 117 Nev. 130, 133, 17
2 P.3d 989, 991 (2001) (“Statutes should be given their plain meaning and must be
3 construed as a whole and not be read in a way that would render words or phrases
4 superfluous or make a provision nugatory” (internal quotations omitted); and *see*
5 *Pellegrini v. State*, 117 Nev. 860, 873-74, 34 P.3d 519, 528–29 (2001).
6 Accordingly, the comma in NRS 612.530(1) cannot affect a proper application of
7 this statute.

8 Although NRS 233B.130(2) is broken down into subsections a
9 through c and Subsection 1 of NRS 612.530 is not, they each require petitioners to
10 make the parties to the administrative proceedings parties to the judicial review
11 proceeding. This Court, in *Otto, supra*, relied upon NRS 233B.130 because it was
12 dealing with a tax case. Absent the applicability of NRS 612.530(1), NRS
13 233B.130(2)(a) would likely be at issue here. *See* NRS 233B.039(3)(a).

14 In *Kame v. Employment Sec. Dept.*, 105 Nev. 22, 769 P.2d 66 (1989),
15 however, this Court addressed NRS 612.530(1) and determined it was mandatory
16 and jurisdictional. A couple years earlier, in *Caruso v. Nevada Employment Sec.*
17 *Dept.*, 103 Nev. 75, 734 P.2d 224 (1987), this Court determined that NRS
18 612,530(1) was jurisdictional. The Legislature has spoken, and as reiterated in
19 *Otto*, this Court observed:

20 **“When a party seeks judicial review of an**
21 **administrative decision, strict compliance with the**
 statutory requirements for such review is a

1 precondition to jurisdiction by the court of judicial
2 review,” and “[n]oncompliance with the requirements
3 is grounds for dismissal.” *Kame v. Employment Security*
4 *Dep’t*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989); *see also*
5 *Ultsch v. Illinois Mun. Retirement Fund*, 226 Ill.2d 169,
6 314 Ill.Dec. 91, 874 N.E.2d 1, 7 (2007) (stating that
7 “[b]ecause review of a final administrative decision
8 may be obtained only as provided by statute, a court
9 exercises ‘special statutory jurisdiction’ when it
10 reviews an administrative decision,” and that “[a]
11 party seeking to invoke a court’s special statutory
12 jurisdiction must strictly comply with the procedures
13 prescribed by the statute”).

14 *Otto, supra*, 282 P.3d at 725 (Emphasis added).

15 C. The Cure Is Dismissal.

16 McDonald’s borrowed the phrase “technical dereliction” from *Bing*
17 *Const. Co. of Nevada v. Nevada Dept. of Taxation*, 107 Nev. 630, 817 P.2d 710
18 (1991). McDonald’s reliance on this case, however, is misplaced because it hinged
19 on the application of NRS 3.275. In *Bing*, this Court stated:

20 While **NRS 233B.130 is jurisdictional** in nature and is
21 designed to place limits on the substantive rights of
 parties to seek review in a civil action commenced before
 an agency, **NRS 3.275 is clearly designed to facilitate**
 the gathering of data. There is no indication that NRS
 3.275 was meant to be jurisdictional, or to control the
 substantive rights of parties.

22 *Bing, supra*, 107 Nev. at 631, 817 P.2d at 711 (Emphasis added). As recognized in
23 *Otto* and *Kame*, NRS 612.530(1) is also jurisdictional. McDonald’s advances the
24 argument made in *Civil Serv. Comm’n for City of Reno v. Second Judicial Dist.*

1 *Court ex rel. County of Washoe*, 118 Nev. 186, 42 P.3d 268 (2002). In *Otto*,
2 however, this Court overruled *Civil Service Commission* stating,

3 To the extent that *Civil Service Commission* holds that a
4 petition for judicial review that fails to comply with the
NRS 233B.130(2)(a) naming requirement may
5 nonetheless invoke the district court's jurisdiction,
however, it is overruled.

6 *Otto, supra*, 282 P.3d at 725 n.9.

7 Long ago, this Court observed, “[W]here a statute upon a particular
8 subject has provided a tribunal for the determination of questions connected with
9 that subject ... the jurisdiction thus conferred is exclusive, **unless otherwise**
10 **expressed or clearly manifested.**” *Scott v. Nevada Employment Security*
11 *Department*, 70 Nev. 555, 559, 278 P.2d 602, 603-04 (1954) quoting *Minnesota*
12 *Valley Canning Company v. Rehnblom*, 242 Iowa 1112, 49 N.W.2d 553, 555
13 (1951) (Emphasis added).

14 VI. CONCLUSION

15 A Writ of Mandamus or Prohibition should be issued by this Court
16 directing the district court to dismiss the underlying judicial review action with
17 prejudice or arrest its proceedings in this matter, based upon the lack of subject
18 matter jurisdiction.

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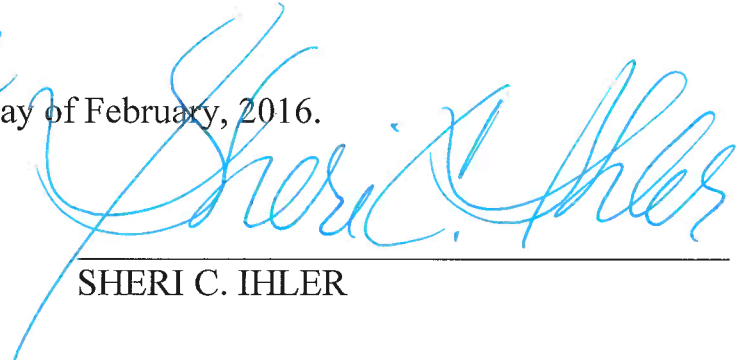
1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRAP 25(d)(1)(B), I hereby certify that I am an employee
3 of the State of Nevada, over the age of 18 years; and that on the date hereinbelow
4 set forth, I served a true and correct copy of the foregoing REPLY IN SUPPORT
5 OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION by placing the
6 same within an envelope which was thereafter sealed and deposited with the State
7 of Nevada Mail for postage and mailing from Carson City, Nevada, addressed for
8 delivery as follows:

9 HON. SCOTT FREEMAN
10 Department 9
11 Second Judicial District Court
75 Court Street
Reno, NV 89501

12 CHARLES ZEH, ESQ.
13 575 Forest Street, Suite 200
Reno, NV 89509

14 **DATED** this 18th day of February, 2016.

15 
16 SHERI C. IHLER
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