Case No. 69807

In the Supreme Court of Nevada

TITLEMAX OF NEVADA, INC., a Nevada Corporation,

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION,

Respondent,

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable VALERIE ADAIR, District Judge
District Court Case No. A-15-719176-C

APPELLANT'S REPLY BRIEF

DANIEL F. POLSENBERG
Nevada Bar No. 2376
JOEL D. HENRIOD
Nevada Bar No. 8492
DALE KOTCHKA-ALANES
Nevada Bar No. 13,168
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200
DPolsenberg@LRRC.com
JHenriod@LRRC.com
MKotchka-Alanes@LRRC.com

PATRICK J. REILLY
Nevada Bar No. 6103
ERICA C. SMIT
Nevada Bar No. 13,959
HOLLAND & HART LLP
9555 Hillwood Drive
Second Floor
Las Vegas, Nevada 89134
(702) 669-4600
PReilly@HollandHart.com
ECSmit@HollandHart.com

Attorneys for Appellant

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APPELLANT'S REPLY BRIEF

TitleMax was not required to wait for the FID to bring administrative proceedings against it before seeking a judicial declaration as to the meaning of two statutes and a regulation. The FID's argument turns the exhaustion doctrine on its head. Administrative exhaustion applies only when there is a specific statutory procedure that the ***aggrieved party*** must pursue prior to bringing suit. Here, there was no statutory procedure that TitleMax *could have* pursued, let alone one it was *required* to pursue. That ***the FID*** could have pursued further administrative proceedings against TitleMax only indicates that this case was ripe for review – not that TitleMax failed to exhaust an applicable procedure.

The FID's suggestion that TitleMax had to wait until the FID brought proceedings against it runs contrary to the very purpose of declaratory relief. The declaratory judgment act was enacted so that parties would not have to operate under threat while waiting for their potential opponents to sue them.

Even if there were a statutory procedure TitleMax could have exhausted, "[e]xhaustion is not required where, as here, the only issue

is the interpretation of a statute." *State, Dep't of Bus. & Indus. v. Check City*, 130 Nev. Adv. Op. 90, 337 P.3d 755, 758 n.5 (2014). The FID has yet to articulate what purported "factual issues" had to be resolved before the district court could declare whether TitleMax's Grace Period Payments Deferment Agreement ("GPDA") complied with the relevant statutes. Whether a contract complies with statutory requirements is a purely legal inquiry. Likewise, the meaning of the regulation prohibiting guarantors (but not co-borrowers) on a loan was a question of law, and as such, TitleMax's request for judicial declaration was proper.

TitleMax was entitled to a judicial declaration as to the meaning of the laws that the FID was threatening to enforce against it. Therefore, the district court's order dismissing TitleMax's complaint for declaratory relief should be reversed.

ARGUMENT

I.

THERE WAS NOTHING FOR TITLEMAX TO "EXHAUST" – THE PROCEDURE THE FID ADVOCATES COULD NOT BE INITIATED BY TITLEMAX

The FID argues that exhaustion is the rule (RAB at 6), but exhaustion is the rule only where there is something to exhaust.

A. There Was No Statutorily Prescribed Procedure to "Exhaust" Before TitleMax Could Seek Declaratory Relief

Administrative exhaustion is required when there is a specific statutory procedure that the aggrieved individual can – and must – pursue. Nevada's legislature knows how to condition judicial relief on administrative exhaustion. *See, e.g.*, *Benson v. State Eng'r*, 131 Nev. Adv. Op. 78, 358 P.3d 221, 224 (2015) ("'[T]he cancellation of a permit *may not be reviewed or be the subject of any judicial proceedings* unless a written petition for review has been filed and the cancellation has been affirmed, modified or rescinded' by the State Engineer." (quoting NRS 533.395(4))); *Pope v. Motel 6*, 121 Nev. 307, 311, 114 P.3d 277, 280 (2005) ("NRS 613.420 requires an employee alleging employment discrimination to exhaust her administrative remedies by filing a complaint with NERC before filing a district court action."); *Cty. of Washoe v. Golden Rd. Motor Inn, Inc.*, 105 Nev. 402, 404, 777 P.2d 358, 359 (1989) ("NRS 361.420(1) and (2) direct taxpayers to protest the payment of their taxes with the county treasurer and seek relief from the state board of equalization before commencing suit in the district court.").

Administrative exhaustion was not required here because, unlike the cases cited above, there is "no similar Nevada statute [that] requires [TitleMax] to first present [its] challenge to the [FID]." *See Falcke v. Douglas Cty.*, 116 Nev. 583, 587, 3 P.3d 661, 663 n.2 (2000) (determining that petitioner did not need to present his development code provision challenge to county board before applying for judicial relief).

There is no provision in NRS 604A or NRS 233B requiring TitleMax to seek interpretation from the FID prior to bringing suit for declaratory relief.[1] This makes sense because there is no special administrative expertise in statutory interpretation. *See Prudential Ins. Co. of Am. v. Ins. Comm'r*, 82 Nev. 1, 4–5, 409 P.2d 248, 250 (1966)

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[1] The FID does not argue that exhaustion is required under NRS 233B.110 or NAC 232.040 – and for good reason. NAC 232.040 is permissive, not mandatory – "an interested person ***may*** petition the Director to issue a declaratory order or advisory opinion concerning the applicability of a statute, regulation or decision of the Department or any of its divisions." NAC 232.040(1) (emphasis added); *see also* NRS 0.025(1) ("'May' confers a right, privilege or power."). NAC 232.040 does not require pre-suit adjudication by the FID.

Nor does NRS 233B.110 apply because, by its terms, it is limited to determining the "validity or applicability of any regulation." It does not apply to statutes at all, nor does it encompass interpreting the plain language of a regulation. Here, TitleMax was not challenging the validity or constitutionality of NAC 604A.230, nor was it challenging the regulation's applicability to TitleMax's business as exceeding the FID's statutory authority. TitleMax acknowledged it had to comply with NAC 604A.230; it merely sought a declaration as to the regulation's meaning.

(ruling that unlike "*discretionary* orders and decisions of the commissioner," the construction of a statute was an issue for the court, as "[t]he meaning of the . . . statute is not a question that the legislature has committed to the insurance commissioner for decision"). "It is," after all, "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

B. The FID Did Not Have Original Jurisdiction

"The exhaustion doctrine . . . applies only when an administrative agency has original jurisdiction." *Nevada Power Co. v. Eighth Judicial Dist. Court*, 120 Nev. 948, 959, 102 P.3d 578, 586 (2004) (internal quotation marks and citation omitted). Despite its arguments to the contrary,[2] the FID does not have original or exclusive jurisdiction to interpret statutes and regulations.

First, there is no statutory provision granting the FID exclusive or original jurisdiction. *Contrast with Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 572, 170 P.3d 989, 994 (2007) (finding that Department of Insurance had exclusive original jurisdiction where statute specifically

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[2] (*See* RAB at 6 & n.9; 1 App. 55, 74; 2 App. 328, 332-33, 341; 3 App. 392, 501 ("And the FID has exclusive original jurisdiction and should be allowed to opine on these statutes first.").)

"grants the Insurance Commissioner 'exclusive jurisdiction in regulating the subject of trade practices in the business of insurance in this state'" (quoting NRS 686A.015(1))).

Second, agencies never have the "exclusive" word on what a statute means. "Exclusive jurisdiction" means that there is no private right of action for one party to enforce a statute against another without proceeding before the agency. *See, e.g.*, *Allstate*, 123 Nev. at 573, 170 P.3d at 995 (ruling that doctors could not sue insurers for failure to promptly pay claims under insurance statutes, as the Nevada Department of Insurance had "exclusive original jurisdiction over" such matters); *Sports Form, Inc. v. Leroy's Horse & Sports Place*, 108 Nev. 37, 41, 823 P.2d 901, 903 (1992) (determining that betting establishment could not sue another company under certain gaming laws because "Chapter 463 does not contemplate a private cause of action," but was instead to be enforced by "only the Nevada Gaming Control Board or the Nevada Gaming Commission").

TitleMax is not seeking to enforce a provision of NRS 604A against another private party.[3] Rather, the FID is trying to preclude TitleMax from obtaining a judicial declaration as to the statute's meaning. TitleMax is expressly allowed to do so under Nevada's Declaratory Judgment Act. *See* NRS 30.040(1) ("Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction . . . arising under the . . . statute"); *Prudential*, 82 Nev. at 5, 409 P.2d at 250 ("If the law is unclear or obscure, a court, when asked, must seek out and proclaim its meaning. Declaratory relief is tailored for that purpose.").

A party need not first ask an agency before asking a court to declare what a statute means. *See* NRS 30.040; *Check City*, 130 Nev. Adv. Op. 90, 337 P.3d at 758 n.5 ("Exhaustion is not required where, as here, the only issue is the interpretation of a statute."); *Prudential*, 82 Nev. at 3–5, 409 P.2d at 249–50 (ruling that party could "seek a judicial declaration of the meaning of the insurance premium tax statute by an

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[3] Customers can privately enforce certain provisions of NRS Chapter 604A – meaning that the FID does not have original or exclusive jurisdiction over the entire chapter. *See* NRS 604A.930.

action for declaratory relief" rather than "petition to 'review' an order of the insurance commissioner").

As in *Prudential*, "[t]he purpose of this suit is simply to ascertain the meaning of a state statute." 82 Nev. at 5, 409 P.2d at 251. "Without question, [TitleMax] chose the proper remedy" when it petitioned for declaratory relief. *Id.*, 82 Nev. at 5, 409 P.2d at 250.

C. The FID Relies on Procedures *It* Could Take – Not TitleMax

Administrative exhaustion applies when it is the ***aggrieved individual*** who must take some action before filing suit. *Mesagate Homeowners' Ass'n v. City of Fernley*, 124 Nev. 1092, 1101, 194 P.3d 1248, 1254 (2008) (aggrieved property owners had to appeal city building permit to board of appeals); *Pope*, 121 Nev. at 311, 114 P.3d at 280 (aggrieved employee must file complaint with agency); *Golden Rd. Motor Inn*, 105 Nev. at 404, 777 P.2d at 359 (taxpayer must follow statutory procedure).

Here, there was no statutorily prescribed procedure to challenge the conclusions in the FID's private reports of examination. A licensee is simply directed to respond to the report of examination "within 30 days outlining what actions that will be taken to correct all deficiencies

and violations noted in the report." (1 App. 63.) There is no provision anywhere in NRS Chapter 604A or NAC Chapter 604A for appeal or review of a report of examination. Because the FID's powers are strictly limited by statute and the power conferred upon it by the legislature, the FID cannot manufacture such a procedure on its own. *See, e.g.*, *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961) ("[T]he fact is that the [agency] is entirely a creature of Congress and the determinative question is not what the [agency] thinks it should do but what Congress has said it can do."); *City of Reno v. Civil Serv. Comm'n of City of Reno*, 117 Nev. 855, 858, 34 P.3d 120, 122 (2001) ("The scope of an agency's authority is limited to the matters the legislative body has expressly or implicitly delegated to the agency."), *opinion modified on denial of reh'g*, 42 P.3d 813 (Nev. 2002); *Andrews v. Nevada State Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 97 (1970) ("Official powers of an administrative agency cannot be assumed by the agency, nor can they be created by the courts in the exercise of their judicial function.").

The FID argues that the administrative "remedy" available to TitleMax was the FID's *own ability* to notice a hearing. (RAB at 1 n.2,

8-11 (citing NRS 604A.800 and NRS 604A.820).) Both cited provisions describe actions *the FID* can take – not TitleMax. *See* NRS 604A.800 ("If *the Commissioner* finds that probable cause for revocation of any license exists . . . , *the Commissioner* may, upon 5 days' written notice and a hearing, enter an order suspending a license for a period") (emphases added); NRS 604A.820 ("If *the Commissioner* has reason to believe that grounds for revocation or suspension of a license exist, *the Commissioner* shall give 20 days' written notice to the licensee . . . and set a date for a hearing.") (emphases added).

There is no statutory procedure for TitleMax to request a hearing. *Contrast with Allstate*, 123 Nev. at 574-76, 170 P.3d at 995-96 (determining that doctors had to exhaust administrative remedies when statute provided that insurance commissioner "*shall* hold a hearing" upon application by any "aggrieved" person)).[4] The *Allstate* court expressly conditioned its exhaustion ruling on the fact that "a medical provider who is aggrieved . . . may apply for a hearing before the Insurance Commissioner and petition for judicial review if the

[4] NRS 679B.310(2)(b) (emphasis added).

application is denied or the Insurance Commissioner refuses or fails to hear the matter." *Allstate*, 123 Nev. at 574, 170 P.3d at 995.

Here, there is no statutory procedure by which TitleMax could – or must – request a hearing before the FID.[5]

II.

TITLEMAX SOUGHT STATUTORY AND REGULATORY INTERPRETATION– PURELY LEGAL ISSUES

A. TitleMax Petitioned the Court to Decide Issues of Statutory and Regulatory Interpretation

TitleMax sought the interpretation of NRS 604A.210, NRS 604A.445, and NAC 604A.230. (1 App. 16.)

The issues before the district court were:

(1) whether 604A.445 (limiting the "original term" of a title loan to 210 days) and NRS 604A.210 (prohibiting "*additional* interest" during a

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[5] That the FID voluntarily offered that TitleMax could request an administrative hearing (1 App. 63, 67-70) does not change that TitleMax was not statutorily enabled or required to request a hearing prior to bringing suit. The FID wanted TitleMax to "submit a plan of compliance or request an administrative hearing" (1 App. 67), but this was shifting the FID's statutory duty of noticing a hearing to TitleMax.

Moreover, the FID's invitation for TitleMax to voluntarily request a hearing seems absurd given that (1) the FID had made its position abundantly clear, and (2) TitleMax would be billed an hourly fee for any hearing conducted pursuant to NRS 604A. *See* NRS 604A.740. *Cf. Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 1001 (8th Cir. 2015) (rejecting that there were other adequate ways to contest agency determination where agency "repeatedly made it clear . . . that a permit . . . *would ultimately be refused*"), *aff'd*, 136 S. Ct. 1807 (2016).

grace period)[6] allowed the original contract rate of interest to be charged while payments on the loan principal were deferred for 210 days, followed by an interest-free 210-day period in which to repay the principal; and

(2) whether NAC 604A.230[7] prohibited listing an individual as a co-borrower on a title loan when the individual was not on the vehicle title.

Before reversing her position, the district court judge correctly recognized that she was being asked to decide two questions of law:

> The only issue -- I mean to me the two questions of law are this, and I think it's pretty clearly articulated, but I'm going to articulate it now -- whether or not a coborrower who does not have title to the vehicle is in fact a guarantor.
>
> And the second question is whether or not during a grace period the lender can charge interest at the agreed-upon rate

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[6] NRS 604A.210 allows for a grace period of any length that does not charge "1. Any fees for granting such a grace period; or 2. Any additional fees or ***additional*** interest on the outstanding loan during such a grace period." (Emphasis added). As TitleMax explained to the district court, a prior draft of this provision was specifically amended to insert the word "additional." (2 App. 261 ("deleting: '***fees or interest***' and inserting: '***additional fees or additional interest***'").)

[7] NAC 604A.230 provides in relevant part, "A licensee shall not . . . [r]equire or accept a guarantor to a transaction entered into with a customer." NAC 604A.230(1)(a).

> or whether or not they can't charge any interest during that period.
>
> Those -- I mean I think I've put that out pretty plainly. Those are the two questions of law. Whether additional interest means interest at the agreed-upon rate or it means interest at a higher than agreed-upon rate to get the grace period. That's the question of what additional means.

(3 App. 507.)[8]

These questions of statutory and regulatory interpretation required no determination of factual issues. *See Check City*, 130 Nev. Adv. Op. 90, 337 P.3d at 755 & 758 n.5 (it was a question of statutory interpretation requiring no administrative exhaustion whether a NRS 604A limitation on the amount of a deferred deposit loan included "only the principal borrowed or the principal amount plus any interest or fees charged").

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[8] *See also* 3 App. 508 ("Those are the two questions. What [doe]s additional mean? And what does guarantor mean? Those are the questions. Is a guarantor a co-borrower, and what does additional mean? That's it. Those are the questions of statutory construction in my opinion."); 3 App. 517-18 ("I think clearly the meaning of additional interest is a question of law and basically boils down to what does additional mean? I think there's some ambiguity there because two reasonable interpretations of additional is additional meaning any interest beyond what you originally agreed to pay as part of your total payment of the loan, or does additional mean interest at a higher rate than what you bargained for? So those are the two potential constructions there. I think that's a question of statutory interpretation . . . .").

In *Check City*, like here, the FID informed the licensee of its statutory interpretation via Reports of Examination. *Id.*, 130 Nev. Adv. Op. 90, 337 P.3d at 756. The issue before the Court was whether a statute limiting "the amount of a deferred deposit loan to 25 percent of a borrower's expected gross monthly income . . . includes only the principal borrowed or the principal amount plus any interest or fees charged." *Id.*, 130 Nev. Adv. Op. 90, 337 P.3d at 755. Likewise, here, the question is whether (a) NAC 604A.230's prohibition on guarantors prohibits co-borrowers and (b) whether NRS 604A.210's prohibition on "additional interest" during a grace period prohibits *any* interest or rather allows charging the original rate of interest during a period of deferment on the principal.

In *Check City*, this Court correctly recognized that the issue before it was one of statutory interpretation even though it considered "[a]s an example" an actual "loan agreement" in the record "under which a customer borrowed $300 and agreed to pay $321 the following week." *Id.*[9] Just as this Court did not need to decide in *Check City* whether

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[9] The FID suggests that certain "facts are more readily discovered when actual contracts are reviewed" rather than TitleMax's blank GPDA.

$321 exceeded 25 percent of that particular borrower's expected gross monthly income, the district court here did not need to decide how much interest particular customers had actually paid or whether particular borrowers were in fact treated as guarantors. These questions were not before the court.

B. The "Factual Issues" Cited by the District Court and the FID Actually Were Legal Determinations

Despite spending over ten pages arguing that factual findings must be made through the administrative process, the FID failed to identify any disputed factual issues that had to be resolved before the district court could render an answer to the statutory and regulatory interpretation questions TitleMax posed. (*See* RAB at 11-22.)

1. Statutory and regulatory compliance is a legal determination – not a question of fact

a. NAC 604A.230

In considering whether NAC 604A.230 prohibited listing an individual as a co-borrower on a title loan when the individual was not named on the vehicle title, the district court incorrectly stated that

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(RAB at 13.) Even if true, this does not mean there are any factual questions an agency must decide. The FID could – and did – submit actual contracts to the district court; TitleMax did not object. Whether the court considered the blank GPDA or a signed GPDA "as an example," how the GPDA operated was not disputed; the only question was whether it complied with the statutes.

"there are questions of fact as to what the differences are between a co-borrower and a guarantor." (3 App. 523.) But these are legal terms defined as a matter of law. *See* Restatement (Third) of Suretyship & Guaranty § 15 (1996) (a guarantor "is a secondary obligor and the secondary obligation is, upon default of the principal obligor on the underlying obligation, to satisfy the obligee's claim with respect to the underlying obligation," while a cosigner "is jointly and severally liable with the principal obligor to perform the obligation set forth in that contract"); *see also* Black's Law Dictionary (10th ed. 2014) (defining "guarantor" as "[s]omeone who makes a guaranty or gives security for a debt . . . a guarantor's liability does not begin until the principal debtor is in default").

During the motion to dismiss hearing, the district court expressed concern that perhaps it needed to know "how are these loans being enforced against the co-borrowers to answer the question of whether or not they're really de facto guarantors." (3 App. 510.) This concern was misplaced.

First, this was not the question posed to the district court. TitleMax had sought only "a declaration that an individual may be a co-

borrower on a tile loan without violating NAC 604A.230 when said individual is not listed on title of the vehicle associated with said loan." (1 App. 16.) For purposes of this legal question, the district court could assume that an individual really was a co-borrower.

Second, the district court never explained what it meant by "de facto guarantors." The whole notion of a "guarantor" in the context of a NRS 604A title loan is academic, as a licensee's "sole remedy" for a default on a title loan "is to seek repossession and sale of the vehicle." NRS 604A.455(2). Absent fraudulent borrower conduct, which is not present here, the licensee cannot pursue borrowers (or guarantors) personally. NRS 604A.455.

Desperate to create a "factual" issue, the FID argues that "it was unknown whether the additional persons were legal owners of the vehicles and such facts could be provided through an administrative hearing." (RAB at 17; *see also, e.g.*, 2 App. 335 (arguing below that "there is a genuine issue of material fact with regard to whether the additional party to the loan is listed on the title").)

The FID's argument ignores the very premise of TitleMax's question – TitleMax sought "a declaration that an individual may be a

co-borrower on a tile loan without violating NAC 604A.230 ***when said individual is not listed on title of the vehicle***." (1 App. 16 (emphasis added); *see also, e.g.*, 2 App. 297 (openly agreeing with the FID that "TitleMax currently allows a co-borrower to be on a title loan ***when the co-borrower is not on the title***") (emphasis added).) There was no issue of fact – TitleMax openly admitted that co-borrowers did not have to be legal owners of the vehicles because, based on its interpretation of the regulation, they were not required to be. The FID's disagreement was precisely why TitleMax sought clarification.

Similarly, it does not matter "***why*** a non-owner of the vehicle is included as a party to the loan." (2 App. 325 (emphasis added) (FID arguing below that TitleMax never explained this and "these missing facts create issues of material fact"); *see also* 3 App. 397.) The only question was ***whether*** a non-owner being included on a loan somehow ran afoul of NAC 604A.230 – a purely legal question.[10]

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[10] *Haase-Hardie v. Wisconsin Dep't of Nat. Res.*, 855 N.W.2d 443, 450 (Wis. Ct. App. 2014) (whether practices "comply with the relevant statutes and regulations . . . are questions of law, not disputes of material fact"); *see also Wheeless v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan*, 39 F. Supp. 2d 577, 582 (E.D.N.C. 1998) (whether notice "complies with this regulation is a question of law subject to de novo review").

b. GPDA

Likewise, there were no disputed facts as to how the GPDA operated. The district court incorrectly stated that "there is a question of fact as to the implementation of these grace periods and whether the total interest charged during the grace period plus the interest charged during the term of the loan (with extensions) exceeds the amount of allowable interest under NRS 604A.445." (3 App. 523.)

But the amount of interest charged was not disputed; whether the interest charged exceeded the amount allowable under the statutes was a question of law. TitleMax agreed that if the customer paid according to the GPDA's payment schedule, TitleMax charged "simple interest" for 210 days while payments on the principal were deferred and then allowed an additional interest-free 210-day period in which to re-pay the principal. (*See* 1 App. 41-43; 2 App. 287.)[11] The only question was

[11] There was no dispute over the contract's actual terms. The FID argues that a customer might not have understood it was paying a greater total amount of interest (RAB at 12-13), but the question before the district court was not whether a customer was misled or confused by the contract's terms. The question was one of statutory interpretation: whether the original rate of simple interest could be charged during a 210-day grace period while deferring payment on the principal.

whether NRS 604A.210 and NRS 604A.445 allowed this, and thus, was a question of law.[12]

2. TitleMax's disagreement with the FID's legal interpretations does not create a question of fact

The FID has consistently mischaracterized TitleMax's disagreement with the FID's legal interpretations as questions of fact. (*See, e.g.*, RAB at 14-16, 3 App. 394; 3 App. 399 ("Because TitleMax is arguing that there is a grace period, there must be unknown facts which create issues of fact that must be determined through the pending administrative proceeding."); 3 App. 400 ("If TitleMax actually agreed with the facts as seen by the FID, TitleMax would have to agree with the FID that additional interest is being charged.").)

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[12] *McCracken v. Elko Cty. Sch. Dist.*, 103 Nev. 655, 658–59, 747 P.2d 1373, 1375 (1987) (lower court's finding that school board's actions complied with requirements of statute was "in error as a matter of law"); *see also, e.g.*, *Imhof v. City of Wilmington*, 2014 IL App (3d) 121058-U, ¶ 30 (Ill. App. Ct. 2014) (unpublished) ("To the extent that this appeal requires us to determine whether the contracts complied with applicable statutory provisions, that also presents a question of law we review *de novo*."); *McCarty v. Citicorp Acceptance Co.*, 752 S.W.2d 206, 207 (Tex. App. 1988) ("The sole question presented is whether the quoted language from the . . . contract complies with art. 5069–7.07(3) as a matter of law. We hold that it does."); *Lionel Corp. v. Grayson-Robinson Stores*, 104 A.2d 304, 308 (N.J. 1954) (whether "contracts failed to comply with the statute . . . is a question of law"); *Spencer Optical Mfg. Co. v. Johnson*, 31 S.E. 392, 393 (S.C. 1898) ("the question whether the contract in question complied with the statute is purely a question of law").

Disagreement with the FID's legal interpretation does not create issues of fact. Issues of statutory interpretation are legal determinations. *See Constr. Indus. Workers' Comp. Grp. ex rel. Mojave Elec. v. Chalue*, 119 Nev. 348, 351, 74 P.3d 595, 597 (2003) ("Statutory interpretation is a question of law reviewed de novo.").

The FID tries to turn legal disputes into issues of fact. For example, the FID argues, "because TitleMax charges more interest through the GPPDA than through the original 210-day loan, the extended repayment schedule offered through the GPPDA is not free of cost, and therefore is not gratuitous. These are factual determinations, not questions of law." (RAB at 15-16 (footnote omitted).

The FID is wrong. The alleged factual issue – that the *total* amount of interest collected in the schedule of payments under the GPDA is more than the *total* amount of interest due under the original loan payment schedule – is not in dispute. Rather, TitleMax disputes the FID's ***legal*** interpretation that NRS 604A.210 forbids this.[13]

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[13] While this appeal is not the proper place to argue the merits of the underlying dispute, the word "additional" in NRS 604A.210 is rendered superfluous if the statute is interpreted through the FID's lens. However, this is not a practical application. If the legislature had intended to prohibit an increase in the total amount of interest, then

TitleMax does not deny that simple interest accrues during the period of deferment on principal payments under the GPDA; it disputes the FID's legal interpretation that the "gratuitously offers" language in NRS 604A.070 forbids this. *See* NRS 604A.070 ("'Grace period' means any period of deferment offered gratuitously by a licensee to a customer if the licensee complies with the provisions of NRS 604A.210."). In this context, "gratuitously" modifies "offers" and means voluntarily, as opposed to being required to. *Contrast* Black's Law Dictionary (10th ed. 2014) (defining "gratuitous" as "[d]one or performed without obligation to do so"), *with* NRS 604A.475 (*requiring* licensees to offer repayment plans before repossessing a vehicle).[14]

How a word in a statute is interpreted is a legal determination. *See J.D. Constr. v. IBEX Int'l Grp.*, 126 Nev. 366, 375, 240 P.3d 1033, 1039 (2010) ("[A] dispute over the interpretation of a . . . statute is one

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there was no reason to specifically add the word "additional" – it should have barred *any* interest *during a grace period*. *See S. Nevada Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (courts must interpret statutes "in a way that would not render words or phrases superfluous or make a provision nugatory") (internal quotation marks and citation omitted).

[14] Curiously, the FID cites to Black's Law Dictionary in other places in its brief (RAB at 15 n.32 & 16 n.35), but switches to Webster's to argue that "gratuitous" means "free." (RAB at 16 n.33.)

of statutory construction," which "is a question of law"); *Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007) (statutory construction is "a purely legal inquiry"); *Nyberg v. Nevada Indus. Comm'n*, 100 Nev. 322, 324, 683 P.2d 3, 4 (1984) ("the proper construction of the . . . period prescribed by NRS 616.5422(1) is a legal, rather than a factual, question"); *see also, e.g.*, *Dykema v. Del Webb Communities, Inc.*, 132 Nev. Adv. Op. 82, 385 P.3d 977 (2016) (determining as a matter of law "when a notice of completion has been 'issued' for purposes of determining [statutory] commencement date"); *McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 649, 730 P.2d 438, 442 (1986) (determining as a question of law the "meaning of 'consider' as used in NRS 241.030(1)").

The proper construction of "guarantor" in NAC 604A.230 and the meaning of "additional interest" in NRS 604A.210 are purely legal questions. The FID's attempts to fabricate factual issues lack merit.

3. The FID relies on inapposite case law to suggest exhaustion is required

The FID relies on *Baldonado* for the proposition that because TitleMax asked "the court to interpret statutory language, apply its interpretation to the existing business practice and grant injunctive

relief," TitleMax is not entitled to declaratory relief. (RAB at 14 n.29 (citing *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 965, 194 P.3d 96, 105 (2008)).)

The situation foreclosing declaratory relief in *Baldonado* notably is not present here. There, casino employees brought suit alleging that their employer's tip sharing policy "violated Nevada labor laws." 124 Nev. at 954, 194 P.3d at 98. This Court ruled that the employees had no private cause of action to enforce the labor statutes via a district court action because "the labor statutes . . . ***require*** the Labor Commissioner to hear and decide complaints seeking enforcement of the labor laws." *Id.*, 124 Nev. at 963, 194 P.3d at 104 (emphasis added). Because the employees had to bring their claims before the Labor Commissioner instead of the district court, the employees could not do an end-run around the statutes and seek "injunctive relief and damages" in court through a declaratory judgment claim "when an administrative remedy is provided for by statute." *Id.*, 124 Nev. at 964-65, 194 P.3d at 105.

Unlike *Baldonado*, there is no "administrative remedy . . . provided for by statute." (*See supra*, Part I.)

Unlike *Baldonado*, TitleMax is not suing a third party and trying to enforce provisions of NRS 604A against such a party; rather TitleMax has brought suit for declaratory relief and named the relevant agency as a party.

Unlike *Baldonado*, TitleMax has not sued for money damages. TitleMax's request for injunctive relief was a natural corollary of its request for a declaratory judgment: if NRS 604A.210 and NRS 604A.445 do not prohibit the charging of simple interest during a period of deferred payments on the principal, and if NAC 604A.230 does not prohibit co-borrowers who are not the vehicle owners, then TitleMax requested that the FID be enjoined from seeking to discipline TitleMax for engaging in business practices within the statutory and regulatory scope. That TitleMax asked for injunctive relief was not a basis to dismiss its complaint for declaratory relief. *See* NRS 30.100 (allowing "[f]urther relief based on a declaratory judgment . . . whenever necessary or proper"); *S. Nevada Homebuilders Ass'n, Inc. v. City of N. Las Vegas*, 112 Nev. 297, 299, 913 P.2d 1276, 1278 (1996) (where ordinance was ruled invalid in declaratory relief action, district court "appropriately prohibited the City from enforcing the Ordinance"

pursuant to supplemental request for injunctive relief), *disapproved on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001).

III.

THIS COURT HAS ALREADY REJECTED THE FID'S MOOTNESS ARGUMENTS

Reminiscent of its failed motion to dismiss this appeal, the FID argues that TitleMax has already been afforded relief, received an administrative hearing, and that facts "found by the ALJ . . . are to be given deference." (RAB 18.)

But, this Court has already determined that "respondent fails to demonstrate that this appeal is moot." (Dec. 14, 2016 Order (denying the FID's motion to dismiss or stay the appeal).)

The FID ignores that TitleMax filed its suit for declaratory relief first – and then, **on the same day the FID moved to dismiss TitleMax's declaratory relief suit**, the FID filed its administrative complaint and notice of hearing. (1 App. 50-51; 1 App. 96-109.)

The FID decries "piecemeal litigation" as being "not judicially economical and . . . disfavored" (RAB at 19), but the FID unnecessarily multiplied these proceedings and refused to allow the district court to

render a decision on statutory interpretation. The only reason this appeal is proceeding simultaneously with an appeal of the hearing officer's decision is because the FID improperly blocked TitleMax's ability to receive a declaratory ruling at the outset, which would have obviated the need for any administrative proceedings. *See* 10B Wright, Miller, et al., "Purpose of Declaratory Judgments," *Federal Practice & Procedure* § 2751 (4th ed. updated Sept. 2016) (the declaratory judgment act "permits actual controversies to be settled before they ripen into violations of law . . . and ***it helps avoid a multiplicity of actions*** by affording an adequate, expedient, and inexpensive means for declaring in one action the rights and obligations of litigants") (emphasis added).

The FID repeatedly cites to the hearing officer's order, which is not part of the record and cannot be considered, as it was issued *after* this appeal was filed and thus was not considered by the district court. (*See* RAB at 5 & n.7; 16-18 & n.37, n.40; 22-23 & n.56, n.58, n.59); *Carson Ready Mix, Inc. v. First Nat. Bank of Nevada*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) ("We cannot consider matters not properly appearing in the record on appeal. . . . We have no power to look outside

of the record of a case.") (internal quotation marks and citation omitted); *see also, e.g.*, *Marvin v. Fitch*, 126 Nev. 168, 171, 232 P.3d 425, 427 n.3 (2010) (refusing to "consider the supplemental material from either party because" it was not "presented to or considered by the district court").

What happened *after* the district court's decision in this case is irrelevant because the whole point of this appeal is to establish that at the time the district court dismissed this case, it should not have.

This Court has already ruled this case is not moot. If the FID and other agencies could initiate administrative proceedings *after* a declaratory relief suit has been filed and thereby render the judicial proceedings moot, the FID would always be able to deprive a party of its right to declaratory relief. This is certainly an issue "capable of repetition, yet evading review" and something the FID should not be allowed to do. *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 172, 87 P.3d 1054, 1057 (2004) (issues capable of repetition, yet evading review are not moot).[15]

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[15] It is ironic that the FID argues this case is now moot when, in the same breath, it argues "the matter was not ripe for review." (RAB at

IV.

TITLEMAX WAS NOT REQUIRED TO RISK FURTHER ADMINISTRATIVE SANCTIONS TO OBTAIN A JUDICIAL INTERPRETATION

The FID suggests that there was something amiss about TitleMax filing for declaratory relief instead of waiting for the FID to commence administrative proceedings against it. (RAB at 7.)

But the dilemma of being forced to comply voluntarily with an agency's (erroneous) interpretation or face further administrative sanctions is precisely what the declaratory judgment procedure was meant to avoid. *See, e.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967) (finding that agency "interpretation of a statutory provision . . . puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate" – "Either they must comply with the [agency interpretation] and incur the costs of changing [their business practices] or they must follow their present course and risk prosecution") (internal quotation marks and citation omitted),

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27.) The FID admits that "TitleMax was headed toward an administrative hearing provided it did not change its business practices" at the time TitleMax brought suit. (RAB at 3.) This case was undoubtedly ripe, as TitleMax sought the determination of "purely legal questions," the disagreement between the FID and TitleMax was "quite concrete," and the hardship to TitleMax – either complying with the FID's misguided interpretation or risking administrative sanctions – was evident. *See Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 867–69 (8th Cir. 2013) (discussing ripeness doctrine).

abrogated on other grounds by Califano v. Sanders, 430 U.S. 99, 105 (1977); *Check City*, 130 Nev. Adv. Op. 90, 337 P.3d at 758 n.5 (pointing out that "the possibility of a license suspension—a consequence Check City might have faced if it failed to comply with the FID's interpretation of NRS 604A.425—may constitute irreparable harm" and that administrative exhaustion was not required before Check City could file for declaratory relief).

"Possibly in no branch of litigation is the declaration more useful than in the relations between the citizen and the administration." Edwin Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 Yale L.J. 445, 445 (1943) (cited in *Abbott Labs.*, 387 U.S. at 153 n.18). This is because agencies are imbued with "ever widening powers," and a "citizen seeking a declaration of the illegality of an administrative act often finds himself enmeshed in . . . a mystic maze, whereas he wished merely to ascertain whether the regulation or order . . . to which he had been subjected, was valid or not, or, if valid, what it meant." *Id.* at 445-46. "[I]n a constitutional government only legal demands need to be obeyed," and those subject to regulatory statutes and regulations "should be enabled to challenge their constitutionality, applicability

and construction by the simple method of declaratory adjudication." *Id.* at 446, 493 (emphasis added).

That TitleMax cannot initiate the procedure the FID proposes it should have exhausted (*see supra* Part I.B) further proves that TitleMax's only adequate remedy was to petition for a declaratory judgment rather than wait on the FID to proceed with an administrative hearing that only the FID had the power to notice. *See* 10B Wright, Miller, et al., "Purpose of Declaratory Judgments," *Federal Practice & Procedure* § 2751 (4th ed. updated Sept. 2016) ("[T]he declaratory-judgment remedy . . . gives a means by which rights and obligations may be adjudicated . . . in cases in which a party who could sue for coercive relief has not yet done so."); *Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383, 398 n.8 (5th Cir. 2003) ("[T]he purpose of declaratory judgment actions . . . is to resolve outstanding controversies without forcing a putative defendant to wait to see if it will be subjected to suit."); *cf. Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012) (pointing out that while "judicial review ordinarily comes by way of a civil action brought by the [agency] . . . the Sacketts ***cannot initiate that process***,

and each day they wait for the agency to drop the hammer, they accrue . . . additional . . . potential liability") (emphasis added).

As one court vividly put it, the "Declaratory Judgment Act was designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure— or never." *Japan Gas Lighter Ass'n v. Ronson Corp.*, 257 F. Supp. 219, 237 (D.N.J. 1966); *cf. Sackett*, 566 U.S. at 132 (Alito, J., concurring) (rejecting agency's argument that "[u]ntil the EPA sues them, [aggrieved individuals] are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue [while potential fines continue to accrue] . . . . In a nation that values due process, . . . such treatment is unthinkable."). TitleMax did not have to either comply voluntarily with the FID's interpretation or wait and see if the FID would bring administrative proceedings against it – it could bring suit for declaratory relief. In fact, this was the statutorily prescribed remedy. *See* NRS 30.040.

CONCLUSION

The district court decision dismissing TitleMax's complaint for declaratory relief should be reversed.

DATED this 20th day of March, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
DALE KOTCHKA-ALANES (SBN 13,168)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

PATRICK J. REILLY (SBN 6103)
ERICA C. SMIT (SBN 13,959)
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
(702) 669-4600

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 6,983 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 20th day of March, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Dale Kotchka-Alanes*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
DALE KOTCHKA-ALANES (SBN 13,168)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

PATRICK J. REILLY (SBN 6103)
ERICA C. SMIT (SBN 13,959)
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134
(702) 669-4600

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2017, I submitted the foregoing "Appellant's Reply Brief" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Adam Paul Laxalt
Attorney General
David J. Pope
Sr. Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP