IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

DOLLAR LOAN CENTER, LLC, a domestic liability company,

Respondent.

Supreme Court Case No.: 70002

District Court Case No.: A-15-720959-C

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

APPELLANT'S OPENING BRIEF

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RETENTION IN THE SUPREME COURT

This case should be retained by the Supreme Court because it presents a question of statewide public importance: whether subsection (2)(f) of NRS 604A.480 means what it says when it denies payday lenders the right to sue consumers who default on a refinancing loan. NRAP 17. The Legislature enacted NRS Chapter 604A to protect consumers from predatory lenders and the long-term "debt treadmill." Consistent with that policy objective, NRS 604A.480 severely limits the conditions under which a lender may provide a new high-interest, long-term loan to refinance a borrower who has defaulted on a payday loan. One of those limitations deliberately chosen by the Legislature was to disallow a lender the ability to sue if a borrower defaults on the new loan issued under the provisions of subsection (2)(f) of NRS 604A.480.

II. INTRODUCTION

The policy behind NRS Chapter 604A is to prohibit short-term lenders from making predatory loans that force consumers into a long-term cycle of debt, commonly referred to in the Legislative history of Chapter 604A as the "debt treadmill." Generally speaking, customers who enter into agreements for high-interest loans live paycheck to paycheck, and one added expense can send them to a short-term, high-interest lender. Often this type of borrower is unable to repay the original loan within the typical 35-day duration of the loan.

Indeed, as the legislative history makes clear, before Chapter 604A was enacted, predatory payday lenders literally banked on the hoped-for default. Once a borrower was unable to repay their short-term loan, lenders would convince the borrower to "refinance" the principle and interest from the short-term loan using a much longer term high-interest loan. Not surprisingly, trapped on this "debt treadmill," debtors usually ended up defaulting again at some point. This time, the predatory lender would sue on the default and would inevitably win a judgment for all of the remaining principle and interest (often trebled), plus late fees, overdraft fees, and collection costs. The lender then would get a garnishment order, ensuring that the lender was paid out of the borrower's wages. When all was said and done, a predatory lender could get as much as ten times the original value of the loan, with an actual return on investment of over 1,000 percent. As described

in the legislative history of Chapter 604A, this was called "back-end" lending, because predatory lenders issued short-term payday loans expecting to make their real money on the "back-end" after default.

Chapter 604A put a stop to that practice. As originally drafted, the provision that is now NRS 604A.480 only included Subsection 1, which strictly prohibits extending a payday loan beyond a short, 60-day extension. But a few payday lenders asked for an exception to that strict ban on converting short-term payday loans to a long-term, high-interest loan. Those lenders explained that, unlike the predatory lenders targeted by Chapter 604A, they never sued if a debtor defaulted. So the Legislature amended NRS 604A.480 to add Subsection 2, which allows a defaulted short-term payday loan to be refinanced as a long-term loan, but only if the lender agrees not to sue on the original or refinanced loan.

This all is very clear from the legislative history of NRS 604A, and from the legislative history of Respondent Dollar Loan Center, LLC's ("Dollar Loan") repeated unsuccessful attempts to have the Legislature remove NRS 604A.480(2)(f)'s lawsuit prohibition. It is just as clear from the plain text of NRS 604A.480 itself, as Dollar Loan itself has repeatedly acknowledged when it sought to have the ban removed by the Legislature. And this plain reading of NRS 604A.480 is clearly supported by the policy objectives behind the original enactment of NRS 604A. The rationale is obvious: the litigation ban on long-term

refinancing of payday loans directly furthers the Legislature's desire to kill predatory "back-end" lending practices that exacerbated the debt treadmill.

But the lower court in this case held otherwise. In a broadly-worded order drafted for the court by Dollar Loan, the court expressly held that NRS 604A.480 "contains no prohibition against a licensee from initiating civil suits or alternate dispute resolution proceedings against a debtor that is in default." Respectfully, that ruling cannot be reconciled with the plain text of NRS 604A.480, with its legislative history and purpose, or with the authoritative interpretation given to the provision by the state agency authorized to administer it. Indeed, it doesn't even jibe with the interpretation repeatedly given to the statute by Dollar Loan itself in the past, and even arguably in the complaint in this case. Accordingly, and as explained further below, the State respectfully requests that the district court's order granting declaratory relief be reversed.

III. JURISDICTIONAL STATEMENT

This Appeal arises from a final order of the Eighth Judicial District Court entered on February 25, 2016. Aplt. App. DLC00461-DLC00467 (the "Order"). The Order is appealable under NRAP 3A(b)(1). Petitioner timely filed its notice of appeal on March 16, 2016.

IV. ISSUE PRESENTED

Did the district court err in ruling that "NRS 604A.480 ... contains no

prohibition against a [lender] for initiating civil suits or alternative dispute resolution proceedings against a debtor that is in default"?

V. STATEMENT OF THE FACTS AND CASE

A. Nevada's regulation of the "payday loan" industry.

In 2005, the Legislature passed Assembly Bill (A.B.) 384, subsequently codified as NRS Chapter 604A,[1] to address predatory lending practices by so-called "payday lenders" in Nevada. At issue in this case are two types of loans regulated under NRS Chapter 604A: deferred deposit loans and high-interest loans. A deferred deposit loan is a transaction in which the customer provides a check or authorization for the electronic transfer of funds on a future date in exchange for the customer's immediate receipt of a lesser sum of money.[2] A high-interest loan is a loan that has single or multiple installments and charges an annual interest rate of more than 40 percent.[3] The original loan term of a deferred deposit loan or high-interest loan is generally limited to 35 days.[4]

Most consumers of high-interest loans live paycheck to paycheck, and one unexpected expense can send them to a payday lender. These customers do not

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[1] A.B. 384, 73rd Leg. (Nev., July 1, 2005).

[2] NRS 604A.050.

[3] NRS 604A.0703.

[4] NRS 604A.408(1).

look at the interest rate, nor do they shop around for the best deal.[5] The lending abuses by these short-term, high-interest lenders often lock unwary consumers into a cycle of debt, referred to as the "debt treadmill."

> The debt treadmill begins when a customer takes out their first payday loan. A loan interest rate can range from 150 to 1,100 percent annually. It is not uncommon among those who seek assistance from credit-counseling agencies and legal-aid agencies to take out a second loan to pay the first and a third one to pay the second . . . .[6]

Through this cycle of refinancing an outstanding short-term payday loan with the proceeds of a new long-term loan, a consumer can end up owing many times the original amount of the loan in interest, fees, and other charges.

But things often do not end there. Eventually, many consumers falter on the debt treadmill, defaulting on their loan. Before Chapter 604A was enacted, if the lender commenced a civil action or alternative dispute resolution process on the refinanced loan, then such borrowers became saddled with adverse judgments for debts far in excess of the amounts originally borrowed—potentially up to ten times the amount of their original loans.[7] In the absence of meaningful constraints on their collection practices, persistent and resourceful lenders then may obtain

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[5] Aplt. App. DLC00265-267 (Hearing on A.B. 384 Before the Assembly Commerce Comm., 73rd Leg. (Nev., May 6, 2005)).

[6] *Id.*

[7] *Id.*

judgments leaving the consumers subjected to garnishment of wages pushing the consumers more deeply into a downward spiral of debt.

Statistics from 2004 shed light on the magnitude of the debt treadmill, giving Nevada lawmakers reason for concern. In 2004, small claims cases involving high-interest or payday loans comprised 55 percent of cases in Las Vegas, and 75 percent in North Las Vegas.[8] Given the overwhelming backlog of bad debt collection cases, some justice court hearings amounted to no more than a rubber stamp of judgments by default.[9] Often unsophisticated debtors in default would not even show up to court, exacerbating and encouraging predatory lending practices. These circumstances were the impetus for A.B. 385, introduced in 2005.

As originally introduced, A.B. 385 contained a restriction designed to completely halt the debt treadmill by strictly limiting "back-end" refinancing in the case of a consumer with an outstanding, short-term payday loan. In such a case, a payday lender was limited to one, and only one, refinancing arrangement to discharge the balance of an original short-term loan with the proceeds of a new loan.[10] Generally, the term of an original payday loan is limited to 35 days.[11] As

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[8] *Id.*

[9] *Id.*

[10] Aplt. App. DLC00351-DLC00352 (Proposed Amendment to A.B. 385, May 6, 2005).

initially proposed, the duration of a refinancing arrangement was limited to a single 60-day extension beyond the term of the original loan. This prohibition was subsequently codified as subsection 1 of NRS 604A.480 ("Subsection 1").

A few payday lenders balked at this singular limitation. These were lenders who, under their particular business model, entered into longer-term refinancing arrangements but would also contractually agree to forego any civil action against their customers in the event of a default.[12] These "good actors" asserted that they would be driven out of business absent an exception to the single 60-day refinancing extension rule. In order to accommodate the specific business model of this subset of payday lenders, a narrow exception was added to the bill. This exception was subsequently codified as subsection 2 of NRS 604A.480 ("Subsection 2").

Subsection 2 allows for an unlimited repayment period—far beyond that of any other permissible new loan—and at an interest rate of up to 199 percent. In order to take advantage of the exception, however, a lender must abide by nine enumerated requirements, including: performing a credit check, not charging interest after the maturity date of the loan, reporting the payment history to a major consumer reporting agency, allowing the customer to rescind the loan within five

[11] NRS 604A.408.

[12] Aplt. App. DLC00266- DLC00352 (Hearing on A.B. 384 Before the Assembly Commerce Comm., 73rd Leg. (Nev., May 6, 2005)).

days without fee, and requiring the customer to participate in credit counseling. Subject to these restrictions, the lender is permitted to issue a loan under Subsection 2, provided the lender "***does not commence any civil action or process of alternative dispute resolution on a defaulted loan or any extension or repayment plan thereof.***"[13] In short, lenders understood that if they refinanced loans under Subsection 2, they were foregoing civil action in favor of charging interest up to 199 percent for a longer time period.[14] This prohibition was subsequently codified as paragraph (f) of Subsection 2.

With these amendments, A.B. 384 was enacted and subsequently codified in NRS Chapter 604A. In 2007, the Legislature adopted further limitations in Subsection 1, prohibiting a lender from adding to the principal amount of the new loan any unpaid interest or other charges that accrued during the original term of the loan or any extension of the outstanding loan.[15]

B. The agency's interpretation of Subsection 2.

On December 10, 2009, the FID issued an advisory opinion regarding mandatory disclosures for loans made pursuant to NRS 604A.480 (the "2009 FID

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[13] Aplt. App. DLC00351-DLC00352 (Proposed Amendment to A.B. 385, May 6, 2005)).

[14] *See* Aplt. App. DLC00413-DLC00416 (Hearing on S.B. 123 Before the Senate Commerce Comm., 78th Leg. (Nev., Feb 13, 2015)).

[15] A.B. 478, 74th Leg. (Nev., 2007).

Advisory Opinion"). [16] In it, the FID concluded that the civil remedies bar in paragraph (f) against civil suits or alternative dispute resolution is applicable to all loans made under Subsection 2. On October 30, 2012, the Attorney General issued an official opinion on this same subject, Op. Nev. Att'y Gen. No. 2012-06 (Oct. 30, 2012) (the "AGO 2012-06").[17] The Attorney General reasoned as follows:

> [NRS 604A.480] provides that a licensee who utilizes the exception in ... [Sub]section 2 may not commence a civil action or process of alternative dispute resolution "on a defaulted loan or any extension or repayment plan thereof." NRS 604A.480(2)(f). The statute does not confine the prohibition to the outstanding loan; it applies to "a defaulted loan or any extension or repayment plan thereof." The bar reasonably applies to either an outstanding loan or a new loan used to pay the balance on an outstanding loan.[18]

C. Dollar Loan's unsuccessful attempts to change Subsection 2.

In 2011, the Legislature considered a proposal by certain payday lenders—including Dollar Loan—that would have modified paragraph (f) of Subsection 2.[19] Through its testifying representative, Dollar Loan conceded that it was "barred by [Subsection 2] from accessing the courts for civil remedy which may be required in

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[16] Aplt. App. DLC 00163-DLC00169 (Advisory Opinion, Dec. 10, 2009)).

[17] Aplt. App. DLC00157-DLC00161 (AGO 2012-06).

[18] *Id.* DLC00160 (AGO 2012-06).

[19] Aplt. App. DLC00392-DLC00393 (Hearing on A.B. 514 Before the Assembly Commerce Comm., 76th Leg. (Nev., April 6, 2011)).

an instance of breach of contract or default on a loan."[20] On this basis, Dollar Loan sought to amend Subsection 2 to make the civil remedies bar applicable only to "an outstanding loan [that] is ... in default at the time of the new loan agreement."[21] In other words, Dollar Loan sought to remove any forward-looking requirement from the civil remedies bar and turn it into merely a condition precedent.

Opponents of Dollar Loan's proposal, however, pointed out that such a change would undo the existing balance between Subsections 1 and 2.[22] A spokesperson for the Legal Aid Center of Southern Nevada explained as follows:

> [T]he Legislature saw fit to state that lenders cannot establish or extend a period beyond 60 days after the original date of the loan. An exception was put in subsection 2, which is the subject of the bill. I was involved in the negotiations on this. The installment loan lenders ... said they could not live with NRS 604A.480, but they had a different business model. Their model consisted of the nine criteria that are in subsection 2 of NRS 604.480, the last of which is the subject of this bill. It is important to keep in mind that this exception allows for a loan period of 150 days, which is totally different from the two-week payday loan model. The Legislature, in determining to allow a loan period as an exception of 150 days, included the criteria that such a lender would not sue to collect on that loan if it went into default. While that situation may seem unfair, one needs to look at the big picture and see that the Legislature determined that it would not allow a lender to collect interest for 150 days and to sue the

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[20] *Id.* (Mr. Ferrari, representing Dollar Loan Center).

[21] *Id.*

[22] *Id.* DLC00395-DLC00396 (testimony of Mr. Wulz, Executive Director of the Legal Aid Center of Southern Nevada).

borrower if there was a default.[23]

Not surprisingly, given the testimony, the Legislature declined to make such a change, thereby preserving the existing balance.[24] The bill died in committee.

After the 2011 legislative session ended in June 2011, an opinion was issued by the Legislative Counsel Bureau ("LCB") dated July 26, 2011 (the 2011 LCB Opinion"),[25] which Dollar Loan subsequently obtained. In the opinion, the LCB summarily concluded that Subsection 2 imposes no bar on a lender's civil remedies. Instead, LCB opined that the requirements in Subsection 2, including paragraph (f), are "not affirmative prohibitions," characterizing them as mere conditions precedent. Curiously, LCB's characterization of the statute mirrored the proposed amendment that Dollar Loan had just unsuccessfully requested—an amendment that its representative had testified was necessary in order for it to "access civil remedies."[26]

In 2015, Dollar Loan again undertook to effect legislative changes to Subsection 2—this time to remove completely the civil remedies bar in paragraph

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[23] *Id.*

[24] *Id.*

[25] Aplt. App. DLC00007-DLC00009.

[26] Aplt. App. DLC00392-DLC00393 (Hearing on A.B. 514 Before the Assembly Commerce Comm. 76th Leg. (Nev., April 6, 2011)).

(f) of Subsection 2. Again, Dollar Loan's representative conceded that paragraph (f) bars any lender who operates by the guidelines of NRS 604A.480 from "accessing the courts for civil remedy which may be required in an instance of breach of contract or default on a loan."[27] This concession was consistent with the conclusion of AGO 2012-06.

And again, in 2015, the Legislature was advised of the negative consequences that could result from undoing the existing balance between Subsections 1 and 2. The spokesperson for the Legal Aid Center of Southern Nevada explained that the proposed bill would "encourage high-interest, long-term loans by providing litigation as a weapon, thereby opening a "loophole that will be exploited on the backs of the working poor."[28] Indeed, in discussing paragraph (f), Legislators recognized that the proposed removal of the civil remedies bar would weaken the law and open the door to the type of litigation and abuses that took place prior to the enactment of NRS Chapter 604A in 2005. This bill also died in committee.

In summary, the Legislature twice rejected Dollar Loan's efforts to eliminate

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[27] *Id.*

[28] Aplt. App. DLC00421-DLC00422 (Hearing on S.B. 123 Before the Senate Commerce Comm., Leg., 78th (Feb 13, 2015); *see also id.* at 410-411 (stating the deletion of "paragraph (f) of [S]ubsection 2" was necessary to allow Dollar Loan to access a "civil remedy"); *id.* at DLC 00413] ("Dollar Loan Center lends under [NRS 604A.480], and civil remedy is not allowed.").

the restrictions of paragraph (f), creating a clear record of its intent to preserve the balance between Subsections 1 and 2. There is no doubt that the Legislature intended that a lender under Subsection 2 not commence a civil action on the default of a loan granted under that provision. Had Dollar Loan succeeded in its efforts to upset this balance, the resulting legislation would have once again opened the door to unreasonable "back-end" refinancing, and the corresponding debt treadmill, that existed prior to the enactment of Chapter 604A in 2005.[29]

Today the statute reads as follows:

> 1. ***Except as otherwise provided in subsection 2***, if a customer agrees in writing to establish or extend the period for the repayment, renewal, refinancing or consolidation of an outstanding loan by using the proceeds of a new deferred deposit loan or high-interest loan to pay the balance of the outstanding loan, ***the licensee shall not establish or extend the period beyond 60 days after the expiration of the initial loan period***. The licensee shall not add any unpaid interest or other charges accrued during the original term of the outstanding loan or any extension of the outstanding loan to the principal amount of the new deferred deposit loan or high-interest loan.
>
> 2. ***This section does not apply*** to a new deferred deposit loan or high-interest loan if the licensee:
>
> (a) Makes the new deferred deposit loan or high-interest loan to a customer pursuant to a loan agreement which, under its original terms:
>
> (1) Charges an annual percentage rate of less than 200 percent;
>
> (2) Requires the customer to make a payment on the loan at least once every 30 days;
>
> (3) Requires the loan to be paid in full in not less than 150 days; and
>
> (4) Provides that interest does not accrue on the loan at the annual percentage rate set forth in the loan agreement after the date of

[29] *Id.*

maturity of the loan;

(b) Performs a credit check of the customer [...];

(c) Reports information relating to the loan [...];

(d) Gives the customer the right to rescind [...];

(e) Participates in good faith with a counseling agency [...]; and

(f) ***Does not commence any civil action*** or process of alternative dispute resolution ***on a defaulted loan or any extension or repayment plan thereof.***

NRS 360A.480 (2016) (emphases added).

Again, under Subsection 1, a lender is limited to a single 60-day refinancing period. And in order to take advantage of the exception in Subsection 2, a lender must abide by the nine enumerated restrictions, including the civil remedies bar in paragraph (f).

D. The district court's order.

After twice failing to have the Legislature modify paragraph (f), Dollar Loan, on July 6, 2015, filed a complaint for declaratory relief.[30] In its complaint, Dollar Loan acknowledged that the legislative intent underlying Subsections 1 and 2 of NRS 604A.480 is to "prevent borrowers from falling onto the perilous "debt treadmill."[31] Dollar Loan also conceded that:

> NRS 604A.480 ***bars*** a licensee from ***commencing a civil action*** or process of alternative dispute

[30] On September 16, 2015, the district court converted the matter to an NRS 29.010 proceeding. Aplt. App. DLC00057-DLC00059.

[31] Aplt. App. DLC00003-DLC00004 (Complaint at ¶ 9).

> resolution ***upon the default of a loan*** that has been renewed, refinanced, or consolidated ***under NRS 604A.480(2)***, and in which its proceeds are used to repay a prior loan underwritten by the licensee.[32]

In short, in its complaint, Dollar Loan acknowledged that the underlying intent for Subsection 2 was to prevent borrowers from becoming trapped on a debt treadmill. And to that end, Dollar Loan appears to have conceded that the civil remedies bar was deliberately designed to ***prohibit*** a legal remedy if the lender elects to use the refinance option in Subsection 2.

In its district court briefing, however, Dollar Loan struck a different tone. Relying on the 2011 LCB Opinion,[33] Dollar Loan asserted that the "conditions set forth in Subsection 2" do not constitute "prohibitions of any kind."[34] It went on to mischaracterize FID's position that a lender "may never take any action on ***any*** defaulted loan."[35] In point of fact, under FID's position, a lender is not barred under all circumstances from commencing a civil action on a defaulted loan.[36]

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[32] *Id.* (emphases added).

[33] Aplt. App. DLC00197-DLC00199.

[34] Aplt. App. *Id.*, DLC00196.

[35] Aplt. App. DLC00197-DLC00198 (emphasis added).

[36] As FID explained in pleadings before the lower court, this matter concerns a single type of loan under Chapter 604A—one made under the provisions of Subsection 2. Other loans types that are not made under Subsection 2 are not

Instead, under FID's position, in order to take advantage of Subsection 2, a lender must abide by the nine enumerated restrictions, including the paragraph (f) forward-looking civil remedies bar.

Perhaps confused by Dollar Loan's mischaracterization of FID's position, the district court broadly ruled that NRS 604A.480 "contains no prohibition against" a lender "initiating civil suits or alternate dispute resolution proceedings against a debtor that is in default."[37] According to the district court, the statute merely provides that a lender cannot be exempt from Subsection 1 if it has "already commenced any civil action or process of alternative dispute resolution against a debtor."[38] Broadly construed, the court's order implies that the civil remedies bar in paragraph (f) does not apply to ***any*** Subsection 2 loan.

VI. SUMMARY OF THE ARGUMENT

This matter concerns the enforcement of a loan made pursuant to Subsection 2. In 2005, the Legislature enacted NRS Chapter 604A for the purpose of protecting consumers from predatory loans. The public policy behind the enactment was to protect consumers from the perpetual cycle of debt—the "debt treadmill"—commonly associated with refinancing high-interest, short-term loans

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subject to the civil remedies bar of paragraph (f). Aplt. App. DLC00534-DLC00535.

[37] Aplt. App. DLC00455-DLC00456 (District Court Order).

[38] *Id.*

into high-interest, ***long-term*** loans. Consistent with that policy choice, the plain language of paragraph (f) forbids recourse to civil remedies to enforce payment of a high-interest, long-term Subsection 2 loan. The legislative history of Chapter 604A—and of Dollar Loan's repeated attempts to remove paragraph (f)—further demonstrates that, consistent with its clear text, paragraph (f) was in fact intended to be a litigation bar. Indeed, everyone—including Dollar Loan—publicly agreed that that was its meaning. But now the district court's order below has effectively rewritten the statute—after the Legislature expressly declined to do so. The State respectfully asks this Court to return NRS 604.480 to its original meaning, consistent with its clear text, legislative intent, and the policy behind its enactment.

VII. STANDARD OF REVIEW

This appeal involves a question of statutory interpretation. When the language of the statute is clear and unambiguous, the Court must give effect to the apparent intent of the statute, and the Court is not allowed to construct any other meaning.[39] While this Court will "review issues pertaining to statutory construction *de novo*, an administrative agency charged with the duty of administering an act is impliedly clothed with the power to construe the relevant laws … and the construction placed on a statute by the agency charged with the

[39] *Charlie Brown Constr. Co. v. Boulder City,* 106 Nev. 497, 503, 797 P.2d 946, 949 (1990).

duty of administering it is entitled to deference."[40] The Legislature has authorized the FID to carry out all of the provisions of Chapter 604A,[41] and has charged the Commissioner with administering all laws relating to the FID.[42] This Court will "defer to an agency's interpretation of its governing statutes ... if the interpretation is within the language of the statute."[43] In this regard, an "administrative statutory construction will not be readily disturbed" by this Court.[44]

If a statute is ambiguous, then the plain meaning rule is inapplicable, and the Legislature's intent "becomes the controlling factor in statutory construction."[45] This Court considers the Legislature's intent by reviewing the statute's terms, context, and public policy purpose.[46] The reading of a statute

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[40] *Dept. of Business and Indus. v. Granite Const. Co.*, 118 Nev. 83, 90, 40 P.3d 423, 428 (2002).

[41] NRS 604A.300.

[42] NRS 232.530(2).

[43] *Dutchess Business Services, Inc. v. Nevada State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008); *Div. of Insurance v. State Farm Mut. Ins.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000); *SIIS v. Snyder*, 109 Nev. 1223, 1228, 865 P.2d 1168, 1171 (1993) (construction placed on statute by agency charged with duty of administering it is entitled to deference).

[44] *Westergard v. Barnes*, 105 Nev. 830, 834, 784 P.2d 944, 947 (1989).

[45] *Harris Associates v. Clark County School Dist.,* 119 Nev. 638, 642, 81 P.3d. 532, 534 (2003) (internal citation omitted).

[46] *Matter of William S.*, 122 Nev. 432, 437, 132 P.3d 1015, 1019 (2006).

should be "in line with what reason and public policy would indicate the legislature intended," and to promote the underlying legislative policy.[47] Accordingly, "[s]tatutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained."[48]

VIII. ARGUMENT

A. Subsections 1 and 2 give lenders two refinancing options.

As a starting point, it is important to delineate what is (and what is not) permitted under NRS 604A.480. This section provides one of several procedures available under Chapter 604A in the event that a borrower is unable to repay an original loan within 35 days. (Other procedures available under the chapter include, for example, a grace period, an extension, or a repayment plan.) In the event a borrower is unable to repay an original loan, a lender and borrower may elect to proceed under NRS 604A.480. In that case, they may proceed under either Subsection 1 or Subsection 2.

Under Subsection 1, a lender may extend an original deferred deposit loan or high-interest loan through the proceeds of a new deferred deposit loan or high-

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[47] *Department of Motor Vehicles & Public Safety v. Lovet*, 110 Nev. 473, 477, 874 P.2d 1247, 1249-1250 (1994).

[48] *Colello v. Administrator of the Real Estate Division*, 100 Nev. 344, 347 683 P.2d 15, 17 (1984).

interest loan for an additional 60 days beyond the term of the original loan. And under Subsection 1, a lender is also prohibited from adding any unpaid interest or other charges accrued under the original loan to the principal amount of the loan.[49]

Alternatively, under Subsection 2, a lender is permitted to offer to refinance an original loan at a much longer term—in excess of 150 days beyond the term of the original loan—and at an interest rate of up to 199 percent. However, paragraphs (a) through (f) of Subsection 2 enumerate nine requirements to ensure consumer protection for this new loan or any extension or repayment plan related to it. Even with these requirements, some lenders may still prefer to operate under Subsection 2, given the unlimited duration of a Subsection 2 loan at an interest rate of up to 199 percent. In weighing the pros and cons for its business model when it chooses to issue a Subsection 2 loan, a lender is aware that in exchange for less restrictive conditions on the term and interest provisions of the loan, the lender must abide by the restriction in paragraph (f), which very clearly prohibits the lender from commencing "any civil action or process of alternative dispute resolution on a defaulted loan or repayment plan thereof."[50]

In summary, under Subsection 1, a lender may only extend an original deferred deposit loan or high-interest loan through the proceeds of a new deferred

[49] NRS 604A.480(1).

[50] NRS 604A.480(2)(f).

deposit loan or high-interest loan for an additional 60 days. If the lender elects to use the exception to this single 60-day extension rule, it may proceed under Subsection 2, which does allow a lender the option to negotiate a much longer extension (at a high interest rate). But a lender may only exercise this latter option if it forgoes the ability to sue on the original, defaulted loan, as well as on the new high-interest, long-term loan.

B. The plain language of paragraph (f) bars the use of civil remedies.

This conclusion—that the civil remedies bar in paragraph (f) requires lenders to forgo the ability to sue on the original, defaulted loan, as well as on the new high-interest, long-term loan—is supported by the clear text of the statute.[51]

Paragraph (f) requires that a Subsection 2 lender "not commence any civil action or process of alternative dispute resolution on a defaulted loan ***or*** any extension or repayment plan thereof." A Subsection 2 loan must be considered an "extension or repayment plan" of a "defaulted" payday loan if Subsection 2 of NRS 604A.480 is to be read consistently with Subsection 1. "Statutes must be

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[51] In such cases, where the text is plain, this Court will first "presume that a legislature says in a statute what it means and means in a statute what it says there." *RTTC Comm. v. Saratoga Flier, Inc.*, 121 Nev. 34, 37, 110 P.3d 24, 26 (2005). This Court has held that "the plain meaning of the words in a statute should be respected unless doing so violates the spirit of the act." *City of Las Vegas v. Eighth Judicial Dist. Court*, 124 Nev. 540, 544, 188 P.3d 55, 57 (2008) (internal citation omitted). This Court will not look beyond the language if the "words of the statute have a definite and ordinary meaning." *State v. Quinn,* 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001).

construed as a whole, and phrases may not be read in isolation to defeat the purpose behind the statute."[52] Subsection 1 makes clear the Legislature, in enacting NRS 604A.480, considered that a lender would "extend the period for the repayment, renewal, refinancing or consolidation of an outstanding loan ***by*** using the proceeds of a new deferred deposit loan or high-interest loan to pay the balance of the outstanding loan."[53] Because a "new deferred deposit loan or high-interest loan" is precisely what the Legislature considered to be an "extension or repayment plan" of the original "defaulted loan," paragraph (f)'s civil action bar must apply to "any" Subsection 2 loan used to extend or repay an original loan.

The district court's reading of paragraph (f)'s civil action ban—as being a mere a "condition precedent" to be met ***before*** a Subsection 2 loan may be issued, but with no meaning ***after*** the Subsection 2 loan has been issued—fails to acknowledge that paragraph (f) broadly bans "***any*** civil action" on "***any*** extension or repayment plan" for a defaulted loan, without any temporal or other restriction. By refusing to apply paragraph (f)'s civil action ban to a Subsection 2 loan—which clearly falls within the meaning of paragraph (f)'s "any extension" language—the district court effectively imposed a temporal restriction on paragraph (f)'s

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[52] *State Tax Commission ex rel. Nevada Department of Taxation v. American Home Shield of Nevada, Inc.*, 127 Nev. 382, 386, 254 P.3d 601, 604 (2011) (internal citations omitted).

[53] NRS 604A.480(1) (emphasis added).

expansive prohibition that is simply not found in the text. And, as explained below, interpreting paragraph (f) as merely a condition precedent is even more sharply at odds with the legislative history and purpose of the statute.

C. Any ambiguity must be construed to promote the legislative intent of the statute.

Even if the text of NRS 604A.480 were less clear, the legislative history confirms that the civil remedies bar in paragraph (f) was intended to apply to both an original defaulted loan ***and*** a new Subsection 2 loan. If this Court finds ambiguity as to Subsection 2,[54] then the provision should be interpreted and applied consistent with the legislative intent, legislative history, and the underlying public policy behind NRS Chapter 604A.

There can be no reasonable doubt regarding the legislative intent of paragraph (f). Notwithstanding the other consumer protections in Chapter 604A—such as the general 35-day limit on the period of a high-interest loan—absent a prohibition on long-term refinancing, lenders could simply push to extend the loans by issuing new long-term, high-interest loans to pay off the short-term loan in order to collect more money on the back-end. This would perpetuate the infamous debt treadmill which we know was precisely the impetus behind Chapter

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[54] A statute is ambiguous if it is subject to two or more reasonable interpretations. *Nevada Dep't of Corrections v. York Claims Services, Inc.*, __ Nev. __, __, 348 P.3d 1010, 1013 (2015).

604A's enactment.

The Legislature clearly understood this problem, and acted to address it. But under the district court order, a lender is entirely exempt from Subsection 1 if it has not "already" commenced a civil action or process; in other words, a lender is free to issue a new long-term loan at 199 percent interest, without foregoing its right to commence a civil action on default of the new loan. Such an interpretation renders paragraph (f) useless in preventing the long-term, high-interest "debt treadmill" that Chapter 604A was meant to address. The very practices the Legislature sought to curtail by enacting Chapter 604A would be allowed: lenders could freely convert short-term payday loans into long-term, high-interest loans. After borrowers defaulted (even after paying on the loans for years and already paying back the original principle amount many times over), lenders could sue, obtain judgments for many times the amount of the original debt, and then seek to garnish wages.

The legislative history sets forth a clear statement of the Legislature's intent to protect consumers from such long-term, high-interest lending practices, as well as reduce court backlogs by barring the use of litigation as an enforcement and collection tool. "Where the intention of the legislature is clear, it is the duty of the court to give effect to such intention and to construe the language of the statute to

effectuate, rather than to nullify, its manifest purpose."[55]

D. The FID's prior interpretation is entitled deference.

While this Court does "review questions of statutory construction *de novo*," the "construction placed on a statute by the agency charged with the duty of administering it is entitled to deference."[56] The Legislature has authorized the FID to carry out all of the provisions of NRS Chapter 604A,[57] and as such, the agency is "impliedly clothed with power to construe [NRS Chapter 604A] as a necessary precedent to administrative action."[58] The Commissioner, moreover, has been given the power to administer all laws relating to the FID,[59] including the authority to issue advisory opinions concerning the applicability of statutory provisions.[60]

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[55] *Sheriff, Clark County v. Luqman*, 101 Nev. 149, 156 697 P.2d 107, 113 (1985); *see also Matter of Petition of Phillip A.C.*, 122 Nev. 1284, 1293, 149 P.3d. 51, 58 (2006) ("Statutes with a protective purpose should be liberally construed in order to effectuate the intended benefits.") (internal citations omitted).

[56] *Dept. of Business and Indus. v. Granite Const. Co.*, 118 Nev. 83, 90, 40 P.3d 423, 428 (2002).

[57] NRS 604A.300.

[58] *State v. State Engineer,* 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (internal citations omitted).

[59] NRS 232.530(2).

[60] NRS 233B.120.

Exercising the foregoing authority, the FID issued the 2009 FID Advisory Opinion, in which the FID previously interpreted the restriction in Subsection 2.[61] The FID properly interpreted NRS 604A.480 in accordance with its text and legislative history. The FID concluded that the civil remedies bar in paragraph (f) of Subsection 2 is generally applicable to loans made under Subsection 2. As such, the FID's reasonable "administrative statutory construction" should not be "readily disturbed."[62] But the district court order does just that—concluding that the prohibition in paragraph (f) does not apply to ***any*** new Subsection 2 loan even when the loan is used to refinance an outstanding loan in default.[63] The district court's ruling never addresses—much less effectuates—the clear intent of the Legislature.

This Court, giving appropriate deference to the agency's construction of the statute, should reverse the district court order, and confirm that a lender is barred from commencing a civil action or process of alternative dispute resolution upon the default of a Subsection 2 loan.

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[61] As noted in Section III.B., *infra.*, on October 30, 2012, the Attorney General issued an official opinion on this same subject, Op. Nev. Att'y Gen. No. 2012-06 (Oct. 30, 2012) (the "AGO 2012-06"). Aplt. App. DLC00157-DLC00161 (AGO 2012-06).

[62] *Westergard v. Barnes*, 105 Nev. 830, 834, 784 P.2d 944, 947 (1989).

[63] Aplt. App. DLC00465-DLC00466 (emphasis added).

E. In ruling that the prohibition in paragraph (f) does not apply to *any* new Subsection 2 loan, the district court order goes beyond the assertions in Dollar Loan's initial complaint.

Again, according to the district court, if a lender has not "already commenced any civil action or process of alternative dispute resolution against a debtor," then it is free to issue a new Subsection 2 loan and enforce it by whatever means the lender deems appropriate, without regard to the civil remedies bar in paragraph (f).[64] This is not consistent with the assertion in Dollar Loan's original complaint, wherein Dollar Loan appeared to concede that the civil remedies bar ***was*** deliberately enacted to ***prohibit*** the use of litigation as a collection remedy when the lender elects to use the refinance option in Subsection 2.[65] Respondent subsequently changed tack in its brief to the district court, wherein it placed great reliance on the 2011 LCB Opinion,[66] asserting that the "conditions set forth in Subsection 2" do not constitute "prohibitions of any kind."[67]

Any reliance on the 2011 LCB Opinion, however, is misplaced for several reasons. First, the LCB conclusion contradicts that of Respondent's own representative, who confirmed that the "current statute prohibits any lender who

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[64] *Id.*

[65] *See* Section IV.D., *supra.*

[66] Aplt. App. DLC00194-DLC00199.

[67] Aplt. App. DLC00196.

operates by the guidelines in NRS 604A.480 from accessing civil remedy."[68] Indeed, Respondent's repeated attempts to repeal the civil remedies bar in paragraph (f) further underscores its interpretation and understanding of the statute as a prohibition against the use of litigation as a debt collection tool.

Second, the opinion as stated in the 2011 LCB Opinion was apparently not shared by the LCB's representative who testified before the Legislature in 2015. He explained the operation of Subsection 2 to the Legislature as follows:

> Based on my review of NRS 604[A].480, the lender of a deferred deposit loan or high-interest loan can seek access to court as a remedy at law for an outstanding or defaulted original loan. Subsection 2 of NRS 604[A].480 pertains to treadmill, or cycle of debt referencing a second loan for purposes of paying back an original loan.[69]

In other words, at least one LCB counsel concluded that the paragraph (f) prohibition does apply when the lender issues a Subsection 2 loan for purposes of refinancing a defaulted loan. By contrast, the author of the 2011 LCB Opinion apparently concluded that the paragraph (f) prohibition never applies to a new loan issued under Subsection 2.

Finally, and perhaps most importantly, the conclusion in the 2011 LCB

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[68] Aplt. App. DLC00392-DLC00393 (Hearing on S.B. 123 Before the Senate Commerce Comm., 78th Leg. (Nev., Feb 13, 2015).

[69] Aplt. App. DLC00101 (Hearing on S.B. 123 Before the Senate Commerce Comm., 78th Leg. (Nev., March 16, 2015)).

Opinion is devoid of any substantive analysis or reasoning—amounting to the mere *ipse dixit* of the LCB counsel. The opinion fails to address the statutory text, or the underlying legislative history, and as such deserves no deference from this Court.[70]

IX. CONCLUSION

For the foregoing reasons, the district court's order granting declaratory relief should be reversed.

DATED this 23rd day of August 2016.

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[70] In contrast, AGO 2012-06 concluded that the "prohibition against civil suits or alternative dispute resolution under NRS 604A.480(2)(f) is applicable to all loans made pursuant to NRS 604A.480(2)." Aplt. App. DLC00157-DLC00161 (AGO 2012-6). Attorney general opinions, while not binding, are "entitled to great weight, and in the absence of controlling authority, opinions of the attorney general are persuasive." 7 Am. Jur. 2d *Attorney General* § 10 (2016); *see also Cannon v. Taylor*, 88 Nev. 89, 91-2, 493 P.2d 1313, 1315 (1972) ("[A]s a general proposition where government officials are entitled to rely on opinions of the state's Attorney General, and do rely in good faith, they are not responsible in damages to the governmental body they serve if the Attorney General is mistaken.").

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief 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) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 14 pt. Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 7,357 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of August 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on August 23, 2016.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, for delivery within three calendar days to the following non-CM/ECF participants:

/s/ Michele Caro
An employee of the
Office of the Attorney General