Case No. 70498

In the Supreme Court of Nevada

ALBERT THOMAS, et al.,

Appellants,

vs.

MEI-GSR HOLDINGS, LLC, et al.,

Respondents.

APPEAL

from the Second Judicial District Court, Washoe County
The Honorable ELLIOT A. SATTLER, District Judge
District Court Case No. CV12-02222

RESPONDENTS' PETITION FOR *EN BANC* RECONSIDERATION

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

MEI-GSR Holdings, LLC; Gage Village Commercial Development, LLC; and AM-GSR Holdings, LLC are limited liability companies. Grand Sierra Resort Unit Owners' Association is a nonprofit corporation; no publicly traded company owns more than 10% of its stock. No publicly traded company has an interest in this appeal.

H. Stan Johnson of Cohen-Johnson, LLC and Mark Wray of The Law Offices of Mark Wray, Gayle Kern of Kern & Associates, Ltd., and Sean Brohawn of Brohawn Law represented respondents here and in the district court. Daniel F. Polsenberg, Joel D. Henriod, Kristen Martini, Dale Kotchka-Alanes, and Abraham G. Smith of Lewis Roca Rothgerber Christie LLP have appeared before this Court.

Dated this 29th day of June, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Daniel F. Polsenberg*
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PETITION FOR *EN BANC* RECONSIDERATION

Respondents (defendants below) seek *en banc* reconsideration of the panel's February 26, 2018 order of reversal. Before filing suit, appellants (plaintiffs below) did not meet the mandatory administrative prerequisites in NRS 38.300 through 38.360.[1] The panel waived the statutory requirements, however, because it mistakenly held that the statute is not jurisdictional.

The Jurisdictional Question Is Recurring and Unresolved

The question whether NRS 38.300 through 38.360 limits the courts' subject-matter jurisdiction is substantial and has caused confusion among Nevada's state and federal courts.[2] NRAP 40A(a)(2).

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[1] Consistent with the panel's finding at Order 5–6 n.2, defendants refer to the 2011 version unless otherwise noted. The 2011 version of NRS 38.300 through 38.360 appears in the Rule 28(f) addendum. Although the details of the mediation and arbitration requirement changed in 2013, the core considerations for assessing whether that requirement is jurisdictional did not.

[2] *Compare* 5 App. 1088–93 (dismissing the complaint below for lack of subject-matter jurisdiction); *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 2:15-CV-0693-GMN-VCF, 2016 WL 389981, at *2 (D. Nev. Jan. 31, 2016) ("because these claims were not submitted to mediation prior to the filing of this action, the Court lacks subject matter jurisdiction"); *1597 Ashfield Valley Tr. v. Fed. Nat. Mortg. Ass'n Sys.*, 2:14-CV-2123 JCM, 2015 WL 4581220, at *5, *10 (D. Nev. July 28, 2015) ("the court finds that it does not have subject matter jurisdiction" over claims sub-

The Panel's Decision Conflicts with the En Banc *Court's Approach*

The panel's decision also creates tension with how the *en banc* Court has approached the mediation and arbitration requirements in NRS 38.310. NRAP 40A(a)(1). The panel held that defendants were estopped from invoking the statute, but just three days earlier the *en banc* Court came to the opposite result in a case where neither party raised the statute until appeal. The Court not only deferred the question "whether NRS 38.310's mediation or arbitration requirement is jurisdic-

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ject to NRS 38.310); *Layton v. Green Valley Vill. Cmty. Ass'n*, 2:14-CV-01347-GMN, 2015 WL 1961134, at *2 (D. Nev. Apr. 29, 2015) ("Plaintiff must first submit his claims to the NRED before this Court may exercise jurisdiction."); *Anderson v. Assessment Mgmt. Servs.*, 2:13-CV-02185-GMN, 2015 WL 1530601, at *2–3 (D. Nev. Apr. 6, 2015) ("Plaintiff has failed to satisfy her burden of establishing this Court's jurisdiction by showing her compliance with [NRS] 38.310."); *Karimova v. Alessi & Koenig, LLC*, 2:13-CV-151 JCM CWH, 2013 WL 3678091, at *2–3 (D. Nev. July 11, 2013) (granting motion to dismiss under NRS 38.310 "for lack of jurisdiction"); *and BAC Home Loans Servicing, LP v. Stonefield II Homeowners Ass'n*, 2:11-CV-167 JCM RJJ, 2011 WL 2976814, at *3 (D. Nev. July 21, 2011) (same), *with Carrington Mortg. Servs., LLC, v. Absolute Bus. Sols., LLC*, No. 2:15-cv-01862-JAD-PAL, 2016 WL 1465339, at *3 (D. Nev. Apr. 14, 2016) (holding that "NRS 38.310 is not a jurisdictional statute; it is an exhaustion statute that creates prerequisites for filing certain state-law claims" but determining that "NRS 38.310 requires the dismissal of all qualifying claims that have not been mediated or arbitrated").

tional," but actually treated the statute's application as something not subject to waiver:

> [T]his court may address plain error *sua sponte*, and we choose to address this issue and conclude that NRS 38.310's mediation or arbitration requirement controls here.

Aliante Master Ass'n v. Prem Deferred Tr., 414 P.3d 300, No. 71026, 2018 WL 1135387, at *3 (Nev. Feb. 23, 2018). Notwithstanding the defendant's failure to raise the issue, "the district court was *required* to dismiss the class members' claims pursuant to NRS 38.310(2)." *Id.* (emphasis added).

In light of the significance of this recurring issue and the conflicting approaches taken by the panel and the *en banc* Court, the *en banc* Court should grant reconsideration.

ISSUES ON *EN BANC* RECONSIDERATION

1. In contrast to a question of "subject-matter jurisdiction," which cannot be waived, is a challenge to a case's justiciability susceptible to waiver?

2. NRS 38.310 (2011) provides, in part, that

> 1. No civil action based upon a claim relating to:
>
> (a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association;
>
> * * *
>
> may be commenced in any court in this State unless the action has been submitted to mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360 * * * .
>
> 2. A court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

NRS 38.330(5) (2011) provides, in part, that

> Any complaint filed in such an action must contain a sworn statement indicating that the issues addressed in the complaint have been arbitrated pursuant to the provisions of NRS 38.300 to 38.360.

Do these statutes limit the court's subject-matter jurisdiction?

BACKGROUND

This case arises out of a dispute over a condo association's covenants, conditions and restrictions (CC&Rs). Plaintiffs purchased hotel-condominium units in the Grand Sierra Resort and later sued defendants—the unit owners' association and its owners and operators—for unlawful business practices in alleged violation of the CC&Rs. Order 4-5. Defendants had other claims that they agreed to resolve with plaintiffs' claims in the district-court action. Order 9. The parties did not submit their claims to mediation or arbitration beforehand. Order 9.

After the district court entered case-concluding sanctions against defendants, but before a prove-up hearing, the court dismissed the action for lack of jurisdiction because of plaintiffs' failure to mediate their claims under NRS 38.310. Order 6.

The panel reversed, holding that NRS 38.310 does not limit the court's jurisdiction. Order 7-8. Based on that finding, the panel considered NRS 38.310 susceptible to waiver and decided in the first instance that defendants were estopped from enforcing the statutory requirements. Order 8-10.

ARGUMENT

This Court Has Not Treated Mandatory Mediation or Arbitration as Subject to Waiver

Although this Court has not previously decided whether NRS 38.310 limits the district court's jurisdiction over claims involving the interpretation of CC&Rs, this Court has never allowed a district court to bypass those pre-suit requirements. Even if exhaustion is a requirement of "justiciability" rather than "jurisdiction," a court has no power to address nonjusticiable cases, and parties cannot waive justiciability requirements.

The Exhaustion Requirement Is Jurisdictional

In any case, NRS 38.310 follows the pattern of statutes held to limit the district court's subject-matter jurisdiction. Exclusive original jurisdiction over CC&R claims lies in Nevada's Real Estate Division of the Department of Business and Industry. NRS 38.320(1). "No civil action . . . may be commenced in any court" without exhausting mandatory mediation or arbitration before the Division. NRS 38.310(1). The Legislature even included a command to the court itself: "A court *shall dismiss* any civil action which is commenced in violation" of NRS

38.310(1)—quintessential jurisdiction-stripping language. NRS 38.310(2) (emphasis added).

The Affidavit Requirement Is Jurisdictional

In addition, the district court has jurisdiction only over valid complaints. NRS 38.330(5) requires a complaint to include an affidavit confirming compliance with the exhaustion requirement. Without such an affidavit, the complaint was void, and the court had no jurisdiction to adjudicate it.

I.

THE IRRELEVANT DEBATE ON TERMINOLOGY: NEITHER JURISDICTION NOR JUSTICIABILITY CAN BE WAIVED

Jurisdiction and what the Court has more recently called justiciability both define limits on a court's power. Until the panel's decision, a question of waiver had never depended on whether statutory exhaustion requirements were "couched in terms of subject-matter jurisdiction or ripeness," for failure to observe the Legislature's restrictions on judicial review "renders the controversy nonjusticiable." *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007). And justiciability "must be considered at all stages of the litigation." *Wheeler Springs*

Plaza, LLC v. Beemon, 119 Nev. 260, 264 n.3, 71 P.3d 1258, 1260 n.3 (2003). It, like jurisdiction, cannot be waived. *Id.*

A. Historically, Statutory Prerequisites to Litigation Were Considered "Jurisdictional"

For much of this Court's history, jurisdiction simply meant "the power to hear and determine and give the judgment rendered." *Foley v. Foley*, 24 Nev. 197, 212, 51 P. 834, 836 (1898) (quoting *Ex parte Reed*, 100 U.S. 13, 23 (1879)) (emphasis added).

Based on this broad understanding of jurisdiction, this Court held that "[f]ailure to exhaust administrative remedies generally deprives a district court of subject matter jurisdiction." *Rosequist v. Int'l Ass'n of Firefighters Local 1908*, 118 Nev. 444, 448, 49 P.3d 651, 653 (2002).

B. Using the Label "Justiciability" Does Not Change the Essential Characteristic—a Limit on Judicial Power

Somewhere along the way, courts began to describe "jurisdiction" as legislative limits on the court's power and "justiciability" as the inherent limits of judicial power. *See, e.g.*, *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 410-11 (1966) (describing cases as "beyond our jurisdiction or beyond our authority to consider"); *Landreth v. Malik*, 127 Nev. 175, 183, 251 P.3d 163, 168 (2011) ("'[j]udicial [p]ower' is

the authority to hear and determine justiciable controversies" (quoting *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967))).

This definitional shift led the Court in *City of Henderson v. Kilgore* to classify exhaustion as a requirement of justiciability rather than jurisdiction. 122 Nev. 331, 336 n.10, 131 P.3d 11, 15 n.10 (2006).

The label does not affect the outcome, however. *Allstate*, 123 Nev. at 571 & n.14, 170 P.3d at 993 & n.14. If the parties come to court before pursuing a statutorily required remedy, the court cannot adjudicate the matter. *See id.*; *Heller v. State Legislature*, 120 Nev. 456, 463-64, 93 P.3d 746, 750-51 (2004); *City of Reno v. IAFF, Local 731*, 130 Nev., Adv. Op. 100, 340 P.3d 589, 592 n.2 (2014) ("the district court would be required to dismiss the underlying claims as nonjusticiable for failure to exhaust administrative remedies"). Without a justiciable controversy, there is no "legal right to set judicial machinery in motion." *Heller*, 120 Nev. at 460-61, 93 P.3d at 749 ("we necessarily reach the [standing] issue, as it affects our original jurisdiction"); *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 968-969, 194 P.3d 96, 107 (2008). As judicial review of such a matter would be a mere "advisory opinion," a court has no power to adjudicate it. *Personhood Nev. v. Bristol*, 126 Nev. 599,

603, 245 P.3d 572, 575 (2010); *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).[3]

C. The Absence of a Justiciable Controversy, Like the Absence of "Jurisdiction," Cannot be Waived

There is a risk that by cleaving justiciability from jurisdiction, we will forget the characteristics common to both concepts.

Parties cannot confer jurisdiction by stipulation, and a challenge to the court's subject-matter jurisdiction cannot be waived. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011).[4] Likewise, a "court

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[3] This doctrine accords with over two centuries of jurisprudence in the U.S. Supreme Court. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 98 (1998); *cf.* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 103 (trans. Henry Reeve, 4th ed. 1841) ("[A]n American judge can only pronounce a decision when litigation has arisen, he is only conversant with special cases, and he cannot act until the cause has been duly brought before the court."). If a court finds a case nonjusticiable, it must acknowledge that fact and proceed no further. *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

[4] An objection to jurisdiction can even be raised for the first time on rehearing. *See, e.g.*, *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (Tex. 1991); *Preblich v. Battley*, 181 F.3d 1048, 1054 (9th Cir. 1999); *Baltimore & O.S.W.R. Co. v. New Albany Box & Basket Co.*, 96 N.E. 28, 29 (Ind. App. 1911); *see also Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance."). So while plaintiffs' argument that defendants "abandoned" the jurisdictional argument is inaccurate (*see* RAB at 43 n.13,

that lacks subject matter jurisdiction . . . does not acquire it by estoppel." *Friedman v. Eighth Judicial Dist. Court*, 127 Nev. 842, 852, 264 P.3d 1161, 1168 (2011). "It matters not that the defendant specifically and voluntarily elected the tribunal" because "no action of the parties can confer subject-matter jurisdiction upon a court where the court has no authority to act." *Id.* (internal quotation marks omitted); *accord Semper v. Gomez*, 747 F.3d 229, 247 (3d Cir. 2014) ("judicial estoppel cannot be used to create subject matter jurisdiction"); *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1228 (10th Cir. 2011) (same).

So, too, for defects in justiciability. *Oryszak v. Sullivan*, 576 F.3d 522, 526–27 (D.C. Cir. 2009) (Ginsburg, J., concurring) ("the nonjusticiability of a claim may not be waived"); *Mo. Retired Teachers Found. v. Estes*, 323 S.W.3d 100, 104 n.8 (Mo. Ct. App. 2010) ("Because it is a tool of the court used to determine whether a controversy is ready for judicial review, ripeness, like jurisdiction, is not waived by the failure of a party to raise it at the earliest opportunity." (quoting *Local 781 Int'l Ass'n of Fire Fighters v. City of Independence,* 947 S.W.2d 456, 461 (Mo. Ct. App. 1997))). A party cannot, through estoppel, turn a case that is

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45-46, 48-49 n.14, 64-65 (citing to authorities that use the language of subject-matter jurisdiction)), it is also irrelevant.

not justiciable (because it is premature) into a case that the court is competent to resolve. Justiciability, like jurisdiction, "must be considered at all stages of the litigation" and cannot be waived. *Wheeler Springs*, 119 Nev. at 264 n.3, 71 P.3d at 1260 n.3.

So even if the exhaustion requirement in NRS 38.310 is a limit on the justiciability of a claim rather than the court's jurisdiction, a party's failure to exhaust mediation or arbitration may be raised at any time. *See also Mesagate Homeowners' Ass'n v. City of Fernley*, 124 Nev. 1092, 1101, 194 P.3d 1248, 1254 (2008) (appellant's failure to exhaust administrative remedies—an argument not considered by the district court—made its petition "nonjusticiable," "thereby precluding any further consideration of the merits of this appeal").

D. Using Estoppel to Bypass Justiciability Violates the Separation of Powers

For a court to adjudicate a nonjusticiable claim based on the defendant's "estoppel" would usurp the legislature's constitutional power to limit how and when courts may hear cases. NEV. CONST. art. 3, § 1.

Since its earliest days, this Court upheld those legislative limits; when courts fail to observe them, their rulings are invalid. *Steel v. Steel*, 1 Nev. 27, 30-31 (1865) ("[T]he requirements of the statute au-

thorizing [recovery] are not idle, useless formulae; they are mandates of law not to be disregarded, and must be substantially complied with.").

This judicial respect of legislative limits is particularly important for exhaustion requirements. *Allstate*, 123 Nev. at 572, 170 P.3d at 994. If, according to a statute, a matter is not ripe for judicial review, judicial consideration of that matter "runs afoul of the separation of powers." *Heller*, 120 Nev. at 472, 93 P.3d at 756.

E. Dismissal was Proper for Lack of a Justiciable Controversy

Here, even accepting the panel's conclusion that "NRS 38.310 does not implicate a district court's subject matter jurisdiction," plaintiffs' failure to exhaust the mandatory statutory remedies left the court without a justiciable controversy. No allegation of waiver or estoppel could fix that defect.

So, as the district court found, "to act contrary to the mandates of NRS 38.310 would violate the separation of powers, whereby courts are bound to follow the laws passed by legislative bodies." (5 App. 1093.) The Legislature granted the Real Estate Division the opportunity to resolve CC&R disputes in the first instance. As the court noted, it could not "substitute its opinion of what should happen under these facts for

the opinion of the people of this State as expressed by their elected legislators." (5 App. 1093.) The district court was correct to dismiss the complaint.

II.

PLAINTIFFS' FAILURE TO COMPLY WITH NRS 38.310 DEPRIVES THE DISTRICT COURT OF SUBJECT-MATTER JURISDICTION

If the distinction between jurisdiction and justiciability misleads courts into believing that only defects of jurisdiction—not justiciability—limit the court's power to hear the case, then it is time to abandon the distinction.

And here, even observing the distinction, it really does make sense to consider the legislative limits in NRS 38.300 through 38.360 as jurisdictional. Unlike other administrative statutes that merely direct the *parties* to a nonjudicial forum before turning to the court, the statute here also imposes a direct limit on the *court* to "dismiss any civil action" commenced without first exhausting mediation or arbitration. NRS 38.310(2). The court lacks power to hear the case not only because it is not a controversy ripe for judicial review but also because the Legisla-

ture has expressly taken the power of review away from the court, leaving it without jurisdiction.

A. The Rule for Determining Whether a Statute Limits the District Court's Jurisdiction

1. Mandatory Pre-Suit Remedies Limit the District Court's Jurisdiction

Even after the distinction drawn between jurisdiction and justiciability drawn in *Kilgore*, this Court has approved the jurisdictional view in statutory exhaustion cases. In *Benson v. State Engineer*, this Court affirmed the district court's dismissal of petitioner's action for lack of subject-matter jurisdiction when the petitioner sued without exhausting administrative remedies. 131 Nev., Adv. Op. 78, 358 P.3d 221, 224, 228 (2015).

Benson adheres to the rationale in *Eluska v. Andrus*, twice cited with approval by this Court, where the Ninth Circuit explained that "when exhaustion is statutorily mandated, the exhaustion requirement is jurisdictional and the district court must dismiss the action." 587 F.2d 996, 999 (9th Cir. 1978).[5]

[5] *Accord Intercontinental Travel Mktg., Inc. v. F.D.I.C.*, 45 F.3d 1278, 1283 (9th Cir. 1994); *Vazquez v. Sessions*, 881 F.3d 396, 402 (5th Cir. 2018); *Un v. Gonzales*, 415 F.3d 205, 210 (1st Cir. 2005).

This view of statutory exhaustion recognizes that directing parties initially to a nonjudicial forum creates in *that* forum—not the district court—exclusive original jurisdiction. *Cf. Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 572, 170 P.3d 989, 994 (2007).

2. Mandatory Dismissal Strips Jurisdiction

Jurisdictional limits can also arise by express legislative direction. For example, a condition in habeas cases—that "an appeal may not be taken to the court of appeals" without a certificate—governed the appellate courts' "adjudicatory authority" and so revoked subject-matter jurisdiction. *Gonzalez v. Thaler*, 565 U.S. 134, 141–42 (2012).[6] Similarly,

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[6] *See also Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (plurality) (provision that an action "shall not be filed or maintained in a Federal court" and actions related thereto "shall be promptly dismissed" was jurisdictional); *Klamath-Siskiyou Wildlands Ctr. v. MacWhorter*, 797 F.3d 645, 647 (9th Cir. 2015) (the clause "[n]o action may be commenced" is jurisdictional and "acts as an absolute bar to bringing suit"); *Keene Corp. v. United States*, 508 U.S. 200, 208-09 (1993) ("[n]o person shall file or prosecute" is jurisdictional language); *Weinberger v. Salfi*, 422 U.S. 749, 756 (1975) ("[n]o action . . . shall be brought under [28 U.S.C. § 1331]" is jurisdictional language)); *Meliezer v. Resolution Tr. Co.*, 952 F.2d 879, 881 (5th Cir. 1992) (court lacked jurisdiction despite the absence of an explicit exhaustion requirement because "the language of the statute and indicated congressional intent make clear that such is required"); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987) (jurisdiction to enforce a collective bargaining agreement vests only once grievance and arbitration procedures are exhausted); *Nat'l Football League Players Ass'n v. Nat'l Football League*, 874 F.3d 222, 227

a mandate that the district court "shall dismiss any claim" that ignored pre-petition requirements for successive habeas petitions was a jurisdictional bar. *Case v. Hatch*, 731 F.3d 1015, 1026-27 (10th Cir. 2013). It "clearly speaks to the power of the court to entertain the application, rather than any procedural obligation of the parties." *Id.*

This Court has likewise contrasted statutes that do not specifically require courts to dismiss a particular kind of case from those that do. *Barber v. State*, 131 Nev., Adv. Op. 103, 363 P.3d 459, 463 (2015) (*en banc*). In determining that statutory deadlines in juvenile court were not jurisdictional, this Court found pivotal the absence of a dismissal requirement. *Id.*

B. NRS 38.310 Is a Jurisdictional Limit

NRS 38.310 bears the hallmarks of a jurisdictional statute. It both requires the parties to exhaust specific pre-suit remedies *and* requires the district court to dismiss any unexhausted claims.

(5th Cir. 2017) (exhaustion under collective bargaining procedures creates exclusive forum). *Cf. also Rock Island A. & L.R. Co. v. United States*, 254 U.S. 141, 142 (1920) (Holmes, J.) (failure to comply exactly with the exhaustion requirements deprived litigant of a judicial remedy).

1. NRS 38.310(1) Mandates Pre-Suit Remedies

NRS 38.310(1) commands that "***[n]o civil action*** . . . may be commenced ***in any court*** in this State" unless the parties first exhaust the mediation and arbitration procedures in NRS 38.300 through 38.360. (Emphasis added.) That provision ousts the district court from exercising jurisdiction, instead directing the parties to the Real Estate Division for arbitration or mediation. *See* NRS 38.320(1), 38.330. The parties could agree to make the pre-litigation efforts nonbinding, but they could not agree to obviate that process altogether.

2. The District Court "Shall Dismiss" a Noncompliant Suit

NRS 38.310(2) mandates that "a ***court shall dismiss*** any civil action which is commenced in violation" of the exhaustion requirements of NRS 38.310(1). (Emphasis added.) *Cf. McKnight Family, L.L.P. v. Adept Mgmt.*, 129 Nev., Adv. Op. 64, 310 P.3d 555, 558 (2013) (rejecting the argument that a district court could not dismiss an action once underway and holding that NRS 38.310(2) "mandates dismissal").

That independent limit on the court's adjudicatory power, as expressed in an obligation to the court itself, is the classic way for a legislature to divest the courts of subject-matter jurisdiction. And it stands

in contrast with the statutes reviewed in *Kilgore* (NRS 288.110(3)), *Allstate* (NRS 679B.120(3); NRS 686A.015(1)), and *Barber* (NRS 62D.310), which contain no direction of dismissal.

Here, because plaintiffs never went to the Division with exclusive original jurisdiction, the district court was never vested with jurisdiction.

III.

INDEPENDENTLY, THE LACK OF A SWORN STATEMENT DEPRIVES THE DISTRICT COURT OF SUBJECT-MATTER JURISDICTION

Even if plaintiffs had pursued mandatory arbitration, the district would still lack subject-matter jurisdiction because their complaint lacks "a sworn statement indicating that the issues in the complaint have been arbitrated pursuant to the provisions of NRS 38.300 to 38.360, inclusive." NRS 38.330(5).[7]

[7] Under the 2011 version, parties had to arbitrate before filing suit. *See* Minutes of the Senate Judiciary Committee, June 16, 1995, at 7 ("If mediation is not successful, or if a decision cannot be made, or if no mediation is sought, the matter will go to arbitration."). The 2013 amendments now allow an action to be filed after arbitration, mediation, or referral to the Division's program, but it remains clear that an affidavit must accompany *all* complaints, whether following mediation, arbitration, or participation in the Division's program. *See* 2013 Nev. Stat. 2295, 2297, 2299 (AB 370, §§ 1, 6) (adding NRS 38.325 and modify-

A. Statutory Affidavit Requirements Are Jurisdictional

A plaintiff's failure to file a complaint with a statutorily required affidavit renders the complaint "void ab initio." *Otak Nevada, LLC v. Eighth Judicial District Court*, 127 Nev. 593, 599, 260 P.3d 408, 411 (2011) (construction-defect complaint). That means that the complaint does not "legally exist" and so cannot be cured by amendment. *Otak Nevada, LLC*, 127 Nev. at 599, 260 P.3d at 411–12 (citing *Fierle v. Perez*, 125 Nev. 728, 219 P.3d 906 (2009) and *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1303, 148 P.3d 790 (2006) (medical-malpractice complaint)); *accord Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 123, 272 P.3d 134, 137 (2012) (void complaint "never legally existed"); *Coyote Creek Mobile Home Cmty. LLC v. McCracken*, No. A144006, 2016 WL 3092001, at *7 (Cal. Ct. App. May 24, 2016) (same).

And when "a complaint . . . is void ab initio," "[a]ny action taken by a court [is] without subject-matter jurisdiction." *Ala. Dep't of Corrections v. Montgomery Cnty. Comm'n*, 11 So. 3d 189, 192 (Ala. 2008).[8]

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ing NRS 38.330(1)).

[8] *Accord Black Canyon Citizens Coal., Inc. v. Bd. of Cnty. Comm'rs*, 80 P.3d 932, 935 (Colo. App. 2003); *Jordan v. Metro-N. Commuter R.R. Co.*, No. 3:13-CV-749 (JBA), 2015 WL 5684027, at *4 (D. Conn. Sept. 28, 2015); *In re Summit Metals, Inc.*, 477 B.R. 484, 503 (Bankr. D. Del.

That is because the district court "acquire[s] jurisdiction of the subject-matter" only "upon the filing of the complaint." *Parks v. Garrison*, 57 Nev. 480, 67 P.2d 314, 314 (1937). Without a valid complaint, the court lacks jurisdiction. *Cunningham v. Eighth Judicial Dist. Court*, 102 Nev. 551, 560, 729 P.2d 1328, 1334 (1986). The statutory affidavit requirement "prohibit[s] judicial discretion and, consequently, mandates automatic dismissal." *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 127 Nev., Adv. Op. 53, 260 P.3d 408, 411 (2011).

That is consistent with this Court's treatment of the filing requirements for a petition for judicial review: they are "mandatory and jurisdictional." *Washoe County v. Otto*, 128 Nev. 424, 432, 282 P.3d 719, 725 (2012).

B. The Affidavit Requirement in NRS 38.330(5) Is Jurisdictional

Mirroring the statute discussed in *Otak*, NRS 38.330(5) requires the complaint to contain a sworn statement certifying compliance with NRS 38.300 to 38.360. That filing requirement is mandatory and jurisdictional.

2012); *Savo v. Mastrianno*, No. CV146047572S, 2014 WL 6843593, at *4 (Conn. Super. Ct. Oct. 28, 2014).

Accordingly, plaintiffs' failure to attach the affidavit left the district court without a valid complaint to vest its jurisdiction.

IV.

THE DISTRICT COURT SHOULD ADDRESS ESTOPPEL IN THE FIRST INSTANCE

Where estoppel is an available defense, and the district court did not reach that issue, the proper course is to remand for the district court to make findings on the estoppel issue. *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 96–97, 16 P.3d 1074, 1079 (2001). That follows from the general rule that a district court is better positioned to apply the law to the evidence it hears, subject to this Court's review. *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court*, 128 Nev. 723, 736, 291 P.3d 128, 137 (2012). In *Pro-Max*, remand was necessary in part to resolve the factual question of whether the party to be estopped from invoking a statutory defense was previously aware of the statute. *Id.*

Here, the district court's view that NRS 38.310 is jurisdictional kept the court from resolving the factual issues of plaintiffs' estoppel argument. (5 App. 1093.) The court's concluding comment that it would have denied the motion were it to decide "based on what was

'fair' or 'just'" (5 App. 1094) is no substitute for a reasoned estoppel analysis. *See Marcuse v. Del Webb Cmties., Inc.*, 123 Nev. 278, 287, 163 P.3d 462, 468–69 (2007) (discussing five elements of judicial estoppel).

So even if the panel correctly held that judicial estoppel allows a court to adjudicate a complaint in violation of NRS 38.300 through 38.360, the panel should not have decided on its own that estoppel applies here. For instance, the panel found that the "timing and degree of inconsistency" of defendants' positions showed that they had not acted out of ignorance, fraud, or mistake. Order 10. These fact-intensive issues go to defendants' state of mind, were never decided below, and should have been left to the district court in the first instance.

CONCLUSION

The question of whether a district court has power to hear a complaint that violates the exhaustion and affidavit requirements in NRS 38.300 through 38.360 is important and recurring. The *en banc* Court previously treated that question as one that could be addressed *sua sponte*. But now, the panel's decision says that the statute is subject to waiver. This Court should grant reconsideration.

Dated this 29th day of June, 2018.

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CERTIFICATE OF COMPLIANCE

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