

IN THE SUPREME COURT OF NEVADA

KAZUO OKADA, ARUZE USA,
INC., UNIVERSAL
ENTERTAINMENT CORP.,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, AND THE
HONORABLE ELIZABETH
GONZALEZ, DISTRICT JUDGE,
DEPT. 11,

Respondents,

and

WYNN RESORTS, LIMITED AND
ROBERT J. MILLER,

Real Parties in Interest.

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District Court Case
No. A-12-656710-B

**PETITION FOR WRIT OF PROHIBITION,
OR IN THE ALTERNATIVE MANDAMUS**

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RULE 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.

Petitioner Aruze USA, Inc. is a wholly owned subsidiary of Petitioner Universal Entertainment Corporation ("UEC"). UEC is traded on the Tokyo Stock Exchange JASDAQ (standard). UEC's parent company is Okada Holdings Limited. No publicly held corporation holds 10% or more of UEC's stock. Defendant Kazuo Okada is an individual.

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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ petition under NRAP 17(a)(10) and (11) because it raises a principal issue of statewide public importance and of first impression involving statutory and common law: What is the scope and effect of the newly-enacted "absolute" gaming privilege under NRS 463.120(6), which makes confidential and privileged *all* information and data provided by gaming licensees to the Nevada Gaming Control Board "in connection with its regulatory, investigative or enforcement authority," without regard to whether the information was requested by the agency or required by regulation? The scope of NRS 463.120(6), which was signed into law on June 12, 2017, affects the stated public policy of the Nevada Gaming Control Act and the Court's jurisprudence under which privileges are narrowly construed.

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I. THE RELIEF SOUGHT

Petitioners Aruze USA, Inc., Universal Entertainment Corporation, and Kazuo Okada (collectively, "Aruze") seek a writ of mandamus compelling the district court to vacate its October 26, 2017 order, which denies Aruze's motion to compel discovery of highly relevant non-privileged testimony and documents regarding Wynn Resorts Limited's (WRL) and director Robert Miller's communications with the Nevada Gaming Control Board (NGCB) regarding allegations of misconduct against Defendants prior to the forced redemption of Aruze's stock in WRL. The involuntary, pretextual redemption of this enormous block of founder's stock at substantially below market value to perpetuate co-founder Steven A. Wynn's control of the company is at the heart of this lawsuit.

The district court's order denying discovery of this essential non-privileged information is based on recently-enacted NRS 463.120(6), which appears to confer a novel and absolute "gaming privilege" over any and all oral or written information and data provided by a gaming licensee to the NGCB "in connection with [the NGCB's] regulatory, investigative, or enforcement authority," which the statute does not define. But the

privilege conferred by NRS 463.120(6) did not exist when, prior to commencement of this lawsuit, director Miller communicated with the NGCB. Nor did the statute exist when requests for production and deposition questions were posed about director Miller's communications with the NGCB. The statute, by its terms, does not have retroactive effect to foreclose document production and answers to questions posed to Mr. Miller before the statute became effective. Moreover, director Miller's communications with the NGCB were not made "in connection with its regulatory, investigative, or enforcement authority." The communications were gratuitous. Applying this new and novel statute in this case to immunize WRL against discovery of information essential to Aruze's defense and to prosecute its counterclaims would undermine this Court's time-honored jurisprudence that privileges are narrowly construed and sparingly applied because they obstruct a search for the truth.

II. ISSUES PRESENTED

1. Does the "absolute" privilege for gaming licensees under NRS 463.120(6) apply to prevent discovery of voluntary, unsolicited communications with Nevada gaming regulators made by a licensee several years before the statute was enacted and requested in litigation

more than a year before the statute was enacted, when the Nevada State Legislature has declared otherwise in the same statute?

2. Does the "in connection with its regulatory, investigative, or enforcement authority" element of NRS 463.120(6) permit licensees that initiate litigation to withhold *voluntary* communications to the Nevada gaming regulators that were not called for by the regulators and that are directly relevant to the opposing party's claims and defenses?

III. MATERIAL FACTS

A. Case Background.

In the early 2000s, Steve Wynn and Kazuo Okada partnered to found WRL. Vol. I, PA102 (4th Am. Countercl. ¶ 31).¹ They were approximately equal stockholders, with Mr. Okada holding his shares through Aruze USA. Vol. I, PA108 (*id.* ¶ 52). Years later, their business relationship began to deteriorate, after Mr. Wynn lost half of his stock in a divorce (thus making Aruze by far WRL's largest shareholder), and Mr. Okada began questioning certain aspects of Mr. Wynn's leadership of the Company. Vol. I, PA112, 116 (*id.* ¶¶ 71, 80-82).

¹ Citations to "PA" are to the Petitioners' Appendix. Each citation is preceded by the volume number where the page citation(s) can be found.

Shortly thereafter, Mr. Wynn launched a campaign to remove Mr. Okada as a director and redeem Aruze USA's shares by investigating alleged misconduct by Mr. Okada in unrelated business endeavors abroad. Vol. I, PA122–123, 126–127 (*id.* ¶¶ 104, 109–110, 121–122). On or about October 29, 2011, WRL's Compliance Committee hired former FBI Director Louis J. Freeh to investigate the alleged misconduct by Mr. Okada. Not long thereafter, Mr. Freeh delivered a report and made a presentation to WRL's Board of Directors which served as the basis for the WRL Board's decision to redeem Aruze USA's shares on February 18, 2012. Vol. I, PA 126-127,133 (*id.* (¶¶ 119, 122, 144); Vol. I, PA81 (WRL Second Am. Compl. ¶ 45).

Former Nevada Governor Robert J. Miller was on WRL's Compliance Committee and served as its Chair. Vol. I, PA121,128–129 (4th Am. Countercl. ¶¶ 99, 127). "[S]everal weeks or a month" after Mr. Freeh was retained, Mr. Miller had a telephone conversation with NGCB regulator Mark Lipparelli about WRL's retention of Louis Freeh and the Company's alleged concerns about Aruze. Vol. II, PA246 (Feb. 9, 2016 Depo. Tr. Robert J. Miller ("Miller Tr.") at 112:16). WRL's legal counsel, Kimmarie Sinatra, participated in the call. Vol. II, PA246 (*id.* at 112:23-25).

Months later—but before Mr. Freeh had interviewed Mr. Okada and before Aruze's stock was redeemed—Mr. Miller and Ms. Sinatra had a second telephone conversation with NGCB. Vol. II, PA250 (Miller Tr. at 312:14-24). Also around that time, between January 12 and February 13, 2012, WRL exchanged emails with the NGCB that appear to relate to Gov. Miller's communications with the NGCB on this issue. Vol. II, PA257 (*e.g.*, WRL privilege log WYNN-PRIV084544-45).

WRL does not allege, nor is there any evidence, that NGCB had requested the information provided by Mr. Miller and/or Ms. Sinatra or that the regulator was conducting its own investigation before February 18, 2012, when Aruze received notice that its stock had been redeemed. Vol. I, PA137 (4th. Am. Countercl. ¶ 157).

B. Procedural Background.

Hours after redeeming Aruze's stock, WRL filed this suit against Aruze in the Eighth Judicial District Court, seeking a judicial declaration that it was justified in doing so. Vol. I, PA1-68 (Compl.).

On August 8, 2014, Aruze served Requests for Production (RFP) on WRL seeking "[a]ll documents concerning Communications with the NGCB," including communications with the NGCB "concerning

Mr. Okada, Universal, and/or Aruze USA and their affiliates." Vol. I, PA191, 216 (Aruze Second Set of RFP Nos. 78, 79, 215). In response, WRL withheld a number of relevant and responsive documents as allegedly privileged. Vol. I PA253-258 (Excerpts of WRL's Am. Fifteenth Supp. Privilege Log).

In February 2016 Aruze deposed Mr. Miller and sought his testimony regarding the two telephone conversations he and Ms. Sinatra had with NGCB regulator Mark Lipparelli in late 2011 and early 2012. Vol. I, PA246-247, 250 (Miller Tr. at 111:8-112:25; 114:1-10; 312:8-314:2). WRL's counsel claimed confidentiality and instructed Mr. Miller not to provide any specifics about the calls. Vol. I, PA246, 250 (*id.* at 112:3-5; 313:7-21). Mr. Miller's deposition was not completed, and Aruze sought additional time to complete it, which the district court granted in the summer of 2016. Vol. II, PA233 (Decl. of Adam Miller in support of Motion to Compel ¶ 4).

C. The 2017 amendment of NRS 463.120.

On June 12, 2017—more than a year after Aruze deposed Mr. Miller and almost three years after Aruze served RFPs seeking information about WRL's communications with the NGCB—the Governor approved an amendment to NRS 463.120 adopted by the Nevada

Legislature. See Vol. II, PA 225-228 (S.B. 376, 2017 Leg., 79th Sess. (Nev. 2017), available at

https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB376_EN.pdf),

last visited on October 31, 2017.²

Section 1.4 of SB 376 amended NRS 463.120 to include a new subsection (6), which provides:

Notwithstanding any other provision of state law, if any applicant or licensee provides or communicates any information and data to an agent or employee of the [Nevada Gaming Control] Board or Commission in connection with its regulatory, investigative or enforcement authority:

(a) All such information and data are confidential and privileged and the confidentiality and privilege are not waived if the information and data are shared or have been shared with an authorized agent of any agency of the United States Government, any state or any political subdivision of a state or the government of any foreign country in connection with its regulatory, investigative or enforcement authority, regardless of whether such information and data are shared or have been shared either before or after being provided or communicated to an agent or employee of the Board or Commission; and

(b) The applicant or licensee has a privilege to refuse to disclose, and to prevent any other person or governmental agent, employee or agency from disclosing, the privileged information and data.

S.B. 376, 2017 Leg., 79th Sess. § 1.4 (Nev. 2017) (Vol. II, PA226-227).

² The Court may take judicial notice of the Nevada Revised Statutes and "[a]ny other statute of this State if brought to the attention of the court by its title and the day of its passage." NRS 47.140(2)–(3).

New subsection (11) of NRS 463.120 broadly defines "information and data" to include "all information and data in any form," whether "oral, written, audio, visual, digital or electronic," and includes "without limitation," any type of document, including "self-evaluative assessments, self-critical analysis or self-appraisals of an applicant's or licensee's compliance with statutory or regulatory requirements." S.B. 376 § 1.4 (Vol. II, PA225).

Section 2 of the act provides that "[t]he confidentiality and privilege set forth in the amendatory provisions of this act apply to any request made on or after the effective date of this act to obtain any information or data . . . provided or communicated by an applicant or licensee to an agent or employee of the [NGCB] or . . . Commission *in connection with its regulatory, investigative or enforcement authority.*" S.B. 376 § 2 (Vol. II, PA228) (emphasis added). There is no legislative history for this amendment that could shed light on the meaning of this italicized ambiguous phrase.

D. The District Court Denies Aruze's Motion to Compel Based on NRS 463.120(6).

On September 14, 2017, Aruze filed a Motion to Compel

Director Robert Miller's Testimony and Production of Documents

Regarding Pre-Redemption NGCB Contacts (Motion to Compel). Vol. II, PA229-258. The Motion to Compel was filed in anticipation of director Miller's continued deposition that was scheduled for October 10, 2017. Vol. II, PA231 (*id.* at 3). WRL opposed the Motion on several grounds, including the "absolute" privilege under newly enacted NRS 463.120(6). Vol. II, PA260-262 (Opp'n at 2-4). In reply, Aruze argued that the privilege under NRS 463.120(6) does not apply because Aruze's request for testimony and documents had not been made "on or after the effective date of" NRS 463.120(6) but more than a year earlier. Vol. II, PA269 (Reply at 3) (quoting § 2 of SB 376).

The district court held a hearing on the Motion to Compel on September 25, 2017. Vol. II, PA274-318 (9-25-17 Hearing Tr.). The district court judge said she initially understood NRS 463.120(6) to protect only documents that were already privileged when provided to the NGCB. Vol. II, PA292 (Tr. at 19:18-21). But at the conclusion of the hearing, the district court "modified" her view of the statute. Vol. II, PA296 (*id.* at 23:18-23). The court then denied Aruze's Motion to Compel under "section (6) of the new statute," saying that communications to the NGCB were privileged, "protected and confidential." Vol. II, PA 300 (*id.* at 24:9-10; 24:19-22). The

district court expressly declined to consider retroactivity of NRS 463.120(6), because the Motion to Compel was heard after the new statute came into existence on June 12, 2017. Vol. II, PA 300 (*id.* at 24:1-3). An order denying the Motion to Compel was entered on October 26, 2017. Vol. II, PA319-25.

IV. REASONS WHY THE WRIT SHOULD ISSUE

Aruze seeks clarification of the applicability and scope of the new and altogether novel gaming licensee's privilege under NRS 463.120(6), which formed the basis for the district court's order denying Aruze discovery of essential information regarding WRL's voluntary communications with the NGCB in 2011-2012. The interpretation of NRS 463.120(6) will have far-reaching consequences for Nevada's privilege law and the many persons dealing with gaming licensees in Nevada. The statute appears to establish a special type of privilege not recognized elsewhere: if you are a Nevada gaming licensee and are contemplating litigation (as WRL apparently was at the time Mr. Miller was communicating with the Gaming Control Board), or are thereafter involved in litigation in which your communications with the Board are relevant,

you may defeat discovery of that relevant evidence in the litigation by voluntarily disclosing the evidence to the State's gaming regulators.³

Although a writ of mandamus is generally not available to review an order denying discovery, *Clark County Liquor and Gaming Licensing Bd. v. Clark*, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986), public policy may be served by consideration of a writ petition where, as here, at issue is the interpretation and application of an important statutory amendment, *Sandpointe Apartments, LLC v. Dist. Ct.*, 129 Nev. ___, ___, 313 P.3d 849, 852 (2013) ("*Sandpointe*"), which involves " 'the precise parameters of a privilege' conferred by a statute that this court has never interpreted." *Diaz v. Dist. Ct.*, 116 Nev. 88, 993 P.2d 50, 54 (2000) (quoting *Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 667, 856 P.2d 244, 247 (1993)) (internal modification omitted).

This Court has traditionally construed statutory privileges narrowly because they obstruct a search for the truth. *Rogers v. State*, 127 Nev. 323, 328, 255 P.3d 1264, 1267 (2011). By making confidential and

³ Absent NRS 463.120(6), such information would be discoverable from the licensee in litigation. See NRS 49.385. The information might be confidential under NRS 463.120(4). Even so, confidential information would be discoverable from the NGCB "upon the lawful order of a court of competent jurisdiction." NRS 463.120(4). No such exception is provided under NRS 463.120(6). See further Argument B (1) and (2), below.

privileged "*any* information and data" provided by a gaming licensee to NGCB "in connection with" its regulatory function, without defining this term, NRS 463.120(6)—if not narrowly construed—could impose unwarranted secrecy on evidence, thereby undermining the public trust in the judicial system and the integrity in gaming operations that the Nevada Gaming Control Act was enacted to prevent: It is "the public policy of this state" that the "continued growth and success of licensed gaming is dependent upon *public confidence and trust that . . . the rights of the creditors of [gaming] licensees are protected* and that gaming is free from criminal and corruptive elements." NRS 463.0129(1)(b) (emphasis added).

Aruze is a major creditor and former shareholder of Nevada gaming licensee Wynn Resorts, Limited whose rights are severely impacted by the new privilege statute as the district court interpreted and applied it. WRL claims it was justified in depriving Aruze of its stock at a greatly depressed price because Mr. Okada's alleged misconduct abroad put its licenses in jeopardy, and WRL will use its communications with the NGCB to support that conclusion (implicitly or explicitly) at trial. As urged by WRL and interpreted by the district court, NRS 463.120(6) prohibits Aruze from defending itself against WRL's claim that its licenses were in jeopardy

through discovery of the substance of WRL's voluntary communications with the NGCB in 2011–2012—at a time when WRL had no basis in statute or regulation to expect confidentiality or privilege for the information at issue. By denying Aruze discovery of relevant information initially requested in 2014 and again in 2016, the district court gave NRS 463.120(6) the very retroactive effect that the statute expressly prohibits.

Clarification of the new privilege under NRS 463.120(6) (sometimes referred to as the "gaming privilege") is therefore necessary to assure that it is construed and applied consistent with its terms, the public policy of NRS Chapter 463, and the Court's jurisprudence that privileges are narrowly construed.

V. ARGUMENT

A. NRS 463.120(6) does not apply retroactively.

Statutory interpretation, including the question whether the application of a statute has retroactive effect, is a "question of law" that is reviewed "de novo." *Sandpointe*, 129 Nev. at ___, 313 P.3d at 853. When a statute's language is "plain and unambiguous and its meaning clear and unmistakable," courts should apply the statute as written and may not look beyond the language of the statute to search for its meaning. *Id.* at ___, 313 P.3d at 854 (internal quotation marks and quotations omitted).

1. By its terms, NRS 463.120(6) applies only prospectively.

Here, the Legislature has plainly and unambiguously provided that "[t]he confidentiality and privilege set forth in the amendatory provisions of this act"—*i.e.*, NRS 463.120(6)—"apply to any *request* made on or *after* the effective date of this act" S.B. 376 § 2, Vol. II, PA228 (emphasis added). The Legislature expressly declared that the act would become "effective upon passage and approval"—*i.e.*, June 12, 2017. S.B. 376 § 3, Vol. II, PA228. Read together, sections 2 and 3 of SB 376 make clear that the confidentiality and unique privilege in NRS 463.120(6) only apply to "requests" made on or after June 12, 2017. Here, Aruze made specific requests for specific information and documents provided by WRL to NGCB years before the amendments to the statute became effective—it served RFPs in 2014 and sought testimony from Mr. Miller in February of 2016. Vol. I, PA179, 191, 216; Vol. I, PA245-251. Thus the prospective privilege of NRS 463.120(6), *by its terms*, does not apply to these "old" requests made before the statute existed.

The district court overlooked the express language of section 2 and treated NRS 463.120(6) as if it were a rule of pure procedure that does not implicate issues of retroactivity, remarking: "I find that the issue of

retroactivity does not need to be addressed. . . because the motion is being heard now, after the new statute has come into existence." Vol. II, PA 296-297 (Tr. at 23:25–24:3); Vol. II, PA320–321 (Order at 2–3). But a motion to compel is not a "request." It is an application to the Court "for an order compelling disclosure or discovery," Nev. R. Civ. P. 37(a), because a request (*e.g.*, for production) has been dishonored. If the Legislature had intended "request" to mean a motion filed in court, as opposed to discovery requests, it would have used the term "motion" or "application," as it has elsewhere. *See, e.g.*, NRS 463.341 ("An **application** to a court for an order requiring the Board or the Commission to release any information declared by law to be confidential shall be made only upon **motion** in writing on 10 days' written notice to the Board or Commission . . .") (emphasis added). The Legislature did not express such an intention.

2. NRS 463.120(6) is substantive and presumed to operate prospectively.

A privilege rule is not merely a rule of practice that refers to "the processes of litigation." It is a "substantive or quasi-substantive" rule if it "affects private conduct *before* litigation arises." *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 555 n.2 (2d Cir. 1967) (emphasis added); *see also* FRE 501, advisory committee's note (" . . . federal law should not supersede

that of the States in substantive areas such as privilege absent a compelling reason").

The Court recently pointed out that "[s]ubstantive statutes are presumed to operate only operate prospectively," unless the drafters clearly intended otherwise. *Sandpointe*, 129 Nev. at ___, 313 P.3d at 853. The statute in issue here has no legislative history that would suggest the drafters of S.B. 376 intended it, contrary to its express terms, to apply retroactively. When a new statute affects settled expectations, such as by attaching a "new disability in respect to transactions . . . already past," the statute is said to have a retroactive effect. *Id.* at ___, 313 P.3d at 853 (internal quotation marks and quotations omitted).

In 2011-2012, more than five years before NRS 463.120(6) was enacted, WRL had no expectation of privilege or confidentiality when it voluntarily communicated with the NGCB about Mr. Okada's alleged unsuitability. *See* NRS 463.120(4) (providing for confidentiality only in enumerated cases and creating exceptions allowing for courts to compel disclosure). As applied by the district court, the gaming privilege enacted under NRS 463.120(6) would have an impermissible retroactive effect, because it deprives Aruze of its *right* to responses to prior discovery

requests seeking the non-privileged information WRL voluntarily disclosed to the NGCB about Aruze in 2011 and 2012. In other words, the district court's reliance on NRS 463.120(6) gives it retroactive effect because it attaches "new legal consequences to events completed before its enactment." *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994).

Even assuming the privilege in issue is purely procedural, the privilege of NRS 463.120(6) by its express terms applies only prospectively to requests made on or after June 12, 2017. S.B. 376 § 2, Vol. II, PA228. By contrast, the privilege conferred by the statute involved in *Mattison v. Pullen*, 353 A.2d 327 (Vt. 1976)—the principal case on which WRL relied in the district court to support its argument that NRS 463.120(6) is procedural and thus applies to this case—did not distinguish between discovery requested before its enactment and discovery requested after enactment. The Vermont Supreme Court said, "when a new enactment deals with practice and procedure only, it applies to all action[s]," including discovery requests made before the effective date of the enactment, "*unless otherwise expressed*" by the legislature. *Id.* at 329 (citing *Murray v. Mattison*, 63 Vt. 479, 480, 21 A. 532, 532 (1891)) (emphasis added). WRL made no mention of this exception in argument to the district court. It should have, because

the Nevada Legislature "otherwise expressed" itself when it said the "confidentiality and privilege" set forth in NRS 463.120(6) only apply to "requests" made on or after June 12, 2017. S.B. 376 § 2, Vol. II, PA228. Thus *Mattison v. Pullen* is not authority for applying this newly-enacted amendment to requests for production made prior to the effective date of subsection 6.

Given that the express language of the act indicates the new privilege applies only prospectively, and a retroactive application would deprive Aruze of its right to know what information was or was not communicated between WRL and the NGCB prior to WRL's redemption of Aruze's shares, the district court should be directed to vacate its erroneous Order and enter an amended order compelling the requested discovery that Aruze has been requesting since 2014.

B. NRS 463.120(6) must be narrowly construed.

"[T]his court has consistently held that "statutory privileges should be construed narrowly, according to the 'plain meaning' of [their] words," because they hinder the quest for the truth. *Rogers v. State*, 127 Nev. 323, 328, 255 P.3d 1264, 1267 (2011) (citing, e.g., *Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. 380, 415, 873 P.2d 946, 968 (1994) (work product

doctrine and attorney-client privileges must be "strictly confined within the narrowest possible limits" because they "obstruct the search for truth and . . . their benefits are, at best, indirect and speculative" (internal quotation marks, modifications, and quotation omitted).

1. Narrow construction of NRS 463.120(6) would be consistent with the statutory scheme of NRS Chapter 463.

"Statutes within a scheme and provisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results." *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001). Thus, NRS 463.120(6) should be interpreted consistent with the purpose of NRS Chapter 463 and in harmony with other provisions and subsections of NRS 463.120.

NRS 463.120(6) is part of the Nevada Gaming Control Act. One of the Act's overriding purposes is to instill "public confidence and trust" in honest, competitive, and non-corrupt gaming operations. NRS 463.0129(1)(b)-(c) . This purpose is reflected, for example, in NRS 463.110, which provides that all regular or special meetings of the NGCB are "open to the public except for investigative hearings" NRS 463.110(1)–(2).

Subsections (1) and (2) of NRS 463.120 are consistent with that purpose by providing that the NGCB's records of special and regular meetings, as well as records of gaming license applications and acts taken with respect to those applications are open to the public. NRS 463.120(1)-(2).

Subsection (4) of NRS 463.120 provides a list of information and data that is deemed "confidential" (but not privileged)—*e.g.*, information provided by the government or "an informer" and information obtained by a NGCB's agent pursuant to an audit or investigation—but that information may be disclosed "upon a lawful order of a court. . . ." NRS 463.120(4). Subsection (5) of NRS 463.120 protects as "confidential and absolutely privileged" information and data "prepared or obtained by an agent or employee of the Board or Commission" related to certain topics, but those protections may be waived and the information disclosed to certain governmental entities. NRS 463.120(5). However, the confidentiality and privilege under subsection (5) are provided for the benefit of the NGCB or the Gaming Commission; *not* the licensee. NRS 463.120(4)-(5).

The new NRS 463.120(6) goes much further. It provides that any and all "information and data"—regardless of their nature—provided

by a gaming licensee to an agent of the NGCB "in connection with its regulatory, investigative or enforcement authority" are confidential and privileged, and that both the NGCB and the "licensee ha[ve] a privilege to refuse to disclose such information." NRS 463.120(6)(a)-(b). There is no waiver provision or exception for disclosure under a court order. Because NRS 463.120(6) is in derogation of the Act's declared public policy, it should be "strictly confined within the narrowest possible limits consistent with the logic of their principles." *Whitehead*, 110 Nev. at 414-415, 873 P.2d at 968 (holding same for work product and attorney-client privileges) (modifications and internal quotations omitted).

2. Narrow construction is necessary to ensure that the privilege conferred by NRS 463.120(6) does not displace other provisions of the statute.

Statutes should be not construed in a manner that renders "any part of a statute inconsequential." *Savage v. Pierson*, 123 Nev. 86, 94, 157 P.3d 697, 702 (2007). If construed literally, NRS 463.120(6) produces inconsistent results. For example, if an "informer" provides information to the NGCB, such information is merely confidential and subject to disclosure under NRS 463.120(4)(c), but if the informer is also a licensee and the information was provided "in connection with [NGCB's]

regulatory, investigative or enforcement authority," then the information is absolutely privileged. Or if an agent of the NGCB obtains information from a gaming licensee "pursuant to an . . . investigation," such information is no longer merely confidential under NRS 463.120(4)(e), but absolutely privileged under NRS 463.120(6). Such a result would render NRS 463.120(4)(e) meaningless, which must be avoided, if at all possible. *Savage*, 123 Nev. at 94, 157 P.3d at 702.

Moreover, NRS 463.120(6) does not require that the information provided to the NGCB be privileged to begin with. Thus, if a licensee voluntarily provides the NGCB with factual information relevant to issues in a lawsuit that is otherwise discoverable, *Wardleigh v. Dist. Ct.*, 111 Nev. 345, 352, 891 P.2d 1180, 1184 (1995), or—worse—false information relevant to issues in a lawsuit, this new statute makes it privileged and non-discoverable. The subject of that non-privileged relevant or false information volunteered to the NGCB would have no way of knowing, verifying, or refuting that information *or* using it in the lawsuit. It is one thing to be precluded from bringing a civil action based on false information provided to the NGCB, *see* NRS 463.3407; *Hampe v. Foote*, 118 Nev. 405, 47 P.3d 438 (2002); it is quite another, as is the case here, to be

prohibited from discovering evidence that could show WRL was seeking the NGCB's approval for redemption of Aruze's stock and Mr. Okada's ouster when the regulator had not taken any position on either of those subjects *and* WRL's licenses were not in jeopardy if the licensee did not do either or both. Vol. I, PA96 (4th Am. Countercl. ¶ 4).

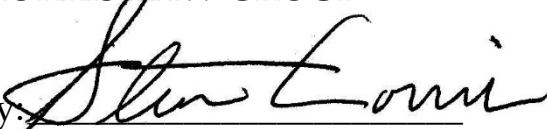
It is therefore crucial to maintaining public trust and impartial judicial administration to construe NRS 463.120(6) in the narrowest way possible to only allow licensees to claim confidentiality and privilege over documents and information provided to the NGCB that a licensee was by law *required* to file with the NGCB to fulfill its regulatory, investigative, or enforcement authority. Information *voluntarily* provided to the NGCB, such as that provided by WRL here, is not such information just because it may subsequently become related to some aspect of the Board's "regulatory, investigative or enforcement authority." Without such a limiting construction, NRS 463.120(6) would produce unreasonable and absurd results, as it has here. As Justice Scalia famously remarked, "applying the '[in connection with]' provision according to its terms [i]s a project doomed to failure, since, as many a curbstome philosopher has observed, everything is [connected] to everything else." *Cal. Div. of Labor*

Standards Enf't v. Dillingham Constr., N.A., 519 U.S. 316, 335 (1997) (Scalia, J., concurring).

VI. CONCLUSION

The Court should consider this writ petition to clarify the scope and effect of NRS 463.120(6). Because the district court overlooked the express terms of the statute to deny Aruze documents and testimonial discovery of relevant information voluntarily provided to the NGCB five years before—and requested in the litigation several years before—the new privilege's enactment, the Court should issue a writ of mandamus the district court requiring it to vacate its Order denying Aruze's Motion to Compel and enter an amended order directing WRL to produce the requested discovery Aruze had been seeking for years prior to the effective date of the statute.

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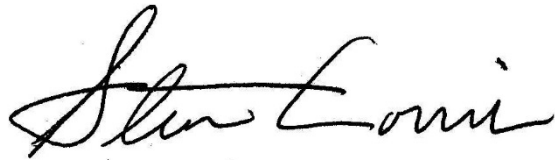
VERIFICATION

1. I, Steve Morris, declare:
2. I am one of the attorneys for the Petitioners herein;
3. I verify that I have read the foregoing **PETITION FOR**

WRIT OF PROHIBITION, OR IN THE ALTERNATIVE MANDAMUS

that the same is true my own knowledge, except for those matters therein stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury of the laws of Nevada, that the foregoing is true and correct.

A handwritten signature in cursive script that reads "Steve Morris". The signature is written in black ink and is positioned above a horizontal line.

STEVE MORRIS

CERTIFICATE OF COMPLIANCE

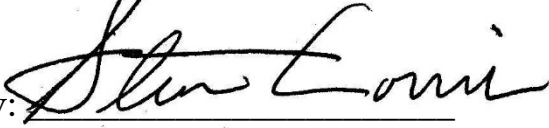
1. I hereby certify that I have read this **PETITION FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE MANDAMUS**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Palatino 14 point font and contains 4,888 words.

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to

be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

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