Case No. 74335

In the Supreme Court of Nevada

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

Appellant,

vs.

TITLEMAX OF NEVADA, INC., AND TITLEBUCKS D/B/A TITLEMAX, a Nevada Corporation,

Respondent,

APPEAL
from the Eighth Judicial District Court, Clark County
The Honorable JOE HARDY, District Judge
District Court Case No. A-16-743134-J

RESPONDENT'S ANSWERING BRIEF

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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.

1. TitleMax of Nevada, Inc. is a Nevada corporation. It is solely owned by its parent, TMX Finance LLC, which in turn is privately held by TMX Finance Holdings, Inc., itself a privately held corporation. No publicly traded company owns more than 10% of the stock in any of these entities. No publicly traded company has an interest in this appeal.

2. Daniel F. Polsenberg, Joel D. Henriod, and Dale Kotchka-Alanes of Lewis Roca Rothgerber Christie LLP, and Patrick J. Reilly of Holland & Hart, LLP, have appeared for TitleMax in the district court and in this Court.

DATED this 20th day of July, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
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ROUTING STATEMENT

This matter should be retained by the Supreme Court. Although this is an appeal from a judicial review of an administrative proceeding (NRAP 17(b)(4)), it presents a principal issue of statewide importance regarding statutory construction and penalties for alleged willful behavior (NRAP 17(a)(14)). In addition, the penalties imposed here could involve tens of millions of dollars. (*E.g.*, 72 App. 16980–81.) This case presents pure questions of law involving a substantial conflict between the legislative intent and the agency's contrary objective.

The FID admits "[t]his court could consider retaining this matter pursuant to NRAP 17(a)(14) on the basis that there is 'a question of statewide public importance.'" (AOB at 6.)

ISSUES PRESENTED FOR REVIEW

1. Do the provisions of NRS 604A.445(3), which govern only the "original term" of a loan, apply to grace periods, which are separately governed by NRS 604A.070 and 604A.210?

2. In charging only the contractual interest (not compounding or charging a fee or a higher rate), did TitleMax comply with NRS

604A.210 during a grace period, especially in light of the statute's legislative and administrative history?

3. Did the district court properly conclude that TitleMax did not willfully violate any provision of NRS Chapter 604A, reversing the administrative sanction for a willful violation, where the sanction required return of all interest and principal, amounting to tens of millions of dollars?

STATEMENT OF THE CASE

This is an appeal from the judicial review reversing an administrative agency determination, Eighth Judicial District Court, the HONORABLE JOE HARDY, District Judge.

STATEMENT OF THE FACTS AND PROCEEDINGS

A. TitleMax's Offering of the Grace Period Payments Deferment Agreement (GPDA)

Under NRS 604A.445, the original term of a title loan can be 30 days or up to 210 days if certain conditions are met.

1. TitleMax's Original Grace Period Plan

TitleMax originally offered a 30-day product in Nevada and allowed customers to refinance up to six times. TitleMax offered a repayment

plan that incorporated a grace period under which the customer had to make minimum interest payments, but could then take an additional seven or eight months to repay principal only. (6 App. 1328–29.)

The FID took issue with TitleMax's 30-day product, arguing only that TitleMax did not adequately take into account customers' ability to repay the loan in 30 days. (6 App. 1329–30.)

TitleMax disagreed with the FID's interpretation, but nevertheless stopped offering the 30-day product in a good faith attempt to appease the FID. (6 App. 1329.)

2. TitleMax then Offered the Grace Period Payment Deferment Agreement (GPDA)

In 2014, as an alternative to the 30-day product, TitleMax began offering a 210-day loan. (6 App. 1329–30.)

To offer customers flexibility in repayment, TitleMax, relying on counsel, also began offering a Grace Period Payments Deferment Agreement ("GPDA"). (6 App. 1331, 1347.) The GPDA contained a payment schedule comprised of fourteen 30-day payment periods. (6 App. 1334; 51 App. 11940–42.) Under the GPDA, the customer was charged only 210 days of interest, and the interest rate under the loan agreement remained unchanged. (51 App. 11940–42.)

The first seven payments could be interest-only payments at the customer's option, and then the customer had an additional 210 days to repay the principal ***without any interest*** or fees included. (51 App. 11940–41; 6 App. 1333, 1339, 1341.) The payment schedule under the GPDA was as follows:

PAYMENT NUMBER	AMOUNT OF PAYMENT	DEFERRED PERIODIC DUE
1	<Interest Only Pymt. on New Principal Bal.>	<First 30 Day Due Date>
2	^same as above	^Plus 30 Days
3	^same as above	^Plus 30 Days
4	^same as above	^Plus 30 Days
5	^same as above	^Plus 30 Days
6	^same as above	^Plus 30 Days
7	^same as above	^Plus 30 Days
8	<New Principal bal. divided by 7>	^Plus 30 Days
9	<New Principal bal. divided by 7>	^Plus 30 Days
10	<New Principal bal. divided by 7>	^Plus 30 Days
11	<New Principal bal. divided by 7>	^Plus 30 Days
12	<New Principal bal. divided by 7>	^Plus 30 Days
13	<New Principal bal. divided by 7>	^Plus 30 Days

14	<New Principal bal. divided by 7> **If odd amt list odd amt here	^Plus 30 Days

(51 App. 11940–41.)

There was no customer deception in the GPDA. The district court expressly found this to be true. (74 App. 17409.)

When voluntarily signing the GPDA, customers acknowledged that their obligation to pay simple interest under the loan agreement remained unchanged and that interest would be charged at the original contractual interest rate. (51 App. 11940–42.)

TitleMax did not charge any fees for entering the GPDA. (4 App. 872–73; 5 App. 990; 6 App. 1249.) The district court also concluded this as a matter of law. (74 App. 17409.) In fact, the FID admitted that TitleMax charged no fee. (4 App. 872–73; 5 App. 990; 6 App. 1249.)

While the GPDA allowed for interest-only payments for the first 210 days, customers could make payments on the principal at any time during the first 210 days. In fact, TitleMax had many customers who repaid their loan in full within the first 210 days, even though they had signed a GPDA.[1] The GPDA could still be of value to such customers,

[1] (*See, e.g.,* 15 App. 3434–52, 37 App. 8805–27, 23 App. 5499–24 App.

though, because it allowed customers the flexibility to make lower initial payments (i.e. $260/month instead of $452/month) and then pay off the entire loan when they were able. (*E.g.*, 35 App. 8247, 8251–53, 8257.) TitleMax offered the GPDA to its customers precisely to give them such flexibility in making their payments. (6 App. 1331–32.)

Before TitleMax offered the GPDA, it consulted with its own legal department and outside counsel, both of whom advised that the GPDA complied with Nevada law. (6 App. 1339–40, 1347, 1360.)

B. The Conflict between the FID and TitleMax

1. The FID Alleges a Violation of NRS Chapter 604A but Does Not Rebut TitleMax's Position

When the FID closed its 2014 examination of TitleMax, it issued a Report of Examination with a "Needs Improvement" rating and stated that TitleMax's GPDA "violates NRS 604A.445(3) *and NRS 604A.210*." (44 App. 10212–28 .)

5521, 42 App. 9689–9715, 34 App. 8162–85, 9 App. 2067–10 App. 2085, 35 App. 8245–69, 18 App. 4045–67, 18 App. 4069–94, 11 App. 2387–2409, 29 App. 6903–25, 20 App. 4551–74, 37 App. 8746–67, 19 App. 4380–99, 16 App. 3786–17 App. 3806, 12 App. 2712–31, 27 App. 6393–6413, 14 App. 3068–86, 21 App. 4993–5014, 13 App. 3026–45, 22 App. 5238–56, 44 App. 10115–34, 8 App. 1761–85, 8 App. 1823–9 App. 1848, and 33 App. 7882–7902.)

Shortly after, TitleMax — through counsel — wrote a detailed letter to the FID, responding to the alleged statutory violations. (48 App. 11285–94.) In this letter, TitleMax spent several pages setting forth its position why the GPDA did not violate NRS 604A.210 and 604A.445. (48 App. 11289–94.) TitleMax informed the FID, "As an alternative to the 210-day single-pay loan, the Companies are willing to revert back to their prior approach with 30-day single pay loans, which the Companies believe are in full compliance with applicable law." (48 App. 11293.) TitleMax explained that it considered the GPDA to comply with Nevada law and requested that the FID

> change its 'Needs Improvement' rating to 'Satisfactory' for each of the 2014 audits. If the Division believes that our analysis is incorrect or that our procedures will result in further negative regulatory findings; however, please respond to us in writing.

(48 App. 11293–94.)

In the FID's response letter, the FID addressed a different statutory issue and then stated in a single sentence: "With regard to your other matters raised in your February 9 Letter, the FID stands by its position." (48 App. 11298–300.) The FID did not respond to TitleMax's offer to revert to the 30-day loan product, nor did the FID

offer any reasoning, explanation, or legal authority for the proposition that the GPDA allegedly violated NRS 604A.210 and 604A.445.

The FID conducted another examination of TitleMax in mid-2015. (44 App. 10230.) In its 2015 Report of Examination, the FID issued an "Unsatisfactory" rating to TitleMax, citing TitleMax's offering of the GPDA as "a repeat violation." (44 App. 10230–42.)

2. The FID Attempts to Thwart TitleMax's Effort to Get a Judicial Resolution of the Statute

On June 1, 2015, 16 days before that year's examination was completed, TitleMax filed a declaratory relief action in the district court. The declaratory relief action was separate from and commenced before the underlying proceedings. (6 App. 1289, 1368; 51 App. 11991–94.) TitleMax sought declaratory relief as to whether the GPDA violated *NRS 604A.210* and 604A.445. (51 App. 11991–94.)

On October 6, 2015, the FID moved to dismiss TitleMax's pending declaratory relief action for alleged "failure to exhaust administrative remedies." (52 App. 12304–53 App. 12315.) *The same day*, the FID filed the administrative complaint against TitleMax that forms the basis of this appeal. (8 App. 1595–1611.)

Although the FID convinced a district judge to dismiss the declaratory judgment action,[2] this Court reversed, holding that "[e]xhaustion is not required here because TitleMax sought only the interpretation of statutes." *TitleMax of Nevada, Inc. v. State Dep't of Bus. & Indus., Fin. Institutions Div.*, Case No. 69807, Doc. No. 17-33587 at 5, 404 P.3d 415, 2017 WL 4464351, at *2 (Nev. 2017) (unpublished) ("*TitleMax I*"). This Court recognized that TitleMax requested a declaration "that the deferment agreement's interest formula did not accrue 'additional interest' during a grace period in violation of either NRS 604A.210 or NRS 604A.445." *Id.*

Although the FID's motion to dismiss the declaratory relief action was meritless, by filing it the FID prevented TitleMax from obtaining a judicial construction of NRS 604A.210 and 604A.445(3) until after the FID prosecuted the underlying administrative action.

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[2] A minute entry granting the FID's motion to dismiss was entered December 14, 2015 (Case 69807, 3 JA 520). Unable to obtain a judicial construction of NRS 604A.210 and 604A.445(3) and being in the midst of administrative proceedings prosecuted by the FID, TitleMax stopped offering the GPDA on new loans in December 2015. (6 App. 1345–46, 1360; 7 App. 1485.) In the months after TitleMax stopped offering the GPDA, default rates on its loans in Nevada **nearly doubled**. (7 App. 1472–73.)

C. The Administrative Proceedings Against TitleMax

In its administrative complaint against TitleMax, the FID alleged that TitleMax willfully violated NRS 604A.210 and NRS 604A.445. (8 App. 1595–1611.)[3]

As noted by the district court, "the ALJ stated that 'NRS 604A.210 and NRS 604A.[0]70 are the only provisions in Chapter 604A that address grace periods,' but nevertheless concluded that the GPDA had to comply with NRS 604A.445(3)." (74 App. 17413 (quoting 58 App. 13581–84).) The ALJ then found that the GPDA did not comply with NRS 604A.445(3) because it "is an illegal extension of the loan in violation of NRS 604A.445(3)(c)" and the payments are not ratably and fully amortized. (58 App. 13583–84.)

The ALJ concluded that the GPDA "does not constitute a true grace period" and that the "imposition of seven interest-only payments is simply the impermissible charging of additional interest," as

[3] The FID also alleged that TitleMax violated NAC 604A.230. The administrative law judge concluded, however, that TitleMax did not violate NAC 604A.230's prohibition against guarantors by allowing individuals who were not legal owners of the vehicle to be co-borrowers on the title loan. (58 App. 13584–85.) The FID does not contest that ruling.

"TitleMax stands to earn more money in interest charges under the [GPDA]." (58 App. 13583–84.)

The ALJ also found that TitleMax willfully violated NRS 604A.445(3) by continuing to offer the GPDA after being told by the FID during 2014 and 2015 examinations that the GPDA was unlawful. (58 App. 13586–87.) Since "TitleMax was placed on notice by FID that" the GPDA "violated the law" no later than December 18, 2014, the ALJ ruled that "every [GPDA] entered into after December 18, 2014, is void, and TitleMax is not entitled to collect, receive or retain any principal, interest or other charges or fees with respect to those loans." (58 App. 13587.) Only 307 loans, however, were actually in evidence in the administrative proceedings. (*E.g.*, 72 App. 16980.) As a result, the ALJ voided loans that she had never seen because they were never entered as evidence in the administrative proceeding.

The determination of a willful violation was based on TitleMax continuing to offer the GPDA after it had been advised by lay FID examiners that they believed the GPDA violated the statutes (58 App. 13586–88), even though the FID's counsel would not give an explanation to TitleMax's lawyers why TitleMax's interpretation was

incorrect and even though the FID had deliberately thwarted TitleMax's attempt to obtain a judicial interpretation.

The ALJ ordered that:

1. TitleMax immediately cease and desist offering the GPDA to customers (which TitleMax had already done);
2. TitleMax conduct a full accounting and ***return of all principal and interest*** it collected under every GPDA entered into after December 18, 2014;
3. TitleMax pay an administrative fine of $307,000, with $257,000 held in abeyance provided TitleMax was, and remained, compliant with NRS 604A.445; and
4. TitleMax compensate the FID for the costs expended on the court reporter and transcripts in the administrative proceedings.

(58 App. 13588.)

From proceedings in the district court, the return of principal and interest in all cases, not just the 307 matters presented to the ALJ, could reach a penalty in the tens of millions of dollars. (*E.g.*, 72 App. 16980–81.)

D. The District Court Determined that the Critical Statute Is NRS 604A.210 and that TitleMax Did Not Violate It at All, Let Alone Willfully

1. The District Court Agreed with TitleMax's Interpretation of the Controlling Statutes

The district court reversed the ALJ's order. The district court found legal error in the ALJ's conclusions regarding TitleMax's interpretation of NRS 604A.070, NRS 604A.210, and NRS 604A.445(3). (74 App. 17414.) The district court concluded that the GPDA as written did not violate these statutes. (*Id*.) The district court also ruled that, even if there had been some technical violation of one of the statutes, TitleMax did not willfully violate any of these provisions. (74 App. 17414–15, 17420–25.)

The district court held that the plain language of NRS 604A.445(3) indicates that this statute applies only to the "original term" of the loan, and does not govern grace periods. (74 App. 17414, 17416–17.) NRS 604A.445(3) does not set a maximum time period on the loan, and amortization is not a requirement for grace periods, the district court explained. (*Id*.)

The district court held that the word "additional" as used in NRS 604A.210, must mean more than the original contractual rate of

interest. (74 App. 17414, 17417–20.) The district court also concluded that the legislative history of NRS 604A.210 supports TitleMax's statutory interpretation. (74 App. 17414, 17418–20.)

2. In the Alternative, the District Court Held that TitleMax Could Not Be Sanctioned for Willful Misconduct

The district court also held in the alternative that, "at a minimum," TitleMax's statutory interpretation, if not correct, was reasonable and precluded a finding of willfulness. (74 App. 17414–15, 17420–25.) TitleMax could not be penalized for willful conduct. The district court rejected the ALJ's supposition that TitleMax acted willfully by not immediately submitting to the questionable statutory interpretation advanced by the FID's lay examiners. (74 App. 17415, 17422–25.)

The district court also noted that the FID had previously attempted to pass a regulation in 2012 that would have prohibited charging any interest during a grace period, but did not do so. This demonstrated to the district court that TitleMax reasonably interpreted NRS 604A.210 and did not act willfully. (74 App. 17414, 17421.)

The district court also explained that TitleMax's conduct could not be considered willful in light of the FID's failure to respond to TitleMax's request for an explanation of the FID's position, even though TitleMax had set out a lengthy articulation of its legal position. (74 App. 17415, 17422–23) The district court also considered TitleMax's reliance on counsel, although not dispositive, to be yet another indication that TitleMax acted in good faith and did not willfully violate any provision of NRS 604A. (74 App. 17414–15, 17421–22.)

In sum, the district court explained, "the ALJ's ruling is clearly erroneous, arbitrary and capricious, and is hereby reversed and vacated." (74 App. 17415.)

STANDARD OF REVIEW: NO DEFERENCE TO THE FID OR THE ADMINISTRATIVE LAW JUDGE ON CONSTRUCTION OF THE STATUTES

The district court held that NRS 604A.070, NRS 604A.210, and NRS 604A.445 were unambiguous. Under this circumstance, neither that court nor this Court may defer to the FID's interpretation of the statutes. The FID is not entitled to deference by this Court in determining the meaning of the statutes' plain language.

The question whether TitleMax's GPDA complied with NRS 604A.210 is a purely legal determination upon which the Court owes no deference to the FID or to the ALJ. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (courts decide "pure legal questions without deference to an agency determination") (internal quotation marks and citation omitted); *Manke Truck Lines, Inc. v. Pub. Serv. Comm'n*, 109 Nev. 1034, 1036–37, 862 P.2d 1201, 1203 (1993) (questions of statutory construction are "purely legal issue[s] . . . reviewed without any deference whatsoever to the conclusions of the agency").[4]

SUMMARY OF THE ARGUMENT

The FID seeks to apply the wrong statute. Grace periods under NRS Chapter 604A are explicitly governed by NRS 604A.070 and NRS 604A.210, the statutory provisions that address grace periods. Grace periods are not governed by NRS 604A.445(3), which governs the

[4] While the FID suggests that an agency's conclusions of law that are closely related to the agency's view of the facts are entitled to deference (AOB at 14), that standard does not apply here. (73 App. 17224–25.) This Court has already concluded that only pure statutory interpretation is needed to determine whether the interest formula in the GPDA violates either NRS 604A.210 or NRS 604A.445. *TitleMax I*, Doc. No. 17-33587 at 5. And the FID itself conceded that "[t]he facts necessary to resolve this judicial review are not subject to any legitimate dispute." (73 App. 17197.)

"original term" of a title loan and does not mention grace periods. NRS 604A.210 is an exception to the requirements of NRS 604A.445(3). This is clear both from the statutory language and from common sense. It does not make sense to apply the requirements of NRS 604A.445(3), such as amortization, to grace periods. By definition, a grace period is a period of deferment on principal payments, so principal and interest could not be "amortized."

As the district court correctly held, TitleMax complied with NRS 604A.210, the applicable statute for grace periods. Both the language and the legislative history of NRS 604A.210 make it clear that the prohibition against "additional interest" prevents lenders from charging a higher interest rate or compound interest during a grace period, but it does not forbid *any* interest. In fact, the bill that became NRS 604A.210 originally would have prohibited charging "any interest," but that was changed in the final version to prohibit just "additional interest." The Legislature made that amendment to clarify that lenders could charge the original contractual rate of interest during a grace period—just not a higher interest rate or compounded interest. While the FID proposed a regulation imposing the interpretation it seeks to enforce now, that

regulation was never passed. And the FID's recent attempt to change the statutory language did not work either; instead, the legislature adopted TitleMax's interpretation in a clarifying amendment. TitleMax's Grace Period Payments Deferment Agreement (GPDA) complied with NRS 604A.210 by charging only the contractual rate of interest during a grace period.

Even assuming that reasonable minds could differ as to the meaning of the statutory provisions, TitleMax did not willfully violate any provision of NRS Chapter 604A. The district court agreed with TitleMax's interpretation, showing that TitleMax's position was not objectively unreasonable. At a minimum, the district court was correct to reverse the administrative decision imposing tens of millions of dollars in sanctions on TitleMax.

ARGUMENT

I.

THE REQUIREMENTS OF NRS 604A.445(3) DO NOT APPLY TO GRACE PERIODS

The FID is simply arguing the wrong statute in relying on NRS 604A.445(3), rather than NRS 604A.210 and 604A.070. While the FID

claims that this case is as easy as looking at a speed limit sign, the agency is looking at the wrong sign.

A. The Plain Language of the Statutes Makes Clear That a Grace Period under NRS 604A.210 Is an Exception to the Requirements of NRS 604A.445(3)

1. NRS 604A.445(3)'s General Rule

At issue in these proceedings are various provisions of NRS Chapter 604A.[5] The FID relies on a general provision, NRS 604A.445(3), which by its express language applies only to the "original term" of a 210-day loan:

> 3. The original term of a title loan may be up to 210 days if:
>
> (a) The loan provides for payments in installments;
>
> (b) The payments are calculated to ratably and fully amortize the entire amount of principal and interest payable on the loan;
>
> (c) The loan is not subject to any extension; and
>
> (d) The loan does not require a balloon payment of any kind.

[5] Chapter NRS 604A was recently amended in 2017. These changes clarify the provisions at issue, as will be discussed *infra*, but the citations here are to the provisions in effect before 2017.

NRS 604A.445(3).

2. The Exception for "Grace Period" in NRS 604A.210 Controls this Case

As the district court concluded, however, TitleMax relies on an exception. NRS 604A.210 makes clear that "the provisions of this chapter do not prohibit . . . a grace period" if certain conditions are met:

> The provisions of this chapter do not prohibit a licensee from offering a customer a grace period on the repayment of a loan or an extension of a loan, except that the licensee shall not charge the customer:
>
> 1. Any fees for granting such a grace period; or
>
> 2. Any additional fees or additional interest on the outstanding loan during such a grace period.

NRS 604A.210. For a grace period, the licensee cannot charge a fee to grant it or "additional interest" during it.

3. The Definition of "Grace Period" in NRS 604A.070 Underscores that NRS 604A.210 Controls

NRS 604A.070 defines "grace period" to mean "any period of deferment offered gratuitously by a licensee to a customer if the licensee complies with the provisions of NRS 604A.210." In other words, if a grace period complies with NRS 604A.210, it is a grace period.

4. The Definition of "Extension" in NRS 604A.065 Expressly Excludes a "Grace Period"

The FID claims that the GPDA is an extension, which is prohibited under NRS 604A.445(3). But the definition of "extension" under NRS 604A.065 expressly excludes a grace period under NRS 604A.210 and 604A.070:

> 1. "Extension" means any extension or rollover of a loan beyond the date on which the loan is required to be paid in full under the original terms of the loan agreement, regardless of the name given to the extension or rollover.
>
> 2. *The term does not include a grace period.*

NRS 604A.065 (emphasis added). So, while extensions are not allowed under NRS 604A.445(3), a grace period complying with NRS 604A.210 is not an extension, and can never be treated as such.

To determine if the GPDA is a grace period, and therefore an exception to NRS 604A.445(3), this Court needs to examine NRS 604A.210 and 604A.070, not NRS 604A.445(3).

B. NRS 604A.445(3) Does Not Govern Grace Periods and Thus Does Not Apply to the GPDA

The FID's core position is that TitleMax's grace period violated the general rule of NRS 604A.445(3). Indeed, the agency states the issue presented on the statutory interpretation arguments as "[w]hether the [d]istrict [c]ourt's order is contrary to the plain language of NRS 604A.445(3) . . . ." (AOB at 6.) But the FID is focusing on the wrong statute, the general rule instead of the specific NRS 604A.210 exception.

As the district court recognized, under the plain language of NRS 604A.445(3), the 210-day limit applies only to the original term of the loan; that subsection refers to and governs the original term of the loan, not grace periods. (74 App. 17414, 17416–17.)

NRS 604A.445(3) does not set a maximum time period on a loan. It does not say that a title loan can never be longer than 210 days. Rather, by providing that the "original term" of a title loan can be up to 210 days, the statute contemplates that a title loan can be of longer duration if a "grace period" is included under NRS 604A.210. While NRS 604A.445(3) prohibits "extensions" of a 210-day title loan, the

definition of "extension" specifically excludes grace periods. NRS 604A.065(2).

The requirements of NRS 604A.445(3) thus do not apply to grace periods, and TitleMax did not violate NRS 604A.445(3) by offering the GPDA to its customers.

C. NRS 604A.445(3) Is Not a "Specific" Statute that Controls over NRS 604A.210

The FID argues that NRS 604A.445(3) controls because it is a "specific" statute governing 210-day title loans, claiming that subsection 3 is an "exception" to NRS 604A.445(1), which allows for 30-day loans. (AOB at 11–12, 25.) But that is just wrong.

There are two types of auto title loans under NRS 604A.445. Subsection (1) provides for a 30-day loan, which can be extended six times for a total of 210 days, and subsection (3) provides for a 210-day loan. They are two separate categories, and one is not an exception to the other. A grace period under NRS 604A.210 is an exception to both.

Under the FID's reading of NRS Chapter 604A, the grace period provided for in NRS 604A.210 could never be an exception to either form of title loan, or any other type of loan. But the FID is wrong. The grace period is an exception to any general provision defining a loan.

NRS 604A.210 expressly states, "The provisions of this chapter [604A] do not prohibit a licensee from offering a customer a grace period on the repayment of a loan or an extension of a loan . . . ."

D. Amortization under NRS 604A.445(3) Is Not a Requirement for Grace Periods

As the FID acknowledged, there is no amortization requirement for grace periods. (4 App. 882, 5 App. 983, 6 App. 1270; *see also* 5 App. 1096–97 ("Q. . . . [T]here's no requirement that the grace period be fully amortized; correct? A. Correct.").)

Requiring amortization during a grace period, or a period of *deferment* on principal payments, is nonsensical. If no payments are being made on the principal, it makes no sense to "ratably and fully amortize the entire amount of principal and interest payable on the loan." *Cf.* NRS 604A.445(3)(b).

E. The ALJ and the FID Are Wrong that No Title Loan Can Exceed 210 Days

NRS 604A.445(3) does not say that a title loan can never be longer than 210 days. NRS 604A.445(3) stands in contrast to provisions like NRS 604A.408(3), which prohibits establishing or extending the period for repayment of a deferred deposit or high-interest loan "for a period

that exceeds 90 days after the date of origination of the loan." If the Legislature had wanted to set a maximum time limit on a title loan, it knew how to do so.[6]

If no title loan could ever be longer than 210 days, then there could never be a grace period on a 210-day title loan. But that is not what NRS 604A provides. Rather, by providing that the "original term" of a title loan may be up to 210 days and prohibiting only extensions, NRS 604A.445(3) contemplates that a title loan can be of longer duration if a "grace period" is included under NRS 604A.210.

Indeed, the FID conceded that the mere length of the repayment period under the GPDA was not a violation of any law and that a grace period could be of unlimited duration. (5 App. 1017, 1077–78; 6 App. 1247–49; 7 App. 1516.)

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[6] *Dep't of Taxation v. DaimlerChrysler Servs. N. Am., LLC,* 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) ("Here, the Legislature could have clearly provided [the contended result], but it did not do so."); *see also Jama v. Immigration & Customs Enf't,* 543 U.S. 335, 341 (2005) ("We do not lightly assume that [the Legislature] has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when [the Legislature] has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

NRS 604A.445(3) does not proscribe a maximum time limit on title loans. Nor does it proscribe a maximum time period during which interest can accrue. It merely sets the parameters for the "original term" of a 210-day loan.

II.

TITLEMAX DID NOT CHARGE "ADDITIONAL INTEREST" UNDER NRS 604A.210(2)

TitleMax's GPDA complied with the statutory provisions governing grace periods, NRS 604A.070 and NRS 604A.210.

In the district court, the dispute between the parties focused on the meaning of the phrase "additional interest" in NRS 604A.210(2). Under the plain language of NRS 604A.210, which the district court held to be unambiguous, the word "additional" preceding "interest" means something more than the original contract rate of interest provided for in the loan agreement.

Words in statutes must have meaning.[7] The FID's position was that "any" interest would be additional interest. This interpretation

[7] *S. Nevada Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (courts must interpret statutes "in a way that would not render words or phrases superfluous or make a provision nugatory") (internal quotation marks and citation omitted); *Coast Hotels & Casinos, Inc. v. Nevada State Labor Comm'n*, 117 Nev. 835,

ignores both the rule that each word must have meaning and the legislative history of that particular wording.

A. NRS 604A.210(2) Precludes Only "Additional Interest," Not Just "Any" Interest, during a Grace Period

If the Legislature had intended that the lender could not charge the standard contract interest rate during a grace period, it would have said so. The Nevada Legislature could have prohibited charging "any interest" during a grace period, but it did not. *Contrast* NRS 604A.210(1) (prohibiting "[a]ny fees"), *with* NRS 604A.210(2) (prohibiting "additional interest").[8] Had the Legislature intended that the total "amount" of interest could not exceed the amount stated in the original loan document, it knew how to say so.[9]

841, 34 P.3d 546, 550 (2001) ("[T]his court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.").

[8] *Russello v. U.S.,* 464 U.S. 16, 23 (1983) *(*"Had Congress intended [the contended result], it presumably would have done so expressly as it did in the immediately following subsection").

[9] *See* NRS 604A.435(1)(e) (prohibiting a deferred deposit lender from accepting a "check or written authorization for an electronic transfer of money for any deferred deposit loan in an amount which exceeds the total of payments set forth in the disclosure statement required by the Truth in Lending Act and Regulation Z that is provided to the customer") (emphasis added); *DaimlerChrysler,* 121 Nev. at 548, 119 P.3d at 139 ("Here, the Legislature could have clearly provided [the contended result], but it did not do so."); *see also Jama,* 543 U.S. at 341.

TitleMax charged the contract interest during the grace period, but not "additional" interest beyond that. While the original contract interest rate is applied to the "outstanding loan" during the first seven months, interest is not compounded, nor does the interest rate increase. Rather, interest at the same rate as specified in the original loan agreement accrues and is charged for the first 210-day period. After that, no interest at all is charged for the next seven months.

If no "additional interest" meant that no interest could be charged during a grace period, then the word "additional" would be meaningless. "Additional" must have a meaning different from "any."[10] The prohibition on "additional interest" means that simple interest at the rate specified in the original loan agreement is allowed to accrue.

The district court correctly concluded that NRS 604A.210 is unambiguous: "the prohibition on 'additional interest' means a licensee cannot charge interest at a *rate* of interest higher than that specified in the loan agreement." (74 App. 17418.)

[10] *See Coast Hotels*, 117 Nev. at 841, 34 P.3d at 550 ("[T]his court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.").

B. The 2005 Legislative History Confirms that the Legislature Did Not Mean to Preclude Interest During the Grace Period

1. It is Appropriate to Consult the Legislative History

The FID previously acknowledged that NRS 604A.210 was ambiguous and could be interpreted precisely as TitleMax has interpreted it and did nothing to foreclose such an interpretation. (72 App. 17079; 6 App. 1222.) In the face of ambiguity, consideration of the statute's legislative history is proper. *See Nev. Dep't of Corrs. v. York Claims Servs.*, 131 Nev. Adv. Op. 25, 348 P.3d 1010, 1013 (2015)*; Café Moda v. Palma*, 128 Nev. 78, 82, 272 P.3d 137, 140 (2012); *State Farm Mut. Auto. Ins. Co. v. Comm'r of Ins.*, 114 Nev. 535, 541, 958 P.2d 733, 736 (1998) (considering legislative history where term was "reasonably susceptible to varying interpretations").

2. The Amendment During the Adoption Makes Clear that the Legislature Intended Only to Preclude "Additional" Interest and Higher Rates, Not the Continuation of "Any" Interest during the Grace Period

NRS 604A.210 was adopted as part of 2005's A.B. 384, which was intended to curb egregious lending practices and abusive debt collection

activities. Those activities included making the consumer liable for treble damages upon non-payment, charging "late fees of 2 percent a day," and allowing "a higher interest rate than" the original contract rate if payments were late. (*See, e.g.*, 48 App. 11319–23, 49 App. 11410–33, 50 App. 11590.)

AB 384 originally provided that, during a grace period, a licensee shall not charge "[a]ny fees or interest on the outstanding loan . . . . " (49 App. 11449.) The bill was specifically amended, however, to prohibit only the charge of "additional interest" during the grace period:

> Sec. 23 The provisions of this chapter do not prohibit a licensee from offering a customer a grace period on the repayment of a loan, except that the licensee shall not charge the customer:
>
> 1. Any fees for granting such a grace period; or
>
> 2. Any ***additional*** fees or ***additional*** interest on the outstanding loan during such a grace period.

(49 App. 11555.) This language was added after input from and compromise with members of the lending community. (49 App. 11491.)

The new language was added to alter the effect of the original bill, and the amendment reflects the clear intent not to prohibit "any

interest" during the grace period. A licensee would, however, be prohibited from engaging in practices mentioned above, such as imposing additional late fees or imposing "a higher interest rate than" the contract rate. But the Legislature did not discontinue "any" interest during a grace period. It intended only to provide that while lenders could continue to charge the original rate of interest through grace periods, they just could not charge *additional* interest beyond that.

The FID tries to argue that the GPDA did result in "additional interest" because it resulted in more total interest being charged than would have been charged if the borrower had made timely payments under the original loan. But this interpretation again renders the word "additional" nugatory. If the Legislature did not want any "total amount" of interest to be charged other than that specified in the original loan, it could have just omitted the word "additional," prohibited all interest during the grace period, and reached the same conclusion. The FID's "view thus runs afoul of the cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (internal quotation marks and citation omitted).

The district court acknowledged that the legislative history supports TitleMax's interpretation. (74 App. 17414, 17418–20.) The word "additional" was specifically added to the original proposed statute as a clarification of what interest could be charged during the grace period. (49 App. 11555; 50 App. 11586.) This indicates that the Legislature chose not to prohibit "any interest" being charged during a grace period. *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1151 (9th Cir. 1991) ("As a general canon of statutory construction, where the final version of a statute [changes] language contained in an earlier draft, a court may presume that the earlier draft is inconsistent with ultimate congressional intentions.").

If the Legislature intended the FID's interpretation, it would have simply kept the original language barring lenders from charging "any" interest during a grace period. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 510 U.S. 86, 100–01 (1993) ("we are mindful that Congress had before it, but failed to pass, just such a scheme. . . . We are directed by those words [actually adopted], and not by the discarded draft."). The "any . . . interest" proposal was specifically rejected in favor of the "additional interest" language actually enacted.

(49 App. 11449, 11555; 50 App. 11586.) "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (internal quotation marks and citation omitted). Thus, "[w]here Congress includes [certain] language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended." *Russello*, 464 U.S. at 23–24.

C. The Rejected Regulation Attempting to Prohibit Any Interest Is Further Indication that NRS 604A.210(2) Does Not Preclude Interest

The FID's Deputy Commissioner Carla Kolebuck admitted that NRS 604A.210 could be read to "permit the contract rate of interest to be charged during a grace period so long as it is not considered 'additional interest or fees' on the loan." (72 App. 17079.) At a public workshop in 2012, which TitleMax attended, the FID solicited comments in relation to "POSSIBLE ACTION regarding whether the proposed regulations should be amended to add a regulation to address

accrual of contract interest during a grace period." (72 App. 17071; 6 App. 1366.)

Members of the lending industry proposed a regulation providing "a licensee is permitted to continue to accrue interest at its contract rate during the term of any grace period offered within the terms and conditions of its title loan agreement provided the licensee does not charge any fees or any additional interest, such as a penalty or higher rate of interest, during such grace period." (*See* http://fid.nv.gov/uploadedFiles/fidnvgov/content/Opinion/Propoosed_Regulations/2012-09-21_NoticeOfWorkshop604A.pdf, Ex. C.)[11]

In contrast, the FID submitted proposed regulatory language stating that a licensee could collect interest on the outstanding loan during a grace period "not to exceed the amount of accrued interest and fees as disclosed in the loan agreement. During a grace period, no

[11] As explained in the district court briefing (73 App. 17137), because of double-sided exhibits meant to save paper, every other page of the Notice of Workshop and proposed regulations appears to have been omitted from the administrative record. However, the complete Notice is posted on the FID's website, is capable of accurate and ready determination, and can be judicially noticed. *See* NRS 47.130. The FID did not object to the district court considering the cited exhibits on the FID's website.

interest shall accrue and no fees shall be charged after expiration of the loan period." (72 App. 17074.)

Neither the industry's nor the FID's proposed regulation was ever adopted. (6 App. 1222.)

That the industry and the FID disagreed on the meaning of the statute is indication of its susceptibility of different meanings. That the FID failed to adopt a regulation embodying its interpretation is a reflection of the lack of legitimate support for that construction. The ALJ notably ignored this issue in her decision.

D. The Legislature's 2017 Amendment to NRS 604A.210 Rejects the FID's Approach and Adopts TitleMax's Interpretation

While this case was pending in the district court, the FID teamed up with Assemblyman Edgar Flores and the Legal Aid Center of Southern Nevada and, citing this case, tried to get the Legislature to amend NRS 604A.210 to reflect that no interest should accrue during a grace period. Instead, the Legislature rejected the proposal.

AB 163 attempted to amend NRS 604A.210 to provide that a licensee shall not "[c]harge . . . any fees, interest, costs or anything else

of value during such a grace period." The proposed amendment was as follows:

> 604A.210 The provisions of this chapter do not prohibit a licensee from offering a customer a grace period on the repayment of a loan or an extension of a loan, except that the licensee shall not ~~[charge]~~ ***:***
>
> ***1. Charge*** the customer ~~[:~~
> ~~1. Any]~~ ***any*** fees ***, interest, costs or anything else of valueduring such a grace period or*** for granting such a grace period; or
> 2. ~~[Any additional fees or additional interest on the outstanding loan during]~~ ***Condition the granting of*** such a grace period ~~[.]~~ ***on the customer making any new loan agreement or adding any addendum or term to an existing loan agreement.***

(73 App. 17256; Respondent's Rule 28(f) Pamphlet with 2017 Legislative History of NRS 604A ("2017 Legis. Hist.") at Vol. 1, pg. 63.)

Witnesses testified about the circumstances of this case to attempt to convince the Legislature to prohibit interest being charged during a grace period. *See* Prepared Testimony of Tennille K. Pereira, Ex. D to March 15, 2017, Assembly Committee on Commerce and Labor Hearing on AB 163 ("TitleMax is the best example of this issue.") (2017 Legis. Hist. at Vol. 1, pg. 218); Prepared Testimony of Venicia Considine, Ex. E to March 15, 2017, Assembly Committee on Commerce and Labor

Hearing on AB 163 (discussing and attaching a TitleMax GPDA) (2017 Legis. Hist. at Vol. 1, pg. 219–24).

But the Legislature rejected the proposal and instead adopted an amendment that prohibited only "[c]harg[ing] the customer interest at a rate in excess of that described in the existing loan agreement." NRS 604A.210(3)(b) (2017). This legislative action adopts the interpretation of NRS 604A.210 proposed by TitleMax in this case. Here is the language of the enrolled amendment to NRS 604A.210:

> 604A.210 ***1.*** The provisions of this chapter do not prohibit a licensee from offering a customer a grace period on the repayment of a loan or an extension of a loan, except that the licensee shall not ~~[charge the customer:~~
>
> ~~1. Any fees for granting such a grace period; or~~
>
> ~~2. Any additional fees or additional interest on the outstanding loan during such a grace period.]~~ ***grant a grace period for the purpose of artificially increasing the amount which a customer would otherwise qualify to borrow.***
>
> ***2. Except in compliance with the provisions of NRS 604A.408, 604A.445 or subsection 2 of NRS 604A.480, where they apply, a licensee shall not:***
>
> ***(a) Condition the granting of the grace period on the customer making any new loan agreement or adding any***

> ***addendum or term to an existing loan agreement; or***
>
> ***(b) Charge the customer interest at a rate in excess of that described in the existing loan agreement.***

(74 App. 17392–93; 2017 Legis. Hist. at Vol. 1, pg. 123–24.)

E. "Grace Period" Is a Statutorily Defined Term, and the FID Cannot Change that Definition

The FID seems to argue that "grace period" should be given what the agency claims is its common meaning, although it cites no authority for that definition. Worse yet, the FID ignores that "grace period" is statutorily defined in NRS 604A.070. Agencies are not free to concoct their own meanings where the Legislature has established a definition and occupied the field.

NRS 604A.070 provides:

> NRS 604A.070 "Grace period" defined. "Grace period" means any period of deferment offered gratuitously by a licensee to a customer if the licensee complies with the provisions of NRS 604A.210.

So long as a grace period meets the requirements of NRS 604A.070 and 604A.210, it is a grace period. The FID cannot change, alter, or amend the statutory definition.

F. The FID Has Been Trying Unsuccessfully to Change or Avoid the Clear Meaning of Grace Periods under NRS 604A.210

The FID clearly does not like the concept of a grace period as established by the Legislature. The FID has its own, and different, idea of what a grace period should be.[12] But it is the legislative intent and the actual statutory language, not the FID's contrary objective, that control.

While the FID would like *no* interest to accrue during a grace period, the Legislature rejected this approach when it enacted NRS 604A.210 in 2005 and specifically added the word "additional" to clarify what kind of interest could not be charged during a grace period. (49 App. 11555.)

To effect its idea of what it would like the law to be, despite the plain wording of the statutes, the FID then attempted to bring about a regulation that differed from the legislative requirements. (72 App. 17074.) In 2012, the FID proposed a regulation that "no interest shall accrue" during a grace period. (72 App. 17070–72.) But the FID's

[12] For example, the FID argued that a "grace period effectively extends the due date of each monthly installment from the first of the month to a later date within that month, typically the fifteenth." (73 App. 17204.) But there is no statutory support for the FID's made-up requirements for a grace period.

attempt to change the statutory language via a regulation failed. (6 App. 1222.)

Then, when TitleMax challenged the FID's attempt to regulate by fiat and enforce its never-enacted ideas of what a grace period should be, the FID attempted to thwart TitleMax's recourse to the courts to obtain a neutral judicial interpretation of the statutes. (52 App. 12304–53 App. 12315.) Instead of allowing TitleMax to obtain a judicial construal of the statutes as TitleMax sought, the FID moved to dismiss TitleMax's declaratory relief action so the FID could institute administrative proceedings against TitleMax on its home turf. The FID's motion to dismiss TitleMax's complaint for declaratory relief and the FID's administrative complaint against TitleMax were filed *the same day*. (52 App. 12304–53 App. 12315; 8 App. 1595–1611.)

Ultimately, both the FID's proffered reasons for dismissal of TitleMax's declaratory relief action and the FID's administrative allegations against TitleMax were deemed meritless. *TitleMax I*, Doc. No. 17-33587; (74 App. 17465–86.)

Unable to accomplish its proposed statutory change via regulation or in the courts, the FID teamed up with Assemblyman Edgar Flores

and the Legal Aid Center of Southern Nevada and went to the Legislature — while this case was ongoing — seeking a "clarification" that the original statute meant something different from its plain wording. (73 App. 17256); March 15, 2017, Assembly Committee on Commerce and Labor Hearing on AB 163 at 11, 13–14, 20 (2017 Legis. Hist. at Vol. 1, pg. 65, 145, 147–48, 154).

FID Commissioner George Burns testified before the Legislature that "there are certain people who like to parse every word in the law in order to dismiss common sense and to undermine **what I believe** is the spirit and intent of the law." Testimony of Commissioner George E. Burns, March 15, 2017, Assembly Committee on Commerce and Labor Hearing on AB 163 at 11 (2017 Legis. Hist. at Vol. 1, pg. 145) (emphasis added). This was strongly reminiscent of his testimony in this case before the ALJ, where he accused TitleMax's attorney of "parsing the words here in order to complicate and mask the violation." (6 App. 1250.) This accusation came in response to a question that forced Commissioner Burns to admit that his requirement that "payments do not take place during [a] grace period" did not appear in NRS 604A.210.

(6 App. 1250.) It is not "parsing the words" to insist on some basic statutory support for the FID's position.

Even the Legislature would not prohibit the charging of any interest during a grace period — the language originally proposed in 2017. (74 App. 17256, 17392–93.) Instead, the Legislature adopted TitleMax's construction, clarifying that interest could be charged during a grace period so long as it was not in excess of the original contract rate. (74 App. 17392–93.)

The FID has now attempted several times to unilaterally change the meaning of "grace period" under NRS 604A.210, but has not been successful. As part of the executive branch, the FID is tasked with enforcing the law as written by the Legislature — not what the FID thinks the law should be. TitleMax complied with every single statutory requirement and cannot be penalized for failing to comply with what the FID wants the law to be.

III.

TITLEMAX ACTED REASONABLY, PRECLUDING A FINDING OF WILLFULNESS

The district court also concluded, in the alternative and "at a minimum," that the ALJ's willfulness finding was clearly erroneous.

(74 App. 17420.) "Even assuming TitleMax's statutory interpretation were incorrect —which the Court does not believe it is — TitleMax's statutory interpretation was reasonable." (*Id.*) As such, the district court concluded, there was no willful violation that could possibly lead to the penalties the ALJ imposed. (*Id.*)

TitleMax's statutory interpretation was not objectively unreasonable. That TitleMax acted in accord with a reasonable and plausible interpretation means that TitleMax did not engage in any willful violation. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007) (there was no willful violation where party's reading of the statute "was not objectively unreasonable").

As the district court stated, "[t]he evidence suggests that TitleMax always strove to be in compliance with the law and that TitleMax believed the GPDA was statutorily compliant." (74 App. 17425; *see also, e.g.*, 5 App. 979 (FID witness agreeing that "whenever TitleMax has agreed with the FID's interpretation and application of the law, they fix — they fix the issue"); 6 App. 1323–24, 1339–40, 1347, 1360, 1428.)

The fact that the ALJ and district court disagreed over the interpretation of these statutes is itself indicative that TitleMax could

not have "willfully" violated these rules. For the FID to prevail on this issue, it must effectively demonstrate that Judge Hardy's interpretation of these statutes was baseless. The FID makes no such contention.

A. Where a Party Complies with a Permissible Interpretation of an Ambiguous Statute, There Is No Willful Violation

1. The Correct Standard

Where a party complies with a permissible interpretation of an ambiguous statute, there is no willful violation. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 639 (7th Cir. 2014) ("[I]f there was a violation, it was not willful because it consisted of a permissible interpretation of an ambiguous statute."); *Dixon v. Green Tree Servicing, LLC*, No. 2:13-CV-227-PPS, 2015 WL 2227741, at *4 (N.D. Ind. May 11, 2015) ("There is no willful violation of a statute when the violation is based on a reasonable reading—indeed, even a misreading—of the statute. This is particularly true where a statute's guidance is ambiguous.") (citations omitted); *United States v. Prabhu*, 442 F. Supp. 2d 1008, 1029 (D. Nev. 2006) (there is no knowing violation of the False Claims Act[13] when the defendant's "conduct is

[13] The standard for "knowingly" under the False Claims Act is

consistent with a reasonable interpretation of ambiguous regulatory guidance").

"[C]ourts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions." *Lusardi Constr. Co. v. Aubry*, 824 P.2d 643, 655–56 (Cal. 1992); *see also State v. Harmon*, 35 Nev. 189, 127 P. 221, 223 (1912) ("Penalties and forfeitures are not favored, unless plainly expressed.").

2. The FID's Incorrect Standards

a. THE FID DISAVOWS ITS OWN CASE LAW AND TRIES TO CHANGE "WILLFULLY" TO "NON-ACCIDENTALLY"

In arguing willfulness to the ALJ, the FID itself cited the same cases on which TitleMax relies to define willfulness, *In re Fine*, 116 Nev. 1001, 13 P.3d 400 (2000) and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). In fact, the FID conceded then that willfulness means "that the licensee knew or recklessly disregarded whether its actions were prohibited by statute." (*See* 71 App. 16951–54.)

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remarkably similar to the willfulness standard articulated in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). *Compare* 31 U.S.C. § 3729 (b)(1) (a person acts knowingly when the person "has actual knowledge of the information;. . . or acts in reckless disregard of the truth or falsity of the information"), *with McLaughlin*, 486 U.S. at 133 (confirming standard of willfulness that the actor "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute").

Now before this Court, however, the FID disavows its prior position and argues that "'willful' connotes nothing more than 'an act which is intentional, or knowing, or voluntarily, as distinguished from accidental.'" (AOB at 29 & n.45 (citing *United States v. Murdock*, 290 U.S. 389, 394 (1933), *overruled in part on other grounds by Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 73 (1964)).)

But that is not the correct standard in the context of NRS 604A.900, which imposes severe penalties. In fact, while the FID purports to rely on *Murdock*, the Supreme Court in that case rejected the argument that "willfully," as used in a tax statute imposing criminal liability, meant "no more than voluntarily." 290 U.S. at 394–95 (where "the act declares a willful failure to observe the [statutory] directions a penal offense, an evil motive is a constituent element of the crime"); *see also In re Fine*, 116 Nev. 1001, 1021, 13 P.3d 400, 413 (2000) (the construction of "willful" must be determined by its context).

b. THE FID RELIES ON INAPPOSITE CASES

The FID primarily relies on outdated and inapplicable California case law. But these cases are inapposite.

In *May* and *Wilson*, the California Court of Appeals considered whether breaches of private contracts and orders were willful. *See May v. N.Y. Motion Picture Corp.*, 45 Cal. App. 396, 404, 187 P. 785 (Cal. Ct. App. 1920) (considering whether habitually tardy actress was wrongfully discharged and concluding that "willful" disobedience of an employer's reasonable order "is an intentional disobedience. It does not necessarily imply any evil intent on the part of the servant or malice toward his master"); *Wilson v. Sec. First Nat. Bank of Los Angeles*, 84 Cal. App. 2d 427, 430–32, 190 P.2d 975 (Cal. Ct. App. 1948) (quoting *May* and determining that breach of a real estate contract was willful). Neither case considered the meaning of "willful" within the context of a statute allowing the imposition of punitive statutory penalties.

In *Pittenger*, another old California Court of Appeals case cited by the FID, the court relied on a specific provision of California's penal code providing that the

> word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Cal. Penal Code § 7; *Pittenger v. Collection Agency Licensing Bureau*, 208 Cal. App. 2d 585, 588, 25 Cal. Rptr. 324 (Cal. Ct. App. 1962).[14] Nevada's statutes contain no such provision.

In fact, both Nevada's statutes and case law suggest that to willfully violate a statute, a party must ***know*** its actions violate the statute and nevertheless proceed. *See In re Fine*, 116 Nev. at 1022, 13 P.3d at 414 (concluding in a civil case that "willful misconduct occurs when the actor ***knows*** she is violating a judicial canon or rule of professional conduct and acts contrary to that canon or rule ***in spite of such knowledge***") (emphases added); NRS 686B.1762 (in an insurance chapter, providing that "'[w]illful' or 'willfully' in relation to an act or omission which constitutes a violation of this chapter means ***with actual knowledge or belief that the act or omission constitutes a violation and with specific intent to commit the violation***") (emphasis added); NRS 281A.170 (Nevada's ethics in government law defining "willful violation" to mean "a violation where the public officer

[14] *Hale v. Morgan*, 22 Cal. 3d 388, 396, 404, 584 P.2d 512 (Cal. 1978) also relied on this provision, but nevertheless found that the statutory penalties that had been assessed were "constitutionally excessive."

or employee . . . ***[a]cted intentionally and knowingly***") (emphasis added).

B. The Indicia of TitleMax's Reasonableness

1. The Legislative History of NRS 604A.210 Confirms that TitleMax Acted on a Reasonable Interpretation of That Statute

TitleMax cannot be found to have willfully violated NRS 604A.210 when the FID's interpretation of the statute was never codified or enacted. The 2005 legislative history makes clear that the amendment to the portion of AB 284 that became NRS 604A.210(2) was not to prohibit the accrual of "any interest" during the grace period. Even if this Court adopts a different interpretation of the ultimate language, TitleMax should not be penalized for advocating the actual legislative intent.

2. The FID Admitted NRS 604A.210 Was Ambiguous and Did Not Adopt a Regulation Rejecting TitleMax's Interpretation

In its 2012 workshop, which TitleMax attended, the FID expressly acknowledged ambiguity in NRS 604A.210 and recognized that TitleMax's interpretation of the statute was plausible. (72 App. 17071, 17079; 6 App. 1366.) "It was stated that the Division acknowledges

some ambiguity exists in the statutes, and that ***a possible interpretation would permit the contract rate of interest to be charged during a grace period*** . . . ." (72 App. 17079 (emphasis added).) Thus, the FID acknowledged that TitleMax's interpretation of NRS 604A.210 is plausible. Not only this, but other industry members evidently agreed with TitleMax as well. (*See* http://fid.nv.gov/uploadedFiles/fidnvgov/content/Opinion/Propoosed_Regulations/2012-09-21_NoticeOfWorkshop604A.pdf, Ex. C.)

In addition, although the FID proposed a contrary regulation, that proposal was never adopted. (72 App. 17074; 6 App. 1222.) There was no controlling authority adopting the FID's current position; there was, at most, disagreement. Thus, TitleMax's interpretation cannot be considered a willful violation.

The FID's proposed, but never-passed, regulation supports the district court's determination that the ALJ's willfulness ruling was clearly erroneous and arbitrary and capricious.

3. TitleMax Acted Reasonably in Determining Its Legal Obligations

If a party "acts reasonably in determining its legal obligation, its action cannot be deemed willful." *McLaughlin v. Richland Shoe Co.*,

486 U.S. 128, 135 n.13 (1988). And even if a party "acts unreasonably, but not recklessly, in determining its legal obligation, then" its actions should still not be considered willful. *Id.* Here, at the very least, TitleMax acted reasonably in determining its legal obligations. Its actions cannot therefore be deemed willful.

a. TITLEMAX REASONABLY RELIED ON COUNSEL

Consulting with counsel is a relevant factor and indicates here that TitleMax acted reasonably in determining its legal obligations. *See McLaughlin*, 486 U.S. at 135 n.13 (if a party "acts reasonably in determining its legal obligation, its action cannot be deemed willful"). A violation is not willful where "officials act[] reasonably and in good faith in attempting to determine whether their plan would violate" the statutory requirements. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 129–30 (1985) (determining that employer did not willfully violate statute where it "sought legal advice"); *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 645 (9th Cir. 1993) (analogizing reliance on previous opinion to relying on legal advice and finding such reliance "constituted good faith as a matter of law"); *City Council of City of Reno v. Reno Newspapers, Inc.,* 105 Nev. 886, 894, 784 P.2d 974, 979 (1989) (finding

no willful violation of the district court's preliminary injunction where city council members followed the advice of the city attorney).

b. THE FID DID NOT EVEN RESPOND TO TITLEMAX'S LEGAL POSITION

When TitleMax laid out its legal position in its February 9, 2015, letter and explained why, in its analysis, the GPDA did not violate any part of NRS 604A (48 App. 11285–94), the FID responded with a letter stating merely that "the FID stands by its position." (48 App. 11300.) TitleMax's attempt to explain its position to the FID and the FID's lack of explanation or any meaningful response are yet further indications that TitleMax did not willfully violate any statutory provision here. There was no attorney general opinion, case law, legislative history, or official guidance supporting the FID "stand[ing] by" its lay examiners' opinions (48 App. 11300), and TitleMax did not act unreasonably, let alone recklessly, in offering an agreement that both internal and outside counsel had determined was lawful. *See McLaughlin*, 486 U.S. at 135 n.13 (even where a party "acts unreasonably, but not recklessly, in determining its legal obligation, then, although its action would be considered willful under petitioner's test, it should not be so considered under . . . [the] standard we approve today").

4. The District Court Agreed with TitleMax's Legal Position

That the district court agreed with TitleMax's statutory interpretation means that it had a reasonable basis and was not "objectively unreasonable." *See Safeco*, 551 U.S. at 69 (where a party's reading of a statute is "not objectively unreasonable," there is no basis for a finding of willfulness or recklessness). The FID ignores this post-ALJ reality, and notably does not contend that Judge Hardy's ruling was unserious or objectively unreasonable. Given the foregoing, how can the FID possibly characterize TitleMax's interpretation of these statutes as such?

C. Disagreement with Lay FID Examiners Does Not Constitute Willfulness

The sole basis for the ALJ's finding of willfulness (72 App. 16970) was that TitleMax continued to offer the GPDA after the FID's lay employees suggested that it violated NRS 604A.210 and 604A.445. (*See* 7 App. 1502, 1513, 1514, 1518.) Indeed, the ALJ ordered the return of all principal and interest collected under every GPDA entered into after December 18, 2014, ***the very day*** lay FID examiners first opined that

TitleMax was not in compliance with these statutes. (72 App. 16970–71.)

That is not the law. Private parties are allowed to disagree with agency interpretations. For example, in *Baystate*, the First Circuit called into question a labor regulation that deemed an employer's conduct willful "if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful." *See* 29 C.F.R. § 578.3(c)(2); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 680 & n.15 (1st Cir. 1998). The court explained that this standard was incongruous with Supreme Court case law and would

> preclude[] legitimate disagreement between a party and the Wage and Hour Division about whether the party is an employer covered by the Act, leaving a putative employer in an ***untenable position***: either accept the Wage and Hour Division's position and comply with its advice, or risk a finding of a willful violation of the Act.

Baystate, 163 F.3d at 680 (emphasis added).

TitleMax should not be put in the untenable position of having to acquiesce to the FID's position — no matter how unreasoned, unsupported, or whether a lay examiner decides it — or risk a finding of

willfulness. TitleMax's legitimate disagreement with the FID does not constitute willfulness. *See Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 188 & n.9 (3d Cir. 1988) (rejecting Secretary of Labor's reliance "on the fact that the casino did not change its pay practices even after the Secretary declared them improper," noting that "***private parties must retain a right to disagree*** with the Secretary's interpretation of the regulations . . . . ***Such disagreement is not willfulness***.") (emphases added); *State Farm*, 114 Nev. at 542, 958 P.2d at 737 (ruling that private party "reasonably construed" statutory provision, that agency engaged in improper rulemaking, and noting that even though the impact of disputed rule was admittedly small, private party objected "to being coerced into accepting the Division's incorrect interpretation"). "Standing firm" in one's position and "litigating . . . issues vigorously" does not constitute willfulness, even if one's position is ultimately deemed incorrect after the fact. *See In re Univ. Med. Ctr.*, 973 F.2d 1065, 1089 (3d Cir. 1992). TitleMax did not willfully violate the law; it merely disagreed with the FID's interpretation of the law.

D. The FID Should Be Estopped From Arguing Willfulness, When It Engaged in Ad Hoc Rulemaking and Blocked TitleMax's Efforts to Obtain Clarity on the Law

The FID should be estopped from arguing that TitleMax willfully violated the law because: (1) it blocked TitleMax's attempts to obtain clarity on the law; and (2) it engaged in ad hoc rulemaking in violation of the notice and hearing requirements in Nevada's Administrative Procedure Act (the "APA").

1. The FID Blocked TitleMax's Efforts to Obtain Legal Clarity

When the FID took issue with the GPDA during its 2015 examination, TitleMax immediately filed suit for a declaratory judgment. (51 App. 11991–94.) But the FID moved to dismiss that lawsuit, prohibiting TitleMax from obtaining a judicial interpretation of the law. (52 App. 12304–53 App. 12315.)[15]

Although this Court reversed the dismissal of TitleMax's declaratory judgment action *TitleMax of Nevada, Inc. v. State of Nevada*

[15] Even after the FID initiated the administrative proceedings, TitleMax again moved for an expedited declaration as to the legal interpretation of the statutes at issue — before going through the time and expense of an evidentiary hearing. (52 App. 12221–23.) But the FID **again** opposed TitleMax's efforts to obtain clarity on the law. (52 App. 12228–35.)

Department of Business and Industry, Financial Institutions Division, Case 69807, the FID was able to prevent TitleMax from obtaining a judicial construction of NRS 604A.210 and 604A.445(3) until after the FID proceeded with the underlying administrative action against TitleMax.

Because the FID acted to prevent TitleMax's good-faith efforts to obtain a judicial and neutral interpretation of the law, it cannot complain that TitleMax willfully violated the very statutes on which TitleMax was trying to obtain clarity. *See Kizer v. PTP, Inc.*, 129 F. Supp. 3d 1000, 1006 (D. Nev. 2015) (equitable estoppel "stands for the basic precepts of common honesty, ordinary fairness, and good conscience" and "is a weapon in the court's arsenal of inherent equitable powers") (internal quotation marks and citations omitted; alteration incorporated).

2. The FID Engaged in Ad Hoc Rulemaking— It Cannot Enforce a Regulation that Was Never Adopted, Without Notice and a Hearing

In this case, the FID attempted to enforce its prior proposed, but never adopted, regulation. The agency tried to do through enforcement what it could not do through legislation. This is a clear instance of ad

hoc rulemaking in violation of the Administrative Procedure Act.[16] *S. Nev. Operating Eng'rs Contract Compliance Trust v. Johnson*, 121 Nev. 523, 532–33, 119 P.3d 720, 727 (2005) (where Labor Commissioner "engaged in ad hoc rulemaking in violation of the APA's notice and hearing requirements," his decision was invalid); *State Farm*, 114 Nev. at 543–44, 958 P.2d at 738–39 (where agency tried to compel private party "to modify its definition" of a term for purposes of an insurance rate hike, the "Division engaged in improper rulemaking in violation of the notice and hearing requirements of the APA").

Here, the FID's interpretation of NRS 604A.210 is a regulation because it is an "agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy." *See* NRS 233B.038(1)(a). The FID has essentially defined "additional interest" as charging any interest beyond what the borrower would pay under the original loan without deferment. This is a definition and interpretation of general applicability that will affect other title lenders.

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[16] Before passing a regulation, an agency must provide notice of an intent to adopt such a regulation. NRS 233B.060. There must be a reasonable opportunity for all interested persons to submit their views and arguments regarding the proposed regulation. NRS 233B.061. And there must be a hearing and workshop. *Id.*

See Las Vegas Transit Sys., Inc. v. Las Vegas Strip Trolley, 105 Nev. 575, 576–77, 780 P.2d 1145, 1145–46 (1989) ("[W]e established that 'defining' means establishing limits or stating exactly what a thing is.") (ruling that Commission defined a term and set a standard of general applicability without following the APA); *Coury v. Whittlesea-Bell Luxury Limousine*, 102 Nev. 302, 305, 721 P.2d 375, 377 (1986) ("An agency makes a rule when it does nothing more than state its official position on how it interprets a requirement already provided for and how it proposes to administer its statutory function.").

That the FID's interpretation of "additional interest" is in fact a regulation is further evidenced by the FID's previously proposing, but not adopting, precisely the same rule it seeks to enforce here. (72 App. 17074; 6 App. 1222.) The FID previously held a workshop and gave notice as it was required to do under the APA, and TitleMax attended. (72 App. 17071; 6 App. 1366.) But, importantly, the regulation was never passed. (6 App. 1222.) If the FID wants to be able to enforce the proposed-but-never-passed regulation, it must again comply with the APA's procedures and actually pass the regulation. *See Nat'l Treasury Employees Union v. Devine*, 733 F.2d 114, 117 (D.C. Cir. 1984)

("proposed regulations are only administered and enforced *after* they are issued as final regulations").

That the FID did not comply with the APA's procedures further confirms that its proposed interpretation is entitled to no deference. *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("*Chevron* deference is not warranted where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation"). If the FID wanted its statutory interpretation to be given deference and have the force of law, it had to follow the procedures in the APA. *See* NRS 233B.040; *cf. Encino*, 136 S. Ct. at 2125 (where an agency's "procedures are defective, a court should not accord *Chevron* deference to the agency interpretation").

When regulations are publicly passed, all licensees stand on the same footing, and all are on notice of what is required under the law. That is precisely why the procedures in the APA must be followed. Here, however, the FID singled out TitleMax for arbitrary enforcement of its never-enacted rule, and its actions were invalid. *See State Farm*, 114 Nev. at 544, 958 P.2d at 738–39 ("this court has not hesitated to

invalidate agency actions in which the agency was formulating a rule of policy or general application") (overturning "Division's interpretation [that] effectuates its unilateral policy"); *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 265 (1979) ("When these procedures, grounded in basic notions of fairness and due process, are not followed, and the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion, this court will not hesitate to intervene.").

E. The Penalty Was Inappropriate

1. The Penalty Was Excessive

The ALJ ordered the forfeiture of not only any interest charged during the grace period, but absolutely all interest and principal collected under every GPDA after the 2014 examination. This could amount to tens of millions of dollars. (*E.g.*, 72 App. 16980–81.) As the district court stated, this "only confirms that the appropriate course of action is to reverse and vacate the penalties issued by the ALJ." (74 App. 17483.)

2. The Penalty Was Improperly Based on Matters Not Before the ALJ

Although the ALJ had only 307 loan files before her, she ordered a penalty of the return of principal and interest of all loans involving a

GPDA entered into after the 2014 examination. This exceeded the ALJ's authority.[17]

And the sanction is not supported even by the evidence before the ALJ. The ALJ did not evaluate the evidence and specify loans that were void. The FID claimed in its administrative complaint that an evidentiary hearing was "necessary to determine exactly how many times [TitleMax] charged customers more money under the [GPDA]." (8 App. 1599.) But neither the FID nor the ALJ bothered to look at the evidence to actually determine this. Rather than determine what amounts of interest customers were actually charged, the FID and the ALJ compared the amount of interest *projected* under the original loan with the amount of interest *projected* under the GPDA. (*See, e.g.*, 71 App. 16963.) The ALJ **acknowledged** that "[w]hether the customer ends up paying more money in interest charges under the [GPDA] than he or she would have under the original loan agreement is situation-specific to every loan agreement" and that "a customer may pay late under the original" loan agreement and "end up paying more in interest

[17] *See* NRS 233B.125 ("[D]ecisions must be based upon a preponderance of the evidence."); NRS 233B.123 (laying out what kinds of evidence may be considered); NRS 233B.121(9) ("Findings of fact must be based exclusively on a preponderance of the evidence and on matters officially noticed.").

than the customer would have paid had the customer made payments on time under the [GPDA]." (71 App. 16967.) Yet the ALJ ignored these factual possibilities and ordered that *all* loans in which a GPDA was entered into after December 18, 2014, were voided[18] — even those not in the record. (72 App. 16971.) Of the loans that were in the record, TitleMax has identified over 20 in which the customer repaid the entire loan within 210 days despite the execution of a GPDA.[19]

Because the ALJ's decision was not based on actual evidence in the record, it violates TitleMax's due process rights and exceeds the ALJ's statutory authority. *See* NRS 233B.121 (findings "must be based exclusively on . . . the evidence and on matters officially noticed"); NRS 233B.123. The ALJ did not engage in fact finding based on evidence, but rather articulated (and enforced) an agency interpretation of general applicability. *See* NRS 233B.038(1)(a). This was improper.

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[18] The ALJ did not even calculate how many of the loan files submitted in evidence contained a GPDA entered into after December 18, 2014.
[19] (15 App. 3434–52, 37 App. 8805–27, 23 App. 5499–24 App. 5521, 42 App. 9689–9715, 34 App. 8162–85, 9 App. 2061–10 App. 2085, 35 App. 8245–69, 18 App. 4045–67, 18 App. 4069–94, 11 App. 2387–2409, 29 App. 6903–25, 20 App. 4551–74, 37 App. 8746–67, 19 App. 4380–99, 16 App. 3786–17 App. 3806, 12 App. 2712–31, 27 App. 6393–6413, 14 App. 3068–86, 21 App. 4993–5014, 13 App. 3026–45, 22 App. 5238–56, 44 App. 10115–34, 8 App. 1761–85, 8 App. 1823–9 App. 1848, 33 App. 7882–7902.)

CONCLUSION

This Court should affirm the district court order reversing the administrative determination. In the alternative, this Court should, at a minimum, affirm the conclusion that TitleMax did not act willfully and that the sanctions under NRS 604A.900 must be vacated.

DATED this 20th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

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

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 11337 words.

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

DATED this 20th day of July, 2018.

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I hereby certify that on July 20, 2018 I submitted the foregoing "Respondent's Answering Brief" for filing *via* the Court's eFlex electronic filing system. Electronic notification and e-mail will be sent to the following:

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