

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MICHAEL WHITFIELD,  
Appellant,

vs.

NEVADA STATE PERSONNEL  
COMMISSION; STATE OF NEVADA  
DEPARTMENT OF  
ADMINISTRATION; LORNA WARD,  
APPEALS OFFICER; AND THE  
STATE OF NEVADA DEPARTMENT  
OF CORRECTIONS, AS EMPLOYER,  
Respondents.

Electronically Filed  
Jul 10 2020 05:37 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Case No. 79718

District Court Case No.

CV19-00641

**APPEAL**

**From the Second Judicial District Court  
The Honorable Kathleen Drakulich, District Judge**

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**APPELLANT'S OPENING BRIEF**

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## **NRAP 26.1 DISCLOSURE STATEMENT**

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 so the Justices of this Court may evaluate possible disqualification or recusal.

The following have an interest in the outcome of this case or are related to entities interested in the case: Appellant, Michael Whitfield. There are no other known interested parties.

Snell & Wilmer L.L.P. now represents Mr. Whitfield, who previously had been in pro per.

## **Routing Statement**

The Nevada Supreme Court should retain this appeal because it raises questions of statewide public importance and involves inconsistencies in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts. NRAP 17(a)(11)–(12).

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## **Introduction**

Appellant Michael Whitfield timely challenged Nevada Department of Corrections' ("NDOC") termination of his employment after he had worked for NDOC for almost thirteen years, only to have his Petition for Review dismissed for its purported failure to correctly name all required respondents in the caption. As discussed below, this requirement has not been clear or uniformly applied and rather serves as a trap for the unwary and a technicality that functions to secure the dismissal of otherwise timely and meritorious petitions for review.

This Court should reverse the hyper-technical dismissal of Whitfield's petition and allow it to proceed on its merits.

## **Statement of the Issues**

1. Whether the District Court erred when it dismissed Whitfield's Petition for Judicial Review naming all necessary respondents in accordance with NRS 233B.130(2)(a) and *Prevost v. State Department of Administration*, 134 Nev. 326, 418 P.3d 675 (2018).

2. Whether the district court erred by not accepting the timely Amended Petition for Judicial Review filed by Mr. Whitfield, a pro se litigant, to cure any alleged technical jurisdictional defects.



3. Whether *Washoe County v. Otto*, 128 Nev. 424, 282 P.3d 719 (2012), requiring strict compliance with NRS 233B.130, should be partially modified to allow amendment to a petition when, as here, it was timely filed within the 30-day jurisdictional window.

## **Statement of the Case**

### **I. Nature of the Case**

This appeal arises from dismissal of a petition for judicial review challenging the final administrative decision of the Nevada Personnel Commission upholding the termination of appellant from the Nevada Department of Corrections.

### **II. Factual Background**

Michael Whitfield was employed at NDOC as a corrections officer for approximately thirteen years. JA 030. In August 2017, an Order of Protection was entered against Mr. Whitfield in the Superior Court of California, County of Santa Clara, directing that Whitfield could not “own, possess, have, buy, or try to buy receive or try to receive, or in any other way get guns.” *Id.* An essential function required as part of his job was to carry a firearm, and while working at NDOC, the Warm Springs Correctional Center Associate Warden was notified of the Order of Protection against Mr. Whitfield. *Id.*

In September 2017, NDOC temporarily assigned Mr. Whitfield to administrative duties not requiring a firearm, with a deadline of December 17, 2017 to resolve the issue. JA 031. Mr. Whitfield unsuccessfully attempted to get the Protective Order modified. *Id.* He was provided with notices and support from the Warden, as well as an extension to January 5, 2018, to resolve the situation and qualify for POST requirements. *Id.*

In March 2018, Mr. Whitfield was served by NDOC with a Notice of Allegations Administrative Investigation, followed by Specificity of Charges the following month. JA 031–032. A pre-disciplinary hearing was held in April. JA032. After Mr. Whitfield was unable to comply with the terms of his employment at NDOC (to possess a firearm and qualify for firearm use biannually), Mr. Whitfield was terminated, effective April 20, 2018. JA033.

### **III. Procedural History**

Mr. Whitfield appealed NDOC's decision to the Nevada State Personnel Commission. On December 14, 2018, the Nevada State Personnel Commission conducted an administrative hearing before a hearing officer. JA028 ("BEFORE THE NEVADA STATE PERSONAL

COMMISSION HEARING OFFICER”). The only parties of record to that proceeding were Mr. Whitfield, as the petitioner-employee, and NDOC as the respondent-employer. *Id.* On March 1, 2019, the hearing officer issued her “findings of fact, conclusions of law, and decision,” which ultimately upheld the termination. *Id.*

By this point, Mr. Whitfield was representing himself and continued to do so until this Court referred his appeal to the Legal Aid Center of Southern Nevada for pro bono representation. *See* JA029 n.1; November 27, 2019 Order (Appeal No. 79718).

Following the hearing by the Nevada State Personnel Commission, Mr. Whitfield, acting pro se, filed a Petition for Judicial Review on March 20, 2019, in the Second Judicial District Court. JA001. The petition was captioned “IN THE MATTER OF: MICHAEL WHITFIELD (Appeal No. 1803430-LLW) Petitioner[.]” *Id.* The cited appeal number was same number used in the administrative appeal proceedings that resulted in the hearing officer’s decision, which likewise included this number in its caption. *Compare id., with* JA029. The body of Mr. Whitfield’s petition stated that he was petitioning “from the final judgment of the Nevada State Personnel Commission,” which found him

“ineligible for reinstatement/rehire from his position as [sic] Nevada Department of Corrections.” JA001. The *body* of the petition thus named as respondents to this new APA action “the agency and all parties of record to the administrative proceeding” that upheld Mr. Whitfield’s termination. *See* NRS 233B.130(2)(a).

Mr. Whitfield then timely served this petition and the summonses upon the Attorney General’s Office, the director of NDOC, and the Nevada Department of Administration. JA083–92.

On April 4, 2019, NDOC filed a motion to dismiss Mr. Whitfield’s petition. JA018. NDOC argued that Mr. Whitfield’s petition, despite citing the Nevada State Personnel Commission and NDOC, “fail[ed] to name any respondents, much less the agency and all parties of record to the administrative proceeding as required by NRS 233B.130(2)(a).” JA019. NDOC further contended that the 30-day window under the APA for filing a petition for judicial review had passed and that Whitfield was thus barred from amending his petition to name any ostensibly omitted respondents. JA 019, 024. In NDOC’s view, these purported deficiencies deprived the court of subject matter jurisdiction over the petition. *Id.*

On April 8, 2019, before the district court had ruled on NDOC’s motion to dismiss, Mr. Whitfield filed an amended petition for judicial review. JA042. The caption to this amended petition included all the entities and individuals that NDOC argued in its motion were required respondents. JA042. And the following day, Mr. Whitfield filed an opposition to NDOC’s motion, arguing that, under this Court’s decision in *Prevost v. State Department of Administration*, 134 Nev. 326, 418 P.3d 675 (2018), failure to name a required respondent in the *caption* to a petition for judicial review—as opposed to its body—does not deprive a court of subject matter jurisdiction. JA046. Mr. Whitfield further contended that any omissions in his original petition were cured by his amended petition, which he asserted could be filed under NRCP 15. *Id.*

On June 24, 2019, the district court granted NDOC’s motion to dismiss. JA060. It held that (1) Mr. Whitfield’s original petition did not comply with the party naming requirements under NRS 233B.130 by failing to name “any respondent in the caption or the body” and (2) the APA prevented the amended petition from relating back to the original petition. JA064. Notably, the court’s order did not specify which parties Mr. Whitfield’s should have included in that petition. *Id.*

Mr. Whitfield filed a motion for reconsideration on July 2, 2019. JA067. NDOC filed an opposition on July 11, and Mr. Whitfield replied on July 16. JA072, 093. On September 17, 2019, the district court denied the motion, ruling that no new issues of fact or law justified changing its prior ruling. JA107, 110.

On September 23, 2019, Mr. Whitfield, still acting pro se, appealed the district court's order denying his motion for reconsideration. JA 113. He subsequently moved to amend his notice to appeal in order to clarify that he was also appealing the underlying order dismissing his petition for judicial review. JA116 (motion); JA121 (attached amended notice of appeal). NDOC eventually moved to dismiss Mr. Whitfield's appeal. This Court denied that motion, holding that it could "be reasonably inferred from the original notice of appeal and case appeal statement that [Mr. Whitfield] intended to appeal from the underlying judgment" and that his notice of appeal was timely filed. December 9, 2019 Order (Appeal No. 79718).

Soon after, undersigned counsel agreed to represent Mr. Whitfield pro bono, in conjunction with two student-practice certified law students as part of the Partners in Pro Bono program.

## Summary of the Argument

The district court erred by dismissing Mr. Whitfield's petition for judicial review because he complied with all statutory requirements necessary to confer subject matter jurisdiction on the district court to review the administrative agency's final decision. If Mr. Whitfield's petition was defective, the district court should have permitted the promptly-filed amended petition to cure any technical defects.

Mr. Whitfield complied with all naming requirements necessary to confer jurisdiction on the district court. The APA only requires that a petition name "the agency and all parties of record to the administrative proceeding." The only respondents Mr. Whitfield's petition needed to name were (1) the Nevada State Personnel Commission and (2) the Nevada Department of Corrections. Mr. Whitfield's petition indeed named both of the necessary respondents.

Further, this Court has recognized that naming respondents in the body of a petition for judicial review is sufficient to satisfy the APA and confer jurisdiction on the district court to have jurisdiction. *Prevost*, 134 Nev. at 328, 418 P.3d at 676 (holding that "the failure to identify a party in the caption of a petition for judicial review is not, in and of itself, a

fatal jurisdictional defect”). Because Mr. Whitfield complied with all naming requirements, this Court should reverse the dismissal of the petition and allow it to proceed on its merits.

Further, these requirements should not be so strictly and technically construed that they serve as a trap for the unwary. As a pro se litigant, Mr. Whitfield diligently took the steps necessary to challenge his dismissal from his lengthy career as a public servant and have that decision reviewed by a court. He filed his petition on time and in the proper court. He also named all necessary respondents and included the appeal number assigned to his case before the Personnel Commission. Mr. Whitfield also served all necessary respondents and the Attorney General’s Office with his petition, such that all necessary respondents received notice and were aware of the underlying administrative matter.

Despite taking all necessary steps, NDOC secured the dismissal of Mr. Whitfield’s petition by moving to dismiss the petition just one day after the 30-day window for filing a petition expired—thus purportedly depriving him of the opportunity to file a new petition. But Mr. Whitfield



promptly attempted to correct the alleged errors by filing his amended petition just two business days later.

*Otto's* strict compliance standard should not function to dismiss swaths of petitions based on technicalities rather than their merits. This Court decided as much in *Prevost* and should likewise conclude here that form should not be elevated over substance. Where a petition names the required respondents—albeit not in the caption—it conforms with the APA.

Here, Mr. Whitfield complied with all requirements and his petition should be considered on the merits.

### **Standard of Review**

An issue of subject matter jurisdiction is a question of law that this Court reviews de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). Likewise, issues of statutory interpretation are reviewed de novo. *Webb v. Shull*, 128 Nev. 85, 88–89, 270 P.3d 1266, 1268 (2012).

## Argument

### **I. Mr. Whitfield’s Petition for Judicial Review Was Sufficient Because the Nevada State Personnel Commission and the Nevada Department of Corrections Were Named in the Petition and on Notice.**

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Mr. Whitfield fulfilled the statutory requirements for filing a petition for judicial review. Under NRS 233B.130(2)(a), a petition for judicial review must, “name as respondents the agency and all parties of record to the administrative proceeding.” Therefore, the only necessary respondents for this petition were (1) the Nevada State Personnel Commission and (2) the Nevada Department of Corrections.

Here, Whitfield identified both the Nevada State Personnel Commission and NDOC in the *body* of his petition. JA001. In *Prevost v. State Department of Administration*, the Nevada Supreme Court clarified that “the failure to identify a party in the caption of a petition for judicial review is not, in and of itself, a fatal jurisdictional defect.” 134 Nev. 326, 328, 418 P.3d 675, 676 (2018). There is no statutory requirement mandating the petitioner to name the respondents in the caption. *See id.*, 418 P.3d at 676–77.

**A. The Nevada State Personnel Commission and the Nevada Department of Corrections Were the Proper and Only Necessary Respondents.**

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Judicial review of an administrative agency's decision in Nevada, including the requirements for filing a petition for review, is controlled by the Nevada Administrative Procedures Act (APA). *Washoe County v. Otto*, 128 Nev. 424, 430, 282 P.3d 719, 724 (2012). An aggrieved party may request judicial review by filing a petition naming, "the agency and all parties of record to the administrative proceeding." NRS 233B.130(2)(a).

In Mr. Whitfield's case, the agency was the Nevada State Personnel Commission, and the only parties of record to the administrative proceeding were "MICHAEL WHITFIELD, Petitioner-Employee," and "STATE OF NEVADA DEPARTMENT OF CORRECTIONS, Respondent-Employer." JA028.

Therefore, the only entities Mr. Whitfield was required to name in his petition for judicial review were the Nevada State Personnel Commission and the Nevada Department of Corrections. Mr. Whitfield was not required to name any additional agencies or parties in his petition for judicial review.

**B. Failure to Name the Respondents in the *Caption* of the Petition Was Not Jurisdictionally Fatal.**

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Mr. Whitfield named the required respondents in the body of his petition for judicial review and therefore fulfilled the statutory requirements for the district court to have jurisdiction over this matter. Pursuant to NRS 233B.130(2)(a), a petitioner must name the agency and parties of record as respondents, but there is no requirement that the petitioner list these names in the caption. In *Otto*, the Nevada Supreme Court determined that a petitioner must name these parties in a petition for judicial review or the district court would lack jurisdiction over the case. 128 Nev. at 432–33, 282 P.3d at 725. But in *Prevost*, the Court clarified that “*Otto* implicitly recognizes that the failure to identify a party in the caption of a petition for judicial review is not, in and of itself, a fatal jurisdictional defect.” *Prevost*, 134 Nev. at 328, 418 P.3d at 676.

Mr. Whitfield’s case is more analogous to the circumstances in *Prevost* than to those in *Otto*. In *Otto*, the petitioner was a county, not an individual. See 128 Nev. at 429, 282 P.3d at 723. Washoe County failed to name the individual proper parties as respondents, instead listing all respondents as “Certain Taxpayers,” even after the district court allowed amendment of the petition. *Id.* at 429–30, 282 P.3d at

723–24. The county did not name the individual respondents anywhere in the petition. *Id.* at 434, 282 P.3d at 726.

Conversely, in *Prevost*, an individual filed a petition for judicial review and failed to name all proper respondents in the caption or explicitly in the body of the petition. *See* 418 P.3d at 676. But because the petitioner named the respondent in the body of the petition through incorporation by reference of the attached administrative decision, the Court determined the petition was not jurisdictionally deficient. *Id.* at 676–77.

Here, Mr. Whitfield did name all proper respondents in the body of his petition. Both the Nevada State Personnel Commission (the agency) and NDOC (the only party of record to the administrative proceeding, other than Mr. Whitfield) were explicitly named in the body of the petition. JA001. Indeed, the petition here presents an even more straightforward application of the APA’s naming requirements than the petition in *Prevost*, which only named the missing respondent in its body through the incorporation-by-reference doctrine.

Moreover, Mr. Whitfield’s petition provided the named respondents and the Attorney General’s Office ample notice of what administrative

decision he was challenging. The petition's caption cited the case number for the underlying administrative proceeding. *Compare* JA001 (citing Appeal No. 1803430-LLW), *with* JA029 (the hearing officer's findings of fact, conclusions of law, and decision in Appeal No. 1803430-LLW). And NDOC did not contend in its motion to dismiss that any party lacked notice. *See* JA021.

Accordingly, Mr. Whitfield fulfilled the statutory requirements of NRS 233B.130 and the district court had proper jurisdiction over his petition for judicial review.

## **II. Under Principles of Equity, Fairness, and Access to Justice, Amendment of the Petition Should Be Permitted.**

It is generally accepted that courts liberally construe pro se parties' complaints and appellate briefs. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007), *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014). Further, it is generally accepted that pro se parties should have leave to amend when curing the deficiency is at all possible. *See Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir. 2013). Courts are "generally more solicitous of the rights of pro se litigants, particularly when technical jurisdictional requirements are involved." *Borzeka v. Heckler*, 739 F.2d 444, 447 n.2

(9th Cir. 1984). Finally, sophisticated practitioners should not obstruct pro se litigants of judicial review based on a mere technicality.

**A. The Nevada Administrative Procedures Act Does Not Address Timelines to Amend Petitions and Therefore Does Not Allow Adequate Access to Justice for Pro Se Litigants.**

Under NRS 233B.130(2)(d), a petition for judicial review must be filed within 30 days after service of the final decision of the agency. However, nothing in the text provides guidance on timeliness of amendments to correct errors in the petition, when jurisdiction has been properly invoked. *See* NRS 233B.130. The APA only addresses the timeline to file a petition for judicial review, not a timeline for amendments.

Nonetheless, Nevada courts have summarily discarded numerous petitions for judicial review based on motions to dismiss that take advantage of technical deficiencies in petitions for judicial review—dealing with either the technical captioning requirements or service requirements. Many of these motions to dismiss have been filed by the administrative appellee and involve the Attorney General’s Office in some form. *See, e.g., Heat & Frost Insulators & Allied Workers Local 16 v. Labor Comm’r*, 134 Nev. 1, 408 P.3d 156 (2018); *Sun City Summerlin*

*v. Sun City Summerlin*, 451 P.3d 82, 2019 WL 5681200 (Nev. Oct. 31, 2018) (unpublished); *Washington v. Las Vegas Parking Inc.*, 2019 WL 1396790 (Nev. Ct. App. Mar. 25, 2019) (unpublished); *Sadjadi v. Liberty Mutual Ins. Co.*, 2018 WL 5801940, at \*1 (Nev. Ct. App. Oct. 25, 2018) (unpublished); *Hillygus v. State Dep't of Admin.*, 2018 WL 4405839 (Nev. Ct. App Aug. 30, 2018) (unpublished). These dismissals are depriving people of review in ways that are undesirable.

And as these cases demonstrate, the strict interpretation of NRS 233B.130(2)(d), along with the Attorney General's broad reading of the APA's naming requirements, has caused confusion among both pro se litigants and experienced practitioners as to what entities must be named in a petition for judicial review. As a result, the APA has become a trap for the unwary, excluding petitioners from court based on minor omissions they are unable to correct through amendment , thus depriving them of their right to due process in court.

Here, Mr. Whitfield, a pro se petitioner who should have liberal discretion to amend, was deprived of his access to justice. NDOC filed its motion to dismiss based on a purported technical deficiency, the day after the 30-day window for filing a petition for judicial review expired.



*Compare* JA028 (March 1, 2019 hearing officer’s decision), *with* JA001 (March 20, 2019 petition for judicial review), *and* JA018 (April 4, 2019 motion to dismiss). Although Mr. Whitfield promptly responded and filed an amended petition for judicial review within two business days, followed shortly thereafter by an opposition to the motion to dismiss, his petition was still dismissed. JA042 (June 8, 2019 amended petition). Because NDOC, as a sophisticated litigant, waited to file the motion to dismiss until after the 30-day deadline for filing petitions for judicial review, the district court ruled Mr. Whitfield lacked subject matter jurisdiction and therefore dismissed his petition. JA060. To uphold equity, fairness, and justice to pro se litigants, the Court should allow Mr. Whitfield to amend.

**B. Mr. Whitfield Should Be Allowed to Proceed Because, as a Pro Se Petitioner, Filed an Amended Petition in a Timely Manner, After Becoming Aware That the Original Petition Caption Was Potentially Insufficient.**

Parties should be given leave to amend when curing a deficiency is at all possible. *See Crowley*, 734 F.3d at 977. It is generally accepted that courts are “more solicitous of the rights of pro se litigants, particularly when technical jurisdictional requirements are involved.” *Borzeka*, 739 F.2d at 447 n.2. Therefore, the rule in *Otto* requiring strict compliance

with jurisdictional requirements under APA, should be relaxed to allow access to justice, especially for pro se parties and when these rules have been substantially complied with.

In *Otto*, the Court's requirement for strict compliance with NRS 233B.130 did not provide petitioners with a mechanism for amendment under statute. Prior to *Otto*, the court permitted amendment. *See Civil Serv. Comm'n v. District Court*, 118 Nev. 186, 189–90, 42 P.3d 268 (2002); *Jiminez v. State Dep't of Prisons*, 98 Nev. 204, 644 P.2d 1023 (1982) (allowing amendments for petitions of judicial review to relate back to the original filing date when the proper defendant(s) had notice of the action and there was no prejudice). However, with the Court's requirement for strict compliance, there is no mechanism for a petitioner to cure potential defects, or to be notified of defects, in his petition for judicial review. Such petitioners are thus deprived of due process.

Mr. Whitfield substantially complied with the requirements for naming and service under NRS 233B.130. Additionally, upon notice of a perceived defect in his petition for judicial review by receiving NDOC's motion to dismiss, Mr. Whitfield expediently amended his petition within two business days and had previously completed service upon all

required parties. JA042; JA083–092. Allowing judicious amendment is equitable and complies with the general rule allowing pro se petitioners to correct technical requirements. Therefore, the Court should allow Mr. Whitfield’s amendment to satisfy NRS 233B.130.

**III. Alternatively, This Court Should Modify *Otto* in Part, Allowing Amendment to a Petition When, as Here, It Was Timely Filed Within the 30-Day Jurisdictional Window.**

In *Otto*, this Court determined that the APA filing requirements enumerated under NRS 233B.130(2) are “mandatory and jurisdictional.” 128 Nev. at 432, 282 P.3d at 725. This conclusion stemmed from the fact that this section states that “[p]etitions for judicial review *must* . . . (a) Name as respondents the agency and all parties of record to the administrative proceeding; . . . and (c) Be filed within 30 days after service of the final decision of the agency.” *Id.* (quoting NRS 233B.130(2)). The petitioner-appellant in that case effectively failed to name any party in its timely filed petition, referring only to “Certain Taxpayers (Unidentified)’ in the caption . . . .” *Id.* at 434, 282 P.3d at 726. And though that petitioner attempted to cure that naming defect in its *amended* petition, this Court held that the second petition was infirm because it was filed well after the 30-day window and was thus untimely.

*Id.* at 434, 282 P.3d at 727 (“[W]e need not address Washoe County’s amended petition because the amended petition was filed after the APA’s statutory filing deadline.”).

*Otto* thus implicitly interpreted the two filing requirements conjunctively, mandating that a petition for judicial review name all required parties within 30 days of the agency’s decision. Stated another way, under *Otto*, a petitioner cannot add any parties missing from his original petition *after* that window, even if that original petition was timely filed. This interpretation of the APA thus precludes any amendment to the petition after 30 days of the challenged agency decision.

As discussed above, Mr. Whitfield’s primary position is that he complied with the APA by naming NDOC and the Nevada State Personnel Commission within the *body* of the original petition that he undisputedly filed within the 30-day window. JA001. But if this Court determines that these two entities were not squarely named or that the petition needed to include additional entities as respondents, the Court should re-examine *Otto* because it has resulted in an unworkable standard unsupported by the APA’s text.

As seen in the excerpt quoted above, the APA requires that a petition be filed within 30 days of the agency decision and that the agency and all parties of record be named. But nothing in the statute's text expressly precludes a petitioner from amending his petition to cure any filing defects if, as here, the original petition was timely filed.

Indeed, this understanding of the filing requirements comports with the Nevada Rules of Civil Procedure, which “govern proceedings under the APA to the extent that they are not in conflict with the provisions of the APA.” *Prevost*, 134 Nev. at 328 n.3, 418 P.3d at 677. A petition for judicial review is analogous to a complaint in that both commence a civil action in district court. And NRCP 15(a) permits a party to amend “as a matter of course” within “21 days after serving” a pleading and, after that point, with leave of the court, which should be “freely give[n] . . . when justice so requires.” NRAP 15(a)(1)(A), (a)(2). Here, Mr. Whitfield, acting pro se at the time, moved the district court to amend his petition well within 21 days of serving it upon the entities and individuals required under the APA.<sup>1</sup> *See* NRS 233B.130(2)(c); *see also*

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<sup>1</sup> NDOC did not challenge the fact that Mr. Whitfield timely served all the individuals and entities required under NRS 233B.130(2)(c). *See*

JA083–092 (petition and summonses served on March 25–26, 2019); JA042 (Amended Petition for Judicial Review, filed April 8, 2019); JA046 (Mr. Whitfield raising this argument in his opposition to respondents’ motion to dismiss).

Moreover, even once a statute of limitations expires, Rule 15(c) allows an amendment to the parties named in the complaint to relate back to the date of the original pleading. To apply relation back, “the party to be brought in by amendment” must have received enough notice of the action to prevent prejudice and should have known that it would have been named in the action, but for a mistake concerning the party’s identity. NRCP 15(c)(2). Likewise, because the APA’s text does not expressly preclude amending the petition once the filing deadline has expired, a petitioner who served the entities required under the APA with his original petition should be permitted to file an amended petition after the 30-day window to correct any technical defects to the party-naming requirements.

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JA021 (NDOC’s motion to dismiss acknowledging that “Mr. Whitfield personally served NDOC on March 26, 2019”).

Here, there can be little doubt that Mr. Whitfield's service of his original petition provided the required entities adequate notice of the existence and nature of his APA action. His petition addressed both NDOC and Nevada State Personnel Commission and, in its caption, cited the case number for the underlying administrative proceeding. *Compare* JA001 (citing Appeal No. 1803430-LLW), *with* JA029 (the hearing officer's findings of fact, conclusions of law, and decision in Appeal No. 1803430-LLW). Mr. Whitfield then timely served this petition and the summonses. JA083–092. And a week later, the Attorney General's Office, on behalf of NDOC, concurrently filed a "statement of intent to participate in petition for judicial review" and a motion to dismiss Mr. Whitfield's petition. JA018, 039. So, to the extent that this Court concludes that Mr. Whitfield's original petition did not adequately name all the required parties, his amended petition should be permitted to relate back to the date of his first filing.

Like many cases in which a petition is dismissed for failure to comply with the APA's naming requirements, the instant appeal demonstrates why *Otto's* interpretation of the APA is unworkable and thus warrants modification. *See State v. Lloyd*, 129 Nev. 739, 750, 312

P.3d 467, 474 (2013) (“[W]hen governing decisions prove to be unworkable or are badly reasoned, they should be overruled.” (internal quotation marks and citation omitted)). As discussed above, *Otto* has created a trap door for both pro se and represented litigants seeking relief under the APA. Even where a timely filed petition provides an agency sufficient notice of which administrative decision is being challenged, the Attorney General’s Office need only wait to appear until *after* the 30-day window has expired and then raise a technical defect under APA’s naming requirements—thus precluding any opportunity to amend the petition. As demonstrated in the cases cited above, this has led to the summary dismissal of numerous petitions. Because this result is not only unjust, but also untethered to the APA’s text, this Court should modify its holding in *Otto*. Once a timely petition is filed, a petitioner should be permitted to amend that petition to cure any defects under the APA’s party-naming requirements.

*[continued on following page(s)]*



## Conclusion

For the foregoing reasons, this Court should reverse the district court's dismissal of Mr. Whitfield's petition and remand this case to allow it to proceed on the merits.

DATED: July 10, 2020

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that the **APPELLANT'S OPENING BRIEF** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2016 processing program in 14-point Century Schoolbook type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 4,779 words.

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

**CERTIFICATE OF SERVICE**

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On July 10, 2020, I caused to be served a true and correct copy of the foregoing **APPELLANT’S OPENING BRIEF** upon the following by the method indicated:

- BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court’s Service List for the above-referenced case.
- BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court’s Service List for the above-referenced case.
- BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

          /s/ Kelly H. Dove            
An Employee of SNELL & WILMER L.L.P.