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
Nov 23 2020 11:33 a.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

APPELLANT'S REPLY BRIEF

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Introduction

Mr. Whitfield's petition for judicial review explicitly states that he is challenging the decision by the Nevada State Personnel Commission (the "Commission") to uphold his termination from the Nevada Department of Corrections ("NDOC"). Thus, under *Prevost v. State Department of Administration*, 134 Nev. 326, 418 P.3d 675 (2018), he permissibly and adequately named these entities in the *body* of his petition. In arguing that Mr. Whitfield's petition for judicial review failed to comply with the Nevada Administrative Procedures Act ("APA"), Respondents attempt to avoid this Court's precedent and the statute's plain language.

Though Respondents contend that Mr. Whitfield needed to also name the Department of Administration (the "Department") and the Commission's hearing officer, the APA only requires that a petition name "*the* agency" that rendered the final administrative determination at issue. NRS 233B.130(2)(a) (emphasis added). In this instance, that agency is the Commission because it rendered the decision in Mr. Whitfield's employment hearing through its hearing officer, who is

merely an extension of the Commission. The district court therefore erred in dismissing Mr. Whitfield's petition.

Moreover, this case sharply illustrates how the strict-compliance standard adopted in *Washoe County v. Otto*, 128 Nev. 424, 282 P.3d 719 (2012) denies access to justice for countless Nevadans and has ultimately rendered the APA unworkable. Indeed, the Nevada Attorney General's Office here—as it does in many similar cases—waited until just after the APA's 30-day filing window had expired to move to dismiss, arguing that *Otto* prohibits amending the petition to add or substitute any missing respondents. But given the complex analysis often required to determine *which* entity is the proper agency-respondent, *Otto* frequently results in petitions being immediately dismissed on purely procedural grounds, as Mr. Whitfield's was here. That result is particularly unjust in this case because Respondents were undisputedly aware of what administrative decision Mr. Whitfield was challenging given that the Attorney General's Office appeared on behalf of NDOC shortly after he served these entities with his petition, which listed the administrative appeal number from his hearing. Accordingly, if this Court finds that Mr. Whitfield failed to comply with the APA's naming

requirements, it should partially modify *Otto* to permit limited amendment to a petition initially filed within the 30-day window.

Response to Respondents' Statement of the Case

This appeal solely addresses whether the district court erred in holding that it lacked jurisdiction to adjudicate the petition because Mr. Whitfield ostensibly failed to name all the respondents required under the APA. Yet Respondents included in their Answering Brief a lengthy statement of the case comprised largely of extraneous material, devoting several pages to the circumstances of Mr. Whitfield's termination and the hearing officer's specific findings. Ans. Br. 1–7. Such facts are wholly irrelevant to the issues on appeal and appear to be an inappropriate attempt to color this Court's perception of Mr. Whitfield. Similarly, Respondents extensively and unnecessarily recount the details underlying their unsuccessful motion to dismiss this appeal as untimely—implicitly attempting to re-argue an issue that this Court already decided. Ans. Br. 7. This Court should therefore disregard Respondents' statement of the case.

Arguments

I. Mr. Whitfield's Petition for Judicial Review Named All Proper Respondents and Complied with the Requirements of NRS 233B.130(2)(a).

The parties agree that the APA requires a party aggrieved by an administrative agency's decision to name two types of respondents in a petition for judicial review: (1) "the agency" that rendered the decision (the "agency-respondent") and (2) "all parties of record to the administrative proceeding" (the "party-respondent(s)"). *See* NRS 233B.130(2)(a); Ans. Br. 16. By extension, the parties also agree that Mr. Whitfield's petition needed to name the Commission as the agency-respondent and NDOC as the sole party-respondent. *Compare id.*, *with* Op. Br. 11.

Even though the petition named these two entities in its *body*—a practice permitted under this Court's decision in *Prevost*—Respondents argue that his petition failed to satisfy the APA for two reasons. First, they contend that the petition did not sufficiently name the Commission or NDOC because it did not expressly refer to these entities as "respondents." Second, Respondents assert that both the Department of Administration and the Commission's hearing officer, Lorna Ward, are also respondent-agencies in this matter and should have therefore been

named. Respondents thus implicitly contend that multiple entities can constitute "the agency," despite the APA's use of strictly singular language.

As addressed below, these arguments are without merit.

A. Under *Prevost*, Mr. Whitfield's Petition Sufficiently Named the Commission and NDOC.

Mr. Whitfield's petition stated that he was seeking "[j]udicial [r]eview from the final judgment of the Nevada State Personnel Commission in this action." JA001; *see also* Ans. Br. 16 (acknowledging same). The petition further specified that the "[s]aid judgement [sic] was rendered on March 1, 2019" and found "Mr. Whitfield ineligible for reinstatement/rehire to his position as [sic] Nevada Department of Correction." JA001. And beyond providing the precise content and date of that final agency decision, the caption cited the correct administrative appeal number. *Compare id.*, *with* JA029. The petition thus clearly and unequivocally named the Commission as the agency that rendered the administrative decision that Mr. Whitfield is challenging and NDOC as the sole party of record to that administrative proceeding other than Mr. Whitfield. And given that this Court recently clarified that it is sufficient to name a respondent in the petition's *body* (rather than its caption), it is

evident that Mr. Whitfield complied with the APA's naming requirements. *Prevost*, 134 Nev. at 328, 418 P.3d at 676 ("Prevost named CCMSI in the body of the petition . . . . We conclude that this is sufficient to satisfy NRS 233B.130(2)(a) . . . .").

Respondents nonetheless argue that the petition failed to name the Commission or NDOC because it did not refer to either entity "as a respondent" to the action. Ans. Br. 16. In other words, a petition must, in Respondents' view, expressly *title* a party as a "respondent" in order to satisfy the APA. But Respondents fail to cite any authority in support of this formulaic reading of the statute.

Conversely, *Prevost* forecloses this argument by demonstrating that a petition names a party as a respondent regardless of whether it expressly uses that title. In finding that the petitioner there satisfied the APA, this Court cited the fact that CCMSI was merely referenced in the administrative decision attached to the petition. *Prevost*, 134 Nev. at 328, 418 P.3d at 676. That attached decision could not have identified CCMSI as a respondent to the petition for judicial review, as it had not yet been filed. Nor did the decision name CCMSI in its caption or explicitly state that it was a party to the administrative proceeding.

Prevost, Appeal No. 71472, Appellant's Appendix at 6 (Nev. June 14, 2017).[1] Indeed, the dissent in *Prevost* centered on this very point. 134 Nev. at 329, 418 P.3d at 677 (Stiglich, J., dissenting) ("I disagree with the majority's conclusion that the statute is satisfied . . . when the relevant party is simply *mentioned* somewhere in the petition or attached documents . . . . The mere fact that the relevant name appears in documents attached to the petition does not indicate that the named party is *named as a respondent*."). But it is of course the Court's majority opinion that governs this appeal.

And the petition here even more clearly identifies the Commission and NDOC as respondents than CCMSI was identified in *Prevost*. Both entities are directly cited in the body of Mr. Whitfield's petition rather than in an attached document incorporated by reference.[2] JA001. The petition also expressly states that Mr. Whitfield is seeking judicial review

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[1] This Court may take judicial notice of the record in other cases on its docket. *Rock Springs Mesquite II Owners' Ass'n v. Raridan*, 464 P.3d 104 n.1, 110 (Nev. 2020); *see also Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

[2] Because Mr. Whitfield is therefore not relying on incorporation by reference, there is no relevance to Respondents' emphasis of the fact that he did not attach the administrative decision to his petition. *See* Ans. Br. 21–22.

of the Commission's "final judgment" in the administrative proceeding that upheld Mr. Whitfield's termination from NDOC. And even though the petition is thus clear on its face that NDOC is the party-respondent, this conclusion is buttressed by the fact that the underlying administrative proceeding is designed solely to allow state employees to challenge adverse employment actions taken by the employing state entity—in this case NDOC—which appears as a party in such proceedings. NRS 284.390; *see also* JA035 (administrative decision citing this statute).

Accordingly, Mr. Whitfield's petition sufficiently named the Commission as the agency-respondent and NDOC as the party-respondent.

B. Mr. Whitfield Correctly Named the Commission as the Sole Agency-Respondent.

Respondents also contend that, along with the Commission, Mr. Whitfield was required to name Hearing Officer Ward and the Department of Administration as agency-respondents. Ans. Br. 17–19. But this argument ignores the fact that the APA requires only a single

agency to be named as the agency-respondent.[3] And under this Court's precedent, the Commission is the proper agency-respondent.

1. Both the APA's plain text and this Court's precedent establish that the statute requires naming only a single agency-respondent.

The APA uses strictly singular language to describe the *agency*-respondent that the petition must name. For instance, while the naming requirement uses the term "parties of record" for the party-respondents, it refers only to "the agency" for the agency-respondent. NRS 233B.130(2)(a) (emphasis added). The petition must similarly "[b]e filed within 30 days after service of the final decision of the agency." NRS 233B.130(2)(d) (emphasis added); *accord* NRS 233B.130(3) ("The agency and any party desiring to participate in the judicial review must file a statement of intent to participate . . . ." (emphasis added));

[3] Respondents summarily assert that Mr. Whitfield is judicially estopped from arguing that his petition did not need to additionally name Hearing Officer Ward or the Department. Ans. Br. 14–15. This argument is premised on the fact that Mr. Whitfield, while acting pro se, filed an amended petition that sought to add these two parties *after* Respondents argued in their motion to dismiss that they must be named. *Id.* But Respondents have fallen far short of demonstrating that Mr. Whitfield benefitted from his mistaken belief that these two entities were required respondents or that his position was an "attempt to obtain an unfair advantage" rather than "a result of ignorance" of the law. *NOLM, LLC v. Clark County*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004).

NRS 233B.130(6) ("The petition for judicial review . . . must be served upon the agency and every party within 45 days after the filing of the petition." (emphasis added)). Accordingly, the APA's express, unambiguous text requires that a petition name only a single agency-respondent. *Anthony S. Noonan IRA, LLC v. U.S. Bank Nat'l Ass'n EE*, 136 Nev. Adv. Op. 41, 466 P.3d 1276, 1279 (2020) ("When a statute's language is plain and unambiguous, we will apply the statute's plain language.").

Moreover, the APA's varied use of single and plural language is both intentional and intuitive. Although there can often be several parties to an administrative proceeding—often requiring the aggrieved party to name multiple *party*-respondents—only one agency can render the final decision that is subject to judicial review. To that end, this Court has held that the term "agency" under the APA "refers to *the* agency that made the final determination at issue in the petition for judicial review." *Sierra Club v. State Div. of Envtl. Prot.*, Appeal

No. 59906, 129 Nev. 1151, 2013 WL 7158582, *2 (Dec. 19, 2013) (unpublished disposition) (emphasis added).[4]

But Respondents fail to address the APA's plain language, citing instead to two cases that purportedly demonstrate that a petition must name multiple entities within the same agency. Ans. Br. 18–19 (citing *Sierra Club*, 2013 WL 7158582; *Cooper Roofing & Solar, LLC v. Chief Administrative Officer of Occupational Safety & Health Admin.*, Appeal No. 67914, 132 Nev. 958, 2016 WL 2957129 (May 19, 2016)). But neither decision supports that proposition nor justifies deviating from the APA's text.

In *Cooper Roofing*, a company filed a petition for review after administratively appealing a citation from Nevada OSHA to the OSHA "Review Board." 2016 WL 2957129, *1. But the petition failed to name the Review Board, which this Court determined was independent from Nevada OSHA and therefore needed to be named as the agency. *Id.* at *2. This Court did not, however, hold that both entities constitute *agency-*

[4] Mr. Whitfield recognizes that *Sierra Club* is an unpublished disposition issued before 2016 and should thus normally not be cited. NRAP 36(c)(2). But as addressed below, Respondents first raised this decision in their answering brief for an incorrect proposition.

respondents under the APA. Rather, it is evident from that case's procedural posture and record that Nevada OSHA was one of the parties of record to the Review Board proceeding and was therefore a necessary *party*-respondent in the petition for judicial review. *Cooper Roofing*, Appeal No. 67914, Appellant's Appendix at APP00015 (Nev. Sept. 17, 2015) (naming Nevada OSHA and Cooper Roofing as the two parties of record to the administrative proceeding before the Review Board).

In contrast, this Court in *Sierra Club* addressed which of the three agencies involved constituted the proper agency-respondent. 2013 WL 7158582, *1. Although the petition named "the entity whose underlying action was [being] challenged," it failed to include the entity "that made the final determination at issue in the petition for judicial review." *Id*. at *2. Accordingly, the petition was deficient not because it failed to name all three entities, but rather due to its failure to name the one entity that constituted the agency-respondent.

In that respect, *Sierra Club* mirrors the analysis required in this appeal. Contrary to Respondents' premise, only one of the three entities they list can constitute the agency-respondent, and that agency is the Commission.

2. The Commission is the correct agency-respondent because it ultimately rendered the decision that Mr. Whitfield challenges in his petition.

As discussed above, this Court has clarified that the agency-respondent is "the agency that made the final determination at issue in the petition for judicial review." *Id.* And in *Cooper Roofing*, this Court adopted the U.S. Supreme Court's framework for determining whether government entities constitute "independent agencies" for naming purposes. 2016 WL 2957129, *1 (citing *Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Comp. Programs*, 519 U.S. 248 (1997)). When an "adjudicatory authority" exists under the organizational umbrella of an "overarching agency," courts assess "the amount of control" that the latter has over the adjudicatory authority. *Id.* at *2. "While it was not necessary for the overarching agency to 'have absolute veto power over the decisions of its adjudicator before the adjudicator is deemed to be "within" the agency,'" the "power to appoint the members of the [adjudicator] and establish its rules of procedure demonstrate[s] the [overarching agency has] 'indirect but substantial control over the [adjudicator] and its decisions.'" *Id.* (quoting *Ingalls*, 519 U.S. at 268–69). Applying this framework, this Court found that OSHA's Review

Board is independent of Nevada OSHA given that the Review Board members are appointed by the governor, no person employed by Nevada OSHA can also serve on the Review Board, and Nevada OSHA does not have control over the Review Board's procedures. *Id.*

Accordingly, where there are interrelated state entities and a dispute regarding which entity is "the agency" under the APA, *Cooper Roofing* and *Sierra Club* pose two related questions: (1) whether those entities are independent agencies that are thus capable of being named and (2) which of the independent agencies rendered the final decision at issue and is thus *the* proper agency-respondent to name. Because it is undisputed here that the Department, the Commission, and the Commission's hearing officer are interrelated, applying these principles requires delineating the role, relationship, and authority of each entity—an analysis that Respondents failed to conduct.

The Department provides an array of services to other state entities through its various divisions, such as Fleet Services, Purchasing, State Public Works, the Nevada State Library, and Human Resource Management. *See* NRS 336.016; NRS 333.020(6); NRS 341.014–.0145; NRS 378.005; NRS 284.025. The Commission is a body that operates as

part of the Division of Human Resource Management.[5] NRS 284.030(1); NRS 284.015(4) (defining "the Division"). It is comprised of five voting members appointed by the governor and is statutorily empowered to promulgate regulations governing the state personnel system. NRS 284.030(2); NRS 284.065(2)(d); NRS 284.010; *see also* NAC Chapter 284 (regulations for the "State Personnel System"). The Commission also holds adjudicatory roles. It directly reviews decisions from the Division's Administrator "involving the classification or allocation of particular positions." NRS 284.065(2)(f). And, as relevant here, the Commission appoints the hearing officers who preside over a state employee's administrative appeal of an employing agency's adverse employment action. NRS 284.091; NRS 284.390(1).

So, although the Department is the "overarching agency," the Commission is an independent agency under the *Cooper Roofing* framework. The Commission's membership is wholly independent of the Department or any other government entity given that the governor

[5] Respondents have not asserted that the Division of Human Resource Management was a necessary agency-respondent and have therefore waived that argument. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011).

appoints the members, who are prohibited from holding "partisan political office" or serving as state employees during or immediately preceding their terms. NRS 284.060. The Commission also has its own statutory powers and is required to "prescribe" its own "rules and regulations for its own management and government." NRS 284.060. It is thus evident that the Department is merely the organizational umbrella under which the Commission and an array of other government entities operate. And because the Department had no involvement in or authority over Mr. Whitfield's employment hearing, it is also clear that, under *Sierra Club*, the Department could *not* have made the final determination at issue in his petition—i.e., whether he was wrongfully terminated. The Department is therefore not the proper agency-respondent.[6]

[6] Respondents cite the fact that the petitioner in *Prevost* named the Department, which they assert "suggests" that this Court confirmed that the Department was a necessary respondent. Ans. Br. 18. But the only issue addressed in *Prevost* was whether the petitioner properly named CCMSI despite not including that party-respondent in the petition's caption. 134 Nev. at 328, 418 P.3d at 676. Accordingly, *Prevost* merely demonstrates that even counseled petitioners often resort to a "kitchen sink" approach to naming respondents given the APA's complex naming rules and *Otto*'s strict-compliance standard.

In contrast to the Commission's autonomy, hearing officers like Ward are merely extensions of the Commission and are thus not independent agencies under the APA. The Commission not only appoints hearing officers, but the statute authorizing state employees to challenge adverse employment actions makes clear that the resulting hearing takes place "before the hearing officer *of the Commission* to determine the reasonableness of the [employment] action." NRS 284.390(1) (emphasis added). Hearing Officer Ward likewise identified herself in her written decision as "the Nevada State Personnel Commission Hearing Officer." JA029. Moreover, the Commission regulates almost every aspect of these employment hearings, including issues of timing, notice, and accommodations, NAC 284.782; the availability and length of continuances, NAC 284.786; the conduct of the parties and the hearing officer, NAC 284.788; the types of evidence permitted and how evidence must be presented, NAC 284.794–.806; and the precise sequence of the hearing's components, NAC 284.814(3) ("The matter must be heard in the following manner . . . ."). So, although it does not appear that the Commission has an "absolute veto power" over a hearing officer's findings, the Commission's authority to appoint hearing officers and

"establish [their] rules of procedure" demonstrates that the Commission has "substantial control" over hearing officers and their decisions. *See Cooper Roofing*, 2016 WL 2957129, *2. Accordingly, Hearing Officer Ward is not an independent agency, and her ruling in Mr. Whitfield's employment hearing is therefore the decision "of the Commission." *See* NRS 284.390(1).

But despite citing to both *Cooper Roofing* and *Sierra Club*, Respondents fail to meaningfully address their holdings or to assess the roles of the Department, the Commission, or the Commission's hearing officer. Instead, they merely cite in passing to NRS 233B.031, which defines the term "agency" as "an agency, bureau, board, commission, department, division, officer or employee of the Executive Department of the State Government authorized by law to make regulations or to determine contested cases." Ans. Br 17. But this statute simply clarifies that the role of agency-respondent is not limited to entities that are colloquially referred to as an agency. Regardless of whether the entity is styled as a department, a commission, a board, etc., it can constitute the agency-respondent if it makes the final determination at issue in the petition. *See Sierra Club*, 2013 WL 7158582, *2 (citing NRS 233B.031

and finding that the State Environmental Commission was the agency-respondent). That fact does not address—let alone alter—the conclusion that Hearing Officer Ward is merely an extension of the Commission and that her ruling therefore constituted the Commission's decision.

Because that administrative decision is "the final determination at issue" in Mr. Whitfield's petition for judicial review, the Commission is *the* agency-respondent under the APA. *Id.* And given that his timely petition properly named the Commission, along with NDOC as the sole party-respondent, Mr. Whitfield has satisfied the APA's naming requirement. This Court should therefore reverse the district court's order dismissing the petition.

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

Alternatively, if this Court determines that Mr. Whitfield did not fully comply with the APA's naming requirements, he should be permitted to amend his petition under principles of equity and fairness. Op. Br. 15–20. To provide adequate access to justice for pro se parties, courts have generally allowed leave to amend when curing the deficiency is at all possible. *See Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir. 2013). When technical jurisdictional requirements are involved, courts

are "generally more solicitous of the rights of pro se litigants." *Borzeka v. Heckler*, 739 F.2d 444, 447 n.2 (9th Cir. 1984). Sophisticated practitioners should not take advantage of pro se litigants and obstruct judicial review based on a mere technicality.

Here, Respondents do not dispute that they obtained dismissal of Mr. Whitfield's petition by taking advantage of the APA's complex naming requirements and *Otto*'s strict-compliance standard. *See* Ans. Br. 23–27. Aware that *Otto* prohibits amending a petition after the 30-day filing window and that Mr. Whitfield was acting pro se, Respondents waited until just after the window had expired to move to dismiss his petition for purportedly failing to name all the necessary respondents. *Compare* JA028 (March 1, 2019 administrative decision), *with* JA18 (April 4, 2019 petition for judicial motion to dismiss). And though Mr. Whitfield filed an amended petition two business days later, JA042, his petition was still dismissed for failure to strictly comply with the APA.

Respondents also do not dispute that Mr. Whitfield's petition notified them of what administrative decision he was challenging. Indeed, the Attorney General's Office appeared on behalf of NDOC shortly after he served Respondents with his petition, which listed the

administrative appeal number from his hearing.[7] JA039 (statement of intent to participate in petition for judicial review); JA003–009 (summonses).

Accordingly, if Mr. Whitfield was required to have named additional or different respondents, then a mere technicality will prevent him from challenging an administrative decision that ended his 13-year career in public service. And given that Respondents also do not contest that the Attorney General's Office and similar entities have likewise obtained dismissals of numerous other petitions on purely procedural grounds, it is evident that *Otto*'s strict-compliance standard is severely limiting access to justice. The principles of fairness and equity should thus permit petitioners, including Mr. Whitfield, to amend timely filed petitions for judicial review.

[7] Respondents merely highlight the fact that Mr. Whitfield did not serve Hearing Officer Ward. Ans. Br. 18 n.4. If this Court concludes that Hearing Officer Ward should have been named (and thus served) and that Mr. Whitfield is also entitled to amend his petition, the APA allows the district court to extend the service deadline. NRS 233B.130(5).

III. Alternatively, Because the APA Does Not Expressly Prohibit Amendment of a Timely Filed Petition, This Court Should Partially Modify *Otto*.

Mr. Whitfield raises a final alternative argument, contending that this Court should partially modify *Otto* to permit a petitioner to amend his petition when, as here, it was timely filed. Op. Br. 20–25. In other words, so long as a party aggrieved by an agency decision files the petition within 30 days of that decision, he should be permitted to amend his petition to add any parties of record that were inadvertently omitted or to substitute the correct agency.[8] This argument is premised on the fact that the APA does *not* expressly prohibit amending a petition after 30 days. *See* NRS 233B.130(2)(a).

Before addressing this argument's merit, Respondents assert that it is somehow "an outright admission that [Mr. Whitfield's] petition failed to strictly comply with the mandatory and jurisdictional requirements of

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[8] As discussed above, it is Mr. Whitfield's position that the APA's plain language requires that only a single agency-respondent be named. *See supra* § I.B.1. But if this Court holds otherwise, Mr. Whitfield should be permitted to add whichever individuals or entities this Court determines constitute the relevant agencies in this matter. Likewise, if this Court finds that the petition should have named the Commission's hearing officer in lieu of or in addition to the Commission itself, Mr. Whitfield should be given the opportunity to add or substitute the hearing officer.

NRS 233B.130(2)(a)." Ans. Br. 28. But Respondents—like Mr. Whitfield—frame this issue as an "alternative argument." *Compare id.*, *with* Op. Br. 20 ("Alternatively, This Court Should Modify *Otto* in Part . . . ."). Mr. Whitfield also expressly stated that his "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." Op. Br. 21. Respondents thus incorrectly portray Mr. Whitfield's argument.

Respondents also misapprehend Mr. Whitfield's position by asserting that he is attempting to "judicially legislate" new terms into the APA. Ans. Br. 29–30. Mr. Whitfield does not seek to amend the statutory scheme. He instead requests that this Court revisit its interpretation of the APA's filing requirements in *Otto*, which Mr. Whitfield respectfully contends incorrectly construed the statute's text. In holding that the APA precludes amending a petition after the filing window, this Court read the two relevant filing requirements conjunctively. 128 Nev. at 432, 282 P.3d at 725. It thus found that a party must both file a petition for judicial review within 30 days and name all necessary parties within that

window. 128 Nev. at 432, 282 P.3d at 725. This conclusion stemmed from the APA's use of the word "must," which applies to both requirements. *Id.* But the fact that a petition "must . . . . [n]ame as respondents the agency and all parties of record to the administrative proceeding" does not necessitate finding that this specific requirement can be satisfied only within the 30 days allotted for initially filing that petition. Indeed, this subsection does not expressly prohibit amending a petition after that window. A party can therefore satisfy the APA's plain text by filing a petition for judicial within 30 days of the administrative decision and, if necessary, subsequently filing an amended petition to add or substitute all necessary parties.

For this reason, there is no merit to Respondents' contention that NRCP 15 is "clearly inconsistent" with the APA. Ans. Br. 28–29; *see also Prevost*, 134 Nev. at 328 n.3, 418 P.3d at 677 n.3 ("[T]he provisions of the NRCP govern proceedings under the APA to the extent that they are not in conflict with the provisions of the APA."). Because the statute does not expressly prohibit amendment after the 30-day filing window, it does not conflict with NRCP 15(a), which permits amendments "as a matter

of course" within "21 days after serving" a pleading and, thereafter, with the court's leave.[9] NRAP 15(a)(1)(A), (a)(2).

Likewise, there is no tension between the APA and the relation-back doctrine under NRCP 15(c), which provides an additional mechanism for amending the petition after the 30-day window. Even if Mr. Whitfield should have named additional entities, Respondents do not contest that any missing entities received sufficient notice that they would have been named but for Mr. Whitfield's purported error in determining which parties had to be named. *Compare* Op. Br. 24, *with* Ans. Br. 28–30. And as addressed above, the Attorney General's Office entered an appearance in this case shortly after Mr. Whitfield served Respondents with his petition. JA018, 039; JA083–092.

Finally, Respondents fail to refute the fact that *Otto* has resulted in an unworkable standard.[10] As demonstrated by this case and the other

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[9] To be clear, Mr. Whitfield contends that the APA does *not* prevent amending a petition after the 30-day filing window. NRCP 15(a) thus provides the procedural mechanism for doing so.

[10] Rather than squarely address this point, Respondents merely repeat their central contention that Mr. Whitfield failed to name any parties in his petition. Ans. Br. 30. But as discussed above, Mr. Whitfield's petition sufficiently named the Commission and NDOC, the only agency and party of record that exist in this matter. And even if this Court holds otherwise, that conclusion does not address whether the APA permits an

examples that Mr. Whitfield cited, Op. Br. 16–17, it is often unclear—even to a represented petitioner—which agencies and parties must be named. Indeed, Respondents' fleeting contention that "the APA's naming requirements are neither mysterious nor confusing," Ans. Br. 25, is belied by their arguments regarding which entities constitute the agency-respondent in Mr. Whitfield's administrative appeal of his termination. And even though the three entities that they highlight—the Department of Administration, the Commission, and the Commission's hearing officer—are interrelated, Respondents contend that a petitioner should know that all three must purportedly be named—despite the lack of express statutory guidance on this point. Similarly, many petitions are dismissed because of ambiguity regarding which entities are considered a party to the proceeding. *See, e.g.*, *Prevost*, 134 Nev. at 327, 418 P.3d at 676 (reversing dismissal of a petition filed by an NDOC employee for failing to also name NDOC's third-party administrator for worker's compensation claims as a party of record); *Sun City Summerlin Cmty. Ass'n, Inc. v. Clark County*, Appeal No. 75914 (Nev. May 25, 2020)

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aggrieved party to cure any naming defects if he timely filed the original petition.

(Cadish, J. dissenting from order denying en banc reconsideration) ("[T]he order of affirmance incorrectly concludes that Rhodes Ranch was a party of record to the administrative proceeding involved in this appeal," which consolidated 40 cases.).

Accordingly, *Otto*'s application over the years has demonstrated that its strict-compliance standard primarily serves to preclude judicial review of administrative actions for countless aggrieved parties, including civil servants claiming wrongful termination. And because that standard is untethered to the APA's text, this Court should modify *Otto* to permit an aggrieved party who timely filed a petition for judicial review to amend that petition to name any missing agencies or parties of record.

[continued on following page(s)]

Conclusion

For the foregoing reasons, this Court should reverse the district court's order dismissing Mr. Whitfield's petition for judicial review and remand this case for further proceedings.

DATED: November 23, 2020

SNELL & WILMER L.L.P.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the **APPELLANT'S REPLY 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 5,303 words.

Finally, I hereby certify that I have read the **APPELLANT'S REPLY 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 November 23, 2020, I caused to be served a true and correct copy of the foregoing **APPELLANT'S REPLY 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/ Maricris Williams
An Employee of SNELL & WILMER L.L.P.

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