

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA GAMING COMMISSION, A POLITICAL SUBDIVISION OF THE
STATE OF NEVADA; AND NEVADA GAMING CONTROL BOARD, A
POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

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Elizabeth A. Brown
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Appellants,

v.

STEPHEN A. WYNN, AN INDIVIDUAL,

Respondent.

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
CASE No. A-20-809249-J

JOINT OPENING BRIEF

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JURISDICTION

This Court has jurisdiction pursuant to Nevada Rule of Appellate Procedure (“NRAP”) 3A(b)(1) and NRAP 4(a)(4)(C)-(D). Nevada Gaming Control Board (“Board”) and Nevada Gaming Commission (“Commission”) appeal from a final judgment. Written notice of entry of the judgment was entered and served on November 25, 2020. Appendix (“App.”). JA0625. The Board and the Commission timely appealed on December 23, 2020. JA0643 and JA0665.

ROUTING STATEMENT

This Court should retain jurisdiction to hear this appeal because it raises issues of statewide importance. The court below erroneously adopted a novel rule permitting district court review of interlocutory Commission decisions. It then used its newfound authority to hold that an individual can halt the Board’s ongoing investigation of him and avoid Commission discipline by unilaterally severing his existing relationship with a gaming licensee. The district court’s order impermissibly intrudes on the Board and the Commission’s ability to discharge their duties under the Gaming Control Act.

This Court should clarify that the Board and the Commission’s jurisdiction, once acquired over an individual found suitable to be associated with a gaming licensee, is not nullified by the individual’s unilateral exit. This Court should also

reiterate that district courts should not use extraordinary relief as a vehicle to intrude into the Commission's dominion over discipline in the gaming industry.

ISSUES PRESENTED

1. Where NRS 463.315 limits judicial review to final orders on the merits, did the district court have jurisdiction to consider Respondent Stephen A. Wynn's petition for judicial review of the Commission's interlocutory denial of his motion to dismiss?

2. Do any or all of the Commission's five separate, independent bases for subject matter jurisdiction require denial of Wynn's petition?

INTRODUCTION

Over 50 years ago, this Court made "emphatically clear" that courts must not obstruct the Nevada Gaming Commission's administrative hearings nor "block the Gaming Control Board in its effort to discharge assigned duties." *Gaming Control Bd. v. Dist. Ct.*, 82 Nev. 38, 40, 409 P.2d 974, 975 (1966). Nevada's control over gaming in the State is in doubt if the Gaming Control Act's administrative procedures are not allowed to operate as intended by the Legislature. *Id.* The district court's review of the Commission's interlocutory order denying Wynn's motion to dismiss violates this precedent. The district court had no authority to review the Commission's order, much less issue a writ terminating it.

The district court erred in framing the issue presented in this case as whether Wynn could be found suitable at the present moment—after divestment of his Wynn Resorts interests. Properly understood, however, this case asks whether the Board is empowered to recommend revocation, after a previous finding of suitability, and whether the Commission has power to impose such discipline. The unambiguous language of the Gaming Control Act answers these questions in the affirmative.

Wynn cannot, on the one hand, embrace the Board and Commission's suitability finding to facilitate his rise in the gaming industry and then, through unilateral action, escape the Board and Commission's scrutiny of his suitability status. The Legislature granted the Board and the Commission full and absolute power to revoke any previous finding of suitability—power that they utilized here. Wynn's role as an innovator in the gaming industry, a man who reinvented modern Las Vegas, occurred under the watch of the Board and the Commission. Wynn accepted the benefit of the Board and the Commission's regulatory power, and Nevada law does not permit him to now escape scrutiny at his whim. The district court's order permitting him to do so violates both the language and the spirit of the Gaming Control Act. This Court must reverse the district court's order.

STATEMENT OF THE CASE

The Board filed a complaint in the Commission seeking discipline against Wynn for alleged violations of the Nevada Gaming Control Act (the "Gaming

Control Act”) and Commission regulations. Wynn moved to dismiss, and the Commission denied his motion. Wynn then filed a petition for judicial review and/or a writ of prohibition or mandamus in the Eighth Judicial district court. The Board and the Commission separately opposed Wynn’s petition and countermoved to dismiss it. The district court granted the petition and denied the countermotions to dismiss. The Board and Commission both timely filed notices of appeal from the order granting the petition and denying the countermotions.

STATEMENT OF FACTS

I. Statutory Background

A. The Board and the Commission have “[f]ull and absolute power” to revoke “any” suitability finding.

In the late 1950’s Nevada’s Legislature enacted the Gaming Control Act. NRS 463.010. A few years later, the Legislature created the Board and the Commission. NRS 463.022, 463.030.

The Gaming Control Act created a framework for regulating Nevada’s gaming industry. The Commission is to craft regulations to enforce and administer the Gaming Control Act. NRS 463.150. But such is the Commission’s expansive jurisdiction over Nevada’s gaming industry that its powers are not limited to specific enumerated ones described by the Gaming Control Act:

The Commission may exercise any proper power and authority necessary to perform the duties assigned to it by

the Legislature, and is not limited by any enumeration of powers in this chapter.

NRS 463.143.

The Legislature recognized that “[t]he gaming industry is vitally important to the economy of the State and the general welfare of [Nevadans]...” NRS 463.129(1)(a). Because of gaming’s role in Nevada, the Legislature found that “[p]ublic confidence and trust can only be maintained by strict regulations of persons, locations practices, associations and activities related to the operation of licensed gaming establishments...” NRS 463.129(1)(c).

Only suitable persons may be associated with gaming in Nevada. Suitability does not concern a person’s temporal connection to a particular license, but more broadly their worthiness to be associated with gaming in this State. The Legislature explained in NRS 463.170(4), “[a]n application to receive a license or be found suitable constitutes a request for a determination of the applicant’s general character, integrity, and ability to participate or engage in, or be associated with gaming...” NRS 463.170(4). The Commission and the Board must continue to observe the conduct of all licensees and persons having material direct or indirect involvement with a licensed gaming operation. NRS 463.1405(1).

Nothing in the Gaming Control Act limits the Board’s investigatory power to a person’s active connection to a licensee. Under the Gaming Control Act, the Board may “determine whether there has been any violation of [Chapter 463] or chapter

368A, 462, 464, 465, 466 of NRS or any regulations adopted thereunder.” NRS 463.310(1). The Legislature empowered the Board, “after any investigation,” to recommend revocation of a finding of suitability. NRS 463.310(2)(a).

Nor does anything in the Gaming Control Act limit the Board’s power to initiate a complaint to persons with an active connection to a licensee. The Board initiates disciplinary proceedings by filing a complaint and transmitting a summary of the evidence. NRS 463.310(2)(b). A “respondent” means “any licensee or other person...” NRS 463.0187. The Board has “full and absolute power” to recommend revocation of “any” finding of suitability. NRS 463.1405(3). The Commission similarly “has full and absolute power and authority” to revoke “any” finding of suitability. NRS 463.1405(4). Such discipline can be recommended by the Board or approved by the Commission “for any cause deemed reasonable.” NRS 463.1405(3)-(4).

Notably, the Legislature created a punishment beyond a person’s disassociation with the gaming license to whom their suitability determination was appended. Persons whose suitability has been revoked cannot play a role in gaming through indirect means. After a revocation of a finding of suitability, licensees are prohibited from paying or employing unsuitable persons, after written notice from the Commission. NRS 463.645(1)-(3).

B. Judicial review is available only for final decisions.

The Gaming Control Act describes when judicial review is available. After a contested matter hearing, it requires the Commission to “render a written decision on the merits” that “contain[s] findings of fact, a determination of the issues presented and the penalty to be imposed, if any.” NRS 463.3145(1). Judicial review is available only for persons aggrieved by “a final decision or order of the Commission made after hearing or rehearing by the Commission pursuant to NRS 463.312 to 463.3145...” NRS 463.315(1), NRS 463.318(2).

II. The Board’s Disciplinary Complaint Against Wynn

Until he severed his relationship with Wynn Resorts, Wynn was its chief executive officer, chairman, and controlling shareholder. JA0001. Wynn Resorts is a publicly traded company. JA0003. Wynn Resorts owns Wynn Las Vegas, LLC (“Wynn LV”), which holds a nonrestricted gaming license. *Id.*

In early 2018, the *Wall Street Journal* published an article titled “Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn.” JA0004. The *Journal*’s article detailed several allegations. It reported that Wynn paid \$7.5 million to resolve a Wynn LV manicurist’s allegations that he subject her to unwelcome sexual conduct, which Wynn LV failed to investigate despite a supervisor’s complaint to human resources. *Id.* The *Journal* asserted that there were further instances of unwelcome sexual conduct by Mr. Wynn with employees. *Id.*

The Board launched an investigation of Wynn that lasted approximately 7 months. JA0008. The Board's investigators reviewed an internal investigation by Wynn Resorts; conducted interviews with current and former employees; and reviewed the public documents from several lawsuits that detailed allegations of unwelcome sexual conduct by Wynn, confidential settlement agreements between Wynn, Wynn Resorts, and employees, and Wynn Resorts policies and procedures pertaining to sexual harassment and personal relationships between managers and subordinate employees at the company. JA0006-7.

After considering this information, the Board found evidence of unwelcome sexual conduct by Wynn with subordinate employees. JA0008. Wynn described all sexual interactions as consensual. *Id.* However, he appeared oblivious to the power differential between himself and subordinate employees that were dependent upon his good opinion for their livelihoods. *Id.*

Wynn attempted to thwart any investigation of his conduct with subordinate employees. Wynn entered into several confidential settlement agreements with non-disclosure clauses. *Id.* The Board issued an Order to Appear requiring Wynn to testify at an Investigative Hearing, but he did not show up. *Id.*

In January 2019, the Board filed a complaint against Wynn Resorts. JA0009. A month later Wynn Resorts entered into a stipulated settlement. *Id.* It paid a \$20 million fine. *Id.* It also admitted that Wynn engaged in sexual misconduct with

employees, that he failed to comply with Wynn Resorts policies to maintain a professional work environment, that Wynn Resorts' failure to follow its policies led to several uninvestigated reports of unwelcome sexual conduct by Wynn, and that Wynn's conduct was unsuitable and inappropriate considering the power disparity between him and non-managerial employees. *Id.*

Nevada's investigation of Wynn Resorts and Wynn was not the only one conducted. Wynn Resorts was investigated by the State of Massachusetts. JA0010. The report of the Massachusetts Investigations and Enforcement Bureau cited to a written statement by Wynn wherein he admitted to several relationships but claimed that he was unaware of whether he violated Wynn Resorts' policies because he was unfamiliar with their terms. *Id.* Massachusetts fined Wynn Resorts \$35 million and imposed an additional fine of \$500,000 against its then-CEO Matthew Maddox. *Id.*¹

III. The Commission's Denial of Wynn's Motion to Dismiss

The Board filed a complaint against Wynn. JA0001. The Board prayed that the Commission revoke Wynn's finding of suitability under NRS 463.310(4), fine Wynn a sum for each of his alleged violations of the Gaming Control Act and the Commission's regulations, and for such further relief as the Commission deemed

¹ The facts set out here reflect the Board's administrative complaint. If the Commission's disciplinary proceedings resumes, the Board will have the burden of proving the facts alleged. Nothing in this brief has the purpose or effect of prejudging any factual dispute that may arise in the Commission's disciplinary proceeding.

appropriate. JA0023. Wynn moved to dismiss on subject matter jurisdiction grounds. JA0027.

The Commission agreed with the Board that subject matter jurisdiction existed on five separate grounds. **First**, the Legislature granted “[t]he Commission...full and absolute power to...revoke...any finding of suitability.” JA0259, (citing NRS 463.1405(4)). **Second**, the Legislature mandated that the Commission review complaints filed by the Board and conduct proper procedural activities in accord with the Gaming Control Act, including revoking a finding of suitability. *Id.* (citing NRS 463.310(4)(b)). **Third**, the Legislature empowered the Commission to fine persons who were found suitable, but who violated Nevada law or regulations. *Id.* at 3:24-28 and 4:1 (citing NRS 463.310(4)(d)). **Fourth**, as a necessary corollary to the Board’s power to compel the attendance of witnesses to render meaningful the Board’s investigatory power, the Commission has subject matter jurisdiction over complaints that seek to fine witnesses that disregard the Board’s Order to Appear. JA0260 at 4:2-11 (citing 463.140(5)). **Fifth**, the Commission’s duties of “strict regulation of all persons...related to the operation of licensed gaming establishments” would be nullified if the subject of the Commission and the Board’s observation and an investigation (*see* NRS 463.140, 463.1405, 463.310, 453.3145) could unilaterally strip the Commission of subject matter jurisdiction. *Id.* at 4:12-25 (quoting NRS 463.0129(1)(c)). Wynn and the Board

stayed proceedings before the Commission while he pursued relief in the district court. JA0262.

IV. Proceedings Before the District Court

Until he severed his relationship in March 2018, Wynn was entrenched with Wynn Resorts. Wynn founded the company, named it after himself, served as its chief executive officer, and was chairman of its board of directors. JA0266. Even Wynn concedes that he subjected himself to the Board and the Commission's jurisdiction by founding Wynn Resorts in 2005. JA0267.

Wynn's position in his suit is simple. It is not that he wasn't subject to the Board and the Commission's jurisdiction whilst at Wynn Resorts, but that he possessed the unilateral power to evade investigation and potential discipline by jumping ship from the gaming licensee. JA0271. Even though the Commission disagreed in an interlocutory order, he sought review under NRS 463.315, or alternatively, sought a writ to prevent the Board and the Commission from exercising power over him. JA0275-77.

Wynn petitioned for judicial review and/or writ of mandamus/prohibition. JA0308. The district court granted Wynn's petition and issued a writ of prohibition. JA0611. Relying principally on NRS 463.1405(1), Wynn contended that the Board's subject matter jurisdiction over discipline pertaining to his conduct at Wynn Resorts ceased the moment he severed his "material involvement" with the entity

for which he was found suitable, Wynn Resorts. JA0331-32. The district court agreed. JA0618. The Board and the Commission appeal from that ruling.

SUMMARY OF ARGUMENT

The Legislature foreclosed the district court’s interpretation of the Gaming Control Act in the plain language of the Act itself. The Act grants the Commission “full and absolute power” to revoke a finding of suitability. NRS 463.1405(4). Wynn, who sought and accepted the Board and Commission’s suitability finding, is thus subject to revocation of that status—regardless of any unilateral actions he might take to divest himself of his gaming interests while under scrutiny. Under the plain language of the Act, the district court erred in finding Wynn not subject to the Board and Commission’s revocation authority. Even if Wynn were not subject to their authority on that basis, however, the Commission also found four additional, and separate, bases for its subject matter jurisdiction over him.

The district court’s single-minded reliance on NRS 463.1405(1)—to the exclusion of virtually every other provision in the Gaming Control Act—was in error. The Board’s duty to investigate those seeking or holding a finding of suitability under NRS 463.1405(1) is independent from its “full and absolute power and authority” to discipline persons who have been “found suitable” under NRS 463.1405(3). And in any event, the Board’s action here arises from its investigation

of Wynn for violations of the Gaming Control Act when Wynn was materially involved with a gaming licensee, so it is within the language of NRS 463.1405(1).

The district court's erroneous interpretation of the Gaming Control Act leaves a vexing question: how the Board and the Commission's regulatory role can function when discipline can be avoided at the sole discretion of the individual under scrutiny. Neither Wynn nor the district court made any attempt to posit an answer. Because the district court's order adopts an interpretation of the Gaming Control Act that is contrary to its plain language and to the Legislature's intent in enacting the law, its order must be reversed and vacated.

ARGUMENT

I. Standard of Review

A. This Court reviews de novo a dismissal on subject matter jurisdiction grounds.

The district court may properly dismiss a complaint when a lack of subject matter jurisdiction is apparent on the face of the complaint. *Rosequist v. Int'l Ass'n of Firefighters Local 1908*, 118 Nev. 444, 448, 49 P.3d 651, 653 (2002), *overruled on other grounds by Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 573 n.22, 170 P.3d 989, 995 n.22 (2007); *see* NRCP 12(h)(3). This court reviews a district court's order granting a motion to dismiss for lack of subject matter jurisdiction de novo. *See Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015).

B. This Court defers to an agency’s construction of its jurisdiction.

“Although statutory construction is generally a question of law reviewed de novo,” Nevada courts “defer[] to an agency’s interpretation of its governing statutes or regulations if the interpretation is within the language of the statute.” *Taylor v. Dep’t of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). What that has always meant is that “[a]n administrative construction that is within the language of the statute will not be readily disturbed by the courts.” *Pub. Employees’ Ret. Bd. v. Washoe Cty.*, 96 Nev. 718, 615 P.2d 972 (1980) (citing *Oliver v. Spitz*, 76 Nev. 5, 348 P.2d 158 (1960)). In fact, the agency’s interpretation only yields where “an alternative reading is compelled by the plain language of the provision.” *United States v. State Eng’r*, 117 Nev. 585, 589-90, 27 P.3d 51, 53-54 (2001) (quoting *S. Cal. Edison Co. v. Pub. Utilities. Comm’n*, 102 Cal.Rptr.2d at 698 (Ct. App. 2000)) (citations omitted). Interpretations involving the agency’s authority or jurisdiction are accorded the same deference. *City of Arlington v. FCC*, 569 U.S. 290, 296-97, 307 (2013) (applying analogous federal principles).

II. The District Court Did Not Have Authority to Review the Commission’s Interlocutory Order

A. The Gaming Control Act bars review of interlocutory orders.

Nothing in the Gaming Control Act supports the district court’s order granting Wynn’s petition of judicial review. NRS 463.315(1) provides:

Any person aggrieved **by a final decision or order** of the Commission . . . may obtain a judicial review thereof in the district court of the county in which the petitioner resides or has his, her or its principal place of business.

Id. (emphasis added). An order denying a motion to dismiss is an interlocutory order—not a final one. *Int’l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (characterizing a denial of a motion to dismiss as “interlocutory”).

NRS 463.3145 further explains why judicial review is unavailable to Wynn. It defines a “written decision or order of the Commission,” and contains a key qualifier, specifying that orders subject to judicial review are “on the merits.” NRS 463.3145(1). An order concerning subject matter jurisdiction is not “on the merits.” *See, e.g., Sugarman Iron & Metal Co. v. Morse Bros. Machinery & Supply Co.*, 50 Nev. 91, 255 P. 1010, 1013 (1927); *see also Ne. Erectors Ass’n of the BETA v. Sec. of Labor*, 62 F.3d 37, 39 (1st Cir. 1995) (citing 2A James Moore, et al., *Moore’s Federal Practice* ¶ 12.07, at 12–49 & n. 3 (1993)). Indeed, the district court acknowledged precedent confirming that judicial review of the Commission’s interlocutory denial of a motion to dismiss is not subject to judicial review. JA0615 (citing *Resnick v. Nev. Gaming Comm’n*, 104 Nev. 60, 63, 752 P.2d 229, 231 (1988) (citing NRS 463.315)).

There is good reason for the Legislature to preclude interlocutory review of Commission orders. It is important that disciplinary matters proceed expeditiously.

Where, like here, discipline is delayed for years by interlocutory review, evidence can become stale and witnesses' memory lost. And where discipline is warranted, it should be imposed earlier in the process so that the public is protected.

Precluding interlocutory review also preserves judicial resources. It is more efficient to have all purported errors considered in a single review after a final disciplinary decision, rather than piecemeal appeals at each stage of the proceedings. *See Bally's Grand Hotel & Casino v. Reeves*, 112 Nev. 1487, 1489, 929 P.2d 936, 937 (1996). And waiting until the end allows the reviewing court to have a developed factual record, instead of having to rely on allegations, as is the case here.

The district court attempted to overcome NRS 463.3145(1)'s plain language and this Court's binding precedent by citing *Benson v. State Eng'r*, 131 Nev. 772, 358 P.3d 221 (2015). But *Benson* assessed judicial review under NRS 533.395, which applies only to State Engineer water-rights decisions. 131 Nev. at 776-77, 358 P.3d at 224. *Benson* does not even purport to apply to review of Commission interlocutory decisions like the one at issue here.

B. The district court had no authority or basis to grant writ relief.

A writ of prohibition is an extraordinary remedy. It is not given as of right, but at the Court's discretion. *Cheung v. Dist. Ct.*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005). Such a writ is available to "arrest the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings

are without or in excess of [its] jurisdiction...” NRS 34.320. A writ of prohibition “may be issued only...where there is not a plain, speedy and adequate remedy in the ordinary course of law.” NRS 34.330. The right to petition for judicial review of an administrative decision constitutes an adequate remedy. *Howell v. Ricci*, 124 Nev. 1222, 1229, 197 P.3d 1044, 1049 (2008) (citing *Kay v. Nunez*, 122 Nev. 1100, 1104-05, 146 P.3d 801, 805 (2006)).

As noted above, this Court has counseled strongly against judicial interference in Board and Commission matters. Unsurprisingly, given this precedent, no Nevada authority supports the district court’s conclusion that it may issue extraordinary relief to interfere in an ongoing Commission disciplinary hearing. In the absence of any precedent, the district court relied on Article 6, Section 6 of Nevada’s Constitution. JA0615. But this Court has “consistently held” that that constitutional provision “does not authorize intrusion” into gaming disciplinary proceedings. *State v. Eighth Jud. Dist. Ct. (Gaming Commission)*, 111 Nev. 1023, 1025, 899 P.2d 1121, 1122 (1995). The district court’s failure to address this Court’s precedent is legal error. Consistent with *State*, this Court should reverse and vacate the district court’s order granting Wynn’s request for a writ of prohibition.

In sum, nothing in Nevada law invites the district court to second-guess the Board’s decision to recommend discipline and the Commission’s interpretation of their jurisdiction to hear and issue a decision on the merits.

III. The Board and the Commission Have Jurisdiction over Wynn

A. The Gaming Control Act's text compels the conclusion that the Board and Commission have authority.

Questions of statutory analysis start with the text crafted by the Legislature. *Blackburn v. State*, 129 Nev. 92, 95, 294 P.3d 422, 425 (2013). Here, it can end there too. *See id.* The Legislature in Sections 4(b) of NRS 463.310 empowered the Commission to revoke “any” “finding of suitability.” There is nothing ambiguous about the word “any.” Courts routinely interpret a legislature’s use of the word “any,” when it is not surrounded by limiting language, to mean all. *U.S. v. Gonzales*, 520 U.S. 1, 5 (1997). This Court just did so. *Legislature v. Settelmeyer*, 137 Nev. Adv. Op. 21, slip op. at 8-9 (May 13, 2021).

The Legislature used the same expansive language to describe the Board’s power to investigate persons such as Wynn. In Section 2 and 2(a) of NRS 463.310, the Legislature wrote, “[i]f, after **any** investigation the Board is satisfied that...[a]...finding of suitability...should be...revoked...the Board shall initiate a hearing before the Commission by filing a complaint with Commission...” (emphasis added). Again, there is no limiting language surrounding the word “any,” it therefore means all.

Separately, the Board, the Commission, and its respective members are empowered to “compel the attendances of witnesses at any place within this state, to administer oaths and to require testimony under oath.” NRS 463.140(5). The Board

issued an order to appear to Wynn, which he ignored. The Commission had jurisdiction to discipline him for allegedly violating the Gaming Control Act and its regulations by refusing to appear after being ordered to do so. *See* NRS 463.310(1)(a), Gaming Comm’n Reg. 5.070. Denying them jurisdiction over persons who defy an Order to Appear would make Orders to Appear a dead letter, just like a subpoena would have little value if the subpoenaed party could ignore it at will.

The district court’s conclusion that “NRS 463.1405 makes clear that the person over whom the Board seeks to investigate and observe” must have a present connection with a gaming licensee is wrong. JA0618. The word “investigate” in subsection 1 of NRS 463.1405 pertains to applicants seeking a finding of suitability. NRS 463.1405(1). It is true that the Board is to observe the conduct of persons found suitable under subsection 1 of NRS 463.1405, but subsection 1 says nothing about the Commission’s power to impose discipline based on violations of the Gaming Control Act and accompanying regulations that were observed or discovered as part of the Board’s investigation conducted under NRS 463.310(1)(a).

The district court also erred by relying on Commission Regulation 4.030(10). That section merely states that the Commission only requires certain persons be found suitable while their connection with the gaming licensee remains. Nev. Gaming Comm’n Reg. 4.030(10). But the district court ignored that the Commission did require Wynn to be found suitable. It is his conduct while he was connected with a

gaming licensee, Wynn Resorts, that was under investigation and is the subject of potential discipline before the Commission. The Board has full and absolute power to recommend discipline and the Commission has full and absolute power to impose it against Wynn.

Finally, the district court erred by holding that the Board had no jurisdiction to place an administrative hold on Wynn's finding of suitability. JA0621. This issue is a red herring. Wynn's argument is that *he* stripped the Board and Commission of jurisdiction by quitting Wynn Resorts, not that the Board acted in excess of its jurisdiction by imposing an improper hold on his finding of suitability.

B. The district court's interpretation undermines the Gaming Control Act's purpose.

The Legislature's grant of authority to revoke "any" finding of suitability would be nullified if it did not reach persons such as Wynn. He is a person the Commission found suitable, was subject to investigation and potential discipline, but who jettisoned his ties with a gaming licensee in order to dodge looming discipline. *Paramount Ins. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970).

The Board's expansive power to recommend discipline and the Commission's expansive power to impose discipline is consistent with the Legislature's purpose under the Gaming Control Act. The Legislature has demanded "strict regulation of all persons...related to the operation of licensed gaming establishments" to maintain public trust and confidence in Nevada's gaming industry. NRS 463.0129(1)(c). The

Board and the Commission are empowered to observe persons such as Wynn that are found suitable. NRS 463.1405(1) and Nev. Gaming Comm’n Reg. 5.040. Based on those observations, the Board is empowered to investigate “any violation of [the Gaming Control Act] ... or any regulations adopted thereunder.” NRS 463.310(1)(a).

These statutes have a purpose to protect the public and the integrity of Nevada’s vital gaming industry. They should be liberally construed to effectuate that purpose. *Hantges v. City of Henderson*, 121 Nev. 319, 322, 113 P.3d 848, 850 (2005). Indeed, the failure to continue meeting the standards of suitability is grounds for disciplinary action against a person who was previously found suitable. NRS 463.170(8). The Board and the Commission’s statutory and regulatory duties would be impossible to carry out if persons such as Wynn could unilaterally strip them of jurisdiction by severing their relationship with a gaming licensee after sniffing that investigation and discipline may be forthcoming.

C. The district court failed to grant proper deference to the Board and Commission’s statutory interpretation.

Under principles of statutory construction, the district court was required to stop with the unambiguous language of NRS 463.1405(3), NRS 463.1405(4), NRS 463.310(1)(a), NRS 463.310(2), and NRS 463.310(4)(b). Indeed, the district court acknowledged that “Legislature intended the Board and Commission to have unfettered authority to regulate Nevada’s Gaming Industry.” JA0617. Because it

departed from these unambiguous texts, the district court imposed unwarranted limits on the Board and Commission's power. JA0618.

The district court's approach reflects a misunderstanding of statutory interpretation. Courts interpreting statutes such as NRS 463.1405(3) and NRS 463.1405(4) should only resort to other statutes for guidance if there was an ambiguity in the statutes *sub judice*. *State v. Hughes*, 127 Nev. 626, 629, n.2, 261 P.3d 1067, 1069 n.2 (2011). There is nothing ambiguous about the words "any" and "full and absolute power." Any means all and it includes Wynn, who was found suitable but sought to avoid looming discipline by unilaterally severing his ties with Wynn Resorts.

However, if NRS 463.1405(3) and (4)—and the other statutory provisions granting the Board and Commission authority to consider disciplining Wynn—were somehow ambiguous enough to justify relying on NRS 463.1405(1), that would not change the outcome. If NRS 463.1405(3) and (4) are so ambiguous that we need to look to subsection 1 to interpret them, then the courts must defer to the agencies' reasonable interpretation of them. *See Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008).

The district court did not grapple with that inconsistency in its analysis. It implicitly found NRS 463.1405(3) and (4) ambiguous enough that it had to look

elsewhere in the statute for the answer to this question, but then refused to grant the Commission deference for its interpretation.

D. Persuasive authority confirms that a person cannot avoid investigation and potential discipline through his unilateral action.

Wynn is not the first to try and avoid investigation and potential discipline by essentially surrendering his privileged status before the gavel falls. In such circumstances, courts have had little difficulty in finding the surrender ineffective to strip the reviewing agency of jurisdiction.

In *Pahl v. Bd. of Chiropractic Exam'rs*, 164 Or. App. 378, 380, 993 P.2d 149, 150 (Or. Ct. App. 1999), a chiropractor argued that by voluntarily surrendering his license, he abandoned his property interest in it, and it therefore no longer existed. Consequently, he argued that the board was “without jurisdiction to act.” *Id.* at 380, 993 P.2d at 150. The court specifically held that “[t]o imply from that statutory scheme that a licensed chiropractor faced with professional discipline may avoid the board’s regulatory reach by unilaterally surrendering his or her license would seriously undermine the board’s responsibility to protect the public’s interest.” *Id.* at 381-82, 993 P.2d at 150-51. Courts consistently reject attempts to thwart jurisdiction by voluntary severance in various professions.²

² See *Stern v. Conn. Med. Examining Bd.*, 545 A.2d 1080 (Conn. 1988) *en banc* (citing *Boedy v. Dep’t of Prof’l Regulation*, 433 So.2d 544 (Fla. App. 1983)); *Cross v. Colo. State Bd. of Dental Exam’rs*, 552 P.2d 38 (Col. Ct. App. 1976); *Cal. Pac. Collections, Inc. v. Powers*, 449 P.2d 225 (Cal.1969) *en banc*; see also *State ex rel.*

In upholding the jurisdiction of the administrative agency, these cases recognized that continued jurisdiction was necessary to keep faith with the agency's duty to protect the public interest and the integrity of the industry governed by the agency. The same is true here.

CONCLUSION

Wynn cannot unilaterally decide whether he is subject to discipline for his alleged misconduct during his tenure leading one of the most prominent gaming licensees in the State. For the reasons stated above, this Court should reverse the district court's order granting Wynn's petition.

Dated this 27th day of May, 2021.

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Okla. Bd. of Med. Licensure & Supervision v. Gregory, 367 P.3d 922, 923 (Okla Ct. Civ. App. 2015); *Senise v. Corcoran*, 552 N.Y.S.2d 483 (N.Y. Sup. Ct. 1989).

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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.

Dated this 27th day of May, 2021.

AARON D. FORD
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By: /s/ Steve Shevorski
Steve Shevorski
Chief Litigation Counsel

CERTIFICATE OF SERVICE

Pursuant to NEV. R. APP. P. 25(5)(c), I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 27th day of May, 2021. I certify that the participants in this case are registered electronic filing systems users and will be served electronically.

/s/ Traci Plotnick

Traci Plotnick, an employee of the
Office of the Nevada Attorney General