Case No. 82263

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court

NEVADA GAMING COMMISSION AND NEVADA GAMING CONTROL BOARD,

Appellants,

v.

STEPHEN A. WYNN,

Respondent.

On Appeal from the Eighth Judicial District Court, CASE NO. A-20-809249-J

JOINT APPENDIX – VOLUME II OF III

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Docket 82263 Document 2021-15316

INDEX

VOL.	DOCUMENT	Page(s)
II	Acceptance of Service for Nevada Gaming Commission, filed 1/30/20	292-293
II	Acceptance of Service for Nevada Gaming Control Board, filed 1/30/20	294-295
I	Complaint (NGC 19-03), filed 10/14/19	1-23
II	Initial Appearance Fee Disclosure, filed 1/27/20	291
I	Motion to Dismiss Complaint Based on Lack of Subject Matter Jurisdiction, filed 11/14/19	27-173
III	Nevada Gaming Commission's Notice of Appeal, filed 12/23/20	643-664
II	Nevada Gaming Commission's Opposition to Wynn's Petition and Countermotion to Dismiss, filed 4/10/20	342-373
II-III	Nevada Gaming Commission's Reply Brief in Support of Its Countermotion to Dismiss Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition, filed 5/22/20	481-503
I	Nevada Gaming Control Board's Opposition to Stephen Alan Wynn's Motion to Dismiss Based on Lack of Subject Matter Jurisdiction, filed 11/27/19	175-187
III	Notice of Appeal, filed 12/23/20	665-685
II	Notice of Entry of Order, filed 5/20/20	473-480
III	Notice of Entry of Order, filed 8/12/20	523-532

III Notice of Entry of Order Granting Petitioner's Petition For Judicial Review, filed 11/25/20 625-642

II Notice of Entry of Stipulation and Order, filed 4/10/20 405-410

II Notice of Entry of Stipulation and Order, filed 4/28/20 415-422

II Notice of Entry of Stipulation and Order Regarding Briefing Schedule on Petition for Judicial Review and Related Matters, filed 2/19/20 300-307

I Notice of Meeting, dated 12/12/19 208-209

III Notice of Supplemental Authorities, filed 10/13/20 577-595

II Order Denying Respondent's Motion to Dismiss, filed 1/9/20 257-261

III Order Granting Petitioner's Petition for Judicial Review, filed 11/19/20 611-624

II Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition, (A-20-809249-J), filed 1/27/20 264-290

II Petitioner Stephen A. Wynn's Consolidated Opposition to Respondents' Countermotions to Dismiss and Reply Brief in Support of Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition, filed 5/1/20 423-457

II Petitioner Stephen A. Wynn's Opening Brief in Support of Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition, filed 3/13/20 308-341

II Petitioner's Ex Parte Application to Exceed 7,000 Words for His Consolidated Opposition to Respondents' Countermotions To Dismiss and Reply Brief in Support of Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition, filed 5/1/20 458-467

I Receipt of Copy of Motion to Dismiss Complaint Based on Lack of Subject Matter Jurisdiction, dated 11/14/19 174

I Receipt of Copy of Reply in Support of Motion to Dismiss Complaint Based on Lack of Subject Matter Jurisdiction, dated 12/9/19 188

I Reply in Support of Motion to Dismiss Complaint Based on Lack of Subject Matter Jurisdiction, filed 12/9/19 189-207

III Reply Supporting Respondent Nevada Gaming Control Board's Countermotion to Dismiss Under NRCP 12(b)(5), filed 5/22/20 504-511

II Respondent Nevada Gaming Control Board's Answering Brief and Countermotion to Dismiss Under NRCP 12(b)(5), filed 4/10/20 374-401

II Stipulation and Order, filed 4/10/20 402-404

II Stipulation and Order, filed 4/28/20 411-414

II Stipulation and Order, filed 5/19/20 468-472

I Stipulation and Order Re: Briefing Schedule and Hearing Date on Respondent's Forthcoming Motion to Dismiss, filed 11/8/19 24-26

II Stipulation and Order Re: Briefing Schedule on Petition for Judicial Review and Related Matters, filed 2/19/20 296-299

II Stipulation and Order Re: Continued Stay of Proceedings Pending Respondent's Forthcoming Petition for Judicial Review, filed 1/23/20 262-264

I-II Transcript of Hearing before the Nevada Gaming Commission on the Motion to Dismiss Complaint Based on Lack of Subject Matter Jurisdiction, dated 12/19/19 210-256

III Transcript of Hearing: Nevada Gaming Commission's Opposition to Wynn's Petition and Countermotion to Dismiss on 9/17/20, filed 1/14/2021 533-576

III Transcript of Proceedings on Petitioner's Motion to Strike Section II of the Nevada Gaming Commission's "Reply" in Support of Countermotion to Dismiss on 7/23/20, filed 1/14/21 512-522

III Transcript of Proceedings on Petition for Judicial Review on 11/17/20, filed 12/9/20 596-610

CERTIFICATE OF SERVICE

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, and e-served the same on all parties listed on the Court's Master Service List.

/s/ *Traci Plotnick*
Traci Plotnick, an employee of the
Office of the Nevada Attorney General

1 Solis-Rainey?
2 COMMISSIONER SOLIS-RAINEY: No, I would
3 just echo those comments. For me, the timing of
4 the conduct and the activity involved is
5 important. And if that conduct and activity
6 occurred during the -- during the time frame in
7 which the individual or entity was a licensee and
8 was somebody found suitable, then I believe the
9 Commission retains authority to address that
10 conduct, and I believe we have an obligation to do
11 so.
12 CHAIRMAN ALAMO: Thank you, Commissioner
13 Solis-Rainey.
14 I think it's all kind of been said.
15 Unless there's any more discussion or
16 deliberation, I think we have all shown our tilt
17 here.
18 This is in proper form for a motion, and
19 there's a couple of ways we can do this. I think
20 during deliberation, we actually gave a lot of on
21 the record points as to why we feel this way, so I
22 don't think a need to list out, you know, in the
23 motion what your supports are. I think they can
24 be taken from our transcript of what everybody
25 said.

1 So I think a motion can be made, just
2 based on our deliberation, and a simple motion at
3 that. Or if somebody wants to do it in a
4 different way, you can probably list some of the
5 things and we can have that discussion. But I
6 leave it now to see if -- it is in proper form for
7 a motion here.
8 Commissioner Cohen, you're going to the
9 mic.
10 COMMISSIONER COHEN: I'm prepared to
11 make a motion, but I would ask Chief Caruso, it
12 is -- is it proper for us just to make a motion to
13 approve or to deny, or do you believe -- based
14 upon the deliberations that were set forth on the
15 record, or do you believe we have to go further?
16 MS. CARUSO: I think it's clear from the
17 record what your support would be based on each of
18 your comments. Unless someone has an objection to
19 that, you could just make a motion to grant or
20 deny based on the deliberations here today.
21 COMMISSIONER COHEN: Thank you, Chief
22 Caruso.
23 Then based upon the comments of Chief
24 Caruso and the Chairman, I would move that the --
25 that the motion to dismiss the complaint based

1 upon lack of subject matter jurisdiction as filed
2 by Respondent Stephen Alan Wynn be denied in its
3 entirety.
4 CHAIRMAN ALAMO: Okay. Thank you,
5 Commissioner Cohen. I think it's very clear.
6 I think before I take a vote, I just
7 want to tell everybody, don't move out of your
8 chairs, because I do want to make a comment after
9 the vote is taken.
10 So any further discussion? Let's go
11 ahead and let's take a vote.
12 All in favor? Any opposed? Let the
13 record reflect, it passes unanimous, five to zero.
14 (The motion was put to a vote and
15 carried unanimously as indicated below:)
16 MS. FUETSCH: Aye.
MR. MORAN: Aye.
17 MS. SOLIS-RAINEY: Aye.
MR. COHEN: Aye.
18 DR. ALAMO: Aye.
19 CHAIRMAN ALAMO: I just want to make one
20 comment here to both parties. There are no
21 winners here today. That's definite. We have no
22 winners here. And based upon the complaint, I
23 think there's room for settlement here. And I
24 would instruct the parties, as we move forward
25 with this case, to continue to meet and confer

1 with the purpose of trying to resolve this prior
2 to a full hearing on the merits.
3 For the good of Nevada, continue to meet
4 and confer and resolve this. But if you do not,
5 we, the Commission, are here and waiting.
6 So thank you very much. I appreciate
7 it.
8 MR. WILLIAMS: Mr. Chairman, can I ask
9 two procedural questions?
10 CHAIRMAN ALAMO: I could have Chief --
11 go ahead. Go ahead and ask them. If it gets too
12 convoluted, I can have -- Chief, you will confer.
13 MR. WILLIAMS: And I'm happy to talk
14 with your counsel.
15 CHAIRMAN ALAMO: Go ahead.
16 MR. WILLIAMS: For the record, Colby
17 Williams, Campbell & Williams, on behalf of
18 Mr. Wynn.
19 Do you anticipate there being -- and
20 this is for a timing purpose -- a written decision
21 that will come from this proceeding?
22 CHAIRMAN ALAMO: Go ahead, Chief.
23 MS. CARUSO: I anticipate that there
24 will be, but we're not certain on that yet, but --
25 CHAIRMAN ALAMO: Okay. We'll have to

1 get back to you on that, confer offline.
2 MR. WILLIAMS: Okay. And the second
3 question that I'll ask -- but, again, it may be
4 better directed to your counsel -- is the parties
5 have previously entered into a stipulation which
6 you had approved with respect to staying the
7 remaining proceedings while we dealt with this
8 jurisdictional issue. That stipulation also
9 contemplated that probably both sides, depending
10 on the result here today, may be interested in
11 seeking a petition for judicial review.
12 CHAIRMAN ALAMO: We're going to bookmark
13 that, and you're going to have a conversation with
14 my counsel.
15 MR. WILLIAMS: Perfect. Thank you.
16 CHAIRMAN ALAMO: Very good. Thank you,
17 everybody.
18 (End of excerpt.)
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER

2

3 STATE OF NEVADA)
) ss
4 County of Clark)

5

6 I, HEIDI K. KONSTEN, Certified Court
7 Reporter, do hereby certify:
8 That I was present at the meeting of the
9 NEVADA GAMING COMMISSION on Thursday, December 19,
10 2019, and thereafter took stenotype notes of the
11 proceedings, and thereafter transcribed the same
12 into typewriting as herein appears;
13 That the foregoing transcript is a
14 complete, true, and accurate transcription of my
15 said shorthand notes of proceedings.
16 IN WITNESS WHEREOF, I have set my hand in
17 my office in the County of Clark, State of Nevada,
18 this 5th day of February, 2020.

19

20

21 _____
Heidi K. Konsten, RPR, NV CCR #845
22

23

24

25

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JAN 09 2020
NEVADA GAMING COMMISSION
LAS VEGAS, NEVADA

NGC Case No. 19-03

STATE OF NEVADA

BEFORE THE NEVADA GAMING COMMISSION

NEVADA GAMING CONTROL BOARD, Complainant, vs. STEPHEN ALAN WYNN, Respondent.	**ORDER DENYING RESPONDENT'S MOTION TO DISMISS**

On December 19, 2019 at the regularly scheduled Nevada Gaming Commission (Commission) meeting, Chairman Tony Alamo, M.D. presided over a hearing on Respondent's Motion to Dismiss Complaint Based on Lack of Subject Matter Jurisdiction (Motion) filed on November 14, 2019. Donald J. Campbell, Esq. and J. Colby Williams, Esq. were present for Respondent, and Nevada Attorney General Chief Litigation Counsel Steve Shevorski appeared on behalf of the Nevada Gaming Control Board (Board).

Based on the above-mentioned Motion, the Opposition and Reply briefs filed in this matter, as well as arguments from the parties' counsel and the record made at the hearing, the Motion is denied for the reasons set forth in this Order and those stated on the record at the time of the hearing.

BACKGROUND

1. The facts set forth here are drawn from the Complaint filed by the Board and Respondent's uncontested evidentiary submissions included with the Motion. Nothing in this Order relieves any party of its burden, if any, to prove any issue at a hearing held pursuant to NRS 463.310 to 463.318.

2. On or around March 24, 2005, Respondent was found suitable by the Commission as Chief Executive Officer (CEO), Chairman, shareholder and controlling shareholder of Wynn Resorts, Ltd. (Wynn Resorts), which is registered as a publicly traded company with the Commission. Wynn Resorts, through wholly owned subsidiaries and

holding companies, owns Wynn Las Vegas, LLC (Wynn LV), which holds a nonrestricted gaming license.

3. In early 2018, the Board initiated an investigation into allegations of misconduct by Respondent in violation of the Nevada Gaming Control Act.

4. On February 6, 2018, Respondent resigned from his position as CEO and Chairman of Wynn Resorts.

5. Soon thereafter, Respondent, by and through his family partnership, sold or entered into agreements to sell all of its shares of Wynn Resorts stock.

6. By mid-2018, Respondent had extinguished any ownership interest in Wynn Resorts and relinquished any management responsibilities therewith.

7. Thereafter, at the request of Wynn Resorts, Respondent was removed as an officer and director from the Wynn LV nonrestricted gaming license.

8. During its investigation, the Board issued a written Order to Appear requiring Respondent to appear at the Board's offices on September 7, 2018 at 11:00 AM. The Order to Appear was hand delivered to Respondent's counsel during a meeting with Board staff on August 30, 2018. The Order to Appear stated that failure to comply would be grounds for revocation or suspension of Respondent's findings of suitability.

9. In violation of the Order to Appear, Respondent failed to appear and testify on September 7, 2018.

10. On October 14, 2019, the Board filed a Complaint alleging, among other things, that Respondent "had repeatedly violated Nevada's gaming statutes and regulations, bringing discredit upon the State of Nevada and its gaming industry." The Complaint seeks revocation of Respondent's findings of suitability and the imposition of a fine pursuant to NRS 463.310(4) for each alleged violation of the Nevada Gaming Control Act and/or the Commission's regulations.

11. On November 14, 2019, Respondent moved to dismiss the Complaint. The Board filed an opposition to which Respondent filed a reply brief.

. . .

DISPOSITION

12. The sole issue raised by the Motion and decided by this Order is whether the Commission has subject-matter jurisdiction to consider the allegations in the Complaint.

13. The Board has the burden of establishing that the Commission has jurisdiction.

14. In determining whether the Board has met its burden, the Commission may rely on the allegations in the Complaint and relevant evidentiary submissions. *See Morrison v. Beach City LLC*, 116 Nev. 34, 37 (2000); *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

15. NRS 463.143 provides that "[t]he Commission may exercise any proper power and authority necessary to perform the duties assigned to it by the Legislature, and is not limited by an enumeration of powers in this chapter."

16. NRS 463.1405(4) provides that "[t]he Commission has full and absolute power to . . . revoke . . . any finding of suitability." Because the Board is seeking to revoke Respondent's findings of suitability, this matter is within the Commission's jurisdiction under NRS 463.1405(4).

17. NRS 463.310(3) obligates the Commission to review a complaint filed by the Board and conduct further proceedings in accordance with NRS 463.3125 to 463.3145. Thereafter, NRS 463.310(4)(b) authorizes the Commission to "[l]imit, condition, suspend or revoke any . . . finding of suitability." Because the Board filed a complaint with the Commission in this matter, and is seeking to revoke Respondent's findings of suitability, NRS 463.310(3) and 463.310(4)(b) establish an independent basis for the Commission's jurisdiction over this matter.

18. NRS 463.310(4)(d) authorizes the Commission, in accordance with the proper procedures, to "[f]ine each person or entity, or both, which is . . . found suitable" for violations of Nevada law and regulations. Because Respondent was found suitable and the Board filed a complaint with the Commission by which it seeks to fine Respondent for alleged violations of Nevada law and regulations, NRS 463.310(4)(d) establishes an

independent basis for the Commission's jurisdiction over this matter.

19. NRS 463.140(5) vests in the Board and the Commission, and their respective members, the authority to "compel the attendance of witnesses at any place within this state, to administer oaths and to require testimony under oath." In accordance with that power, the Board issued an Order to Appear to compel Wynn's attendance at an investigatory meeting and to give testimony under oath. Relying on the authority granted to the Commission by the Legislature in NRS 463.143, it is necessary for the Commission to possess and exercise the power to sanction witnesses that do not comply with orders to appear. Because the Board issued an Order to Appear to Respondent and Respondent failed to comply with the Order to Appear, NRS 463.140(5) is an independent basis for the Commission's jurisdiction over this matter.

20. The Legislature has found that "strict regulation of all persons . . . related to the operation of licensed gaming establishments" is necessary to maintain public confidence and trust in the gaming industry in this State. NRS 463.0129(1)(c). To that end, it has charged the Board and Commission with observing the conduct of persons associated with gaming, investigating potential violations of the gaming laws and sanctioning persons found to have violated the laws. *See, e.g.*, NRS 463.140, 463.1405, 463.310, 463.3145. In turn, the Commission has been granted the express authority to carry out these duties without limitation. *See* NRS 463.143. The Commission would not be able to carry out its legislatively prescribed duties if persons under investigation could unilaterally strip the Commission of its jurisdiction by disassociating with and/or divesting any interest held in licensed gaming establishments. Accordingly, exercising jurisdiction in this case is a "proper power and authority necessary to perform the duties assigned to [the Commission] by the Legislature" and is an independent basis for jurisdiction under NRS 463.143.

21. Even if the Commission's authority were limited to sanctioning conduct that occurred when a person was materially involved with a licensed gaming operation, all of the violations of law alleged here, except for Respondent's failure to comply with the

Board's Order to Appear, occurred while Respondent was materially involved with a licensed gaming operation.

22. The basis for Commission jurisdiction set out above are independent from one another. Each basis would, standing alone, be sufficient for the Commission to have jurisdiction over this matter.

23. The Commission has considered the arguments put forward by Respondent in support of dismissal and finds them to be without merit.

24. This Order's determination of the Motion is a preliminary matter. An evidentiary hearing on the merits of this case is forthcoming. Accordingly, NRS 463.3145(1), which requires the Commission to "render a written decision on the merits" after hearing, does not apply. Nevertheless, for the convenience of the parties and to produce a clear record throughout this case, the Commission is hereby issuing this written Order.

Accordingly, the Commission finds and concludes that the Board has carried its burden of showing that the Commission has jurisdiction over this matter. Based on the foregoing, and good cause appearing:

IT IS HEREBY ORDERED that Respondent's Motion to Dismiss Complaint Based on Lack of Subject Matter Jurisdiction is **DENIED**.

Dated this 9th day of January 2020.

NEVADA GAMING COMMISSION

T. Alamo MD

TONY ALAMO, M.D., Chairman

Submitted by:

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Attorney General

By: _____
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STATE OF NEVADA

BEFORE THE NEVADA GAMING COMMISSION

NEVADA GAMING CONTROL BOARD, Complainant, vs. STEPHEN ALAN WYNN, In his capacity as having been found suitable as Chief Executive Officer, Chairman of the Board, and shareholder and controlling shareholder of Wynn Resorts, Ltd.; Respondent.	CASE NO.: NGC 19-03 **STIPULATION AND ORDER RE: CONTINUED STAY OF PROCEEDINGS PENDING RESPONDENT'S FORTHCOMING PETITION FOR JUDICIAL REVIEW**

WHEREAS, the Nevada Gaming Control Board (the "Board") filed the above-captioned disciplinary action on October 14, 2019;

WHEREAS, on November 8, 2019, the Chairman of the Nevada Gaming Commission (the "Commission") approved a stipulation between the Board and Respondent Stephen A. Wynn ("Mr. Wynn") setting forth a briefing schedule and procedural framework to address the threshold question of the Commission's and the Board's jurisdiction prior to conducting any substantive hearing on the merits of the underlying Complaint. The stipulation provided, in part, that all proceedings in this disciplinary action would be stayed during the pendency of Mr. Wynn's Motion

to Dismiss, and that each party would have the right to seek a further stay of proceedings if any of them filed a petition for judicial review after the Commission's ruling on the Motion;

WHEREAS, the Commission conducted a hearing on Mr. Wynn's Motion to Dismiss on December 19, 2019. After considering argument from the parties' respective counsel, the members of the Commission orally denied the Motion.

WHEREAS, the Commission issued its written order denying the Motion on January 9, 2020.

WHEREAS, Mr. Wynn's counsel advised respective counsel for the Board and the Commission of their intent to file a petition for judicial review of the Commission's written order;

WHEREAS, the Board and Mr. Wynn continue to believe it will promote economy and efficiency to address the jurisdictional question before proceeding to a substantive hearing in this matter, and that such economy and efficiency can best be achieved through a further stay of proceedings during the pendency of Mr. Wynn's petition for judicial review.

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the parties, through their respective counsel of record as follows:

1. Mr. Wynn will file his forthcoming petition for judicial review on or before January 29, 2020;

2. During the pendency of Mr. Wynn's petition for judicial review, all other proceedings in this action shall be stayed. Each party shall have the right as provided in NRS Chapter 463 to seek a further stay from the Commission, the District Court and/or the Nevada Supreme Court should any party seek further review after the District Court's ruling on Mr. Wynn's forthcoming petition for judicial review. If the District Court denies the petition, and Mr. Wynn opts not to seek further judicial review, then his Answer shall be due 20 days after entry of the District Court's order.

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3. All parties reserve their right to file a motion, upon proper notice, seeking to lift the stay of proceedings memorialized by this Stipulation.

DATED this 23rd day of January, 2020.

CAMPBELL & WILLIAMS

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By _____ #8256
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IT IS SO ORDERED:

By _____
TONY ALAMO, M.D.
Chairman, Nevada Gaming Commission

Approved as to form and content:

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Attorney General

By _____
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Stephen A. Wynn

CASE NO: A-20-809249-J
Department 14

DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	CASE NO.: DEPT. NO.: **PETITION FOR JUDICIAL REVIEW, ALTERNATIVELY, FOR WRITS OF MANDAMUS AND/OR PROHIBITION** **[Exempt from Arbitration Under NAR 3(A) – Action Seeking Judicial Review of Administrative Decision]**

Petitioner Stephen A. Wynn, by and through his undersigned counsel, hereby petitions for judicial review of the Order Denying Motion to Dismiss entered by Respondent Nevada Gaming Commission on January 9, 2020, a copy of which is attached hereto as Exhibit 1. NRS 463.315 authorizes judicial review of such orders. Petitioner alternatively seeks Writs of Mandamus and/or Prohibition under NRS Chapter 34 on grounds Respondents are without jurisdiction in the underlying disciplinary action, and Petitioner lacks an adequate remedy at law.

NATURE OF THE ACTION

1. In an overreach unprecedented in the storied annals of Nevada gaming, Respondent Nevada Gaming Control Board ("NGCB") instituted disciplinary proceedings against Petitioner

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Stephen A. Wynn ("Mr. Wynn" or "Steve Wynn") despite the incontrovertible fact that Mr. Wynn voluntarily separated himself from the only Nevada licensees with which he was affiliated—Wynn Resorts, Limited ("Wynn Resorts" or the "Company") and its affiliates—nearly two years ago. Because Mr. Wynn no longer has any involvement with licensed gaming operations in Nevada or anywhere in the world, and because the statutes and regulations governing Nevada gaming limit the NGCB's and Commission's regulatory and disciplinary powers only to applicants seeking to enter the gaming industry or those persons/entities presently involved therein, Mr. Wynn moved to dismiss the NGCB's Complaint based upon a lack of subject matter jurisdiction. At a hearing on December 19, 2019, Respondent Nevada Gaming Commission (the "Commission") denied Mr. Wynn's Motion. The Commission entered its written Order on January 9, 2020, noting that the Order addressed a "preliminary matter" and that "[a]n evidentiary hearing on the merits of this case is forthcoming." *See* Ex. 1 ¶ 24. This Petition now follows.

INDENTIFICATION OF PARTIES

2. Petitioner Steve Wynn is a citizen of Clark County, Nevada. He is the founder of Wynn Resorts, the former Chief Executive Officer of the Company, and the former Chairman of its Board of Directors.

3. Respondent Commission is a political subdivision of the State of Nevada organized and existing under Chapter 463 of the Nevada Revised Statutes. The Commission's responsibilities include acting on recommendations from the NGCB in licensing matters and adopting regulations to implement and enforce laws governing gaming in Nevada.

4. Respondent NGCB is an administrative agency of the State of Nevada organized and existing under Chapter 463 of the Nevada Revised Statutes. The NGCB is charged with the administration and enforcement of gaming laws as set forth in Title 41 of the Nevada Revised Statutes and the Regulations of the Commission.

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JURISDICTION AND VENUE

5. The Court has jurisdiction over this matter and the parties thereto pursuant to NRS 14.065. Mr. Wynn is a Nevada citizen. The Commission and the NGCB are political subdivisions of the State of Nevada. NRS 463.315(1) authorizes this Court to review orders of the Commission, and NRS Chapter 34 authorizes this Court to hear petitions for extraordinary writs.

6. Venue is proper in this district pursuant to NRS 13.010 *et seq.* and NRS 463.315(1) as Mr. Wynn resides in Clark County, Nevada.

ALLEGATIONS COMMON TO ALL CLAIMS

A. Background.

7. Mr. Wynn has been the leading innovator in the gaming industry since his first Commission approvals at the Golden Nugget in the early 1970's. In Mr. Wynn's 45+ year tenure as a gaming licensee, the NGCB has never brought any disciplinary action against him, and he and his companies have received numerous approvals from the Commission over the decades.

8. Mr. Wynn is widely credited with reinventing modern Las Vegas with the opening of The Mirage Casino and Resort in or about 1989. Mr. Wynn thereafter opened The Treasure Island Casino & Resort and The Bellagio under the umbrella of Mirage Resorts, Inc. After achieving unprecedented success with the foregoing Las Vegas properties, Mr. Wynn sold Mirage Resorts and founded Wynn Resorts in 2002. Once Mirage Resorts was sold, Mr. Wynn's gaming licenses and approvals ended, and he was required to undergo investigations and obtain findings of suitability as a new applicant when he sought to return to the industry in 2005.

9. Wynn Resorts, through its wholly owned subsidiary, Wynn Las Vegas, LLC ("Wynn Las Vegas"), opened Wynn Las Vegas in 2005. The NGCB recommended, and the Commission approved, Wynn Las Vegas for a non-restricted gaming license, and likewise found Mr. Wynn suitable in his capacity as the Chairman and CEO of Wynn Resorts as well as in his capacity as the controlling shareholder of the Company.

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10. On or about February 19, 2012, Wynn Resorts commenced an action styled *Wynn Resorts, Limited v. Kazuo Okada, et al.*, Case No. A-12-656710-B (the "Okada Litigation"), which was pending in the Eighth Judicial District Court from or about February 2012 through Spring 2018, when the matter was resolved. The case arose from the Company's redemption of stock held by Aruze USA, Inc. ("Aruze"). Aruze and its affiliates thereafter asserted counterclaims against Wynn Resorts, Mr. Wynn, the Company's other directors, and the Company's then-General Counsel. Elaine Wynn, Mr. Wynn's ex-wife, who was sued by Aruze as a member of the Board at the time of the redemption, subsequently filed crossclaims against Mr. Wynn, the Company, and others.

11. On January 26, 2018, during the final pre-trial stages of the Okada Litigation, *The Wall Street Journal* published an article alleging that "dozens" of former Wynn Resorts employees had accused Mr. Wynn of engaging in sexual misconduct while he was Chairman and CEO of the Company. *The Wall Street Journal* and other media outlets thereafter published additional articles and stories on the same subject, many of which contained demonstrably false statements of fact for which Mr. Wynn continues to pursue legal relief.

B. Mr. Wynn Completely Separates Himself from all Involvement with Wynn Resorts.

12. Confronted with the above allegations, Mr. Wynn made the decision to resign as Chairman and CEO of Wynn Resorts so that the Company he created could continue its successes and avoid or minimize possible damage to Wynn Resorts' employees, suppliers, creditors and shareholders from the distraction that allegations of this nature might cause. Mr. Wynn's resignation was effective February 6, 2018. Mr. Wynn and Wynn Resorts (and Wynn Resorts Holdings, LLC) thereafter entered into a written agreement on February 15, 2018, outlining the terms of his separation from the Company and all of its affiliates, which included Mr. Wynn's agreement to forego pursuit of a severance package worth approximately $330 million.

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13. At the time of his resignation, Mr. Wynn owned approximately twelve percent of Wynn Resorts' stock through a family partnership. Mr. Wynn acted promptly to divest his stock ownership in an orderly manner. On March 21, 2018, Mr. Wynn's family partnership sold 4,104,999 shares of Wynn Resorts stock. On March 22, 2018, Mr. Wynn's family partnership entered into agreements to sell its remaining ownership stake in the Company (approximately eight million shares).

14. Although the parties' Separation Agreement permitted Mr. Wynn to remain in his residence at Wynn Las Vegas until June 1, 2018, Mr. Wynn moved out of his residence in or about April 2018. Similarly, although Wynn Resorts' bylaws permitted Mr. Wynn to vote at the Company's annual shareholders meeting on May 16, 2018 based on his stock ownership as of March 2018, Mr. Wynn did not vote or otherwise participate at said meeting.

15. In short, Mr. Wynn ceased all direct or indirect ownership and material involvement with Wynn Resorts and its affiliates by March 2018.

16. Upon information and belief, Wynn Resorts notified the NGCB and/or Commission in early 2018 of Mr. Wynn's resignation from his positions and sale of his stock, and the NGCB removed Mr. Wynn as an officer and director from its Location Report on the Wynn Las Vegas license as of February 23, 2018 and as a shareholder as of March 28, 2018. The NGCB did not contact Mr. Wynn to verify this, nor did the NGCB advise Mr. Wynn of its actions in removing Mr. Wynn as an officer, director and shareholder from the Wynn Las Vegas license.

C. Massachusetts Gaming Regulators ("Mass Gaming") Determine that Mr. Wynn Is No Longer a "Qualifier."

17. At the time the aforementioned *Wall Street Journal* article was published, Wynn Resorts and its affiliates were constructing a new casino resort in Everett, Massachusetts that was subject to investigation, approval and regulation by Mass Gaming. On or about February 27, 2018, Mr. Wynn's counsel notified Mass Gaming of the changed circumstances described above, which

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raised the question of whether Mr. Wynn remained an individual "qualifier" requiring approvals under the Massachusetts regulatory scheme. Mass Gaming conducted a hearing on April 27, 2018 to consider the issue, and it issued a written Decision and Order on May 7, 2018, finding that Mr. Wynn would no longer be a qualifier after the Wynn Resorts Annual Shareholders Meeting on May 16, 2018, and that Wynn Resorts no longer needed to obtain Mass Gaming approval for Mr. Wynn.

18. Mass Gaming made extensive findings regarding Mr. Wynn's non-qualifier status, which include in pertinent part:

> ***Mr. Wynn is no longer an officer or director of Wynn Resorts, Ltd., and accordingly, he can no longer exercise control or provide direction to Wynn MA, LLC or Wynn Resorts, Ltd. in either of those capacities as a matter of law***. Further, it is clear that Mr. Wynn no longer owns any stock in Wynn Resorts, Ltd., and, at the conclusion of the next annual stockholders meeting, ***he can no longer exercise control or provide direction in that capacity either.*** Mr. Wynn's resignation as an officer and director and divestiture of stock holdings further demonstrates that ***he no longer holds a financial interest in the gaming establishment*** under construction in Everett, Massachusetts or in Wynn MA, LLC, the gaming licensee which holds the license issued by the Commission. These latter factors eliminate Mr. Wynn as a qualifier under categories 2 and 3.[1]

Mass Gaming likewise determined that Mr. Wynn was (or would be) eliminated as a qualifier under the remaining five factors set forth in its licensing scheme upon the completion of Wynn Resorts' next annual shareholders meeting in May 2018 and upon the discharge of Mr. Wynn's city ledger account.

19. Given his status as a non-qualifier, Mr. Wynn was under no obligation to cooperate with Mass Gaming's ongoing investigation into Wynn Resorts. Despite this fact, Mr. Wynn's counsel continued to field and respond to various inquiries from Mass Gaming investigators.

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[1] *See* Mass Gaming Decision and Order dated May 7, 2018 at 5-8 (emphases added).

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D. NGCB's Interaction with Mr. Wynn's Counsel.

20. On or about June 29, 2018, a NGCB agent sent a letter to Mr. Wynn, in care of his counsel, notifying him that the NGCB intended to schedule an investigative hearing in late August 2018 at which he would be required to appear and present testimony. This was the first official NGCB communication to Mr. Wynn that it sought to interview him as part of an investigation into the allegations contained in the aforementioned media reports.

21. Even though Mr. Wynn had not been affiliated with any Nevada gaming licensee for months by that time, Mr. Wynn's counsel agreed to meet with NGCB agents in the spirit of cooperation just as they had continued to respond to occasional inquiries from Mass Gaming. Mr. Wynn's counsel flew to northern Nevada and met with NGCB agents on August 30, 2018 in Carson City.

22. During the meeting, Mr. Wynn's counsel reaffirmed the undisputed fact that Mr. Wynn had completely separated himself from Wynn Resorts and, thus, was no longer directly or indirectly involved with any Nevada licensee such that he would remain subject to the jurisdiction of the NGCB and/or the Commission. Mr. Wynn's counsel further advised that Mr. Wynn had no intention of returning to any role involved with gaming in Nevada. Finally, Mr. Wynn's counsel advised that while Mr. Wynn was willing to cooperate with the NGCB's investigation despite his departure from the gaming industry, such cooperation would necessarily have to be limited to answering written inquiries as Mr. Wynn was a party to a number of ongoing lawsuits seeking to vindicate his good name and had to be vigilant about protecting any applicable privileges and work product.

23. Despite the positions articulated by Mr. Wynn's counsel, the NGCB agents advised they intended to formally interview Mr. Wynn on September 7, 2018. Mr. Wynn's counsel provided written correspondence to the NGCB on September 5, 2018 wherein he reiterated the above points made at the August 30 meeting.

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24. The NGCB greeted the letter from Mr. Wynn's counsel with silence. It never responded to the letter. Nor did it ever contest that Mr. Wynn was no longer directly or indirectly involved with any Nevada licensee.

E. The Commission Fines Wynn Resorts $20 Million.

25. On January 25, 2019, the NGCB filed a complaint against Wynn Resorts and Wynn Las Vegas, LLC based on the alleged failure to investigate allegations of wrongdoing made against Mr. Wynn. The complaint is notable given NGCB's admission that Mr. Wynn had resigned from all positions he held with Wynn Resorts and its affiliates in February 2018 and that he held no ownership interest therein by March 2018.

26. Simultaneously with the filing of the complaint, the NGCB and the respondents executed a Stipulation for Settlement and Order that remained subject to Commission approval. The Commission approved the Stipulation for Settlement at a hearing held on February 26, 2019. The Commission further imposed a fine on Wynn Resorts in the amount of $20 million, as the Stipulation and Order allowed, which was memorialized in an Addendum to the Stipulation for Settlement and Order.

F. Mass Gaming Fines Wynn Resorts $35 Million.

27. Just over a month after the Commission imposed its fine on Wynn Resorts, Mass Gaming conducted an adjudicatory hearing regarding the Company's suitability for a Massachusetts gaming license on April 2-4, 2019.

28. On or about April 30, 2019, Mass Gaming issued a written decision finding that Wynn Resorts, Wynn MA, LLC and their qualifiers were suitable to maintain a gaming license in the Commonwealth, subject to the fines and conditions set forth in the decision.

29. Mass Gaming imposed a fine on Wynn Resorts in the amount of $35 million, nearly double that imposed by the Commission.

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G. The NGCB Files a Complaint Against Mr. Wynn Nearly Two Years After He Voluntarily Ceased all Involvement with Wynn Resorts.

30. In or about Summer 2019, Mr. Wynn's attorneys learned that the NGCB was considering the filing of a disciplinary action against Mr. Wynn. In an effort to spare taxpayers and Mr. Wynn the expense and fatigue associated with protracted administrative and/or judicial proceedings resurrecting the subject matter addressed in the Wynn Resorts disciplinary actions, Mr. Wynn's counsel contacted NGCB agents about a possible negotiated resolution. Even though it is Mr. Wynn's position that the NGCB and the Commission have no jurisdiction over him given his lack of any involvement with a Nevada licensee, Mr. Wynn was nonetheless willing to consider entering a stipulation whereby he would agree not to seek any involvement in the Nevada gaming industry in the future. The parties were unable to reach a resolution.

31. On October 14, 2019, well over a year after Mr. Wynn's counsel had advised NGCB agents of their lack of jurisdiction over Mr. Wynn, the Chairwoman for the NGCB sent Mr. Wynn's counsel a letter advising that "the Nevada Gaming Control Board will seek to have the Nevada Gaming Commission revoke the Findings of Suitability for Mr. Stephen A. Wynn."

32. The NGCB filed its Complaint against Mr. Wynn the same day, which expressly acknowledges that he is no longer an officer, director or stockholder of Wynn Resorts or its affiliates. The Complaint instead alleges that the NGCB retains jurisdiction over Mr. Wynn because it placed an "administrative hold" on his Findings of Suitability.

33. The statutes and regulations governing gaming in Nevada are devoid of any concept known as an "administrative hold." The NGCB never provided Mr. Wynn with any written notice that it was placing a so-called "administrative hold" on any of his prior gaming approvals.

34. The Complaint, in large measure, mirrors the complaint NGCB filed against Wynn Resorts. Put differently, the Complaint against Mr. Wynn is not premised on any "new"

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developments or presently-occurring conditions, other than the allegation that he failed to appear at the September 7, 2018 interview in violation of the gaming statutes and regulations.

35. The relief sought in the Complaint is two-fold. First, the NGCB requests the Commission "to fine Mr. Wynn a monetary sum pursuant to the parameters defined in NRS 463.310(4) for each separate violation of the provisions of the Nevada Gaming Control Act or the Regulations of the Gaming Commission." Second, the NGCB requests that the Commission "revoke Mr. Wynn's Findings of Suitability pursuant to the parameters defined in NRS 463.310(4)."

H. Post-Complaint Events and Proceedings Before the Commission.

36. On October 15, 2019, Mr. Wynn served the Commission and NGCB with a public records request pursuant to NRS Chapter 239. The request seeks a variety of public records from the Commission's and NGCB's files, including the policies and procedures—if any—regarding NGCB's use of so-called "administrative holds" in Mr. Wynn's case or any other matter.

37. The Executive Secretary for the Commission and the NGCB acknowledged receipt of Mr. Wynn's public records request on October 22, 2019, but advised the agencies would be unable to provide a response thereto until nearly three months later on January 13, 2020.

38. On November 7, 2019, the Commission Chair approved a stipulation setting forth a briefing schedule and procedural framework to address the threshold question of jurisdiction prior to conducting any substantive hearing on the merits of the NGCB Complaint. The stipulation provides, in part, that all proceedings in the underlying disciplinary action would be stayed during the pendency of Mr. Wynn's Motion to Dismiss.

39. On December 19, 2019, the Commission conducted a hearing on Mr. Wynn's Motion to Dismiss. After considering brief argument from the parties' respective counsel, the members of the Commission voted unanimously to deny Mr. Wynn's Motion.

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40. On January 3, 2020, the Executive Secretary for the Commission and the NGCB sent another letter regarding Mr. Wynn's public records request. The agencies advised that they would be unable to meet the January 13, 2020 response date identified in their October 22 letter, and that they would need yet another month to respond to Mr. Wynn's request. The only explanation offered for the new February 12, 2020 response date was "constraints on administrative resources."

41. On January 9, 2020, the Commission issued its written Order denying Mr. Wynn's Motion. Notably, the Order states that it only addresses a "preliminary matter," and that "[a]n evidentiary hearing on the merits of this case is forthcoming." *See* Ex. 1 ¶ 34.

42. On January 23, 2020, the Commission Chair approved a stipulation continuing the aforementioned stay of proceedings during the pendency of this Petition. A true and correct copy of the Stipulation and Order is attached hereto as Exhibit 2.

FIRST CAUSE OF ACTION

(Petition for Judicial Review – NRS 463.315, *et seq.*)

43. Mr. Wynn incorporates all previous paragraphs as though fully set forth herein.

44. The jurisdiction of an administrative agency is limited to the express powers delegated from the legislature and embodied in applicable statutes. While an agency may likewise possess an implied power, such implied powers are necessarily limited and must be essential to carrying out the agency's express statutory duties.

45. Nothing in Nevada's statutory scheme expressly or impliedly authorizes the NGCB to pursue and the Commission to impose discipline on persons who no longer have any material involvement with a gaming licensee. Nevada's statutes instead limit the NGCB's and the Commission's powers to those persons or entities seeking to enter the gaming industry or those that have a present, material involvement with a licensee or the operations of a licensee. Mr. Wynn, undisputedly, has had no such involvement with a gaming licensee for nearly two years.

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46. The Commission's denial of Mr. Wynn's Motion to Dismiss, and its intent to proceed with the disciplinary action, violates the provisions of the Nevada and United States Constitutions including, but not limited to, the separation of powers and due process clauses contained therein.

47. The Commission's denial of Mr. Wynn's Motion to Dismiss, which has the effect of permitting the NGCB to pursue and the Commission to impose discipline and fines on Mr. Wynn despite his lack of involvement with the Nevada gaming industry, is in excess of the statutory authority and/or jurisdiction of the Commission and the NGCB.

48. The Commission's denial of Mr. Wynn's Motion to Dismiss is arbitrary, capricious and/or not in accordance with Nevada law.

49. The Commission's denial of Mr. Wynn's Motion to Dismiss constitutes an "order" that is subject to a petition for judicial review under NRS 463.315, *et seq*.

50. The Commission's denial of Mr. Wynn's Motion to Dismiss prejudices Mr. Wynn's substantial rights, and must be reversed for the reasons stated herein.

51. Mr. Wynn has been forced to hire an attorney to prosecute this action and therefore seeks recovery of his attorney's fees and court costs.

SECOND CAUSE OF ACTION

(In the Alternative, Petition for Writ of Mandamus)

52. Mr. Wynn incorporates all previous paragraphs as though fully set forth herein.

53. To the extent the NGCB and Commission contend the latter's denial of Mr. Wynn's Motion to Dismiss is not subject to judicial review under NRS 463.315, *et seq.*, Petitioner alternatively seeks relief by way of extraordinary writ.

54. A writ of mandamus will lie to compel the performance of an act the law requires as a duty resulting from an office, trust or station where, as here, the Petitioner lacks an adequate remedy at law. *See* NRS 34.150, *et seq*.

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55. Permitting the NGCB to pursue disciplinary proceedings against Mr. Wynn, and permitting the Commission to consider and impose discipline on Mr. Wynn—including the taking of his property through the imposition of fines—when neither administrative body has continuing jurisdiction over him has caused and will continue to cause Mr. Wynn irreparable harm for which there is no plain, speedy, and adequate remedy at law.

56. Nevada law required the Commission to grant Mr. Wynn's Motion to Dismiss, but it failed to do so for reasons that were clearly erroneous, arbitrary, capricious and/or otherwise not in accordance with law.

57. Mr. Wynn, thus, requests this Court to issue a writ of mandamus compelling the Commission to grant his Motion to Dismiss.

58. Mr. Wynn has been forced to hire an attorney to prosecute this action and therefore seeks recovery of his attorney's fees and court costs pursuant to NRS 34.270.

THIRD CAUSE OF ACTION

(In the Alternative, Petition for Writ of Prohibition)

59. Mr. Wynn incorporates all previous paragraphs as though fully set forth herein.

60. To the extent the NGCB and Commission contend the latter's denial of Mr. Wynn's Motion to Dismiss is not subject to judicial review under NRS 463.315, *et seq.*, Petitioner alternatively seeks relief by way of extraordinary writ.

61. A writ of prohibition will lie to arrest the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. *See* NRS 34.320, *et seq.*

62. Permitting the NGCB to pursue disciplinary proceedings against Mr. Wynn, and permitting the Commission to consider and impose discipline on Mr. Wynn—including the taking of his property through the imposition of fines—when neither administrative body has continuing

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jurisdiction over him has caused and will continue to cause Mr. Wynn irreparable harm for which there is no plain, speedy, and adequate remedy at law.

63. Nevada law neither expressly nor impliedly authorizes the NGCB and Commission to pursue the disciplinary action below given that Mr. Wynn has no involvement with any Nevada gaming licensee.

64. Mr. Wynn, thus, requests this Court to issue a writ of prohibition arresting the underlying disciplinary proceedings.

65. Mr. Wynn has been forced to hire an attorney to prosecute this action and therefore seeks recovery of his attorney's fees and court costs.

PRAYER FOR RELIEF

WHEREFORE, Mr. Wynn prays for judgment as follows:

1. That Respondents be ordered to prepare the record in Case No. NGC19-03, and file the same with the Court;

2. That the NGCB's and Commission's actions be reviewed pursuant to NRS 463.315, *et seq*. and/or NRS Chapter 34, and that the Court reverse the Commission's denial of Mr. Wynn's Motion to Dismiss or, alternatively, compel the Commission to grant Mr. Wynn's Motion and arrest the proceedings in the underlying disciplinary action as they are in excess of the NGCB's and Commission's jurisdiction.

3. For an award of attorney's fees and costs; and

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4. For such other and further relief as the Court deems just and proper.

DATED this 27th day of January, 2020.

CAMPBELL & WILLIAMS

By **/s/ *Donald J. Campbell***

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VERIFICATION

Under penalty of perjury, the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

DATED this 27 day of January, 2020.

STEPHEN A. WYNN

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- EXHIBIT 1 -

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JAN 09 2020
NEVADA GAMING COMMISSION
LAS VEGAS, NEVADA

NGC Case No. 19-03

STATE OF NEVADA

BEFORE THE NEVADA GAMING COMMISSION

NEVADA GAMING CONTROL BOARD, Complainant, vs. STEPHEN ALAN WYNN, Respondent.	**ORDER DENYING RESPONDENT'S MOTION TO DISMISS**

On December 19, 2019 at the regularly scheduled Nevada Gaming Commission (Commission) meeting, Chairman Tony Alamo, M.D. presided over a hearing on Respondent's Motion to Dismiss Complaint Based on Lack of Subject Matter Jurisdiction (Motion) filed on November 14, 2019. Donald J. Campbell, Esq. and J. Colby Williams, Esq. were present for Respondent, and Nevada Attorney General Chief Litigation Counsel Steve Shevorski appeared on behalf of the Nevada Gaming Control Board (Board).

Based on the above-mentioned Motion, the Opposition and Reply briefs filed in this matter, as well as arguments from the parties' counsel and the record made at the hearing, the Motion is denied for the reasons set forth in this Order and those stated on the record at the time of the hearing.

BACKGROUND

1. The facts set forth here are drawn from the Complaint filed by the Board and Respondent's uncontested evidentiary submissions included with the Motion. Nothing in this Order relieves any party of its burden, if any, to prove any issue at a hearing held pursuant to NRS 463.310 to 463.318.

2. On or around March 24, 2005, Respondent was found suitable by the Commission as Chief Executive Officer (CEO), Chairman, shareholder and controlling shareholder of Wynn Resorts, Ltd. (Wynn Resorts), which is registered as a publicly traded company with the Commission. Wynn Resorts, through wholly owned subsidiaries and

holding companies, owns Wynn Las Vegas, LLC (Wynn LV), which holds a nonrestricted gaming license.

3. In early 2018, the Board initiated an investigation into allegations of misconduct by Respondent in violation of the Nevada Gaming Control Act.

4. On February 6, 2018, Respondent resigned from his position as CEO and Chairman of Wynn Resorts.

5. Soon thereafter, Respondent, by and through his family partnership, sold or entered into agreements to sell all of its shares of Wynn Resorts stock.

6. By mid-2018, Respondent had extinguished any ownership interest in Wynn Resorts and relinquished any management responsibilities therewith.

7. Thereafter, at the request of Wynn Resorts, Respondent was removed as an officer and director from the Wynn LV nonrestricted gaming license.

8. During its investigation, the Board issued a written Order to Appear requiring Respondent to appear at the Board's offices on September 7, 2018 at 11:00 AM. The Order to Appear was hand delivered to Respondent's counsel during a meeting with Board staff on August 30, 2018. The Order to Appear stated that failure to comply would be grounds for revocation or suspension of Respondent's findings of suitability.

9. In violation of the Order to Appear, Respondent failed to appear and testify on September 7, 2018.

10. On October 14, 2019, the Board filed a Complaint alleging, among other things, that Respondent "had repeatedly violated Nevada's gaming statutes and regulations, bringing discredit upon the State of Nevada and its gaming industry." The Complaint seeks revocation of Respondent's findings of suitability and the imposition of a fine pursuant to NRS 463.310(4) for each alleged violation of the Nevada Gaming Control Act and/or the Commission's regulations.

11. On November 14, 2019, Respondent moved to dismiss the Complaint. The Board filed an opposition to which Respondent filed a reply brief.

. . .

DISPOSITION

12. The sole issue raised by the Motion and decided by this Order is whether the Commission has subject-matter jurisdiction to consider the allegations in the Complaint.

13. The Board has the burden of establishing that the Commission has jurisdiction.

14. In determining whether the Board has met its burden, the Commission may rely on the allegations in the Complaint and relevant evidentiary submissions. *See Morrison v. Beach City LLC*, 116 Nev. 34, 37 (2000); *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

15. NRS 463.143 provides that "[t]he Commission may exercise any proper power and authority necessary to perform the duties assigned to it by the Legislature, and is not limited by an enumeration of powers in this chapter."

16. NRS 463.1405(4) provides that "[t]he Commission has full and absolute power to . . . revoke . . . any finding of suitability." Because the Board is seeking to revoke Respondent's findings of suitability, this matter is within the Commission's jurisdiction under NRS 463.1405(4).

17. NRS 463.310(3) obligates the Commission to review a complaint filed by the Board and conduct further proceedings in accordance with NRS 463.3125 to 463.3145. Thereafter, NRS 463.310(4)(b) authorizes the Commission to "[l]imit, condition, suspend or revoke any . . . finding of suitability." Because the Board filed a complaint with the Commission in this matter, and is seeking to revoke Respondent's findings of suitability, NRS 463.310(3) and 463.310(4)(b) establish an independent basis for the Commission's jurisdiction over this matter.

18. NRS 463.310(4)(d) authorizes the Commission, in accordance with the proper procedures, to "[f]ine each person or entity, or both, which is . . . found suitable" for violations of Nevada law and regulations. Because Respondent was found suitable and the Board filed a complaint with the Commission by which it seeks to fine Respondent for alleged violations of Nevada law and regulations, NRS 463.310(4)(d) establishes an

independent basis for the Commission's jurisdiction over this matter.

19. NRS 463.140(5) vests in the Board and the Commission, and their respective members, the authority to "compel the attendance of witnesses at any place within this state, to administer oaths and to require testimony under oath." In accordance with that power, the Board issued an Order to Appear to compel Wynn's attendance at an investigatory meeting and to give testimony under oath. Relying on the authority granted to the Commission by the Legislature in NRS 463.143, it is necessary for the Commission to possess and exercise the power to sanction witnesses that do not comply with orders to appear. Because the Board issued an Order to Appear to Respondent and Respondent failed to comply with the Order to Appear, NRS 463.140(5) is an independent basis for the Commission's jurisdiction over this matter.

20. The Legislature has found that "strict regulation of all persons . . . related to the operation of licensed gaming establishments" is necessary to maintain public confidence and trust in the gaming industry in this State. NRS 463.0129(1)(c). To that end, it has charged the Board and Commission with observing the conduct of persons associated with gaming, investigating potential violations of the gaming laws and sanctioning persons found to have violated the laws. *See, e.g.*, NRS 463.140, 463.1405, 463.310, 463.3145. In turn, the Commission has been granted the express authority to carry out these duties without limitation. *See* NRS 463.143. The Commission would not be able to carry out its legislatively prescribed duties if persons under investigation could unilaterally strip the Commission of its jurisdiction by disassociating with and/or divesting any interest held in licensed gaming establishments. Accordingly, exercising jurisdiction in this case is a "proper power and authority necessary to perform the duties assigned to [the Commission] by the Legislature" and is an independent basis for jurisdiction under NRS 463.143.

21. Even if the Commission's authority were limited to sanctioning conduct that occurred when a person was materially involved with a licensed gaming operation, all of the violations of law alleged here, except for Respondent's failure to comply with the

Board's Order to Appear, occurred while Respondent was materially involved with a licensed gaming operation.

22. The basis for Commission jurisdiction set out above are independent from one another. Each basis would, standing alone, be sufficient for the Commission to have jurisdiction over this matter.

23. The Commission has considered the arguments put forward by Respondent in support of dismissal and finds them to be without merit.

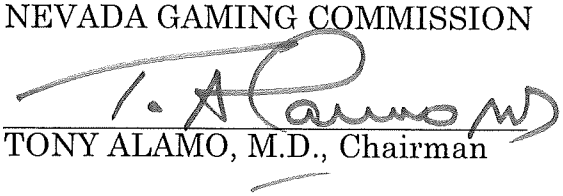
24. This Order's determination of the Motion is a preliminary matter. An evidentiary hearing on the merits of this case is forthcoming. Accordingly, NRS 463.3145(1), which requires the Commission to "render a written decision on the merits" after hearing, does not apply. Nevertheless, for the convenience of the parties and to produce a clear record throughout this case, the Commission is hereby issuing this written Order.

Accordingly, the Commission finds and concludes that the Board has carried its burden of showing that the Commission has jurisdiction over this matter. Based on the foregoing, and good cause appearing:

IT IS HEREBY ORDERED that Respondent's Motion to Dismiss Complaint Based on Lack of Subject Matter Jurisdiction is **DENIED**.

Dated this 9th day of January 2020.

NEVADA GAMING COMMISSION



TONY ALAMO, M.D., Chairman

Submitted by:

AARON D. FORD
Attorney General

By: _____
Darlene Caruso (Bar No. 5866)
Chief Deputy Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101

- EXHIBIT 2 -

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Attorneys for Respondent
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STATE OF NEVADA

BEFORE THE NEVADA GAMING COMMISSION

NEVADA GAMING CONTROL BOARD, Complainant, vs. STEPHEN ALAN WYNN, In his capacity as having been found suitable as Chief Executive Officer, Chairman of the Board, and shareholder and controlling shareholder of Wynn Resorts, Ltd.; Respondent.	CASE NO.: NGC 19-03 **STIPULATION AND ORDER RE: CONTINUED STAY OF PROCEEDINGS PENDING RESPONDENT'S FORTHCOMING PETITION FOR JUDICIAL REVIEW**

WHEREAS, the Nevada Gaming Control Board (the "Board") filed the above-captioned disciplinary action on October 14, 2019;

WHEREAS, on November 8, 2019, the Chairman of the Nevada Gaming Commission (the "Commission") approved a stipulation between the Board and Respondent Stephen A. Wynn ("Mr. Wynn") setting forth a briefing schedule and procedural framework to address the threshold question of the Commission's and the Board's jurisdiction prior to conducting any substantive hearing on the merits of the underlying Complaint. The stipulation provided, in part, that all proceedings in this disciplinary action would be stayed during the pendency of Mr. Wynn's Motion

to Dismiss, and that each party would have the right to seek a further stay of proceedings if any of them filed a petition for judicial review after the Commission's ruling on the Motion;

WHEREAS, the Commission conducted a hearing on Mr. Wynn's Motion to Dismiss on December 19, 2019. After considering argument from the parties' respective counsel, the members of the Commission orally denied the Motion.

WHEREAS, the Commission issued its written order denying the Motion on January 9, 2020.

WHEREAS, Mr. Wynn's counsel advised respective counsel for the Board and the Commission of their intent to file a petition for judicial review of the Commission's written order;

WHEREAS, the Board and Mr. Wynn continue to believe it will promote economy and efficiency to address the jurisdictional question before proceeding to a substantive hearing in this matter, and that such economy and efficiency can best be achieved through a further stay of proceedings during the pendency of Mr. Wynn's petition for judicial review.

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the parties, through their respective counsel of record as follows:

1. Mr. Wynn will file his forthcoming petition for judicial review on or before January 29, 2020;

2. During the pendency of Mr. Wynn's petition for judicial review, all other proceedings in this action shall be stayed. Each party shall have the right as provided in NRS Chapter 463 to seek a further stay from the Commission, the District Court and/or the Nevada Supreme Court should any party seek further review after the District Court's ruling on Mr. Wynn's forthcoming petition for judicial review. If the District Court denies the petition, and Mr. Wynn opts not to seek further judicial review, then his Answer shall be due 20 days after entry of the District Court's order.

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3. All parties reserve their right to file a motion, upon proper notice, seeking to lift the stay of proceedings memorialized by this Stipulation.

DATED this 23rd day of January, 2020.

CAMPBELL & WILLIAMS

By _____
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700 South Seventh Street
Las Vegas, Nevada 89101

Attorneys for Respondent
Stephen A. Wynn

AARON D. FORD
Attorney General

By _____ #8256
STEVEN G. SHEVORSKI (8256)
Chief Litigation Counsel
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101

Attorneys for Complainant
Nevada Gaming Control Board

IT IS SO ORDERED:

By _____
TONY ALAMO, M.D.
Chairman, Nevada Gaming Commission

Approved as to form and content:

AARON D. FORD
Attorney General

By _____
DARLENE CARUSO (5866)
Chief Deputy Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101

Attorneys for Nevada Gaming Commission

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Attorneys for Petitioner
Stephen A. Wynn

CASE NO: A-20-809249-J
Department 14

DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	CASE NO.: DEPT. NO.: **INITIAL APPEARANCE FEE DISCLOSURE**

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for parties appearing in the above entitled action as indicated below:

STEPHEN A. WYNN **$270.00**

DATED this 27th day of January, 2020.

CAMPBELL & WILLIAMS

By ***/s/ Donald J. Campbell***
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Attorneys for Petitioner
Stephen A. Wynn

DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	CASE NO.: A-20-809249-J DEPT. NO.: 14 **ACCEPTANCE OF SERVICE**

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Darlene Caruso, Esq., Chief Deputy Attorney General to Aaron D. Ford, Attorney General, hereby accepts service of process on behalf of Respondent Nevada Gaming Commission on January ~~29~~ 30, 2020, and acknowledges receipt of Petition for Judicial Review with exhibits filed on January 27, 2020 in the above-entitled action as though the same had been served upon said Respondent as required under Nevada Rules of Civil Procedure Rule 4(c).

DATED this ~~29th~~ 30th day of January, 2020.

AARON D. FORD
ATTORNEY GENERAL

DARLENE CARUSO (5866)
Chief Deputy Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101

Attorneys for Respondent Nevada Gaming Commission

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	CASE NO.: A-20-809249-J DEPT. NO.: 14 **ACCEPTANCE OF SERVICE**

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Steven G. Shevorski, Esq., Chief Litigation Counsel to Aaron D. Ford, Attorney General, hereby accepts service of process on behalf of Respondent Nevada Gaming Control Board on January 29, 2020, and acknowledges receipt of Petition for Judicial Review with exhibits filed on January 27, 2020 in the above-entitled action as though the same had been served upon said Respondent as required under Nevada Rules of Civil Procedure Rule 4(c).

DATED this ~~29~~ 30th day of January, 2020.

AARON D. FORD
ATTORNEY GENERAL

#8256

STEVEN G. SHEVORSKI
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Attorneys for Respondent Nevada Gaming Control Board

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	CASE NO.: A-20-809249-J DEPT. NO.: XIV **STIPULATION AND ORDER RE: BRIEFING SCHEDULE ON PETITION FOR JUDICIAL REVIEW AND RELATED MATTERS**

WHEREAS, Petitioner Stephen A. Wynn ("Mr. Wynn") commenced the above-captioned action on January 27, 2020 by filing a Petition for Judicial Review, Alternatively for Writs of Mandamus and/or Prohibition ("PJR");

WHEREAS, Mr. Wynn has, pursuant to NRS 463.316(1), requested Respondent Nevada Gaming Commission (the "Commission") to prepare the record on review, and the Commission is in the process of preparing said record; and

WHEREAS, the parties' respective counsel agree it will promote economy and efficiency to establish an agreed-upon briefing schedule on Mr. Wynn's PJR and any countermotion Respondents may consider filing.

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the parties, through their respective counsel of record, as follows:

1. Mr. Wynn shall file his memorandum of points and authorities in support of the PJR within 21 days after the record on review is filed with the Court;

2. Respondents shall file their points and authorities in opposition to the PJR as well as any countermotion within 21 days after service of Mr. Wynn's points and authorities;

3. Mr. Wynn shall file his reply and opposition to any countermotion within 14 days after service of Respondents' opposition;

4. In the event Respondents file a countermotion, they shall file their reply in support thereof within 14 days after service of Mr. Wynn's reply and opposition.

5. After the filing of the final reply contemplated above, either party may serve and file a notice of hearing setting the PJR for hearing on a day when the Court is hearing civil motions, and which is not less than 7 days from the date the notice is served and filed.

DATED this 12th day of February, 2020.

CAMPBELL & WILLIAMS

By _____

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Attorneys for Respondent
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AARON D. FORD
Attorney General

By_____
STEVEN G. SHEVORSKI (8256)
Chief Litigation Counsel
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Las Vegas, Nevada 89101

Attorneys for Respondent
Nevada Gaming Control Board

IT IS SO ORDERED:

By_____
DISTRICT COURT JUDGE

Dated: _____

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Attorneys for Respondent
Nevada Gaming Control Board

IT IS SO ORDERED:

By_____
DISTRICT COURT JUDGE

Dated: February 18, 2020

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Attorneys for Petitioner
Stephen A. Wynn

DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	CASE NO.: A-20-809249-J DEPT. NO.: 14 **NOTICE OF ENTRY OF STIPULATION AND ORDER REGARDING BRIEFING SCHEDULE ON PETITION FOR JUDICIAL REVIEW AND RELATED MATTERS**

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Please take notice that on the 19th day of February, 2020, a Stipulation and Order Regarding Briefing Schedule on Petition for Judicial Review and Related Matters, was duly entered in the above-entitled matter, a copy of which is attached as "Exhibit 1" and by this reference made part hereof.

DATED this 19th day of February, 2020.

CAMPBELL & WILLIAMS

By:/s/ ***J. Colby Williams***

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this 19th day of February, 2020, I caused the foregoing document entitled **NOTICE OF ENTRY OF STIPULATION AND ORDER REGARDING BRIEFING SCHEDULE ON PETITION FOR JUDICIAL REVIEW AND RELATED MATTERS** to be served upon those persons designated by the parties in the E-Service Master List for the above-reference matter in the Eight Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

By: /s/ ***John Y. Chong***
An Employee of Campbell & Williams

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EXHIBIT 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	CASE NO.: A-20-809249-J DEPT. NO.: XIV **STIPULATION AND ORDER RE: BRIEFING SCHEDULE ON PETITION FOR JUDICIAL REVIEW AND RELATED MATTERS**

WHEREAS, Petitioner Stephen A. Wynn ("Mr. Wynn") commenced the above-captioned action on January 27, 2020 by filing a Petition for Judicial Review, Alternatively for Writs of Mandamus and/or Prohibition ("PJR");

WHEREAS, Mr. Wynn has, pursuant to NRS 463.316(1), requested Respondent Nevada Gaming Commission (the "Commission") to prepare the record on review, and the Commission is in the process of preparing said record; and

WHEREAS, the parties' respective counsel agree it will promote economy and efficiency to establish an agreed-upon briefing schedule on Mr. Wynn's PJR and any countermotion Respondents may consider filing.

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the parties, through their respective counsel of record, as follows:

1. Mr. Wynn shall file his memorandum of points and authorities in support of the PJR within 21 days after the record on review is filed with the Court;

2. Respondents shall file their points and authorities in opposition to the PJR as well as any countermotion within 21 days after service of Mr. Wynn's points and authorities;

3. Mr. Wynn shall file his reply and opposition to any countermotion within 14 days after service of Respondents' opposition;

4. In the event Respondents file a countermotion, they shall file their reply in support thereof within 14 days after service of Mr. Wynn's reply and opposition.

5. After the filing of the final reply contemplated above, either party may serve and file a notice of hearing setting the PJR for hearing on a day when the Court is hearing civil motions, and which is not less than 7 days from the date the notice is served and filed.

DATED this 12th day of February, 2020.

CAMPBELL & WILLIAMS

By _____

DONALD J. CAMPBELL, ESQ. (1216)
J. COLBY WILLIAMS, ESQ. (5549)
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By _____
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Attorney General

By _____
STEVEN G. SHEVORSKI (8256)
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Las Vegas, Nevada 89101

Attorneys for Respondent
Nevada Gaming Control Board

IT IS SO ORDERED:

By _____
DISTRICT COURT JUDGE

Dated: _____

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STEVEN G. SHEVORSKI (8256)
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Attorneys for Respondent
Nevada Gaming Control Board

IT IS SO ORDERED:

By_____
DISTRICT COURT JUDGE

Dated: February 18, 2020

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	CASE NO.: A-20-809249-J DEPT. NO.: XIV **PETITIONER STEPHEN A. WYNN'S OPENING BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW, ALTERNATIVELY, FOR WRITS OF MANDAMUS AND/OR PROHIBITION**

Petitioner Stephen A. Wynn, through his undersigned counsel, hereby submits his Opening Brief in Support of Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

ISSUE PRESENTED 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

A. The Parties 4

B. Background 4

C. Mr. Wynn Separates Himself from all Involvement with Wynn Resorts 5

D. Mass Gaming Determines that Mr. Wynn Is No Longer a "Qualifier" 6

E. The Board's Interaction with Mr. Wynn's Counsel 7

F. The Commission Fines Wynn Resorts $20 Million 8

G. Mass Gaming Subsequently Fines Wynn Resorts $35 Million 9

H. The Board Files a Complaint Against Mr. Wynn Nearly Two Years After He Voluntarily Ceased All Involvement with Wynn Resorts 9

I. Proceedings Before the Commission 11

SUMMARY OF ARGUMENT 12

ARGUMENT 14

I. THE COMMISSION AND THE BOARD LACK SUBJECT MATTER JURISDICTION TO PURSUE AND IMPOSE DISCIPLINE AGAINST THOSE NO LONGER INVOLVED WITH LICENSED GAMING OPERATIONS 14

A. Standard of Review 14

B. The Commission and the Board Have No Inherent Regulatory Powers Beyond Those Expressly Granted or Clearly Implied by Statute 14

1. Neither NRS Chapter 463 nor the gaming regulations *expressly* authorize the Commission or the Board to punish persons who no longer have any involvement with gaming licensees 15

2. Neither NRS Chapter 463 nor the gaming regulations *impliedly* authorize the Commission or the Board to punish persons who

no longer have any involvement with gaming licensees 21

C. The Commission Misinterprets the Scope of NRS 463.143 24

II. IN THE EVENT RESPONDENTS CHALLENGE THE PROPRIETY OF JUDICIAL REVIEW, MR. WYNN ALTERNATIVELY REQUESTS A WRIT OF MANDAMUS AND/OR PROHIBITION 26

CONCLUSION 27

CERTIFICATE OF SERVICE 28

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TABLE OF AUTHORITIES

Cases **Page**

Advanced Pre-Settlement Funding LLC v. Gazda & Tadayon,
437 P.3d 1050, 2019 WL 1422713 (Nev. Mar. 28, 2019) 17

Andrews v. Nevada State Bd. of Cosmetology,
86 Nev. 207, 467 P.2d 96 (1970) 14, 15, 16

Banegas v. State Indus. Ins. Sys.,
117 Nev. 222, 19 P.3d 245 (2001) 25, 26

Benson v. State Engineer,
131 Nev. 772, 358 P.3d 221 (2015) 27

Blackjack Bonding v. City of Las Vegas,
116 Nev. 1213, 14 P.3d 1275 (2000) 25-26

Bielar v. Washoe Health Sys., Inc.,
129 Nev. 459, 306 P.3d 360 (2013) 13, 15

City of Henderson v. Kilgore,
122 Nev. 331, 131 P.3d 11 (2006) 15, 21, 23

Commission on Ethics v. Hardy,
125 Nev. 285, 212 P.3d 1098 (2009) 26

Elizondo v. Hood Mach., Inc.,
129 Nev. 780, 312 P.3d 479 (2013) 14

Hager v. State,
135 Nev. Adv. Op. 34, 447 P.3d 1063 (2019) 18

Heber Light & Power Co. v. Utah Public Service Comm'n,
231 P.3d 1203 (Utah 2010) 15, 20, 26

In re Crawley,
460 B.R. 421 (Bankr. E.D. Pa. 2011) 22

In re Parental Rights as to S.M.M.D.,
128 Nev. 14, 272 P.3d 126 (2012) 16

Int'l Game Tech., Inc. v. Second Judicial Dist. Ct.,
122 Nev. 132, 127 P.3d 1088 (2006) 16

Laube v. Allen,
506 F. Supp. 2d 969 (M.D. Ala. 2007) 19

LePage v. Dep't of Health,
18 P.3d 1177 (Wyo. 2001) 15, 20

McNeill v. State,
132 Nev. 551, 375 P.3d 1022 (2016) 12, 25, 26

Nassiri v. Chiropractic Physicians' Bd.,
130 Nev. 245, 327 P.3d 487 (2014) 14

Shell v. Burlington N. Santa Fe Ry., Co.,
941 F.3d 331 (7th Cir. 2019) 19

S. Nevada Mem'l Hosp. v. State Dep't of Human Res.,
101 Nev. 387, 705 P.2d 139 (1985) 15, 19, 20, 25

State v. Glusman,
98 Nev. 412, 651 P.2d 639 (1982) 12, 21

State v. Lemon,
825 So.2d 927 (Fla. 2002) 17

State v. Wheeler,
23 Nev. 143, 44 P. 430 (1896) 20

United States v. Jackson,
480 F.3d 1014 (9th Cir. 2007) 16

United States v. Wilson,
503 U.S. 329, 112 S.Ct. 1351 (1992) 15

3613 Ltd. v. Dep't of Liquor Licenses & Control,
978 P.2d 1282 (Ariz. App. 1999) 25

Constitutions, Regulations and Statutes

Nev. Const. Art. 3, § 1 25

Nev. Gaming Comm'n Reg. 4.030(10) 13, 20

Nev. Gaming Comm'n Reg. 16.400 ..... 12, 18, 19

NRS 0.030(1) 13, 15

NRS 34.150 27

NRS 34.320 27

NRS 463.0129 ..... 12, 16, 17, 22, 23

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NRS 463.022 ..... 4, 14

NRS 463.030 ..... 4, 14

NRS 463.120 20

NRS 463.140 10

NRS 463.143 ..... 1, 11, 12, 24, 25, 26

NRS 463.1405 ..... 1, 12, 17, 18, 19, 20, 22

NRS 463.1445 20

NRS 463.310 ..... 20, 22

NRS 463.315 ..... 26, 27

1 U.S.C. § 1 16

Other

Black's Law Dictionary (11th ed. 2019) 17

www.merriam-webster.com/dictionary/related 17

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ISSUE PRESENTED

1. Has the Nevada Legislature expressly or impliedly authorized Nevada's gaming regulators to prosecute, discipline, and impose fines upon an individual who no longer has any involvement with a Nevada gaming licensee and, thus, poses no threat to the industry or the public at large?

Petitioner Stephen A. Wynn ("Petitioner" or "Mr. Wynn") respectfully submits the answer is no, and that his motion to dismiss the underlying disciplinary proceeding based on a lack of subject matter jurisdiction should have been granted. The statutes relied upon by the Nevada Gaming Control Board (the "Board") in its Complaint, and the corresponding regulations adopted by the Nevada Gaming Commission (the "Commission"), are all phrased in the present tense and, thus, expressly limit the Board's observational and investigatory powers—which are predicate steps to any disciplinary decision by the Commission—to "licensees and other persons ***having*** a material involvement directly or indirectly with a licensed gaming operation[.]" NRS 463.1405(1) (emphasis added). Mr. Wynn, undisputedly, has no such involvement.

Nor can the Commission enlarge its own jurisdiction by belatedly invoking NRS 463.143, a statute the Board never raised until the hearing below. The Commission believes, incredibly, that NRS 463.143 permits it to carry out its duties "without limitation." (*See* Record on Review ("ROR") at 266:18-19.) That, of course, is not the law; a statute that purports to give unlimited regulatory power to an administrative agency without prescribed standards or restraints is clearly unconstitutional. The Commission's interpretation of and reliance upon NRS 463.143 runs head first into this legal impediment.

STATEMENT OF THE CASE

Mr. Wynn is the former Chairman, Chief Executive Officer, and controlling shareholder of Wynn Resorts, Limited ("Wynn Resorts" or the "Company"). Wynn Resorts, through its subsidiary, Wynn Las Vegas, LLC ("Wynn Las Vegas"), owns and operates the Wynn Las Vegas

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and Encore casino-resort properties on the famed Las Vegas strip. In or about March 2005, the Board recommended, and the Commission approved, Wynn Las Vegas for an unrestricted gaming license. As part of the foregoing process, Mr. Wynn was found suitable in his various capacities with Wynn Resorts. A "finding of suitability" is a term of art under Nevada's gaming statutes and regulations. In the context of this case, the findings constituted an authorization and approval for Mr. Wynn to occupy and act in his positions as Chairman, CEO and controlling stockholder of the Company. A finding of suitability is *not* a gaming license, which is issued to the operating entity (*i.e.*, Wynn Las Vegas) and not to any individuals holding positions of authority within the entity.

On January 26, 2018, *The Wall Street Journal* published an article alleging that several former Company employees had accused Mr. Wynn of engaging in sexual misconduct while he was Chairman and CEO. Though he has steadfastly denied such allegations, Mr. Wynn nonetheless decided to resign his positions for the best interests of the Company and its shareholders. Specifically, Mr. Wynn resigned as Chairman and CEO of Wynn Resorts effective February 6, 2018; he sold all his Company stock by March 22, 2018; and he moved from his residence on the Wynn Las Vegas property by April 2018, thereby ceasing all direct and indirect involvement with the Company at that time. The Board's own records confirm it removed Mr. Wynn as an officer and director from its Location Report on the Wynn Las Vegas license by February 23, 2018, and as a controlling shareholder by March 28, 2018.

Despite the incontrovertible fact that Mr. Wynn voluntarily separated himself from the only Nevada licensees with which he was affiliated more than two years ago, the Board instituted this disciplinary action with a Complaint against Mr. Wynn on October 14, 2019. The Board's action against Mr. Wynn came more than seven months after the Board and the Commission resolved a similar disciplinary complaint against Wynn Resorts in which the Company agreed to pay a $20 million fine to the State of Nevada.

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The only notable event that occurred between the resolution of the complaint against Wynn Resorts and the filing of the Complaint against Mr. Wynn individually happened on April 30, 2019. That is when gaming regulators in Massachusetts ("Mass Gaming") imposed a $35 million fine on the Company. Mass Gaming had already determined more than one year earlier that Mr. Wynn's resignations as an officer and director and his sale of all Company stock removed him from regulatory oversight under that jurisdiction's licensing scheme. In other words, the Board's Complaint against Mr. Wynn was not premised on any alleged misconduct not known to Nevada regulators when they resolved Nevada's issues with Wynn Resorts. Instead, Nevada regulators appear to have reacted after Massachusetts exacted nearly double the amount of money from Wynn Resorts that Nevada had received based on the same allegations.

Even though the Board has repeatedly acknowledged that Mr. Wynn is no longer affiliated with any Nevada gaming licensee, it purports to exercise continuing jurisdiction over him through a so-called "administrative hold" on his findings of suitability. But the concept of an administrative hold appears nowhere in the statutes and regulations governing Nevada's gaming industry. The Board, moreover, never gave Mr. Wynn any written notice that it was placing his findings of suitability in the procedural and substantive equivalent of suspended animation in order to preserve its ability to launch disciplinary proceedings against him at some later, unknown time of its choosing. The Board apparently believes it can keep anyone in limbo forever just in case some long-past event comes to light, gains publicity, and is determined by the Board to warrant punishment. Under the Board's theory, then, there is no statute of limitation to protect a departed individual years after the alleged wrongs occurred, and years after the individual has severed all ties with the industry. Such a person would forever be subject to substantial fines and "revocation" of a suitability finding that has already ceased to exist by operation of law upon the individual relinquishing his or her positions as an officer, director or controlling shareholder of a licensed entity. That makes no sense.

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Because Mr. Wynn no longer has any involvement with licensed gaming operations in Nevada or anywhere in the world, and because the statutes and regulations governing Nevada gaming limit the Board's and the Commission's regulatory and disciplinary powers only to applicants seeking to enter the gaming industry or those persons/entities presently involved therein, Mr. Wynn moved to dismiss the Board's Complaint based upon a lack of subject matter jurisdiction. The Commission denied Mr. Wynn's motion at a hearing held on December 19, 2019. The Commission thereafter entered its written order on January 9, 2020, and Mr. Wynn timely filed his Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition on January 27, 2020.

STATEMENT OF FACTS

A. The Parties.

Mr. Wynn is the founder of Wynn Resorts, the former Chief Executive Officer of the Company, the former Chairman of its Board of Directors, and the Company's former controlling shareholder. (ROR at 159:18-19.) The Commission is an administrative agency of the State of Nevada organized and existing under NRS Chapter 463. *See* NRS 463.022. The Commission's responsibilities include acting on recommendations from the Board in licensing matters and adopting regulations to implement and enforce laws governing gaming in Nevada. The Board is an administrative agency of the State of Nevada organized and existing under NRS 463.030. (ROR at 159:13-16.) The Board is charged with the administration and enforcement of gaming laws as set forth in NRS Title 41 and the Commission's regulations. (*Id.*)

B. Background.

Mr. Wynn is widely credited with reinventing modern Las Vegas with the opening of The Mirage casino-resort in 1989. (ROR 69-70.) Mr. Wynn thereafter opened The Treasure Island casino-resort and The Bellagio under the umbrella of Mirage Resorts, Inc. (*Id.*) After achieving unprecedented success with the foregoing Las Vegas properties, Mr. Wynn sold Mirage Resorts

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and founded Wynn Resorts in 2002. (*Id.*) Once Mirage Resorts was sold, Mr. Wynn's gaming approvals ended, and he was required to undergo investigations and obtain findings of suitability as a new applicant when he sought to return to the industry in 2005. (ROR 73-85.) In Mr. Wynn's 45-plus-year tenure as a gaming licensee, the Board had never brought any disciplinary action against him, and he and his companies received numerous approvals from the Commission over the decades. (ROR 58:13-17.)

Wynn Resorts, through its subsidiary, Wynn Las Vegas, opened the Wynn Las Vegas casino-resort in April 2005. (ROR 73-85.) The Board recommended, and the Commission approved, Wynn Las Vegas for a non-restricted gaming license in March 2005, and likewise found Mr. Wynn suitable in his capacity as the Chairman and CEO of Wynn Resorts as well as in his capacity as the Company's controlling shareholder. (*Id.*)

On January 26, 2018, *The Wall Street Journal* published an article alleging that "dozens" of former Wynn Resorts employees had accused Mr. Wynn of engaging in sexual misconduct while he was the Company's Chairman and CEO. (ROR 59:19-22.) *The Wall Street Journal* and other media outlets thereafter published additional articles and stories on the same subject, many of which contained demonstrably false statements for which Mr. Wynn continues to pursue legal relief. (*Id.*)

C. Mr. Wynn Separates Himself from all Involvement with Wynn Resorts.

Confronted with the above allegations, Mr. Wynn made the decision to resign as Chairman and CEO of Wynn Resorts so that the Company he created could continue its successes and avoid or minimize possible damage to Wynn Resorts' employees, suppliers, creditors and shareholders from the distraction that allegations of this nature might cause. (ROR 60:6-10.) Mr. Wynn's resignation was effective February 6, 2018. (ROR 87-88.) Mr. Wynn and Wynn Resorts thereafter entered into a written agreement on February 15, 2018, outlining the terms of his separation from

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the Company and its affiliates, which included Mr. Wynn's agreement to forego a severance package worth approximately $330 million. (ROR 90-96.)

At the time of his resignation, Mr. Wynn owned approximately twelve percent of Wynn Resorts' stock through a family partnership. (ROR 104.) Mr. Wynn acted promptly to divest his stock ownership in an orderly manner. On March 21, 2018, Mr. Wynn's family partnership sold 4,104,999 shares of Wynn Resorts stock. (ROR 98.) On March 22, 2018, Mr. Wynn's family partnership entered into agreements to sell its remaining ownership stake in the Company (approximately eight million shares). (*Id.*)

Although the Separation Agreement permitted Mr. Wynn to remain in his residence at Wynn Las Vegas until June 1, 2018, Mr. Wynn moved out in April 2018. (ROR 61:3-5.) Similarly, although Wynn Resorts' bylaws permitted Mr. Wynn to vote at the Company's annual shareholders meeting on May 16, 2018 based on his stock ownership as of March 2018, Mr. Wynn did not vote or otherwise participate at said meeting. (ROR 61:5-8.) In short, Mr. Wynn ceased all direct or indirect ownership and material involvement with Wynn Resorts and its affiliates by March 2018. Acknowledging this fact, the Board removed Mr. Wynn as an officer and director from its Location Report on the Wynn Las Vegas license by February 23, 2018 and as a shareholder by March 28, 2018. (ROR 79.)

D. Mass Gaming Determines that Mr. Wynn Is No Longer a "Qualifier."

At the time *The Wall Street Journal* article was published, Wynn Resorts and its affiliates were constructing a new casino resort in Everett, Massachusetts that was subject to investigation, approval and regulation by Mass Gaming. (ROR 101.) On or about March 27, 2018, Mr. Wynn's counsel notified Mass Gaming of the changed circumstances described above, which raised the question of whether Mr. Wynn remained an individual "qualifier" requiring approvals under the Massachusetts regulatory scheme. (*Id.*) Mass Gaming conducted a hearing on April 27, 2018 to consider the issue. (*Id.*) It issued a written Decision and Order on May 7, 2018, finding that Mr.

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Wynn would no longer be a qualifier after the Wynn Resorts Annual Shareholders Meeting on May 16, 2018, and that Wynn Resorts no longer needed to obtain Mass Gaming approval for Mr. Wynn. (ROR 101-108.)

Mass Gaming made extensive findings regarding Mr. Wynn's non-qualifier status, which include in pertinent part:

> ***Mr. Wynn is no longer an officer or director of Wynn Resorts, Ltd., and accordingly, he can no longer exercise control or provide direction to Wynn MA, LLC or Wynn Resorts, Ltd. in either of those capacities as a matter of law***. Further, it is clear that Mr. Wynn no longer owns any stock in Wynn Resorts, Ltd., and, at the conclusion of the next annual stockholders meeting, ***he can no longer exercise control or provide direction in that capacity either.*** Mr. Wynn's resignation as an officer and director and divestiture of stock holdings further demonstrates that ***he no longer holds a financial interest in the gaming establishment*** under construction in Everett, Massachusetts or in Wynn MA, LLC, the gaming licensee which holds the license issued by the Commission. These latter factors eliminate Mr. Wynn as a qualifier under categories 2 and 3.

(ROR 105) (emphases added). Mass Gaming likewise determined that Mr. Wynn was (or would be) eliminated as a qualifier under the remaining five factors set forth in its licensing scheme upon the completion of Wynn Resorts' next annual shareholders meeting in May 2018 and upon the discharge of Mr. Wynn's city ledger account. (ROR 107-108.)

Given his status as a non-qualifier, Mr. Wynn was under no obligation to cooperate with Mass Gaming's ongoing investigation into Wynn Resorts. Despite this fact, Mr. Wynn's counsel continued to field and respond to various inquiries from Mass Gaming investigators. (ROR 62.)

E. The Board's Interaction with Mr. Wynn's Counsel.

On or about June 29, 2018, the Board sent a letter to Mr. Wynn, in care of his counsel, notifying him that it intended to schedule an investigative hearing in late August 2018 at which he would be required to appear and present testimony. (ROR 110.) This was the first official Board communication to Mr. Wynn that it sought to interview him as part of an investigation into the allegations contained in the aforementioned media reports. Even though Mr. Wynn had not been affiliated with any Nevada gaming licensee for months by that time, Mr. Wynn's counsel agreed

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to meet with Board agents in the spirit of cooperation just as they had continued to respond to occasional inquiries from Mass Gaming. (ROR 63:5-10.) Mr. Wynn's counsel flew to northern Nevada and met with Board agents on August 30, 2018 in Carson City. (*Id.*)

During the meeting, Mr. Wynn's counsel reaffirmed the undisputed fact that Mr. Wynn had completely separated himself from Wynn Resorts and, thus, was no longer directly or indirectly involved with any Nevada licensee such that he would remain subject to the jurisdiction of the Board and/or the Commission. (ROR 63:11-14.) Mr. Wynn's counsel further advised that Mr. Wynn had no intention of returning to any role involved with Nevada gaming. (ROR 63:14-15.) Finally, Mr. Wynn's counsel advised that while Mr. Wynn was willing to cooperate with the Board's investigation despite his departure from the gaming industry, such cooperation would necessarily have to be limited to answering written inquiries as Mr. Wynn was a party to a number of ongoing lawsuits seeking to vindicate his good name and had to be vigilant about protecting any applicable privileges and work product. (ROR 63:15-20.)

Despite the positions articulated by Mr. Wynn's counsel, the Board's agents advised they intended to formally interview Mr. Wynn on September 7, 2018. (ROR 63:21-22.) Mr. Wynn's counsel provided written correspondence to the Board on September 5, 2018 wherein he reiterated the above points made at the August 30 meeting. (ROR 112-114.) The Board greeted the letter from Mr. Wynn's counsel with silence. (ROR 64:3-5.) It never responded to the letter. (*Id.*) Nor did it ever contest that Mr. Wynn was no longer directly or indirectly involved with any Nevada licensee. (*Id.*)

F. The Commission Fines Wynn Resorts $20 Million.

On January 25, 2019, the Board filed a complaint against Wynn Resorts and Wynn Las Vegas based on the alleged failure to investigate allegations of wrongdoing made against Mr. Wynn. (ROR 116-137.) The complaint is notable given the Board's admission that Mr. Wynn

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had resigned from all positions he held with Wynn Resorts and its affiliates in February 2018 and that he held no ownership interest therein by March 2018. (ROR 123:1-5.)

Simultaneously with the filing of the complaint, the Board and the respondents executed a stipulation regarding settlement that remained subject to Commission approval. (ROR 139-146.) The Commission approved the stipulation at a hearing held on February 26, 2019. (*Id.*) The Commission further imposed a $20 million fine on Wynn Resorts, as the stipulation allowed, which was memorialized in an addendum thereto. (ROR 148-150.)

G. Mass Gaming Subsequently Fines Wynn Resorts $35 Million.

Just over a month after the Commission imposed its fine on Wynn Resorts, Mass Gaming conducted an adjudicatory hearing regarding the Company's suitability for a Massachusetts gaming license. (ROR 151-153.) On April 30, 2019, Mass Gaming issued a written decision finding that Wynn Resorts, Wynn MA, LLC and their qualifiers were suitable to maintain a gaming license in the Commonwealth, subject to the fines and conditions set forth in the decision. (*Id.*) Mass Gaming imposed a $35 million fine on Wynn Resorts, nearly double that imposed by the Commission. (*Id.*)

H. The Board Files a Complaint Against Mr. Wynn Nearly Two Years After He Voluntarily Ceased all Involvement with Wynn Resorts.

In or about Summer 2019, Mr. Wynn's attorneys learned that the Board was considering a disciplinary action against Mr. Wynn. (ROR 65:15-16.) To spare taxpayers and Mr. Wynn the expense and fatigue associated with protracted administrative and/or judicial proceedings resurrecting the subject matter addressed in the Wynn Resorts disciplinary actions, Mr. Wynn's counsel contacted Board agents about a possible negotiated resolution. (ROR 65:16-20.) Even though it is Mr. Wynn's position that the Board and the Commission have no jurisdiction over him given his lack of any involvement with a Nevada licensee, Mr. Wynn was nonetheless willing to consider entering a stipulation whereby he would agree not to seek any involvement in the Nevada

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gaming industry in the future. (ROR 65:20-66:1.) The parties were unable to reach a resolution. (ROR 66:1-2.)

On October 14, 2019, well over a year after Mr. Wynn's counsel advised Board agents of their lack of jurisdiction over Mr. Wynn, the Chairwoman for the Board sent Mr. Wynn's counsel a letter advising that "the Nevada Gaming Control Board will seek to have the Nevada Gaming Commission revoke the Findings of Suitability for Mr. Stephen A. Wynn." (ROR 155.) The Board filed its Complaint against Mr. Wynn the same day, which expressly acknowledges he is no longer an officer, director or stockholder of Wynn Resorts or its affiliates. (ROR 157-179.) The Complaint instead alleges that the Board retains jurisdiction over Mr. Wynn because it placed an "administrative hold" on his findings of suitability. (ROR 159:17-25.) The statutes and regulations governing Nevada gaming are, however, devoid of any concept known as an "administrative hold." Nor did the Board ever provide Mr. Wynn with any written notice that it was placing an "administrative hold" on his prior gaming approvals. (ROR 66:17-19.)

The Complaint against Mr. Wynn, in large measure, mirrors the complaint the Board filed against Wynn Resorts. (ROR 66:20-21.) It is not premised on any "new" developments or presently-occurring conditions, other than the allegation that Mr. Wynn failed to appear at the September 7, 2018 interview in violation of the gaming statutes and regulations.[1] (ROR 66:21-67:2.) The relief sought in the Complaint is two-fold. First, the Board requests the Commission "to fine Mr. Wynn a monetary sum pursuant to the parameters defined in NRS 463.310(4) for each separate violation of the provisions of the Nevada Gaming Control Act or the Regulations of the Gaming Commission." (ROR 179:7-9.) Second, the Board requests that the Commission "revoke

[1] The Commission contends it has disciplinary jurisdiction over Mr. Wynn pursuant to NRS 463.140(5) given his alleged failure to sit for an interview. (ROR 266:2-11.) Suffice it to say, if the Board and the Commission lack disciplinary jurisdiction over Mr. Wynn in the first instance, they cannot bootstrap an alleged failure to sit for an interview into an independent basis for the discipline they seek here.

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Mr. Wynn's Findings of Suitability pursuant to the parameters defined in NRS 463.310(4)." (ROR 179:10-11.)

I. Proceedings Before the Commission.

On November 7, 2019, the Commission Chair approved a stipulation setting forth a briefing schedule and procedural framework to address the threshold question of jurisdiction prior to conducting any substantive hearing on the merits of the Board's Complaint. (ROR 28-30.) Mr. Wynn thereafter moved to dismiss the Complaint on November 14, 2019, arguing that neither NRS Chapter 463 nor the applicable gaming regulations expressly or impliedly authorize the Board to pursue, and the Commission to impose, discipline against persons who no longer have any involvement with gaming licensees. (ROR 32-180.) The Board opposed the motion on November 27, 2019, and Mr. Wynn filed a reply in support thereof on December 9, 2019. (ROR 181-214.)

The Commission conducted a hearing on December 19, 2019 during which the Board's counsel argued for the first time that NRS 463.143 vested the Commission with jurisdiction over this matter. (ROR 237:14-20; 241:20-25.) After considering argument from the parties' respective counsel, the Commission members voted unanimously to deny Mr. Wynn's Motion. (ROR 246-258.) On January 9, 2020, the Commission issued its written order denying Mr. Wynn's Motion. (ROR 263-267.) Notably, the order begins its legal analysis with the late-cited NRS 463.143, proclaiming that this statute permits the Commission to carry out its legislative duties "***without limitation***." (ROR 265:10-12; 266:18-19) (emphasis added). As in the Board's underlying papers, the Commission's order altogether fails to address the concept of an "administrative hold," the alleged authority therefor, or the fact that the plain language of the relevant statutes and regulations are all phrased in the present tense. (ROR 263-267.) The Commission's silence on these points, like the Board's before it, is telling.

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SUMMARY OF ARGUMENT

No one disputes the vital role legalized gaming plays in Nevada's economy. Nor does anyone dispute that the Board and the Commission have broad power to regulate and control the gaming industry in a manner to protect the public's health, safety, and welfare. That said, the Commission's position that NRS 463.143 permits it to carry out its legislative duties "without limitation" is simply wrong. First, the Nevada Supreme Court has never addressed this statute in the more than fifty years it has been on the books, let alone endorsed the sweeping interpretation the Commission posits. To the contrary, the Court has expressly recognized "that there are limitations on the police power of the state"—even when it comes to gaming. *State v. Glusman*, 98 Nev. 412, 423, 651 P.2d 639, 646 (1982). Second, accepting the Commission's interpretation of NRS 463.143 would render the statute unconstitutional as the legislature cannot delegate unlimited regulatory power to an administrative agency without prescribed standards or restraints. *See McNeill v. State*, 132 Nev. 551, 375 P.3d 1022 (2016).

Mr. Wynn established below that the legislature has, in fact, prescribed standards that limit the Board's and the Commission's jurisdiction to those seeking to enter Nevada's gaming industry or those who have ongoing involvement with a licensed gaming operation. For example, the plain language of NRS 463.1405(1) expressly limits the Board's continuing observational powers to "licensees and other persons ***having*** a ***material involvement*** directly or indirectly with a licensed gaming operation or registered holding company." (emphases added). Neither the Board nor the Commission ever grappled with the legislature's use of the present tense term "having." Similarly, the regulations adopted by the Commission deem a person to have "material involvement" with a corporate licensee only if he "***is*** a controlling person or key employee" or "***exercises*** significant influence upon the management or affairs of the corporation." *See* Nev. Gaming Comm'n Reg. 16.400 (emphases added). The Board and the Commission likewise failed to address these present tense terms notwithstanding that the Nevada Supreme Court and the Nevada Legislature have

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instructed that verb tense is significant when construing statutes. *See, e.g., Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 467, 306 P.3d 360, 365-66 (2013); NRS 0.030(1)(b).

There is more. Besides seeking to impose substantial fines upon Mr. Wynn, the Board's Complaint seeks to "revoke" his findings of suitability. But, again, the plain language of Nevada's gaming regulations contemplates "Findings of Suitability" for when a person is "***directly or indirectly involved with licensees***" and, then, only for "***so long as that involvement continues***." Nev. Gaming Comm'n Reg. 4.030(10) (emphasis added). A finding of suitability, moreover, "relates only to the specified involvement for which it was made" and is not transferable when the nature of the person's involvement with the licensee changes from that for which he or she was originally found suitable. *Id.* Mr. Wynn's "involvement" with Wynn Resorts undeniably changed when he resigned as an officer and director and sold his stock. His findings of suitability ended at that point, by operation of the Commission's own regulations, so no findings of suitability remain in existence. An approval that does not exist cannot be "revoked."

The Board's claim that it can keep Mr. Wynn's findings of suitability in a zombie-like state through an "administrative hold" is also unsupported by law. Mr. Wynn argued extensively below that nothing in the relevant statutes or gaming regulations expressly or impliedly authorizes the use of an administrative hold to maintain perpetual jurisdiction over those who have left Nevada's gaming industry. The Board and the Commission both avoided any discussion of administrative holds in their opposition papers or resulting order, impliedly conceding that the mechanism was made up out of whole cloth to pursue the unprecedented discipline sought in this action.

In sum, the Board and the Commission are empowered to oversee those having an ongoing material involvement with a licensed gaming operation. That power does not extend to those who have received approvals but no longer have any such material involvement. To extend the legislature's delegation of power to encompass anyone who has ever received a finding of suitability would give regulators the power to seek and order revocations forever, even after death,

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if alleged unsuitable conduct is later "uncovered." The legislature wisely limited its delegation to persons who *have* (present tense) material involvement with a licensed gaming operation. Neither the Board nor the Commission are permitted to expand their authority beyond this express delegation to those who do not hold any position with a gaming licensee and who do not present any danger to the public health, safety, morals, good order and general welfare of Nevada inhabitants.

ARGUMENT

I. THE COMMISSION AND THE BOARD LACK SUBJECT MATTER JURISDICTION TO PURSUE AND IMPOSE DISCIPLINE AGAINST THOSE NO LONGER INVOLVED WITH LICENSED GAMING OPERATIONS

A. Standard of Review.

This Court reviews a petition for judicial review in the same manner as the Nevada Supreme Court. *See Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014). Questions of law, including administrative construction of statutes, are reviewed *de novo* without deference to the agency's determination. *See id.* (citing *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 785, 312 P.3d 479, 482 (2013) ("Like the district court, [this court] decide[s] pure legal questions without deference to an agency determination.") (quotation omitted) (alteration in original)). Because the Commission's order is premised entirely on its construction of various gaming statutes (*see* ROR 265-67), the standard of review is *de novo*.

B. The Commission and the Board Have No Inherent Regulatory Powers Beyond Those Expressly Granted or Clearly Implied by Statute.

The Commission and the Board are state administrative agencies created by the provisions of NRS Chapter 463. *See* NRS 463.022 (creation of Commission); NRS 463.030 (creation of Board). As administrative agencies, the Commission and the Board have "no general or common law powers, but only such powers as have been conferred by law expressly or by implication." *Andrews v. Nevada State Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 96 (1970).

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"Administrative agencies cannot enlarge their own jurisdiction nor is subject matter jurisdiction conferred upon an agency by consent or failure to raise the agency's lack of jurisdiction." *S. Nevada Mem'l Hosp. v. State Dep't of Human Res.*, 101 Nev. 387, 394, 705 P.2d 139, 144 (1985); *see also Andrews*, 86 Nev. at 208, 467 P.2d at 97 ("Official powers of an administrative agency cannot be assumed by the agency, nor can they be created by the courts in the exercise of their judicial function.").

"The grant of authority to the agency must be clear." *Andrews*, 86 Nev. at 208, 467 P.2d at 97. "Accordingly, to ensure that the administrative powers of the [Commission and the Board] are not overextended, any reasonable doubt of the existence of any power must be resolved against the exercise thereof." *Heber Light & Power Co. v. Utah Public Service Comm'n*, 231 P.3d 1203, 1208 (Utah 2010) (quotation omitted); *see also LePage v. Dep't of Health*, 18 P.3d 1177, 1180 (Wyo. 2001) ("Reasonable doubt of the existence of [an agency] power must be resolved against the exercise thereof" as "[a] doubtful power does not exist."). Applying the foregoing principles and fundamental rules of statutory construction, it is clear the Nevada legislature neither expressly nor impliedly authorized the Commission and the Board to discipline persons who no longer have any involvement with gaming licensees.

1. Neither NRS Chapter 463 nor the gaming regulations *expressly* authorize the Commission or the Board to punish persons who no longer have any involvement with gaming licensees.

"When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006). The Nevada Supreme Court has repeatedly instructed that "verb tense is significant in construing statutes," *Bielar*, 129 Nev. at 467, 306 P.3d at 365-66 (citing *United States v. Wilson*, 503 U.S. 329, 333, 112 S.Ct. 1351, 1354 (1992)), as has the legislature. *See* NRS 0.030(1) (stating, in part, "[e]xcept as otherwise expressly provided in a particular statute or required by the context . . . [t]he present tense includes the future tense." [but *not* the past tense]).

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This statute is patterned after 1 U.S.C. § 1, which is known as "The Dictionary Act," and similarly provides that "words used in the present tense include the future as well as the present." The Ninth Circuit has explained that "Congress did *not* say that its usage of the present tense applies to past actions, an omission that, given the precision of The Dictionary Act in this regard, could not have been an oversight." *United States v. Jackson*, 480 F.3d 1014, 1019 (9th Cir. 2007) (emphasis in original).[2]

While the Commission's order cites various statutes that purportedly authorize the Board to pursue (and the Commission to impose) discipline against Mr. Wynn, *see* ROR 265-67, the plain language of those statutes demonstrates that the jurisdiction of the Commission and the Board is limited to those seeking to enter the gaming industry or those presently involved with Nevada licensees. Mr. Wynn is neither.

NRS 463.0129. The Commission, for instance, cites NRS 463.0129(1)(c) for the principle that "the Legislature has found that 'strict regulation of all persons . . . related to the operation of licensed gaming establishments' is necessary to maintain public confidence in the gaming industry of this State." (ROR 266:12-14). The Commission, though, conveniently omits the opening clause of this statute. The actual language reads as follows: "[p]ublic confidence and trust ***can*** only be maintained by strict regulation of all persons . . . ***related*** to the operation of licensed gaming establishments[.]" NRS 463.0129(c) (emphases added). The statute is phrased in the present tense when it states that the public trust "can only be maintained" and, hence, makes clear that the statute's focus is on current threats that would undermine the public's confidence and trust in the

[2] "When the Legislature adopts a statute substantially similar to a federal statute, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts." *Int'l Game Tech., Inc. v. Second Judicial Dist. Ct.*, 122 Nev. 132, 153, 127 P.3d 1088, 1103 (2006); *In re Parental Rights as to S.M.M.D.*, 128 Nev. 14, 26 n.9, 272 P.3d 126, 134 n.9 (2012) ("when the Legislature patterns a statute after a federal statute we presume it intended the same construction and operation") (citing *Int'l Game Tech.*).

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"operation of licensed gaming establishments" if not dealt with appropriately.[3] The statute goes on to authorize "strict regulation of all persons . . . related to the operation of licensed gaming establishments." NRS 463.0129(1)(c). But Mr. Wynn is undisputedly outside the purview of this statute as he is no longer "related to the operation" of any licensed gaming establishments given his resignation as an officer and director of Wynn Resorts in February 2018, and the sale of his Company stock in March 2018.[4]

NRS 463.1405. The Commission also cites NRS 463.1405(4) for the proposition that it has "full and absolute power and authority to . . . revoke . . . any finding of suitability." (ROR 265:13-14.). The Commission then summarily concludes "[b]ecause the Board is seeking to revoke Respondent's findings of suitability, this matter is within the Commission's jurisdiction under NRS 463.1405(4)." (*Id.* at 265:14-16.) This is wrong for two reasons. First, Mr. Wynn's findings of suitability ended when he ceased having any involvement with Wynn Resorts. While the Board seeks to keep those findings in existence through the artifice of an "administrative hold," nothing in the law supports such a tactic as explained below. *See* Point I.B.2, *infra*. Second, the Commission is putting the cart before the horse as it cannot make a revocation determination under NRS 463.1405(4) until after the Board investigates pursuant to NRS 463.1405(1) and makes a recommendation pursuant to NRS 463.1405(3).

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[3] *See, e.g., State v. Lemon*, 825 So.2d 927, 930 (Fla. 2002) (observing "Webster's Dictionary defines 'can' (***present tense of 'could'***) as 'to be able to do, make, or accomplish.' *Merriam Webster's Collegiate Dictionary* 165 (10th ed.1999)) (emphasis added).

[4] The plain meaning of a term used in a statute can be ascertained through contemporaneous dictionary definitions. *See Advanced Pre-Settlement Funding LLC v. Gazda & Tadayon*, 437 P.3d 1050, 2019 WL 1422713, at *2 (Nev. Mar. 28, 2019). The Merriam-Webster Dictionary defines "related" as "connected by reason of an established or discoverable relation." *See* https://www.merriam-webster.com/dictionary/related (last visited March 5, 2020); *see also Black's Law Dictionary* (11th ed. 2019) ("**related** *adj.* (17c) **1**. Connected in some way; having relationship to or with something else <a closely related subject>.") (emphasis in original). Mr. Wynn has not been "connected" to the operation of Wynn Resorts for more than two years.

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The plain language of NRS 463.1405(1), in turn, clearly limits the scope of the Board's jurisdiction to investigate and observe to (i) those who are seeking to enter the gaming industry (*i.e.*, an "applicant"), or (ii) those who are presently involved in the gaming industry on a continuing basis:

> The Board shall investigate the qualifications of each applicant under this chapter before any license or any registration, finding of suitability or approval of acts or transactions for which commission approval is required or permission is granted, ***and shall continue to observe the conduct of all licensees and other persons <u>having</u> a material involvement directly or indirectly with a licensed gaming operation***. . . .

Id. (emphasis added). Again, Mr. Wynn does not fall within the plain language of the statute. He is not an applicant for any gaming approval. Nor does he have any "material involvement directly or indirectly with a licensed gaming operation." Indeed, Mr. Wynn has no present involvement of any kind with any licensed gaming establishments.[5]

The key word in this statute is "having." The Seventh Circuit recently explained the meaning of the word "having" where used in a provision of the Americans with Disabilities Act:

> 'Having' means presently and continuously. It does not include something in the past that has ended or something yet to come. To settle the technical debate, it is a present participle, used to form a progressive tense. *See* Bryan A. Garner, Garner's Modern American Usage 1020 (4th ed. 2016) (defining 'present participle' as '[a] nonfinite verb form ending in -ing and used in verb phrases to signal the progressive aspect').

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[5] The regulations define "material involvement," in the context of publicly traded corporations like Wynn Resorts, as follows: "A person may be deemed to have a material relationship to, or ***material involvement*** with, a corporation, affiliated company or a licensee if the person ***is*** a controlling person or key employee of the corporation, affiliated company or a licensee, or if the person, as an agent, consultant, advisor or otherwise, ***exercises*** a significant influence upon the management or affairs of the corporation, affiliated company or a licensee." Nev. Gaming Comm'n Reg. 16.400 (emphases added). As with the other statutes relied on by the Commission in its order, Regulation 16.400 is couched in the present tense and, therefore, does not authorize the Commission or the Board to exercise jurisdiction over a person who "[***was***] a controlling person or key employee of the corporation" or to a person who "[***exercised in the past***] significant influence upon the management or affairs of the corporation." *See Hager v. State*, 135 Nev. Adv. Op. 34, 447 P.3d 1063, 1071 (2019) ("The use of the present tense—criminalizing firearm possession by a person 'who *is* an unlawful user'—was not idle.") (quotations omitted) (emphasis in original).

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Shell v. Burlington N. Santa Fe Ry., Co., 941 F.3d 331, 336 (7th Cir. 2019); *see also Laube v. Allen*, 506 F. Supp. 2d 969, 980 (M.D. Ala. 2007) ("[A] present participle . . . denotes action that is continuing or progressing, as distinct from . . . a perfect participle that denotes completion."). Applying the foregoing principles of statutory construction and basic grammar, no one can genuinely contend the Board has express statutory power or jurisdiction to observe and prosecute Mr. Wynn given that he has no present or continuous involvement—material, direct, indirect, or otherwise—with any licensed gaming operation.

When the Board was unable to overcome the plain language of NRS 463.1405(1), it attempted before the Commission to expand the legislature's actual delegated power by adding the word "received" to assert what it wishes the statute said: "[t]he legislature demanded that the Board observe the conduct of persons who have ***received*** a finding of suitability. NRS 463.1405(1)." (ROR 190:18-20) (emphasis added). Of course, that language is found nowhere in the statute. Faced with the same dilemma, the Commission engaged in the same sleight of hand in its order. The Commission sought to expand the scope of NRS 463.1405(1) by stating: "[the legislature] charged the Board and the Commission with observing the conduct of persons ***associated*** with gaming[.]" (ROR 266:15-17) (emphasis added). The legislature did no such thing. Like the Board below, the Commission's order tries to expand its own jurisdiction by employing the nebulous word "associated" even though it appears nowhere in the applicable statutory language. That is impermissible. *See S. Nevada Mem'l Hosp*, 101 Nev. at 394, 705 P.2d at 144 ("[a]dministrative agencies cannot enlarge their own jurisdiction"). The relevant phrase is "having a material involvement directly or indirectly with a licensed gaming operation," which unequivocally removes Mr. Wynn from the purview of the Board's and the Commission's powers. The gaming regulators' ongoing refusal to confront the express language of NRS 463.1405(1) and Reg. 16.400 cannot change this reality.

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NRS 463.310. The Commission's order also found that NRS 463.310 provides it with an independent basis for asserting jurisdiction over Mr. Wynn. (ROR 265:17-266:1.) This, too, is incorrect. NRS 463.310 cannot independently expand the Commission's and the Board's jurisdiction beyond the express "Powers and Duties" set forth in NRS 463.120 – NRS 463.1445. It is, instead, an enforcement mechanism that enables the Commission and the Board to effectuate certain powers and duties authorized by the legislature in the aforementioned statutes, including NRS 463.1405. In other words, before the Board can pursue (and the Commission can impose) discipline against a person pursuant to the procedures set forth in NRS 463.310, that person must first fall within the substantive parameters of the statutes that define the agencies' powers. Mr. Wynn undisputedly does not. To the extent there is any ambiguity about the Board's or Commission's powers (or lack thereof), it must be resolved against the administrative agencies. *See Heber Light & Power Co.*, 231 P.3d at 1208; *LePage*, 18 P.3d at 1180; *see also See State v. Wheeler*, 23 Nev. 143, 44 P. 430, 432 (1896) (penal statutes must be strictly construed).

Nev. Gaming Comm'n Reg. 4.030. The Board seeks to revoke Mr. Wynn's findings of suitability. (ROR 6:11.) Notably, however, the Board's Complaint, its opposition papers, and the Commission's order are all devoid of any reference to the actual gaming regulation that defines "Findings of Suitability," Regulation 4.030(10). That omission is presumably because the subject regulation, like the statutes addressed above, similarly limits the Commission's and the Board's jurisdiction:

> 10. Findings of Suitability. The Nevada Gaming Control Act and regulations thereunder require or permit the Commission to require certain persons, ***directly or indirectly involved with licensees***, be found suitable to hold a gaming license ***so long as that involvement continues. A finding of suitability relates only to the specified involvement for which it was made.*** If the nature of the involvement changes from that for which the applicant is found suitable, the applicant may be required to submit to a determination by the Commission of his or her suitability in the new capacity.

Nev. Gaming Comm'n Reg. 4.030(10) (emphases added).

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The plain language makes clear that the Board and the Commission only have jurisdiction to make findings of suitability when a person is "***directly or indirectly involved with licensees***" and, then, only for "***so long as that involvement continues***." By converse logic, then, the Board and the Commission can only "revoke" findings of suitability when those same circumstances exist—*i.e.*, a person is "directly or indirectly involved with licensees" and only for "so long as that involvement continues." *Cf. State v. Glusman*, 98 Nev. at 421, 651 P.2d at 645 ("[NRS 463.170(2)] describes with specificity the standards of conduct applicable to a determination of suitability and, by converse logic, that conduct which is inconsistent with suitability[.]"). Again, the Board acknowledges in its Complaint and its Location Report that Mr. Wynn is not directly or indirectly involved with any Nevada licensee. Additionally, because a finding of suitability "***relates only to the specified involvement for which it was made***" and is otherwise non-transferable, it is entirely unclear how Mr. Wynn's previous suitability findings as a stockholder, as an officer and as a director of Wynn Resorts continue to survive in the ether—unmoored from any Nevada licensee or gaming property—now that Mr. Wynn is no longer a stockholder, an officer or a director, and has completely disassociated himself from Wynn Resorts and the gaming industry as a whole. Simply put, there is nothing for the Commission to "revoke."

2. Neither NRS Chapter 463 nor the Gaming Regulations *impliedly* authorize the Commission or the Board to punish persons who no longer have any involvement with gaming licensees.

While the Nevada Supreme Court "has determined that an administrative agency may possess an implied limited power, ***any implied limited power must be essential to carry out an agency's express statutory duties***." *City of Henderson v. Kilgore*, 122 Nev. at 335, 131 P.3d at 14 (emphasis added). The ability to discipline persons who have ceased all involvement with gaming licensees is not essential to the Board's and Commission's express statutory power to regulate Nevada's gaming industry. Nor is it essential to preserve the public policy embodied in NRS

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463.0129(1)(d) (*i.e.*, to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State[.]").

The Board has the express statutory authority to investigate the qualifications of applicants seeking to enter Nevada's gaming industry. *See* NRS 463.1405(1). It also has the express statutory authority to observe and investigate all persons having a material involvement with licensees to ensure they remain suitable. *See id.* Finally, the Board is expressly authorized to make recommendations to the Commission regarding applicants and involved persons, and to bring disciplinary proceedings against the latter. *See* NRS 463.1405(3); NRS 463.310(1) and (2). The Commission, upon recommendation from the Board, has the express power to deny the applications of those seeking to enter the industry and can impose discipline against those persons who have a material involvement with licensees. *See* NRS 463.1405(4); NRS 463.310(4).

Here, though, the Board and the Commission seek to expand their disciplinary jurisdiction to a third category of persons—those who received a prior approval from the Commission but have since ended all involvement with a licensee or the gaming industry in general. This is clearly an overreach and not implied by the express legislative delegation of authority to regulate applicants and individuals involved in gaming operations, as it would mean that gaming regulators in Nevada have lifetime jurisdiction to impose discipline against anyone who has ever received a gaming approval, no matter how long ago the approval was received, no matter how long ago a purported infraction occurred, and no matter how long ago the person left the industry and was removed from the Board's Location Report. That cannot be the law. *Cf. In re Crawley*, 460 B.R. 421, 433 n.12 (Bankr. E.D. Pa. 2011) ("a bankruptcy court does not obtain lifetime jurisdiction over the debtor") (quotation omitted).[6]

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[6] The Board seeks to accomplish the expansion of its jurisdiction in this manner through the use of an "administrative hold" which, according to the Board, apparently allows it to retain disciplinary jurisdiction over a person in perpetuity. (ROR 6:22-25.) Not so. First, an

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Nor is such an expansive concept of jurisdiction "essential to carry out [the Board's and Commission's] express statutory duties." *See City of Henderson*, 122 Nev. at 335, 131 P.3d at 14. The public policy of the state concerning gaming is expressed, in part, as follows:

> The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming . . . [is] conducted honestly and competitively, that establishments which hold restricted and nonrestricted licenses where gaming is conducted and where gambling devices are operated do not unduly impact the quality of life enjoyed by residents of the surrounding neighborhoods, that the rights of the creditors of licensees are protected and that gaming is free from criminal and corruptive elements.

NRS 463.0129(1)(b); *see also* NRS 463.0129(1)(d) (gaming establishments are to be "controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State."). Where, as here, a person ceases all involvement with the operations of a licensee and is out of the gaming industry altogether, the purposes of NRS 463.0129 have been protected: once a person leaves the industry, the imposition of discipline is no longer necessary to ameliorate an alleged threat to the public health, safety, and welfare, because the goals to be achieved through the disciplinary process have already been accomplished. (*See* ROR 52:18-55:2) (explaining how goals of revoked suitability have already been satisfied here).

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administrative agency cannot enlarge its own jurisdiction. *See* Point I.B, *supra*. Nor can it assume any official powers. *See id*. Next, the words "administrative hold" are found nowhere in NRS Chapter 463 or the gaming regulations—a point never contested by the Board or the Commission—which means the legislature has not expressly authorized the Board to employ such a maneuver. The question then becomes whether the legislature has impliedly authorized such an action—*i.e.*, is it "essential" to the Board's ability to carry out its express statutory duties? *See City of Henderson*, 122 Nev. at 335, 131 P.3d at 14. Clearly not. The Board has express power to deal with applicants and persons who have an ongoing, direct or indirect, involvement in the operation of a licensee. For the reasons set forth herein, an "administrative hold" is not essential to the Board's ability to carry out its express duties regarding applicants and involved persons once someone has left the gaming industry altogether, and has no involvement in gaming operations of any licensee.

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C. The Commission Misinterprets the Scope of NRS 463.143.

The Commission's order relies in large part on NRS 463.143, which provides that "[t]he Commission may exercise any proper power and authority necessary to perform the duties assigned to it by the Legislature, and it is not limited by an enumeration of powers in this chapter." (ROR 265:10-12.) The Commission interprets this statute to constitute express legislative authority to carry out its duties "without limitation." (ROR 266:18-19.) Mr. Wynn never had the opportunity below to brief the meaning of this statute as the Board never cited it in the Complaint or in its opposition papers. (ROR 4-27; 181-194.) The Board's counsel instead raised it for the first time at the hearing before the Commission. (ROR 237:14-20; 241:20-25.) Regardless, the statute is not the panacea the Commission would like.

First, the statute is limited to the *Commission's* delegated powers, so it obviously cannot justify any expansion of the *Board's* powers. Second, the plain language of the statute merely authorizes the Commission to exercise any "proper" power—even one not expressly enumerated in Chapter 463—that is needed to carry out the duties assigned to it by the legislature. *See* NRS 463.143. As explained above, however, those duties nowhere include the power to impose discipline forever upon anyone who has ever been found suitable to be involved in a licensed gaming operation. Because the legislature never delegated the Commission the power to punish people who have left the gaming industry, NRS 463.143—when properly interpreted—adds nothing to the jurisdictional calculus. Indeed, the Board and the Commission have not articulated how fining and revoking an individual no longer involved in a licensed gaming operation is "necessary to perform" their assigned duties to investigate and license applicants and to oversee currently-operating licensed locations.

Ignoring the narrow focus of the statutory language, the Commission summarily contends that NRS 463.143 authorizes it to carry out its duties "without limitation." (ROR 266:18-19.) This position is both dangerous and untenable. "The power conferred upon the Legislature to make

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laws cannot be delegated to any other body or authority." *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001) (citing Nev. Const. Art. 3, § 1). While the legislature "may authorize administrative agencies to make rules and regulations supplementing legislation if the power given is prescribed in terms sufficiently definite to serve as a guide in exercising that power," *see id.*, "[a] statute that gives unlimited regulatory power to a commission, board, or agency without prescribed restraints offends the constitution." *3613 Ltd. v. Dep't of Liquor Licenses & Control*, 978 P.2d 1282, 1287 (Ariz. App. 1999); *accord McNeill v. State*, 132 Nev. at 557, 375 P.3d at 1026 ("[s]uch authority will be upheld as constitutional so long as suitable standards are established by the legislature for the agency's use of its power.").

Under the Commission's interpretation, NRS 463.143 provides an "independent basis for jurisdiction" over Mr. Wynn in this disciplinary action. (ROR 266:22-25.) NRS 463.143, though, says nothing about the Commission's jurisdiction. Other statutes, as explained above, address the interplay between the Board's continuing powers to observe, investigate and recommend discipline against those "having" involvement in gaming operations and the Commission's power to act on those recommendations and impose discipline. *See* Point I.B.2, *supra*. The Commission's belated effort to use NRS 463.143 to expand its jurisdiction to punish persons who are no longer involved in the gaming industry is unprecedented and unsound.

For starters, the Commission's position again disregards the principle that "[a]dministrative agencies cannot enlarge their own jurisdiction." *S. Nevada Mem'l Hosp*, 101 Nev. at 394, 705 P.2d at 144. Next, because the Commission is dependent upon the Board to observe, investigate and pursue disciplinary actions in the first instance, the Commission's attempt to enlarge its own jurisdiction has the concomitant effect of enlarging the Board's jurisdiction even though NRS 463.143 says nothing about the Board's powers, thereby rendering the Commission's position doubly-wrong. Finally, using the purported "unlimited" authority delegated by NRS 463.143 to expand the Commission's jurisdiction is tantamount to creating law, *cf. Blackjack Bonding v. City*

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of Las Vegas, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000) (a court's jurisdiction "is subject to legislative control"), and would violate the separation of powers doctrine if the Commission's construction were correct. *See Commission on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103-04 (2009) ("Nevada's Constitution . . . contains an express provision prohibiting any one branch of government from impinging on the functions of another."). The Nevada Supreme Court has repeatedly declined to interpret statutes in a manner that would render them unconstitutional due to an unlimited delegation of legislative power.[7] Her Honor should do the same by rejecting the Commission's suggestion that NRS 463.143 grants it unlimited power to fill in any perceived jurisdictional gaps in the regulatory framework governing Nevada gaming.

II. MR. WYNN ALTERNATIVELY REQUESTS A WRIT OF MANDAMUS AND/OR PROHIBITION.

NRS 463.315 authorizes judicial review of not only a "final decision," but also of a Commission "order" that aggrieves any person. *See* NRS 463.315, *et seq*. Therefore, judicial review of the Commission's denial of Mr. Wynn's motion to dismiss is both proper and ripe. That said, even if the Court were to determine that judicial review is not appropriate under these circumstances, Mr. Wynn has alternatively requested, and is entitled to, writ relief. "Requiring that a party participate in an administrative process in front of an agency lacking jurisdiction constitutes neither plain, speedy, nor adequate relief." *Heber Light & Power Co.*, 231 P.3d at 1207 (although administrative agency's denial of motion to dismiss was not a final agency action under the Utah Administrative Procedures Act, Utah Supreme Court nonetheless issued an extraordinary

[7] *See, e.g., McNeil*, 132 Nev. at 557, 373 P.3d at 1026 ("In enacting NRS 213.1234, the Legislature did not explicitly provide the Board the authority to create additional [lifetime supervision] conditions. And even assuming that the Legislature had intended to do so, ***that delegation of power would fail because the Legislature has not provided guidelines informing the Board how, when, or under what circumstances, it may create additional conditions***.") (emphasis added); *Banegas*, 117 Nev. at 227, 19 P.3d at 248-29 (declining to interpret statute in a manner that would give SIIS sole discretion to determine the amount and duration of death benefits payable to certain beneficiaries).

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writ to arrest administrative proceedings where agency lacked jurisdiction); *see also Benson v. State Engineer*, 131 Nev. 772, 777, 358 P.3d 221, 224 (2015) (exhaustion of administrative remedies "is not required . . . when the agency clearly lacks jurisdiction.") (quotation omitted). Accordingly, Mr. Wynn alternatively seeks relief by way of extraordinary writ under NRS 34.150 (Writ of Mandamus) and NRS 34.320 (Writ of Prohibition).

CONCLUSION

Based on the foregoing, Mr. Wynn respectfully requests that this Court judicially review the Board's and the Commission's actions pursuant to NRS 463.315, *et seq*. and/or NRS Chapter 34, and reverse the Commission's denial of Mr. Wynn's underlying motion to dismiss. Alternatively, Mr. Wynn requests the Court to compel the Commission to grant Mr. Wynn's dismissal motion and arrest the proceedings in the underlying disciplinary action as they are in excess of the Board's and the Commission's jurisdiction.

DATED this 13th day of March, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this 13th day of March, 2020, I caused the foregoing document entitled **Petitioner Stephen A. Wynn's Opening Brief in Support of Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition** to be served upon those persons designated by the parties in the E-Service Master List for the above-reference matter in the Eight Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	Case No. A-20-809249-J Dept. No. 14

NEVADA GAMING COMMISSION'S OPPOSITION TO WYNN'S PETITION AND COUNTERMOTION TO DISMISS

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iii
JURISDICTIONAL STATEMENT 1
STATEMENT OF ISSUES 1
INTRODUCTION 1
STATEMENT OF THE CASE 2
STATEMENT OF FACTS 3
I. The Parties 3
A. The Board and the Commission 3
B. Wynn 4
II. The Board's Investigation of Wynn's Alleged Violations of the Act 5
III. The Board's Complaint and the Proceedings Before the Commission 6
SUMMARY OF ARGUMENT 7
ARGUMENT 8
I. The Act Bars Wynn's Petition for Judicial Review 8
II. The Commission's Decision was Proper Because Its Interpretation of the Act was Reasonable 9
A. The Commission's Interpretation of the Act Is Entitled to Deference 10
B. The Four Bases of Authority Identified in the Commission's Decision Constitute Reasonable Interpretations of the Act 12
1. NRS 463.1405(4) Grants the Commission Authority to Revoke Wynn's Findings of Suitability and Fine Him 12
2. NRS 463.310 Also Grants the Commission Authority to Revoke Wynn's Findings of Suitability and Fine Him 14

…

3. NRS 463.140(5) Gives the Commission Authority to Discipline Wynn for Allegedly Violating an Order to Appear 15
4. NRS 463.143 Is Another Basis for the Commission's Authority to Discipline Wynn 16
a. Disciplining Regulatees Who Have Divested from the Gaming Industry Is Necessary to Carry Out the Commission's Duties 17
b. Wynn's Attacks on NRS 463.143 Are Not Persuasive 18
C. Regulation 4.030(10) Does Not Limit the Commission's Authority 20
CONCLUSION 22
CERTIFICATE OF COMPLIANCE 24
CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

CASES **PAGE**

Ariz. Cannabis Nurses Ass'n v. Ariz. Dep't of Health Servs.,
392 P.3d 506, 511-12 (Ariz. Ct. App. 2017) 10

Aronsen v. Crown Zellerbach,
662 F.2d 584, 590 (9th Cir. 1981) 15

Banegas v. State Indus. Ins. Sys.,
117 Nev. 222, 230, 19 P.3d 245, 250 (2001) 15

City of Arlington v. FCC,
569 U.S. 290, 296, 297, 298, 307, 133 S. Ct. 1863, 1868, 1869, 1874-75 (2013) 10

Cf. Comm'r v. Beck's Estate,
129 F.2d 243, 245 (2d Cir. 1942) 13

City of Mesquite v. Eighth Judicial Dist. Court,
135 Nev. 240, 242, 243, 445 P.3d 1244, 1248 (2019) 10

Glusman v. Nevada,
459 U.S. 1192, 103 S. Ct. 1170 (1983) 3

Heber Light & Power Co. v. Utah Pub. Serv. Comm'n,
231 P.3d 1203, 1208 (Utah 2010) 11

Int'l Game Tech., Inc. v. Second Judicial Dist. Court,
124 Nev. 193, 197, 179 P.3d 556, 558 (2008) 9

Int'l Game Tech., Inc. v. Second Judicial Dist. Court,
122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006) 10

Legislature. Cf. State Gaming Control Bd. v. Eighth Judicial Dist. Court,
82 Nev. 38, 40, 409 P.2d 974, 975 (1966) 20

Nassira v. Chiropractic Physicians' Board,
130 Nev. 245, 327 P.3d 487 (2014) 11

Prods. & Leasing v. Hotel Conquistador, Inc.,
573 F. Supp. 717, 721 (D. Nev. 1982)..... 4, 19

Prod. & Leasing, Ltd. v. Hotel Conquistador,
709 F.2d 21 (9th Cir. 1983) 4, 19

Pub. Emps.' Ret. Sys. v. Nev. Policy Research Inst., Inc.,
134 Nev. 669, 674 n.4, 429 P.3d 280, 286 n.4 (2018) 21

Resnick v. Nev. Gaming Comm'n,
104 Nev. 60, 63, 752 P.2d 229, 231 (1988) 9

R.O.A. Gen., Inc. v. Utah Dep't of Transp., Dist. Three,
966 P.2d 840, 843 (Utah 1998) 12

Rosenthal v. State ex rel. Nev. Gaming Comm'n,
96 Nev. 959, 962, 620 P.2d 874, 876 (1980) 3

Spilotro v. State ex rel. Nev. Gaming Comm'n,
99 Nev. 187, 191-92, 661 P.2d 467, 470 (1983) 3

State v. Eighth Judicial Dist. Court,
111 Nev. 1023, 1025, 899 P.2d 1121, 1122 (1995) 4

State v. Glusman,
98 Nev. 412, 417, 418, 651 P.2d 639, 643 (1982) 3

State Gaming Control Bd. v. Eighth Judicial Dist. Court,
82 Nev. 38, 40, 409 P.2d 974, 975 (1966) 4, 20

State v. Rosenthal,
93 Nev. 36, 39, 43, 559 P.2d 830, 832, 834, 835 (1977) 4, 19

Taylor v. Dep't of Health & Human Servs.,
129 Nev. 928, 930, 314 P.3d 949, 951 (2013) 10, 11

STATUTES AND RULES

Nevada Gaming Commission Regulation 4.010 21

Nevada Gaming Commission Regulation 4.011 21

Nevada Gaming Commission Regulation 4.030 8

Nevada Gaming Commission Regulation 4.030(10) 13, 20, 22

Nevada Gaming Commission Regulation 5.010 6

Nevada Gaming Commission Regulation 5.011 ..... 6, 7
Nevada Gaming Commission Regulation 5.011(1) 7
Nevada Gaming Commission Regulation 5.011(8) 7
Nevada Gaming Commission Regulation 5.011(10) 7
NRCP 12(b)(5) 1
NRS 233B.135 11
NRS 463.010 1
NRS 463.120 15
NRS 463.140 17
NRS 463.140(1) 3, 18
NRS 463.140(5) 6, 8, 12, 15, 16, 22
NRS 463.143 ..... 8, 12, 17, 18, 19, 20
NRS 463.166 13
NRS 463.166(1)(c) 13
NRS 463.170(2)(a) 6
NRS 463.170(2)(b) 6, 21
NRS 463.310 ..... 3, 8, 12, 14, 15, 17
NRS 463.310(3) 3
NRS 463.310(4) 3, 15
NRS 463.310(4)(b) 14
NRS 463.310(4)(d) 14, 22
NRS 463.312 ..... 6, 9
NRS 463.315 8
NRS 463.315(1) 1, 9
NRS 463.317(3)(d) 3
NRS 463.318(2) 1, 9
NRS 463.860 1
NRS 463.0129(1)(a) 3

NRS 463.0129(1)(b) 3

NRS 463.0129(1)(c) 3

NRS 463.1405 17

NRS 463.1405(1) 13, 14

NRS 463.1405(3) 13

NRS 463.1405(4) 8, 12, 13, 15, 22

NRS 463.1445 15

NRS 463.3145 ..... 3, 9, 17

NRS 463.3145(1) 3, 9

OTHER

Accusé d'agressions sexuelles, le magnat américain Steve Wynn quitte son empire de casinos, Le Monde (Feb. 7, 2018), https://bit.ly/39KkkNA 5

Alexandra Berzon et al., *Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn*, Wall Street J. (Jan. 27, 2018), https://on.wsj.com/2UGZRoD 5

Corky Siemaszko, *Vegas Casino King Steve Wynn Accused of 'Pattern of Sexual Misconduct' in* Wall Street Journal *Report*, NBC News (Jan. 26, 2018), https://nbcnews.to/3dTTuG5 5

Interlocutory, *Black's Law Dictionary* (11th ed. 2019) 9

Julia Jacobo & Alyssa Pone, *Billionaire Steve Wynn Accused of Sexual Misconduct by Dozens*, ABC News (Jan. 26, 2018), https://abcn.ws/346lySk 4

Nina Munk, *Steve Wynn's Biggest Gamble*, Vanity Fair (Apr. 24, 2014), https://bit.ly/3aKH9SW 5

Respondent Nevada Gaming Commission, by and through counsel, opposes Petitioner Stephen A. Wynn's Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition, and countermoves to dismiss the petition under Nevada Rule of Civil Procedure 12(b)(5).

JURISDICTIONAL STATEMENT

The Nevada Gaming Commission (the "Commission") contends that this Court lacks jurisdiction to consider Wynn's petition for judicial review. *See infra* Argument Part I. This Court has jurisdiction to consider his petition for a writ of mandamus or prohibition pursuant to NRS 463.318(2).

STATEMENT OF ISSUES

I. Does this Court have jurisdiction to consider Wynn's petition for judicial review of an interlocutory order, given that NRS 463.315(1) contemplates a petition for judicial review only of a "final decision or order of the Commission made after hearing or rehearing by the Commission?"

II. Was the Commission's conclusion that it has authority to consider disciplinary action for alleged violations of the Nevada Gaming Control Act (the "Act"), NRS 463.010 - 860, reasonably consistent with the Act?

INTRODUCTION

For over four decades, Wynn has sought the permission of the Commission and the Nevada Gaming Control Board (the "Board") to participate in the gaming industry. He has purposefully availed himself of the Commission and the Board's authority because his work as a licensee and person found suitable has brought him fame and fortune. His prominence in gaming is such that his personal signature looms over the Las Vegas Strip at the top of the Wynn casino tower, and his career has resulted in a reported net worth in the billions.

During the time that Wynn was regulated by the Commission and subject to the Act, he allegedly engaged in an extensive pattern of sexually harassing and assaulting his subordinates. The allegations, which are set out in a complaint filed after the Board's seven-month investigation, include his coercing sex in his office from employees who told

him that they did not want to have sex with him. Wynn concurrently took steps to hide this alleged sexual misconduct from regulators by using private attorneys and requiring victims to sign nondisclosure agreements. Such conduct, if proved, would constitute violations of the Act, as well as of the Commission's regulations.

When Wynn's alleged sexual misconduct was reported in the national (and international) press, it degraded the public's confidence in the integrity of the gaming industry and brought discredit to the State. Even though Wynn's violative conduct occurred during the time he was involved in the gaming industry, and even though the harm his actions caused continues to this day, he contends that the Commission lacks authority to consider disciplining him. He bases that contention on the fact that, after the Board began investigating him, he divested from the gaming industry.

Wynn's contention contradicts the plain text of the Act and would undermine the public policy that animates Nevada gaming regulation. Even if the Act were ambiguous, the Commission's reasonable interpretation of the Act would be entitled to deference. After benefitting for decades from the privilege of taking part in gaming, Wynn cannot unilaterally escape his burdens. The Commission has jurisdiction to consider discipline against him; this Court should deny and dismiss his petition.

STATEMENT OF THE CASE

The Board filed a complaint with the Commission charging that Wynn violated the Act during his time as chief executive officer, chairman and controlling shareholder of a gaming licensee. The complaint also charged that, after he had divested from the licensee, he violated the Act by failing to comply with a Board-issued order to appear. Wynn moved to dismiss the complaint; the Commission denied Wynn's motion.

Wynn now petitions for judicial review of the Commission's interlocutory order denying his motion to dismiss. In the alternative, he petitions for a writ of mandamus or prohibition to end the Commission's disciplinary proceedings.

The underlying disciplinary proceedings remain pending, but are stayed while this Court determines Wynn's petition.

STATEMENT OF FACTS

I. The Parties

A. The Board and the Commission

"The gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants." NRS 463.0129(1)(a). As the Nevada Legislature has recognized, "[t]he continued growth and success of gaming is dependent upon public confidence and trust" in the regulation of gaming. NRS 463.0129(1)(b). And that is an issue because the "peculiar nature" of the industry "presents numerous concerns and problems of control." *State v. Glusman*, 98 Nev. 412, 417, 651 P.2d 639, 643 (1982), *appeal dismissed sub nom. Glusman v. Nevada*, 459 U.S. 1192, 103 S. Ct. 1170 (1983). The foremost among those concerns is protecting gaming from "any potentially significant criminal or corruptive taint and thus maintaining public confidence and trust in the [industry]." *Spilotro v. State ex rel. Nev. Gaming Comm'n*, 99 Nev. 187, 191-92, 661 P.2d 467, 470 (1983).[1]

To resolve the peculiar problems presented by gaming and to maintain the public trust, the Legislature has established two administrative bodies tasked with the "strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments." NRS 463.0129(1)(c); *see Glusman*, 98 Nev. at 418, 651 P.2d at 643. The two bodies are the Board and the Commission, which are both charged with administering the Act "for the protection of the public and in the public interest." NRS 463.140(1). Among the Board's many duties, relevant here is that it "performs an investigatory function, and makes recommendations to the [Commission]." *Rosenthal v. State ex rel. Nev. Gaming Comm'n*, 96 Nev. 959, 962, 620 P.2d 874, 876 (1980). The Commission, in turn, conducts disciplinary proceedings based on the Board's recommendations, and is the ultimate decisionmaker and factfinder. *See* NRS 463.310(3)-(4), 463.3145(1), 463.317(3)(d).

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[1] The facts set out here are drawn from the Board's complaint and Wynn's uncontested evidentiary submissions. Their inclusion here is to properly frame the issue on review and does not indicate that the Commission has prejudged any factual question. All facts stated here remain subject to proof at a hearing pursuant to NRS 416.310 -.3145.

Because of the "broad authority" delegated to the Board and Commission, it is necessary that they "have the reasonably unfettered ability to fulfill their responsibilities under the [Act]." *Prods. & Leasing v. Hotel Conquistador, Inc.*, 573 F. Supp. 717, 721 (D. Nev. 1982); *aff'd sub nom. Prod. & Leasing, Ltd. v. Hotel Conquistador, Inc.*, 709 F.2d 21 (9th Cir. 1983). The Nevada Supreme Court has explained that necessary control over gaming would "not exist if regulatory procedures [were] not allowed to operate," so courts must avoid impeding the Board and Commission's enforcement actions. *State Gaming Control Bd. v. Eighth Judicial Dist. Court*, 82 Nev. 38, 40, 409 P.2d 974, 975 (1966). For that reason, the high court has repeatedly reversed district courts that inappropriately limited the Commission's authority to protect the public interest through disciplinary proceedings.[2]

B. Wynn

For over 45 years, first as a licensee and later as a person found suitable, Wynn was a prominent member of the gaming industry subject to the Commission's authority. R. at 58.[3] During that lengthy period, he repeatedly sought and obtained from the Board and Commission permission to manage gaming operations. *Id.* Most recently, in 2005 he applied for and received findings of suitability in his capacities as chief executive officer, chairman, shareholder and controlling shareholder of Wynn Resorts, Ltd. (together with its affiliates and subsidiaries, the "Company"). *Id.* at 263.

Wynn's high-profile participation in the industry regulated by the Commission was lucrative for him. His net worth, due to his career in gaming, is reported to be over a billion dollars. Julia Jacobo & Alyssa Pone, *Billionaire Steve Wynn Accused of Sexual Misconduct by Dozens*, ABC News (Jan. 26, 2018), https://abcn.ws/346lySk. He has also been

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[2] *See, e.g.*, *State v. Eighth Judicial Dist. Court*, 111 Nev. 1023, 1025, 899 P.2d 1121, 1122 (1995); *State v. Rosenthal*, 93 Nev. 36, 39, 559 P.2d 830, 832 (1977); *State Gaming Control Bd.*, 82 Nev. at 40, 409 P.2d at 975.

[3] "R." citations refer to the record on review filed by the Commission, with the prefix and leading zeroes omitted.

characterized as epitomizing gaming in Southern Nevada. *See* R. at 58-59; Nina Munk, *Steve Wynn's Biggest Gamble*, Vanity Fair (Apr. 24, 2014), https://bit.ly/3aKH9SW.

II. <u>The Board's Investigation of Wynn's Alleged Violations of the Act</u>

During his career, Wynn allegedly conducted a decades-long practice of sexually harassing and assaulting his gaming-industry employees. R. at 7. In 2018 Wynn's alleged sexual misconduct was publicized in a front-page article in the *Wall Street Journal*. Alexandra Berzon et al., *Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn*, Wall Street J. (Jan. 27, 2018), https://on.wsj.com/2UGZRoD.

The article, which identified Wynn in its headline as a "Las Vegas Mogul," described numerous allegations of improper, potentially criminal behavior. Berzon et al., *supra*. For example, it reported that Wynn had sex with an employee manicurist after an appointment in his office, despite her telling him that "she didn't want to have sex and was married." *Id.* Employees explained that Wynn's "power in Las Vegas, combined with the knowledge that the jobs they held were among the best-paying available there, added up to a feeling of dependence and intimidation when [he] made requests of them." *Id.* According to the article and the Board's investigation, Wynn hid his misconduct from regulators and the public by using private settlements and requiring his victims to sign nondisclosure agreements; he also ordered the Company to refrain from investigating at least one complaint about him. R. at 7, 22; *see* Berzon et al., *supra*. Media organizations across the country and overseas picked up the *Journal*'s reporting.[4]

"Immediately" after learning about the *Journal*'s reporting, the Board began investigating the allegations. R. at 9. The Board's seven-month investigation involved, among other things, speaking with current and former Company employees and executives, reviewing legal documents (including confidential settlement agreements) and monitoring the Company's internal investigation of Wynn's conduct. *Id.* at 10.

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[4] *See, e.g.*, Corky Siemaszko, *Vegas Casino King Steve Wynn Accused of 'Pattern of Sexual Misconduct' in* Wall Street Journal *Report*, NBC News (Jan. 26, 2018), https://nbcnews.to/3dTTuG5; *Accusé d'agressions sexuelles, le magnat américain Steve Wynn quitte son empire de casinos*, Le Monde (Feb. 7, 2018), https://bit.ly/39KkkNA.

The Board also served an "order to appear" on Wynn pursuant to NRS 463.140(5). R. at 24. The order directed Wynn to provide testimony under oath at a certain date and time at the Board's offices. *Id.* The order advised Wynn that failing to comply with it would be grounds for potential revocation of his finding of suitability. *Id.* The Board also met personally with Wynn's counsel to emphasize the importance – and stakes for Wynn's findings of suitability – of the order to appear. *Id.* Wynn did not appear at the Board's offices at the required date and time (or any time thereafter), in violation of the order. *Id.* at 24-25.[5]

III. <u>The Board's Complaint and the Proceedings Before the Commission</u>

At the conclusion of its investigation, the Board filed a complaint with the Commission in accordance with NRS 463.312. R. at 4. The complaint alleged that Wynn "repeatedly violated Nevada's gaming statutes and regulations, bringing discredit upon the State of Nevada and its gaming industry." *Id.*

Five counts comprised the complaint. The first four alleged that Wynn engaged in sexual conduct with subordinates, including sexually assaulting a manicurist and a cocktail server. R. at 16-23. It asserted that those actions violated NRS 463.170(2)(a), which requires that a person found suitable be "[a] person of good character, honesty and integrity." R. at 17, 19-20, 22. It also asserted that they violated NRS 463.170(2)(b), which similarly requires that a person found suitable "not pose a threat to the public interest of this State or to the effective regulation and control of gaming." R. at 17, 19, 21-22.

In addition, the complaint asserted that Wynn's misconduct violated a number of Commission regulations. For example, it asserted that Wynn had violated the rule that all gaming establishments must be "operated in a manner suitable to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State." R. at 18-22 (citing Nev. Gaming Comm'n Reg. 5.010). And it cited Regulation 5.011, which provides

[5] Wynn's counsel notified the Board that Wynn would not appear, but did not request that Wynn be excused from appearing or that the appearance time be postponed. R. at 24-25.

(among other things) that "[f]ailure to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the State" and "[f]ailure to conduct gaming operations in accordance with proper standards of custom, decorum, and decency" are grounds for discipline. R. at 18-22 (citing Nev. Gaming Comm'n Reg. 5.011(1), (8), (10)).[6]

Wynn moved to dismiss the complaint "based on a lack of subject matter jurisdiction." R. at 32. The Commission considered the issue and voted unanimously to deny the motion to dismiss. *Id.* at 257-58.

After denying Wynn's motion, the Commission issued a written decision explaining the bases for the denial. R. at 263-67. The decision expressly stated that "determination of the [m]otion [was] a preliminary matter" and that an "evidentiary hearing on the merits of this case [would be] forthcoming." *Id.* at 267.

Wynn petitioned for judicial review or, in the alternative, a writ of mandamus or prohibition. The Commission now opposes Wynn's petition and countermoves to dismiss it.

SUMMARY OF ARGUMENT

I. Petitions for judicial review are unavailable to challenge a denial of a motion to dismiss. The Act permits petitions for judicial review only after the Commission has issued a final decision or order on the merits. A denial of a motion to dismiss is not a final order on the merits. (That rule does not apply to Wynn's request for a writ of mandamus or prohibition.)

II. Wynn's petition should be denied because the Commission's decision was reasonably consistent with the Act.

A. Courts defer to agency interpretations of their governing statutes as long as they are reasonably consistent with the statutory language. The Commission's interpretation of its governing statute – the Act – was reasonably consistent with the Act's text, so it is entitled to deference by this Court.

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[6] The complaint cited the then-operative version of Regulation 5.011. Since then, the Regulation has been amended. *See* Nev. Gaming Comm'n Reg. 5.011 (2020). The amendment did not change the substance of the cited provisions, but they were renumbered.

B. The Commission's decision denying Wynn's motion to dismiss identified four independent bases for its authority. All four constitute reasonable interpretations of the Act to which this Court should defer.

1. NRS 463.1405(4) expressly gives the Commission "full and absolute power and authority" to revoke Wynn's finding of suitability and to fine him.

2. NRS 463.310 likewise authorizes the Commission to "limit, condition, suspend or revoke" a finding of suitability, and also to fine any person who has previously been found suitable.

3. Under NRS 463.140(5), the Commission has authority to discipline witnesses who have violated an order to appear, as Wynn is alleged to have done.

4. Finally, NRS 463.143 grants the Commission all "proper power and authority" to carry out its legislatively prescribed duties. Disciplining a person who has sought to be regulated by the Commission, and who is charged with violating the Act while within the Commission's authority, is a proper power and authority under NRS 463.143.

C. Wynn's invocation of Regulation 4.030 does not change the calculus. Wynn's interpretation is wrong because it would render the Commission powerless in precisely the cases where discipline is warranted. And his argument that his findings of suitability are no longer in force presupposes that the Commission has authority here. That is because the Act makes it the Commission's duty to determine whether or not Wynn's findings of suitability have expired.

ARGUMENT

I. <u>The Act Bars Wynn's Petition for Judicial Review</u>

The Act does not authorize petitions for judicial review targeting interlocutory orders, and that portion of this case must be dismissed. Wynn contends that a petition for judicial review is available here because "NRS 463.315 authorizes judicial review of not only a 'final decision,' but also of a Commission 'order' that aggrieves any person." Pet'r Stephen A. Wynn's Opening Br. Supp. Pet. for Judicial Review 26 [hereinafter "Wynn Br."].

That quote omits the crucial qualifier that such a petition is available to review only 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) (emphasis added).

A hearing or rehearing held pursuant to NRS 463.312 to 463.3145 is a specific kind of a disciplinary hearing. It must be based on a complaint filed by the Board and result in a written decision on the merits that contains findings of fact, a determination of the issues presented and the penalty to be imposed, if any. NRS 463.312, 463.3145(1).

The Nevada Supreme Court has confirmed that NRS 463.315(1) allows petitions for judicial review only after merits determinations, such as final disciplinary orders. *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 63, 752 P.2d 229, 231 (1988). By that same token, "interlocutory Commission determination[s]" – such as a denial of a motion to dismiss – are not a permissible basis for a petition for judicial review. *See id.*

Because the denial of Wynn's motion to dismiss was an interlocutory order, NRS 463.315(1) does not allow a petition for judicial review challenging it. Wynn has not argued that the denial was a merits determination. *See* Wynn Br., *supra*, at 26. Nor could he. An order denying a motion to dismiss is interlocutory, as it does "not constitut[e] a final resolution of the whole controversy." *Interlocutory*, *Black's Law Dictionary* (11th ed. 2019); *see, e.g.*, *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (characterizing a denial of a motion to dismiss as "interlocutory"). Furthermore, in this case, the Commission's order noted that it determined only a "preliminary matter" and that "[a]n evidentiary hearing on the merits of this case [would be] forthcoming." R. at 267.

II. <u>The Commission's Decision Was Proper Because Its Interpretation of the Act Was Reasonable</u>

Unlike petitions for judicial review, the Act may permit the consideration of extraordinary writ petitions, such as the writ of mandamus or prohibition that Wynn has requested. *See* NRS 463.318(2). "Writ relief is an extraordinary remedy" and the decision as to whether to even consider a writ petition lies entirely within the court's discretion.

City of Mesquite v. Eighth Judicial Dist. Court, 135 Nev. 240, 242, 445 P.3d 1244, 1248 (2019). Courts "generally decline" to consider petitions challenging orders denying motions to dismiss. *Id.* at 243, 445 P.3d at 1248. However, they can exercise their discretion to consider such petitions when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Id.*

If this Court considers Wynn's petition for a writ of mandamus or prohibition, it should deny it. As long as the interpretations of the Act that underpin the Commission's decision are reasonably consistent with the Act, the Commission's decision must be deferred to. Here, the Commission concluded that there are four independent statutory bases for its authority to consider the Board's allegations. That conclusion constituted a reasonable interpretation of the Act that should be upheld by this Court.[7]

A. The Commission's Interpretation of the Act Is Entitled to Deference

"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 means is "as long as [the agency's] interpretation is reasonably consistent with the language of the statute," this Court should not disturb it. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006); *see Taylor*, 129 Nev. at 930, 314 P.3d at 951. It makes no difference if the petitioner frames the challenge to agency action in jurisdictional terms – the same deference is still owed to the agency's reasonable interpretation of the statute. *City of Arlington v. FCC*, 569 U.S. 290, 296-97, 307, 133 S. Ct. 1863, 1874-75 (2013); *Ariz. Cannabis Nurses Ass'n v. Ariz. Dep't of Health Servs.*, 392 P.3d 506, 511-12 (Ariz. Ct. App. 2017).

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[7] As explained in *supra* Argument Part I, this Court lacks jurisdiction to consider Wynn's petition for judicial review. If this Court disagrees and considers the petition for judicial review anyway, it should deny it for the same reasons his petition for a writ of mandamus or prohibition is due to be denied.

Wynn offers three reasons why he thinks this Court should not defer to the Commission's reasonable interpretation of the Act. All three are off base.

Wynn first relies on *Nassira v. Chiropractic Physicians' Board*, 130 Nev. 245, 327 P.3d 487 (2014), for the proposition that "[q]uestions of law, including administrative construction of statutes, are reviewed de novo without deference to the agency's determination." Wynn Br., *supra*, at 14. However, *Nassira* was discussing agency interpretations of statutes outside the agency's area of expertise – that case turned on the meaning of a section of the Nevada Administrative Procedure Act, which applies to all agencies equally. *See* 130 Nev. at 248-49, 327 P.3d at 489 (citing NRS 233B.135). Where an agency is interpreting its own governing statute – as the Commission is doing in this case – it is entitled to deference. *Taylor*, 129 Nev. at 930, 314 P.3d at 951.

Wynn's second reason is that "[a]dministrative agencies cannot enlarge their own jurisdiction." Wynn Br., *supra*, at 15; *see also id.* at 1, 19, 22 n.6, 25 (quoting or referring to the same language). That does not advance Wynn's argument; it merely restates the question presented. That is, if the Commission reasonably interpreted the Legislature's grant of authority, it is not enlarging its jurisdiction. On the other hand, if the Commission's interpretation of the Act was not reasonable, it improperly enlarged its jurisdiction. Either way, the question comes down to whether the Commission's interpretation was reasonably consistent with the language of the statute. *Taylor*, 129 Nev. at 930, 314 P.3d at 951.

Wynn's third reason is that "any reasonable doubt of the existence of any power must be resolved against the exercise thereof." Wynn Br., *supra*, at 15 (quoting *Heber Light & Power Co. v. Utah Pub. Serv. Comm'n*, 231 P.3d 1203, 1208 (Utah 2010)). That statement – as indicated by its citation of a Utah decision – does not reflect Nevada law. In this State, courts will respect an agency's interpretation as long as it is reasonable. *See Taylor*, 129 Nev. at 930, 314 P.3d at 951.

In addition, the cited case was articulating the unique standard of review applicable to Utah Public Services Commission decisions. The general rule in Utah, when the Utah

Public Services Commission is not involved, is the same as in Nevada: courts will "defer to [an agency's] interpretation of [its governing] statute and uphold it so long as it is reasonable." *R.O.A. Gen., Inc. v. Utah Dep't of Transp., Dist. Three*, 966 P.2d 840, 843 (Utah 1998).

B. The Four Bases of Authority Identified in the Commission's Decision Constitute Reasonable Interpretations of the Act

The Commission's decision denying Wynn's motion to dismiss identified four separate statutory bases for its authority here: NRS 463.1405(4), 463.310, 463.140(5) and 463.143. R. at 265-66. As the decision noted, the bases are "independent from one another" and "each basis would, standing alone, be sufficient" for the Commission to have authority to consider discipline against Wynn. *Id.* at 267. In short, for reversal to be appropriate here, Wynn would have to show that *all four* bases constitute unreasonable interpretations of the Act. He cannot do so.

1. NRS 463.1405(4) Grants the Commission Authority to Revoke Wynn's Findings of Suitability and Fine Him

NRS 463.1405(4) provides in full:

> The Commission has full and absolute power and authority to deny any application or limit, condition, restrict, revoke or suspend any license, registration, finding of suitability or approval, or fine any person licensed, registered, found suitable or approved, for any cause deemed reasonable by the Commission.

The Commission reasonably concluded that the language providing that it has "full and absolute power and authority" to (1) "revoke" any "finding of suitability" and (2) "fine any person . . . found suitable" grants it authority to (1) revoke Wynn's findings of suitability and (2) fine him. *See* R. at 265; NRS 463.1405(4). There is no temporal limit to NRS 463.1405(4)'s grant of authority. *See* NRS 463.1405(4). What matters is that the subject of the proceeding has purposefully availed himself of the Commission's authority by seeking and obtaining a finding of suitability. If he has done so, the Commission retains authority to revoke the finding of suitability at a later date, for any cause it deems reasonable. *See id.* Because Wynn obtained findings of suitability and this action involves

the potential revocation of those findings and the imposition of a fine, it is within the Commission's NRS 463.1405(4) authority.

Wynn does not dispute that his case falls within the plain meaning of NRS 463.1405(4). *See* Wynn Br., *supra*, at 17. However, his brief sets out two arguments for why, according to him, the provision cannot mean what it says. *Id.* Neither holds water.

His first argument is that his "findings of suitability ended when he ceased having any involvement with [the Company]." Wynn Br., *supra*, at 17. That presupposes that the Commission has authority because it is the Commission that determines whether his findings of suitability have already expired. As the regulation cited by Wynn provides, Wynn Br., *supra*, at 13, where "the nature of [a person's] involvement changes," he "may be required to submit himself to a determination *by the [C]ommission* of his suitability in the new capacity," Nev. Gaming Comm'n Reg. 4.030(10) (emphasis added). The result is that Wynn can raise the affirmative defense that he has no finding of suitability to revoke, but that defense will be evaluated by the Commission in exercise of its NRS 463.1405(4) authority.[8]

Wynn's second argument is that "the Commission is putting the cart before the horse as it cannot make a revocation determination under NRS 463.1405(4) until after the Board investigates pursuant to NRS 463.1405(1) and makes a recommendation pursuant to NRS 463.1405(3)." Wynn Br., *supra*, at 17. Wynn does not cite any authority for that proposition, and there is none. *See id.* Nothing in subsection (4), the revocation provision, ties it to subsection (1). Likewise, nothing in subsection (1) ties it to subsection (4). If the Legislature had intended to impose such an important limitation on the Commission's "full and absolute power and authority," it would have said so in the text. *Cf. Comm'r v. Beck's*

[8] Even if the Commission ruled that Wynn's finding of suitability has expired, that would not render the disciplinary proceedings moot. For one, that would have no bearing on the other form of relief sought in the complaint – monetary fines due to Wynn's violations of the Act. For another, revocation imposes substantive limitations on a person that the expiration of a finding of suitability does not. NRS 463.166, for example, requires that a licensee obtain approval from the Commission before entering into any contract with a person who has had his finding of suitability revoked. NRS 463.166(1)(c).

Estate, 129 F.2d 243, 245 (2d Cir. 1942) (rejecting an interpretation that violated "[t]he familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation").

The reason there is no authority is that Wynn's analysis is wrong. Subsections (1) and (4) perform two different functions. Subsection (1) creates two obligations (investigating and observing) for the Board. Separately, subsection (4) grants authority to the Commission to regulate those who have put themselves within the Commission's authority by seeking and obtaining a finding of suitability.[9]

2. NRS 463.310 Also Grants the Commission Authority to Revoke Wynn's Findings of Suitability and Fine Him

NRS 463.310 provides in relevant part:

> After [certain preliminary steps] have been complied with, the Commission may:
>
> . . .
>
> (b) Limit, condition, suspend or revoke any registration, finding of suitability, preliminary finding of suitability, pari-mutuel license, or prior approval given or granted to any applicant by the Commission; [and]
>
> . . .
>
> (d) Fine each person or entity, or both, which is licensed, registered, found suitable or found preliminarily suitable.

NRS 463.310(4)(b), (d). The Commission reasonably concluded that its authority to "revoke" any "finding of suitability" and "[f]ine each person" who has been "found suitable" granted it authority to revoke Wynn's findings of suitability and fine him. *See* R. at 265; NRS 463.310(4)(b), (d).

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[9] Even on Wynn's reading the Commission would have authority here. The Board began its investigation when Wynn was still an executive and controlling shareholder of the Company. *See* R. at 6. Therefore, the Board's investigation qualifies as "observ[ing] the conduct of . . . persons having a material involvement directly or indirectly with a licensed gaming operation." NRS 463.1405(1). Almost all of the misconduct charged in the complaint is likewise from when Wynn was materially involved with the Company.

Just like with NRS 463.1405(4), Wynn does not dispute that his case is within the plain language of 463.310(4). *See* Wynn Br., *supra*, at 20. He argues, instead, that "NRS 463.310 cannot independently expand the Commission's and the Board's jurisdiction beyond the express 'Powers and Duties' set forth in NRS 463.120 [to] NRS 463.1445." *Id.* And just like his last argument, he cites no authority for that proposition. *See id.*

Wynn's attempted kneecapping of NRS 463.310 has no basis in the text and should be rejected. *See Aronsen v. Crown Zellerbach*, 662 F.2d 584, 590 (9th Cir. 1981) ("[C]ourts should not add language to an unambiguous statute absent a manifest error in drafting or unresolvable inconsistency."). This Court should prefer the straightforward reading that NRS 463.310's grant of authority to revoke findings of suitability and impose fines is a grant of authority to revoke findings of suitability and impose fines.

In fact, NRS 463.310's text contradicts Wynn's reading. He is trying to draw a distinction between NRS 463.310, on the one hand, and sections of the Act that establish the Commission's "Powers and Duties," on the other. *See* Wynn Br., *supra*, at 20. NRS 463.310 is also, by its own express terms, a provision establishing "powers and duties of the Commission." NRS 463.310; *see also Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 230, 19 P.3d 245, 250 (2001) (noting that "[t]he title of a statute" can "be considered in determining legislative intent"). Therefore, the text obliterates Wynn's attempted distinction.

3. NRS 463.140(5) Gives the Commission Authority to Discipline Wynn for Allegedly Violating an Order to Appear

NRS 463.140(5) reads in relevant part:

> The Board and the Commission or any of its members has full power and authority to issue subpoenas and compel the attendance of witnesses at any place within this state, to administer oaths and to require testimony under oath.

The Commission reasonably concluded that NRS 463.140(5) grants it authority to enforce the order to appear by disciplining Wynn. *See* R. at 266; NRS 463.140(5)

…

Wynn does not contest that he violated the order to appear. *See* Wynn Br., *supra*, at 8, 10 n.1. Nor does he challenge the Commission's conclusion, in its decision denying his motion, that "it is necessary for the Commission to possess and exercise the power to sanction witnesses that do not comply with orders to appear." R. at 266. As a result, the Commission has authority to enforce the order to appear by disciplining Wynn.

In a footnote, Wynn argues (without citing any authority) that "if the Board and the Commission lack disciplinary jurisdiction over Mr. Wynn in the first instance, they cannot bootstrap an alleged failure to sit for an interview into an independent basis for the discipline they seek here." Wynn Br., *supra*, at 10 n.1. Nothing in the Act suggests that the Board and Commission's order-to-appear authority is limited to those persons who are already within the scope of its regulatory authority. *See* NRS 463.140(5). That is, NRS 463.140(5) does *not* say that it is limited to "persons already found suitable" or something similar.

Instead, the limit on the Board and Commission's authority is that they can direct orders to appear only to "witnesses." NRS 463.140(5). Because Wynn does not dispute that he was a witness to the alleged violations of the Act that the Board was investigating, he was and is within the scope of the order-to-appear authority. *See id.*

4. NRS 463.143 Is Another Basis for the Commission's Authority to Discipline Wynn

NRS 463.143 reads in full:

> 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.

The Commission reasonably concluded that considering discipline for Wynn is a proper power and authority necessary to perform the duties assigned to it. *See* R. at 266; NRS 463.143.

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a. Disciplining Regulatees Who Have Divested from the Gaming Industry Is Necessary to Carry Out the Commission's Duties

As the Commission's decision explained, the Legislature has charged the Commission with observing the conduct of persons associated with gaming, investigating potential violations of the gaming laws and sanctioning persons who have been found to have violated the laws. R. at 266; see NRS 463.140, 463.1405, 463.310, 463.3145. The provision at issue here, NRS 463.143, grants the Commission express authority to exercise any proper power and authority necessary to perform those duties. Sanctioning Wynn, if the allegations against him are proved, is a proper power and authority necessary to the Commission's duties.

To see why it is necessary for the Commission to have authority here, consider the consequences of Wynn's proposed rule that the Commission's authority ends if an individual chooses to divest from the gaming industry. Wynn's proposal would be akin to a rule that a state could not prosecute someone who committed a crime in state but then left the state's boundaries. Not only would that rule undermine police and prosecutors' ability to do their jobs, but it would also undermine the law's deterrent effect, because any would-be criminal would know that he could simply cross state lines and be safe from punishment.

Wynn's rule would do the same thing to the Commission. In the universe that Wynn is calling for, the Commission's ability to discipline regulatees would not turn on whether discipline was warranted, but would instead depend on whether the regulatee himself deigned to remain within the Commission's authority. And where violating the Act would be economically beneficial, there would be no reason for regulatees to comply with the Act, since they could escape discipline by divesting from the industry if they were ever caught. Indeed, all regulatees could do what Wynn is trying to do here – use confidentiality provisions and other methods to hide wrongdoing for years, generate substantial income from gaming activity during that time, and then rob the Commission of enforcement authority by divesting after the wrongdoing is discovered.

Exercising authority over regulatees, like Wynn, who allegedly violated the Act while involved in the industry but who have since divested is therefore necessary for the Commission to carry out its duty of enforcing the Act "for the protection of the public and in the public interest." *See* NRS 463.140(1).

b. Wynn's Attacks on NRS 463.143 Are Not Persuasive

Wynn raises four challenges to the Commission's exercise of its 463.143 authority. All should be rejected. First, he argues that the Commission's exercising its authority here is not necessary to its duties. Wynn Br., *supra*, at 24. The Commission has already explained why that is wrong. *See supra* Argument Part II.B.4.a.

Second, Wynn argues that that "the Commission summarily contends that NRS 463.143 authorizes it to carry out its duties 'without limitation.'" Wynn Br., *supra*, 24. He asserts that the Commission's "position is both dangerous and untenable" because "[a] statute that gives unlimited regulatory power to a commission, board, or agency without prescribed restraints offends the constitution." *Id.* at 24-25 (alteration in original).

That argument distorts the Commission's statement by taking "without limitation" out of its context. In fact, the Commission's language simply paraphrases the statute itself. The Commission's decision listed several of its legislatively prescribed duties: "observing the conduct of persons associated with gaming, investigating potential violations of the gaming laws and sanctioning persons found to have violated those laws." R. at 266. The decision then explained that the Commission "has been granted the express authority to carry out *these duties* without limitation." *Id.* (citing NRS 463.143) (emphasis added).

The Commission's authority is therefore constrained – all of its actions must have a connection with the duties the Act charges the Commission with carrying out. *See* R. at 266; NRS 463.143. As NRS 463.143 provides, the Commission has authority to take all necessary steps to perform those duties, without being "limited by any enumeration of powers in [the Act]."

Put in that proper context, Wynn's concern about statutes that give "unlimited regulatory power to a commission" is irrelevant. *See* Wynn Br., *supra*, at 25. Neither NRS

463.143 nor the Act as a whole gives the Commission unlimited powers. While the Commission possesses "broad authority" to discharge its "awesome responsibility of regulating the gaming industry and keeping undesirable elements out of the gaming industry," it can exercise that authority only in connection with fulfilling its duties under the Act. *See Prods. & Leasing v. Hotel Conquistador, Inc.*, 573 F. Supp. 717, 721 (D. Nev. 1982) (quoting *State v. Rosenthal*, 93 Nev. 36, 559 P.2d 830 (1977)), *aff'd sub nom. Prod. & Leasing, Ltd. v. Hotel Conquistador, Inc.*, 709 F.2d 21 (9th Cir. 1983).

For that reason, the Nevada Supreme Court has held that the "wide discretion" the Commission possesses in disciplining licensees is constitutionally sound. *See Rosenthal*, 93 Nev. at 43, 559 P.2d at 834-35. The Commission's authority to discipline persons found suitable is no different: it is broad, but not boundless, and therefore constitutional.

Third, Wynn argues that NRS 463.143 "says nothing about the Commission's jurisdiction," unlike "[o]ther statutes" that "address the interplay between the Board's continuing powers to observe, investigate and recommend discipline against those 'having' involvement in gaming operations and the Commission's power to act on those recommendations and impose discipline." Wynn Br., *supra*, at 25. As an initial matter in administrative law, there is no distinction between the "authority" conferred by NRS 463.143 and "jurisdiction." If the Commission is acting within the scope of authority granted by the Legislature, it is acting within its jurisdiction. *See City of Arlington*, 569 U.S. at 297-98, 133 S. Ct. at 1868-69. If its action exceeds the authority granted, then the Commission does not have jurisdiction. *See id.* As a result, NRS 463.143's grant of "authority" constitutes a grant of jurisdiction.

Wynn's third argument fails for the additional reason that he is attempting to limit the Commission's authority based on other enumerations of its power in the Act. NRS 463.143 expressly bars that kind of argument, as it provides that the Commission's authority "is not limited by any enumeration of powers in this chapter." NRS 463.143 is an independent grant of authority; the fact that other parts of the Act grant other authorities does not limit it. *See id.*

Fourth and finally, Wynn argues that "using the purported 'unlimited' authority delegated by NRS 463.143 to expand the Commission's jurisdiction is tantamount to creating law, and would violate the separation of powers doctrine if the Commission's construction were correct." Wynn Br., *supra*, at 25-26 (citation omitted). However, the Commission's assertion of authority here is merely a reasonable interpretation of NRS 463.143's text. It is faithful to the Legislature's definition of the Commission's scope of authority. By improperly trying to limit the Commission's authority, Wynn is the one who is invading the province of the Legislature. *Cf. State Gaming Control Bd. v. Eighth Judicial Dist. Court*, 82 Nev. 38, 40, 409 P.2d 974, 975 (1966) ("Courts owe fidelity to the legislative purpose and must not block the [Board] in its effort to discharge assigned duties.").

C. Regulation 4.030(10) Does Not Limit the Commission's Authority

Wynn raises one argument that is separate from the bases identified in the Commission's decision. He argues that Nevada Gaming Commission Regulation 4.030(10) – which clarifies certain characteristics of findings of suitability – imposes its own limits on the Commission's jurisdiction. Wynn Br., *supra*, at 20. Regulation 4.030(10) provides in full:

> The Nevada Gaming Control Act and regulations thereunder require or permit the [C]ommission to require that certain persons, directly or indirectly involved with licensees, be found suitable to hold a gaming license so long as that involvement continues. A finding of suitability relates only to the specified involvement for which it was made. If the nature of the involvement changes from that for which the applicant is found suitable, he may be required to submit himself to a determination by the [C]ommission of his suitability in the new capacity.

Nev. Gaming Comm'n Reg. 4.030(10).

Wynn's analysis of that regulation is wrong. He first asserts that "the Board and the Commission only have jurisdiction to make findings of suitability when a person is 'directly or indirectly involved with licensees' and, then, only for 'so long as that involvement continues.'" Wynn Br., *supra*, at 21 (emphasis omitted). Based on that, he claims that "[b]y converse logic" the "Board and the Commission can only 'revoke' findings

of suitability when those same circumstances exist – i.e., a person is 'directly or indirectly involved with licensees' and only for 'so long as that involvement continues.'" *Id.*

That "converse logic" is faulty. The necessary precondition for revoking a finding of suitability is that the individual has a finding of suitability – not that the same conditions exist that existed when the original finding was made.

Wynn's rule would make revoking a finding of suitability impossible exactly when revocation is necessary. Consider an example. A finding of suitability is proper only where (among other things) the applicant's "prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest of this State." *See* NRS 463.170(2)(b). If, after the finding is made, the Commission discovers that the person *does* pose a threat to the State's public interest, the "same circumstances" as when the finding was made no longer exist. *See id.* In that scenario, revocation would be necessary, but Wynn's rule would bar it because the circumstances had changed. Such a reading would undermine the Act and regulations' purpose of "protecting[ing] the public health, safety, morals, good order and welfare of [the State's] inhabitants." Nev. Gaming Comm'n Reg. 4.010; *see also Pub. Emps.' Ret. Sys. v. Nev. Policy Research Inst., Inc.*, 134 Nev. 669, 674 n.4, 429 P.3d 280, 286 n.4 (2018) (rejecting an interpretation that would have undermined the purpose of the statute being applied).

The example in the previous paragraph is not an academic hypothetical; it is a description of this case. Wynn is alleged to have violated the Act by, among other things, bringing the State into disrepute and harming the public's confidence in the trustworthiness of gaming. *See* Nev. Gaming Comm'n Reg. 4.011. If the allegations are proved, he has rendered himself unsuitable. *See* NRS 463.170(2)(b). It would be perverse if his violations of the Act are what insulated him from the appropriate discipline – revocation of his findings of suitability.

Wynn also asserts that "because a finding of suitability 'relates only to the specified involvement for which it was made' and is otherwise non-transferable, it is entirely unclear how Mr. Wynn's previous suitability findings as a stockholder, as an officer and as a

director of [the Company] continue to survive in the ether." Wynn Br., *supra*, at 21 (emphasis omitted). As the Commission already explained, *see supra* Argument Part I.B.1, assertion is an affirmative defense that is squarely within the Commission's authority to decide in the first instance. *See* Nev. Gaming Comm'n Reg. 4.030(10) (providing that the Commission has discretion as to whether to require, or not require, a person found suitable to apply for a new finding after changing capacities). Put simply, there may be "nothing for the Commission to 'revoke,'" but that is for the Commission to decide.

In any case, such a defense does not address the Commission's authority to fine Wynn under NRS 463.1405(4) and 463.310(4)(d), or its authority to discipline him for violating the order to appear. *See* NRS 463.140(5).

CONCLUSION

Divesting and resigning from the Company did not cure the harm caused by Wynn's alleged actions. Due to his prominence in the industry, the erosion in trust and damage to this State's reputation that resulted from his alleged misconduct will linger on. The Act should not be read to provide that Wynn can escape from liability for that lasting damage by removing himself, for now, from his previous roles.

The Commission's decision rests on reasonable readings of the statute that it is charged with enforcing. It likewise advances the Legislature's purpose of protecting the public and safeguarding one of our State's most important industries. By contrast, Wynn's interpretations lack foundation in the text of the Act or the caselaw construing it. Wynn's proposed rules would eviscerate the Commission's ability to protect the public interest and maintain the public's trust.

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For the reasons stated above, this Court should deny Wynn's petition and grant the Commission's countermotion to dismiss.

Respectfully submitted April 10, 2020.

AARON D. FORD
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 12 pt. Century Schoolbook.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 7,130 words.

3. Finally, I hereby certify that I have read this 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.

DATED this April 10, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 10th day of April, 2020, I caused the foregoing **NEVADA GAMING COMMISSION'S OPPOSITION TO WYNN'S PETITION AND COUNTERMOTION TO DISMISS** to be served upon those persons designated by the parties in the E-Service Master List for the above-reference matter in the Eight Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

/s/ *Angelica Collazo*
An employee of
the Office of the Nevada Attorney General

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada	Case No. A-20-809249-J Dept. No. XIV

RESPONDENT NEVADA GAMING CONTROL BOARD'S ANSWERING BRIEF AND COUNTERMOTION TO DISMISS UNDER NRCP 12(b)(5)

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF ISSUES 2

STATEMENT OF JURISDICTION 2

STATEMENT OF THE CASE 3

A. NGC's complaint 3

B. Statutory Background 4

1. Full and absolute power to revoke a finding of suitability 4

2. No judicial review of non-merits orders 5

C. Commission's denial of Mr. Wynn's motion to dismiss 5

1. Commission's order was not made under NRS 463.3145(1) 5

2. Five independent grounds for subject matter jurisdiction 6

STATEMENT OF FACTS 6

A. Parties 7

B. Wynn repeatedly violated Wynn Resort's policy 7

C. Wynn thwarted Wynn Resorts and GCB's discovery of his behavior through payment of significant sums and non-disclosures agreements 8

D. Wynn impeded the GCB's investigation of these serious allegations by refusing to appear and testify 8

E. Mr. Wynn's incomplete statement of facts 9

STANDARD OF REVIEW 10

SUMMARY OF ARGUMENT 11

ARGUMENT .....

A. No judicial review absent a ruling "on the merits" 12

B. Mandamus cannot be used to challenge subject matter jurisdiction 13

C. Wynn's request for a writ of prohibition fails 13

1. Judicial review after a merits hearing is an adequate remedy 13

2. The Commission has subject matter jurisdiction 15

(i) Restrictive interpretation of agency jurisdiction is wrong 16

(ii) Five bases for subject matter jurisdiction 17

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

CASES **PAGE**

Andrews v. Nev. State Bd. of Cosmetology,
86 Nev. 207, 467 P.2d 96 (1970) 16

Banegas v. State Indus. Ins. Sys.,
117 Nev. 222, 19 P.3d 245 (2001) 17

Buzz Stew, LLC v. City of N. Las Vegas,
124 Nev. 224, 181 P.3d 670 (2008) 7, 11

CCSD v. Clark Cty. Classroom Teachers Ass'n,
115 Nev. 98, 977 P.2d 1008 (1999) 16

Cheung v. Dist. Ct.,
121 Nev. 867, 124 P.3d 550 (2005) 13

City of Arlington, Texas v. FCC,
569 U.S. 290 (2013) 16-17

Cty. of Washoe v. City of Reno,
77 Nev. 152, 360 P.2d 602 (1961) 14

Elizondo v. Hood Machine, Inc.,
129 Nev. 780, 312 P.3d 479 (2013) 10

Gaming Control Bd. v. Dist. Ct.,
82 Nev. 38, 409 P.2d 974 (1966) 1

Hantages v. City of Henderson,
121 Nev. 319, 113 P.3d 848 (2005) 15

Heber Light & Power Co.,
231 P.3d 1203 (Utah 2010) 14

Howell v. Ricci,
124 Nev. 1222, 197 P.3d 1044 (2008) 13

Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.,
124 Nev. 193, 179 P.3d 556 (2008) 12-13

Kay v. Nunez,
122 Nev. 1100, 146 P.3d 801 (2006) 10

Leite v. Crane Co.,
749 F.3d 1117 (9th Cir. 2014) 7

Nassira v. Chiropractic Physicians' Bd.,
130 Nev. 245, 327 P.3d 487 (2014) 10

Ne. Erectors Assoc. of the BETA v. Sec. of Labor,
62 F.3d 37 (1st Cir. 1995) 12

Neer v. Okla. Tax Comm'n,
982 P.2d 1071 (Okla.1999) 11

Pan v. Eighth Jud. Dist. Ct.,
120 Nev. 222, 88 P.3d 840 (2004) 13

Pub. Employees' Ret. Bd. v. Washoe Cty.,
96 Nev. 718, 615 P.2d 972 (1980) 10

Resnick v. Nev. Gaming Comm'n,
104 Nev. 60, 752 P.2d 229 (1988) 12

Smith v. Eighth Jud. Dist. Ct.,
107 Nev. 674, 818 P.2d 849 (1991) 13

State v. Eighth Jud. Dist. Ct. (Gaming Commission),
111 Nev. 1023, 899 P.2d 1121 (1995) 1, 3, 14

State v. Rosenthal,
93 Nev. 36, 559 P.2d 830 (1977) 19

Sugarman Iron & Metal Co. v. Morse Bros. Machinery & Supply Co.,
50 Nev. 91, 255 P. 1010 (1927) 12

Taylor v. Dep't of Health & Human Servs.,
129 Nev. 928, 314 P.3d 949 (2013) 10

United States v. State Eng'r,
117 Nev. 585, 27 P.3d 51 (2001) 11

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982) 19

STATUTES

NRS 233B.039 14

NRS 34.160 13

NRS 34.320 13

NRS 34.330 13

NRS 368.140 14

NRS 463.110 9

NRS 463.0129 ..... 4, 6, 15

NRS 463.0187 5

NRS 463.022 4

NRS 463.030 4

NRS 463.140 ..... 4, 6, 19

NRS 463.1405 ..... 4, 6, 11, 17-19
NRS 463.143 19
NRS 463.170 4
NRS 463.310 ..... 5-6, 18-19
NRS 463.3145 ..... 2, 5-6, 12, 19
NRS 463.315 ..... 2, 5, 12
NRS 463.645 4
NRS 463.765 144

OTHER AUTHORITY

Nev. Const. art. 6, §6 3
NRAP 28 2
NRCP 12 11
EDCR 2.15 2
Nev. Gaming Comm'n Reg. 4.030 1
Nev. Gaming Comm'n. Reg. 7.150 20
Nev. Gaming Comm'n Reg. 16.400 1

The State of Nevada ex rel. The Nevada Gaming Control Board answers Petitioner Stephen A. Wynn's petition for judicial review and for writs of mandamus and/or prohibition and countermoves for dismissal with prejudice.

INTRODUCTION

Over 50 years ago, Nevada's Supreme Court ruled that the judicial power should not reach prematurely into the administrative affairs of gaming regulators. The court wrote:

> It is emphatically clear that a court is powerless to prevent the occurrence of an administrative hearing before the Nevada Gaming Commission. Any effort to obstruct the orderly administrative process provided by the Gaming Control Act casts serious doubt upon the ability of Nevada to control the privileged enterprise of gaming. Control does not exist if regulatory procedures are not allowed to operate. Courts owe fidelity to the legislative purpose and must not 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). Since that decision, Nevada courts has consistently declined litigants' invitations to second-guess gaming regulators in the exercise of their powers under the Gaming Control Act. *State of Nev. v. Dist. Ct.,* 111 Nev. 1023, 1025, 899 P.2d 1121, 1122 (1995) (noting that the district court lacks jurisdiction over the "administration, licensing, control, supervision, and discipline of gaming").

Mr. Wynn invites this Court ignore its duty to keep faith with these entrenched principles of judicial non-interference. Mr. Wynn's entire brief is well-crafted misdirection about the present tense of words that are used in the statutes and regulations to indicate when a person must apply for a suitability determination and for how long that particular finding of suitability lasts. *See* Nev. Gaming Comm'n Reg. 16.400; 4.030(10). But that says nothing about jurisdictional limits on the GCB to recommend discipline and the Commission to hear complaints arising from the respondent's tenure with the licensee.

This case is not about whether Mr. Wynn could be found suitable now, but rather whether the GCB and the Commission have power over discipline for acts committed by Mr. Wynn while he was associated with a gaming licensee. The answer is plainly yes.

This Court should deny Mr. Wynn's petition and dismiss this case with prejudice.

STATEMENT OF THE ISSUES

For decades our Supreme Court has implored the courts not to intrude on Commission disciplinary proceedings. When Mr. Wynn filed his petition with this Court, he asked for the very thing that the Supreme Court abhors, pervasive judicial interference into an administrative arena governed by a Commission possessing unique expertise to handle Nevada's most vital industry. Mr. Wynn's unprecedented petition raises the following issues:

1. Where the Gaming Control Act limits judicial review to orders on the merits, does this Court have jurisdiction to consider Mr. Wynn's petition for judicial review of the Commission's interlocutory denial of a motion to dismiss?

2. Where the extraordinary writ of mandamus is limited to reviewing abuses of discretion and to orders compelling direct and specific ministerial acts, is mandamus appropriate to review the GCB and the Commission's assertion of subject matter jurisdiction to interpret and enforce the Gaming Control Act?

3. Where Nevada law requires deference to the GCB and the Commission's interpretation of the Gaming Control Act, do any or all of the five separate, independent bases for subject matter jurisdiction warrant denial of Mr. Wynn's petition for writ of prohibition?

STATEMENT OF JURISDICTION

Mr. Wynn's petition for judicial review violates Eighth Judicial District Court Rule 2.15 by not including a statement of jurisdiction. *See* EDCR 2.15(e) ("All memoranda of points and authorities filed in proceedings involving Petitions for Judicial Review must be in the form provided for appellate briefs in Rule 28 of the Nevada Rules of Appellate Procedure.") NRAP 28 requires a "Statement of Jurisdiction." NRAP 28(a)(4). Mr. Wynn's petition for judicial review skips this rule, and for good reason.

Mr. Wynn's omission is substantive. This Court lacks subject matter jurisdiction to consider Mr. Wynn's petition for judicial review. Judicial review of Commission decisions is limited to written decisions "on the merits." *Compare* NRS 463.3145(1) and NRS

463.315(1). There is no language in the Gaming Control Act that permits district courts to review the Commission's denial of a motion to dismiss for lack of subject matter jurisdiction, which is decidedly not an order on the merits.

Nevada's Constitution permits District Courts to entertain extraordinary writs. *See* NEV. CONST. art. 6, §6. However, Nevada courts have never permitted District Courts to use this power to "intru[de] into the administration, licensing, control, supervision and discipline of gaming." *Eighth Jud. Dist. Ct. (Gaming Commission)*, 111 Nev. at 1024, 899 P.2d at 1122 (citing *Gaming Control Bd., supra).* This Court should decline to use its discretion to accept Mr. Wynn's invitation to do so now.

STATEMENT OF THE CASE

A. NGC's complaint

NGC filed its complaint against Mr. Wynn on October 14, 2019. ROR 000004. NGC in its complaint alleged that Mr. Wynn's conduct regarding female subordinate employees demonstrated a lack of good character, reputation, and habits that posed a threat to the public interest of Nevada. ROR 000016 (count one). NGC further alleged that Mr. Wynn's disregard for Wynn Company's policies and procedures with respect to relationships with subordinate employees showed a lack of regard for, *inter alia*, suitable business practices. ROR 000019 (count two). Mr. Wynn failed to report allegations of sexual harassment to Wynn Company in accord with company policy and his use of non-disclosure agreements and private funds to thwart Wynn Company's timely investigation of such alleged incidents, which resulted in discredit being brought on Nevada's gaming industry. ROR 000020-23 (counts three and four). Finally, Mr. Wynn thwarted the GCB's ability to investigate his activities by disregarding the GCB's Order to Appear. ROR 000023-25. (count five).

The GCB sought different types of relief against Mr. Wynn. The GCB sought to revoke Mr. Wynn's Finding of Suitability. The GCB also sought to impose a monetary fine on Mr. Wynn for each violation of the Nevada Gaming Control Act or the Regulations of the Gaming Commission. ROR 000026.

B. Statutory background

1. Full and absolute power to revoke a finding of suitability

Nevada's legislature described the vital role that gaming plays in our State's economy and to the welfare of its citizens. NRS 463.0129(1)(a). The legislature correctly recognized that the gaming industry's continued growth in our state is dependent on public confidence and trust in licensed gaming. NRS 463.0129(1)(b). Public confidence and trust is achieved through "strict regulation" of, inter alia, persons "related to the operation of licensed gaming establishments..." NRS 463.0129(1)(c). All places where gaming is conducted are to be "assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State…" NRS 463.0129(1)(e).

Nevada's legislature created the Commission and the GCB. NRS 463.022, 030. The Commission and the GCB are to administer the provisions of the Nevada Gaming Control Act to protect the public interest consistent with Nevada policy. NRS 463.140(1). The GCB has "full and absolute power" to recommend to the Commission that a finding of suitability be revoked. NRS 463.1405(3). This Commission "has full and absolute power and authority" to revoke a finding of suitability. NRS 463.1405(4).

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. Nevada Revised Statute 463.170(4) explains, "[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). That suitability is broader than a person's connection to a current licensee is patent from the language of Nevada Revised Statute 463.645, which prohibits licensees, after receiving written notice from the Commission, from paying or employing persons whose suitability has been revoked. NRS 463.645(1)-(3).

. . .

There is no language in Chapter 463 that limits the investigatory power and disciplinary power to a person's current connection to a licensee. The GCB is empowered to look into past conduct to "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 GCB is empowered to recommend revocation of a finding of suitability by filing a complaint with the Commission after "any investigation" that "satisf[ies]" the GCB that such discipline is warranted. NRS 463.310(2). A "respondent" to a complaint filed with the Commission means "any licensee or other person…" NRS 463.0187.

2. No judicial review of non-merits orders

The Gaming Control Act describes when judicial review is available. It provides the following, "[a]fter the hearing of a contested matter, the Commission shall render a written decision on the merits which must contain 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 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).

C. Commission's denial of Mr. Wynn's motion to dismiss

Mr. Wynn moved to dismiss the GCB's complaint against him. ROR 000032. The Commission denied Mr. Wynn's motion. ROR 000263.

1. Commission's order was not made under NRS 463.3145(1)

The Commission first noted the preliminary, interlocutory nature of its ruling. The Commission wrote that its order was "preliminary" and not made after "an evidentiary hearing on the merits." ROR 000267. The Commission concluded that NRS 463.3145(1) did not apply to its order. *Id.* at 9-12. The Commission's written decision was "for the convenience of the parties and to produce a clear record throughout th[e] case…" *Id.* at 5:11-12. In denying Mr. Wynn's motion, the Commission found several independent bases for the existence of its subject matter jurisdiction, each firmly entrenched in the plain language of the Gaming Control Act.

2. Five independent grounds for subject matter jurisdiction

Because the Legislature stressed the vital importance of gaming to the State (NRS 463.0129(1)(a)), the Commission found ample grounds in the Gaming Control Act for subject matter jurisdiction over Mr. Wynn. The Commission ruled as follows.

First, the Legislature granted "[t]he Commission…full and absolute power to…revoke…any finding of suitability." ROR 000265 at 3:13-16 (citing NRS §463.1405(4)). **Second**, the Legislature mandated that the Commission review complaints filed by the GCB and conduct proper procedural activities in accord with the Gaming Control Act, including revoking a finding of suitability. *Id.* at 3:17-23 (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. ROR 000265-66 at 3:24-28 and 4:1. **Fourth**, as a necessary corollary to the GCB's power to compel the attendance of witnesses before the GCB to render meaningful the GCB's investigatory power, the Commission has subject matter jurisdiction over complaints that seek to fine witnesses that disregard the GCB's Order to Appear. ROR 000266 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 GCB's observation and an investigation (*see* NRS 463.140, 463.1405, 463.310, 453.3145) could unilaterally strip the Commission of subject matter jurisdiction. ROR 000266 (quoting NRS 463.0129(1)(c)). Finally, the Commission noted that all of the conduct that was the subject of the GCB's complaint (except the failure to appear) occurred while Mr. Wynn was associated with a gaming licensee. ROR 000266-67.

STATEMENT OF FACTS

Mr. Wynn repeats the error he made before the Commission by conflating two different types of subject matter jurisdiction arguments. Mr. Wynn framed the issue before this Court as whether "Nevada'[s] Legislature expressly or impliedly authorized Nevada's gaming regulators to prosecute, discipline, and impose fines" against Mr. Wynn after he severed his relationship with Wynn Resorts. Br. at 1:2-5. Because he makes a legal

argument, and not a factual one, Wynn Resorts makes a facial attack on the GCB and the Commission's subject matter jurisdiction as opposed to a factual one.

Wynn's style of argument is meaningful because a reviewing tribunal views a facial attack the same way it reviews a motion to dismiss for failure to state a claim. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). In Nevada, dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). This Court should not spare a second on Wynn's statement of facts, but should accept as true all allegations made in the GCB's complaint.

A. Parties

The GCB is an administrative agency created by Chapter 463 of the Nevada Revised Statutes. ROR 000006 at Compl. at ¶8. Wynn is the former Chief Executive Officer, Chairman, and controlling shareholder of Wynn Resorts. *Id.* at ¶9. The Commission had issued findings of suitability regarding Wynn. ROR 000006 at ¶9 and ROR 000007-8 at ¶16. The GCB through its complaint recommends that this Commission revoke Wynn's findings of suitability and issue an appropriate fine against him. ROR 000026 at pg. 23.

B. Wynn repeatedly violated Wynn Resort's policy

Wynn Resorts mandated that all managers comport themselves professionally. ROR 000009 at ¶25. To that end, romantic relationships between supervisors and subordinate employees was strongly discouraged. *Id.* at ¶24. Wynn Resorts' sexual harassment policy prohibited harassment, whether such conduct was intentional or unintentional. ROR 000008 at ¶17. Wynn never learned the details of these policies. ROR 000013 at ¶53.

In disregard of these policies and the obvious power disparity between himself and subordinate employees, Wynn had multiple sexual encounters with subordinate employees. Wynn has conceded that he had "'multiple consensual relationships during his tenure at Wynn Resorts…" *Id.* at ¶53 (quoting Wynn's written statement to the Investigations and Enforcement Bureau of the Massachusetts Gaming Commission). Matthew Maddox, the

CEO of Wynn Company, views Wynn's behavior differently by saying, "there were many victims, and those victims felt powerless…" *Id.* at ¶54 (quoting Adjudicatory Hearing Transcript Dated April 2, 2019, 28:6-7).

C. Wynn thwarted Wynn Resorts and GCB's discovery of his behavior through payment of significant sums and non-disclosure agreements

Wynn Resorts' policy was to investigate allegations of harassment in the workplace. ROR 000008-9 at ¶22-23. Wynn Resorts was to obtain statements from affected parties, preserve evidence, determine the potential for risk occurrence, protect the employees affected, complete an investigation, and determine the allegation's merits. *Id.* Repeatedly, Wynn interrupted this process to prevent discovery on the merits of serious allegations.

Wynn frustrated anyone's ability to discover the merits of the allegations against him. A Wynn Resort manicurist made serious allegations that Wynn engaged in unwelcome sexual conduct toward her. ROR 000020 at ¶96. Wynn privately settled her dispute for $7.5 million and mandated that the manicurist sign a confidentiality and non-disclosure agreement. *Id.* at ¶97. A Wynn Resort cocktail server made serious allegations of harassment against him. ROR 000021 at ¶110. Wynn scotched discovery of the merits of these allegations by privately paying $975,000 and requiring the cocktail server to sign a confidentiality and non-disclosure agreement. ROR 000021-22 at ¶¶111-13. Other Wynn Resorts employees have made serious allegations of unwelcome sexual conduct by Wynn, as is evidenced by multiple demand letters sent by their attorneys. ROR 000011 at ¶41. Again, Wynn resolved these disputes through confidentiality agreements with non-disclosures clauses. *Id.* at ¶42.

D. Wynn impeded the GCB's investigation of these serious allegations by refusing to appear and testify

The GCB went straight to the source, Wynn, to investigate these serious allegations, and indeed, serious payments of over $8 million (amounts stated are only those known that are of public record). *Id.* at ¶43. Rather, than comply with the GCB's investigation, Wynn . . .

sought to dictate the terms of his participation to serve his own personal ends. This is patent from reviewing Mr. Campbell's letter of September 5, 2018. ROR 000112-14.

Rather than appear and give testimony, Wynn offered to respond to written inquiries. ROR 000113. Wynn's rationale was inimical to the public interest because it was devoted to his self-interest:

> Despite this indisputable state of affairs [Wynn's alleged claim he is "no longer a bona-fide licensee"], Mr. Wynn desires to cooperate with Nevada regulators in any reasonable manner which does not compromise his ongoing efforts to vindicate his good name.

Id. Wynn never explains in his counsel's letter why Wynn's goal to vindicate a personal goal trumps the GCB's legal duty to investigate matters affecting its statutory duties. *See* NRS §463.110(4).

E. Mr. Wynn's incomplete statement of facts

No party disputes that Mr. Wynn ceased association with Wynn Resorts. ROR 000004 at ¶2. NGC affirmatively alleged that he resigned in its complaint. *Id*. Mr. Wynn wastes pages of his putative statement of facts, which is not in issue.

Mr. Wynn then tells the Court that Mass Gaming found that he was no longer a "qualifier." Br. at 6. It is unclear what point Mr. Wynn is making but he is also missing one. The "qualifier" analysis in Massachusetts being reference pertains to the two phases in the application phase for an enterprise in that state. ROR 000102 n.2. Accordingly, Mass Gaming considered Mr. Wynn's current nexus to the applicant under seven associational factors, not Mass Gaming's jurisdiction to punish Mr. Wynn for past conduct while associated with the applicant. ROR 000102

Mr. Wynn writes that the GCB did not dispute that he "was no longer directly or indirectly involved with any Nevada licensee." Br. 8:21-22. Wynn never tells the Court that his non-compete agreement barred him from such involvement for two years after he executed the separation agreement. ROR 00092-93 at ¶8.

Mr. Wynn writes that Mass Gaming fined Wynn Resorts $35 million in its written decision. Br. 9:10-17. But, Mr. Wynn never tells the Court of the findings by the

Investigations and Enforcement Bureau of the Massachusetts Gaming Commission that provide a basis for that prodigious fine. The IEB found Mr. Wynn admitted to "multiple consensual relationships during his tenure at Wynn Resorts, but that Mr. Wynn was unaware of Wynn Resorts code of conduct and related polices. ROR 000013 at ¶53. Further, the CEO of Wynn Company testified regarding the conduct of Mr. Wynn "that there were many victims, and those victims felt powerless." *Id.* at ¶54 (quoting Adjudicatory Hearing Transcript Dated April 2, 2019, 28:6-7). Mass Gaming found that the "corporate culture of the founder-led organization led to disparate treatment of [Mr. Wynn] in ways that left the most vulnerable at grave risk." ROR 000014 at ¶55.

STANDARD OF REVIEW

Mr. Wynn' statement of the standard of review is not correct. He cites *Nassira v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 327 P.3d 487 (2014), for the proposition that "[q]uestions of law, including administrative construction of statutes, are reviewed de novo without deference to the agency's determination." Br. at 14. Mr. Wynn's argument is not correct for two reasons. That standard applies exclusively to petitions for judicial review (*Elizondo v. Hood Machine, Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013), but not to extraordinary writs. *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006). That standard also does not apply where the agency is interpreting a statute within the agency's expertise pursuant to the legislature's charge. There, a different deferential standard applies, so long as the agency's interpretation is within the language of the statute.

"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,* 102 Cal.Rptr.2d at 698 (citations omitted); *see also Neer v. Okla. Tax Comm'n*, 982 P.2d 1071, 1078 (Okla.1999) (administrative construction cannot override plain statutory language).

In lieu of filing an answer, NRCP 12(b)(5) permits a defendant to file a motion to dismiss for failure to state a claim upon which relief may be granted. A motion to dismiss under NRCP 12(b)(5) should be granted where it appears beyond a doubt that the plaintiff could prove no set of facts, which, if accepted by the trier of fact, would entitle him to relief. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

SUMMARY OF ARGUMENT

Mr. Wynn wants it both ways. In his petition, he touts his role as an innovator, a man who reinvented modern Las Vegas, and a person who had a 45+ year tenure "as a gaming licensee." Pet. At ¶¶7-8. All of that occurred under the watch of the GCB and the Commission. Mr. Wynn cannot accept the benefit of the GCB and the Commission's regulatory power that facilitated his rise, but then escape scrutiny at his whim.

Nevada's legislature forecloses Mr. Wynn's interpretation of the Gaming Control Act. The Gaming Control Act grants the Commission "full and absolute power" to revoke a finding of suitability. NRS 463.1405(4). But, independent of NRS 463.1405(4), the Commission found four additional separate bases for subject matter jurisdiction.

Mr. Wynn cannot attack the GCB and the Commission's assertion of subject matter jurisdiction over him without explaining how the GCB and the Commission's regulatory role would function under his restrictive view where discipline can be avoided at the respondent's discretion. He does not even try. This Court should reject Mr. Wynn's constrained view of the GCB and the Commission's jurisdiction because it renders the GCB and the Commission's oversight duties and enforcement powers meaningless.

In sum, nothing in the Gaming Control Act supports Mr. Wynn's view. The GCB had subject matter jurisdiction to recommend discipline against Mr. Wynn. The

. . .

Commission had subject matter jurisdiction to hear the GCB's complaint. This Court should reject Mr. Wynn's petition and dismiss his case.

ARGUMENT

A. No judicial review absent a ruling "on the merits"

There is no precedential support for Mr. Wynn's petition for judicial review. Nothing in NRS 463.315(1) permits this action. The relevant statute in full provides:

> 1. Any person 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**, inclusive, and whether or not a petition for rehearing was filed, 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. [Emphasis added].

Mr. Wynn appears to concede that an order denying a motion to dismiss is not a final decision. Br. at 26:13. An order denying a motion to dismiss is an interlocutory order. *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"). Because Mr. Wynn cannot base his petition for judicial review on a final order, he mistakenly argues that this Court can review an "order that aggrieves any person." Br. at 26:13-14. But, Mr. Wynn cannot rewrite NRS 463.315 to make a basis for this action where none exists.

Mr. Wynn never explains how a decision on a motion to dismiss is an "order" pursuant to NRS 463.312 to 463.3145. The Nevada Supreme Court has confirmed that that language allows petitions for review only after merits determinations like final disciplinary orders. *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 63, 752 P.2d 229, 231 (1988) (citing NRS 463.315).

Further, NRS 463.3145, the statute that defines a "written decision or order of the Commission," contains the key qualifier that specifies 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 Assoc. of the BETA*

v. Sec. of Labor, 62 F.3d 37, 39 (1st Cir. 1995) (citing *See* 2A James Moore, et al., *Moore's Federal Practice* ¶ 12.07, at 12–49 & n. 3 (1993)).

B. Mandamus cannot be used to challenge subject matter jurisdiction

Mr. Wynn bears the burden of demonstrating that extraordinary relief is warranted. *Pan v. Eighth Jud. Dist. Ct.,* 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. *See* NRS 34.160; *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.,* 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

Here, Mr. Wynn never identifies a duty that seeks to compel or abuses of discretion. Mr. Wynn's argument is to arrest the proceedings before the Commission due to an alleged lack of express or implied authority from the Nevada legislature. Br. at 1:2-5 (Issue Presented). Wynn's argument, if it is anything, is for a writ of prohibition. *See* NRS 34.320; *Smith v. Eighth Jud. Dist. Ct.,* 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

C. Wynn's request for a writ of prohibition fails

1. Judicial review after a merits hearing is an adequate remedy

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 the jurisdiction of such tribunal, corporation, board or person." 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.

A petition for judicial review is an adequate legal remedy. 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). Further, the right to appeal is generally considered an adequate remedy. *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004).

Moreover, a remedy does not fail to be adequate just because pursuing it through the ordinary course of law is more time consuming. *See Cty. of Washoe v. City of Reno*, 77 Nev. 152, 156, 360 P.2d 602, 603 (1961) (citing *Hubbard v. Justice's Court*, 5 Cal.App. 90 (1907)).

Here, Mr. Wynn has a right judicial review after a written order on the merits. NRS 463.3145(1). That it does not come soon enough for him does not legally matter.

Mr. Wynn does not and cannot cite Nevada authority to support his alternative arguments for extraordinary relief. Rather, Mr. Wynn cites precedent from Utah to argue that requiring participation in an administrative proceeding before a body lacking jurisdiction is reviewable via extraordinary writ. Br. at 26:17-22 and 27:1 (citing *Heber Light & Power Co.*, 231 P.3d 1203, 1207 (Utah 2010). *Heber Light & Power* is also not persuasive authority because it is based on Utah's Administrative Procedures Act. *Heber Light & Power*, supra. The GCB and the Commission are exempted from Nevada's equivalent Administrative Procedures Act. NRS 233B.039(1)(e)-(f).[1]

Mr. Wynn's citation to Utah law flies in the face of decades of precedent that forbids this Court's intrusion into disciplinary proceedings under the Gaming Control Act. It is a bedrock principle of Nevada jurisprudence that district courts have no power to "intru[de] into the administration, licensing, control, supervision and discipline of gaming." *Eighth Jud. Dist. Ct. (Gaming Commission)*, 111 Nev. at 1024, 899 P.2d at 1122 (citing *Gaming Control Bd. v. Dist. Ct.*, 82 Nev. 38, 409 P.2d 974 (1966)). However, that is precisely what Mr. Wynn seeks from this Court – an unprecedented judicial intrusion into the powers of the Commission and the GCB. The GCB's complaint sought to fine and discipline a person, Mr. Wynn, found suitable under the Gaming Control Act.

In sum, nothing in Nevada law invites this Court to use an extraordinary writ to second-guess the GCB's decision to recommend discipline and the Commission's interpretation of their jurisdiction to hear and issue a decision on the merits.

. . .

---

[1] There are two exceptions to this rule, NRS 463.765 and 368.140 pertaining to fees and taxes, but neither provision is applicable here.

2. The Commission has subject matter jurisdiction

That the GCB and Commission's subject matter jurisdiction derives from the Gaming Control Act. When construing a statute, this Court should keep in mind the purpose of the statute to "'avoid meaningless or unreasonable results, and ... 'liberally construe[ ][it] in order to effectuate the benefits intended to be obtained.'" *Hantages v. City of Henderson*, 121 Nev. 319, 113 P.3d 848 (2005) (quoting *Edgington v. Edgington,* 119 Nev. 577, 583, 80 P.3d 1282, 1287 (2003) (footnote omitted) (quoting *Colello v. Adm'r, Real Estate Div.,* 100 Nev. 344, 347, 683 P.2d 15, 17 (1984)).

Here, NRS 463.0129(1) provides in relevant part:

> 1. The Legislature hereby finds, and declares to be the public policy of this state, that:
> (a) The gaming industry is vitally important to the economy of the State and **the general welfare of the inhabitants**.
> (b) The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming and the manufacture, sale and distribution of gaming devices and associated equipment are conducted honestly and competitively, that establishments which hold restricted and nonrestricted licenses where gaming is conducted and where gambling devices are operated do not unduly impact the quality of life enjoyed by residents of the surrounding neighborhoods, that the rights of the creditors of licensees are protected and that gaming is free from criminal and corruptive elements.
> (c) **Public confidence and trust** can only be maintained by **strict regulation of all persons**, locations, practices, associations and activities **related** to the operation of licensed gaming establishments, the manufacture, sale or distribution of gaming devices and associated equipment and the operation of inter-casino linked systems. [Emphasis added.]

While Mr. Wynn emphasizes only the commercial importance to the State (Br. 12:1), he ignores that the legislature's dual command to safeguard the "general welfare of [our state's] inhabitants" and "public confidence and trust." NRS 463.0129(1)(a) and (c). Because of these commands, the Legislature mandated "strict regulation of all persons…related to the operation of licensed gaming establishments." NRS 463.0129(1)(c).

Here, the GCB has alleged that Mr. Wynn disregarded his own company's policies regarding harassment, personal relationships with subordinates, and investigation protocol relating to such incidents. He has paid over $8 million in settlement payment in

matters where subordinate employees have made serious allegations of improper workplace conduct, specifically including unwelcome sexual conduct. He has disregarded his obligation to cooperate with the GCB's investigation by refusing to provide testimony at an investigative hearing, deferring instead to his personal interest in private litigation.

Throughout his brief, Mr. Wynn disregards the important public safety and general welfare purposes of the Gaming Control Act, which require the Commission to strictly regulate those persons who are associated with gaming licensees. For example, Mr. Wynn writes that "[n]either the Board nor the Commission ever grappled with the legislature's use of the present sense term 'having' in NRS 463.1405(1)." Br. 12:21-22. To the contrary, the Commission correctly recognized that its duties of observation, the GCB's duties of investigation, and the Commission's duties of sanctioning violations of the law would be rendered meaningless if persons like Mr. Wynn could evade jurisdiction by severing their employment. ROR 000266 at 4:18-25.

(i) Restrictive interpretation of agency jurisdiction is wrong

To support his restrictive view of the GCB and the Commission's jurisdictional power, Mr. Wynn relies on a flurry of out-of-state cases contending that to argue that an agency's power must be resolved against the agency. Br. at 15:7-18. But, that is not Nevada law. An administrative agency only has those powers delegated to it by the legislature, *Andrews v. Nev. State Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96 (1970). However, it is equally true that Nevada's Supreme Court has interpreted subject matter jurisdiction to include agency power by implication to guard against an illogical restriction that would unnaturally prohibit the agency from ordering compliance with authority conferred by the legislature. *CCSD v. Clark Cty. Classroom Teachers Ass'n*, 115 Nev. 98, 103, 977 P.2d 1008, 1011 (1999).

Mr. Wynn appears to be arguing that stricter scrutiny should apply to an agency's interpretation of jurisdictional statutes versus others it is charged with administering. However, Justice Scalia's opinion in *City of Arlington, Texas v. FCC*, 569 U.S. 290 (2013) on deference to an agency's interpretation of its own jurisdiction is worth revisiting. "No

matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington*, 569 U.S. at 297 (emphasis added). Therefore, this Court should not be resolving doubts against the Commission's jurisdiction as Mr. Wynn mistakenly invites the Court to do, but rather deferring to the GCB and the Commission's interpretations so long as they are within the statutes cited.

Mr. Wynn cites to various provisions of the Gaming Control Act and the regulations to argue "[n]either NRS Chapter 463 nor the gaming regulations *expressly* authorize the Commission or the Board to punish persons who no longer have any involvement with gaming licensees." Br. at 15:19-20. In a variant on a theme, Mr. Wynn later argues that NRS 463.143 "says nothing about the Commission's jurisdiction," unlike "[o]ther statutes" that "address the interplay between the Board's continuing powers to observe, investigate and recommend discipline against those 'having' involvement in gaming operations and the Commission's power to act on those recommendations and impose discipline." Br. 25. As *City of Arlington* shows, however, Mr. Wynn's argument has no legal meaning. There is no basis for "carving out some arbitrary subset of such claims as 'jurisdictional.'" *City of Arlington*, *supra*, at 298. The question correctly framed is whether the GCB and the Commission actions are within the bounds of their authority.

(ii) Five bases for subject matter jurisdiction

The Commission had subject matter jurisdiction based on NRS 463.1405(4). Mr. Wynn seeks to escape the Commission's "full and absolute power…to revoke a finding of suitability" by associating it with subsection 1. Br. at 17-18. There are several problems with Mr. Wynn's argument.

NRS 463.1405(4) does not cross-reference subsection 1. This Court should not read subsection 1 as a limit on subsection 4 where the Legislature has not said so. Further, the statute's title shows that subsection 1 describes duties of the GCB to investigate "persons having a material involvement" (NRS 463.1405(1)), but subsection 4 describes the "absolute powers of Board and Commission." NRS 463.1405; see also *Banegas v. State Indus. Ins.*

Sys., 117 Nev. 222, 230, 19 P.3d 245, 250 (2001) (noting that "[t]he title of a statute" can "be considered in determining legislative intent"). Finally, Mr. Wynn fails to explain how it would exercise its powers under subsection 4 if subsection 1 limited them to temporal connection of the investigative subject to a licensee.

The Commission had subject matter jurisdiction based on NRS 463.310(3) and (4)(b). Because Mr. Wynn cannot avoid the conclusion that this matter falls within the plain language of both sections, he does not even try. Rather, he regurgitates his failed NRS 463.1405(1) argument. Br. 20:6-7. However, the GCB and the Commission's plain language reading of these provisions is to be preferred.

The Legislature empowered the GCB to "determine whether there has been **any** violation of, inter alia, [the Gaming Control Act]." NRS 463.310(1)(a) (emphasis added). "If, after **any** investigation, the [GCB] is satisfied that…" either a "finding of suitability…should be revoked" or a "person found suitable…should be fined" the GCB "shall" file its complaint with the Commission. NRS 463.310(2)(a)-(b) (emphasis added). The Commission is then empowered to hear the matter and impose discipline, which includes fines and revocation of a "finding of suitability." NRS 463.310(4). Nothing in these sections contains limiting language consistent with Mr. Wynn's argument. Quite the opposite, the GCB is charged with investigating any violation of the Gaming Control Act, which necessarily includes violations by persons such as Mr. Wynn who have left their employer but are still subject to the GCB and the Commissions' powers and duties.

NRS 463.140 provides a separate basis for the Commission's subject matter jurisdiction. NRS 463.140(5) provides that "[t]he Board and the Commission or any of its members has full power and authority to issue subpoenas and compel the attendance of witnesses at any place within this state, to administer oaths and to require testimony under oath." Wynn does not dispute that the Board issued an order for him to appear under NRS 463.140(5) and he does not dispute that he refused to appear as ordered. *See* Mem., *supra*, at 10 n.1. He also does not challenge the Commission's conclusion, in the order below, that "it is necessary for the Commission to possess and exercise the power to sanction witnesses

that do not comply with orders to appear." ROR 000266. In sum, the Commission has authority to consider disciplining Wynn for his refusal to comply with an order to appear.

In no way is Mr. Wynn's status vis-à-vis Wynn Resorts relevant to Mr. Wynn's duty to appear. The Board and Commission's authority permits them to direct orders to appear only to "witnesses." NRS 463.140(5). Mr. Wynn does not dispute that he was a witness to the alleged violations of the Act. In sum, the Commission has authority to consider disciplining Wynn for his refusal to comply with an order to appear.

The Commission had subject matter jurisdiction based on NRS 463.143. As the Commission's order explained, the Legislature has charged the Commission with observing the conduct of persons associated with gaming, investigating potential violations of the gaming laws and sanctioning person who have been found to have violated the laws. ROR 000266; *see* NRS 463.140, 463.1405, 463.310, 463.3145. None of these provisions would have efficacy if Mr. Wynn's construction were adopted. The Legislature did not use any language that even hints that the Commission's power ends the moment the subject chooses to divest from a particular gaming licensee.

There is no constitutional problem with NRS 463.143. Nevada's Supreme Court has similarly held that the "wide discretion" that the Commission possesses in gaming is constitutionally sound. *State v. Rosenthal*, 93 Nev. 36, 43, 559 P.2d 830, 834-35 (1977). Moreover, the Commission never claimed for itself unlimited power but rather powers incident to observing the conduct of persons associated with gaming, investigating potential violations of the gaming laws and sanctioning persons found to have violated those laws." ROR 000266. All powers found within the Gaming Control Act.

Finally, Mr. Wynn cannot plausibly argue that the GCB asserts "lifetime" jurisdiction over him. It isn't. Even accepting Mr. Wynn's absurd premise, the timeliness of processing a particular issue is not a concern of subject matter jurisdiction. Arguments about timeliness have nothing to do with subject matter jurisdiction, unless the legislature makes it so. *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393 (1982). If Mr. Wynn . . .

truly believes that the GCB waited too long to bring its complaint for disciplinary action, then he can assert legal or equitable defenses. Nev. Gaming Comm'n. Reg. 7.150(1).

CONCLUSION

For these reasons, this Court should deny Mr. Wynn's petition and dismiss this case with prejudice.

Respectfully submitted April 10, 2020.

AARON D. FORD
Attorney General

By: /s/ *Steve Shevorski*
Steve Shevorski (Bar No. 10515)
Chief Litigation Counsel
Attorneys for Defendant
State of Nevada ex rel. The Gaming Control Board

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12 pt. font and Century Schoolbook. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 12 points or more and contains 6,717 words. Finally, I hereby certify that I have read this appellate 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.

Dated this 10th day of April, 2020.

AARON D. FORD
Attorney General

By: /s/ *Steve Shevorski*
Steve Shevorski
Chief Litigation Counsel

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 10th day of April, 2020, and e-served the same on all parties listed on the Court's Master Service List.

/s/ *Traci Plotnick*
Traci Plotnick, an employee of the
Office of the Attorney General

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	Case No. A-20-809249-J Dept. No. 14

STIPULATION AND ORDER

WHEREAS, Petitioner Stephen A. Wynn commenced the above-captioned action on January 27, 2020 by filing a Petition for Judicial Review, Alternatively for Writs of Mandamus and/or Prohibition (the "Petition");

WHEREAS, on February 18, 2020 the Court entered an order setting a stipulated briefing schedule;

WHEREAS, on March 13, 2020 Wynn filed and served his opening brief in support of the Petition;

WHEREAS, under the current briefing schedule Respondents Nevada Gaming Control Board and Nevada Gaming Commission's (collectively, "Respondents") respective

memoranda of points and authorities in opposition to the Petition and countermotions (collectively, "Responsive Briefs") are due April 3, 2020; and

WHEREAS, as a consequence of the current coronavirus pandemic and other factors, Respondents desire a one-week extension to that deadline, and Wynn does not oppose such extension.

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the parties, through their respective counsel of record, as follows:

1. Respondents shall file their Responsive Briefs on or before April 10, 2020; and

2. The remaining deadlines set out in the February 18 briefing schedule shall remain unchanged.

[Signature page follows]

DATED this 30th day of March, 2020.

AARON D. FORD
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By: /s/ *Darlene Caruso*
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Attorneys for Petitioner Stephen A. Wynn

IT IS SO ORDERED:

DATED: April 8, 2020

DISTRICT JUDGE

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4/10/2020 7:10 PM
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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	Case No. A-20-809249-J Dept. No. 14

NOTICE OF ENTRY OF STIPULATION AND ORDER

PLEASE TAKE NOTICE that the STIPULATION AND ORDER was entered in the above-entitled matter on the 31st day of March, 2020, a copy of which is attached hereto as Exhibit A.

DATED this 10th day of April, 2020.

AARON D. FORD
Attorney General

By: /s/ *Darlene Caruso*
DARLENE CARUSO (Bar No. 5866)
Chief Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101

Attorneys for Respondent Nevada Gaming Commission

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 10th day of April, 2020, I caused the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER** to be served upon those persons designated by the parties in the E-Service Master List for the above-reference matter in the Eight Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

/s/ *Angelica Collazo*
An employee of
the Office of the Nevada Attorney General

EXHIBIT A

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	Case No. A-20-809249-J Dept. No. 14

STIPULATION AND ORDER

WHEREAS, Petitioner Stephen A. Wynn commenced the above-captioned action on January 27, 2020 by filing a Petition for Judicial Review, Alternatively for Writs of Mandamus and/or Prohibition (the "Petition");

WHEREAS, on February 18, 2020 the Court entered an order setting a stipulated briefing schedule;

WHEREAS, on March 13, 2020 Wynn filed and served his opening brief in support of the Petition;

WHEREAS, under the current briefing schedule Respondents Nevada Gaming Control Board and Nevada Gaming Commission's (collectively, "Respondents") respective

memoranda of points and authorities in opposition to the Petition and countermotions (collectively, "Responsive Briefs") are due April 3, 2020; and

WHEREAS, as a consequence of the current coronavirus pandemic and other factors, Respondents desire a one-week extension to that deadline, and Wynn does not oppose such extension.

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the parties, through their respective counsel of record, as follows:

1. Respondents shall file their Responsive Briefs on or before April 10, 2020; and

2. The remaining deadlines set out in the February 18 briefing schedule shall remain unchanged.

[Signature page follows]

DATED this 30th day of March, 2020.

AARON D. FORD
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Attorneys for Petitioner Stephen A. Wynn

IT IS SO ORDERED:

DATED: March 31, 2020

DISTRICT JUDGE

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4/28/2020 1:54 PM
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Stephen A. Wynn

DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	Case No. A-20-809249-J Dept. No. 14

STIPULATION AND ORDER

WHEREAS, Petitioner Stephen A. Wynn ("Mr. Wynn") commenced the above-captioned action on January 27, 2020 by filing a Petition for Judicial Review, Alternatively for Writs of Mandamus and/or Prohibition (the "Petition");

WHEREAS, on February 18, 2020, the Court entered an order setting a stipulated briefing schedule;

WHEREAS, on March 13, 2020, Mr. Wynn filed and served his opening brief in support of the Petition;

WHEREAS, the parties entered into a stipulation and the Court entered an order extending the time for Respondents Nevada Gaming Control Board and Nevada Gaming Commission (collectively, "Respondents") to file their respective memoranda of points and authorities in opposition to the Petition and countermotions (collectively, "Responsive Briefs") by one week to April 10, 2020;

WHEREAS, Respondents filed their Responsive briefs on April 10, 2020.

WHEREAS, under the current briefing schedule, Mr. Wynn's reply in support of the Petition and response to the countermotions is due April 24, 2020; and

WHEREAS, as a consequence of the current coronavirus pandemic and other factors, Mr. Wynn desires a one-week extension to that deadline, and Respondents do not oppose such extension.

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the parties, through their respective counsel of record, as follows:

1. Mr. Wynn shall file his reply in support of the Petition and response to the countermotions on or before May 1, 2020; and

2. The remaining deadlines set out in the February 18 briefing schedule shall remain unchanged.

[Signature page follows]

DATED this 17th day of April, 2020.

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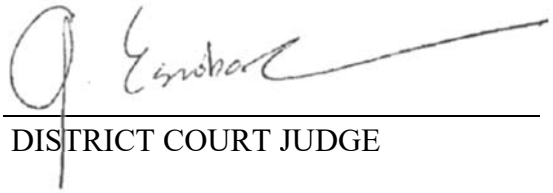
IT IS SO ORDERED:



DATED: April 24, 2020

DISTRICT COURT JUDGE

Subject: RE: Wynn - Request for Extension in Time to Respond
Date: Friday, April 17, 2020 at 10:23:48 AM Pacific Daylight Time
From: Kiel B. Ireland <KIreland@ag.nv.gov>
To: 'Colby Williams' <jcw@cwlawlv.com>
CC: Don Campbell <djc@cwlawlv.com>, Darlene B. Caruso <DCaruso@ag.nv.gov>, Steven G. Shevorski <SShevorski@ag.nv.gov>

Yes, please do.

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From: Steven G. Shevorski <SShevorski@ag.nv.gov>
Sent: Friday, April 17, 2020 10:13 AM
To: 'Colby Williams' <jcw@cwlawlv.com>; Kiel B. Ireland <KIreland@ag.nv.gov>
Cc: Don Campbell <djc@cwlawlv.com>; Darlene B. Caruso <DCaruso@ag.nv.gov>
Subject: RE: Wynn - Request for Extension in Time to Respond

Yes. Works for me.

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From: Colby Williams <jcw@cwlawlv.com>
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Cc: Don Campbell <djc@cwlawlv.com>; Darlene B. Caruso <DCaruso@ag.nv.gov>; Steven G. Shevorski <SShevorski@ag.nv.gov>
Subject: Re: Wynn - Request for Extension in Time to Respond

Thank you both. With those consents, I presume I have your authority to apply your respective e-signatures to the stipulation?

J. Colby Williams, Esq.
Campbell & Williams
Tel. 702.382.5222

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	CASE NO.: A-20-809249-J DEPT. NO.: 14 **NOTICE OF ENTRY OF STIPULATION AND ORDER**

Please take notice that on the 28th day of April, 2020, a Stipulation and Order, was duly entered in the above-entitled matter, a copy of which is attached as "Exhibit 1" and by this reference made part hereof.

DATED this 28th day of April, 2020.

CAMPBELL & WILLIAMS

By:/s/ ***J. Colby Williams***

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this 28th day of April, 2020, I caused the foregoing document entitled **NOTICE OF ENTRY OF STIPULATION AND ORDER** to be served upon those persons designated by the parties in the E-Service Master List for the above-reference matter in the Eight Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

By: /s/ ***John Y. Chong***
An Employee of Campbell & Williams

EXHIBIT 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	Case No. A-20-809249-J Dept. No. 14

STIPULATION AND ORDER

WHEREAS, Petitioner Stephen A. Wynn ("Mr. Wynn") commenced the above-captioned action on January 27, 2020 by filing a Petition for Judicial Review, Alternatively for Writs of Mandamus and/or Prohibition (the "Petition");

WHEREAS, on February 18, 2020, the Court entered an order setting a stipulated briefing schedule;

WHEREAS, on March 13, 2020, Mr. Wynn filed and served his opening brief in support of the Petition;

WHEREAS, the parties entered into a stipulation and the Court entered an order extending the time for Respondents Nevada Gaming Control Board and Nevada Gaming Commission (collectively, "Respondents") to file their respective memoranda of points and authorities in opposition to the Petition and countermotions (collectively, "Responsive Briefs") by one week to April 10, 2020;

WHEREAS, Respondents filed their Responsive briefs on April 10, 2020.

WHEREAS, under the current briefing schedule, Mr. Wynn's reply in support of the Petition and response to the countermotions is due April 24, 2020; and

WHEREAS, as a consequence of the current coronavirus pandemic and other factors, Mr. Wynn desires a one-week extension to that deadline, and Respondents do not oppose such extension.

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the parties, through their respective counsel of record, as follows:

1. Mr. Wynn shall file his reply in support of the Petition and response to the countermotions on or before May 1, 2020; and

2. The remaining deadlines set out in the February 18 briefing schedule shall remain unchanged.

[Signature page follows]

DATED this 17th day of April, 2020.

CAMPBELL & WILLIAMS

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Chief Litigation Counsel
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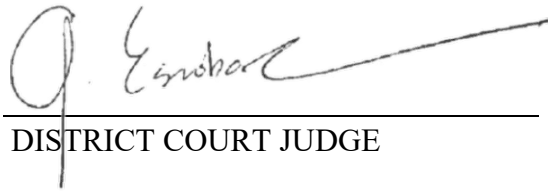
Attorneys for Respondent Nevada Gaming Control Board

IT IS SO ORDERED:



DATED: April 24, 2020

DISTRICT COURT JUDGE

Subject: RE: Wynn - Request for Extension in Time to Respond
Date: Friday, April 17, 2020 at 10:23:48 AM Pacific Daylight Time
From: Kiel B. Ireland <KIreland@ag.nv.gov>
To: 'Colby Williams' <jcw@cwlawlv.com>
CC: Don Campbell <djc@cwlawlv.com>, Darlene B. Caruso <DCaruso@ag.nv.gov>, Steven G. Shevorski <SShevorski@ag.nv.gov>

Yes, please do.

Kiel B. Ireland
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Yes. Works for me.

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Subject: Re: Wynn - Request for Extension in Time to Respond

Thank you both. With those consents, I presume I have your authority to apply your respective e-signatures to the stipulation?

J. Colby Williams, Esq.
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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	CASE NO.: A-20-809249-J DEPT. NO.: XIV **PETITIONER STEPHEN A. WYNN'S CONSOLIDATED OPPOSITION TO RESPONDENTS' COUNTERMOTIONS TO DISMISS AND REPLY BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW, ALTERNATIVELY, FOR WRITS OF MANDAMUS AND/OR PROHIBITION**

Petitioner Stephen A. Wynn, through his undersigned counsel, hereby submits his Consolidated Opposition to Respondents' Countermotions to Dismiss and Reply Brief in Support of Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

FACTUAL BACKGROUND 3

ARGUMENT 4

I. THE AGENCIES' COUNTERMOTIONS TO DISMISS SHOULD BE DENIED 4

A. NRS 463.315(1) Permits Judicial Review of the Commission's Order Denying Mr. Wynn's Motion to Dismiss as It Was Made after a Hearing and Aggrieves Mr. Wynn 4

B. Mr. Wynn's Requested Writ Relief Independently Permits the Court to Review the Commission's Order Denying Mr. Wynn's Motion to Dismiss 8

II. THE FOUR BASES IDENTIFIED IN THE COMMISSION'S ORDER DO NOT CONFER THE AGENCIES WITH POWERS TO PUNISH THOSE NO LONGER INVOLVED IN NEVADA'S GAMING INDUSTRY 12

A. The Agencies' Desire for a More Deferential Standard of Review Is Understandable, but Misplaced 12

B. The Agencies Failure to Address the Board's "Administrative Hold" Is a Concession that Mr. Wynn's Petition is Meritorious 14

C. The Agencies' Continuing Effort to Read NRS. 463.1405(4) in Isolation Violates Hornbook Principles of Statutory Construction 15

D. NRS 463.310 Is an Enforcement Mechanism, Not a Grant of Expanded Jurisdiction 18

E. The Agencies Cannot Bootstrap NRS 463.140(5) into an Independent Basis to Pursue the same Unauthorized Discipline Against Mr. Wynn in His Capacity as an Alleged "Witness" 22

F. The Commission Cannot Use NRS 463.143 to Extend Its Jurisdiction/ Powers to Those Who Lack Material Involvement with Licensed Gaming Operations 23

CONCLUSION 27

CERTIFICATE OF COMPLIANCE 28

CERTIFICATE OF SERVICE 29

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TABLE OF AUTHORITIES

Cases **Page**

Al Otro Lado, Inc. v. McAleenan,
394 F. Supp. 3d 1168 (S.D. Cal. 2019) 15

Banegas v. State Indus. Ins. Sys.,
117 Nev. 222, 19 P.3d 245 (2001) 20

Bd. of Review, Nev. Dep't of Emp't v. Second Jud. Dist. Ct.,
133 Nev. 253, 396 P.3d 795 (2017) 9

Benjamin v. Frias Transp. Mgmt. Sys., Inc.,
2019 WL 442396 (Nev. Jan. 31, 2019),
433 P.3d 1257 (unpublished disposition) 14

Benson v. State Engineer,
131 Nev. 772, 358 P.3d 221 (2015) 10

Brad Assocs. v. Nev. Fed. Fin. Corp.,
109 Nev. 145, 848 P.2d 1064 (1993) 5

Cable v. State ex rel. its Employers Ins. Co. of Nev.,
122 Nev. 446, 117 P.3d 171 (2005) 16

City of Henderson v. Kilgore,
122 Nev. 331, 131 P.3d 11 (2006) 24

Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n,
117 Nev. 835, 34 P.3d 546 (2001) 7, 21

Cohen v. State,
113 Nev. 180, 930 P.2d 125 (1997) 26

Dezzani v. Kern & Assocs., Ltd.,
134 Nev. 61, 412 P.3d 56 (2018) 6, 7

Engelmann v. Westergard,
98 Nev. 348, 647 P.2d 385 (1982) 10

First Fin. Bank v. Lane,
130 Nev. 972, 339 P.3d 1289 (2014) 8

Fulbright & Jaworski v. Eighth Jud. Dist. Ct.,
131 Nev. 30, 342 P.3d 997 (2015) 9

Galardi v. Naples Polaris, LLC,
129 Nev. 306, 301 P.3d 364 (2013) 13

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Gallagher v. City of Las Vegas,
114 Nev. 595, 959 P.2d 519 (1998) 13

Gaming Control Bd. v. Eighth Jud. Dist. Ct.,
82 Nev. 38, 409 P.2d 974 (1966) 11

Hotel Employees v. Gaming Control Bd.,
103 Nev. 588, 747 P.2d 878 (1987) 13

Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct.,
132 Nev 544, 376 P.3d 167 (2016) 9, 10

Humphries v. New York-New York Hotel & Casino,
133 Nev. 607, 403 P.3d 358 (2017) 6

In re Beatrice B. Davis Family Heritage Trust,
133 Nev. 190, 394 P.3d 1203 (2017) 9

In re Discipline of Agwara,
2016 WL 4005655 (Nev. July 22, 2016)
132 Nev. 983 (unpublished disposition) 17, 18

Jackson v. Harris,
64 Nev. 339, 183 P.2d 161 (1947) 8

Leavitt v. Wickham,
2:13-cv-00490-GMN-CWH,
2015 WL 430463 (D. Nev. Feb. 3, 2015) 2

Local Gov't Employee-Mgmt. Relations Bd. v. Educ. Support Employees Ass'n,
134 Nev. 716, 429 P.3d 658 (2018) 12-13

Nevada Power Co. v. Eighth Jud. Dist. Ct.,
120 Nev. 948, 102 P.3d 578 (2004) 9

Nuleaf CLV Dispensary, LLC v. Dep't of Health & Human Servs.,
134 Nev. 129, 414 P.3d 305 (2018) 13

Pawlik v. Shyang-Fenn Deng.,
134 Nev. 83, 412 P.3d 68 (2018) 12

People v. Ault,
95 P.3d 523 (Cal. 2004) 8

Resnick v. Nev. Gaming Comm'n,
104 Nev. 60, 752 P.2d 229 (1988) 5, 7, 8

Shell v. Burlington N. Santa Fe Ry., Co.,
941 F.3d 331 (7th Cir. 2019) 15

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S. Nevada Homebuilders Ass'n v. Clark Cty.,
121 Nev. 446, 117 P.3d 171 (2005) 16, 18

State v. Eighth Jud. Dist. Ct.,
111 Nev. 1023, 899 P.2d 1121 (1995) 11

State v. Glusman,
98 Nev. 412, 651 P.2d 639 (1982) 11

State Dep't of Bus. & Indus. v. Check City,
130 Nev. 909, 337 P.3d 755 (2014) 10

State v. Wheeler,
23 Nev. 143, 44 P. 430 (1896) 22

Taylor v. Dep't of Health & Human Servs.,
129 Nev. 928, 314 P.3d 949 (2013) 12

Thomas v. Nevada Yellow Cab Corp.,
130 Nev. 484, 327 P.3d 518 (2014) 21

United States v. State Eng'r,
117 Nev. 585, 27 P.3d 51 (2001) 12

Viega GmbH v. Eighth Jud. Dist. Ct.,
130 Nev. 368, 328 P.3d 1152 (2014) 9

Regulations, Rules and Statutes

EDCR 2.15(e) 5

EDCR 2.20(e) 14

EDCR 2.20(h) 2

Nev. Gaming Comm'n Reg. 4.030 .....14, 21, 24

Nev. Gaming Comm'n Reg. 5.232 20

Nev. Gaming Comm'n Reg. 14.305 20

Nev. Gaming Comm'n Reg. 16.400 .....1, 15, 16, 18

Nev. Gaming Comm'n Reg. 16.440 25

Nev. Gaming Comm'n Reg. 25.030 20-21

NRCP 12(b)(1) 3

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NRCP 12(b)(5) 3

NRS 34.150 .....5, 27

NRS 34.320 .....5, 9, 27

NRS 116.31164 6

NRS 179.221 23

NRS 463.140 22

NRS 463.1405 ..... passim

NRS 463.143 23

NRS 463.270 .....21, 24

NRS 463.310 ..... 18-22, 24

NRS 463.312 .....5, 7

NRS 463.3133 .....5, 8

NRS 463.3145 .....4, 5, 6, 7

NRS 463.315 ..... 2-8, 11, 27

NRS 463.318 .....8, 10

NRS 463.343 10

NRS 463.637 25

NRS 463.645 25

SCR 102(4)(b) 17, 18

Other

73 C.J.S. *Public Admin. Law and Proc*. § 148 (June 2019 Update) 21

http://www.nevadaresorts.org/benefits/taxes.php 4

1A Norman J. Singer & J.D. Shambie Singer, *Sutherland & Statutory Construction* § 21.14 (7th ed. 2009) 6

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INTRODUCTION

Petitioner Wynn understands and accepts that the Board and the Commission (collectively, the "Agencies") have broad authority to regulate gaming businesses and those who hold approvals and licenses to operate such businesses. It is, however, equally true that government, generally, and the Agencies, in particular, are not permitted to go beyond their delegated powers. Where, as here, the Agencies attempt to act in excess of their legislatively-delegated authority to regulate the conduct of gaming businesses, Nevada's court system is the proper forum to address and redress those government excesses. Unfortunately, the Agencies' Answering Briefs largely avoid any meaningful treatment of the administrative excesses raised by Mr. Wynn and, instead, seek to dissuade the Court's intervention with omission, misdirection and exaggeration. Each strategy fails.

We begin with the Agencies' omissions. After demonstrating that the Agencies lack jurisdiction under the plain language of the Gaming Control Act (the "Act") to discipline an individual whose findings of suitability have ended, Mr. Wynn argued that the artifice utilized to maintain jurisdiction over him after he departed Nevada's gaming industry—an "administrative hold" on his findings of suitability—had never been used before to impose discipline and was nowhere authorized in any gaming statute or regulation. The Commission and the Board never responded to this argument below, and neither has done so here. While necessity may be the mother of invention, the Agencies are not permitted to invent powers not otherwise delegated simply because they feel the need to punish Mr. Wynn years after he left the gaming industry.

Relatedly, Mr. Wynn argued that the plain, present tense language of NRS 463.1405(1) and Nev. Gaming Comm'n Reg. 16.400 establish that the Agencies' delegated observational and disciplinary powers are limited to existing licensees and those who continue to have material involvement in licensed gaming operations, which Mr. Wynn does not. Mr. Wynn has had absolutely no involvement, material or otherwise, in licensed gaming since early 2018. The

Commission and the Board failed to respond to this argument as well. These repeated failings are concessions as to the merit of Mr. Wynn's positions, and reinforce the Agencies' lack of power to pursue and impose their desired punishment of revocations and fines.

Rather than tackle the plain language of the statutes and regulations head-on, the Agencies opt for misdirection by counter-moving to dismiss Mr. Wynn's Petition for Judicial Review on grounds the Commission's underlying order was not a final determination on the merits under NRS 463.315(1) and, thus, precludes this Court's review.[1] The Agencies' position, however, presumes without analysis that the statute only permits judicial review after a "final decision" or a "final order." While Mr. Wynn disagrees with this contention for the reasons set forth below, he is nonetheless admittedly entitled to seek the Court's consideration of the jurisdictional question presented herein through a writ of prohibition and/or mandamus, which he has done.

The Agencies next seek to uphold their purported jurisdiction over Mr. Wynn by invoking a lenient standard of review. According to the Agencies, the Court should defer to their interpretation of gaming statutes and regulations because they are tasked with enforcing the same. There is, however, a glaring problem with this position. The principle that courts will defer to an agency's interpretation of its own statute only applies if the subject statute is ambiguous. While the parties obviously differ on the plain meaning of the gaming statutes and regulations at issue herein—to the extent the Agencies actually join the debate—no one has argued they are ambiguous. As such, no deference is owed to the Commission's underlying order, which this Court reviews de novo.

---

[1] While EDCR 2.20(h) permits the Agencies to file replies in support of their countermotions, they should be limited to addressing Mr. Wynn's opposition to the dismissal motions (*i.e.*, Point I, *infra*), not his reply arguments in support of his original petition (*i.e.*, Point II, *infra*). If not so limited, the Agencies would essentially obtain an improper surreply and the last word on Mr. Wynn's petition. *See, e.g., Leavitt v. Wickham*, 2:13-cv-00490-GMN-CWH, 2015 WL 430463, at *3 (D. Nev. Feb. 3, 2015) (recognizing that surreplies "are highly disfavored, as they are usually a strategic effort by the nonmovant to have a last word on a matter.") (quotation omitted).

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As for the substantive arguments regarding the basis of their purported jurisdiction, the Agencies cherry-pick portions of statutes they believe support their cause while ignoring those that undermine it. For example, to evade the limitations embodied in NRS 463.1405(1), the Agencies disregard the language of this statute altogether and, instead, focus on a different subsection of the same statute, NRS 463.1405(4), which they contend gives the Commission "absolute power" to discipline Mr. Wynn. The problem, though, is that engaging in this buffet-style approach—*i.e.*, choose what you like and refuse what you don't—violates the fundamental tenet that statutes are to be construed together as a whole. The Agencies' arguments regarding the other statutes upon which they premise their powers suffer from similar flaws.

Finally, despite the Agencies' exaggerated claims to the contrary, Mr. Wynn's reading of the law does not strip the Board or the Commission of their important regulatory roles. The Agencies retain power to discipline the license holder even after a one-time suitable person leaves the industry—which they exercised here by imposing a record fine against Wynn Resorts. Moreover all disciplinary goals to be achieved through revocation of an individual's suitability, except for the prospect of yet more fines, have already been accomplished. Nevada's gaming industry and the public have been appropriately protected since Mr. Wynn voluntarily departed all positions that would allow him to influence a Nevada gaming operation.

FACTUAL BACKGROUND

The Commission acknowledges that Mr. Wynn's factual recitation is "uncontested." *See* Comm'n Br. at 3:26-28 (n.1). For its part, the Board argues the Court "should not spare a second on Mr. Wynn's statement of facts" because Mr. Wynn's underlying Motion to Dismiss should be subjected to the dismissal standard under NRCP 12(b)(5), not NRCP 12(b)(1). *See* Bd. Br. at 6:24-7:10. The Commission's order, while wrong in its end result, is correctly based on the NRCP 12(b)(1) standard. (ROR 265:4-9.) Regardless, Mr. Wynn addressed the Board's argument at length before the Agencies, *see* ROR at 198:21-201:4, and will not waste the Court's time

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rearguing this point. The bottom line is that his dismissal motion should have been granted regardless of which standard applies.

One new theme that appears in the Answering Briefs is that Mr. Wynn gained "fame and fortune" and became a billionaire "due to his career in gaming[.]" Comm'n Br. at 1:19-24; 4:20-5:2. The apparent point is that Mr. Wynn benefited by being a part of the regulatory scheme governing licensed gaming in Nevada for nearly five decades. *See id.* No argument there. But it is pure fiction to suggest that the benefits flowing from Mr. Wynn's involvement in Nevada gaming were a one-way-street. Beginning with the Golden Nugget, continuing with Mirage Resorts, Inc. and culminating with Wynn Resorts, Limited, the State of Nevada reaped billions of dollars in gaming taxes, property taxes, and other benefits from Mr. Wynn's companies. *See, e.g.*, http://www.nevadaresorts.org/benefits/taxes.php (reflecting that hospitality industry contributed nearly $1.5 billion of tax revenue to Nevada in 2018 alone) (last visited April 24, 2020).

That Nevada and Mr. Wynn mutually benefited when the latter was actively involved in licensed gaming is, frankly, irrelevant. The issue presented here is whether the Legislature granted the Agencies powers to pursue and impose discipline upon Mr. Wynn now that he has no involvement in licensed gaming operations and, thus, no longer poses any purported threat to the industry or the public. Again, the answer to that question is no.

ARGUMENT

I. THE AGENCIES' COUNTERMOTIONS TO DISMISS SHOULD BE DENIED.

A. NRS 463.315(1) Permits Judicial Review of the Commission's Order Denying Mr. Wynn's Motion to Dismiss as It Was Made after a Hearing and Aggrieves Mr. Wynn.

Both the Commission and the Board argue that Mr. Wynn's Petition for Judicial Review is premature and subject to dismissal because the underlying order denying Mr. Wynn's motion to dismiss was not a final agency determination on the merits. *See* Comm'n Br. at 8:23-9:22; Bd. Br. at 12:4-13:1. The Agencies rely on NRS 463.315, NRS 463.3145, and the Nevada Supreme

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Court's opinion in *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 752 P.2d 229 (1988). We address each in turn.[2]

The relevant language from NRS 463.315 states:

> Any person 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, inclusive . . . may obtain a judicial review thereof . . . .

NRS 463.315(1) (emphasis added). The statute, thus, requires three elements before a party can seek judicial review thereunder: (1) the Commission must issue a final decision or an order; (2) after a hearing held pursuant to NRS 463.312 to 463.3145; and (3) the petitioner must be aggrieved by the decision or order. Beginning with the last element, no one disputes Mr. Wynn is aggrieved by the Commission's denial of his motion to dismiss. Nor can anyone genuinely dispute that the order came after a hearing held pursuant to NRS 463.312 to NRS 463.3145 since the Commission conducted a hearing on December 19, 2019 with all five of its members present, and the hearing was reported and transcribed (*see* ROR at 215-262), which satisfies the requirements of NRS 463.3133 titled "*Hearings other than investigative hearings; procedure.*"

The crux of the parties' dispute turns on the first element and the phrase "final decision or order"—namely, whether the adjective "final" not only modifies the noun "decision" but also the noun "order." Other than citing *Resnick*, which is distinguishable for reasons discussed below, the

[2] The Board also argues that Mr. Wynn's Opening Brief violates EDCR 2.15(e) because it purportedly lacks a "Statement of Jurisdiction." *See* Bd. Br. at 2:20-26. This is silly. First, Mr. Wynn provided a statement of the Court's jurisdiction in his actual Petition, specifically identifying NRS 463.315(1) and NRS Chapter 34 as the bases therefor. *See* Pet. at 3:1-5 (titled "Jurisdiction and Venue"). Second, Mr. Wynn repeated in his Opening Brief that NRS 463.315(1), NRS 34.150, and NRS 34.320 each provide an independent basis for the Court's jurisdiction to hear this matter, *see* Wynn Br. at 26:11-27:5, and the Board responded thereto. *See* Bd. Br. at 12:3-14:25. The Board's apparent hang-up that Mr. Wynn did not place these authorities under a (second) heading styled "Jurisdiction" is "a classic case of form over substance." *Brad Assocs. v. Nev. Fed. Fin. Corp.*, 109 Nev. 145, 149, 848 P.2d 1064, 1067 (1993).

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Agencies assume this to be true without engaging in any statutory construction. Assumptions, of course, are no substitute for facts.

The indisputable fact here is that the word "or" separates the phrase "final decision" from the word "order." As the Nevada Supreme Court recently explained, "[t]he word 'or' is typically used to connect phrases or clauses representing alternatives." *Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 65-66, 412 P.3d 56, 60 (2018) ("courts presume that 'or' is used in a statute disjunctively unless there is *clear* legislative intent to the contrary." (quotation omitted) (emphasis in original)). When examining the phrase "agent ***or*** attorney" in NRS 116.31164(4) (emphasis added), the *Dezzani* court determined that the Legislature intended the word "attorney" to be distinct from the word "agent" and not a subset thereof. *See id.* ("when a list exists, the 'or' between two subsections makes it necessary to read 'or' as a disjunctive.") (quoting 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland & Statutory Construction* § 21.14 (7th ed. 2009)). Applying the same principle to NRS 463.315(1), the Legislature's use of the disjunctive term "or" to separate the phrase "final decision" from the word "order" demonstrates that the latter is meant to be distinct from and an alternative to the former.

The Agencies' reliance on NRS 463.3145 does not change this result. The Legislature notably employed different language in NRS 463.3145. Rather than using the disjunctive "or," the Legislature repeatedly used the conjunctive term "and" when describing the form of "decision ***and*** order" required after the conclusion of an evidentiary hearing on the substantive disciplinary charges at issue. *See* NRS 463.3145(1) ("Copies of the decision ***and*** order. . . .") (emphasis added); NRS 463.3145(2) ("The Commission may, upon motion made within 10 days after service of a decision ***and*** order. . . .") (emphasis added). The distinction is meaningful. *See, e.g.*, *Humphries v. New York-New York Hotel & Casino*, 133 Nev. 607, 611, 403 P.3d 358, 362 (2017) ("when considering a list of options, 'or' creates alternatives while 'and' creates a conjunctive list.") (quotation omitted). Where, as here, "the [L]egislature has employed a term or phrase in one place

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and excluded it in another, it should not be implied where excluded." *Dezzani*, 134 Nev. at 65, 412 P.3d at 59-60 (quoting *Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001)). In other words, while the "decision ***and*** order" required by NRS 463.3145 qualifies as a "final decision" under NRS 463.315(1), the Legislature's use of the disjunctive "or" in NRS 463.315(1) demonstrates that alternative forms of "order[s]" are likewise subject to judicial review.

Nor is the Supreme Court's decision in *Resnick* dispositive. *Resnick* involved an applicant who had been called forward for licensing as opposed to the type of disciplinary proceeding at issue here. 104 Nev. at 61-62, 752 P.2d at 230. Resnick filed a petition with the Commission seeking discovery of the Board's investigatory file, which the Commission denied without a hearing. *Id.* Resnick thereafter sought judicial review of the Commission's denial pursuant to NRS 463.315, and the district court determined that it lacked jurisdiction. *Id.* The Nevada Supreme Court affirmed.

While the *Resnick* court found that an interlocutory decision denying discovery to a license applicant was not a "final decision or order" under NRS 463.315(1), it simultaneously recognized that the Legislature envisioned several other dispositions may qualify for judicial review in the disciplinary context, including "disciplinary orders, decisions to suspend or revoke licenses, and resolutions on the merits of certain controversies[.]" 104 Nev. at 62-63, 752 P.2d at 231. The Court additionally emphasized that, even if the discovery order did qualify as a "final decision or order," Resnick had not satisfied the remainder of the statutory langue—*i.e.*, that the order was "made after hearing or rehearing by the Commission pursuant to NRS 463.312 to 463.3145." *Id.* at 63, 752 P.2d at 231. Without deciding what hearings are covered by NRS 463.315(1), the Court found that Resnick could not meet this requirement because the Commission "did not conduct any hearing whatsoever." *Id.*

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Resnick does not control here for multiple reasons. First, this is a disciplinary matter, not a licensing matter in which the courts have no role. *See* NRS 463.318(2) (no judicial review of licensing denials). Second, the Commission's order denying Mr. Wynn's motion to dismiss would certainly appear to be within the undefined "disciplinary orders" referenced in *Resnick*. Third, unlike *Resnick*, the Commission did conduct a hearing on Mr. Wynn's motion in accordance with the procedural requirements of NRS 463.3133. Finally, *Resnick* contains no statutory interpretation of the phrase "final decision or order" and, hence, does not support the proposition that only a "final [ ] order" is subject to judicial review.[3] In sum, NRS 463.315(1) permits judicial review of the Commission's denial of Mr. Wynn's motion to dismiss as it is an order made after a hearing that aggrieves Mr. Wynn. The Agencies' countermotions should be denied.

B. Mr. Wynn's Requested Writ Relief Independently Permits the Court to Review the Commission's Order Denying Mr. Wynn's Motion to Dismiss.

The Commission candidly recognizes that the Court is permitted to consider Mr. Wynn's requested writ relief independent of NRS 463.315. *See* Comm'n Br. at 7:17-19 (acknowledging that the rule underpinning its motion to dismiss the petition for judicial review "***does not apply*** to Wynn's request for a writ of mandamus or prohibition.") (emphasis added). For its part, the Board similarly appears to acknowledge that a writ of prohibition is a proper vehicle to challenge an agency's lack of jurisdiction, but nonetheless contends Mr. Wynn's requested writ relief is inappropriate here because a petition for judicial review at the end of the administrative process constitutes an adequate remedy at law. *See* Bd. Br. at 13:15-14:25. Not exactly.

[3] "Cases cannot be urged as authority for every point that may be found lurking in the record where no issue of such point was made before the court." *Jackson v. Harris*, 64 Nev. 339, 351, 183 P.2d 161, 166 (1947); *see also First Fin. Bank v. Lane*, 130 Nev. 972, 977, 339 P.3d 1289, 1292-93 (2014) (where issue was not squarely presented in prior opinion, "principles of *stare decisis* do not apply with the same force that they might otherwise."); *People v. Ault*, 95 P.3d 523, 533 n.10 (Cal. 2004) ("It is axiomatic that cases are not authority for propositions not considered.").

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A writ of prohibition is available to arrest or remedy actions taken by a board or tribunal without or in excess of its jurisdiction. *See* NRS 34.320. Writ relief is an extraordinary remedy, which courts will not entertain unless a party is without a plain, speedy, and adequate remedy at law. *See Fulbright & Jaworski v. Eighth Jud. Dist. Ct.*, 131 Nev. 30, 35, 342 P.3d 997, 1001 (2015). While the Board is correct to the extent that a right to petition for judicial review or to file an appeal is "generally" considered an adequate remedy, *see* Bd. Br. at 13:24-28, the Nevada Supreme Court has repeatedly instructed that those rights are not adequate to correct an invalid exercise of personal or subject matter jurisdiction.[4] Regardless, "[e]ven if an adequate legal remedy exists, [the] court will consider a writ petition if an important issue of law needs clarification." *In re Beatrice B. Davis Family Heritage Trust*, 133 Nev. 190, 194, 394 P.3d 1203, 1207 (2017); *see also Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct.*, 132 Nev 544, 547, 376 P.3d 167, 170 (2016) (courts "may consider writ petitions that present matters of first impression that may be dispositive in the particular case."). All these considerations exist here.

Mr. Wynn is challenging the Agencies' subject matter jurisdiction, which the Nevada Supreme Court has consistently held is appropriate to consider via petitions for writ relief. The lack of an adequate legal remedy is obvious as it would be a tremendous waste of resources to go through discovery and a substantive evidentiary hearing if the Agencies lack subject matter jurisdiction at the outset. Indeed, the harm to Mr. Wynn and his reputation would be irreparable once the public hearing is held, rendering any future appellate relief on the jurisdictional issue a hollow victory. Even if an adequate legal remedy exists, and it does not, Mr. Wynn's petition

[4] *See Fulbright, supra* (citing *Viega GmbH v. Eighth Jud. Dist. Ct.*, 130 Nev. 368, 373-74, 328 P.3d 1152, 1156 (2014) ("the right to appeal is inadequate to correct an invalid exercise of personal jurisdiction over a defendant")); *see also Nevada Power Co. v. Eighth Jud. Dist. Ct.*, 120 Nev. 948, 954, 102 P.3d 578, 582-83 (2004) (subject matter jurisdiction); *Bd. of Review, Nev. Dep't of Emp't v. Second Jud. Dist. Ct.*, 133 Nev. 253, 255, 396 P.3d 795, 797 (2017) (requested writ relief was properly before the Court where it "present[ed] an issue of subject matter jurisdiction[] necessitating [ ] immediate consideration[.]").

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presents an important issue of first impression that is capable of recurring and requires clarification—*i.e.*, whether the Nevada Legislature expressly or impliedly authorized Nevada's gaming regulators to prosecute, discipline, and impose fines upon an individual who no longer has any involvement with a Nevada gaming licensee.[5]

The Board's mantra that the Court is "forbid[den]" to intrude into disciplinary proceedings under the Gaming Control Act is grossly overblown. *See* Bd. Br. at 1:5-17; 14:14-22. While certain decisions in the gaming context are not subject to judicial intervention, *see, e.g.*, NRS 463.318(2) (no judicial review of licensing denials), other statutory provisions expressly authorize a role for the courts. *See id.* ([e]xtraordinary common-law writs or equitable proceedings are available"); NRS 463.343 (permitting declaratory relief actions to obtain judicial interpretation of gaming statutes). Such provisions are entirely consistent with well-established exceptions to the exhaustion of administrative remedies doctrine that permit judicial intervention in the gaming context and that of other administrative agencies.

The exhaustion doctrine, for example, "does not require one to initiate and participate in proceedings where an administrative agency clearly lacks jurisdiction, or which are vain and futile." *Engelmann v. Westergard*, 98 Nev. 348, 353, 647 P.2d 385, 388-89 (1982); *see also Benson v. State Eng'r*, 131 Nev. 772, 777, 358 P.3d 221, 224 (2015) (same). Nor does the doctrine apply where the issues relate solely to the interpretation of statutes. *See State Dep't of Bus. & Indus. v. Check City*, 130 Nev. 909, 914, 337 P.3d 755, 758 (2014) ("Exhaustion is not required

[5] The Board summarily contends that mandamus cannot be used to challenge subject matter jurisdiction, s*ee* Bd. Br. at 13:3-14, but *Humboldt* suggests otherwise. The *Humboldt* court granted a writ of mandamus compelling the district court to vacate its previous denial of a motion to dismiss and to grant the same where the plaintiff failed to file a statutorily-required medical expert affidavit with her complaint. 132 Nev. at 547, 376 P.3d at 169-70 (explaining "[n]ormally, this court will not entertain a writ petition challenging the denial of a motion to dismiss, [ ] but we may do so when (1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition[.]") (internal citations and quotations omitted).

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where, as here, the only issue is the interpretation of a statute."). The Nevada Supreme Court has expressly applied this exception in the gaming context. *See State v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982) ("it is within our discretion not to apply the exhaustion doctrine especially where the issues relate solely to the interpretation or constitutionality of a statute.").

Unlike other litigants disappointed with actions of the Board or the Commission, Mr. Wynn did not attempt to circumvent the Agencies and proceed straight to court. He instead presented his jurisdictional arguments directly to the Commission pursuant to a stipulation agreed to by the Board and approved by the Commission Chair. (ROR 28-31.) Mr. Wynn only proceeded to district court after the Commission ruled and, again, he did so in compliance with another Commission-approved stipulation. (ROR 269-271.) The subject legal issues present important questions of first impression, turn exclusively on the interpretation of statutes, and have been fully developed before the Commission and this Court. For all these reasons, the matter is ripe and appropriate for judicial consideration. *See Glusman* at 419, 651 P.2d at 644 (compelling reasons existed for not applying the exhaustion doctrine where legal issues were "subjected to critical analysis in the context of an actual controversy," the issues related solely to interpretation or constitutionality of a statute, and their magnitude and likelihood of future recurrence justified a "present determination on the merits"). There is simply no improper judicial intrusion here.[6]

[6] The undisputed facts set forth above differentiate Mr. Wynn's petition from the "improper intrusion" cases relied upon by the Board. *See* Bd. Br. at 1:4-17 (citing *Gaming Control Bd. v. Eighth Jud. Dist. Ct.*, 82 Nev. 38, 40, 409 P.2d 974, 975 (1966); *State v. Eighth Jud. Dist. Ct.*, 111 Nev. 1023, 1025, 899 P.2d 1121, 1122 (1995)). In *Gaming Control Bd.*, the licensee proceeded directly to district court and improperly obtained a stay of the Board's disciplinary action. 82 Nev. at 39-40; 409 P.2d at 974-75. In *State*, the Commission issued an exclusionary order against the subject customer who then sought and obtained a stay of execution from the district court. 111 Nev. at 1121-22, 899 P.2d at 1024-25. The Supreme Court overturned both decisions as only the Commission is empowered to stay its own rulings or proceedings. *See* NRS 463.315(5). Here, by contrast, all parties agreed (twice) that the substantive disciplinary proceedings would be stayed pending final resolution of the threshold jurisdictional issue. (*See* ROR at 29:18-21; ROR at 270:20-27; *see also* Comm'n Br. at 2:27-28.)

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II. THE FOUR BASES IDENTIFIED IN THE COMMISSION'S ORDER DO NOT CONFER THE AGENCIES WITH POWERS TO PUNISH THOSE NO LONGER INVOLVED IN NEVADA'S GAMING INDUSTRY.

A. The Agencies' Desire for a More Deferential Standard of Review Is Understandable, but Misplaced.

Mr. Wynn established in his Opening Brief that courts reviewing administrative agency decisions apply a *de novo* standard of review to pure legal questions, such as statutory interpretation, without deference to the underlying agency determination. *See* Wynn Br. at 14:12-20. This is true "even in the context of a writ proceeding." *Pawlik v. Shyang-Fenn Deng.*, 134 Nev. 83, 85, 412 P.3d 68, 70-71 (2018). Mr. Wynn also cited controlling precedent for the well settled propositions that administrative agencies possess only those powers conferred by the Legislature, that the grant of agency power must be clear, and that agencies are not permitted to enlarge their own jurisdiction or assume powers not granted. *See id.* at 14:21-15:18.

To escape these restrictive standards, both the Commission and the Board identically argue that Nevada courts will "defer[] to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." *See* Comm'n Br. at 10:14-15; Bd. Br. at 10:21-24 (both citing *Taylor v. Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013)). This general principle, though accurately stated, has no application in this proceeding.

What the Agencies fail to explain is that courts will defer to an agency's interpretation of its governing statutes only when an ambiguity exists. Conversely, where "the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *United States v. State Eng'r*, 117 Nev. 585, 589–90, 27 P.3d 51, 53–54 (2001) (rejecting State Engineer's interpretation of an unambiguous statute). Put differently, "[a]n administrative agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision." *Local Gov't Employee-Mgmt.*

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Relations Bd. v. Educ. Support Employees Ass'n, 134 Nev. 716, 720–21, 429 P.3d 658, 662 (2018) ("as we have concluded that the language is plain and unambiguous, there were no gaps for the Board to fill. The Board must adhere to the clear language, irrespective of the outcome."). Neither the Board nor the Commission contend that any of the statutes or regulations at issue are ambiguous. To the contrary, the Commission acknowledges that "the plain text of the Act" governs this dispute. *See* Comm'n Br. at 2:12-13. Mr. Wynn agrees, which means the Commission's order below is entitled to no deference as it ignores or otherwise misdirects from the plain language of the subject statutes and regulations.

That the parties disagree over a statute's ordinary meaning does not give rise to ambiguity. *Cf. Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) ("ambiguity does not arise simply because the parties disagree on how to interpret their contract"). To be considered ambiguous, a statute must be capable of two or more reasonable but inconsistent interpretations. *See Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998). Assuming, *arguendo*, any of the statutes at issue are ambiguous, the Agencies' desired deferential standard of review still does not apply. That is because courts will not defer to an agency interpretation that "conflicts with the constitution or other statutes, ***exceeds the agency's powers***, or is otherwise arbitrary and capricious." *Nuleaf CLV Dispensary, LLC v. Dep't of Health & Human Servs.,* 134 Nev. 129, 133, 414 P.3d 305, 308 (2018) (emphasis added). Finally, even a reasonable agency interpretation of an ambiguous statute may be stricken when it conflicts with legislative intent. *See Hotel Employees v. Gaming Control Bd.*, 103 Nev. 588, 591, 747 P.2d 878, 880 (1987) (agency interpretation that Nev. Gaming Comm'n Reg. 19 required international unions to file personnel information with the Commission exceeded the latter's authority as promulgated in NRS Chapter 463A).

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B. The Agencies' Failure to Address the Board's "Administrative Hold" Is a Concession that Mr. Wynn's Petition Is Meritorious.

Mr. Wynn's position is that his findings of suitability ended once he was no longer an officer, director or controlling shareholder of Wynn Resorts. *See* Wynn Br. at 20:16-21:18. This is entirely consistent with Nev. Gaming Comm'n Reg. 4.030(10), which provides that findings of suitability are not transferable when the nature of the person's involvement with the licensee changes from that for which he or she was originally found suitable. *See id.* Despite filing two briefs totaling more than forty pages, neither the Commission nor the Board addressed Mr. Wynn's repeated arguments that the statutes and regulations governing Nevada's gaming industry nowhere authorize—either expressly or impliedly—the use of an "administrative hold" to "suspend" a person's suitability findings so that the Board may later exercise jurisdiction to pursue disciplinary action against that person even though he or she is no longer involved with licensed gaming operations. *See id*. at 3:12-28; 10:9-14; 13:15-23; 22-23 (n.6).

The significance of this omission cannot be overstated. The Board premised its jurisdiction in this action on the following allegation: "the Gaming Control Board placed an administrative hold on Mr. Wynn's Findings of Suitability and retains jurisdiction over him for purposes that include disciplinary proceedings." (ROR at 6:22-25 (Compl. ¶ 9.)) That's it. By failing to say a single word in their briefs defending the sole basis upon which Board claims to have jurisdiction over Mr. Wynn, the Agencies should be deemed to concede the merit of Mr. Wynn's petition for this reason alone. *See Benjamin v. Frias Transp. Mgmt. Sys., Inc.*, 433 P.3d 1257, 2019 WL 442396, at *1 (Nev. Jan. 31, 2019) ("when a party fails to set forth specific arguments as to why a motion to dismiss should not be granted, EDCR 2.20(e) gives the district court the discretion ***to dismiss the complaint based solely on that failure***.") (emphasis added) (unpublished disposition).

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C. The Agencies' Continuing Effort to Read NRS 463.1405(4) in Isolation Violates Hornbook Principles of Statutory Construction.

Mr. Wynn previously demonstrated that NRS 463.1405(1) utilizes the present tense when identifying the categories of persons/entities over which the Board retains continuing observational powers. *See* Wynn Br. at 17:7-19:28; *see also* NRS 463.1405(1) ("The Board . . . shall continue to observe the conduct of all licensees and other persons ***having*** a ***material involvement*** directly or indirectly with a licensed gaming operation . . . to ensure that licenses are not issued or held by, nor ***is*** there any ***material involvement*** directly or indirectly with a licensed gaming operation . . . by unqualified, disqualified or unsuitable persons[.]") (emphases added); Nev. Gaming Comm'n Reg. 16.400 (defining "material involvement" in present tense terms). Mr. Wynn specifically cited recent legal authority explaining that the term "having" is a present participle that means "presently and continuously . . . not something in the past that has ended." *See id.* (quoting *Shell v. Burlington N. Santa Fe Ry. Co.*, 941 F.3d 331, 336 (7th Cir. 2019)); *see also Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1200 (S.D. Cal. 2019) ("use of the present participle [ ] denotes an ongoing process.").

The Board again failed to address this argument or engage in any interpretation of the actual language used in NRS 463.1405(1) or Nev. Gaming Comm'n Reg. 16.400. The Commission also dodged the issue. The Agencies, like the Commission's underlying order, instead seek refuge in NRS 463.1405(4), which gives the Commission "full and absolute power and authority to . . . revoke . . . any finding of suitability . . . or fine any person . . . found suitable[.]" *See* Comm'n Br. 13:16-14:7; Bd. Br. at 17:20-18:4. According to the Agencies, they can disregard the plain, present tense language in NRS 463.1405(1) because nothing in that subsection expressly "cross-references" or "ties it" to NRS 463.1405(4), and *vice versa*. *See id.* Not only does this argument violate basic principles of statutory construction, it is utterly illogical given the respective roles of the Board and the Commission.

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Starting with statutory construction, the Nevada Supreme Court has explained:

> The issue in this case is one of statutory construction, which is a question of law, and is reviewed de novo, without deference to the district court's conclusions. When interpreting a statute, this court must give its terms their plain meaning, ***considering its provisions as a whole*** so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory. Further, it is the duty of the court, when possible, ***to interpret provisions within a statutory scheme harmoniously with one another*** in accordance with the general purpose of those statues and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent.

S. Nevada Homebuilders Ass'n v. Clark Cty., 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) ("But this subsection [NRS 281.230(2)] must be read in the context of NRS 278.230(1) and the statutory scheme in which it appears.") (emphases added); *see also Cable v. State ex rel. its Employers Ins. Co. of Nev.*, 122 Nev. 446, 452, 117 P.3d 171, 175 (2005) ("subsections of a statute will be read together to determine the meaning of the statute."). NRS 463.1405(4), thus, cannot be read in isolation from the other subsections in the same statute.

The logic of this principle is self-evident when all subsections of NRS 463.1405 are read together. Subsection (1) grants the Board the power to investigate applicants (including the ability to obtain records from the FBI in accordance with Subsection (2)) and to continue to observe licensees and others who have an ongoing "material involvement" with licensed gaming operations.[7] Subsection (3) grants the Board the powers to make recommendations based on the investigations and observations authorized by Subsection (1), and Subsection (4) grants the Commission the absolute power to make certain decisions based on the Board's recommendations. Lest there is any doubt about the respective roles of the Board and the Commission and how they work together, the Court need only review the Commission's Answering Brief on this subject:

> Among the Board's many duties, relevant here is that it performs an investigatory function, and makes recommendations to the [Commission]. The Commission, in

[7] Although the Board cited Nev. Gaming Comm'n Reg. 16.400 once in its brief, *see* Bd. Br. at 1:22, it never addressed the text of the Regulation and its present tense definition of "material involvement." The Commission never even cited the Regulation and, thus, ignored the issue entirely.

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> turn, conducts disciplinary proceedings based on the Board's recommendations, and is the ultimate decisionmaker and factfinder.

Comm'n Br. at 3:20-25 (internal citations and quotations omitted) (alteration in original). The salient point is that—contrary to the Agencies' suggestions elsewhere in their briefs—the Commission does not operate in a vacuum under NRS 463.1405(4) as it instead relies upon the predicate recommendations of the Board before exercising its ultimate decision-making authority.

This Board-Commission paradigm brings us back full circle to NRS 463.1405(1), which defines who can be the subject of the Board's threshold recommendations: *i.e.*, license "applicants" and "all licensees and other persons ***having*** a ***material involvement*** directly or indirectly with a licensed gaming operation[.]" (emphasis added). As Mr. Wynn argued in his Opening Brief—and the Agencies do not dispute—both the Nevada Supreme Court and the Nevada Legislature have recognized that verb tense is significant when construing statutes. *See* Wynn Br. at 15:23-16:6; *see also In re Discipline of Agwara*, 132 Nev. 983, 2016 WL 4005655 (Nev. July 22, 2016) (unpublished disposition).

Agwara is instructive as it construed a disciplinary rule in another highly regulated area, the legal profession. 2016 WL 4005655, at *1. The State Bar alleged that Agwara posed a substantial threat of serious harm to the public based on his alleged failure to safe-keep client and third-party funds. *Id.* Agwara opposed the petition, arguing that he did not pose a substantial threat, that many of the alleged accounting issues were from two years prior and, thus, there was no showing that the public was in current need of protection. *Id.* The relevant disciplinary rule allowed the Supreme Court to suspend or condition the attorney's practice where the attorney "appears to be ***posing*** a substantial threat of serious harm to the public." *Id.* (quoting SCR 102(4)(b)) (emphasis added). The *Agwara* court denied the State Bar's requested suspension in relevant part.

The Court explained: "[w]e interpret ***the present tense*** used in the language of the rule to require a showing that the attorney ***poses a current*** threat of harm." *Id.* (emphasis added). Because

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Agwara's accounts contained sufficient funds, there was no showing he had mishandled client monies, and the charges were from two years prior (in 2014), the Supreme Court found there was insufficient evidence that "Agwara ***currently poses*** a substantial threat of serious harm to the public." *Id.* (emphasis added). The teaching from *Agwara* and the other authorities cited herein is that where a statute, rule or regulation uses a present participle to denote a condition, like "***having*** a material involvement" in NRS 463.1045(1) or "***posing*** a substantial threat" in SCR 102(4)(b), it requires that condition to be current and ongoing, not something in the past.

When NRS 463.1405 is read as a whole and in conjunction with Regulation 16.400, it is clear the Agencies lack the power to pursue and impose discipline on Mr. Wynn as he undisputedly has no current and ongoing involvement with any licensed gaming operation. The Agencies cannot escape this result by ignoring the language used in one of the principal statutes they are relying upon.

D. NRS 463.310 Is an Enforcement Mechanism, Not a Grant of Expanded Jurisdiction.

The Agencies next contend that NRS 463.310 authorizes the present disciplinary action, arguing that Mr. Wynn's case falls within the plain language of the statute. *See* Comm'n Br. 14:8-15:19; Bd. Br. 18:5-20. Not so. The Agencies' defense of NRS 463.310—*i.e.*, that it reaffirms the Board's power to investigate and prosecute violations of the Act and the Commission's power to render discipline based on said investigations and prosecutions—is a strawman since Mr. Wynn does not contend otherwise. His argument is simple: nothing in the Act, when read as a whole, delegates the Agencies disciplinary powers over those unaffiliated with licensed gaming.

As they do with NRS 463.1405(4), the Agencies seek to read NRS 463.310 in isolation without regard for its overall role in the Act. When read as a whole and harmonized with the rest of the statutory scheme, *see S. Nevada Homebuilders Ass'n,* 121 Nev. at 449, 117 P.3d at 173, it is clear that NRS 463.310 is an enforcement mechanism that is dependent upon the scope of powers authorized in NRS 463.1405(1). It is not an independent grant of jurisdictional power.

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NRS 463.1405, as explained above, is contained in the section of NRS Chapter 463 titled "Powers and Duties of the Board and the Commission." NRS 463.1405(1) grants the Board powers (i) to investigate those seeking to enter the gaming industry (*i.e.,* "applicants"), and (ii) to continue to observe those already involved in the industry (*i.e.*, "all licensees and other persons having a material involvement directly or indirectly with a licensed gaming operation or registered holding company[.]"). The powers are designed "to ensure" there is no "material involvement directly or indirectly with a licensed gaming operation or registered holding company by unqualified, disqualified or unsuitable persons . . . ." *Id.* If such problematic individuals are identified, the Board has the power to recommend, and the Commission has the power to order, a variety of safeguards, including revocations and fines. *See* NRS 463.1405(3) and (4).

That said, the Board's powers to observe, identify, and potentially recommend removal of unsuitable persons or the imposition of fines do not specify the procedures for how this is to be accomplished. The Legislature enacted NRS 463.310 in 1955 as the enforcement statute for any Gaming Control Act violations. It is not a "jurisdictional" statute. When NRS 463.1405 was enacted in 1981 and amended in 2003, it established jurisdiction over those having material involvement with licensees, and any alleged violations are handled under the disciplinary procedures in NRS 463.310. Notably, NRS 463.310 is not found in the section of NRS Chapter 463 titled "Powers and Duties of the Board and Commission." It is instead located in a later section of the chapter titled "Disciplinary Actions."

That does not mean, obviously, that the Board can recommend, and the Commission can impose, discipline against any person they choose. A person must first fall within the substantive parameters of NRS 463.1405 before the machinery of NRS 463.310 can be employed against him/her. The express language of NRS 463.310 reaffirms as much by limiting the Board's ability to recommend, and the Commission's power to impose, fines against "a person or entity which ***is*** . . . found suitable," *see* NRS 463.310(2)(b); NRS 463.310(4)(d) (emphasis added), *i.e.*, not a

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person who was found suitable at one time, but whose findings ended because he left the industry. The Agencies, again, disregard this present tense terminology.[8]

The Commission, at least impliedly, has recognized this limitation on its disciplinary jurisdiction. Outside the disciplinary context and outside the context of Mr. Wynn's former roles with Wynn Resorts, the Commission has adopted several regulations that ostensibly permit it and the Board to retain jurisdiction over a person or entity when seeking (or being called forward for) a threshold suitability determination even when that person or entity becomes unaffiliated with a licensee during the regulatory review process. For example, in the context of hosting centers, which the Agencies regulate:

> 1. The Commission may, upon recommendation of the Board, require a person or entity owning, operating or having a significant involvement with a hosting center to file an application for finding of suitability to be associated with licensed gaming[.]
>
> ***
>
> 6. The Commission ***retains jurisdiction*** to determine the suitability of a person or entity described in paragraph 1 ***regardless of whether or not that person or entity has severed any relationship with a registered hosting center or gaming licensee***.

Nev. Gaming Comm'n Reg. 5.232(1) and (6) (emphases added); *see also*, Reg. 14.305(9) (Manufacturers/ Distributors) ("The Commission ***retains jurisdiction*** to determine the suitability of any party described in subsections 1 or 2 ***regardless of whether or not that party has severed any relationship with a gaming licensee or registered manufacturer or distributor of associated equipment***.") (emphases added); Reg. 25.030 ("The Commission ***retains jurisdiction*** to determine

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[8] The Commission instead argues that the title of NRS 463.310 "obliterates" Mr. Wynn's argument on this point because it, too, "establish[es] 'powers and duties of the Commission'." Comm'n Br. at 15:12-19. The Commission, once more, erects a false construct. To begin, the title of a statute does not "establish" powers, it is merely a "descriptive heading or a brief summary of the contents of the statute or subsection." *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 230, 19 P.3d 245, 250 (2001). Next, while a title may help determine legislative intent, courts resort to this principle only when the statute is ambiguous. *See id.* at 225, 19 P.3d at 247 ("the language of NRS 616C.505(8) is ambiguous"). Finally, no one disputes the Commission's power to impose discipline, the question is whether it can impose discipline on a person who is no longer affiliated with a gaming licensee—a topic on which the title of NRS 463.310 is noticeably silent.

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the suitability of an independent agent ***even if the licensee terminates its relationship with the independent agent or the independent agent is otherwise no longer functioning as an independent agent***.") (emphases added).[9]

No similar language exists in the Act that empowers the Board and the Commission to retain disciplinary jurisdiction over a person who lacks any involvement with a gaming licensee just because that person once held a (long-ago-ended) finding of suitability. The absence of such language in the disciplinary context is significant. "[W]hen the legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." *See, e.g.*, *Coast Hotels*, 117 Nev. at 841, 34 P.3d at 550. This principle of statutory interpretation, which is based on the maxim '*expressio unius est exclusio alterius*' ("the expression of one thing is the exclusion of another"), deems such omissions to be intentional. *See Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 521 (2014). NRS 463.310, thus, enables the Agencies to effectuate certain powers delegated to them by the Legislature; it cannot be read to expand their disciplinary jurisdiction to those who no longer have material involvement with Nevada gaming licensees.[10]

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[9] Mr. Wynn cites these regulations only to demonstrate that the Commission has employed express language to retain its jurisdiction when making threshold determinations of suitability, but has not used (and is not permitted to use) similar language anywhere in the disciplinary context. He takes no position on the validity of the cited regulations. *See* 73 C.J.S. *Public Admin. Law and Proc*. § 148 (June 2019 Update) ("If agency rule purports to expand the authority the legislature gave to the agency, the rule does not fall within the scope of the agency's express authority.").

[10] The same principle disposes of the Commission's argument that it is empowered to determine whether Mr. Wynn's findings of suitability have ended. *See* Comm'n Br. at 13:6-15. Unlike NRS 463.270(8), which empowers the Commission to establish the conditions for the voluntary surrender of a gaming license, Regulation 4.030(10) contains no such language applicable to findings of suitability, which are distinct from gaming licenses. *Compare* Nev. Gaming Comm'n Reg. 4.030(1) (classifying "Gaming Licenses") with Reg. 4.030(10) (classifying "Findings of Suitability"). Accordingly, the omission in Regulation 4.030(1) should be deemed intentional. *See Thomas, Coast Hotels, supra*. While the Commission does have the power under Regulation 4.030(10) to determine whether findings remain in good standing after a suitable person transfers to a new position/location within the industry, no such power exists when the person leaves the industry entirely.

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E. The Agencies Cannot Bootstrap NRS 463.140(5) into an Independent Basis to Pursue the same Unauthorized Discipline Against Mr. Wynn in His Capacity as an Alleged "Witness."

NRS 463.140(5) is the third basis on which the Agencies premise their disciplinary jurisdiction over Mr. Wynn, arguing that "[n]othing in the Act suggests that the Board and Commission's order-to-appear authority is limited to those persons who are already within the scope of its regulatory authority." Comm'n Br. at 16:9-11; Bd. Br. at 18:21-19:7. The problem is that in their delayed zeal to enforce the "order to appear" from August 2018, the Agencies seek the identical ultimate discipline against Mr. Wynn in his capacity as a mere "witness"—revocation of suitability findings and substantial fines—they are otherwise precluded from imposing against him in his former capacity as Chairman, CEO and controlling shareholder of Wynn Resorts.

Succinctly stated, Mr. Wynn's findings of suitability ceased to exist long before the Board filed its Complaint. The power to recommend and impose fines is limited to a person who has a current material involvement with a gaming licensee (NRS 463.1405(1)), including someone who "is" found suitable (NRS 463.310(2)(b); NRS 463.310(4)(d)), which does not encompass Mr. Wynn anymore given his departure from the gaming industry well over two years ago. Nothing in NRS 463.310 empowers the Agencies to punish a "witness" who purportedly failed to appear for an investigative interview—a charge Mr. Wynn disputes—in the same manner as existing licensees, registrants and suitable persons who are the express focus of the statute. Because NRS 463.310 is a penal statute that authorizes potential revocations and fines, it must be strictly construed, *see State v. Wheeler*, 23 Nev. 143, 44 P. 430, 432 (1896) (instructing "[w]hile the parts of a penal statute which subject to punishment or penalty are, from their odious nature, to be construed strictly, those which exempt from penal consequences will, because of their opposite character, receive a liberal interpretation"), and cannot be stretched to reach Mr. Wynn.

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F. The Commission Cannot Use NRS 463.143 to Extend Its Jurisdiction/Powers to Those Who Lack Material Involvement with Licensed Gaming Operations.

On the one hand, the Commission appears to recognize the limited scope of NRS 463.143 raised in Mr. Wynn's Opening Brief. *See* Comm'n Br. at 18:5-20:10 (acknowledging that "[t]he Commission's authority is [ ] constrained," that "all of its actions must have a connection with the duties the Act charges the Commission with carrying out," and that the Commission's authority to discipline suitable persons "is broad, but not boundless"). As set forth above, the boundaries of administrative power are established by the plain language of the subject statutory scheme, beyond which an agency is not permitted to enlarge its jurisdiction or assume powers not granted. *See* Point II.A, *supra*.

On the other hand, the Commission contends that the power to punish those no longer affiliated with gaming licensees is "necessary" to perform its assigned duties even though no such power is granted in the plain text of the Act. *See* Comm'n Br. at 17:1-18:4. It begins by analogizing Mr. Wynn's arguments to someone who commits a crime in Nevada, leaves the jurisdiction, and then claims the State cannot punish him because he no longer lives here. *See id.* at 17:12-28. The analogy falls flat. The Agencies' powers to discipline are statutorily-limited to those with present-tense involvement in licensed gaming, whereas Nevada law enforcement authorities maintain jurisdiction to prosecute crimes committed within the State's borders until the applicable statute of limitations expires. The Commission's duty to enforce the Act "for the protection of the public and in the public interest," *see id.* at 18:1-4, is not equivalent to the police power to arrest and seek prosecution for a past criminal act. A person who leaves the gaming industry, by definition, presents no regulatory threat to the public or its interest in gaming, whereas a criminal who flees Nevada after engaging in criminal conduct remains a threat to the People and otherwise accountable to the Executive Branch. *See, e.g.*, NRS 179.221 (establishing procedures for Governor to demand return of Nevada fugitives).

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While "an administrative agency may possess an ***implied limited power***, any implied limited power ***must be essential to carry out an agency's express statutory duties***." *City of Henderson v. Kilgore*, 122 Nev. 331, 335, 131 P.3d 11, 14 (2006) (emphases added). That is clearly not the case here. Though the Commission posits a parade of horribles that would flow if it is unable to discipline those who have voluntarily departed the gaming industry, *see* Comm'n Br. at 17:1-18:4, the following points demonstrate that the current proceeding is hardly "essential" to achieve the stated goals of protecting the public and Nevada's gaming industry.

First, the Commission bemoans that in Mr. Wynn's universe, its power to discipline "would not turn on whether discipline was warranted, but would instead depend on whether the regulatee himself deigned to remain within the Commission's authority." Comm'n Br. at 17:19-28. This is more exaggeration as the Board and the Commission clearly retain power over alleged violations of gaming laws or regulations even after an alleged violator has left the industry. The licensee and its existing management (*i.e.*, those "having a material involvement . . . with a licensed gaming operation") remain responsible under the Act such that the Board and the Commission can pursue and impose discipline (including revocation and fines) against their respective licenses and findings of suitability. *See* NRS 463.1405(1)-(4); NRS 463.270(8); NRS 463.310. This is precisely why the disciplinary proceeding against Wynn Resorts and Wynn Las Vegas was within Agencies' jurisdiction, and netted the State of Nevada a record $20 million fine. That the Agencies may "want" to pursue more fines from Mr. Wynn individually, does not mean such pursuit is permitted—let alone "necessary"—under the Act.

Second, the regulations expressly provide that "[a] finding of suitability relates only to the specified involvement for which it was made. ***If the nature of the involvement changes from that for which the applicant is found suitable, the applicant may be required to submit to a determination by the Commission of his or her suitability in the new capacity***." Nev. Gaming Comm'n Reg. 4.030(10) (emphasis added). Mr. Wynn's involvement with Wynn Resorts—the

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basis upon which he was previously found suitable—has undisputedly changed by virtue of his complete separation from the Company. Thus, if Mr. Wynn ever seeks to re-enter the industry in the future, he would be subject to seeking a new approval from the Commission at which time the Board and the Commission would be able to exercise their express statutory powers to investigate him and, if appropriate, to deny his application. *See* NRS 463.1405(1)-(4). Such a process unquestionably protects the public and satisfies the public policy of the State. Punishing a person who is no longer in a position to harm the public or the gaming industry is simply not "necessary" for the Agencies to perform their properly-delegated duties.

Third, if the Commission revokes any officer's, director's, or employee's findings of suitability, "the publicly traded corporation shall immediately remove that officer, director or employee from any office or position wherein the officer, director or employee is actively and directly engaged in the administration or supervision of, or any other significant involvement with, the gaming activities of the corporation or any of its affiliated or intermediary companies." NRS 463.637(2). This remedy has already occurred: Mr. Wynn voluntarily resigned from his positions as an officer, director or employee of Wynn Resorts, and the Company so notified the Board.

Fourth, if the Commission revokes a person's findings of suitability, the licensee that employed the person may not "[p]ay the person any remuneration for any service relating to the activities of a licensee, except for amounts due for services rendered before the date of receipt of notice of such action by the Commission." NRS 463.645(1). This remedy has already occurred: Mr. Wynn voluntarily gave up his rights to any remuneration when he resigned, which the Company accepted and did not pay.

Fifth, if the Commission revokes the suitability of a controlling stockholder, the affiliated corporation must pursue lawful efforts to require such person to relinquish his or her voting securities, and said person cannot exercise any voting rights. *See* Nev. Gaming Comm'n Reg. 16.440. These remedies have already occurred: Mr. Wynn voluntarily sold his voting securities

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in orderly fashion, respecting the rights of the public markets, other stockholders, and regulatory authorities, without waiting for any "revocation" of his stockholder rights. Nor did he vote or otherwise participate at Wynn Resorts' annual meeting in May 2018 despite having the right to do so given his share ownership on the "record date" established in the Company's earlier proxy statement.

Sixth, if the Agencies' true concern is ensuring that Mr. Wynn's departure from Nevada's gaming industry is permanent, then the parties could have entered a stipulation or contract to that effect without the taxpayer expense associated with this disciplinary proceeding. Such an agreement would be enforceable under Nevada law. *See Cohen v. State*, 113 Nev. 180, 183-84, 930 P.2d 125, 127-28 (1997) (upholding enforceability of stipulated agreement entered into between the Board and applicant, which had been approved by the Commission). Mr. Wynn was willing to consider a negotiated resolution along these lines to avoid the expense and spectacle of protracted administrative/judicial proceedings, but the parties were unable to reach an agreement. (ROR at 65:13-66:2.)

In the end, the only goal of the instant disciplinary proceedings that has not already been achieved is the Agencies' desire to impose additional fines against Mr. Wynn individually on top of those already levied against Wynn Resorts. Nothing in the applicable statutes or regulations, however, expressly or impliedly authorizes the Board to seek, or the Commission to impose, what essentially amounts to an exorbitant "exit tax" to leave Nevada's gaming industry. The Agencies' residual efforts to impose fines and revocation penalties after the public has been protected, and the public interest has been served, is nothing more than vindictiveness. Spite, fortunately, is not a delegated power under the Act. If the Board and the Commission seek to expand their powers to enable the disciplinary pursuit of those who no longer have any involvement in Nevada's gaming industry, they must lobby the Legislature.

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CONCLUSION

Based on the foregoing, Mr. Wynn Respectfully requests that the Court: (1) deny the Agencies' Countermotions to Dismiss; (2) judicially review the Agencies' actions pursuant to NRS 463.315, NRS 34.150 and/or NRS 34.320; and (3) dismiss or otherwise arrest the disciplinary proceedings below.

DATED this 1st day of May, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that Petitioner's Opening Brief and this Reply Brief comply with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because they have been prepared in a proportionally spaced typeface using Microsoft Word in size 12 pt., double spaced, Times New Roman.

I further certify that Petitioner's Opening Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 12 points or more, and contained 8500 words. Petitioner has separately sought leave to file this consolidated Reply brief, which contains 8,342 words (thus exceeding the 7,000 word limit), and is being filed in response to two Countermotions to Dismiss and two Answering Briefs.

I further certify that I have read Petitioner's Opening Brief and this Reply Brief, and to the best of my knowledge, information, and belief, neither are frivolous nor interposed for any improper purpose. I further certify that the foregoing briefs comply with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the briefs 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 subject briefs do not conform with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day of May, 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Campbell & Williams and that I did, on the 1st day of May, 2020, serve the foregoing **Petitioner Stephen A. Wynn's Consolidated Opposition to Respondents' Countermotions to Dismiss and Reply Brief in Support of Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition** by e-mailing and sending via United States Mail, first class postage pre-paid, a copy thereof to the following attorneys of record for Respondents:

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	CASE NO.: A-20-809249-J DEPT. NO.: XIV **PETITIONER'S *EX PARTE* APPLICATION TO EXCEED 7,000 WORDS FOR HIS CONSOLIDATED OPPOSITION TO RESPONDENTS' COUNTERMOTIONS TO DISMISS AND REPLY BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW, ALTERNATIVELY, FOR WRITS OF MANDAMUS AND/OR PROHIBITION**

Petitioner Stephen A. Wynn ("Mr. Wynn"), through his undersigned counsel, hereby submits this application to exceed the 7000-word limit for his Consolidated Opposition to Respondents' Countermotions to Dismiss and Reply Brief in Support of Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition.

DISCUSSION

Mr. Wynn filed his Opening Brief in Support of Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition on March 13, 2020. Pursuant to EDCR 2.15(e), memoranda filed in proceedings involving petitions for judicial review are subject to the formatting requirements for appellate briefs contained in NRAP 28. Pursuant to NRAP 28(g), the

lengths of appellate briefs are governed by NRAP 32(a)(7), which permits opening and answering briefs of up to 14,000 words and reply briefs of up to 7,000 words.[1] Mr. Wynn's Opening Brief was 8,500 words and, thus, well under the word-limit for initial briefs.

On April 10, 2020, Respondent Nevada Gaming Control Board (the "Board") filed a Countermotion to Dismiss and Answering Brief consisting of 6,717 words. The same day, Respondent Nevada Gaming Commission (the "Commission") filed a separate Countermotion to Dismiss and Answering Brief consisting of 7,130 words. While Mr. Wynn could have filed separate oppositions to the countermotions and a separate reply in support of his petition, he instead opted to file a single, consolidated brief opposing both countermotions and replying in support of his petition. While this approach promotes clarity, efficiency and economy, it has also generated a Consolidated Opposition/Reply Brief that exceeds the 7,000 word limit contained in NRAP 32(a)(7). Specifically, Mr. Wynn's consolidated brief is 8,342 words and just over 26 pages, which is less than the 30-page limit that otherwise applies under EDCR 2.20(a).

Mr. Wynn submits good cause exists to grant this application. First, the Board and the Commission each filed an Answering Brief in response to Mr. Wynn's Opening Brief. While there is certainly overlap between the two briefs, each Respondent also raised several distinct arguments that necessitated a response. Second, the Board and the Commssion both included Countermotions to Dismiss, which raised additional discrete issues that Mr. Wynn did not have an opportunity to address until his Consolidated Opposition/Reply. While Mr. Wynn has no objection to the fact that the Board and Commission each filed a combined Answering Brief and Countermotion, reality dictates that he was going to require a slighly enlarged reply brief to address all of the issues raised

[1] Mr. Wynn also filed alternative petitions for writs of mandamus and/or prohibition. At the appellate level, such writs are governed by NRAP 21, and are not subject to the length limitations contained in NRAP 32(a)(7). *See* NRAP 21(d); NRAP 32(c)(2). Regardless, out of an abundance of caution, Mr. Wynn is submitting the instant request for leave to file a slightly enlarged Opposition/Reply.

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by Respondents. Third, if the word-counts for Mr. Wynn's Opening Brief and Consolidated Opposition/Reply are combined, they total less than 17,000 words, which is substantially less than the combined 21,000 words Mr. Wynn could have used under NRAP 37(a)(7). Finally, Mr. Wynn's counsel advised Respondents' respective counsel that Petitioner planned to submit the instant request to the Court, and both kindly advised that they had no opposition thereto. *See* Attached Exhibit A.

CONCLUSION

Based on the foregoing, Mr. Wynn respectfully requests that the Court permit him to file a Consolidated Opposition/Reply brief in excess of 7,000 words (but less than 8,500 words). A proposed Order is attached hereto as Exhibit B.

DATED this 1st day of May, 2020.

CAMPBELL & WILLIAMS

By: /s/ *Donald J. Campbell*
DONALD J. CAMPBELL, ESQ. (1216)
J. COLBY WILLIAMS, ESQ. (5549)
700 South Seventh Street
Las Vegas, Nevada 89101

Attorneys for Petitioner
Stephen A. Wynn

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CERTIFICATE OF SERVICE

I certify that I am an employee of Campbell & Williams and that I did, on the 1st day of May, 2020, serve the foregoing **Petitioner Stephen A. Wynn's *Ex Parte* Application to Exceed 7,000 Words for His Consolidated Opposition to Respondents' Countermotions to Dismiss and Reply Brief in Support of Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition** by e-mailing and sending via United States Mail, first class postage pre-paid, a copy thereof to the following attorneys of record for Respondents:

AARON D. FORD
Attorney General

Darlene Caruso, Chief Deputy Attorney General
Kiel B. Ireland, Deputy Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101

Attorneys for Respondent
Nevada Gaming Commission

AARON D. FORD
Attorney General

Steven G. Shevorski, Chief Litigation Counsel
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101

Attorneys for Respondent
Nevada Gaming Control Board

By: /s/ *John Y. Chong*
An employee of Campbell & Williams

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EXHIBIT A

Subject: RE: Wynn/NGC/NGCB
Date: Wednesday, April 29, 2020 at 8:17:48 PM Pacific Daylight Time
From: Kiel B. Ireland <KIreland@ag.nv.gov>
To: 'Colby Williams' <jcw@cwlawlv.com>
CC: Steven G. Shevorski <SShevorski@ag.nv.gov>, Darlene B. Caruso <DCaruso@ag.nv.gov>

Colby,

That is totally fine with the Commission – no opposition.

Thanks,

Kiel B. Ireland
Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
702-486-3795

From: Steven G. Shevorski <SShevorski@ag.nv.gov>
Sent: Wednesday, April 29, 2020 7:36 PM
To: 'Colby Williams' <jcw@cwlawlv.com>; Kiel B. Ireland <KIreland@ag.nv.gov>
Subject: RE: Wynn/NGC/NGCB

Hi Colby,

Thanks for the heads up. No opposition.

Best regards,

Steve

Steve Shevorski
Chief Litigation Counsel
Office of the Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101
702-486-3783

From: Colby Williams <jcw@cwlawlv.com>
Sent: Wednesday, April 29, 2020 6:59 PM
To: Kiel B. Ireland <KIreland@ag.nv.gov>; Steven G. Shevorski <SShevorski@ag.nv.gov>
Subject: Wynn/NGC/NGCB

Kiel/Steve,

As you know, Petitioner's opposition/reply brief is due this Friday, May 1. Rather than file separate briefs in response to Respondents' respective countermotions to dismiss and answering briefs, we plan to file a single, consolidated brief addressing all issues. As we get close to finalizing the brief, it looks like it's going to come in around 8,000 words or so, which exceeds the 7,000 word limit set forth in NRAP 32(a)(7). While I think an

argument exists that the parties' briefs are not subject to the word limitations in NRAP 32 given that Mr. Wynn has also sought writ relief that would be governed by NRAP 21, we nonetheless plan to file an ex parte application for leave to file a consolidated brief that slightly exceeds the 7,000 word limit. We will, of course, serve you with the application when we file. It's only "ex parte" in the sense that we are not seeking a separate hearing, OST, etc.

As it currently stands the consolidated brief comprises approximately 27 pages. While we need to do some editing, I don't anticipate the word or page count will change much from these figures. Besides giving you a head's up on this issue, I also wanted to inquire whether Respondents' anticipate any opposition to our request. If not, may I have your permission to so represent to the Court in our application?

Thank you for your consideration.

Best regards,
Colby

J. Colby Williams, Esq.
Campbell & Williams
700 South Seventh Street
Las Vegas, Nevada 89101
T: 702.382.5222
F: 702.382.0540
Email: jcw@cwlawlv.com

This message is intended for the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this information in error, please notify us immediately by telephone, and return the original message to us at the above address via U.S. Postal Service. Thank You.

EXHIBIT B

CAMPBELL & WILLIAMS
DONALD J. CAMPBELL, ESQ. (1216)
djc@cwlawlv.com
J. COLBY WILLIAMS, ESQ. (5549)
jcw@cwlawlv.com
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Attorneys for Petitioner
Stephen A. Wynn

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	CASE NO.: A-20-809249-J DEPT. NO.: XIV **[PROPOSED] ORDER GRANTING PETITIONER'S *EX PARTE* APPLICATION TO EXCEED 7,000 WORDS FOR HIS CONSOLIDATED OPPOSITION TO RESPONDENTS' COUNTERMOTIONS TO DISMISS AND REPLY BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW, ALTERNATIVELY, FOR WRITS OF MANDAMUS AND/OR PROHIBITION**

IT IS HEREBY ORDERED that Petitioner may exceed the 7000-word limit set forth in NRAP 32(a)(7) and file a Consolidated Opposition to Respondents' Countermotions to Dismiss and Reply Brief in Support of Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition that does not exceed 8,500 words.

DATED this ____ day of May, 2020.

_____
DISTRICT COURT JUDGE

Submitted by:

CAMPBELL & WILLIAMS

By: /s/ *Donald J. Campbell*
DONALD J. CAMPBELL, ESQ. (1216)
djc@cwlawlv.com
J. COLBY WILLIAMS, ESQ. (5549)
jcw@cwlawlv.com
700 South Seventh Street
Las Vegas, Nevada 89101

Attorneys for Petitioner
Stephen A. Wynn

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Steven D. Grierson
CLERK OF THE COURT

AARON D. FORD
Attorney General
Darlene Caruso (Bar No. 5866)
Chief Deputy Attorney General
Kiel B. Ireland (Bar No. 15368C)
Deputy Attorney General
State of Nevada
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kireland@ag.nv.gov

Attorneys for Respondent Nevada Gaming Commission

DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	Case No. A-20-809249-J Dept. No. XIV

STIPULATION AND ORDER

WHEREAS, Petitioner Stephen A. Wynn commenced the above-captioned action on January 27, 2020 by filing a Petition for Judicial Review, Alternatively for Writs of Mandamus and/or Prohibition (the "Petition");

WHEREAS, on February 18, 2020 the Court entered an order setting a stipulated briefing schedule;

WHEREAS, on March 13, 2020 Wynn filed and served his opening brief in support of the Petition;

. . .

WHEREAS, the parties entered into a stipulation and the Court entered an order extending the time for Respondents Nevada Gaming Control Board and Nevada Gaming Commission (collectively, "Respondents") to file their respective memoranda of points and authorities in opposition to the Petition and countermotions (collectively, "Responsive Briefs") by one week to April 10, 2020;

WHEREAS, Respondents filed their Responsive Briefs on April 10, 2020;

WHEREAS, the parties entered into a stipulation and the Court entered an order extending the time for Wynn to file his reply brief in support of the Petition and opposition to Respondents' countermotions by one week to May 1, 2020;

WHEREAS, Wynn filed and served his reply brief in support of the Petition and opposition to Respondents' countermotions on May 1, 2020;

WHEREAS, under the current briefing schedule Respondents' reply briefs in support of their countermotions are due on May 15, 2020; and

WHEREAS, as a consequence of the current coronavirus pandemic and other factors, Respondents desire a one-week extension to that deadline, and Wynn does not oppose such extension.

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the parties, through their respective counsel of record, as follows:

1. Respondents shall file their reply briefs in support of their countermotions on or before May 22, 2020; and

. . .

. . .

. . .

2. The remaining deadlines set out in the February 18 briefing schedule shall remain unchanged.

DATED this 7th day of May, 2020.

AARON D. FORD
Attorney General

By: /s/ *Darlene Caruso*
Darlene Caruso (Bar No. 5866)
Chief Deputy Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
Attorneys for Respondent Nevada Gaming Commission

CAMPBELL & WILLIAMS

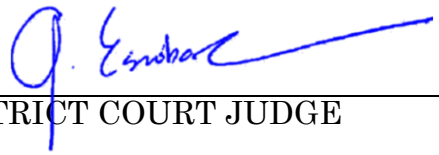
By: /s/ *J. Colby Williams*
J. Colby Williams (Bar No.5549)
700 South Seventh Street
Las Vegas, Nevada 89101
Attorneys for Petitioner Stephen A. Wynn

AARON D. FORD
Attorney General

By: /s/ *Steve Shevorski*
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
Attorneys for Respondent Nevada Gaming Control Board

IT IS SO ORDERED.

DATED this 12th day of May, 2020.



DISTRICT COURT JUDGE

Traci A. Plotnick

Subject: FW: Wynn - Request for 7-Day Extension

From: Colby Williams <jcw@cwlawlv.com>
Sent: Thursday, May 7, 2020 10:23 AM
To: Kiel B. Ireland <KIreland@ag.nv.gov>
Cc: Steven G. Shevorski <SShevorski@ag.nv.gov>; Darlene B. Caruso <DCaruso@ag.nv.gov>
Subject: Re: Wynn - Request for 7-Day Extension

Kiel,

Looks good. You are authorized to add my e-signature.

Best regards,
Colby

J. Colby Williams, Esq.
Campbell & Williams
Tel. 702.382.5222

This message is intended for the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this information in error, please notify us immediately by telephone, and return the original message to us at the above address via U.S. Postal Service. Thank You.

From: "Kiel B. Ireland"
Date: Thursday, May 7, 2020 at 9:42 AM
To: Colby Williams
Cc: "Steven G. Shevorski" , "Darlene B. Caruso"
Subject: RE: Wynn - Request for 7-Day Extension
Resent-From: Proofpoint Essentials
Resent-To: Colby Williams
Resent-Date: Thursday, May 7, 2020 at 9:38 AM

Colby,

Attached please find a draft stipulation extending Respondents' reply brief deadline to May 22. Please let us know if you have any changes or if we may add your e-signature to it.

Thanks again,

Kiel B. Ireland
Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave., Ste. 3900

Las Vegas, NV 89101
702-486-3795

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Nevada Gaming Commission

DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	Case No. A-20-809249-J Dept. No. XIV

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that a Stipulation and Order was entered in the above-entitled matter on the 19th day of May, 2020, a copy of which is attached hereto as Exhibit A.

DATED this 20th day of May, 2020.

AARON D. FORD
Attorney General

By: /s/ *Kiel B. Ireland*
Kiel B. Ireland (Bar No. 15368C)
Deputy Attorney General
Attorneys for Respondent Nevada Gaming Commission

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 20th day of May, 2020, and e-served the same on all parties listed on the Court's Master Service List.

/s/ *Traci Plotnick*
Traci Plotnick, an employee of the
Office of the Attorney General

EXHIBIT A

EXHIBIT A

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5/19/2020 5:10 PM
Steven D. Grierson
CLERK OF THE COURT

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Attorney General
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Attorneys for Respondent Nevada Gaming Commission

DISTRICT COURT

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1. Respondents shall file their reply briefs in support of their countermotions on or before May 22, 2020; and

. . .

. . .

. . .

2. The remaining deadlines set out in the February 18 briefing schedule shall remain unchanged.

DATED this 7th day of May, 2020.

AARON D. FORD
Attorney General

By: /s/ *Darlene Caruso*
Darlene Caruso (Bar No. 5866)
Chief Deputy Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
Attorneys for Respondent Nevada Gaming Commission

CAMPBELL & WILLIAMS

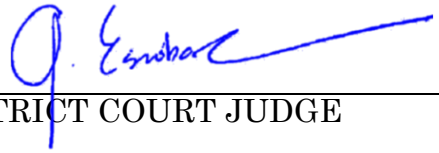
By: /s/ *J. Colby Williams*
J. Colby Williams (Bar No.5549)
700 South Seventh Street
Las Vegas, Nevada 89101
Attorneys for Petitioner Stephen A. Wynn

AARON D. FORD
Attorney General

By: /s/ *Steve Shevorski*
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
Attorneys for Respondent Nevada Gaming Control Board

IT IS SO ORDERED.

DATED this 12th day of May, 2020.



DISTRICT COURT JUDGE

Traci A. Plotnick

Subject: FW: Wynn - Request for 7-Day Extension

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Sent: Thursday, May 7, 2020 10:23 AM
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Subject: Re: Wynn - Request for 7-Day Extension

Kiel,

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Best regards,
Colby

J. Colby Williams, Esq.
Campbell & Williams
Tel. 702.382.5222

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Thanks again,

Kiel B. Ireland
Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave., Ste. 3900

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AARON D. FORD
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kireland@ag.nv.gov

DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN A. WYNN, an individual, Petitioner, vs. NEVADA GAMING COMMISSION, a political subdivision of the State of Nevada; and NEVADA GAMING CONTROL BOARD, a political subdivision of the State of Nevada, Respondents.	Case No. A-20-809249-J Dept. No. XIV

NEVADA GAMING COMMISSION'S REPLY BRIEF IN SUPPORT OF ITS COUNTERMOTION TO DISMISS PETITION FOR JUDICIAL REVIEW, ALTERNATIVELY, FOR WRITS OF MANDAMUS AND/OR PROHIBITION

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 1

I. A Petition for Judicial Review Is Unavailable Here Because the Commission's Order Was Interlocutory and Because No Qualifying Hearing Has Been Held 1

A. *Resnick* Holds that the Commission's Interlocutory Order Was Not a Final Decision or Order 2

B. There Was No Hearing Pursuant to NRS 463.312 to 463.3145 4

II. Wynn Has Not Undermined Any of the Four Independent Bases for Commission Authority 4

A. The Deference owed to the Commission Means that the Commission's Interpretation Must Prevail if There Is Ambiguity 4

B. The Administrative Hold Is Not Relevant Here 6

C. NRS 463.1405(4) Does Not Depend on NRS 463.1405(1) 6

1. Wynn's Theory of How NRS 463.1405 Works Finds No Support in the Act's Text 6

2. Wynn's Other Arguments on NRS 463.1405 Do Not Help His Cause 7

3. Even if Wynn's Arguments Were Correct, He Would Still Lose 8

D. NRS 463.310 Is an Express Grant of "Powers" to Revoke Findings and Suitability and Fine Persons Who Have Been Found Suitable 8

1. Wynn's Reading of NRS 463.310 Is Atextual and Ahistorical 8

2. The Question of Whether Wynn's Findings of Suitability Are Still Effective Is for the Commission to Decide 9

3. Language in Other *Regulations* Does Not Shed Light on the Language in This *Statute* 10

E. NRS 463.310 and the Commission's Inherent Authority Empower It to Enforce the Board's Order to Appear 11

F. Considering Discipline Against Wynn Is Within NRS 463.413's Express Grant of Authority 12

1. Wynn's Proposed Rule Would Undermine Enforcement in the Same Way a Rule Barring Prosecution of Fugitives Would 12

2. NRS 463.143 Is an Express Grant of Authority 13

. . .

3. Exercising Authority over Persons Who Have Left the Gaming Industry Is Necessary for the Commission to Maintain Public Confidence and Protect the Public Interest 14
CONCLUSION 16
CERTIFICATE OF COMPLIANCE 17
CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

CASES **PAGE(S)**

City of Arlington v. FCC,
569 U.S. 290, 133 S. Ct. 1863 (2013) 5

Halverson v. Hardcastle,
123 Nev. 245, 163 P.3d 428 (2007) 12

In re Discipline of Agwara, No. 70361,
132 Nev. 983, 2016 WL 4005655 (Nev. July 22, 2016) 8

Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.,
122 Nev. 132, 127 P.3d 1088 (2006) 5, 8

Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Human Servs.,
134 Nev. 129, 414 P.3d 305 (2018) 5

Prods. & Leasing v. Hotel Conquistador, Inc.,
573 F. Supp. 717 (D. Nev. 1982) 13

Resnick v. Nev. Gaming Comm'n,
104 Nev. 60, 752 P.2d 229 (1988) 1-4

Sheriff v. Andrews,
128 Nev. 544, 286 P.3d 262 (2012) 7

State v. Glusman, 98 Nev. 412, 651 P.2d 639 (1982),
appeal dismissed sub nom. Glusman v. Nevada, 459 U.S. 1192, 103 S. Ct. 1170 (1983) 15

State v. Rosenthal,
93 Nev. 36, 559 P.2d 830 (1977) 9

STATUTES AND REGULATIONS

NRS 463.0129 16
NRS 463.140 14
NRS 463.1405 ..... 6-9, 12
NRS 463.143 6-13
NRS 463.166 15
NRS 463.310 7-12
NRS 463.315 ..... 2, 4
NRS 463.3145 4
Nev. Gaming Comm'n Reg. 4.030(10) 10
Nev. Gaming Reg. 7.240 11

OTHER AUTHORITY

Antonin Scalia & Bryan A. Garner, *Reading Law* (2012) 2, 7

Disposition, BLACK'S LAW DICTIONARY (11th ed. 2019) 3
Disposition, Dictionary.com, https://bit.ly/3g3VNYd (last visited May 19, 2020) 3

Respondent Nevada Gaming Commission, by and through counsel, replies in support of its countermotion to dismiss Petitioner Stephen A. Wynn's Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition.

INTRODUCTION

The Nevada Gaming Commission's (the "Commission") countermotion to dismiss showed that the Commission has authority to consider discipline against Petitioner Stephen A. Wynn. That conclusion is based on a straightforward reading of four independent provisions of the Nevada Gaming Control Act (the "Act"), NRS 463.010-.820. And the Commission explained that allowing a regulatee like Wynn to purposefully avail himself of its regulatory authority for decades, allegedly commit repeated violations of the Act and then exclude himself from any discipline would undermine the Commission's ability to fulfill its legislatively mandated duties to maintain public confidence in gaming regulation and protect the public interest.

In response, Wynn presents various theories on how he believes the Act's provisions *should* work, without any basis in the text of the Act or Nevada caselaw. Even if those efforts were successful, they would – at best – show that the Act is ambiguous. And if the Act is ambiguous, this Court must defer to the Commission's reasonable interpretation of it. Accordingly, this Court should grant the Commission's countermotion to dismiss Wynn's petition.[1]

ARGUMENT

I. <u>A Petition for Judicial Review Is Unavailable Here Because the Commission's Order Was Interlocutory and Because No Qualifying Hearing Has Been Held</u>

Wynn contends that – notwithstanding the Nevada Supreme Court's decision in *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 752 P.2d 229 (1988), and the plain language of NRS 463.315(1) – this

[1] Wynn contends that the Agencies "should be limited to addressing Mr. Wynn's opposition to the dismissal motions (i.e., Point I, *infra*), not his reply arguments in support of his original petition (i.e., Point II, *infra*)." Wynn Opp'n 2 n.1. He is drawing an artificial distinction. Wynn filed a single "Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition." The Commission moved to dismiss that entire petition, and now files this reply brief supporting its motion to dismiss the petition. The Commission's having the last word has been contemplated since the stipulated briefing schedule was agreed upon and entered. *See* Stip. & Order re: Briefing Schedule on Pet. for Judicial Review & Related Matters ¶¶ 4-5.

Court has jurisdiction to hear his petition for judicial review of the Commission's interlocutory order. Wynn Opp'n 4-8.[2] He is wrong.

A. *Resnick* Holds that the Commission's Interlocutory Order Was Not a Final Decision or Order

The main reason he is wrong is that his contention is contrary to *Resnick*, which is binding precedent. In *Resnick* the Nevada Supreme Court held that NRS 463.315's prerequisite of a "final decision or order" did *not* include "interlocutory Commission determination[s]." 104 Nev. at 63, 752 P.2d at 231. Here, Wynn does not contest that the Commission determination denying his motion to dismiss was interlocutory. *See* Wynn Opp'n 4-8; *see also* Nevada Gaming Comm'n's Opp'n to Wynn's Pet. & Countermot. to Dismiss 9 (explaining why the Commission order was interlocutory) [hereinafter "Comm'n Br."]. As a result, *Resnick* mandates that Wynn's petition for judicial review be dismissed.

Resnick also shows that an order must be "final," just like a decision, by alternatively using the phrases "the Commission's *final orders* and decisions" and "final order" throughout the opinion. 104 Nev. at 62-63, 752 P.2d at 230-31 (emphasis added). Its interpretation of "final decision or order" is grounded in ordinary principles of statutory construction. Just as "unreasonable searches and seizures" in the Fourth Amendment means "unreasonable searches" *and* "unreasonable seizures," "final decision or order" means "final decision" and "final order." Antonin Scalia & Bryan A. Garner, *Reading Law* 147 (2012). The fact that NRS 463.315(1) uses the disjunctive "or" does not matter. *See id.* (explaining that "charitable institutions or societies" means "charitable institutions" and "charitable societies"). And as a practical matter, it would be odd for the Legislature to have undermined the requirement of a "final decision" by allowing any humdrum order to give rise to a petition for judicial review.

Wynn attempts to escape the import of *Resnick* in several ways, none of which are persuasive. First, he argues that

> [W]hile the *Resnick* court found that an interlocutory decision denying discovery to a license applicant was not a 'final decision or order' under NRS 463.315(1), it simultaneously recognized that the Legislature envisioned several other *dispositions* may qualify for judicial review in the

[2] "Wynn Opp'n" citations refer to Petitioner Stephen A. Wynn's Consolidated Opposition to Respondents' Countermotions to Dismiss and Reply Brief in Support of Petition for Judicial Review, Alternatively, for Writs of Mandamus and/or Prohibition.

> disciplinary context, including 'disciplinary orders, decisions to suspend or revoke licenses, and resolutions on the merits of certain controversies[.]'

Wynn Opp'n 7 (second alteration in original) (emphasis added).

The same language Wynn refers to dooms his case on this count. As he acknowledges, the *Resnick* court held that only "dispositions" are appropriate subjects of a petition for judicial review. 104 Nev. at 63, 752 P.2d at 231. A "disposition" is a "final settlement or determination." *Disposition*, BLACK'S LAW DICTIONARY (11th ed. 2019); *accord Disposition*, Dictionary.com, https://bit.ly/3g3VNYd (last visited May 19, 2020) (defining disposition as the "final settlement of a matter"). In other words, a "disposition" must dispose of the case.

Second, Wynn argues that this case "is a disciplinary matter, not a licensing matter in which the courts have no role." Wynn Opp'n 8. True, but irrelevant. *Resnick* applied the same statutory language that is at issue here, and its interpretation has binding force in this case.

Third, Wynn argues that "the Commission's order denying Mr. Wynn's motion to dismiss would certainly appear to be within the undefined 'disciplinary orders' referenced in *Resnick*." Wynn Opp'n 8. But the *Resnick* court referred only to "disciplinary orders" that are "dispositions" – that is, final orders imposing or not imposing discipline. 104 Nev. at 63, 752 P.2d at 231. As explained above, the Commission's order was not a disposition.

Fourth, Wynn argues that "unlike *Resnick*, the Commission did conduct a hearing on Mr. Wynn's motion in accordance with the procedural requirements of NRS 463.3133." Wynn Opp'n 8. That is also irrelevant. Wynn concedes that, under NRS 463.315(1), the disposition appealed from must be (1) "final decision or order" that was (2) "made after hearing or rehearing by the Commission pursuant to NRS 463.312 to 463.3145." *Id.* at 5. That is, the "final decision or order" and "made after hearing" prongs are two separate prerequisites that both must be met for a petition for judicial review to be available. *Id.* The *Resnick* court's holding as to the "made after hearing" prong was separate from the holding that is relevant here, which is that interlocutory orders cannot be the subject of a petition for judicial review. 104 Nev. at 63, 752 P.2d at 231.

Finally, Wynn argues that "*Resnick* contains no statutory interpretation of the phrase 'final decision or order' and, hence, does not support the proposition that only a 'final [ ] order' is subject to

judicial review." Wynn Opp'n 8. That is not true. The *Resnick* court's holding that "final decision or order" does not include interlocutory orders was an interpretation of the phrase "final decision or order." *See* 104 Nev. at 62-63, 752 P.2d at 230-31.

B. There Was No Hearing Pursuant to NRS 463.312 to 463.3145

A petition for judicial review is not available for the independent reason that there has not been a "hearing or rehearing by the Commission pursuant to NRS 463.312 to 463.3145." *See* NRS 463.315(1). A hearing under NRS 463.315(1) requires a "written decision on the merits." NRS 463.3145(1). There has been no such decision here – the Commission's order is explicit that it disposes of a preliminary, non-merits issue. R. at 267.[3]

II. <u>Wynn Has Not Undermined Any of the Four Independent Bases for Commission Authority</u>

If this Court disagrees with the above and determines that a petition for judicial review is available, or decides to consider Wynn's request for writ relief, it should still dismiss his petition. The deference owed to the Commission's order means that it must be affirmed as long as at least one of the Commission's four legal conclusions was a reasonable interpretation of the Act. Only if the plain language of the Act unambiguously contradicts all four bases for authority would granting Wynn's petition be proper. Each of the four bases is a reasonable interpretation of the Act, so Wynn's petition is due to be dismissed.

A. The Deference Owed to the Commission Means that the Commission's Interpretation Must Prevail if There Is Ambiguity

Wynn concedes that "Nevada courts will defer[ ] to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." Wynn Opp'n 12 (alteration in original) (quotation marks omitted). But he contends that "[w]hat the Agencies fail to explain is that courts will defer to an agency's interpretation of its governing statutes only when an ambiguity exists." *Id.*

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[3] "R." citations refer to the record on review filed by the Commission, with the prefix and leading zeroes omitted.

Although Wynn frames this point antagonistically, the parties are in agreement here. If this Court finds that the plain language of the Act supports the Commission's assertion of authority, then it must affirm the order below. If this Court finds that the Act's language is ambiguous, the same result obtains because this Court must defer to the Commission's reasonable interpretation of the Act and affirm the order below. *See Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006). The only way that Wynn can succeed is if this Court finds that the Act is so clear that it unambiguously contradicts all four bases for authority set out by the Commission.

Wynn attempts to resist this point by arguing that "courts will not defer to an agency interpretation that 'conflicts with the constitution or other statutes, *exceeds the agency's powers*, or is otherwise arbitrary and capricious.'" Wynn Opp'n 13 (quoting *Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Human Servs.*, 134 Nev. 129, 133, 414 P.3d 305, 308 (2018)). As the Commission explained in its previous brief, that argument is true but does nothing more but restate the question presented. Comm'n Br., *supra*, at 11.

It is true that courts do not defer to agency decisions that inappropriately expand their powers, just as courts do not defer to unreasonable agency interpretations of statutes. But the flipside is equally true – that as long as the agency's interpretation of the Nevada Legislature's grant of authority is reasonable, it is entitled to deference and must be upheld. *See Int'l Game Tech.*, 122 Nev. at 157, 127 P.3d at 1106; *City of Arlington v. FCC*, 569 U.S. 290, 307, 133 S. Ct. 1863, 1874-75 (2013). Accordingly, the question here is whether the Commission's order was reasonably consistent with the Act's grant of authority to it. *See City of Arlington*, 569 U.S. at 297, 133 S. Ct. at 1868.

The case that Wynn quotes – *Nuleaf* – makes that same point. *Nuleaf* addressed whether an agency had exceeded its authority by issuing certain certificates. *See* 134 Nev. at 136, 414 P.3d at 311. The Nevada Supreme Court held that the agency's conclusion that its enabling statute gave it that authority must be "afford[ed] great deference," and the high court affirmed the agency action. *Id.*

Wynn's last argument on deference is that "even a reasonable agency interpretation of an ambiguous statute may be stricken when it conflicts with legislative intent." Wynn Opp'n 13 (citing *Hotel Emps. Int'l Union v. State ex rel. Nev. Gaming Control Bd.*, 103 Nev. 588, 591, 747 P.2d 878, 880 (1987)). But he offers nothing to show that the Commission's interpretation was contrary to the

Legislature's intent. On the contrary, the Nevada Supreme Court and federal courts have consistently explained that the Legislature intended the Board and the Commission to have "broad authority" due to the "vital importance" of gaming to Nevada's economy and the "numerous concerns and problems of control" inherent in the gaming industry. Comm'n Br., *supra*, at 3-4 (collecting cases); *see also* NRS 463.143 (granting the Commission authority to "exercise any proper power and authority necessary to perform the duties assigned to it by the Legislature").

B. The Administrative Hold Is Not Relevant Here

Wynn contends that the "Board premised its jurisdiction in this action on the following allegation: 'the Gaming Control Board placed an administrative hold on Mr. Wynn's Findings of Suitability and retains jurisdiction over him for purposes that include disciplinary proceedings.'" Wynn Opp'n 14 (quoting R. at 6). From that, he argues that "[b]y failing to say a single word in their briefs defending the sole basis upon which Board claims to have jurisdiction over Mr. Wynn, the Agencies should be deemed to concede the merit of Mr. Wynn's petition." *Id.*

Wynn's fixation on the administrative hold is misplaced. The quoted language does *not* say that the Board's authority derives from the administrative hold. It simply states two separate facts – (1) that the Board placed an administrative hold on Wynn's findings of suitability and (2) that the Board has authority to seek discipline against him. *See* R. at 6. Disciplinary proceedings against Wynn are within the Agencies' authority for the four reasons set out in the Commission's order and extensively litigated in this action; the administrative hold is irrelevant. *See* R. at 265-67.

C. NRS 463.1405(4) Does Not Depend on NRS 463.1405(1)

1. Wynn's Theory of How NRS 463.1405 Works Finds No Support in the Act's Text

Wynn spends much of his brief elaborating a theory of how he thinks NRS 463.1405 works. *See* Wynn Opp'n 15-18. According to him, the Board can make recommendations based only on the investigations and observations authorized by NRS 463.1405(1). *Id.* at 16. He asserts that the Commission can take action based only on that recommendation. *Id.*

What Wynn fails to do, however, is identify anything in the *text* of NRS 463.1405 that supports his theory. Nothing in the text of NRS 463.1405(1) shows that it is an exhaustive list of all of the bases

for a Board investigation. Nothing in the text of NRS 463.1405(3) limits the Board's "full and absolute power and authority to recommend" the revocation of any finding of suitability to only recommendations arising out of NRS 463.1405(1) investigations. And nothing in the text of NRS 463.1405(4) limits the Commission's "full and absolute power and authority" to revoke any finding of suitability to only disciplinary actions arising out of NRS 463.1405(1) investigations.

The absence of textual support for Wynn's theory is striking because another subsection of NRS 463.1405 shows that the Legislature knows how to tie provisions to one another when it wants to. NRS 463.1405(2) establishes procedures for obtaining information from the Federal Bureau of Investigation. Its text limits it to "investigation[s] of an applicant *pursuant to this section*." NRS 463.1405(2) (emphasis added). That means that NRS 463.1405(2) applies only to investigations based on NRS 463.1405(1). The lack of any similar limiting language in the provisions granting full and absolute authority to recommend and effect revocation of a finding of suitability is persuasive evidence that Wynn's interpretation is incorrect. *See Sheriff v. Andrews*, 128 Nev. 544, 548, 286 P.3d 262, 264 (2012).

Wynn's argument is also flawed in that it ignores the other ways, beyond NRS 463.1405, for the Board to initiate an investigation. For example, NRS 463.310(1) provides that the Board is empowered to investigate (among other things) "whether there has been any violation" of the gaming laws, as well as to investigate "[a]s directed by the Commission." NRS 463.310(1)(a), (e). Wynn does not explain how his cramped reading of NRS 463.1405 comports with the broad investigatory authority granted by NRS 463.310(1), or why an investigation authorized by NRS 463.310(1) cannot be the basis for revocation under NRS 463.1405(4).

2. Wynn's Other Arguments on NRS 463.1405 Do Not Help His Cause

Wynn's invocation of the canon of construction that holds that statutory provisions should be read in harmony does not advance his case. *See* Wynn Opp'n 16. The harmonious-reading canon is not a basis for shackling NRS 463.1405(3) and 463.1405(4) to other provisions, absent statutory text showing that that is what the Legislature intended. All that the canon means is "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory." Scalia & Garner, *supra*, at 180. Nothing in the Commission's reading of NRS 463.1405 would cause the provisions to conflict; instead, . . .

they supplement each other and NRS 463.310 to create a comprehensive scheme of monitoring, investigation and enforcement.

Along the same lines, the principal case cited by Wynn, *In re Discipline of Agwara*, No. 70361, 132 Nev. 983, 2016 WL 4005655 (Nev. July 22, 2016) (per curiam) (unpublished disposition), is neither here nor there. *Agwara* concerns attorney discipline, and it has nothing to say about the purported relationship between the different subsections of NRS 463.1405. *See* 2016 WL 4005655, at *1. To the extent that verb tense is important here, the relevant provisions – NRS 463.1405(3) and (4) – use the past tense by granting full and absolute authority to discipline persons "*found* suitable." NRS 463.1405(3), (4) (emphasis added).

3. Even if Wynn's Arguments Were Correct, He Would Still Lose

Even if this Court is inclined to agree with Wynn's arguments, it should still rule against him for two reasons. First, Wynn's arguments are not grounded in the text of NRS 463.1405, but instead rely on applying canons of construction to infer a purported restriction that the Legislature wordlessly imposed. That is an argument, at the very most, that the statute is ambiguous. And if the statute is ambiguous, then then this Court must defer to the Commission's reasonable conclusion that it has authority to revoke findings of suitability. *See Int'l Game Tech.*, 122 Nev. at 157, 127 P.3d at 1106.

Second, Wynn has not refuted the Commission's point NRS 463.1405(1) was one basis for the Board's investigation. Comm'n Br., *supra*, at 14 n.9. The Board began its investigation "immediately" after reports of Wynn's alleged misconduct were printed, when he was still an executive and controlling shareholder of Wynn Resorts, Ltd. (together with its subsidiaries and affiliates, the "Company"). *See* R. at 6, 9. The Company was a licensed gaming operation. Consequently, the Board's investigation constituted "observ[ing] the conduct" of persons "having a material involvement directly or indirectly with a licensed gaming operation" under NRS 463.1405(1). Wynn has no answer on that point.

D. NRS 463.310 Is an Express Grant of "Powers" to Revoke Findings of Suitability and Fine Persons Who Have Been Found Suitable

1. Wynn's Reading of NRS 463.310 Is Atextual and Ahistorical

Next, Wynn returns to a similar theme, contending that "[w]hen read as a whole and harmonized with the rest of the statutory scheme, it is clear that NRS 463.310 is an enforcement mechanism that is

dependent upon the scope of powers authorized in NRS 463.1405(1). Wynn Opp'n 18 (citation omitted). Once again, Wynn points to nothing in the text of NRS 463.310 that supports his contention. *See id.* at 18-20. Likewise, his arguments that NRS 463.310 "is not an independent grant of jurisdictional power" and that is it not "a 'jurisdictional' statute" do not cite any authority at all. By contrast, the Commission's previous brief showed that NRS 463.310's text supported its reasonable conclusion "that [the Commission's] authority to 'revoke' any 'finding of suitability' and '[f]ine each person' who has been 'found suitable' granted it authority to revoke Wynn's findings of suitability and fine him. Comm'n Br., *supra*, at 14 (quoting NRS 463.310(4)(b), (d)).

Even putting aside the facts that Wynn's interpretation of NRS 463.310 contradicts the statute's text and is unsupported by any authority, his analysis does not make sense on his own terms. Wynn's argument is effectively that, although the Legislature enacted NRS 463.310 in 1955, it is not a "jurisdictional" statute, so the Commission did not have "jurisdiction over those having material involvement with licensees" until the enactment of NRS 463.1405 in 1981. *Id.* His argument that the Agencies lacked regulatory authority over persons materially involved with licensees for all of the 1960s and 1970s does not comport with this State's history of gaming regulation. *See, e.g.*, *State v. Rosenthal*, 93 Nev. 36, 39, 559 P.2d 830, 832 (1977).

2. The Question of Whether Wynn's Findings of Suitability Are Still Effective Is for the Commission to Decide

Wynn also argues that he is not a "person . . . which *is* . . . found suitable" subject to NRS 463.310. Wynn Opp'n 19 (ellipses in original). That is because, according to him, his "findings ended because he left the industry." *Id.* at 19-20. As an initial matter, the provisions quoted by Wynn apply only to the Commission's authority to impose fines; they do not apply to its authority to revoke his findings of suitability. *See* NRS 463.310(2)(b), (4)(d).

As to the substance of his argument, the Commission explained in its previous brief that it is not an established fact whether Wynn's findings of suitability have lost their effectiveness by operation of law. Comm'n Br., *supra*, at 13. The relevant regulation gives the Commission discretion to determine whether a finding of suitability is no longer effective, providing that "[i]f the nature of the involvement changes from that for which the applicant is found suitable, he *may* be required to submit himself to a

determination by *the* [*C*]*ommission* of his suitability in the new capacity." Nev. Gaming Comm'n Reg. 4.030(10) (emphasis added). Wynn can ask the Commission to determine that his findings of suitability are no longer valid, such that NRS 463.310's fine-related provisions arguably do not apply to him, but that request would be within the Commission's authority to rule on. *See id.*

In a footnote, Wynn responds that "[u]nlike NRS 463.270(8), which empowers the Commission to establish the conditions for the voluntary surrender of a gaming license, [Nevada Gaming Commission] Regulation 4.030(10) contains no such language applicable to findings of suitability, which are distinct from gaming licenses." Wynn Opp'n 21 n.10. But Wynn is not arguing that he voluntarily surrendered his findings of suitability, he is arguing that his findings ended automatically "because he left the industry." *Id.* at 19-20. Whether or not the Legislature intended there to be a procedure for Wynn to voluntarily surrender his findings of suitability is irrelevant to his argument.

In that same footnote, Wynn also asserts that "[w]hile the Commission does have the power under Regulation 4.030(10) to determine whether findings remain in good standing after a suitable person transfers to a new position/location within the industry, no such power exists when the person leaves the industry entirely." Wynn Opp'n 21 n.10. The problem is that the Commission's authority to determine the continuing validity of a finding of suitability commences when "the nature of the involvement changes from that for which the applicant is found suitable." Nev. Gaming Comm'n Reg. 4.030(10). Because the nature of Wynn's involvement appears to have changed, the Commission has authority in the first instance to determine the continuing validity of his finding of suitability (if he raises that affirmative defense during the merits of his disciplinary proceeding). *See id.*

3. Language in Other *Regulations* Does Not Shed Light on the Language in This *Statute*

Lastly, Wynn argues that "[w]hen the legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." Wynn Opp'n 21. And he points to several regulations in different contexts that provide that "[t]he Commission retains jurisdiction" over parties that have severed their relationship with the gaming industry. Wynn Opp'n 20. But Wynn's legal premise is irrelevant because the *Legislature* did not write the cited regulations, the Commission did. The Commission has not yet issued any regulations in the findings of suitability context analogous to the

ones Wynn cites, so there is nothing to compare to. There is no need to look beyond NRS 463.310, which on its own establishes the Commission's authority to revoke findings of suitability and fine persons who have been found suitable.

E. NRS 463.310 and the Commission's Inherent Authority Empower It to Enforce the Board's Order to Appear

Turning to the Commission's order-to-appear authority, Wynn does not contest that the Board and Commission may order any "witness" to appear in connection with an investigation. *See* Wynn Opp'n 22. And he does not dispute that he was the appropriate subject of an order to appear because he was a "witness" to the alleged violations of the Act that the Board was investigating when it ordered him to appear. *See id.* So he implicitly concedes the validity of the Board's order for him to appear and testify.

Nevertheless, Wynn puts forward two reasons why he thinks that the order to appear is not a basis for the Commission's authority. First, he complains that the Commission is considering "the identical ultimate discipline against Mr. Wynn in his capacity as a mere 'witness' – revocation of suitability findings and substantial fines." Wynn Opp'n 22. He does not identify anything in the Act or Nevada caselaw that prevents the Commission from considering the same types of discipline for violations of different parts of the Act. *See id.* Indeed, given the limited universe of remedies available to the Commission, it is inevitable that sometimes the same forms of discipline will be considered for different types of violations. To the extent that he is complaining that the potential discipline is too harsh, he is free to make that argument to the Commission in his case's merits hearing, but that is a topic squarely within the Commission's authority. *See* NRS 463.310(4); Nev. Gaming Reg. 7.240.

Second, Wynn argues that "[n]othing in NRS 463.310 empowers the Agencies to punish a 'witness' who purportedly failed to appear for an investigative interview." Wynn Opp'n 22. But NRS 463.310 does permit the Commission to issue discipline where "the Board is satisfied that" a finding of suitability should be revoked or a person found suitable should be fined. NRS 463.310(2), (4). As a person who has been found suitable, Wynn is within that language.

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Beyond NRS 463.310, there is an independent basis for disciplining a witness who violates an order to appear. As set out in the Commission's order denying Wynn's motion to dismiss, the Commission has inherent authority to enforce Board and Commission orders to appear. R. at 266.

Courts have "inherent authority" to issue contempt orders and sanctions to enforce their decrees – otherwise witnesses could ignore subpoenas or discovery orders with impunity. *See Halverson v. Hardcastle*, 123 Nev. 245, 262, 163 P.3d 428, 440 (2007) (en banc). Just the same, disciplining witnesses who refuse to comply with valid orders to appear is a power "necessary to perform the duties assigned to [the Commission] by the Legislature" and within the Commission's NRS 463.143 authority. *See* NRS 463.143.

F. Considering Discipline Against Wynn Is Within NRS 463.413's Express Grant of Authority

1. Wynn's Proposed Rule Would Undermine Enforcement in the Same Way a Rule Barring Prosecution of Fugitives Would

NRS 463.143 provides that the "Commission may exercise any proper power and authority necessary to perform the duties assigned to it by the Legislature." Crucially, that grant of authority "is not limited by any enumeration of powers in [the Act]." NRS 463.143.

In its previous brief, the Commission explained why enforcing the Act against a person who has removed himself from the gaming industry is a necessary power within the scope of NRS 463.143. Comm'n Br., *supra*, at 16-20. It pointed out that allowing regulatees to escape Commission authority by divesting would undermine the Act's deterrent force, much as a rule that criminals who leave the State are immune from prosecution would encourage lawbreaking. *Id.* at 17.

Attacking that analogy, Wynn argues that the Board and Commission's "powers to discipline are statutorily-limited to those with present-tense involvement in licensed gaming, whereas Nevada law enforcement authorities maintain jurisdiction to prosecute crimes committed within the State's borders until the applicable statute of limitations expires." Wynn Opp'n 23. The premise of that argument is baseless: nothing in the Act limits the Commission's authority to "present-tense involvement." It is true that some provisions, like NRS 463.1405(1), are written in the present tense. But NRS 463.143 expressly . . .

prohibits attempting to limit the Commission's authority based on other enumerated powers, such as NRS 463.1405(1).

Wynn also asserts that the analogy is inapt because a "person who leaves the gaming industry, by definition, presents no regulatory threat to the public or its interest in gaming, whereas a criminal who flees Nevada after engaging in criminal conduct remains a threat to the People and otherwise accountable to the Executive Branch." Wynn Opp'n 23. But fugitives and divested gaming figures like Wynn pose the same threat to the Nevada public interest because, without enforcement, they can always return to harm the public again. Moreover, protecting the public is only one third of the equation – enforcing the laws against fugitives and people like Wynn serves the additional purposes of deterring others' bad conduct and effecting justice. *See* Comm'n Br., *supra*, at 17.

2. NRS 463.143 Is an Express Grant of Authority

Moving on, Wynn cites *City of Henderson v. Kilgore*, 122 Nev. 331, 131 P.3d 11 (2006), for the proposition that "[w]hile an administrative agency may possess an *implied limited power*, any implied limited power *must be essential to carry out an agency's express statutory duties*." Wynn Opp'n 24 (quotation marks omitted). That principle is irrelevant because NRS 463.143 is an express grant of power to the Commission to take all "necessary" steps to enforce the Act. Far from an implied power, NRS 463.143 is a key part of the Legislature's delegation of "broad authority" to the Commission to discharge its "awesome responsibility of regulating the gaming industry and keeping undesirable elements out of the gaming industry." *See Prods. & Leasing v. Hotel Conquistador, Inc.*, 573 F. Supp. 717, 721 (D. Nev. 1982) (quoting *State v. Rosenthal*, 93 Nev. 36, 559 P.2d 830 (1977)), *aff'd sub nom. Prod. & Leasing, Ltd. v. Hotel Conquistador, Inc.*, 709 F.2d 21 (9th Cir. 1983).

As such, the Commission's application of NRS 463.143 is not to be judged by whether it fell within the confines of implied-powers doctrine. The relevant question on this point is whether the Commission reasonably interpreted the Legislature's broad delegation of power in NRS 463.143. It did.

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3. Exercising Authority over Persons Who Have Left the Gaming Industry Is Necessary for the Commission to Maintain Public Confidence and Protect the Public Interest

The balance of Wynn's brief puts forward myriad arguments about how the Commission's exercising authority in cases like his is not necessary for it to accomplish its legislatively assigned duties. His shotgun approach fails to hit the mark.

Enforcement against third parties: Wynn argues that the Agencies "clearly retain power over alleged violations of gaming laws or regulations even after an alleged violator has left the industry" because the licensee and existing management "remain responsible under the Act such that the [the Agencies] can pursue and impose discipline (including revocation and fines) against [them]." Wynn Opp'n 24. Wynn's argument that enforcing against innocent or less-culpable third parties, instead of the person who actually violated the Act, is not convincing.

For one thing, Wynn ignores the cases where discipline against the non-violator would be inappropriate or unavailable. Imagine a scenario where a mafia figure violates the Act by extorting an innocent licensee, before ceasing any involvement in gaming. It is not reasonable to say that disciplining the *licensee*, while inoculating the extortionist from enforcement, is consistent with the Commission's duty to protect the public interest. *See* NRS 463.140(1). For another thing, the deterrent effect of disciplining an individual is often greater than the threat of enforcing against a third party with which the individual is no longer associated.

To be sure, in *this* case disciplining the Company (in addition to Wynn) was appropriate, because the Company was complicit in Wynn's alleged violations. *See* R. at 5. But that does not mean that it was an adequate substitute for disciplining Wynn himself (if the Board proves its allegations), let alone that disciplining the licensee or management would *always* be an adequate substitute.

Validity of Wynn's findings of suitability: Wynn repeats his argument (rebutted by the Commission above, *see supra* Argument Part II.D.2) that his findings of suitability are no longer valid. Wynn Opp'n 24-25. Based on that, he asserts that Wynn would have to seek a new finding of suitability if he ever reentered the gaming industry, a process that (according to him) "unquestionably protects the public and satisfies the public policy of the State." *Id.* at 25.

. . .

Just focusing on protecting the public, and putting aside for now the other virtues of enforcement, revocation is more protective than Wynn's suggestion of doing nothing. That is because revocation imposes substantive limitations on the person formerly found suitable, for example by requiring a licensee to obtain approval from the Commission before entering into any contract with the person who has had his finding of suitability revoked. *See* NRS 463.166(1)(c).

Consequences of revocation: Wynn also argues that enforcement here is not necessary because a couple of the consequences of revocation have already been accomplished due to his voluntary actions. Wynn Opp'n 25-26. However, the disciplinary process here would accomplish additional purposes if the Board proves its case, such as imposing a fine and triggering the approval-of-contracts requirement mentioned in the previous paragraph. Furthermore, a fair and thorough disciplinary proceeding culminating in a Commission determination one way or the other – unlike any voluntary action – would help maintain "public confidence and trust" in the regulation of gaming, a principal purpose of the Commission. *See State v. Glusman*, 98 Nev. 412, 417, 651 P.2d 639, 643 (1982), *appeal dismissed sub nom. Glusman v. Nevada*, 459 U.S. 1192, 103 S. Ct. 1170 (1983). But the clearest indication that disciplinary proceedings would achieve purposes not already accomplished by Wynn's voluntary actions is this: if everything that could be accomplished has already occurred, why is Wynn spending the time and money to appeal an interlocutory order that did not even determine liability?

Potential stipulation: Wynn further argues that if the Agencies' "true concern is ensuring that [his] departure from Nevada's gaming industry is permanent, then the parties could have entered a stipulation or contract to that effect without the taxpayer expense associated with this disciplinary proceeding." Wynn Opp'n 26. That argument is at odds with his overall contention that the Commission lacks authority to subject him to discipline. If he is not within the Commission's authority, Wynn and others in his situation would have no incentive to settle with the Commission, and the Commission would have no leverage with which to conclude a settlement.

Exit tax: Finally, Wynn argues that "[n]othing in the applicable statutes or regulations, however, expressly or impliedly authorizes the Board to seek, or the Commission to impose, what essentially amounts to an exorbitant 'exit tax' to leave Nevada's gaming industry." Wynn Opp'n 26. The Board is . . .