IN THE SUPREME COURT OF THE STATE OF NEVADA

ORBITZ WORLDWIDE, LLC, ORBITZ LLC, ORBITZ INC, TRAVELSCAPE LLC, TRAVELOCITY INC, CHEAP TICKETS INC, EXPEDIA INC, EXPEDIA GLOBAL LLC, HOTELS.COM LP, HOTWIRE INC, BOOKING HOLDINGS INC, PRICELINE.COM LLC, TRAVELWEB LLC, TRAVELNOW.COM INC, AGODA INTERNATIONAL USA LLC, HOTEL TONIGHT INC, HOTEL TONIGHT LLC,

Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK and the Honorable MARK R. DENTON,

Respondents,

and

STATE OF NEVADA EX REL. MARK FIERRO and SIG ROGICH,

Real Parties in Interest.

Supreme Court No.:

District Court Case No.:

A-20-814111-B

Dept. 13

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PETITION
From the Eighth Judicial District Court
The Honorable Mark R. Denton

PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PROHIBITION

Docket 85111 Document 2022-24280

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Anne Marie Seibel, Esq. Tiffany J. deGruy, Esq. BRADLEY ARANT BOULT CUMMINGS LLP 1819 5th Avenue N Birmingham, Alabama 35203 *Attorneys for Petitioners Booking Holdings, Inc., Priceline.com LLC, Travelweb LLC, and Agoda International USA LLC*	Catherine A. Battin, Esq. Jon Dean, Esq. MCDERMOTT WILL & EMERY LLP 444 West Lake Street Chicago, Illinois 60606 *Attorneys for Petitioners Hotel Tonight, Inc. and Hotel Tonight LLC*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Nevada Rule of Appellate Procedure 26.1, the undersigned counsel of record certify the following in order that the justices of this Court may evaluate disqualification or recusal:

Petitioner Orbitz, LLC is a Delaware limited liability corporation, which is 99% owned by Petitioner Orbitz, Inc., a Delaware corporation which is wholly owned by Petitioner Orbitz Worldwide, LLC, a Delaware limited liability corporation which is wholly owned by Orbitz Worldwide, Inc. Orbitz Worldwide, Inc. is a Delaware corporation, which is wholly owned by Expedia, Inc. Orbitz, LLC is 1% owned by O Holdings, Inc., which is indirectly owned by Expedia, Inc.

Petitioners Travelscape LLC and Expedia Global, LLC are Nevada limited liability corporations which are wholly owned by Expedia, Inc.

Petitioner Hotels.com LP is a Texas limited liability partnership, which is wholly owned by Hotels.com GP, LLC, a Texas limited liability corporation and HRN 99 Holdings, LLC, a New York limited liability corporation. Hotels.com GP, LLC and HRN 99 Holdings, LLC are wholly owned by Expedia, Inc.

Petitioner Hotwire, Inc. is a Delaware corporation which is wholly owned by Expedia, Inc.

Petitioner Expedia, Inc. is a Washington corporation which is wholly owned by Expedia Group, Inc., a publicly held Delaware corporation. No publicly traded

corporation owns 10% or more of Expedia Group, Inc.'s stock.

Petitioners Hotel Tonight, Inc. and Hotel Tonight, LLC are Delaware corporations, which are wholly owned by Airbnb, Inc., a Delaware corporation. Airbnb, Inc. has no parent corporation and no publicly traded corporation owns 10% or more of Airbnb, Inc.'s stock.

Petitioner Booking Holdings, Inc., a publicly held Delaware corporation, is the ultimate parent corporation of Petitioners Priceline.com LLC (a Delaware limited liability company), Travelweb LLC (a Delaware limited liability company), and Agoda International USA LLC (a Delaware limited liability company). No publicly traded corporation owns 10% or more of Booking Holdings, Inc.'s stock.

There are no existing legal entities named Travelocity, Inc., Cheap Tickets, Inc., or Travelnow.com, Inc.

Finally, Petitioners disclose the below law firms whose partners or associates have appeared for Petitioners in this case or are expected to appear in this Court.

- ❖ All Petitioners
- ❖ Orbitz Worldwide, LLC, Orbitz, LLC, Orbitz, Inc., Travelscape LLC, Travelocity, Inc., Cheap Tickets, Inc., Expedia, Inc., Expedia Global, LLC, Hotels.Com, LP, Hotwire, Inc., and Travelnow.com, Inc.
- ❖ Booking Holdings, Inc., Priceline.com LLC, Travelweb LLC, and Agoda International USA LLC
- ❖ BALLARD SPAHR LLP before this Court and the district court.
- ❖ MORGAN, LEWIS & BOCKIUS LLP before this Court and the district court.
- ❖ BRADLEY ARANT BOULT CUMMINGS LLP before this Court and the district court.

- ❖ Hotel Tonight, Inc. and Hotel Tonight LLC
- ❖ MCDERMOTT WILL & EMERY LLP before this Court and the district court.

Dated: August 2, 2022

BALLARD SPAHR LLP

By: /s/ Joel E. Tasca, Esq.
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ROUTING STATEMENT

A writ petition must state "whether the matter falls in one of the categories of cases retained by the Supreme Court pursuant to NRAP 17(a) or presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)." NRAP 21(a)(3)(A). This matter does not presumptively fall within a category of cases assigned to the Court of Appeals. It should be retained by the Supreme Court because it raises as the sole and principal issue a legal question of first impression under the so-called "government action bar" of the Nevada False Claims Act. *See* NRAP 17(a)(11).

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INTRODUCTION

This Petition raises a case-dispositive legal question of first impression regarding the proper interpretation of the Nevada False Claims Act ("NFCA"): Whether a suit by a *qui tam* plaintiff acting on behalf of the government for alleged violations of the NFCA can be maintained while the government itself is a party to a separate civil suit based on the same allegations or transactions as those in the *qui tam* suit? The answer clearly is no, and the district court erred in holding otherwise. The NFCA's so-called "government action bar" expressly states that "***[a]n action may not be maintained*** by a private plaintiff pursuant to this chapter: . . . (b) If the action is based upon allegations or transactions that are the subject of a civil action or an administrative proceeding for a monetary penalty to which the State or a political subdivision is already a party." NRS 357.080(3) (emphasis added).

Here, two private plaintiffs—*qui tam* relators under NRS 357.080(1) ("Relators")—commenced an NFCA action on the government's behalf against Petitioners (on-line travel companies) based on the alleged avoidance of transient lodging taxes on hotel transactions that Petitioners facilitated in Clark County, Nevada ("the Qui Tam Action"). A year later, Clark County—represented by the same counsel who represent Relators in this case—filed a separate civil suit against Petitioners asserting non-NFCA causes of action to recover transient lodging taxes on the ***same*** hotel transactions ("the Clark County Action"). The co-existence of

these two suits and the fact that the Qui Tam Action is based on allegations or transactions that are the subject of the separate Clark County Action are not in dispute. To the contrary, as shown below, the district court made express factual findings establishing both elements. Nor is there any dispute that the Relators have been "maintaining" the Qui Tam Action notwithstanding the Clark County Action.

In denying Petitioners' Motion for Summary Judgment based on these undisputed facts, however, the Eighth Judicial District Court committed legal error. After making the factual finding that the "Clark County Action is based on the same underlying allegations or transactions that are the subject of Relators' *qui tam* action," the district court concluded as a matter of law that the government action bar does not apply: "because the Clark County Action was filed after this [*qui tam*] action was commenced, Clark County is not 'already a party' to the Clark County [suit] for purposes of the NRS 347.080(3)." (I PA 297-98.) In so holding, the district court improperly added a new element to the statute, requiring that the separate civil action must pre-date the *qui tam* action. That conclusion finds no support in the statute and, if allowed to stand, would have the effect of allowing *two* actions on behalf of the government to proceed simultaneously even though they are based on the same underlying allegations or transactions.

The government action bar contains no such sequencing requirement. The statute instead prohibits a *qui tam* relator from maintaining their *qui tam* suit when

the allegations or transactions in their suit are the subject of a separate government suit. It is the mere existence of the two suits—regardless of their filing sequence—that triggers the bar. The Legislature deliberately, and logically, determined that, once the *government* sues, *it* determines the forum and manner in which *its* claims are adjudicated, and the *qui tam* action must give way—the relator's private "action may not be maintained."

Nor is there any ambiguity about what the Legislature meant by use of the word "maintain," given that the Legislature affirmatively *changed* this term when it otherwise adopted language from the federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. In particular, the federal FCA's government action bar specifies that "[i]n no event may a person *bring* [a *qui tam* action] which is based on allegations or transactions which are the subject of a civil suit or administrative civil monetary penalty proceeding in which the Government is already a party." 31 U.S.C. § 3730(e)(3) (emphasis added). Rather than copy the word "bring"—which could connote a need for sequencing of the two actions—the Nevada Legislature employed the broader word "maintain," making clear that the filing sequence of the two actions does not matter for purposes of Nevada's statutory bar.

Pursuant to this Court's decision in *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, the Legislature's departure from established language in the federal FCA is compelling evidence of legislative intent that must be given effect. 122 Nev. 132,

154, 127 P.3d 1088, 1103-04 (2006) (finding that, unlike the federal FCA, the NFCA allows claims based on alleged tax violations, and holding: "This court presumes that the Legislature enacts a statute 'with full knowledge of existing statutes relating to the same subject.' Thus, the presumption that the Legislature, in enacting a statute similar to a federal statute, intended to adopt the federal courts' construction of that statute, is rebutted when the state statute clearly reflects a contrary legislative intent.") (internal citations omitted).

The district court's decision addresses a legal question of first impression. Petitioners are unaware of any state or federal court interpreting the NFCA's government action bar in circumstances where the government's civil action post-dates the *qui tam* suit. And the decision has substantial implications for state litigation prerogatives. In *qui tam* actions, the government is the real party in interest. *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 930 (2009). That status does not change merely because—as in this case—the government declined to intervene in Relators' case. Any proceeds from the Qui Tam Action, whether by judgment or settlement, are paid to the government. NRS 357.040(1). Likewise, any determination that the underlying taxes are not owed would be binding on the government. Because the claims belong to the government, the Legislature understandably determined that the *government* has the final say on how *its* rights are adjudicated. Thus, once the government decides to pursue its

rights through a separate civil action (as here), that election means that any *qui tam* action based on the same allegations or transactions must give way—it "may not be maintained." There are no exceptions. By enabling Relators to separately maintain NFCA claims after the government initiated its own civil action for the same conduct, the district court committed clear legal error, frustrated the legislative intent of placing control over government claims in government hands, exposed Petitioners to duplicative litigation, and assured the waste of judicial resources by sanctioning two overlapping suits.

This Court should issue a writ and direct the district court to grant summary judgment to Petitioners pursuant to the NFCA's government action bar.

RELIEF SOUGHT

Petitioners seek a writ of mandamus or, in the alternative, a writ of prohibition, directing:

1. The Eighth Judicial District Court and the Honorable Mark R. Denton (collectively, "district court") to vacate the Order entered on April 29, 2022, which denied Petitioners' Motion for Summary Judgment based on application of the NFCA's government action bar, and (as may be necessary) to vacate the Order entered on July 12, 2022, which denied Petitioners' Motion for Reconsideration of the April 29 Order; and

2. The district court to grant summary judgment to Petitioners pursuant to the government action bar.

ISSUE PRESENTED

Did the district court err in holding that NRS 357.080(3)(b) does not apply if the *qui tam* suit was filed before the government's separate civil suit? Petitioners submit that the NFCA's government action bar is indifferent to case-filing sequence. The bar applies here, where it is undisputed that: (a) the Qui Tam Action is based on allegations or transactions that are the subject of a separate civil action brought by Clark County; and (b) Relators are maintaining the Qui Tam Action notwithstanding the Clark County Action. Thus, a pure legal question of first impression exists as to whether Relators may "maintain" their *qui tam* action simply because they filed their action before Clark County filed its suit.

FACTUAL ALLEGATIONS RELEVANT TO PETITION

On April 24, 2020, proceeding as private parties under the *qui tam* provisions of the NFCA, NRS 357.080(1), Relators Fierro and Rogich commenced this action in the Eighth Judicial District Court (Clark County).[1] (I PA 001-11.) The named

[1] Although it remains a real-party-in-interest, Nevada declined to intervene in Relators' suit. NRS 357.110(2) ("If the Attorney General . . . elects not to intervene, the private plaintiff may proceed with the action.").

defendants—Petitioners[2]—are alleged to be on-line travel companies ("OTCs"). (I PA 002-07.) Relators allege that the OTCs knowingly avoided obligations to pay certain combined transient lodging taxes owed to Clark County—a portion of which Clark County remits to the State—for hotel transactions the OTCs facilitated for their customers. (I PA 006-07.) According to the Complaint:

> Defendants knowingly and improperly avoided and/or decreased their obligation to pay money to the State by failing to remit the transient lodging tax on the full amount of rent charged to guests that is due and owing to the State of Nevada pursuant to Clark County Code 4.08, *et seq.* and Nevada Revised Statute 244A, 244.335, *et seq.*

(I PA 008, ¶ 51.)

On May 14, 2021, Clark County filed its own civil action. (I PA 203.) That case was removed to federal court. *Clark County, Nevada v. Orbitz Worldwide, LLC, et al.*, No. 2:21-CV-1328 JCM (VCF) (D. Nev.). Each Defendant in the Qui Tam Action also is a defendant in the Clark County Action. (I PA 203.)

[2] "Petitioners" are Orbitz Worldwide, LLC, Orbitz, LLC, Orbitz, Inc., Travelscape LLC, Travelocity, Inc., Cheap Tickets, Inc., Expedia, Inc. Expedia Global, LLC, Hotels.Com, LP, Hotwire, Inc., Travelnow.com, Inc. (together, "Expedia Petitioners"), Booking Holdings, Inc., Priceline.com LLC, Agoda International USA LLC, Hotel Tonight Inc., and Hotel Tonight LLC. On April 1, 2014, priceline.com LLC assumed the former operations of priceline.com Incorporated (n/k/a Booking Holdings Inc.) as they relate to the merchant model hotel business at issue. Relators improperly named Travelocity, Inc., Cheap Tickets, Inc., and Travelnow.com, Inc. as defendants, even though they are not existing legal entities.

Allegations or transactions at issue in the Qui Tam Action are the subject of the Clark County Action. In fact, Clark County—which is represented by the same private law firm and attorneys who are representing Relators in this *qui tam* action—used Relators' *qui tam* complaint as the template for drafting the Clark County complaint. Many of the Clark County allegations are either verbatim or substantively identical to those in the *qui tam* complaint. (*Compare* I PA 002-07 at ¶¶ 3, 4, 5, 36, 37, 40 *with* I PA 204-11 at ¶¶ 1, 2, 3, 56, 33, 47.)

PROCEDURAL HISTORY

On March 5, 2021, Petitioners moved to dismiss the Qui Tam Action, on multiple grounds, including that the allegations and transactions in the complaint had been disclosed publicly prior to suit, and that neither Relator qualified as an "original source" of the information. (I PA 030-31.) The district court heard argument on May 17, 2021.[3]

Following the hearing, the court dismissed with prejudice Counts Two through Six of the complaint (causes of action for which Relators had no standing to sue on the government's behalf), but allowed Count One, the NFCA cause of action,

[3] Petitioners did not raise the government action bar in their Motion to Dismiss because they filed that motion more than two months *before* Clark County sued. (I PA 030, 203.)

to move forward. (I PA 063-64.) Since that ruling, Relators have been proceeding solely in their capacity as private plaintiffs under NRS 357.080, which codifies the government action bar. (*See id.*; I PA 002.)

On June 30, 2021, Petitioners filed their Answers, raising the government action bar as an affirmative defense. (*See, e.g.,* I PA 130.)

On June 30, 2021, Petitioners also filed a Motion for Bifurcated Discovery, seeking to limit initial discovery to the threshold issue of whether the complaint is subject to dismissal under the NFCA's public disclosure bar, NRS 357.100. (I PA 178-79.) In opposition, Relators attached and repeatedly cited to the Clark County complaint, and expressly admitted that the Clark County suit and their *qui tam* action are based on the same allegations or transactions.

> On May 14, 2021, Clark County, Nevada filed ***a new lawsuit*** … ***against the same Defendants*** as named in the [*qui tam* action] ***based upon the same failure to pay transient lodging taxes to various Nevada governmental authorities as is the subject of the [qui tam action]***.

(I PA 152-53 (emphasis added).)[4]

[4] On September 20, 2021, the court granted Petitioners' bifurcation motion, ordering the parties to focus discovery in "Phase One" on gathering facts relevant to the public disclosure bar (*see* I PA 179.) Just before completion of public disclosure discovery, the Attorney General sent a letter to the court purporting to state an "objection" to a "public disclosure bar" dismissal under NRS 357.100. The sufficiency of that letter for purposes of the public disclosure bar has not been adjudicated and is not before this Court in this proceeding.

On February 24, 2022, Petitioners filed a Motion for Summary Judgment based on the government action bar, establishing that the *qui tam* action is based on allegations or transactions that are the subject of a separate civil action brought by Clark County and that, notwithstanding that separate action, Relators were "maintaining" their *qui tam* action in violation of NRS 357.080(3)(b). (I PA 184-218.) Relators opposed the Summary Judgment Motion, but did not contest the material facts relied on by Petitioners. (*See* I PA 219-40; II PA 241-253.)

On April 5, 2022, Relators filed a Motion for Leave to Amend Complaint. (II PA 276-95.) In their Motion, Relators described the purpose of the proposed amendment as "clarifying" that their original *qui tam* complaint extended to avoidance of purported tax obligations in other Nevada counties (including Washoe, Douglas, Lyon, and Nye) in addition to Clark County. (II PA 280.)[5] Pursuant to a stipulation in which Petitioners reserved all rights to challenge the Amended Complaint on any grounds, Relators later filed the Amended Complaint. (II PA 314-16; II PA 336-44.)[6]

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[5] That assertion is at odds with the express language of the original complaint, which only mentions Clark County and only cites the Clark County lodging tax ordinance. *Id.* (Relators admitting: "[T]he allegations [in the original complaint] certainly expressly identify only the Clark County Code 4.08 et seq., ...").

[6] Notwithstanding the added references to additional Nevada counties, the Amended Complaint, like the original, remains based on Clark County allegations or transactions that are the subject of Clark County's civil suit. As such, the Amended Complaint presents the very same legal question as to whether the government action

On April 29, 2022, the district court denied Petitioners' Motion for Summary Judgment: "The Court finds that because the Clark County Action was filed after this [*qui tam*] action was commenced, Clark County is not 'already a party' to the Clark County Action for purposes of NRS 357.080(3)."") (II PA 297-98.)[7] The district court determined, however, that the "Clark County Action is based on the same underlying allegations or transactions that are the subject of Relators' *qui tam* action." (II PA 297.)

On May 13, 2022, Petitioners filed their Motion for Reconsideration of the district court's April 29 Order denying summary judgment. (II PA 322-35.) Relators opposed reconsideration (II PA 345-76) and Petitioners filed a reply (II PA 377-86).

On July 12, 2022, following a hearing, the district court denied reconsideration and granted a 21-day stay (*i.e.*, through August 3, 2022) to enable Petitioners to seek relief from this Court. (II PA 417-18.)

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bar applies when the *qui tam* action is filed before the government files its civil suit.

[7] To accommodate a judicial scheduling conflict, Chief District Judge Linda Bell presided over Judge Denton's motions calendar on the hearing date and heard and decided the summary judgment motion. Judge Bell had no prior (or subsequent) involvement in the Qui Tam Action.

As set forth in the accompanying Motion for Stay, absent a further stay from this Court, Petitioners' deadline to respond to the Amended Complaint is August 9, 2022. No other activity is pending in the district court.

REASONS TO GRANT THE WRIT

I. A WRIT OF MANDAMUS OR PROHIBITION IS PROPER

A writ of mandamus is available "to compel the performance of an act that the law requires as a duty resulting from an office . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (citations omitted). Mandamus's counterpart is the writ of prohibition, which is available "to arrest the extrajurisdictional exercise of judicial functions." *We the People Nev. v. Miller*, 124 Nev. 874, 879, 192 P.3d 1166, 1170 (2008).

A writ may issue "in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; NRS 34.330. Here, Petitioners lack a plain, speedy, and adequate remedy because the parties are in the early stages of litigation. *Int'l Game Tech., Inc.*, 124 Nev. at 198, 179 P.3d at 559. No substantive discovery has commenced. No scheduling order has been entered by the district court. Moreover, the issue before this Court is a threshold question that goes to the heart of whether this action can continue at all. If the government action bar

applies, the action must end—the "action may not be maintained"—per the NFCA.[8] That would include Relators' efforts to pursue the claims in their Amended Complaint. Thus, it makes no sense to subject Petitioners (and the affected counties) to the substantial litigation burdens that will follow without first addressing this threshold and potentially case-ending question of law. Review now also is necessary to protect Petitioners' statutory right not to face duplicative suits. That right cannot be effectively vindicated by appellate review after a final judgment.

This Court also conducts writ review when "an important issue of law needs clarification and public policy is served by t[he] [C]ourt's invocation of its original jurisdiction." *We the People Nev.*, 124 Nev. at 880, 192 P.3d at 1170. That is particularly true when the issue raised by a petition—as here—is purely legal, not factual. *State Bd. of Parole Comm'rs v. Second Jud. Dist. Ct.*, 135 Nev. Adv. Rep. 53, 451 P.3d 73, 77 (2019) (writ petition entertained "because the petition presents a pure question of law that is of statewide significance").

Petitioners raise a legal issue of statewide and governmental importance pertaining to the NFCA that goes to the heart of governmental authority and

[8] Federal court decisions interpreting the federal False Claims Act's government action bar have treated it as jurisdictional. *See, e.g.*, *United States ex rel. Batty v. Amerigroup Ill., Inc.*, 528 F. Supp. 2d 861, 876 (N.D. Il. 2007). Petitioners have not identified any Nevada decisions on this issue. Whether or not the bar is jurisdictional, it remains a threshold question of immediate importance as it determines whether a *qui tam* action can be maintained.

discretion. The Legislature has made clear that the government—not a private party proceeding after non-intervention by the State—gets to decide when, where, and how it pursues governmental claims. And the Legislature has determined that if the government commences a separate civil suit, then the private party *qui tam* action must yield—it "may not be maintained." To hold otherwise would enable a private party to control the government's claims, and to make law and policy affecting the government's interests through *qui tam* litigation. Under these circumstances, writ relief is an appropriate mechanism for evaluating and protecting the government's authority, as delineated by the Legislature. *E.g.*, *South Fork Band of the Te-Moak Tribe of W. Shoshone Indians v. Sixth Jud. Dist. Ct.*, 116 Nev. 805, 811, 7 P.3d 455, 459 (2000); *accord Friedman v. Eighth Jud. Dist. Ct.*, 127 Nev. 842, 854, 264 P.3d 1161, 1169 (2011) (granting writ relief to address the trial court's subject matter jurisdiction).

This Petition raises a question of statutory interpretation applied to undisputed facts. After finding that all other government action bar elements had been satisfied, the district court determined that the statute applies only when the government's civil suit was on file before commencement of the *qui tam* action. No factual development is necessary to decide this question. *See, e.g.*, *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (explaining that the Court will not exercise its discretion to hear a writ petition that

implicates important public interests "unless legal, rather than factual, issues are presented.").

Further, this Court has recognized that writ relief is available following a court's order denying a dispositive motion if sound judicial economy and administration militate in favor of granting relief. *Int'l Game Tech., Inc.*, 124 Nev. at 197, 179 P.3d at 558-59. If this *qui tam* action proceeds, the OTCs (and the government) will face extensive discovery regarding claims that "may not be maintained." Given that this suit involves 17 defendants and pertains to hotel transactions over the past decade in Clark County (and perhaps other Nevada counties), merits discovery—which, due to the importance of materiality and government knowledge in NFCA claims, necessarily will involve discovery from affected local governments regarding their transient lodging laws, the interpretation and enforcement of those laws, and those governments' knowledge of and acquiescence in the tax practices of the OTCs—should not be undertaken unnecessarily.[9]

[9] A finding that Relators cannot maintain this *qui tam* action would not deprive the government of a remedy if the underlying taxes actually were due. Any such liability and relief will be determined by the federal court overseeing the Clark County Action. Indeed, Petitioners submit that it is precisely because of that separate action instituted by Clark County—the taxing authority which would then distribute any remitted taxes as designated in the statute, including to the State—that the Legislature precluded private parties such as Relators from maintaining their separate suit arising out of the same allegations or transactions. *See* NRS 244.3354(1)(a), (2)(a) (directing 3/8% to be deposited with State Treasurer for

Under these principles, a writ is warranted here.

II. THE DISTRICT COURT ERRED BY NOT APPLYING THE NFCA'S GOVERNMENT ACTION BAR TO PRECLUDE RELATORS FROM MAINTAINING THEIR QUI TAM ACTION

The district court clearly erred by conditioning the application of the government action bar on the government filing suit before the *qui tam* plaintiff. The unambiguous language of NRS 357.080(3)(b) demonstrates the error. Whether filed before or after the qualifying government action, the *qui tam* action may not be maintained once that government action is pending. The sequence of the filings is irrelevant.

A. All Government Action Bar Elements Are Satisfied

The NFCA's government action bar, NRS 357.080(3)(b), states:

> An action may not be maintained by a private plaintiff pursuant to this chapter . . . [i]f the action is based on allegations or transactions that are the subject of a civil action or an administrative proceeding for a monetary penalty to which the State or political subdivision is already a party.

The bar applies if four elements are established:

> (1) The action must be brought by private plaintiffs under the *qui tam* provisions of the NFCA,
>
> (2) "allegations or transactions" in the *qui tam* action must be the subject of a separate civil action,

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tourism fund); CCC 4.08.031(c) (directing 3% to be deposited with State Treasurer for education fund).

(3) the State or political subdivision must be a party to the separate civil action, and

(4) the relator must be "maintaining" the *qui tam* action despite the separate civil action.

Petitioners' summary judgment motion established each element:

(1) Relators are proceeding as "private plaintiffs" under the NFCA. *See* NRS 357.080(1) (". . . a private party may bring an action pursuant to this chapter for a violation of NRS 357.040 . . ."); I PA 002, at ¶ 2. ("NRS 357.080(1) authorizes private persons to bring civil actions on behalf of themselves and on behalf of the State of Nevada.");

(2) the district court expressly found that "[t]he Clark County Action is based on the same underlying allegations or transactions that are the subject of Relators' *qui tam* action." (II PA 297);[10]

(3) Clark County is a party to its suit; it is a "political subdivision" within the meaning of the government action bar, *see* NRS 357.030 ("'Political subdivision'" defined. 'Political subdivision' means a county, city, assessment district or any other local government as defined in NRS 354.474."); and

(4) Relators are "maintaining" their action "pursuant to this chapter"—*i.e.,* their NFCA action—notwithstanding the government's separate action. NRS 357.080(3)(b).

[10] This judicial finding accords with Relators' admissions. (I PA 152-53 ("On May 14, 2021, Clark County, Nevada filed a new lawsuit . . . against the same Defendants as named in [this case] ***based upon the same failure to pay transient lodging taxes to various Nevada governmental authorities as is the subject of [this case].***") (emphasis added).)

All of these facts are undisputed.

B. The District Court's Interpretation Of The Government Action Bar Is Legally Erroneous

The district court denied summary judgment based solely on its determination that the government action bar applies only if the *qui tam* action *follows* the government's separate civil action. The court focused on the statute's use of the word "already" when describing the need for the government to be a party to that civil action. (*See* II PA 297-98 ("The Court finds that because the Clark County Action was filed after this [*qui tam*] action was commenced, Clark County is not 'already a party' to the Clark County Action for purposes of NRS 357.080(3).").) This interpretation of the statute—which no party had sponsored in advance of the summary judgment hearing—is wrong as a matter of law.

The statute contains no sequencing requirement, such that the suit in which the government is *already* a party must have been filed before the *qui tam* action. Instead, the provision states that a *qui tam* action may not be *maintained* whenever it co-exists with a qualifying civil action where the government is *already* a party. Once that condition is satisfied, the *qui tam* action must end. This express, unambiguous directive in the statute needs no further interpretation and should be enforced as written. *See Food Mktg. Inst. v. Argus Leader Media,* —— U.S. ——, 139 S. Ct. 2356, 2364, 204 L.Ed.2d 742 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning

and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop.") (internal citations omitted).

1. The District Court Failed To Account For The Legislature's Express Departure From The Federal FCA's Government Action Bar Language

The Legislature's use of the word "maintain" was deliberate and must be accorded controlling weight when interpreting the provision. In generally patterning the NFCA text after the federal FCA,[11] the Legislature purposefully and explicitly varied from the federal FCA government action bar text in 31 U.S.C. § 3730(e)(3). In particular, while the federal FCA provision does not allow a *qui tam* plaintiff to "bring" (*i.e.*, file or commence) an action, the Nevada Legislature replaced that term, such that the NFCA does not allow a *qui tam* plaintiff to "maintain" (*i.e.*, continue to pursue) a *qui tam* action.[12] In so doing, the Legislature avoided and removed any

[11] *See Int'l Game Tech., Inc.*, 122 Nev. at 150, 127 P.3d at 1101 ("Nevada's FCA was expressly modeled after the federal FCA.").

[12] The terms "bring" and "maintain" have different meanings: "Bring an action" means "[t]o sue; institute legal proceedings." BLACK'S LAW DICTIONARY (11th ed. 2019). "Maintain" means "[t]o continue (something)." *Id.* Indeed, in *Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 956 P.2d 117 (1998), this Court pointed favorably to an earlier—but substantively the same—definition of "maintain" from Black's Law Dictionary. In that case, the Court considered the language of NRS 616D.030, which provides that "[n]o cause of action may be brought or *maintained* against an insurer or third party administrator who violates any provision of [Nevada's industrial insurance statutes]." *Id.* (emphasis added.) After the Court recognized that the fifth edition of Black's had defined "maintain" as "to uphold, continue on foot, and keep from collapse a suit already begun" and is "applied to actions already brought, but not yet reduced to judgment," the Court concluded that

temporal or sequential precondition to the application of the NFCA's government action bar.[13] The district court's reading of the statute is the exact opposite.

Indeed, this Court already has recognized the legal significance of this type of affirmative departure by the Legislature from the federal FCA. In *Int'l Game Technology*, the Court relied on the fact that, unlike the federal FCA, the Legislature did not include in the NFCA a prohibition against claims based on the avoidance of certain tax obligations:

> Any ambiguity caused by the Legislature's failure to mention taxes in the [Nevada] FCA is easily resolved by applying basic principles of statutory construction to ascertain the Legislature's intent. ***This court presumes that the Legislature enacts a statute "with full knowledge of existing statutes related to the same subject."*** Thus, the presumption that the Legislature, in enacting a state statute similar to a federal statute, intended to adopt the federal courts' construction of that statute, ***is rebutted when the state statute clearly reflects a contrary legislative intent***.

"Nevada law is in accord with the dictionary definition of 'maintain.'" *Id.* at 259, 956 P.2d at 221.

[13] The Legislature knew how to create temporal or sequential preconditions. For instance, in the same NFCA subsection where the government action bar appears, the statute also states: "An action may not be maintained by a private plaintiff [against certain individuals] if the action is based upon evidence or information known to the State or political subdivision ***at the time the action was brought***." NRS 357.080(3)(a) (emphasis added). The Legislature easily could have employed the same temporal precondition to the government action bar if it intended one.

122 Nev. at 154, 127 P.3d at 1103-04 (internal citations omitted) (emphasis added). This principle must be applied in interpreting the NFCA's government action bar, which affirmatively departed from the federal statute.

As noted, under the federal FCA, the government action bar prevents a relator from "***bring[ing]***"—not "maintaining"—a *qui tam* suit where the government is already a party to a separate civil action. 31 U.S.C. § 3730(e)(3) (emphasis added). Thus, under the federal FCA, the government action bar may prevent a *qui tam* relator from commencing suit—bringing an action—where the government has brought a separate civil action. But, importantly, that sequencing comes from Congress's use of the word "bring"—not the use of the word "already." Indeed, the term "already" in the federal FCA's government action bar is merely descriptive as well: whether the government action bar applies does not change if the government "is a party" versus if it "is already a party."

The Legislature's use of the much broader term "***maintain***" for the NFCA's government action bar—encompasses circumstances where the separate civil action is filed ***after*** the *qui tam* suit. This is the most straightforward and logical explanation for this change. *See Int'l Game Tech., Inc.*, 122 Nev. at 154, 127 P.3d at 1104 (finding dispositive the fact that "Nevada's FCA, in stark contrast to the federal legislation after which it was modeled," did not preclude certain types of reverse false claims).

Further, the Legislature used the term "bring" multiple times in NRS 357.[14] As this Court has made clear, it is a well-established principle of statutory construction that if the Legislature uses the same word throughout a statute, it is presumed to have the same meaning throughout. By contrast, when there is a material change in a statute's wording—such as the deliberate use of the word "maintain" in place of "bring"—that shows a different meaning was intended.[15]

2. The District Court Improperly Ascribed Meaning To The Term "Already"—The Canon Against Surplusage Has No Application Here

The district court ascribed temporal significance to the statute's use of the word "already," implicitly referencing the canon against surplusage, which generally

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[14] *See* NRS 357.080(1) ("a private plaintiff may ***bring*** an action pursuant to this chapter for a violation of NRS 357.040") (emphasis added); NRS 357.080(2) ("If a private plaintiff ***brings*** an action pursuant to this chapter, no person other than the Attorney General . . . may intervene or ***bring*** a related action pursuant to this chapter based on the facts underlying the first action.") (emphasis added); NRS 357.070(1) ("the Attorney General shall investigate diligently . . . and may ***bring*** a civil action pursuant to this chapter") (emphasis added); NRS 357.026 ("'Original source' means a person: (1) . . . who voluntarily provides such information to the State or political subdivision before ***bringing*** an action for a false claim based on the information") (emphasis added).

[15] *See Aerogrow Int'l, Inc. v. Eighth Judicial Dist. of Nev.*, 137 Nev. Adv. Op. 76, 499 P.3d 1193, 1199 (2021) ("a statute's use of two different terms evinces the legislature's intent that different meanings apply to the two terms") (citing *Labastida v. State*, 115 Nev. 298, 302-03, 986 P.2d 443, 446 (1999)); *see also* Norman Singer & Shambie Singer, *2B Sutherland Statutory Construction* § 52:5 (7th ed. 2016) ("when a legislature models a statute after a uniform act, but does not adopt particular language, courts conclude the omission was 'deliberate' or 'intentional'").

provides that statutes should be construed to avoid rendering words superfluous. But the canon is inapplicable here. There is no meaningful difference between whether the government "is a party" to an action and whether the government "is already a party" to an action. In this circumstance, the term "already" simply provides emphasis and clarity to the term "party."

Additionally, the U.S. Supreme Court has observed that "instances of surplusage are not unknown" in statutory text. *See, e.g.*, *Arlington Cent. School Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291, 299 n.1 (2006). And, in circumstances where the purportedly superfluous language merely clarifies other statutory provisions, the canon against surplusage yields because legislatures often use language that adds little to the statute itself but instead clarifies the legislature's intent. *See Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1303 (11th Cir. 2008) (*citing BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 98 (2006)). Such clarifying and emphasizing language does not render the language surplusage, *ApolloMedia Corp. v. Reno*, 19 F. Supp. 2d 1081, 1096 (N.D. Cal. 1998), and "the rule against surplusage is not controlling." *Farmers Ins. Exchange v. Superior Court*, 137 Cal. App. 4th 842, 858 (2006) ("A statute may clarify and emphasize a point notwithstanding the rule against surplusage."); *In re Davenport*, 522 S.W.3d 452, 457 (Tex. 2017) (language is not surplusage because it clarified an issue).

Notably, other provisions of Nevada law also employ the term "already" as a descriptor. *See, e.g.*, NRS 37.030(1) ("The private property which may be taken under this chapter includes: . . . (c) Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been ***already*** appropriated.") (emphasis added); NRS 40.655(1) ("the claimant may recover only the following damages . . . (a) The reasonable cost of any repairs ***already*** made that were necessary and of any repairs yet to be made that are necessary to cure any constructional defect . . ."") (emphasis added). Beyond these examples, Nevada often includes descriptors—akin to the "already" descriptor in the government action bar—to clarify the law's intent. One example is found in Nevada's joinder rule, which refers to "an ***existing party***" even though a party to an action is always an "existing" party. NRCP 19(a)(1)(B)(ii) (emphasis added). Another example is found in Nevada's intervention as a matter of right rule, which allows non-party movants to intervene in an action "unless ***existing parties*** adequately represent that interest." NRCP 24(a)(2) (emphasis added).[16] Here, the terms "already" and "existing" clarify and emphasize. Consequently, the canon against surplusage does not come into play.

[16] *See also* NRS 218F.720(3) (setting forth the Legislature's unconditional right to intervene and granting that authority "whether or not the Legislature's interests are adequately represented by ***existing parties*** and whether or not the State . . . is an ***existing party***") (emphasis added).

3. The District Court's Emphasis On The Term "Already" Is Incompatible With The Term "Maintained"

The district court's focus on the term "already" as evidence of a statutory sequencing requirement is incompatible with the express language that blocks relators from "maintain[ing]" a *qui tam* action in the face of a qualifying government action. NRS 357.080(3)(b) ("An action may not be ***maintained*** by a private plaintiff . . . ."). If the Legislature had intended to promulgate a temporal requirement, there would have been no reason for it to depart from the language of the federal statute, which contains such a sequencing requirement. Here, the Court not only must respect the significance of the Legislature's departure from the federal statute's language but also the rule that all parts of a statute must be harmonized as part of the interpretation process. *We the People Nev.*, 124 Nev. at 881, 192 P.3d at 1171. This rule helps assure that the courts respect the Legislature's intent. *Ibid*.

In any event, the government "is already a party" to the Clark County action. The statute's use of the descriptor "already" makes clear that it is not enough that the government is a real-party-in-interest in the separate civil action, or that it could potentially intervene as a party. The phrase "already" emphasizes that the government must be an actual party litigant in the separate civil action.

The district court's legal conclusion that the NFCA government action bar does not apply if the *qui tam* suit is filed first does not account for—and cannot be

reconciled with—the use of the word "maintain" in the controlling statutory provision.

CONCLUSION

For these reasons, a writ should issue and direct the district court to grant summary judgment to the Petitioners.

Dated: August 2, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14 point. I further certify that the brief is 6,607 words.

2. I 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: August 2, 2022

/s/ Joel E. Tasca

VERIFICATION

1. My name is Joel E. Tasca, I am over 21 years of age, I am an attorney and partner at the law firm Ballard Spahr LLP, and I am counsel of record for Petitioners.

2. I verify under penalty of perjury that I have read the foregoing Petition and know the contents thereof. I further verify that the facts stated in the Petition are true of my own knowledge, except as to those matters stated on information and belief, and that as to such matters, I believe them to be true.

Dated: August 2, 2022

/s/ Joel E. Tasca

CERTIFICATE OF SERVICE

I hereby certify that this **Petition for Writ of Mandamus or, in the Alternative, Prohibition** was filed electronically with the Nevada Supreme Court on August 2, 2022. Participants in this case who are registered with Eflex will be served by the Eflex system and other parties, listed below, who are not registered with the Eflex will be served with a sealed copy of the foregoing via regular U.S. Mail.

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