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; TRAVEL WEB LLC; TRAVELNOW.COM INC.; AGODA INTERNATIONAL USA LLC; HOTEL TONIGHT INC.; AND HOTEL TONIGHT LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE, Respondents,

and

THE STATE OF NEVADA; MARK FIERRO; AND SIG ROGICH,

Real Parties in Interest.

Supreme Court Case No.: 85111

Electronically Filed
Sep 29 2022 11:29 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

REAL PARTIES IN INTEREST'S ANSWER TO PETITIONERS' WRIT OF MANDAMUS OR PROHIBITION

CLARK HILL PLLC
Dominic P. Gentile, Esq. (NSBN 1923)
Michael V. Cristalli, Esq. (NSBN 6266)
Mark S. Dzarnoski, Esq. (NSBN 3398)
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, Nevada 89169
Attorneys for Respondents

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

II. RELEVANT PROCEDURAL HISTORY 3

III. ISSUES RAISED BY THE PETITION ARE MOOT OR PREMATURE 4

IV. PETITIONERS' INTERPRETATION DOES VIOLENCE TO NEVADA CONSTITUTIONAL PRINCIPLES AND THE PURPOSE OF THE NFCA 8

A. Independence of Political Subdivisions Under the Nevada Constitution. 8

B. Unlike Its Federal Counterpart, The State of Nevada and Political Subdivisions Are Not a Unified "Government" Under The NFCA. 12

C. The Purpose of NRS 357.080(3)(b). 14

D. Petitioners Ignore the Role of the Attorney General in the NFCA. 18

V. PETITIONERS MISAPPLY RULES OF STATUTORY INTERPRETATION 21

A. The term "maintained" commonly means "brought" in legal context 21

B. As Used in NRS 357.080(3)(b), The Word "Already" Abounds with Meaning and Must Be Given Legal Effect. 25

C. The "No Surplusage" Canon Supports Giving Each Word Legal Effect; "Already" Should Not Be Read Out of The Statute as Having No Effect. 28

D. The "Avoid Absurd Results" Canon Supports the District Court's Ruling. 30

E. As "Maintain" And "Already" Can Be Read Harmoniously, They Ought to Be. 32

VI. CONCLUSION.....34

VII. CERTIFICATE OF COMPLIANCE 35

TABLE OF AUTHORITIES

CASES

Allison Engine Co. v. United States ex rel. Sanders,
553 U.S. 662, 128 S. Ct. 2123 (2008) 18

Applebaum v. Applebaum,
97 Nev. 11, 621 P. 2d 1110 (1981).....8

Associated Aviation Underwriters, Inc. v. Vegas Jet, L.L.C,
106 F.Supp.2d 1051 (D. Nev., 2000).....5

Blackburn v. State,
129 Nev. 92, 294 P.3d 422 (2013)..... 29, 39

BP Am. Prod. Co. v. Burton,
549 U.S. 84 (2006)..... 34, 35

Breuer v. Jim's Concrete of Brevard, Inc.,
538 U.S. 691 (2003)..... passim

Clark County v. City of Las Vegas,
92 Nev. 323, 550 P. 2d 779 (Nev. 1976) 13

Clark County v. Lewis,
88 Nev. 354, 498 P. 2d 363 (Nev. 1972) 11

Costner v. URS Consultants, Inc.,
153 F.3d 667 (8th Cir. 1998) 20

Food Mktg. Inst. v Argus Leader Media,
—U.S. —, 139 S.Ct. 2356, 2364, 204 L.Ed.2d 742 (2019) 27, 28

G.C. Wallace, Inc. v. Eighth Judicial Dist. Court of State,
127 Nev. 701, 262 P.3d 1135 35

Gallagher v. City of Las Vegas,
114 Nev. 595, 959 P.2d 519 (1998).....36

Humboldt County v. Lander County,
24 Nev. 461, 56 P. 228 (Nev. 1899) 12

Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. of Nevada,
122 Nev. 132, 127 P.3d 1088 (2006) 21, 22

Lander County v. Nye County,
59 Nev. 114, 86 P. 2d 34 (Nev. 1938) 12

Lofthouse v. State,
136 Nev. 378, 467 P.3d 609 (2020) 29, 39

Lyons Township ex rel. Kielczynski v. Village of Indian Head Park,
416 Ill. Dec. 641, 84 N.E. 3rd 1118 (Ill. App. 1st. Dist. 5th Div. 2017) 18

Madera v. State Indus Ins. Sys.,
114 Nev. 253, 956 P.2d 117 (1998) 25

McFadden v. Ellsworth Mill and Mining Company,
8 Nev. 57, 60-61, 1872 WL 3517 *3 (1872) 4

National Mines Co. v. Sixth Judicial Dist. Court Humboldt County,
34 Nev. 67, 116 P. 996 (1911) 25

Newell v. State,
131 Nev. 974, 364 P.3d 602 (2015) 27

Orr Ditch & Water Co. v. Justice Court of Reno Tp., Washoe County,
64 Nev. 138, 178 P.2d 558 (1947) 38

Personhood Nevada v. Bristol,
126 Nev. 599, 245 P. 3d 572 (2010) 5

Phone Recovery Service LLC v. Verizon Washington, DC, Inc.,
191 A. 3rd 309 (D.C. Ct. App. 2018) 17

Randono v. Ballow,
100 Nev. 142, 676 P.2d 807 (1984) 5

S. Nevada Homebuilders Ass'n v. Clark Cnty.,
121 Nev. 446, 117 P.3d 171 (2005) 36

Singleton v. Eureka County,
22 Nev. 91, 35 P. 833 (Nev. 1894) 11

Star Ins. Co. v. Neighbors,
122 Nev. 773, 138 P.3d 507 (2006).....35

State ex rel. Bartlett v. Miller,
243 Cal. App. 4th 1398, 197 Cal. Rptr. 3rd 673 (Cal. App. 2nd Dist. 7th Div. 2016).....17

State ex rel. Foy v. Austin Capital Management, LTD,
355 P. 3rd 1, 7 (N.M. 2015).....18

State ex rel. Ginocchio v. Shaughnessy,
47 Nev. 129, 217 P. 581 (Nev. 1923).....10

State ex rel. Thompson v. Board of Commissioners of Washoe County,
23 Nev. 247, 45 P. 529 (Nev. 1896).....11

State v. Friend,
118 Nev. 115, 40 P.3d 436 (2002).....27

Sturgeon v. Pharmerica Corp.,
438 F. Supp. 3d 246 (E.D. Pa. 2020).....20

United States ex rel. Mateski v. Raytheon Co.,
816 F. 3rd 565 (9th Cir. 2016).....17

United States ex rel. Poteet v. Bahler Medical, Inc.,
619 F. 3d 104 (1st Cir. 2010).....17

United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine,
24 F.3d 320 (1st Cir. 1994)..... 18, 20

United States ex rel. Zizic v. Q2Administrators,
728 F. 3d 228 (3rd Cir. 2013).....17

University and Community College System of Nevada v. Nevadans for Sound Government,
120 Nev. 712, 100 P. 3d 179 (2004).....5

Utility Air Regulatory Group v. E.P.A.,
573 U.S. 302 (2014).....30

W. Pac. R. Co. v. State,
69 Nev. 66, 241 P.2d 846 (1952)..... 36, 38

Walker v. Second Judicial District court in and for County of Washoe,
136 Nev. 678, 476 P. 3d 1194 (2020) 8

Washoe County Water Conservation District v. Beemer,
56 Nev. 104, 45 P. 778 (Nev. 1935) 11

Wedekind v. Bell,
26 Nev. 395, 69 P. 612 (1902) 5

Wilson v. Happy Creek, Inc.,
135 Nev. 301, 448 P.3d 1106 (2019) 30, 33

Youngs v. Hall,
9 Nev. 212, 1874 WL 3944 at *1 (Nev. 1874) 10

Zebe v. State, County of Lander,
112 Nev. 1482, 929 P. 2d 927 (Nev. 1996) 12

STATUTES

NRS 0.039 12

NRS 244.265 11

NRS 244.3352 10

NRS 244A, 244.335 ..... 7, 8

NRS 354.474 14

NRS 357.030 15

NRS 357.080(1) 14, 15, 23

NRS 357.080(3)(b) ..... passim

NRS 357.100 ..... 16, 21

NRS 357.120(2), (3) 23

NRS 357.130(2) 23

NRS 616D.030 25

OTHER AUTHORITIES

14C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3729, p. 235 (1998) 26

1A J. Moore et al., Moore's Federal Practice ¶ 0.167[5], p. 472 (2d ed.1996) 26

ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS at 170 ..... 31, 32, 33, 38

BALLENTINE'S LAW DICTIONARY (3d ed. 1969) 27

BLACK'S LAW DICTIONARY (11th ed. 2019) 25, 28

BLACK'S LAW DICTIONARY (6th ed. 1990) 28

Black's Law Dictionary 1143 (3d ed.1933) 26

Merriam-Webster's Collegiate Dictionary 34 (10th ed. 1993) 31, 32

Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47:27, at 453-54 (7th ed. rev. 2014) 29

The Oxford English Dictionary 363 (2d ed. 1989) 32

The Random House Dictionary of the English Language 60 (2d unabridged ed. 1987) 32

RULES

NRAP 21(d) 41

NRAP 25(1(d) 43

NRAP 28(e) 42

NRAP 32(a)(4) 41

NRAP 32(a)(5) 41

NRAP 32(a)(6) 41

NRAP 32(a)(7) 41

CONSTITUTIONAL PROVISIONS

Nev. Const. Article 4, Section 20 9

Nev. Const. Article 4, Section 25 9

Nev. Const. Article 4, Section 26 9

CODES

31 U.S.C. §§ 3729.....14

31 U.S.C. §3730(e) 19

31 U.S.C. §3730(e)(3)..... 17, 19, 20

31 U.S.C. 3730(e)(4)(A)(i) thru (iii).....16

Clark County Code § 4.08 .....6, 7

Douglas County Code § 3.14.010.....7

Lyon County Code, Chapter 2, § 4.02.01 7

Nye County Code § 3.16.010.....7

Washoe County Code § 25.117 7

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners complain that the district court, when denying their motion for summary judgment on the original Complaint, "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." Petition at 18[1]. As Real Parties in Interest[2] filed and served their First Amended Complaint prior to the district court denying Petitioners' motion for reconsideration of the motion for summary judgment, the original Complaint became and remains nugatory and challenges to it moot and no longer justiciable. No challenges to the First Amended Complaint have been ruled upon by the district court. Thus, the issues raised by the Petitioners are either moot or premature and the Petition should be dismissed.

As not to be presumptuous of the Court, RPI demonstrate that the district court recognized the plain and ordinary meaning of the words "maintain" and "already" in legal context as used in NRS 357.080(3)(b) and construed them harmoniously with each other in accordance with the unanimous decision of the United States Supreme Court in *Breuer v. Jim's Concrete of Brevard, Inc*., 538 U.S. 691 (2003) regarding the meaning of "maintain", the plain meaning of "already" and the canons

[1] Hereinafter referenced "Pet."
[2] Hereinafter referenced "RPI".

of statutory interpretation, thereby avoiding the absurd results of Petitioners' interpretation.

Under Petitioners' interpretation, a promising *qui tam* action seeking to recover hundreds of millions of tax dollars earmarked for State and local education, transportation, convention and tourism expansion - to a portion of which the State is entitled - must be terminated to the State's detriment because Clark County subsequently brought a direct action to recover its share of those taxes. The district court saw this as an absurd result considering the purpose of the NFCA. Under the district court interpretation, if the political subdivision first files a direct action, then private parties cannot subsequently file a *qui tam* action to parasitically gain a piece of the recovery unless the *qui tam* is different in scope. Thus, the purpose of NRS 357.080(3)(b) and the legislative policy of encouraging and incentivizing *qui tam* actions is preserved.

It is easy to see why the district court concluded, "[B]ecause 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)(b). **Exhibit 8,** pg. 3, 1-5. [RAPP_000123-000129]

//

//

//

II.

RELEVANT PROCEDURAL HISTORY

- April 24, 2020 - Original Complaint is filed. **Exhibit 1. [RAPP_000001-000011]**
- June 2, 2021 - District Court dismisses with prejudice all but the Nevada False Claims Act claim for relief set forth in the original Complaint, in response to Petitioners' Motion to Dismiss. **Exhibit 2. [RAPP_000012-000016]**
- May 14, 2021 - Clark County files a direct action against many of the same Petitioners (the "Clark County Action" or "CCA") 386 days after original *qui tam* Complaint was filed.[3] **Exhibit 3. [RAPP_000017-000032]**
- February 24, 2022 - Petitioners file Motion for Summary Judgment on the NFCA claim in the original Complaint. **Exhibit 4. [RAPP_000033-000067]**
- March 10, 2022 - RPI file Response to Motion for Summary Judgment. **Exhibit 5. [RAPP_000068-000089]**
- March 21, 2022 - Petitioners file Reply to Response to Motion for Summary Judgment. **Exhibit 6**. **[RAPP_000090-000102]**
- April 5, 2022 - RPI file Motion for Leave to Amend Complaint. **Exhibit 7. [RAPP_000103-000122]**

[3] Defendants removed the case to the United States District Court styled Clark County, Nevada v. Orbitz Worldwide, LLC, et al., CASE NO.: 2:21-cv-01328-JCM-VCF (USDC, Nevada).

- April 29, 2022 – Order entered denying Motion for Summary Judgment by District Court, Chief Judge Linda Bell, presiding. **Exhibit 8. [RAPP_000123-000129]**
- May 7, 2022 – RPI Motion to Amend is granted pursuant to stipulation and Order. **Exhibit 9**. **[RAPP_000130-000137]**
- May 13, 2022 - Petitioners file Motion for Reconsideration of Court's April 29, 2022, Order. **Exhibit 10. [RAPP_000138-000151]**
- May 16, 2022 – RPI file First Amended Complaint. **Exhibit 11**. **[RAPP_000152-000160]**
- July 12, 2022 – Order entered denying Motion for Reconsideration by District Court, Judge Mark Denton, presiding. **Exhibit 12. [RAPP_000161-000168]**
- August 3, 2022 - Petitioners file the instant Petition.

III.

ISSUES RAISED BY THE PETITION ARE MOOT OR PREMATURE

An amended complaint supersedes and renders its predecessor nugatory. *McFadden v. Ellsworth Mill and Mining Company*, 8 Nev. 57, 60-61, 1872 WL 3517 *3 (1872); *Randono v. Ballow*, 100 Nev. 142, 676 P.2d 807, 808 (1984); *Associated Aviation Underwriters, Inc. v. Vegas Jet, L.L.C*, 106 F.Supp.2d 1051, 1054 (D. Nev., 2000). Thus, RPI Amended Complaint extinguished the original Complaint and rendered moot any prior rulings directed to it. *Personhood Nevada v. Bristol*, 126

Nev. 599, 602, 245 P. 3d 572, 574 (2010); *University and Community College System of Nevada v. Nevadans for Sound Government*, 120 Nev. 712, 720, 100 P. 3d 179 (2004) (citing *Wedekind v. Bell*, 26 Nev. 395, 413-415, 69 P. 612, 613-14 (1902)).

The Petitioners' motion for summary judgment urged that NRS 357.080(3)(b) required dismissal of the RPI lawsuit because the CCA involved "the *same* allegations and transactions that are the subject of this Qui Tam Action." See **Exhibit 4** at 10:9-10. [RAPP_000044] As then phrased by Petitioners, "(t)he subject of the Qui Tam Action and the Clark County Action is the alleged nonpayment of transient lodging taxes imposed by *the Clark County Code*." See **Exhibit 6** at 6:18-7:1, [RAPP_00096-00097] asserting at fn. 6, "The only county tax ordinance referenced in the Qui Tam Action complaint is Clark County Code § 4.08. *See* Complaint, ¶¶ 36, 40, 51; *see also id.* at ¶ 35 (this is a "civil action arising from actions occurring within the County of Clark, State of Nevada").

Petitioners assert that this triggered NRS 357.080(3)(b). See **Exhibit 6** at 7:4-6. [RAPP_000097] During oral argument, the district court observed "(s)o it doesn't necessarily make sense that we would dismiss the broader case that was filed first [the instant matter], leaving the narrower case filed second [the federal case]" **Exhibit 13**, transcript of hearing, at 21:3-5], [RAPP-000189] Petitioners responded:

> MR. TASCA: It -- it's actually the opposite. The only tax that's being pursued in this case is the Clark County tax. And, specifically, it's only the State of

> Nevada's portion of that Clark County tax that it would ultimately receive that's being sought. The broader case is actually the Clark County suit that's in federal court, because that's seeking the entire Clark County alleged unpaid tax it's owed.
>
> **Exhibit 13** at 21:8-14 [RAPP-000189]

The First Amended Complaint expressly includes unpaid transient lodging taxes[4] from transactions occurring in the following counties: Clark, Washoe, Douglas, Lyon and Nye.[5]

> 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*, Washoe County Code 25.117 *et seq.*, Douglas County Code 3.14.010 *et seq.*, Lyon County Code, Chapter 2, Section 4.02.01 *et seq.*, Nye County Code 3.16.010 *et seq.*, such other county codes as have imposed the duty to collect and remit transient lodging taxes upon the Defendants and Nevada Revised Statute 244A, 244.335, *et seq.*

Exhibit 11 at para. 51. (Emphasis added.) [RAPP-000159]

While RPI Motion to for Leave to Amend Complaint was pending, Petitioners entirely changed their original unsuccessful argument and filed a Motion for Reconsideration. For the first time they asserted that (1) whether the same transactions are involved in the two cases is irrelevant and (2) the government action

[4] Hereinafter "TLT".

[5] Under liberal pleading standards, the original Complaint embraced all TLT due to the State of Nevada from Petitioners with those arising in Clark County being the greatest in amount. This issue is also rendered moot by the First Amended Complaint.

bar applies to the proposed First Amended Complaint "primarily because the foundation for all of the claims – *i.e.*, regardless of which county – is that Petitioners' obligation to pay any combined transient lodging taxes arises from the Nevada Revised Statute 244A, 244.335, *et seq.", See* **Exhibit 10** at 10:10-12. [RAPP-000147] The district court rejected this new argument.

No order has been entered by the district court as to any challenge to the First Amended Complaint. As the First Amended Complaint contains allegations regarding different transient lodging transactions in multiple counties, the current request for extraordinary relief is premature. This Court does not render advisory opinions on moot or abstract questions. *Applebaum v. Applebaum*, 97 Nev. 11, 12, 621 P. 2d 1110 (1981).

Neither do Petitioners present a legal issue of statewide importance requiring clarification nor will a ruling by this Court promote judicial economy and administration. See *Walker v. Second Judicial District court in and for County of Washoe,* 136 Nev. 678, 683-84, 476 P. 3d 1194, 1198-99 (2020). As a result, this Court should dismiss the Petition.

//

//

//

//

IV.

PETITIONERS' INTERPRETATION DOES VIOLENCE TO NEVADA CONSTITUTIONAL PRINCIPLES AND THE PURPOSE OF THE NFCA

A. Independence of Political Subdivisions Under the Nevada Constitution.

The Constitution of the State of Nevada makes political subdivisions independent of each other. Article 4, Section 25, reads:

> "The Legislature shall establish a system of County and Township Government which shall be uniform throughout the State." (Emphasis added).

Article 4, Section 20 states, in pertinent part:

> "The legislature shall not pass local or special laws in any of the following enumerated cases"
>
> … "[r]egulating county and township business"
>
> … "[r]eleasing the indebtedness, liability, or obligation of any corporation, association, or person to the state, or to any county, town, or city of this state". (Emphasis added).

Article 4, Section 26, mandates:

> "The Legislature shall provide by law, for the election of a Board of County Commissioners in each County, and such County Commissioners shall jointly and individually perform such duties as may be prescribed by law." (Emphasis added).

In *State ex rel. Ginocchio v. Shaughnessy*, 47 Nev. 129, 217 P. 581, 583-84 (Nev. 1923) this Court recognized:

> "[c]ounty commissioners are administrative agencies of the state. They are required by the organic law to perform such duties as may be prescribed by law. Their duties are various and manifold. They proceed, in the exercise of their powers derived from law, by means of orders, ordinances, and resolutions duly passed and entered upon their records. In the present act the commissioners are not only required, but are commanded by the law, to enact appropriate ordinances to carry out the purposes of the act." (Emphasis added).

NRS 244.3352 creates the TLT and mandates that every county impose it. Thus, once NRS 244.3352 became law, the assessment and collection of the TLT became "county business" which the commissioners of each county are "required …[and] commanded by the law, to enact appropriate ordinances to carry out the purposes of the act" as this Court held in *Ginocchio.* See *Youngs v. Hall,* 9 Nev. 212, 214, 1874 WL 3944 at *1 (Nev. 1874) ("county business" includes levying, assessing and collecting county taxes and taking care of county funds.); *Singleton v. Eureka County,* 22 Nev. 91, 35 P. 833, 836 (Nev. 1894); *Washoe County Water Conservation District v. Beemer,* 56 Nev. 104, 45 P. 778, 784 (Nev. 1935).

Nevada political subdivisions are each an independent legal entity as to each other. They can sue or be sued and control the prosecution or defense of all suits to which they are a party, including the right to compromise and settle disputed or doubtful claims not yet in action. *Clark County v. Lewis*, 88 Nev. 354, 356-57, 498 P. 2d 363, 365 (Nev. 1972). See NRS 244.265. This includes the right to hire counsel to bring litigation and/or protect the county's interests in collecting taxes. *State ex rel. Thompson v. Board of Commissioners of Washoe County*, 23 Nev. 247, 45 P. 529 (Nev. 1896).

A political subdivision of the State of Nevada is not a "person" unless the enabling legislation at issue in a matter provides otherwise.[6] Thus, Clark County is not authorized to bring an action on behalf of the State to recover funds belonging to the State and vice versa. In the absence of statutory or contractual privity as between political subdivisions, one county has neither legal standing nor authority to collect taxes for another. See *Humboldt County v. Lander County*, 24 Nev. 461, 56 P. 228, 231 (Nev. 1899); *Lander County v. Nye County*, 59 Nev. 114, 86 P. 2d 34, 36 (Nev. 1938). A Nevada county lacks the authority to bind other counties in

[6] NRS 0.039 "Person" defined. Except as otherwise expressly provided in a particular statute or required by the context, "person" means a natural person, any form of business or social organization and any other nongovernmental legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization. The term does not include a government, governmental agency or political subdivision of a government. (Emphasis added).

the absence of their consent. *Zebe v. State, County of Lander,* 112 Nev. 1482, 929 P. 2d 927, 928 (Nev. 1996) (one county may not bind another county without its express consent).

This separation of political subdivisions is necessary to maintain the goals and objectives of the Nevada Constitution. This Court has observed the need for this separation to avoid conflicts of interests:

> [W]e believe that our constitutional form of government does not proceed upon gratuitous assumptions of good faith. Instead, fundamental to our government is the checks and balances system inherent in separation of power. Our Constitution, as its preamble recites, is intended to 'secure the Blessings of Liberty to ourselves and our Posterity.' Where one group's political rights are left unsecure, and another group is empowered to trample those rights at will, we believe that it is no answer, from a Constitutional standpoint, to say the former should not complain but should have trust in their fellow men and women.
>
> *Clark County v. City of Las Vegas,* 92 Nev. 323, 345, 550 P. 2d 779 (Nev. 1976)

The NFCA empowers (a) a private plaintiff pursuing recovery on behalf of the State and/or its political subdivisions; (b) the State and political subdivisions thereof pursuing a false claim act case directly on their own behalf; and (c) the State or its individual political subdivisions permitting private plaintiffs to file suit on their behalf to secure money or property owed to them. The right of the State to permit a private plaintiff, at his own expense, to pursue claims on behalf of the State is at the core of the NFCA.

During legislative hearings considering enactment of the NFCA, Tim Terry, Senior Deputy Attorney General, Medicaid Fraud Control Unit, Office of Attorney General, offered his office's support for S.B. 418, noting that S.B. 418 would allow individuals to prosecute a case of fraud on behalf of the State in cases where it might not have sufficient resources to do so and described it as an extra "tool" in the fight against fraud upon the government. [See MINUTES OF THE SENATE COMMITTEE ON GOVERNMENT AFFAIRS Seventieth Session March 31, 1999, at p. 20 attached hereto as **Exhibit 14**.] [RAPP_000196]

The Attorney General has authorized RPI to file the instant *qui tam* action in the name and on behalf of the State of Nevada to recover taxes Petitioners fraudulently failed to remit to the State by virtue of lodging transactions in Clark, Washoe, Douglas, Lyon, Nye and/or other counties.

B. Unlike Its Federal Counterpart, The State of Nevada and Political Subdivisions Are Not a Unified "Government" Under The NFCA.

The Federal False Claims Act ("FFCA"), 31 U.S.C. §§ 3729, *et seq.*, is a weapon for combatting fraud perpetrated upon the federal government. It allows and incentivizes individuals possessing information to sue persons or entities that are defrauding the United States and recover damages and penalties on the United States' behalf. Similarly, the NFCA is a legislatively created weapon for combatting fraud that has been perpetrated upon "the State or a political subdivision, or both the State and a political subdivision." See NRS 357.080(1). The NFCA defines

"Political Subdivision" as "a county, city, assessment district or any other local government as defined in NRS 354.474." NRS 357.030. Unlike the FFCA, which contemplates filing a representative action on behalf of only one party (the United States of America, commonly called "the government"), the NFCA provides for filing a *qui tam* action on behalf of the State of Nevada, and/or any county, municipality, assessment district or a combination thereof. NRS 357.080(1), recognizes that these remain separate legal entities with separate legal capacities and that "(t)he action must be brought in the name of the State or the political subdivision, or both" by the private plaintiff.

Petitioners rewrite the NFCA and characterize the State and each of its political subdivisions as if they constitute a single entity which they refer to as "the government". They then frame their "case-dispositive legal question of first impression" as follows:

> "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?" (Emphasis added). Pet. at pg. 1:3-6.

Petitioners then further recite as a basic fact as follows:

> 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)… (Emphasis added). Pet. at pg. 1:12-14.

However, RPI did not file on behalf of some non-existent entity encompassing without differentiation the State and all its political subdivisions. Rather, the *qui tam* is filed solely on behalf of the State of Nevada for the purpose of recovering the State's share of the TLT flowing from transactions in each political subdivision. This distinction is critical.

C. The Purpose of NRS 357.080(3)(b).

The NFCA and FFCA both contain provisions originating in the 1986 amendments to the FFCA that foreclose an action being prosecuted by a private person absent the permission of their respective Attorneys General. The first arises when the information that forms the factual basis of the action has been publicly disseminated prior to the filing of the action and the relator is not the original source of the information. Compare NRS 357.100 and 31 U.S.C. 3730(e)(4)(A)(i) thru (iii). The second occurs when a private plaintiff files an action based upon allegations or transactions that are the subject of a civil action or administrative proceeding seeking a monetary penalty to which the "State or political subdivision" (NRS 357.080(3)(b)) or "the Government" (31 U.S.C. §3730(e)(3)) "is already a party".

All courts that have addressed these statutes have determined that the legislative purpose for both is to disable opportunistic plaintiffs from bringing

parasitic lawsuits. See *United States ex rel. Poteet v. Bahler Medical, Inc.*, 619 F. 3d 104, 112 (1st Cir. 2010); *United States ex rel. Zizic v. Q2Administrators,* 728 F. 3d 228, 235 (3rd Cir. 2013); *United States ex rel. Mateski v. Raytheon Co.,* 816 F. 3rd 565, 577 (9th Cir. 2016); *Phone Recovery Service LLC v. Verizon Washington, DC, Inc.*, 191 A. 3rd 309, 319 (D.C. Ct. App. 2018); *State ex rel. Bartlett v. Miller,* 243 Cal. App. 4th 1398, 1407, 197 Cal. Rptr. 3rd 673, 679 (Cal. App. 2nd Dist. 7th Div. 2016); *Lyons Township ex rel. Kielczynski v. Village of Indian Head Park,* 416 Ill. Dec. 641, 647, 84 N.E. 3rd 1118, 1124 (Ill. App. 1st. Dist. 5th Div. 2017); *State ex rel. Foy v. Austin Capital Management, LTD,* 355 P. 3rd 1, 7 (N.M. 2015).

In *United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine*, 24 F.3d 320, 327–28 (1st Cir. 1994) overruled on other grounds by *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 128 S. Ct. 2123 (2008), the United States Court of Appeals for the First Circuit examined the FFCA corollary to NRS 357.080(3)(b). It determined the language "the action is based upon allegations or transactions that are the subject of a civil action or an administrative proceeding for a monetary proceeding in which the government is already a party" to be ambiguous regarding how to identify to what proceedings it applies. Articulating the questions that must be answered to determine if the statute applied, the court held:

> What circumstances does § 3730(e)(3) seek to avoid? It seems clear that the answer to this question is circumstances involving "parasitic" *qui tam*

actions which are not otherwise barred by § 3730(e) … Thus, when it is not clear whether or not a *qui tam* action should be barred by the ambiguous provision precluding the action if it is "based upon transactions or allegations which are the subject of" another suit or proceeding in which the government is a party, we think that a court should look first to whether the two cases can properly be viewed as having the qualities of a host/parasite relationship.

In answering this question, we think it would be useful for the court to be guided by the definition of the word "parasite," and ask whether the qui tam case is receiving "support, advantage, or the like" from the "host" case (in which the government is a party) "without giving any useful or proper return" to the government (or at least having the potential to do so). … If this question is answered in the affirmative, the court may properly conclude that there is an identity between "the basis" of the qui tam action and "the subject of" the other suit or proceeding; if this question is answered in the negative, the court similarly may gather that such an identity is lacking

…. [W]e believe it important to note that one of the most important perceptions precipitating the 1986 amendments was that actions which had the potential of providing such return were being precluded by the then-existing statutory regime. In light of this, we feel courts should proceed with

caution before applying the statutory bar of § 3730(e)(3) in ambiguous circumstances.

Id. at 327–28. See also *Sturgeon v. Pharmerica Corp*., 438 F. Supp. 3d 246, 262 (E.D. Pa. 2020) (if a relator's case "is seeking to remedy fraud that the government has not yet attempted to remedy," the statute does not apply); *Costner v. URS Consultants*, Inc., 153 F.3d 667, 676 (8th Cir. 1998) (because this case sought to remedy fraud that the government had not yet attempted to remedy, the statute did not apply).

Here, the *qui tam* action is not parasitic to the CCA. Setting sequence aside, the scope of the *qui tam* is much broader and seeks to remedy fraud that Clark County cannot. Petitioners' construction of NRS 357.080(3)(b) would require that Clark County exercise in its separate lawsuit what it cannot – legal standing and/or authority to enforce rights of the State of Nevada or its other political subdivisions. Clark County possesses neither. As such, it cannot collect or forgive TLT owed to the State or Washoe, Douglas, Lyon, Nye and/or such other counties for lodging transactions that occurred in <u>those counties</u>.

//

//

//

//

D. Petitioners Ignore the Role of the Attorney General in the NFCA.

Once a *qui tam* action is commenced, it may be dismissed only with written consent of the court and the Attorney General.[7] This Court has recognized that the NFCA statutory scheme envisions ongoing activity and control by the Attorney General. See *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. of Nevada*, 122 Nev. 132, 138–39, 127 P.3d 1088, 1093–94 (2006). There the Court observed, using language recognizing that the sequence in which *qui tam* and direct-action lawsuits are filed matters:

> When the *qui tam* plaintiff files an action, he or she must send a copy of the complaint and written disclosure of all material information to the Attorney General. The complaint is then sealed until the Attorney General decides whether to intervene; the defendants are not served until the complaint is unsealed. If the Attorney General decides to intervene "and proceed with the action," the private plaintiff must cede control of the litigation but nevertheless remains a party to the action. But if the Attorney General initially decides not to intervene, the private plaintiff may proceed alone, *with the same rights as the Attorney General would have had.* The Attorney General may later intervene only upon timely application and "if the interest of the State ...

[7] Petitioners previously sought dismissal pursuant to NRS 357.100. However, the Attorney General exercised his authority and objected to the dismissal, resulting in it being denied.

> in recovery of the money or property involved is not being adequately represented by the private plaintiff." The Attorney General also has authority to settle the action and "may move to dismiss the action for good cause." *Generally, a false claims action may not be maintained if administrative or court proceedings involving the same underlying facts and allegations were* ***previously*** *instigated*. (Emphasis added).

Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. of Nevada, 122 Nev. 132, 138–39, 127 P.3d 1088, 1093–94 (2006).

The legislative history of S.B. 418 demonstrates that the Nevada Legislature removed by amendment district attorneys from having any authority under the NFCA, resulting in the Attorney General having exclusive 'powers and duties' regarding matters that are initiated by the *qui tam* process. Senior Deputy Attorney General Terry, Senator Titus and representatives from Washoe and Clark counties stated that counties desired that the NFCA oversight should be handled exclusively by the Attorney General's office. Senior Deputy Attorney General Terry explained that the proposed amendments would delete references to the county-level investigation and prosecution, exclusively bestowing such authority on the Attorney General. [MINUTES OF THE SENATE COMMITTEE ON GOVERNMENT AFFAIRS Seventieth Session March 31, 1999, at p. 19 attached hereto as **Exhibit 14**. [RAPP-000195]

It is inimical to the statutory scheme to grant the Attorney General exclusive oversight of the *qui tam* action and the right to intervene at any time (a) "if the interest of the State ... in recovery of the money or property involved is not being adequately represented by the private plaintiff" [NRS 357.130(2)] or (b) to settle the action and/or "move to dismiss the action for good cause" [NRS 357.120(2), (3)] while at the same time giving a political subdivision which is neither a party nor beneficiary to the *qui tam* case the ability to cause its termination without the approval of the Attorney General.

Since a political subdivision of the State – such as Clark County - may bring a direct action under the NFCA, NRS 357.080(3)(b) of necessity addresses the rights of a *qui tam* relator if that occurs. In order to give meaning and effect and to "take into account the public purposes of this chapter [Chapter 357]" as required in NRS 357.080(1), the phrase "civil action … to which the State or political subdivision is already a party" as set forth in NRS 357.080(3)(b), necessarily refers to "the State or a political subdivision, or both the State and a political subdivision" on whose behalf and in whose name the first-in-time action was "already" brought.

Petitioners' interpretation of NRS 357.080(3)(b) requires that a *qui tam* action filed on behalf of and in the name of the State of Nevada for tax receipts owed to the State from Petitioners fraudulently failing to pay it in every county in which it was not paid must be dismissed if a direct action is filed by any county to collect the

portion of the unpaid taxes owed only to that county. Such an interpretation is entirely dependent upon the Petitioners' substitution of the word "government" for "State or political subdivision". Petitioners' rewriting of the statute would grant the power to cause the dismissal of any NFCA *qui tam* action to each political subdivision of the state even though the *qui tam* action was seeking to vindicate the rights of jurisdictions for which they have no authority: i.e., the State and/or another named political subdivision. The Attorney General's role is extinguished by Petitioners' rewriting of the statute. This is surely an absurd result.

V.

PETITIONERS MISAPPLY RULES OF STATUTORY INTERPRETATION

A. The term "maintained" commonly means "brought" in legal context

Demonstrating willful blindness to *Breuer v. Jim's Concrete of Brevard, Inc*., 538 U.S. 691 (2003), Petitioners assert that the word "maintained" in NRS 357.080(3)(b) has but one possible meaning: To "continue (something)." Pet. at 19 n.12. (Citing BLACK'S LAW DICTIONARY (11th ed. 2019).[8] In *Breuer* the Court

[8] In the footnote where this narrow slice of the definition is supplied, petitioners claim the court in *Madera v. State Indus Ins. Sys*., 114 Nev. 253, 956 P.2d 117 (1998) likewise used the BLACK'S definition to arrive at the same narrow interpretation of the term. But that summary badly misconstrues the case and its import. In *Madera*, the pertinent statutory text read, "'No cause of action may be brought or maintained[.]'" *Madera v. State Indus Ins. Sys*., 114 Nev. 253, 256-257, 956 P.2d 117, 119-120 (1998) (citing NRS 616D.030). It did not analyze "maintained" in isolation, but in statutory conjunction with "brought." This Court held: "We conclude that the use of 'brought and maintained' in NRS 616D.030 parallels the

sought to settle a running circuit split over the proper reading of a statute in which "maintain" had a significant role. Justice Souter, writing for a unanimous Court, wrote:

> While § 216(b) provides that an action "may be maintained ... in any ... State court of competent jurisdiction," the word "maintain" enjoys a breadth of meaning that leaves its bearing on removal ambiguous at best. "To maintain an action" may mean "to continue" to litigate, as opposed to "commence" an action. *Black's Law Dictionary* 1143 (3d ed.1933). But "maintain" in reference to a legal action is often read as "bring" or "file"; "[t]o maintain an action or suit may mean to commence or institute it; the term imports the existence of a cause of action." *Ibid.;* see 1A J. Moore et al., Moore's Federal Practice ¶ 0.167[5], p. 472 (2d ed.1996)(calling the " 'may be maintained' " language an "ambiguous phrase" and "certainly not an express provision against removal within the meaning of § 1441"); 14C C. Wright, A. Miller, &

---

use of 'institute and maintain' as used in the statute in *National Mines*." *Id*. at 259, 121. In turn, *National Mines Co. v. Sixth Judicial Dist. Court Humboldt County*, 34 Nev. 67, 116 P. 996 (1911) held, "In section 1 the two words are used together, "institute and maintain"; and hence both are used in their restricted sense." *National Mines Co. v. Sixth Judicial Dist. Court Humboldt County*, 34 Nev. 67, 116 P. 996, 1,000 (1911). The conjunctive forced the terms to be assigned different meanings, not BLACK'S, which both *Madera* and *National Mines* recognized had a far broader meaning than the one assigned when the term was statutorily conjoined with "brought."

E. Cooper, Federal Practice and Procedure § 3729, p. 235 (1998)(referring to "use of the ambiguous term 'maintain' in the statute").

Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 694-695 (2003). In the instant case, the district court's ruling reflected this full, proper understanding of the term "maintained".[9]

Petitioners give lip service to the appropriate analytical approach being that "[i]n 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." Pet. at 18. (citing *Food Mktg. Inst. v Argus Leader Media*, —U.S. —, 139 S.Ct. 2356, 2364, 204 L.Ed.2d 742 (2019) (internal citations omitted)); *see also Newell v. State*, 131 Nev. 974, 977, 364 P.3d 602, 603-04 (2015) (citing *State v. Friend*, 118 Nev. 115, 120, 40 P.3d 436, 439 (2002)).

But in *Food Mktg. Inst.*, the Supreme Court began its "careful examination" with a review of multiple contemporary dictionaries. Here, in contradistinction,

[9] The circuit split, resolved thirty-four years later by the unanimous Court in *Breuer*, is discussed explicitly in BALLENTINE'S entry for "maintain an action." *See* BALLENTINE'S LAW DICTIONARY (3d ed. 1969). After discussing the competing interpretations in the circuits, BALLENTINE'S observed, "The disagreement is due almost entirely to the uncertainty as to the true meaning of the word 'maintained.'" *Id*. (Emphasis added).

Petitioners assume that "maintain" has but one meaning.[10] They then begin their "analysis" with the naked assertion that, "The unambiguous language of NRS 357.080(3)(b) demonstrates the error." Pet. at 16. To support that conclusion, they fabricate for this Court a contrived phrase found nowhere in NFCA, they then invent a four-element "test" that is bereft of jurisprudential support, and finally declare that they have met their birthed test and therefore must prevail. *Id*. at 16-17.

Most egregiously, the fourth "element" of their offspring – "the relator must be 'maintaining' the *qui tam* action despite the separate civil action" – assumes without analysis the meaning of 'maintain'. To accept the validity of their fourth "element" is to assume the result of, rather than engage in, competent statutory analysis. They invite this Court to ignore *Breuer* - without citing it – and to assume both that "maintain" cannot and does not mean "brought" and that "already" isn't there at all.

[10] Performing Petitioners' work for them, RPI advise the Court that the 2019 edition of BLACK'S cited by petitioners also notes that "maintain" commonly means, "To assert (a position or opinion)." BLACK'S LAW DICTIONARY (11th ed. 2019). And the version of BLACK'S in effect at the time Nevada's False Claims Act was codified notes, "To 'maintain' an action is to uphold, continue on foot, and keep from collapse a suit already begun, or to prosecute a suit with effect." BLACK'S LAW DICTIONARY (6th ed. 1990). Further, "To maintain an action or suit may mean to commence or institute it[.]" *Id*. Further still, "Maintained" was separately defined, "Carried on; kept possession and care of; kept effectively; commenced and continued." *Id*.) (Emphasis added)

B. As Used in NRS 357.080(3)(b), The Word "Already" Abounds with Meaning and Must Be Given Legal Effect.

"When interpreting a statute, we focus on the words used in the statute." *Lofthouse v. State*, 136 Nev. 378, 380, 467 P.3d 609, 611 (2020) (citing *Blackburn v. State*, 129 Nev. 92, 95, 294 P.3d 422, 425 (2013)). "We give those words their plain and ordinary meanings unless the context requires a technical meaning, or a different meaning is apparent from the context." *Id*. (citing Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47:27, at 453-54 (7th ed. rev. 2014). As with "maintain", Petitioners provide no analysis of the plain meaning of the word "already" in NRS 357.080(3)(b) because it would require that they address it as a word which introduces a consideration of time and sequence.

Employing diversion, Petitioners compare the FFCA with the NFCA and insist "[T]he Nevada Legislature replaced [bring], such that the NFCA does not allow a *qui tam* plaintiff to 'maintain' (*i.e.*, continue to pursue) a *qui tam* action." Pet. at 19. They continue, "In so doing, the Legislature avoided and removed any temporal or sequential precondition to the application of the NFCA's government action bar." Pet. at 19-20. They ignore that "already" has its own simple meaning and it cannot be read out of the statute, thereby demeaning the collective intelligence of the legislators that enacted the NFCA. *See Wilson v. Happy Creek, Inc*., 135 Nev. 301, 308, 448 P.3d 1106, 1112 (2019).

A "temporal or sequential precondition" is very much alive in NRS 357.080(3)(b) through the words "already" and "maintained," which is why Petitioners endeavor to eradicate "already". The problem for them is that the context makes clear that "maintained" means "brought." Petitioners argue that the distinction they attempt to draw between the FFCA and NFCA requires that their narrow reading of "maintain" "must be given effect". But "the presumption of consistent usage 'readily yields' to context[.]" *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 320 (2014). This is so because "[t]hough one might wish it were otherwise, drafters more than rarely use the same word to denote different concepts, and often (out of a misplaced pursuit of stylistic elegance) use different words to denote the same concept." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS at 170. Here, the context makes clear that "maintained" means "brought."

Regarding NRS 357.080(3)(b), how shall this Court interpret the word "already"? It is not a technical term requiring a technical definition. It is not a legal term of art, and one will search BLACK'S LAW DICTIONARY in vain seeking it. Neither does the surrounding context suggest an extraordinary meaning is required. Rather, the context clearly confirms that the word's ordinary meaning is the best and proper one to give it.

With respect to "already," the "plain and ordinary meaning" of the word is more than sufficient to understand its import to NRS 357.080(3)(b). The word "already" means "prior to a specified or implied past, present, or future time: by this time: PREVIOUSLY[.]" *Merriam-Webster's Collegiate Dictionary* 34 (10th ed. 1993). It also means, "by this or that time; previously; prior to or at some specified or implied time[.]" *The Random House Dictionary of the English Language* 60 (2d unabridged ed. 1987). Further, "already" means, "Beforehand, in anticipation; previously to some specified time; by this time, thus early." *The Oxford English Dictionary* 363 (2d ed. 1989).

The grammar canon instructs, "'Words are to be given the meaning that proper grammar and usage would assign them.'" Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, 140 (2012)). The word "already" is an adverb, a word that serves "as a modifier of a verb, an adjective, another adverb, a preposition, a phrase, a clause, or a sentence…" *Merriam-Webster's Collegiate Dictionary* 17 (10th ed. 1993). Contrary to Petitioners' assertion, "already" is not a mere "descriptor" of the noun "party", as it is not an adjective and "party" is a noun. Rather, it "express[es] some relation of … time" in the provision where it is located. *Id.* It modifies the transitive verb "maintained," located in the introductory clause of NRS 357.080(3). Far from being a throw-away word with little or no effect, as the district court clearly saw, the inclusion of "already" in NRS 357.080(3)(b) helps to

ensure that the reader understands a private plaintiff may not initiate an action if the State or a political subdivision has, prior to that time, done so based on the same "allegations or transactions."

C. The "No Surplusage" Canon Supports Giving Each Word Legal Effect; "Already" Should Not Be Read Out of The Statute as Having No Effect.

The venerable canon against surplusage abhors and rejects efforts to render words meaningless. "The surplusage canon teaches that, "If possible, every word and every provision' in a statute 'is to be given effect. None should be ignored [or] given an interpretation that causes it to duplicate another provision or to have no consequence.'" *Wilson v. Happy Creek, Inc*., 135 Nev. 301, 308, 448 P.3d 1106, 1112 (2019) (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012).

Petitioners seek the opposite, asking this Court to read the word "already" out of NRS 357.080(3)(b). But "already" can and therefore must be given effect. Although it is well established that "[n]o canon of interpretation is absolute," ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS AT 59, that does not mean such venerable canons ought to be disregarded in the Court's analysis. Indeed, here, the canon interacts well with other canons of construction and so deserves to play an important role in the Court's analysis.

Petitioners argue the word "already" serves merely to provide "emphasis and clarity to the term 'party.'" Pet. at 23. How, one wonders, does the modifying adverb "already" "clarify and emphasize" the noun "party"? What sort of clarity did the drafters think it brought to "party"? Why did they deem it necessary? What emphasis does it add? Petitioners neither raise nor answer those questions but merely say it doesn't matter because "[t]here 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." *Id*. Petitioners marshal a string citation of non-binding decisions tying back to *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 98 (2006) to support ignoring the canon against surplusage, but that root case fails to do so.

In *BP Am. Prod. Co.*, the petitioners argued that the interpretation of a statute ultimately would require violation of the canon against surplusage because it would render one statutory subsection redundant of another statutory subsection. The Court rejected that argument because the two subsections at issue were passed 16 years apart. *Id*. at 96. The latter codified subsection did not constitute surplusage because "[i]t clarifie[d] that administrative offsets are not covered by subsection (a) even if they are viewed as an adjunct of a court action." *Id*. at 98. Thus, the allegedly duplicative subparagraph *had* considerable effect, which the Court recognized and affirmed, finding no violence to the canon against surplusage.

That perspective is thoroughly consonant with the canon's instruction to ensure that all words are given legal effect. This Court should likewise ensure that all the words found in NRS 357.080(3)(b), including "already," are given full legal effect. And as discussed below, treating "already" as surplusage would lead to an absurd result.

D. The "Avoid Absurd Results" Canon Supports the District Court's Ruling.

The text of NRS 357.080(3)(b) is clear and unambiguous, so this Court should give effect to the plain and ordinary meaning of the words found therein. If, however, the Court believes the statute is ambiguous, it "'must construe ambiguous statutes so as to avoid absurd results.'" *G.C. Wallace, Inc. v. Eighth Judicial Dist. Court of State*, 127 Nev. 701, 705, 262 P.3d 1135, 1138 (citing *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 510 (2006)); *see also Gallagher v. City of Las Vegas*, 114 Nev. 595, 599–600, 959 P.2d 519, 521 (1998) (when a statute is ambiguous, the court's interpretation should be in line with what reason and public policy would indicate the legislature intended, and should avoid absurd results).

Even if the Court does not consider the statute to be ambiguous, the "entire subject matter and the policy of the law may also be invoked to aid in its interpretation, and it should always be construed so as to avoid absurd results." *W. Pac. R. Co. v. State*, 69 Nev. 66, 68–69, 241 P.2d 846, 847 (1952*); see also S. Nevada Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173

(2005) ("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 this court, when possible, to interpret provisions within a common statutory scheme 'harmoniously with one another in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent.").

RPI have already pointed to the absurdity that results from (1) empowering a political subdivision to unilaterally terminate a *qui tam* action brought on behalf of the State or another political subdivision that wish to be represented in the *qui tam* and, (2) disempowering the Attorney General from exercising its legislatively conferred exclusive authority to control *qui tam* actions. Since political subdivisions are clearly legislative creations, Petitioners' interpretation would allow them to turn on and overpower their creators, an absurdity in itself.

An additional absurdity results from the fact that the NFCA is intended to incentivize and financially reward private citizens to come forward with information about fraud against the State and political subdivisions. To enable a political subdivision that is neither a party nor a beneficiary to a *qui tam* action to unilaterally terminate it and disadvantage the parties and beneficiaries to the *qui tam* action creates a major disincentive to expend the effort and financial resources required to

bring a *qui tam* if it can be so easily derailed by the political subdivision subsequently filing its own direct action – three hundred eighty-six (386) days later in this case.

Under the district court's interpretation, such scuttling of a pending *qui tam* action could not occur. If the political subdivision was the first to file a direct-action, then private parties cannot try to gain a piece of the possible recovery by filing a subsequent *qui tam* unless it encompasses different political subdivisions or was of a distinctly different scope than the direct-action. Under the "avoid absurd results" rule, the district court's interpretation produces a "fair and reasonable construction with a view to effecting its purpose." *W. Pac. R. Co. v. State*, 69 Nev. 66, 68–69, 241 P.2d 846, 847 (1952).

E. As "Maintain" And "Already" Can Be Read Harmoniously, They Ought to Be.

It is well established that "provisions of a text should be interpreted in a way that renders them compatible, not contradictory." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012). Further, "[T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." *Id.* S*ee also Orr Ditch & Water Co. v. Justice Court of Reno Tp., Washoe County*, 64 Nev. 138, 146, 178 P.2d 558, 562 (1947) ("It is also a familiar policy in the construction of terms of a statute to take into consideration the meaning naturally attaching to them from the context, and to adopt the sense of the words which best harmonizes with the context."). Nevertheless,

Petitioners urge the opposite. They wrongly insist that "maintained" and "already" must be in conflict, that the two are "incompatible." *See* Pet. at 25.

As already discussed, the Supreme Court has made clear that in the legal context "maintain" "enjoys a breadth of meaning[,]"and in "a legal action is often read as 'bring' or 'file[.]'" *Breuer v. Jim's Concrete of Brevard, Inc*., 538 U.S. 691, 695 (2003). At the same time, "already" has an ordinary meaning that is plainly consonant with the Supreme Court's understanding of "maintain." Further, "When a word has more than one plain and ordinary meaning, the context and structure inform which of those meanings applies." *Lofthouse v. State*, 136 Nev. 378, 380, 467 P.3d 609, 611 (2020) (citing *Blackburn v. State,* 129 Nev. 92, 97, 294 P.3d 422, 426 (2013)).

Here, because "maintained" has more than one plain meaning, we must look to the context and structure of the statute to determine which definition applies. Because the adverb "already" is later used to modify the provision in a way that ensures a consideration of timing, "maintained" must mean "brought." This reading ensures that "maintained" and "already" work together rationally. It ensures "already" is given effect and is not read out of the statute. The words "maintained" and "already" can and should be read harmoniously.

//

//

VI.

CONCLUSION

Because Petitioners' motion for summary judgment was directed to the original Complaint and the motion for reconsideration sought review of the order entered upon that motion for summary judgment, the filing of the First Amended Complaint rendered them nugatory and thereby the questions raised by Petitioners moot and not justiciable. Thus, the Petition should be dismissed.

Because the Petition does not present a legal issue of statewide importance requiring clarification nor will a ruling by this Court promote judicial economy and administration by assisting other jurists, parties and lawyers, the Petition should be dismissed.

Should the Court choose to entertain the Petition, it should be denied on its merits for the reasons set out in this Answer.

Respectfully submitted this 29th day of September 2022.

CLARK HILL PLLC

/s/ Dominic P. Gentile, Esq.
Dominic P. Gentile, Esq. (NSBN 1923)
Michael V. Cristalli, Esq. (NSBN 6266)
Mark S. Dzarnoski, Esq. (NSBN 3398)
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, Nevada 89169
Attorneys for Respondents

VII.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complied 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 for Office 365 in Times Roman 14-point font size.
2. I further certify that this brief does **NOT** comply with the page or type volume limitations of NRAP 21(d) because it is 7,968 words and 709 lines putting it 968 words or 59 lines over the maximum words or lines permissible pursuant to NRAP 21(d), excluding the parts of the brief exempted by NRAP 32(a)(7). However, I certify that Real Parties in Interest have filed a Motion For Permission To Exceed Word Limit Of Real Parties In Interest's Answer To Petitioners' Writ Of Mandamus in conjunction with the filing of this Answering Brief.
3. Finally, I hereby certify that I have read the foregoing Real Parties In Interest's Answer To Petitioners' Writ Of Mandamus Or Prohibition, and to the best of my knowledge, information and belief, this brief is not frivolous or interposed for any improper purpose. I further certify this brief, except as set forth herein, complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of NRAP 28(e), which requires every assertion in the brief regarding

matters in the record to be supported by appropriate references to the record on appeal.

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.

Respectfully submitted this 29th day of September 2022.

CLARK HILL PLLC

/s/ Dominic P. Gentile, Esq.
Dominic P. Gentile, Esq. (NSBN 1923)
Michael V. Cristalli, Esq. (NSBN 6266)
Mark S. Dzarnoski, Esq. (NSBN 3398)
A. William Maupin (NSBN 1150)
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, Nevada 89169
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to NRAP 25(1(d) on the29th day of September 2022, I did serve at Las Vegas, Nevada a true and correct copy of, on all parties to this action by Electronic Filing.

/s/ Tanya Bain
Employee of Clark Hill, PLLC