**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, BOOKINGS HOLDINGS INC, PRICELINE.COM LLC, TRAVELWEB LLC, TRAVELNOW.COM INC, AGODA INTERNATIONAL USA LLC, HOTEL TONIGHT INC, HOTEL TONIGHT LLC,

*Petitioners*,

v.

EIGHTH JUDICIAL 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 Case No.: 85111



**On Petition From the Eighth Judicial District Court**
**The Honorable Mark R. Denton**

# REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PROHIBITION

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## INTRODUCTION

This Petition presents an important issue of first impression under the Nevada False Claims Act ("NFCA"): Does the NFCA's government action bar, NRS 357.080(3), preclude private persons from pursuing *qui tam* claims on behalf of the government when the government itself is pursuing a claim for the same conduct in a separate forum? The answer is: unequivocally, yes. The Legislature imposed the bar in clear and express terms to reserve to the government its right to choose where and when to assert claims that belong to it, and to protect against bounty-hunting private actors competing with the government's direct action.

Petitioners seek writ relief from this Court due to the district court's failure to enforce the government action bar pursuant to its express terms, which mandate that a private party *qui tam* action may not be maintained when the government is pursuing a separate civil action arising from the same allegations or transactions. Instead, the district court created an exception to this prohibition by holding that the bar does not apply if the private party's suit was filed first. As demonstrated in the Petition, and amplified below, that interpretation of the bar was clear legal error.

Relators' Answer barely addresses the dispositive statutory interpretation question and, when it does, it wholly avoids or misapplies principles of statutory interpretation that dictate dismissal under the government action bar. Relators' advancement of unfounded constitutional and public policy arguments—nowhere

supported by the State[1]—instead reinforce the important role the government action bar serves in restraining the ability of private plaintiffs to hijack litigation over issues that the government should control.

First, Relators' contention that enforcement of the government action bar somehow implicates constitutional concerns is without merit. Relators' position appears to be that applying the government action bar to this case would somehow place the State's interests in jeopardy or subjugate the State's interest to those of the counties. This is wrong. What Relators never acknowledge in their brief is that the government action bar only applies to ***private plaintiffs*** who assert *qui tam* actions on behalf of the State or political subdivision—cases where, as here, the Attorney General has affirmatively declined to intervene. It does not apply to any action pursued directly by the government, leaving the Attorney General with the full range of options to protect any State interests.[2]

Second, Relators argue that the Amended Complaint moots the district court's order. But, as explained below, the Petition is not moot, as it still includes—indeed showcases—the same allegations or transactions that give rise to the government

[1] Although given the opportunity to weigh in on this legal question, the State of Nevada declined this Court's invitation. *See* State of Nevada's Notice Regarding Order Issued October 11, 2022.

[2] Relators—media consultants with personal financial interests in this litigation—neither speak for the government nor have any responsibility to set government tax (or other) policy or determine how best to pursue governmental claims.

action bar. Moreover, Relators repeatedly have represented that the Amended Complaint merely clarifies the scope of the original Complaint and effected no substantive change.

When Relators belatedly address the core legal question underlying the Petition, their arguments do not—and cannot—overcome the clear and express language of the bar, and its mandate that Relators' *qui tam* action cannot proceed given the government's direct civil action. The government action bar states:

> An ***action may not be maintained*** by a private plaintiff . . . 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). The district court made an express factual finding (*see* II PA 297) that Relators are maintaining a *qui tam* action based on allegations or transactions that are the subject of a separate action initiated by Clark County.[3] Relators do not challenge this fact, nor could they. The same taxes are at issue in both actions—taxes enacted pursuant to the State enabling act but administered and collected by the County.[4] Thus, both actions seek to recover taxes

[3] *Clark County, Nevada v. Orbitz Worldwide, LLC et al.*, No, 2:21-cv-01328 (D. Nev.) ("Clark County Action").

[4] In Nevada, lodging taxes are not imposed directly by the State. Instead, through an enabling act (and subject to certain limitations), the State permits counties to enact, administer and collect lodging taxes. *See* NRS 244.3354(1)(a), (2)(a) (setting forth taxes owed to a qualifying county and directing that three-eighths of the first 1% be

allegedly due under the same tax (or allegations) and based on the exact same transactions. Nonetheless, the court denied summary judgment based on its assessment that the statute bars duplicative *qui tam* suits only if the government's civil suit is filed first.

But the express language of the NFCA's bar contains no such sequencing limitation. Indeed, the Legislature clearly intended the opposite of the district court's holding. The conditional language from the Federal False Claims Act ("FCA") government action bar states: "In no event may a person ***bring*** an action . . . ." 31 U.S.C. 3730(e)(3) (emphasis added). For the NFCA's government action bar, however, the Nevada Legislature affirmatively replaced the word "bring" with "maintain." The NFCA therefore prohibits a private plaintiff from "maintain[ing]" as opposed to "bring[ing]" a *qui tam* action. Thus, in contrast with the FCA, a private plaintiff not only is precluded from bringing (filing) an NFCA claim after another civil action is filed or pending, but also from maintaining (continuing to litigate) a suit when another civil action is commenced. That deliberate statutory change must be given effect, as it shows that the two terms are intended to (and do) have different meanings.

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deposited with State Treasurer for the State's tourism promotion fund); Clark County Code § 4.08.031(c) (directing 3% to be deposited with State Treasurer for education fund).

Relators ignore all of this, arguing instead—based on cases interpreting different statutes, in different jurisdictions, involving different circumstances (none of which involve the deliberate replacement of "bring" with "maintain")—that the two terms are synonymous. This argument is flatly contradicted by principles of statutory construction and the legislative history and plain meaning of the statute at issue here—the NFCA. In the circumstances ***here***, the Legislature employed language ensuring that the government is able to pursue claims in the forum and manner in which the government determines to be in the public interest—irrespective of whether a private party filed an action first.

This writ application poses an important issue of law that will affect the future of *qui tam* actions under the NFCA. The district court committed clear legal error in refusing to enforce the bar. Therefore, this Court should issue a writ and direct the district court to grant summary judgment to Petitioners.

## REASONS TO GRANT THE WRIT

### I. THE PETITION IS RIPE

Contrary to Relators' assertions, the Amended Complaint does not moot this Petition. A "case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (*quoting Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)) (internal quotation marks omitted); *see also Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (same); *Waste Mgmt. of*

*Nevada, Inc. v. W. Taylor St., LLC*, 135 Nev. 168, 169–70, 443 P.3d 1115, 1116–17 (2019) (concluding appeal was not moot where the court remained capable of granting effective relief from the district court's order).

Nor does an amended pleading render a petition premature, particularly when, as here, "the new pleading does not substantively alter the existing causes of action" or basis for review. *Paramax Corp. v. VoIP Supply, LLC*, 175 A.D.3d 939, 940 (N.Y.A.D. 4th Dept. 2019) (holding appeal from order denying motion to dismiss was not moot simply because the complaint had been amended); *see also Shelton v. Lions Eye Inst. For Transplant & Rsch., Inc.*, No. G042372, 2011 WL 810145, at *7 (Cal. Ct. App. Mar. 9, 2011) (concluding amended complaint did not render moot motion for summary judgment, reasoning "if the pending motion for summary judgment is meritorious as against *both* the original *and* amended complaints, no purpose is served by requiring a new or renewed motion" (emphasis in original)).[5]

Here, the Petition is ripe because (1) Relators have represented that the Amended Complaint does not substantively alter the existing causes of action

[5] *Cf.* Charles A. Wright & Arthur R. Miller, 6 Fed. Prac. & Proc. Civ. § 1476 (3d ed.) ("If some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading. To hold otherwise would be to exalt form over substance."); *Pettaway v. Nat'l Recovery Sols., LLC*, 955 F.3d 299, 304 (2d Cir. 2020) (concluding "amended complaint did not moot Defendants-Appellees' pending motion to dismiss because the new allegations did not save her claim."); *Cureton v. U.S. Marshal Serv.*, 322 F. Supp. 2d 23, 25 n.6 (D.D.C. 2004) (applying pending motion to dismiss to amended complaint where amended complaint had the same legal flaw as the original).

relevant to the Court's analysis, (2) even if the Amended Complaint added new claims, it remains based on allegations or transactions that are the subject of the Clark County Action, and (3) the government action bar is at least quasi-jurisdictional, such that the *qui tam* suit could not properly be amended once the bar took effect.

Relators' argument that the district court's order is moot because it addressed the original complaint cannot be reconciled with their simultaneous assertion that the Amended Complaint merely made "express[]" the claims already "embraced" by the original Complaint. Ans. at 6. Indeed, Relators made the same representation to the district court, claiming that the amendment merely clarified that the original complaint always encompassed claims pertaining to other Nevada counties. II PA 280 ("[A] fair reading of the [Original Complaint] is that it encompasses all transient lodging taxes that may be due and owing to the State of Nevada pursuant to the mandated ordinances of each county . . . [T]he proposed amendment is intended to and does clarify that this action includes transient lodging taxes in all counties of the State that have adopted a mandatory ordinance[.]"). Those representations defeat Relators' current mootness argument.[6] If the Amended Complaint is just a

[6] The timing of Relators' motion to amend, occurring more than two years after they commenced this litigation and only ***after*** Petitioners moved for summary judgment pursuant to the government action bar, suggests that Relators recognized that dismissal was warranted and were attempting to preempt that result.

clarification of existing claims, then there is no substantive difference between the two pleadings, and no mootness question arises. *See Paramax Corp.*, 175 A.D.3d at 940. Relators cite no contrary authority.[7]

Regardless, the government action bar still applies even if the Amended Complaint is the operative pleading for purposes of this Petition. Relators argue that the bar requires a complete overlap between allegations or transactions in both the *qui tam* action and the separate civil action and that the addition of any non-overlapping transaction in the *qui tam* case nullifies the bar. Ans. at 16. Not so. The statute makes clear that an "action" by a relator "may not be maintained . . . if the action is based on allegations or transactions that are the subject of a civil action" in which the government is a party. NRS 357.080(3)(b). It provides no exception in circumstances where the relator merely adds transactions that are not directly the

[7] No case cited by Relators holds that an amended pleading automatically renders moot an appeal of a ruling related to the original pleading. In fact, courts regularly hear appeals of orders related to initial pleadings despite subsequent amendment. *See, e.g., Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 456 n.4 (2009) (addressing original complaint on appeal despite subsequent amendment where district court only certified order addressing original complaint for interlocutory appeal); *Associated Aviation Underwriters, Inc. v. Vegas Jet, L.L.C.*, 106 F. Supp. 2d 1051, 1054 (D. Nev. 2000) (examining original pleading on appeal despite amendment to determine whether AAU ever owed a duty to defend prior to amendment). Moreover, even if the Petition could be considered moot, the Court still would have authority to consider it because it "involves a matter of widespread importance that is capable of repetition, yet evading review." *Johnston v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 138 Nev. Adv. Op. 67, 518 P.3d 94, 99 (2022) (quotations omitted).

subject of the separate suit. Nor would it make sense to allow the relator to easily circumvent the bar and allow two suits arising from the same allegations or transactions to simultaneously proceed. Indeed, under Relators' theory, even if there was a sequencing requirement and the *qui tam* suit was filed after the separate government suit, a relator could maintain that suit notwithstanding the government action bar so long as his suit adds any non-overlapping allegation or transaction.

But the relevant question is whether the *qui tam* action "is ***based upon allegations or transactions*** that are the subject of a civil action" in which the government is a party. NRS 357.080(3)(b) (emphasis added). As long as the Clark County allegations or transactions remain in the Amended Complaint—as everyone agrees they do—that statutory condition is satisfied. Further, not only do both actions involve the same transactions, both involve the same, seminal legal issue—whether the State enabling act authorizes a lodging tax that applies to anyone other than hotels (an issue that is currently pending before the court in the Clark County Action). As such, the legal question raised in this Petition—whether the government action bar applies to a *qui tam* action filed before the qualifying government suit—is the same whether the focus is on the original Complaint or the Amended Complaint.[8]

[8] Relators also forget that the Petition was filed after the district court denied Petitioners' motion for reconsideration and the Petition encompasses that order as well. That timing is relevant here because the Amended Complaint was filed while

Finally, Relators' suggestion that the Amended Complaint moots any government action bar challenge wrongly presumes that a bar violation can be cured via amendment. No such presumption is warranted. Once the two suits co-exist, a relator may not maintain his *qui tam* action. At that moment, the statute automatically bars a relator from taking any action to maintain his *qui tam* suit, including amending his complaint to add new claims.[9] In this regard, the government action bar is best viewed as jurisdictional, or at least quasi-jurisdictional. *See, e.g., United States ex rel. Batty v. Amerigroup Ill., Inc.*, 528 F. Supp. 2d 861, 876 (N.D. Ill. 2007) (dismissing *qui tam* claims for lack of jurisdiction pursuant to section 3730(e)(3) (federal government action bar)); *U.S. ex rel. Loi Trinh v. Ne. Med. Servs., Inc.*, No. C 10-1904 CW, 2013 WL 1789712, at *4 (N.D. Cal. Apr. 26, 2013) ("This provision, known as the government action rule, creates a jurisdictional bar"); *United States v. Biotronik, Inc.*, No. 214CV02407KJMEFB, 2016 WL 1587215, at *9 (E.D. Cal. Apr. 20, 2016), *aff'd sub nom. United States ex rel. Bennett v. Biotronik, Inc.*, 876 F.3d 1011 (9th Cir. 2017) (dismissing FCA claim

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the motion for reconsideration was pending and the district court was aware of the amendment when it denied reconsideration and affirmed the earlier order.

[9] Petitioners submit that the bar is absolute, meaning that Relators could not amend their suit to dismiss the claims based on the Clark County transactions because that would still be "maintaining" the "action." But this Court need not reach that question because Relators' Amended Complaint did not remove the Clark County transactions from their suit.

"with prejudice and without leave to amend"); *United States ex rel. Est. of Gadbois v. PharMerica Corp.*, 292 F. Supp. 3d 570, 581 (D.R.I. 2017) (denying leave to amend where government action bar left "the Court without subject-matter jurisdiction"). Federal court decisions interpreting the federal FCA's government action bar have treated it as jurisdictional. *See, e.g.*, *Batty*, 528 F. Supp. 2d at 876. The NFCA should be construed in the same manner.[10]

The event giving rise to the government action bar here occurred when Clark County commenced its separate action, while the original Complaint was operative. Once the Clark County Action was filed, Relators statutorily were barred from "maintaining" their action, and the case could not proceed. *See id.* No amendment could be viable.[11] *See Biotronik*, 2016 WL 1587215, at *9. Thus, Petitioners

[10] Petitioners are cognizant of the fact that the government action bar does not state that courts "lack jurisdiction" over actions subject to the bar, and that the absence of such express language has been deemed meaningful in other contexts. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153, 133 S. Ct. 817, 824, 184 L. Ed. 2d 627 (2013). However, whether or not it is jurisdictional, the necessary consequence of the bar is the same: An action cannot be maintained by a relator once certain conditions are met, as they are here.

[11] It is common sense and has been acknowledged by Nevada courts on numerous occasions that certain defects, such as the one at bar here, simply "cannot be cured through amendment." *Washoe Med. Ctr. v. Second Jud. Dist. Ct. of State of Nev. ex rel. Cnty. of Washoe*, 122 Nev. 1298, 1300–01, 148 P.3d 790, 792 (2006) (holding an NRS 41A.071 defect rendering a complaint *void ab initio* cannot be cured through amendment); *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013), *as corrected* (Aug. 14, 2013) (amendment is futile "if the plaintiff seeks to amend the complaint in order to plead an impermissible claim").

properly focused their government action bar summary judgment motion on the original Complaint, and the subsequently filed Amended Complaint, at least for present purposes, has no bearing.

## II. THE GOVERNMENT ACTION BAR PRECLUDES RELATORS FROM MAINTAINING THEIR *QUI TAM* ACTION

The district court's holding that the government action bar does not apply where the *qui tam* action is filed before the government's separate civil action is clearly erroneous. The statute's plain text contains no such sequencing requirement. Moreover, the district court's adoption of this unstated rule cannot be reconciled with well-established principles of statutory construction, including the significance of the Legislature's (1) departure from the federal FCA's government action bar language—using the term "maintain" rather than "bring," and (2) use of the term "bring" elsewhere in the NFCA, demonstrating that the terms "bring" and "maintain" have different meanings.

### A. The Statute Does Not Contain a Sequencing Requirement

The elements of the government action bar are clear.[12] A *qui tam* action by a private plaintiff "may not be maintained" if (1) the "allegations or transactions" in the *qui tam* action are the subject of a separate civil action, and (2) the State or political subdivision is a party to the separate civil action. These elements are

[12] The express, unambiguous directive in the statute needs no further interpretation and should be enforced as written. *See* Pet. at 18–19.

satisfied here. 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 (emphasis added). Relators similarly admit that both suits are "based upon the same failure to pay transient lodging taxes." I PA 152–53. It also is undisputed that Clark County is a party to its suit and is a "political subdivision" within the meaning of the government action bar. *See* NRS 357.030.

The statute makes no exception enabling a relator to "maintain" his *qui tam* action if he files suit an instant ahead of the government.[13] Indeed, the Legislature knew how to—and did—create unambiguous temporal and sequential preconditions,

[13] Nor does Nevada case law interpreting the provision support imposing such a requirement. Relators mistakenly point to this Court's decision in *Int'l Game Tech.* as "using language recognizing that the sequence in which *qui tam* and direct-action lawsuits are filed matters," Ans. at 18–19, while failing to acknowledge that the Court's observation about the government action bar in that case was not a holding or that the sequencing of the actions was never at issue in that case. Rather, in addressing an unrelated question, this Court made the uncontroversial comment that "a false claims action may not be maintained if administrative or court proceedings involving the same underlying facts and allegations were previously instigated." *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. of Nevada*, 122 Nev. 132, 138–39, 127 P.3d 1088, 1094 (2006). That statement plainly is true; it also is true that the government action bar often is applied in circumstances where the government action was filed prior to the *qui tam* action. But that says nothing about whether the bar has a sequencing requirement or whether the bar ***also*** applies when the *qui tam* action is filed first. Indeed, a fair reading of the Court's use of the phrase "previously instigated" would be consistent with the circumstances here, where Relators are seeking to maintain their suit in 2022 notwithstanding the "previous instigation" of the Clark County suit in 2021.

including in the very same subsection of the NFCA in which the government action bar appears. *See, e.g.*, NRS 357.080(3) ("An action may not be maintained by a private plaintiff pursuant to this chapter (a) 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***." (emphasis added)). The Legislature employed express sequencing terms in other NFCA provisions, such as "before," "after," and "previously." *Compare* NRS 357.080(3)(b) *with* 357.026 ("before"), 357.080(1) ("After such an action is commenced . . ."), 357.130(2) ("previously"). Unlike the NFCA's so-called "first-to-file" bar—another provision that precludes certain *qui tam* actions—which expressly refers to "the first action," the government action bar contains no such language. *Compare* NRS 357.080(3)(b) *with* 357.080(2). The Legislature easily could have—but chose not to—employ similar sequential preconditions to the government action bar. Thus, consistent with the plain text, once the private *qui tam* action and qualifying government action co-exist, the bar applies and the *qui tam* suit must yield.[14]

[14] *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'") (quoting *Labastida v. State*, 115 Nev. 298, 302–03, 986 P.2d 443, 446 (1991)); *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'").

### B. Relators Completely Ignore the Legislature's Express Departure from the Language of the Federal FCA

Although featured prominently in the Petition as well as in Petitioners' summary judgment briefing and argument below, Relators never acknowledge or address the fact that when enacting the NFCA—which otherwise is patterned on the federal FCA[15]—the Nevada Legislature altered the language of the federal FCA's government action bar, replacing the term "bring" with "maintain." While the federal FCA provision says that "in no event may a person ***bring*** an action," the NFCA uses the term "maintain." *Compare* 31 U.S.C. § 3730(e)(3) (emphasis added) *with* NRS 357.080(3)(b). This departure from the federal FCA was no accident. The Legislature specifically evaluated not only the federal FCA, but also the FCA laws in five other states as it determined which provisions to adopt and what language to employ. Each of the five states cited in the legislative history have government action bars that use the word "bring" rather than "maintain."[16] These facts and history—wholly ignored by Relators—cannot be squared with Relators' current argument (Ans. at 21) that the terms are interchangeable.

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[15] *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.").

[16] *See* Cal. Gov't. Code. § 12652(d)(2); Tex. Hum. Res. Code § 36.113(a); TN Code § 4-18-104(d)(2); 740 ILCS 175 § 4(e)(3); Fla. Stat. § 68.087(2); RAPP 192.

By failing to confront the Legislature's distinct and deliberate use of the word "maintain" rather than "bring"—as well as the Legislature's use of the word "bring" elsewhere in the NFCA—Relators disregard established law requiring that each term be ascribed its own meaning. *See Aerogrow*, 137 Nev. Adv. Op. 76, 499 P.3d at 1199. Instead, Relators focus myopically on the term "maintain," pointing to both *Madera* and *National Mines* to suggest that "maintain" and "bring" are equivalent. But neither case helps Relators. Setting aside that these decisions do not interpret the NFCA, both actually ***support*** Petitioners' interpretation because, in them, this Court acknowledged the need to ascribe unique meaning to the word "maintain" where terms meaning bring ("brought" and "institute") appeared elsewhere within the same statute. *See Madera v. State Indus Ins. Sys.*, 114 Nev. 253, 258–59, 956 P.2d 117, 120-21 (1998); *Nat'l Mines Co. v. Sixth Jud. Dist. Ct. Humboldt Cnty.*, 34 Nev. 67, 116 P. 996, 1000 (1911).

Similarly, in *Breuer*, another case Relators tout, the Supreme Court examined statutory context (i.e., surrounding statutory language) to conclude that "to maintain an action" means "'to continue' to litigate, as opposed to 'commence' an action." *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 695 n.1 (2003). Although *Breuer* involved an entirely different statute, enacted by a different legislature, Relators ignore these facts and never mention the NFCA context in which the term "maintain" is used. Thus, they never account for the fact that the Legislature used

the words "bring" and "brought" elsewhere in the NFCA—including in the same subsection where the government action bar resides.[17] In context, this variation in statutory language confirms that the Legislature considered the terms "maintained" and "bring" or "brought" to have distinct meanings.

The Legislature's determination of what language and provisions of the FCA best serve Nevada's governmental interests is made clear elsewhere in the NFCA. Indeed, the Legislature expressly chose not to adopt every provision of the federal FCA. Absent the Legislature's departure from the federal FCA, Relators' *qui tam* action—based on a purported failure to remit taxes—would fail for an entirely different reason. That is because the FCA expressly excludes claims based on tax violations under 31 U.S.C. § 3729(d), a provision absent from the NFCA. This Court held that this very disparity between the federal FCA and NFCA "conclusively demonstrate[d]" the Nevada Legislature's intent to include tax liability matters within the scope of the NFCA. *Int'l Game Tech.*, 122 Nev. at 154, 127 P.3d at 1104.

This dispositive indication of legislative intent—*i.e.*, the Legislature's clear departure from the federal FCA—is what first enabled Relators to bring their claims under a "tax" theory. But that same conclusive demonstration of legislative intent—

[17] *See, e.g.*, NRS 357.080(1) ("The action must be ***brought*** in the name of the State or the political subdivision, or both.") (emphasis added); 357.080(1) ("Except as otherwise provided in this section and NRS 357.100, a private plaintiff may ***bring*** an action pursuant to this chapter . . .") (emphasis added); 357.080(2) ("If a private plaintiff ***brings*** an action . . .") (emphasis added).

*i.e.*, departure from the language of the federal government action bar—applies with full force here to prohibit Relators from maintaining their claims in the face of the Clark County Action.

### C. Statutory Interpretation Rules Require Harmonizing the Terms "Maintain" and "Already"

Relators' grammatical analysis of the word "already" mischaracterizes the Petition. Contrary to Relators' assertion, Petitioners do not contend "maintained" and "already" are "incompatible." *See* Ans. at 33. Rather, Petitioners assert that ***the district court's reading*** of the word "already" is incompatible with the express language of the NFCA because it fails to respect rules of statutory interpretation that require ascribing actual meaning to the term "maintain." NRS 357.080(3)(b); *see also* Pet. at 25.

But "maintain" (*i.e.*, continue to pursue) and "already" can be read harmoniously in the NFCA. Merriam-Webster's Collegiate Dictionary defines "already" as "***prior to a*** specified or implied past, present or ***future time***." *Merriam-Webster's Collegiate Dictionary* 34 (10th ed. 1993) (emphasis added); *see also* Ans. at 27 (Relators advocating for this very definition). In other words, "already" reasonably can be interpreted to mean past (*i.e.*, "prior to a specified . . . present . . . time") or present (*i.e.*, "prior to a specified . . . future time") tense. What is clear, however, is that the term "already" cannot be read in isolation.

In fact, courts interpreting the federal FCA have acknowledged "[i]t is unreasonable to read the term 'is already a party' from § 3730(e)(3) [the federal government action bar] in isolation." *Biotronik*, 876 F.3d at 1017. Addressing this precise phrase in the federal FCA's government action bar, the Ninth Circuit rejected an argument that "the subtle addition of the word 'already'" on its own bespoke a particular tense. *Id.* at 1018. ***Rather, based on context, it was fair to presume that "is already a party" held the same meaning as "is a party,"*** because "once a party to an action, the Government remains a party to that action regardless of the action's conclusion." *See id.* In short, the Ninth Circuit acknowledged that "already" in this context simply means that the government is "now" a party to a separate qualifying action. And that is the very circumstance presented in this Petition. Clark County is now a party to a qualifying civil action.

Relators' discussion of grammatical canons is off-target. Adverbs plainly can and are used to clarify and emphasize.[18] Here, the term "already" modifies the verb "is" (***not*** "maintained") in the phrase "is already a party." *See Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 560 (D.C. Cir. 2016)

[18] *See, e.g.*, *Strickland v. Waymire*, 126 Nev. 230, 236, 235 P.3d 605, 610 (2010) (construing the adverb "actually" as "add[ing] emphasis" and noting that while "[t]his 'may not be very heavy work . . . to perform . . . a job is a job, and enough to bar the rule against redundancy from disqualifying an otherwise sensible reading'" (quoting *Gutierrez v. Ada*, 528 U.S. 250, 258 (2000))).

(noting that adverbs typically appear in close proximity to the verbs, adjectives, and other adverbs they seek to modify). In this context, the term "already" is meant to clarify that the party is not potentially a party (*i.e.*, not a future party) to the action, ***but rather is a party to the action now***—whether the separate action is currently pending or has since been concluded. *See Biotronik*, 876 F.3d at 1118–19. Relators ignore this reasonable interpretation of the word "already" and instead improperly advocate for a reading that eviscerates any meaning for the word "maintain." But if the Legislature had meant that the government was a party "at the time the [private] action was brought," it would have said so unambiguously, as it did in NRS 357.080(3)(a).

**D. The No Surplusage Canon is Inapplicable**

Relators' effort to invoke the canon against surplusage similarly is misplaced, as that canon does not apply to language used to clarify legislative intent. *See Publiese 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)). Simply put, clarifying and emphasizing language is not surplusage. *See ApolloMedia Corp. v. Reno*, 19 F. Supp. 2d 1081, 1096 (N.D. Cal. 1998); *Farmers Ins. Exch. 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) (clarifying language not surplusage). As discussed above, the term "already" has meaning in context, and one that comports with "maintain."

## III. APPLICATION OF THE NFCA'S GOVERNMENT ACTION BAR HERE IS CONSISTENT WITH CONSTITUTIONAL PRINCIPLES AND THE PURPOSE OF THE NFCA

While Relators expend more than 13 pages of their Answering Brief attempting to suggest otherwise, Ans. at 8–21, application of the government action bar to block a relator from maintaining a *qui tam* action that is based on allegations or transactions that the government is separately pursuing poses no constitutional concerns. Indeed, Relators never identify any constitutional violation associated with Petitioners' interpretation of the NFCA government action bar.

### A. Dismissal Pursuant to the Government Action Bar is Consistent with Legislative Intent

The Legislature determined that if the State or political subdivision commences a separate civil suit based on allegations or transactions that are the subject of the *qui tam* suit, then the private party *qui tam* action must yield—it "may not be maintained." NRS 357.080(3)(b). That Legislative directive ensures that government officials—not private parties unaccountable to the people and not beholden to pursue actions in the government's best interests—control the government's claims. To hold otherwise would enable a private party to make law and policy affecting the government's interests through *qui tam* litigation, thereby

potentially impeding or even causing judicial findings that would be binding on the government's claims in the separate action.

While Relators suggest that it would be absurd to allow a civil action brought by a political subdivision to block an NFCA suit arising from the same allegations or transactions, Relators fundamentally misread the government action bar. It does not prevent ***any*** NFCA suit from moving forward, but only certain ***qui tam*** suits. Thus, if the Attorney General wants to pursue a NFCA suit based on the same underlying allegations or transactions, the government action bar would not preclude it from doing so. The Legislature, however, determined that it best served the State's interests to leave that choice to the Attorney General, rather than allowing a private party—with mercenary interests—to potentially dictate the outcome of the government's claims by maintaining a *qui tam* action once the government elects to pursue a separate civil remedy. Far from an absurd result, the government action bar is a logical and important vehicle that preserves governmental prerogatives.

**B. Relators' Focus on Available Remedies is a Red Herring**

There is no merit to Relators' argument that the government action bar should not apply because their *qui tam* action is seeking remedies—*i.e.*, recovery of the State's portion of the county lodging taxes at issue—that Clark County cannot recover in its action. Ans. at 17. As discussed in the next section, Relators' premise is wrong. In the norm, Clark County collects the tax and distributes it to other

governmental entities, including the portion ultimately remitted to the State. In fact, the Clark County Action seeks to collect the entire Combined Transient Lodging Tax, which by definition includes the portions Clark County is required to remit to the State.[19] Critically, the same private counsel represent Relators here and Clark County in the Clark County Action. And, while in this matter, counsel may have suggested an intent to forgo collection of the full tax in the Clark County Action in order to try and resurrect their action on behalf of Relators, that position is not only problematic for them under the tax regime, but also contrary to their position in their pending representation of Clark County.[20]

More fundamentally, in advancing this theory, Relators ignore the fact that the government action bar is triggered by the commonality between the underlying "allegations or transactions" in the two actions, not the particular remedies sought. The NFCA does not require that the remedies sought by the parties in the two actions be identical. Indeed, by referring to separate civil actions and administrative proceedings, the government action bar specifically contemplates that the remedies would not overlap, since a relator's standing under the NFCA to pursue claims on

[19] *See* NRS 244.3354(1)(a), (2)(a) (setting forth taxes owed to a county whose population is 700,000 or more and directing that three-eighths of the first one percent be deposited with State Treasurer for tourism fund); CCC 4.08.031(c) (directing 3% to be deposited with State Treasurer for education fund).

[20] RAPP 17 (Clark County Action Complaint).

behalf of the government in a *qui tam* action is limited to violations of the NFCA, and does not encompass any of the other broad common law and statutory relief available to the government suing on its own behalf.[21] As such, the relevant test under the government action bar is whether the separate government action "is based upon allegations or transactions that are the subject of a civil action." NRS 357.080(3)(b). The relief being sought on behalf of the government is irrelevant to the analysis.

### C. Application of the Bar Does Not Place Any Governmental Interests at Risk

As noted, Relators' quasi-constitutional/policy argument rests on a misconception that application of the bar somehow places the State's interests at risk. But that is not the case—as evidenced at least in part by the State's declination of the Court's invitation to express its views in this action. The Attorney General has multiple options to protect any State interests here, none of which is affected by the bar.

As a preliminary matter, the government action bar only applies to an NFCA *qui tam* action. NRS 357.080(3)(b) ("an action may not be maintained by a private

[21] The record of this *qui tam* action confirms this very point. In their original Complaint, Relators purported to allege common law causes of action on behalf of the government (Counts Two through Six) in addition to an NFCA cause of action (Count One). When Petitioners moved to dismiss the non-NFCA counts for lack of standing, Relators quickly abandoned those claims and the Court dismissed them with prejudice. RAPP 13.

plaintiff"); *Cf. Loi Trinh*, 2013 WL 1789712, at *4–5 ("the government action rule only bars claims by private parties . . . It was never meant to apply to the government because the government does not stand to benefit from the filing or intervening in redundant FCA suits"). In other words, the government action bar never applies to direct NFCA claims brought by the Attorney General. Here, of course, the Attorney General already has investigated the underlying conduct and declined to intervene in Relators' *qui tam* suit. But if the Attorney General wanted to pursue NFCA claims based on the same allegations or transactions, the government action bar would not preclude such a case.

And, as noted above, the government's ability to recover any taxes owed on the underlying transactions would not be compromised by enforcing the government action bar and ending this *qui tam* action. With respect to the Clark County transactions, liability and relief at both the State and County level, if any, will be adjudicated in the separate civil action brought by Clark County. As the authority authorized to administer and collect transient lodging taxes on transactions in Clark County, the separate civil action commenced by Clark County will determine whether any such taxes are owed and, if so, Clark County will recover and distribute those taxes as required by state law, including the small portion that Clark County would remit to the State. The government action bar therefore facilitates the government's ability to recover, by ensuring that the appropriate taxing authority,

not a private party, has the right to pursue liability and recovery in the manner and forum of its choosing. Furthermore, application of the bar, on its own, would not preclude other counties from bringing actions related to taxes owed, if any, on transactions within their jurisdictions.

Accordingly, enforcement of the government action bar in no manner infringes on the Attorney General's ability to protect State interests.

## CONCLUSION

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

Dated: November 15, 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 2016 in Times New Roman, 14 point. I further certify that the brief is 6684 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: November 15, 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 brief and know the contents thereof. I further verify that the facts stated herein 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: November 15, 2022

/s/ Joel E. Tasca

## CERTIFICATE OF SERVICE

I hereby certify that this Reply Brief in Support of Petition for Writ of Mandamus or, in the alternative, Prohibition was electronically filed with the Nevada Supreme Court on November 15, 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 Eflex will be served with a sealed copy of the foregoing via regular U.S. Mail.

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