233B.130(5) is not a jurisdictional requirement because the statute grants the district court authority to extend the deadline for good cause. Because, however, we find the district court did not abuse its discretion in finding Spar failed to show good cause here and denying Spar an extension of time to serve the petition, we affirm the district court's order dismissing Spar's petition for judicial review.

HARDESTY and SILVER, JJ., concur.

TIM WILSON, P.E., NEVADA STATE ENGINEER, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES, APPELLANT, *v.* HAPPY CREEK, INC., RESPONDENT.

No. 74266

September 12, 2019 448 P.3d 1106

Appeal from a district court order granting a petition for judicial review in a water law case. Sixth Judicial District Court, Humboldt County; Steven R. Kosach, Senior Judge.

Affirmed.

HARDESTY, J., with whom STIGLICH, J., agreed, dissented.

Aaron D. Ford, Attorney General, and *James N. Bolotin*, Deputy Attorney General, Carson City, for Appellant.

Taggart & Taggart, Ltd., and *Paul G. Taggart* and *Timothy D. O'Connor*, Carson City, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, PICKERING, J.:

NRS 533.395 authorizes the State Engineer to rescind a water rights permit cancellation but provides that, if the State Engineer does so, "the effective date of the appropriation under the permit is vacated and replaced by the date of the filing of the written petition [for review of the cancellation] with the State Engineer." Based on the State Engineer's adherence to this mandate, respondent in this case lost more than 50 years of priority in water rights—despite having invested nearly $1 million in improving water-use efficiency and otherwise having met all the substantive criteria for maintaining priority of its water rights—because its agent missed a

filing deadline by a few weeks. The respondent's groundwater rights lie in an over-appropriated basin, so loss of original priority dates threatens complete loss of use of water should curtailment occur. Given these extraordinary circumstances, and pursuant to *State Engineer v. American National Insurance Co*., 88 Nev. 424, 498 P.2d 1329 (1972), and its progeny, we hold that the district court properly granted respondent equitable relief, restoring its water rights' original priority dates.

I.

Respondent Happy Creek, Inc. ("Happy Creek") is a ranching and farming company that operates Happy Creek Ranch (the "Ranch") in the Pine Forest groundwater basin in northern Nevada. The Ranch comprises 1399 acres of deeded land that includes 855 irrigated acres, 765 of which are irrigated using the groundwater rights at issue on this appeal. In addition to its deeded acres, Happy Creek holds grazing rights to 95,126 and 6056 acres of public land in the Happy Creek and Hog John Grazing Allotments, respectively. The alfalfa produced on the 765 acres of groundwater-irrigated, deeded land is essential to the economic viability of the Ranch and its cattle operations.

The Ranch's groundwater irrigation rights, totaling 3063 acre feet annually, were appropriated and certificated in stages and carried original priority dates ranging from 1954 to 1990. Since the first groundwater irrigation appropriation in 1954, Happy Creek and its predecessors-in-interest have diligently put the water to beneficial use. In 1994, Happy Creek hired a water rights professional, John Milton, to manage its water rights and handle its filings with the State Engineer, which Milton did without fail until 2016.

To use its water more efficiently, Happy Creek decided in 2007 to convert from flood irrigation to a center-pivot irrigation system. Milton advised that the conversion would require Happy Creek to file applications with the State Engineer to change the place of use for the Ranch's certificated groundwater irrigation rights. *See* NRS 533.325 ("any person who wishes to appropriate any of the public waters, *or to change the place of diversion, manner of use or place of use of water already appropriated*, shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use, apply to the State Engineer for a permit to do so") (emphasis added). In 2009, at Happy Creek's request, Milton filed change applications with the State Engineer so the work to convert the Ranch from flood to center-pivot irrigation could proceed. The State Engineer approved the change applications and set an April 29, 2012 deadline for Happy Creek to file proofs of beneficial use (PBUs). The permits retained their original priority dates but the change in place of use meant Happy Creek

could lose its water rights unless it proved beneficial use consistent with the change applications by April 29, 2012.

Happy Creek spent almost $1 million and several years upgrading its water system. The PBUs required meter readings for the 6 wells involved in the project for a minimum of 12 consecutive months. Though the conversion work was complete, each year one or more of the totalizing flow meters on the irrigation wells failed, resulting in incomplete data needed for the PBUs. As a result, between 2012 and 2015, Milton filed, and the State Engineer granted, extensions of time (EOTs) for Happy Creek to file its PBUs. *See* NRS 533.380(3); NRS 533.410.

On May 19, 2016, the State Engineer mailed Happy Creek notice that it needed to file the PBUs (or EOTs) within 30 days to avoid cancellation of its groundwater permits. Happy Creek received the notice on May 23, 2016, and emailed it that same day to Milton, but Milton missed the June 18, 2016 deadline. (When questioned later, Milton explained that he either temporarily lost the email when he changed his computer's operating system or confused the conversion project's groundwater irrigation permits with other Ranch permits he was processing for Happy Creek at the time.) Regardless, on July 8, 2016, Milton realized his error, and on July 11, 2016, before receiving anything further from the State Engineer, Milton filed a petition on Happy Creek's behalf under NRS 533.395(2) asking the State Engineer to review the then-impending permit cancellations. But as mandated by NRS 533.410, the State Engineer cancelled Happy Creek's groundwater permits on July 19, 2016.

The State Engineer held a hearing on Happy Creek's petition to review the cancellations on October 12, 2016, which Milton and a Happy Creek representative attended. The hearing was recorded but not transcribed. Happy Creek represents, and the State Engineer does not deny, that Happy Creek's representative asked the hearing officer both to rescind the cancellations and restore the water rights' original priority dates, but the hearing officer explained that NRS 533.395(3) did not give him the authority to restore the original priority dates. Following the hearing, the State Engineer rescinded the cancellations contingent on Happy Creek filing PBUs or EOTs within 30 days, which it did. On November 1, 2016, the State Engineer reinstated the permits. But as mandated by NRS 533.395(3), the State Engineer changed the permits' priority dates to July 11, 2016.

Happy Creek timely filed in district court a notice of appeal and a petition for judicial review. In its petition, Happy Creek asked for equitable relief in the form of an order restoring its groundwater rights' original senior priority dates. The district court granted Happy Creek's request for equitable relief, holding that even though NRS 533.395(3) constrained the State Engineer to change the priority dates to July 11, 2016, equity demanded that the permits re-

tain their senior priority dates. In support of its decision, the district court found that Happy Creek spent several years and nearly $1 million upgrading its irrigation system; that Happy Creek continuously put the water to beneficial use; that Happy Creek attempted in good faith to protect its water rights; that the Pine Forest groundwater basin is overappropriated and subject to priority-based curtailment in the future; and that the value of the Ranch depends on the priority of Happy Creek's groundwater irrigation rights. In the district court's words, the "punishment" of losing senior priority dates "does not fit the crime" of the human filing-date error that occurred.

The State Engineer appeals. On appeal, the State Engineer challenges the authority of the district court to grant equitable relief by restoring Happy Creek's original senior priority dates.

II.

A.

Enacted in 1913, NRS 533.025 declares: "The water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public." The elevated importance of water in society "leads to the conclusion that it should be distributed fairly and in the broad interests of the public." David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. Colo. L. Rev. 573, 590 (1997); Sarah F. Bates et al., *Searching Out the Headwaters: Change and Rediscovery in Western Water Policy* 182 (1993) [hereinafter *Headwaters*] ("The principle of equity arises out of the shared, public nature of water."); *see also Kansas v. Colorado*, 206 U.S. 46, 104 (1907) (quoting *Elliot v. Fitchburg R.R.*, 64 Mass. 191, 196 (1852), for the proposition that the right to use of water "is *publici juris*[:] a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors, to the reasonable enjoyment of the same gift of Providence"). Thus, it was a "balancing of competing interests and equitable principles that shaped the foundations of Nevada water law." Sylvia Harrison, *The Historical Development of Nevada Water Law*, 5 U. Denv. Water L. Rev. 148, 154 (2001). And, despite that Nevada often follows its arid Western sister states in codifying and modifying the law of prior appropriation, "consideration of equity or fairness in access and distribution is one of the cardinal principles underlying every enduring water management system." Stephen P. Mumme, *From Equitable Utilization to Sustainable Development*: *Advancing Equity in U.S.-Mexico Border Water Management*, Water, Place, and Equity, at 117 (John M. Whiteley et al. eds., 2008); *see also* Anthony Dan Tarlock & Jason Anthony Robison, *Law of Water Rights and Resources* § 1:1 (2018) (recognizing that although states have modified water rights by statute, "in all jurisdictions, judge-made law remains crucial to the understanding of water allocation legislation").

Consistent with this history, these policies, and the importance of water to Nevada's citizens, long-standing precedent establishes that both this court and the district courts have the authority, "when warranted," to grant equitable relief in water law cases beyond the relief, if any, that the water law statutes allow the State Engineer to grant. *State Eng'r v. Am. Nat'l Ins. Co*., 88 Nev. 424, 426, 498 P.2d 1329, 1330 (1972) (citing *Donoghue v. Tonopah Oriental Mining Co*., 45 Nev. 110, 117, 198 P. 553, 555 (1921)); *see Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 199, 234 P.3d 912, 919-20 (2010) (citing cases "recogniz[ing] the district court's power to grant equitable relief when water rights are at issue" and "confirm[ing] that this court [also] has the power to grant equitable relief in water law cases"); *Blaine Equip. Co. v. State*, 122 Nev. 860, 868, 138 P.3d 820, 825 (2006) (suggesting that "[t]his court has, in the past, affirmed the district court's use of equitable power to grant relief contrary to that mandated by the language of a statute," but noting that the cases so holding "involve[d] an interpretation of the intent behind a joint resolution passed by [Congress] during World War I," citing *Donoghue*, 45 Nev. at 116, 198 P. at 554, or "the unique area of state water law," citing *Am. Nat'l*, 88 Nev. at 426, 498 P.2d at 1330).

American National presented facts similar to those in this case. The respondent applied for a permit to appropriate water, which the State Engineer approved; then, after putting its permitted water to beneficial use, the respondent permittee failed to file its PBU or an EOT by the statutory deadline. 88 Nev. at 425, 498 P.2d at 1330. As mandated by NRS 533.410, the State Engineer cancelled the permit. The permittee filed for judicial review under NRS 533.450, seeking equitable relief. Despite the statutory directive in NRS 533.410 that "the State Engineer shall cancel the permit" if the permittee misses the PBU deadline, the district court granted equitable relief from the permit cancellation. On appeal, the State Engineer "press[ed] the point that the [district] court should not have overruled him since the word 'shall' as used in NRS 533.410 required him to cancel the permit." *Am. Nat'l*, 88 Nev. at 426, 498 P.2d at 1330. Affirming, this court held that NRS 533.410's statutory "directive to [the State Engineer's] office does not . . . affect the power of the district court to grant equitable relief . . . when warranted." *Id.*

Over the past 50 years, this court has repeatedly reaffirmed that equitable relief is available, when warranted, in water law cases. *See Dep't of Conservation & Nat. Res., Div. of Water Res. v. Foley*, 121 Nev. 77, 83, 109 P.3d 760, 764 (2005) (stating that "this court [has] embraced the principle that the district court may grant extraordinary equitable relief [where] the water rights . . . were of record [and] the holders of water rights either exercised diligence in the placement of water to beneficial use or sought relief in response to defects in the cancellation notice"); *Preferred Equities Corp. v. State*

Eng'r, 119 Nev. 384, 389, 75 P.3d 380, 383 (2003) (recognizing that water rights holders may seek and obtain equitable relief, when warranted); *Desert Irrigation, Ltd. v. State,* 113 Nev. 1049, 1061 & n.7, 944 P.2d 835, 843 & n.7 (1997) (granting equitable relief to certificated water rights holder who applied to change the place of use then failed to prove beneficial use according to the conditions specified in the permit, resulting in the cancellation of the permit and consequent loss of senior, certificated water rights); *Engelmann v. Westergard*, 98 Nev. 348, 351, 647 P.2d 385, 387 (1982) ("Although NRS 533.410 provides that water permits 'shall' be cancelled by the State Engineer when a permittee fails to file proof of application of water to beneficial use, this directive does not affect the power of the district court to grant equitable relief to a permittee when warranted."); *Bailey v. State*, 95 Nev. 378, 383, 594 P.2d 734, 737 (1979) (reversing the district court's denial of a permittee's request for equitable relief from the State Engineer's cancellation of its permitted water rights).

In 2003, the Colorado River Commission of Nevada published the seminal treatise *Nevada Water Law*, which summarizes these principles and their special application to water rights permit cancellations as follows:

> Judicial review of the state engineer's cancellation of unperfected permits has raised a special rule of judicial equity. A reviewing court may consider equitable factors in sustaining a permit, even if the state engineer could not. Notwithstanding that the state engineer must adhere to statutory procedures and standards for cancellation of permits for failure to prove that the permittee has put the water to beneficial use, the district court has discretion to provide equitable relief, as in cases where notice of prospective cancellation was not provided to the permittee. The equitable remedies available from the reviewing court are distinguishable from equitable estoppel as a defense to enforcement of the state engineer's orders.

James H. Davenport, *Nevada Water Law* 85 (2003).

B.

Despite the unbroken and hitherto unquestioned line of authority just discussed, the State Engineer argues that the 1981 amendments to NRS 533.395 implicitly terminated Nevada courts' authority to grant equitable relief in permit cancellation cases. Specifically, the State Engineer asserts that the precedent noted above is no longer good law because the core cases—*American National*, *Bailey*, and *Engelmann*—considered the pre-1981 version of NRS 533.395, which made no provision for State Engineer review in permit cancellation cases. *See* 1913 Nev. Stat., ch. 140, § 68, at 213. In

1981, the Legislature added subparagraphs (2) through (4) to NRS 533.395, as follows:

> 2. If any permit is cancelled under the provisions of NRS 533.390, 533.395 or 533.410, the holder of the permit may within 60 days of the cancellation of the permit file a written petition with the state engineer requesting a review of the cancellation by the state engineer at a public hearing. The state engineer may, after receiving and considering evidence, affirm, modify or rescind the cancellation.
>
> 3. If the decision of the state engineer modifies or rescinds the cancellation of a permit, the effective date of the appropriation under the permit is vacated and replaced by the date of the filing of the written petition with the state engineer.
>
> 4. The cancellation of a permit may not be reviewed or be the subject of any judicial proceedings unless a written petition for review has been filed and the cancellation has been affirmed, modified or rescinded pursuant to subsection 2.

1981 Nev. Stat., ch. 45, § 3, at 114. With the addition of these provisions allowing the State Engineer to modify or rescind a statute-based permit cancellation, the State Engineer maintains that the 1981 amendments to NRS 533.395 "resolved the concerns and considerations supporting this Court's decisions to extend equitable relief in those cases." *See Am. Nat'l*, 88 Nev. at 426-27, 498 P.2d at 1330-31 (expressing regret that the State Engineer's lack of discretion in cancelling a permit under NRS 533.410 put the State Engineer in the "awkward and unenviable position . . . [of being] subject to court reversal [in equity] for a decision he is required to make" and venturing that legislative action might be desirable "to allow the State Engineer discretion in a permit cancelation under NRS 533.410 . . . [and that w]ith such a change court reversal would only be appropriate in the event of an abuse of discretion").

The Legislature is "presumed not to intend to overturn long-established principles of law" when enacting a statute. *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp. Inc.*, 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016) (quoting *Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 537, 245 P.3d 1149, 1155-56 (2010)). And, "[t]he great principle[ ] of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown v. Swann*, 35 U.S. 497, 503 (1836). Thus, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

Neither the text nor the legislative history of the 1981 amendments to NRS 533.395 supports that, by those amendments, the

Legislature eliminated equitable relief in permit cancellation cases. To be sure, NRS 533.395(2) and (3) afford the State Engineer discretion to affirm, modify, or rescind a permit cancellation that he did not have before 1981; to that extent, equitable relief is not available and judicial review is for an abuse of direction. *Cf. Las Vegas Valley Water Dist. v. Curtis Park Manor Water Users Ass'n*, 98 Nev. 275, 278, 646 P.2d 549, 550-51 (1982) (holding that, since NRS 534.120 grants the State Engineer complete discretion to grant and, subsequently, revoke temporary permits, equitable relief is not available and judicial review is for an abuse of discretion). But the 1981 amendments to NRS 533.395 gave the State Engineer *no discretion* in the manner of priority date: If the State Engineer modifies or rescinds a permit cancellation under NRS 533.395(2), NRS 533.395(3) imposes a mandatory, non-discretionary duty on the State Engineer to vacate the original priority date and replace it with the date the permittee files its written petition for cancellation review with the State Engineer. Functionally, the mandate to the State Engineer to change the priority date if he modifies or rescinds a permit's cancellation is as absolute as the automatic cancellation mandate at issue in *American National*, *Bailey*, and *Engelmann*—and, like the cancellation mandate, a proper subject of equitable relief.

A court's exercise of its *equitable authority* to revise priority date changes mandated by NRS 533.395(3) differs fundamentally from its deferential *review* of the State Engineer's discretionary decision to affirm, modify, or rescind a cancellation under NRS 533.395(2) and (3). And, not only did the 1981 Legislature fail to expressly limit Nevada courts' equitable jurisdiction in permit cancellation cases, it actually recognized that cancellations would remain subject to "judicial proceedings" in addition to straight review of the State Engineer's decision. Thus, NRS 533.395(4)—which was also added in 1981, along with NRS 533.395(2) and (3)—states that "[t]he cancellation of a permit may not *be reviewed* ***or*** *be the subject of any judicial proceedings* unless a written petition for review has been filed [with the State Engineer] and the cancellation has been affirmed, modified or rescinded pursuant to subsection 2." (Emphasis added.) 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." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012). Applying the surplusage canon so that "reviewed" and "subject of any judicial proceedings" each has meaning, NRS 533.395(4) necessarily encompasses both abuse-of-discretion and equitable review. From the fact that the priority-reset provision in NRS 533.395(3) constitutes the principal non-discretionary feature

of the State Engineer cancellation-review provisions added in 1981, the conclusion follows that the 1981 amendments to NRS 533.395 not only did not eliminate equitable review of priority date changes, they affirmatively preserved it.

This court does not consult legislative history except to disambiguate a statute fairly susceptible to more than one reading, which NRS 533.395 does not appear to be. Assuming *arguendo* that the 1981 amendments to NRS 533.395 rendered it ambiguous, the legislative history demonstrates that the Legislature did not mean to preclude equitable relief, when warranted, from a mandatory priority date change by the State Engineer. To the contrary, the legislative comments expressly state that the object of the bill was to provide "the appropriator with *another* layer of review prior to being cancelled" and "additional reasons" to relieve a permittee from a permit cancellation. Hearing on A.B. 27 Before the Assembly Econ. Dev. and Nat. Res. Comm., 61st Leg. (Nev., February 10, 1981) (statement of William J. Newman, State Engineer) (emphasis added); Hearing on A.B. 27 Before the Senate Nat. Res. Comm., 61st Leg. (Nev., March 9, 1981) (statement of Roland Westergard, Director of the Department of Conservation and Natural Resources) (stating that the bill would "provide an administrative review short of litigation"). Thus, the legislative history makes plain that the bill was intended to *expand* opportunities for a permit holder to retain water rights, not reduce the same by terminating Nevada courts' inherent equitable powers. *See also* Davenport, *supra*, at 85 (stating, post-enactment of NRS 533.395(2)-(4), that "[a] reviewing court may consider equitable factors in sustaining a permit, even if the state engineer could not").

Our 2015 decision in *Benson v. State Engineer*, 131 Nev. 772, 358 P.3d 221 (2015), dispels any lingering doubt about the courts' authority to grant equitable relief from an NRS 533.395(3)-mandated change to a permit's original priority date. Unlike Happy Creek, the permittee in *Benson* did not file the petition for review with the State Engineer but proceeded directly to court, asking the court to restore her cancelled permit with its original priority date. Citing NRS 533.395(4), which requires a permittee to petition the State Engineer for relief before proceeding to court, we affirmed the district court's order of dismissal for failure to exhaust administrative remedies. *Id.* at 779, 782, 358 P.3d at 226, 228. We acknowledged that, under NRS 533.395(3), the State Engineer had a mandatory duty to reset the priority date, which the permittee argued made administrative review futile. But rather than resolve the case on the basis that equitable relief restoring the original priority date cannot be had as a matter of law, we held that administrative review was a necessary precursor to a subsequent judicial proceeding in equity

to restore the original priority date. Not once, but twice, *Benson* refers to judicial restoration of an original priority date as an available equitable remedy following administrative review by the State Engineer as provided in NRS 533.395(2) and (3). *See Benson*, 131 Nev. at 779, 358 P.3d at 226 (if after pursuing relief from the State Engineer "a permit with a 2013 [reset] priority date [as mandated by NRS 533.395(3)] did not allow [Benson] to appropriate sufficient water, seeking judicial review would *then* have been permissible"); *id.* at 780, 358 P.3d at 226 (requiring the permittee to pursue administrative before judicial review as it "will place the district court in a better position . . . to determine issues such as whether a party has proved adequate grounds for having a permit restored *with its original appropriation date*") (emphasis added).

In sum, the long-standing view that Nevada courts have discretion to provide equitable relief where the State Engineer does not, even after the 1981 amendments to NRS 533.395—*see, e.g.*, Davenport, *supra*, at 85 ("Notwithstanding that the state engineer must adhere to statutory procedures and standards . . . , the district court has discretion to provide equitable relief. . . .")—remains well supported. We therefore hold that the district court had the power to grant equitable relief from the new priority date that NRS 533.395(3) mandated the State Engineer to assign.

III.

The State Engineer also argues that, even if the district court has the authority to grant equitable relief under certain circumstances, it erred in doing so in this case because the facts did not support a grant of equitable relief.[1] This claim presents a mixed question of fact and law—do the facts support the equitable relief the district court granted? Although "we will review a district court's decision granting or denying an equitable remedy for abuse of discretion," *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538 (2010), deference is not owed to legal error, *Davis v.*

[1]We reject the State Engineer's additional arguments that the district court failed to make adequate factual findings, erred in granting equitable relief without first determining whether substantial evidence supported the State Engineer's decision, or abused its discretion by considering new or previously undisclosed evidence. Assuming no legal error, the district court's factual findings adequately support its decision. As for the second claimed error, Happy Creek accepts that substantial evidence supports the State Engineer's decision to rescind its permit cancellations; its point is that it deserves equitable relief, beyond that the State Engineer can grant, from NRS 533.395(3)'s priority-date reset provision. Last, the evidence presented to the State Engineer supports the equitable relief the district court granted; to the extent supplemental or previously undisclosed evidence was allowed, it was either unnecessary and, so, harmless or justified by the need to establish an evidentiary basis for the district court to grant equitable relief beyond that the State Engineer could grant.

Ewalefo, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015). So, to the extent the question is whether the facts as found allow equitable relief, de novo review applies. *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709, 717 (2009) (explaining that this court reviews mixed questions of law and fact de novo when legal issues predominate).

Certain limits on Nevada courts' authority to grant equitable relief in water law matters are already noted above; namely, that absent estoppel due to an error by the State Engineer, equitable relief is not available where water was not diligently placed to beneficial use, *see Am. Nat'l*, 88 Nev. at 425, 498 P.2d at 1330; *Desert Irrigation*, 113 Nev. at 1061, 944 P.2d at 843, or where, despite proper notice, the permittee does not petition the State Engineer for permit-cancellation review but proceeds directly to court. *See Benson*, 131 Nev. at 779, 358 P.3d at 226. Further limitations on the availability of equitable relief in the context of water law also exist—specifically, equitable relief should only be used where it improves (1) efficiency; (2) sustainability; (3) fairness; and (4) clarity. *See generally* Helen Ingram et al., *Water and Equity in a Changing Climate*, Water and Equity, at 271, 299. As discussed below, we find support for these limitations in Nevada statutory law and precedent, and determine that the district court's decision in the instant matter falls squarely within those guidelines.

A.

First, efficiency—under Nevada water law, "[b]eneficial use shall be the basis, the measure, and the limit of the right to the use of water." NRS 533.035. Efficiency is therefore a central concern in this state and "fundamental to [Nevada's] water law jurisprudence." *Bacher v. State Eng'r*, 122 Nev. 1110, 1119, 146 P.3d 793, 799 (2006). Thus, to be a "better" remedy—that is, one ensuring more complete justice than a remedy provided by the law, 27A Am. Jur. 2d *Equity* § 215 (2019)—any equitable relief should more effectively promote water being used in a more beneficial, unwasteful, and efficient fashion, *see Foley*, 121 Nev. at 83, 109 P.3d at 764; *see also Water and Equity*, at 299.

Second and relatedly, sustainability—a consideration of particular importance in Nevada, where "the soil is arid, and unfit for cultivation unless irrigated by the waters of running streams" and "lands otherwise waste and valueless [may only] become productive by artificial irrigation." *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269, 280, 21 P. 317, 321 (1889). To properly exercise its discretion to award equitable relief, a district court should therefore take into consideration that water is an "increasingly scarce resource" and craft a remedy that recognizes the interests of future generations. *Bacher*, 122 Nev. at 1116, 146 P.3d at 797; *see also Water and Equity* at 299.

Though the State Engineer attempts to center the instant dispute on Happy Creek's negligence—claiming that "Happy Creek's own failure to comply with state permit requirements [is] what led to the imposition of NRS 533.395(3)'s consequences"—in this court's view, it is actually Happy Creek's diligent improvements to its property and continued beneficial use of its water rights that are at the heart of this case. To wit, it was in fact Happy Creek's investment of nearly $1 million in the installation of the center-pivot system—an investment which improved the efficiency of the Ranch's water use and thus sustainability for future generations, in furtherance of this State's water policies, *see* Leon New & Guy Fipps, *Center Pivot Irrigation* 3 (2000), https://oaktrust.library.tamu.edu/handle/1969.1/86877 (last visited June 12, 2019) ("When properly designed and operated . . . a center pivot system conserves three precious resources—water, energy and time.")—that led to Happy Creek having its rights effectively cancelled under NRS 533.395(3). And, the State Engineer's singular focus on Happy Creek's supposed "fault" ignores that cancellation of Happy Creek's rights here occurred in spite of this significant investment and improvement in water systems and Happy Creek's decades-long, total substantive compliance with this state's water laws.

But a Nevada court has the benefit of equitable powers not available to the State Engineer and therefore is not invariably required to convert a flexible PBU filing—for which the Legislature plainly permits multiple extensions in filing, *see* NRS 533.380(3)—into one with devastating impact for Happy Creek. Though the State Engineer appears unconcerned as to the likely chilling effect the revision of Happy Creek's priority dates could have, this court notes that such rigid administration could ultimately result in perverse incentives, "serv[ing] irrigators who follow unconscionably wasteful or polluting practices," *Headwaters* at 186, over those who, like Happy Creek, implement large-scale, systematic improvements requiring new use applications, *see id.* at 184-86. Reinstating Happy Creek's original priority dates preserves the proper incentives, better serving Nevada's joint interests of efficiency and sustainability in water usage. *See Bacher*, 122 Nev. at 1116, 1119, 146 P.3d at 797, 799.

B.

Third, fairness—Nevada's water is more than mere commodity, it is a public good. *See* NRS 533.025 ("The water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public."). Thus, an equitable remedy must better effect justice than what the statute at issue requires by promoting increased fairness in water accessibility and "permitting equal sharing of the burdens as well as the benefits of . . . development." *Water and Equity* at 299; *see Desert Irrigation*, 113 Nev. at 1060-61, 944 P.2d at 843 (granting equitable

relief where strict application of the statute was "manifestly unfair" given the circumstances); *Bacher*, 122 Nev. at 1116, 146 P.3d at 797 (noting that Nevada's water laws are "necessary to strike a sensible balance between the current and future needs of Nevada citizens and the stability of Nevada's environment")*; see also Kansas*, 206 U.S. at 117 (basing its equitable decision on the respective burdens on and benefits to the states disputing the water rights at issue).

When it comes to weighing the relative benefits and burdens of the various available remedies, equitable or not, against the parties' respective investments in the instant case, the State Engineer focuses on the perceived lack of any burden its ruling placed on Happy Creek because Happy Creek's rights were ultimately reinstated, albeit with a revised priority date. Essentially, the State Engineer would have this court limit *American National* to those situations where a holder's rights have been cancelled in whole. But, Happy Creek presented evidence that the source from which its water is drawn is overappropriated and has already been subject to various limiting orders. Thus, the district court correctly determined that the loss of priority here could ultimately cause an effective cancellation; rendering Happy Creek's otherwise valuable rights useless at some point in the future given the overappropriation of the sources upon which they draw. And to ignore such injury would seem to run contrary to this court's precedent that recognizes that a loss of priority that renders rights useless "certainly affects the rights' value" and "can amount to a de facto loss of rights." *Andersen Family Assocs. v. State Eng'r*, 124 Nev. 182, 190, 191, 179 P.3d 1201, 1206 (2008); *see also* Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood Stick in the Bundle*, 32 Envtl. L. 37, 43 (2002) ("The priority of a water right is . . . its most important . . . feature.").

Moreover, the State Engineer does not appear to dispute that Happy Creek's installation of the center-pivot system came at a significant cost to Happy Creek, nor does the State Engineer indicate that reinstating Happy Creek's original priority date causes the state or its public any identifiable harm. Thus, despite Happy Creek's massive investment in improving its use of the water in issue and that the change in priority will diminish its rights' value, and despite that the State Engineer has identified no public harm that would result from the grant of equitable relief, the State Engineer still insists on this court's rigid application of the law. But, under these circumstances, the district court's equitable remedy works a more fair distribution of water rights, being based on each party's investments and prospective injuries. *See Kansas*, 206 U.S. at 117.

C.

Fourth and finally, clarity—because access to water is such a pressing matter in this state, an equitable remedy that promotes greater clarity in water law and reduces confusion may be "better"

than using a statute designed to improve efficiency as a penalty that could ultimately disincentivize forward-looking efforts to improve the use of scarce water resources. In the State Engineer's view, NRS 533.395(3)'s meaning is clear: it is a mandate that the Legislature intended to have the effect produced here. But, as the prior discussion makes plain, rigid application of NRS 533.395(3) in this case would result in manifest injustice. And this court cannot agree that the Legislature intended any such effect—"for it is not to be supposed that any legislative body passes an act for the purpose of doing a manifest wrong." *Goldfield Consol. Mining Co. v. State*, 35 Nev. 178, 183, 127 P. 77, 78-79 (1912) (quoting *State v. Kruttschnitt*, 4 Nev. 667, 672 (1868)). And even setting aside this presumption, the context and language of the 1981 amendments to NRS 533.395 do not support that the section was intended to eliminate this court's long-standing equitable authority. Thus, providing equitable relief here actually improves the clarity of the law at issue, ensuring that legislative language and intent can be understood in harmony with one another. *See Donoghue*, 45 Nev. at 116-18, 198 P. at 555.

We therefore reject the State Engineer's contention that equitable relief is unavailable wherever a statutory remedy exists: only an "adequate" remedy can fill equity's shoes. *See Benson*, 131 Nev. at 782 n.7, 358 P.3d at 228 n.7. And the analysis above demonstrates that the district court did not abuse its discretion in determining that the solution offered by the State Engineer's strict reading of NRS 533.395 falls short under these circumstances—restoration of the original priority dates better promotes our state's interests in efficiency, sustainability, fairness, and clarity.

IV.

According to the State Engineer, our affirmance of the district court's exercise of equitable authority in this case would be tantamount to "legislating from the bench," unwisely opening the floodgates to equitable appeals in every case involving NRS 533.395(3). But this is not so. As indicated, this case presents unique facts that fit squarely within those limiting principles previously established.

To wit: (1) Happy Creek gave up its certificated status, ultimately investing nearly $1 million to improve its irrigation system and put its water to more efficient use; (2) the permits are for water in an overappropriated basin that could be subject to curtailment based on priority in the future; (3) Happy Creek attempted in good faith to preserve its water rights and comply with procedural requirements; and (4) Happy Creek diligently and consistently put the water to beneficial use for decades. Moreover, many permit applications under NRS 533.325, partially reprinted *supra* page 302, are for new appropriations, not, as in this case, stemming from the change in place of use of certificated rights dating back half a century or more.

Thus, there are likely to be very few cases like Happy Creek's, where equitable review of the State Engineer's non-discretionary revision of priority dates is required to remedy the sort of manifest injustice present here.

Equitable relief on these facts is available under this court's precedent dating back 50 years. *See supra* § II. Far from being "odd" or amounting to "rule-making from the bench," *see post*, at 20 & fn.2 (Hardesty, J., dissenting), our adherence to long-standing precedent provides stability on which those subject to this state's law are entitled to rely. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."). Until today's dissent, no court or commentator has suggested that the 1981 amendment to NRS 533.395 overruled case precedent establishing judicial authority to grant equitable relief on the record presented here. Absent the "express terms" of a statute or its "plainest and most necessary implication" leading to the conclusion that the Legislature intentionally supplanted this court's common law powers, this court's common law authority endures. *W. Indies, Inc., v. First Nat. Bank of Nev.*, 67 Nev. 13, 33, 214 P.2d 144, 154 (1950); *see State Eng'r v. Cowles Bros.*, 86 Nev. 872, 877, 478 P.2d 159, 162 (1970) (reading statute as not abrogating common law based in part on NRS 1.030, providing the common law "shall be the rule of decision" so far as it is "not repugnant to or in conflict with" the United States or state constitution and laws); Scalia & Garner, *supra* page 308, at 96 (discussing the omitted-case canon and common law). The venturesome decision here is not our adherence to precedent but the destabilization of the law that would result were we to give NRS 533.395 the new-minted meaning the State Engineer and the dissent urge—a meaning neither the statute's words nor its history nor 50 years of unbroken precedent can bear.

* * *

In sum, Nevada's courts' equitable authority is a long-standing, well-supported feature of the scheme governing this state's water policy. There is nothing in this court's precedent, or the language or legislative history of NRS 533.395(3), that would justify this court in overturning that precedent. Nor did the district court abuse its discretion in determining that the circumstances this case presents fall squarely within that precedent. We therefore affirm the district court's decision to reinstate Happy Creek's original priority dates in equity.

Gibbons, C.J., and Parraguirre, Cadish, and Silver, JJ., concur.

Hardesty, J., with whom Stiglich, J., agrees, dissenting:

Relying on *State Engineer v. American National Insurance Co.*, 88 Nev. 424, 498 P.2d 1329 (1972), and its progeny, the majority applies equitable relief to restore the original priority dates of cancelled water rights permits. In doing so, the majority improperly substitutes equitable relief for the sole remedy when the State Engineer modifies or rescinds a cancelled permit (replacement of the permits' priority dates) provided by the Legislature in 1981 in NRS 533.395(3). And, to support its disregard of the relief mandated by statute, the majority cites dicta and misconstrues the holding in *Benson v. State Engineer*, 131 Nev. 772, 781, 358 P.3d 221, 227 (2015), in which this court *expressly distinguished* the equitable relief holding in *American National* because of the 1981 legislation. Moreover, even if equitable relief was permissible to restore a priority date against the express remedy in the statute, the majority's decision to do so in this case rests on speculation and belies the fact that Happy Creek continues to use its water rights permits under the revised priority date contemplated by NRS 533.395(3). For these reasons, I respectfully dissent.

The relevant facts in this case are undisputed. Happy Creek holds seven groundwater irrigation rights in the Pine Forest basin totaling 3,063 acre feet annually with original priority dates ranging from 1954 to 1990. In 2007, Happy Creek decided to convert from flood irrigation to a center-pivot irrigation system. Pursuant to NRS 533.325, Happy Creek through its authorized water rights professional, John Milton, filed change of manner and place of use applications with the State Engineer in 2009 to implement the conversion from flood to center-pivot irrigation. The State Engineer approved the change applications and set an April 29, 2012, deadline for Happy Creek to file proofs of beneficial use.

Between 2012 and 2015, Milton filed, and the State Engineer granted, extensions to file the proof of beneficial use. However, on May 19, 2016, the State Engineer mailed Happy Creek notice that it needed to file the proof of beneficial use within 30 days to avoid cancellation of its groundwater permits. Happy Creek received the notice, but Milton did not file anything by the June 18, 2016, deadline. On July 11, 2016, Milton filed a petition pursuant to NRS 533.395(2) requesting the State Engineer to review the impending permit cancellations. As mandated by NRS 533.410, the State Engineer cancelled Happy Creek's groundwater permits on July 19, 2016. On October 12, 2016, the State Engineer held a hearing on the petition to review the permit cancellations. On November 1, 2016, the State Engineer rescinded the permits' cancellations but, as mandated by NRS 533.395(3), changed the permits' priority dates to July 11, 2016, the filing date of the petition seeking rescission of the cancellations.

Happy Creek filed a petition for judicial review seeking equitable relief restoring its groundwater rights' original priority dates. On evidence presented to the district court, but not to the State Engineer in the administrative process, the district court granted equitable relief restoring the original priority dates. While Happy Creek argued that the Pine Forest groundwater basin is overappropriated and subject to priority-based curtailment *in the future*, no evidence showed that Happy Creek was presently prevented from using its groundwater permits with the new priority date.[1]

As noted earlier, the majority places great emphasis on our 1972 opinion in *American National*, in which we considered language in NRS 533.410 requiring the State Engineer to cancel a permit when the holder fails to file proof of beneficial use. We concluded that though the statute mandated cancellation by the State Engineer, it did not preclude the granting of equitable relief "*when warranted.*" 88 Nev. at 426, 498 P.2d at 1330 (emphasis added). What the majority fails to acknowledge is that *American National* is entirely distinguishable from this case. First, in *American National*, the State Engineer did not dispute that equity rested with the permittee and thus the only issue in that case was whether NRS 533.410 barred judicial relief. *Id.* In later cases, however, we have applied *American National* narrowly and only to situations in which the permit holder did not have actual knowledge of the cancellation until after the period for complying with NRS 533.410 or for appealing the cancellation had expired. *See Engelmann v. Westergard,* 98 Nev. 348, 351, 647 P.2d 385, 387 (1982); *Bailey v. State*, 95 Nev. 378, 382, 594 P.2d 734, 737 (1979). Here, there is no concession by the State Engineer that equity lies in favor of Happy Creek, nor is there any doubt that Happy Creek had actual notice of the cancellation of its permits in time to seek an extension under NRS 533.410.

Second, *American National* was decided before the Legislature amended NRS 533.395 to provide for an administrative review process and a remedy for permit cancellation. In 1981, the Legislature added subparagraphs (2) through (4) to NRS 533.395, as follows:

> 2. If any permit is cancelled under the provisions of NRS 533.390, 533.395 or 533.410, the holder of the permit may within 60 days of the cancellation of the permit file a written petition with the state engineer requesting a review of the cancellation by the state engineer at a public hearing. The state engineer may, after receiving and considering evidence, affirm, modify or rescind the cancellation.
>
> 3. If the decision of the state engineer modifies or rescinds the cancellation of a permit, the effective date of the

[1]We have taken judicial notice of State Engineer Order No. 1290 (Sept. 14, 2017), which curtails only *new* appropriations, not *existing* appropriations, in the Pine Forest basin.

> appropriation under the permit is vacated and replaced by the date of the filing of the written petition with the state engineer.
>
> 4. The cancellation of a permit may not be reviewed or be the subject of any judicial proceedings unless a written petition for review has been filed and the cancellation has been affirmed, modified or rescinded pursuant to subsection 2.

1981 Nev. Stat., ch. 45, § 3, at 114. Neither *American National* nor the other cases relied upon by the majority considered the availability of equitable relief in light of the 1981 amendments to NRS 533.395. And, as the State Engineer correctly argues on appeal, the 1981 additions to NRS 533.395 "resolved the concerns and considerations supporting this [c]ourt's decisions to extend equitable relief in" statute-based permit cancellation cases. For example, in *American National*, this court expressed concern that the State Engineer had no discretion in determining whether a permit should be cancelled. In fact, this court specifically suggested that "[l]egislative action would be appropriate to allow the State Engineer discretion in a permit cancelation under NRS 533.410," and that in such case "court reversal would only be appropriate in the event of an abuse of discretion." 88 Nev. at 426-27, 498 P.2d at 1331. The 1981 amendments to NRS 533.395 directly addressed this concern by granting the State Engineer discretion to modify or rescind a cancellation. Thus, unlike in the pre-amendment cases, where the cancellation of water permits resulted in the permit holders being unable to appropriate water unless they were granted equitable relief, *see id.*; *Engelmann*, 98 Nev. at 350, 647 P.2d at 387; *Bailey*, 95 Nev. at 380-81, 594 P.2d at 735-36, NRS 533.395(2) and (3) now permit administrative review and allow for the rescission or modification of any cancellation.

Though no one argues in this case that the language in the statute is ambiguous, the majority claims that "[n]either the text nor the legislative history of the 1981 amendments to NRS 533.395 supports that, by those amendments, the Legislature eliminated equitable relief in permit cancellation cases." Majority opinion *ante* at 307-08. The plain language of NRS 533.395(2) and (3), however, provides for both a statutory process to review permit cancellations and a remedy not previously available in NRS Chapter 533. *See Bacher v. Office of the State Eng'r*, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006) ("If a statute is clear on its face, the court cannot go beyond its plain language in determining legislative intent."). Since 1981, the State Engineer has had the statutory authority to modify or rescind a permit cancellation, and the Legislature, in its wisdom, has determined that in such event, the date of appropriation under the permit is vacated and replaced by the date of the filing of the petition seeking to modify or rescind cancellation. In concluding that nothing in the statute prevents the district court from granting relief

beyond what the State Engineer is permitted to grant, the majority ignores the fact that the record before the district court must be the same record that was developed during the administrative review process. *See* NRS 533.450(1) (providing that a petition for judicial review is "in the nature of an appeal"). As we have previously clarified, both the district court and this court are limited in our review to "whether substantial evidence *in the record* supports the State Engineer's decision." *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979) (emphasis added). Because the State Engineer cannot grant equitable relief, no record as such would be made during the administrative process, and thus for the district court to grant equitable relief, it would have to consider evidence beyond the record in violation of the water law statutes. *See* NRS 533.450; *Revert*, 95 Nev. at 786, 603 P.2d at 264 (stating that an aggrieved party is not entitled to a de novo hearing in the district court).

The majority also claims that our recent decision in *Benson* "dispels any lingering doubt about the courts' authority to grant equitable relief from an NRS 533.395(3)-mandated change to a permit's original priority date." Majority opinion *ante* at 309. However, the majority misconstrues the holding in *Benson*. In *Benson*, the issue was whether the permit holder had to exhaust the administrative process set forth in NRS 533.395(2) before seeking judicial relief. 131 Nev. at 776, 358 P.3d at 222. To the extent we suggested that equitable relief might be available to restore the original priority date following administrative review, such statements were mere dicta. Furthermore, we explicitly distinguished *American National* in *Benson*, explaining that "[t]he difference between the statutes in force before 1981, when we decided *American National*, and in 2013, when Benson filed for judicial review of her canceled water permit, makes *American National* inapplicable to this case." 131 Nev. at 781, 358 P.3d at 227. In doing so, we cited *Smith v. Smith*, 68 Nev. 10, 22, 226 P.2d 279, 285 (1951), acknowledging that a district court does not have jurisdiction in equity "*where statutes in force required [the party] to seek his relief in another way*." *Id.* (alteration in original) (emphasis added); *see also Las Vegas Valley Water Dist. v. Curtis Park Manor Water Users Ass'n*, 98 Nev. 275, 278, 646 P.2d 549, 550-51 (1982) (holding that where the State Engineer's action was discretionary, "[t]he district court was without authority to grant equitable relief, since an adequate remedy exists at law" in the form of limited judicial review for abuse of discretion). While it is true that Benson was denied relief because she failed to seek administrative remedies provided for in NRS 533.395(2), it is also true that this court recognized that NRS 533.395(3) provided an adequate legal remedy even if it was not the remedy Benson wanted. That fact did not render the requirement to seek administrative remedies futile.

It is the Legislature's prerogative to determine the remedies when a permit is cancelled—not this court's. No doubt, the facts in this

case are troubling. But so are the facts in many cases in which filing deadlines have been missed. And the only guardrails offered by the majority to an unbridled use of equitable relief in future cases are those listed in an article discussing conflicts in water generally, *see* Helen Ingram et al., *Water and Equity in a Changing Climate*, Water, Place, and Equity 271, 299 (John M. Whiteley et al. eds., 2008), which in itself is puzzling, as these limitations on equity bear no relationship to how water is appropriated or regulated in Nevada. *See* Elizabeth Dawson, Book Note, 12 U. Denv. Water L. Rev. 432, 432 (2009) (describing *Water and Equity* as "a look into the impact of climate change on water resources and ways to mitigate conflicts in water by employing equitable principles"). While the majority relies on *American National* for equitable relief, it adopts without explanation a set of factors that differ significantly from those enunciated in *American National* and reiterated in *Benson*.[2] With all due respect, the remedies available for modification or rescission of a cancelled permit are the exclusive province of the Legislature, and this court should not engage in rule-making from the bench by adopting suggestions made in a limited chapter of an article focused on climate change, when, as here, the Legislature provided the regulatory remedy.

But, even if equitable relief were available, it would not be appropriate in this case. Happy Creek's argument for equitable relief to override the statutory remedy is that the Pine Forest basin is overappropriated and appropriations *might* be subject to curtailment in the future. This is speculative and there has been no showing of any such order or curtailment of Happy Creek's permit use under its new priority date. As noted in *Benson*, "unproven supposition" is not sufficient to demonstrate that the remedy at law is inadequate in this case. 131 Nev. at 782, 358 P.3d at 228. I, therefore, dissent and would reverse the district court's order changing the priority dates from July 11, 2016, to the original priority dates.

---

[2]The policies and principles of Nevada water law are unique and special in nature, *see Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949) ("It is . . . settled in this state that the water law and all proceedings thereunder are special in character . . . ."), and are already comprised of "oddities" that cannot be explained away by statutory law or judicial decisions, *see* Ross E. deLipkau & Earl M. Hill, *The Nevada Law of Water Rights* 8-1 to 8-2 (2010) (noting the "pitfalls, customs, policies, and folklore" encountered in the practice of water law in Nevada). Today's decision adds yet another oddity to Nevada water law.

CHRISTOPHER ANDERSEN, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE ROB BARE, District Judge, Respondents, and CITY OF LAS VEGAS, Real Party in Interest.

No. 75208

September 12, 2019 448 P.3d 1120

Original petition for a writ of habeas corpus or, alternatively, a writ of mandamus in a criminal matter.

Petition granted.

The Pariente Law Firm, P.C., and *Michael D. Pariente* and *John G. Watkins*, Las Vegas; *Kheel & Kheel Legal Services, PLLC*, and *David D. Kheel*, Las Vegas, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; *Bradford R. Jerbic*, City Attorney, and *Carlene M. Helbert* and *Stephen Rini*, Deputy City Attorneys, Las Vegas, for Real Party in Interest.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

We are asked whether the offense of misdemeanor battery constituting domestic violence is a serious offense such that the right to a jury trial is triggered. While we previously addressed and answered this question in the negative in *Amezcua v. Eighth Judicial District Court*, 130 Nev. 45, 319 P.3d 602 (2014), recent changes by our state legislature demand reconsideration. Because our statutes now limit the right to bear arms for a person who has been convicted of misdemeanor battery constituting domestic violence, the Legislature has determined that the offense is a serious one. And given this new classification of the offense, a jury trial is required. Accordingly, we grant the requested writ.

BACKGROUND

Petitioner Christopher Andersen was arrested and charged with first-offense battery constituting domestic violence (domestic battery), a misdemeanor pursuant to NRS 200.485(1)(a), and simple battery. Before the municipal court, Andersen made a demand for a jury trial, arguing that a conviction for domestic battery was a serious offense and thus compelled a jury trial. After the municipal court denied the demand for a jury trial, Andersen entered a no con-

test plea to the domestic battery charge, and the charge of simple battery was dismissed.

On appeal to the district court,[1] Andersen's sole contention was that he was erroneously denied the right to a jury trial. The district court disagreed and affirmed the conviction. Andersen then filed the instant writ petition.

DISCUSSION

"This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously." *Redeker v. Eighth Judicial Dist. Court*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006), *limited on other grounds by Hidalgo v. Eighth Judicial Dist. Court*, 124 Nev. 330, 341, 184 P.3d 369, 377 (2008); *see also* NRS 34.160. However, this court will not issue a writ of mandamus where the petitioner has "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. For this reason, this court will generally not consider a writ petition that seeks review of a district court decision made within the court's appellate jurisdiction, "unless the petitioner demonstrates that the district court has improperly refused to exercise its jurisdiction, has exceeded its jurisdiction, or has exercised its discretion in an arbitrary or capricious manner" or "the petition present[s] a significant issue of statewide concern that would otherwise escape our review." *Amezcua*, 130 Nev. at 47, 48, 319 P.3d at 603, 604 (internal quotation marks omitted); *see also Redeker*, 122 Nev. at 167, 127 P.3d at 522 (explaining that this court may "exercise its discretion to grant mandamus relief where an important issue of law requires clarification"). It is this latter situation—the need to clarify our caselaw concerning the right to a jury trial for misdemeanor domestic battery charges in light of legislative amendments—that renders district court appellate review an inadequate legal remedy and compels the consideration of Andersen's petition for a writ of mandamus.[2]

It is well established that the right to a jury trial, as established by the Sixth Amendment of the United States Constitution and Article 1, Section 3 of the Nevada Constitution, does not extend to those offenses categorized as "petty" but attaches only to those crimes that are considered "serious" offenses. *See Blanton v. City of N. Las Vegas*, 489 U.S. 538, 541 (1989); *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968); *see also Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 628-29, 748 P.2d 494, 497 (1987) ("[T]he right to a trial by jury

[1]Andersen and the City of Las Vegas agreed to a stay of the execution of Andersen's sentence so he could appeal the denial of his demand for a jury trial.

[2]Andersen alternatively seeks a writ of habeas corpus. In light of this opinion, the request for habeas relief is denied.

under the Nevada Constitution is coextensive with that guaranteed by the federal constitution."), *aff'd sub nom. Blanton*, 489 U.S. 538. In determining whether a particular offense is petty or serious, this "court must examine objective indications of the seriousness with which society regards the offense," and "[t]he best indicator of society's views is the maximum penalty set by the legislature." *United States v. Nachtigal*, 507 U.S. 1, 3 (1993) (internal quotation marks omitted). The word "penalty" encompasses both a term of imprisonment as well as other penalties proscribed by statute, but "[p]rimary emphasis . . . must be placed on the maximum authorized period of incarceration." *Blanton*, 489 U.S. at 542; *see also Nachtigal*, 507 U.S. at 3. To that end, the United States Supreme Court has established that an offense with a maximum authorized period of incarceration of six months or less is presumptively petty. *Blanton*, 489 U.S. at 543. To overcome this presumption, and to demonstrate that an offense rises to the level of seriousness to warrant a jury trial, a defendant must "demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a serious one." *Id*. (internal quotation marks omitted). With this framework in mind, we turn to the offense at issue in this matter.[3]

First-offense domestic battery is a misdemeanor crime, with a maximum authorized period of incarceration of six months. NRS 200.485(1)(a)(1). Thus, pursuant to Supreme Court precedent, there is a presumption that the offense is petty and that the right to a jury trial does not attach. Andersen does not appear to take issue with this presumption but argues the additional penalties elevate domestic battery to a serious offense.

We previously considered the additional penalties imposed by the offense of first-offense domestic battery and concluded that those penalties did not "clearly indicate a determination by the Nevada Legislature that this is a serious offense to which the right to a jury trial attaches."[4] *Amezcua*, 130 Nev. at 50, 319 P.3d at 605. However, just over one year after our decision in *Amezcua*, the Legislature amended the penalties associated with a conviction under NRS 200.485(1)(a). Specifically, NRS 202.360—a statute that prohibits the possession or control of firearms by certain persons—was amended to criminalize possession or control of a firearm in this state by a person who "[h]as been convicted in this State or any other state of a misdemeanor crime of domestic violence as defined

[3]Andersen framed his claim for relief as a procedural due process violation under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). We reject that framework and instead analyze his claim according to the precedent established for jury right determinations.

[4]The additional penalties we considered were "a community-service requirement of not more than 120 hours and a fine of not more than $1,000." *Id.*

in 18 U.S.C. § 921(a)(33)."[5] 2015 Nev. Stat., ch. 328, § 3(1)(a), at 1782. It is this amendment that distinguishes the instant matter from *Amezcua* and commands the conclusion that misdemeanor domestic battery is a serious offense.

In *Amezcua*, we held that a federal regulation restricting a convicted domestic batterer's possession of a firearm was not a direct consequence of a Nevada conviction for misdemeanor domestic battery. 130 Nev. at 50, 319 P.3d at 605. In so holding, we relied partly on the United States Supreme Court's reasoning "that the statutory penalties in other States are irrelevant to the question *whether a particular legislature deemed a particular offense* '*serious.*'" *Nachtigal*, 507 U.S. at 4 (emphasis added) (quoting *Blanton*, 489 U.S. at 545 n.11). But now, although not included in the statute proscribing misdemeanor domestic battery, our Legislature has imposed a limitation on the possession of a firearm in Nevada that automatically and directly flows from a conviction for misdemeanor domestic battery. In our opinion, this new penalty—a prohibition on the right to bear arms as guaranteed by both the United States and Nevada Constitutions—"clearly reflect[s] a legislative determination that the offense [of misdemeanor domestic battery] is a serious one." *Blanton*, 489 U.S. at 543 (internal quotation marks omitted); *see also Pohlabel v. State*, 128 Nev. 1, 9-13, 268 P.3d 1264, 1269-72 (2012) (discussing the history of Article 1, Section 11(1) of the Nevada Constitution which provides citizens with the right to keep and bear arms). Unlike other penalties that we have concluded are not serious, *see, e.g.*, *Blanton*, 103 Nev. at 631 & n.7, 748 P.2d at 499 & n.7 (considering a fine in the range of $200 to $1,000, loss of one's driver's license for a period of 90 days, and mandatory attendance of an alcohol abuse education course at the defendant's expense), the right affected here convinces us that the additional penalty is so severe as to categorize the offense as serious, *see generally McDonald v. City of Chi.*, 561 U.S. 742 (2010) (concluding the Fourteenth Amendment to the United States Constitution makes the Second Amendment fully applicable to the states); *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (concluding the Second Amendment to the United States Constitution confers an individual right to keep and bear arms); *see also Pohlabel*, 128 Nev. at 9-13, 268 P.3d at 1269-72. Given that the Legislature has indicated that the offense of misdemeanor domestic battery is serious, it follows that one facing the charge is entitled to the right to a jury trial.

Accordingly, we grant Andersen's petition and direct the clerk of this court to issue a writ of mandamus instructing the district court

[5]18 U.S.C. § 921(a)(33)(A) (2012) defines a misdemeanor crime of domestic violence, in part, as a misdemeanor offense under state law that has as an element the use, attempted use, or threatened use of physical or deadly force against the type of victim that places the act in the realm of domestic violence.

to vacate its order dismissing Andersen's appeal and proceed in a manner consistent with this opinion.

Gibbons, C.J., and Pickering, Hardesty, Parraguirre, Cadish, and Silver, JJ., concur.

In the Matter of Discipline of
JAMES A. COLIN, Bar No. 6257.

No. 73031

September 19, 2019 448 P.3d 556

Automatic review of a disciplinary board hearing panel's recommendation for attorney discipline.

Attorney suspended.

Schlegelmilch, D.J., dissented in part.

James A. Colin, Las Vegas, in Pro Se.

Daniel M. Hooge, Bar Counsel, and *Phillip J. Pattee* and *Bri F. Corrigan*, Assistant Bar Counsel, Las Vegas, for State Bar of Nevada.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Stiglich, J.:

The Rules of Professional Conduct (RPC) establish ethical guidelines for lawyers, some of which are mandatory and therefore define proper conduct for purposes of professional discipline. We consider in this matter whether to discipline attorney James A. Colin for violating rules that direct lawyers not to engage in conduct intended to disrupt a tribunal (RPC 3.5(d)), not to make statements concerning a judge's integrity or qualifications that the lawyer knows to be false

[1]Chief Justice Mark Gibbons and Justices Kristina Pickering, James W. Hardesty, and Ron D. Parraguirre voluntarily recused themselves from participation in the decision of this matter. Before their retirements, Justices Michael L. Douglas and Michael A. Cherry also voluntarily recused themselves. The Governor then appointed district court judges David A. Hardy, Nathan Tod Young, Scott Freeman, Kimberly A. Wanker, Robert W. Lane, and John Schlegelmilch to sit in place of the six recused justices. Justices Elissa F. Cadish and Abbi Silver therefore did not participate in the decision of this matter.

or with reckless disregard as to the statements' truth or falsity (RPC 8.2(a)), and not to act in a way that is prejudicial to the administration of justice (RPC 8.4(d)). We conclude that the State Bar proved that Colin made statements in pleadings to the court concerning the integrity of several justices that he knew to be false or with reckless disregard for their truth or falsity and that he engaged in conduct prejudicial to the administration of justice, but the evidence does not establish that Colin engaged in conduct intended to disrupt a tribunal because the alleged conduct did not occur inside a courtroom or similar setting. Considering the nature of the misconduct and similar discipline cases, we conclude that a six-month-and-one-day suspension serves the purpose of attorney discipline.

FACTS AND PROCEDURAL HISTORY

This discipline matter arises out of Colin's representation of condemned inmate Charles Lee Randolph in an appeal from a district court order denying Randolph's second postconviction petition for a writ of habeas corpus. In that matter, former Justice Douglas voluntarily recused himself because he had presided over Randolph's trial, and Chief Justice Gibbons and former Justice Cherry recused themselves because, when they were district court judges, they had written letters stating that the deputy district attorney who prosecuted Randolph had always been professional in his interactions with them, and those letters were submitted to this court as part of the prosecutor's response to an order to show cause that had been entered in Randolph's direct appeal. The remaining four justices on the court at that time (Justices Pickering, Hardesty, Parraguirre, and Saitta) decided Randolph's second postconviction appeal, affirming the district court's judgment. *Randolph v. State*, Docket No. 57959 (Order of Affirmance, Jan. 24, 2014). The misconduct at issue here involves statements that Colin included in several pleadings filed in the *Randolph* matter after the court entered its disposition.

Colin's statements in the Randolph matter

In a petition for rehearing and a motion to disqualify the four justices who signed the *Randolph* disposition, Colin made a number of unsupported and outrageous remarks about the court and the justices, many of which were unrelated to the matter on which he sought rehearing. Those statements included, but are not limited to, the following:

> [The Court had] the audacity to affirmatively "alter" the appellate record to conform to the Court's dishonest actions and claims.
>
> . . . .

> [T]he Court took its dishonesty to an unprecedented new level, and . . . the Court affirmatively fabricated a lie, blatantly contrary to the record. . . . Indeed, the Court's own Order proves that the Court is drunk with power, acting like a lawless bully, just lying and cheating to accomplish its evil objective to see Randolph dead.
>
> . . . .
>
> [T]he four Justices . . . are vindictive, dishonest, and totally biased. . . . They have concocted false and unsupportable legal theories . . . and appear to be willing to do anything to achieve their evil aims.
>
> . . . .
>
> The Justices are dishonest, and that dishonesty is apparent from the record in this case, and also from their active participation in a lengthy and ongoing unconstitutional judicial scheme and conspiracy to circumvent the Nevada Constitution, steal money from the Nevada taxpayers, and put $30,000 unconstitutional dollars a year into their own, and/or their judicial friend's pockets.
>
> . . . .
>
> [T]he Justices are engaged in an ongoing conspiracy to circumvent the Nevada Constitution through bogus "service" on a bogus "Law Library Commission."

Colin's motion to disqualify the four justices was denied as untimely in an order signed by Chief Justice Gibbons on March 25, 2014.

Colin filed a motion to strike the March 25 order and filed another motion to disqualify the four justices and to re-disqualify Chief Justice Gibbons and former Justices Cherry and Douglas, in which he alleged that none of the seven justices could be fair and impartial. In that motion, he made the following statements:

> This Nevada Supreme Court has no respect for the Nevada Constitution, or the law of the United States of America. The Court's despicable and blatantly lawless actions have repeatedly proven this sad truth.
>
> . . . .
>
> [F]airness and honesty are anathema [sic] to this Court, which seeks only to use its brute power to make up lies, get paid, and wrongly blame others for its evil objective—the lynching of Charles Lee Randolph.
>
> . . . .
>
> Just because seven (7) dishonest elected government officials conspire together to disobey the law, and agree that lies are the truth, it sure doesn't mean their lies actually are the truth.

> . . . .
> The Nevada Supreme Court works hard to this very day to break the law, make up lies, and complete the judicial lynching of Charles Lee Randolph.

Colin's motions to strike the March 25 order and to disqualify all seven justices were denied in an order signed by Chief Justice Gibbons on September 17, 2014. In that order, Colin was also referred to the State Bar of Nevada for investigation and a determination on the appropriateness of discipline "based on the contemptuous tone and unsubstantiated allegations in the pleadings."

In response, Colin filed a motion to strike the September 17 order, arguing that Chief Justice Gibbons could not resolve the motions as he had recused himself in the matter. In that motion, Colin asserted that "Gibbons' willful illegal behavior seems obviously motivated by a desire to wrongly harm Mr. Randolph and his counsel" and the "vindictive and illegal attempt to 'discipline' undersigned counsel" "is void and illegal, and simply designed to retaliate."

Because the motion to strike the September 17 order was related to the motion to disqualify, the four justices who decided the *Randolph* matter recused themselves from deciding the motion to strike. The Governor appointed three district court judges to decide the motion to strike and, if necessary, the motion to disqualify. The appointed judges granted the motion to strike the March 25 and September 17 orders, concluding that because Chief Justice Gibbons had recused himself, he could not undertake any administrative action in the case. Thereafter, the appointed judges denied the motions to disqualify the four justices who had decided the *Randolph* matter. The petition for rehearing was then denied.

Bar proceedings

Following the referral in the September 17 order, the State Bar filed a disciplinary complaint against Colin in April 2015, alleging that he violated RPC 3.5(d) (conduct intended to disrupt a tribunal), RPC 8.2(a) (false statement concerning the qualifications or integrity of a judge), and RPC 8.4(d) (conduct prejudicial to the administration of justice). Colin filed an answer, in which he admitted to filing the motions to disqualify and strike, generally stating that they were valid and meritorious or reflected his honest opinions or beliefs and generally denying that those pleadings violated the RPCs. The State Bar and Colin entered into a conditional guilty plea agreement, which was reviewed and rejected by a hearing panel.

After the hearing panel rejected the plea agreement, the matter proceeded to a formal, contested hearing. Although Colin was served with a notice of the formal hearing, he failed to appear. During the hearing, the State Bar asserted that Colin's pleadings in the *Randolph* matter violated RPC 3.5, RPC 8.2, and RPC 8.4 be-

cause, in them, he demonstrated an unwillingness to pursue proper legal remedies upon receiving a ruling with which he disagreed and instead made numerous unfounded accusations about the integrity, motives, and competence of the supreme court justices. The panel concluded that Colin's persistent conduct over an extended period of time denigrated the legal system and devolved into a personal attack on those attempting to administer justice. Based on those findings and conclusions, the panel recommends this court suspend Colin for one year and require him to pass the Multistate Professional Responsibility Exam as a precondition to seeking reinstatement. The panel also recommends Colin be ordered to pay the costs of the disciplinary proceeding including $2,500 under SCR 120(3). In support of its recommendation, the panel found three aggravating circumstances (refusal to acknowledge the wrongful nature of his conduct, vulnerability of the victim, and substantial experience in the practice of law) and one mitigating circumstance (absence of a prior disciplinary record).

DISCUSSION

Colin violated RPC 8.2(a) and RPC 8.4(d) but did not violate RPC 3.5(d)

Colin contends that the evidence does not support the panel's conclusions that he violated RPC 3.5(d), RPC 8.2(a), or RPC 8.4(d) because "[t]he State Bar of Nevada intentionally lied to the hearing panel in an effort to get [him] disciplined for telling the truth!"[2] (Emphasis omitted.) The State Bar does not directly respond to this argument.

The State Bar has the burden of showing by clear and convincing evidence that Colin committed the violations charged. *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995). To be clear and convincing, evidence "need not possess such a degree of force as to be irresistible, but there must be evidence of tan-

[2]While Colin makes numerous other arguments, we conclude he waived those arguments by failing to present them to the hearing panel. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that a point not argued below is "waived and will not be considered on appeal").

We acknowledge that Colin presents a novel procedural issue regarding whether the hearing panel was required to render a written decision rejecting his conditional guilty plea agreement. SCR 113(1) provides that a "tendered plea is subject to final approval or rejection by the supreme court if the stated form of discipline includes disbarment or suspension" and SCR 105(2)(e) requires a hearing panel to "render a written decision within 30 days of the conclusion of the hearing." Many other states have specific rules stating that if a hearing panel rejects a conditional guilty plea, the guilty plea is withdrawn and will not be reviewed by the supreme court, *see, e.g.*, Alaska Bar Rule 22(h) (2018); N.J. Rule 1:20-10(b)(3), 1:20-15(g) (2019); N.M. Rule Annotated 17-211 (2019), but Nevada does not have such a rule. We need not consider whether there was a procedural error here because Colin failed to preserve this argument.

gible facts from which a legitimate inference . . . may be drawn." *In re Discipline of Schaefer*, 117 Nev. 496, 515, 25 P.3d 191, 204 (internal quotations marks omitted), *as modified by* 31 P.3d 365 (2001). Our review of the panel's findings of fact is deferential, SCR 105(3)(b), so long as they are not clearly erroneous and are supported by substantial evidence, *see Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013).[3] But we review any conclusions of law de novo. SCR 105(3)(b). Accordingly, we determine de novo whether the factual findings establish an RPC violation. *See LK Operating, LLC v. Collection Grp., LLC*, 331 P.3d 1147, 1157 (Wash. 2014) (stating, in a legal malpractice action, that "[w]hether a given set of facts establish an RPC violation is a question of law subject to de novo review"); *see also Attorney Grievance Comm'n v. Korotki*, 569 A.2d 1224, 1234 (Md. 1990) (indicating that whether a legal fee violates a disciplinary rule is a question of law).

RPC 3.5(d)

RPC 3.5(d) provides that "[a] lawyer shall not engage in conduct intended to disrupt a tribunal." Interpreting the same language in an earlier version of the Rules of Professional Conduct, this court observed that the provision "is designed to guard against in-court disruption of an ongoing proceeding." *In re Discipline of Stuhff*, 108 Nev. 629, 633, 837 P.2d 853, 855 (1992). In *Stuhff*, this court rejected the disciplinary panel's finding that an attorney violated an earlier identically worded version of RPC 3.5(d), agreeing with the attorney that the rule "only applies where actual physical or verbal disruption in the courtroom occurs." *Id.* Thus, "[i]f a lawyer takes action outside a courtroom setting, it is virtually impossible that it could 'disrupt' a tribunal or be intended to do so in the sense contemplated by Rule 3.5(d)." 2 Geoffrey C. Hazard, Jr., et al., *The Law of Lawyering* § 34.09, at 34-15 (4th ed. supp. 2019). We see no reason to overrule *Stuhff*. Accordingly, in order for Colin to have violated RPC 3.5(d), his conduct would have had to occur during a tribunal's proceeding.[4]

Colin's conduct did not occur in a courtroom setting. His statements and conduct all occurred in writing, instead of in-person before a tribunal. Thus, his conduct could not have disrupted the tri-

[3]The deference applied to factual findings in civil matters governs our review of a hearing panel's factual findings because SCR 105(3)(a) provides that bar matters are treated the same as civil actions.

[4]We note that a comment to the current model rule indicates that RPC 3.5(d) can apply to disruptive conduct during "any proceeding of a tribunal, including a deposition." Model Rules of Prof'l Conduct R. 3.5 cmt. 5 (Am. Bar Ass'n 2018).

bunal's proceeding in *Randolph* in the sense contemplated by RPC 3.5(d). Accordingly, we conclude that the panel's findings fail to establish that Colin violated RPC 3.5(d).

RPC 8.2(a)

RPC 8.2(a) provides that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge." No matter the offensive or unkind nature of an attorney's statement, RPC 8.2(a) is limited to statements of fact as opposed to opinion because only statements of fact can be true or false and RPC 8.2(a) is intended to protect the integrity of the judicial system and the public's confidence in it, instead of "protect[ing] judges . . . from unkind or undeserved criticisms." *Attorney Grievance Comm'n v. Frost*, 85 A.3d 264, 274 (Md. 2014). Thus, based on the rule's plain language, there are three elements to an RPC 8.2(a) violation: an attorney makes (1) a statement of fact that (2) impugns the judge's integrity or qualifications, (3) knowing the statement to be false or with a reckless disregard for the statement's truth. We address each element in turn.

First, while many of Colin's statements about the justices are fairly characterized as opinions, substantial evidence supports the panel's findings that at least some of them were statements of fact. The strongest examples of factual statements include Colin's statements that the justices "affirmatively 'alter[ed]' the appellate record"; "affirmatively fabricated a lie, blatantly contrary to the record"; and have actively participated "in a lengthy and ongoing unconstitutional judicial scheme and conspiracy to circumvent the Nevada Constitution, steal money from the Nevada taxpayers, and put $30,000 unconstitutional dollars a year into their own, and/or their judicial friend's pockets" by serving on the Law Library Commission.

Second, substantial evidence supports the panel's findings that Colin's statements concern the qualifications or integrity of the justices. In particular, he accused them of lying, altering the record in a case, engaging in an unconstitutional conspiracy, and stealing money from the taxpayers.

Finally, substantial evidence supports the panel's findings that Colin either knew the statements were false or made the statements with reckless disregard for their truth. In particular, Colin admitted in his affidavit supporting one of the post-judgment disqualification motions that he waited to assert the illegality of the justices' compensation for service on the library commission until after the decision in *Randolph*. He stated that he "considered filing a Motion to Disqualify in 2011 based only on the Justice's [sic] unconstitutional participation in the conspiracy to circumvent the Nevada Constitu-

tion pursuant to the bogus 'Library Commission' but decided to give the Justices the benefit of the doubt." From that admission, it can be inferred that Colin knew the compensation was not illegal and made the false statement only because the court ruled against his client. At the very least, substantial evidence supports the panel's findings that Colin made those statements with reckless disregard for the truth, as any compensation for service on the Law Library Commission necessarily was authorized by the Legislature.

In sum, the State Bar established by clear and convincing evidence that Colin made statements of fact that impugned the justices' integrity, with knowledge of the statements' falsity or with reckless disregard for whether they were false. Based on that evidence and giving deference to the panel's findings of fact, we conclude that Colin violated RPC 8.2(a).

RPC 8.4(d)

Finally, we consider whether the State Bar proved that Colin violated RPC 8.4(d). RPC 8.4(d) provides that it is misconduct for an attorney to "[e]ngage in conduct that is prejudicial to the administration of justice." Interpreting the same language in an earlier version of RPC 8.4(d), this court observed "that conduct that intentionally interferes with the criminal justice and civil litigation processes generally is prejudicial to the administration of justice." *Stuhff*, 108 Nev. at 633-34, 837 P.2d at 855. For purposes of this rule, "prejudice" requires "either repeated conduct causing some harm to the administration of justice or a single act causing substantial harm to the administration of justice." *Id.* at 634, 837 P.2d at 855 (emphasis omitted). Unlike RPC 3.5(d) discussed above, RPC 8.4(d) can be used to address conduct that occurs outside of a courtroom and is intended to or does disrupt a tribunal. *See id.* at 633-37, 837 P.2d at 855-57 (imposing discipline under earlier version of RPC 8.4(d) to conduct that occurred outside the courtroom but was intended to interfere with a court proceeding).

Colin made repeated efforts to disqualify the four justices who decided *Randolph* in an effort to either delay the proceedings or obtain another panel of judges to decide the case anew. In particular, he filed motions to disqualify *after* the justices had entered a decision on the merits and made serious charges of ethical and criminal violations by the justices without any supporting factual allegations or cogent argument supported by legal authority. From that conduct it can be inferred that Colin intended to manipulate the appellate process by delaying the proceedings and obtaining a new panel of judges to decide the case. His post-judgment motion practice significantly delayed the final resolution of the *Randolph* matter. Based on that evidence and giving deference to the panel's findings of fact, we conclude that Colin violated RPC 8.4(d).

The appropriate discipline

Lastly, we turn to the appropriate discipline for Colin's violations of RPC 8.2(a) and RPC 8.4(d). The hearing panel recommended a one-year suspension and passage of the Multistate Professional Responsibility Examination as a condition of reinstatement. Although that recommendation is persuasive, *Schaefer*, 117 Nev. at 515, 25 P.3d at 204, we determine the appropriate discipline de novo, SCR 105(3)(b). In doing so, we weigh four factors: "the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors." *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008).

Colin violated duties owed to the legal system: making false statements about the integrity of a judge and engaging in conduct prejudicial to the administration of justice. Colin's mental state was knowing, as he knew that if he sought to disqualify all of the supreme court justices, the *Randolph* matter would be, at the very least, delayed. Colin's misconduct harmed the legal system and likely the public's perception of the legal system. The baseline sanction for his misconduct, before consideration of aggravating and mitigating circumstances, is suspension. *See Compendium of Professional Responsibility Rules and Standards: Standards for Imposing Lawyer Sanctions*, Standard 6.12 (Am. Bar Ass'n 2018) (recommending suspension for knowingly making false statements to the court and causing an adverse or potentially adverse effect on the legal proceeding); *id.*, Standard 7.2 ("Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.").

The panel found and the record supports two aggravating circumstances (refusal to acknowledge the wrongful nature of his conduct and substantial experience in the practice of law) and one mitigating circumstance (absence of a prior disciplinary record). The panel also found a third aggravating circumstance based on the vulnerability of the victim, apparently on the theory that Colin's misconduct delayed justice for Randolph. That is not an appropriate application of the vulnerable-victim aggravating circumstance. When considering whether a victim is "vulnerable," courts typically look at the victim's individual characteristics such as age, level of education or sophistication, and physical or mental disabilities or impairments. *Annotated Standards for Imposing Lawyer Sanctions* § 9.22 (Am. Bar Ass'n 2015) (collecting cases). The record does not indicate that Randolph is vulnerable for purposes of this aggravating factor. It also is not entirely clear that Randolph is a "victim" of the professional misconduct at issue, given that RPC 8.2(a) and RPC 8.4(d) implicate duties owed to the legal system rather than a client. Thus,

only the first two aggravating circumstances are supported by substantial evidence. Considering the aggravating circumstances and mitigating circumstance together, they do not support a deviation from the baseline sanction of suspension.

Weighing all four factors, we agree with the panel's recommendation that a suspension is appropriate but not with the length of the recommended suspension (one year), which is beyond what is necessary to serve the purpose of attorney discipline. *See State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988) (explaining that the purpose of attorney discipline is to protect the public, the courts, and the legal profession, not to punish the attorney). This court has imposed shorter suspensions in similar cases. *See In re Discipline of Lord*, Docket No. 73447 (Order of Suspension, Dec. 20, 2017) (suspending attorney for six months and one day where the attorney had interrupted a proceeding and made false accusations about the judge, causing the judge to recuse himself and continue the trial); *In re Discipline of Hafter*, Docket No. 71744 (Order of Suspension, Nov. 17, 2017) (suspending an attorney for six months where the attorney made statements on social networking sites that the judge presiding over one of his matters was biased and anti-Semitic). In light of these similar cases and the relevant factors discussed above, we conclude that the purpose of attorney discipline is achieved through a six-month-and-one-day suspension.

Accordingly, we suspend attorney James A. Colin from the practice of law in Nevada for six months and one day commencing from the date of this decision. Because the imposed suspension is longer than six months, Colin must petition the State Bar for reinstatement to the practice of law. SCR 116. As a condition to seeking reinstatement, he must take and pass the Multistate Professional Responsibility Exam. Colin shall pay the costs of the disciplinary proceedings, including $2,500 under SCR 120(3), within 30 days of the date of this decision. The parties shall comply with SCR 115 and SCR 121.1.

Hardy, Young, Freeman, Wanker, and Lane, D.JJ., concur.

Schlegelmilch, D.J., concurring in part and dissenting in part:

I write separately as I do not find the State Bar proved by clear and convincing evidence that the element of "prejudic[e] to the administration of justice" existed as required by RPC 8.4(d).

Colin's behavior clearly violated RPC 8.2(a). The Bar should not view the majority opinion as limiting their ability to disagree with factual or legal determinations made by a Nevada jurist or make valid disqualification affidavits when supported by evidence of bias. Here, Colin's unsupported vexatious attack on the court cannot legitimately be characterized as a professional disagreement with the factual or legal determinations made in the *Randolph* order. In that

respect, I concur with the majority in finding the violation of RPC 8.2(a) was well supported by clear and convincing evidence in the record.[1]

I respectfully disagree with the majority's use of inferences to establish that the record supports a finding of prejudice under RPC 8.4(d) and that the actions of Colin "prejudic[ed] . . . the administration of justice." As stated by the majority, "it can be inferred that Colin intended to manipulate the appellate process by delaying the proceedings and obtaining a new panel of judges to decide the case" by repeated efforts to disqualify the justices. Majority, *supra*, at 332. The hearing panel in this matter made none of the findings inferred by the majority in the hearing panel's Findings of Fact, Conclusions of Law and Recommendation. The State Bar complaint itself only indicates that Colin "wasted court time and resources." Further, there was no evidence or argument presented relating to Colin's intent in the record of the disciplinary proceeding.

As the majority properly points out, *In re Discipline of Stuhff* sets forth that in order to support a violation of RPC 8.4(d), "prejudice" requires "either repeated conduct causing some harm to the administration of justice or a single act causing substantial harm to the administration of justice." 108 Nev. 629, 634, 837 P.2d 853, 855 (1992) (emphasis omitted); *see also* majority, *supra*, at 332. In *Stuhff*, there were specific supported findings of delay and prejudice found by the hearing panel which were upheld by this court. *Id*. In this matter, the hearing panel did not find that a delay occurred, let alone that Colin had the intent to cause a delay.[2] I cannot infer clear and convincing evidentiary support for "prejudic[e] to the administration of justice" when there was none established or considered by the hearing panel in the record. For those reasons, I dissent from the majority as the State Bar did not present clear and convincing evidence of a violation of RPC 8.4(d) to the hearing panel.

I do concur in the stated discipline for Colin's violation of RPC 8.2(a). That violation, standing alone, in light of the stated aggravating and mitigating circumstances, warrants the imposed discipline as it is in conformity with discipline imposed for similar actions in the past by this court.

---

[1]I also concur with the majority's conclusion that Colin did not violate RPC 3.5(d) and that by failing to present any evidence or argument at his disciplinary hearing on his other stated grounds, he waived the same.

[2]Colin's hearing panel never made any findings that (1) any actual delay occurred, (2) Colin intended to manipulate the appellate process, (3) any delay was attributable to Colin, or (4) any delay was not a result of the administrative processes of the court as described by the majority.

THE STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION, Appellant, *v.* TITLEMAX OF NEVADA, INC., dba TITLEBUCKS, dba TITLEMAX, a Delaware Corporation, Respondent.

No. 74335

September 26, 2019 449 P.3d 835

Appeal from a district court order granting a petition for judicial review of an administrative decision. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Affirmed in part and reversed in part.

Aaron D. Ford, Attorney General, *Heidi J. Parry Stern*, Solicitor General, *David J. Pope*, Senior Deputy Attorney General, and *Vivienne Rakowsky*, Deputy Attorney General, Carson City, for Appellant.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod*, and *Dale Kotchka-Alanes*, Las Vegas; *Brownstein Hyatt Farber Schreck, LLP*, and *Patrick John Reilly*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

The Nevada Legislature adopted NRS Chapter 604A in an effort to protect Nevada consumers from predatory lending practices related to certain short-term, high-interest loans such as title loans. A title loan is a loan agreement that charges an annual percentage rate of more than 35 percent and requires the customer to secure the loan by either giving possession of a vehicle that they legally own or by perfecting a security interest in the vehicle. *See* NRS 604A.105(1). Key to this case, Nevada law restricts the duration of title loans, allowing either a 30-day loan that may be extended up to six times in 30-day increments or a 210-day loan. Title lenders offering a 210-day loan are required to structure the loan such that it "ratably and fully amortize[s] the entire amount of principal and interest payable on the loan." NRS 604A.445(3) (2007).[1] Although title lenders may

[1]NRS 604A.445 was amended in 2017 and replaced in revision by NRS 604A.5074. 2017 Nev. Stat., ch. 274, § 6.5, at 1441-42. Because the relevant events took place in 2014-2015, we consider the statute as it applied prior to the amendment.

not offer an "extension" on a 210-day loan, NRS 604A.445(3), they are permitted to offer a "grace period"—that is, they may extend the life of the loan but may not charge additional interest. *See* NRS 604A.070 (2007); NRS 604A.210 (2005).[2]

In this case, we must determine whether the Grace Period Payment Deferment Agreement (GPPDA) that respondent TitleMax of Nevada, Inc., marketed as an amendment to its 210-day loan complies with the statutory restrictions on the duration of a title loan. Because the GPPDA required borrowers to make unamortized payments and consequently charged "additional interest," it impermissibly extended the duration of the loan. We therefore conclude the Administrative Law Judge (ALJ) was correct when she held that the GPPDA violated NRS 604A.445 and NRS 604A.210. Accordingly, the district court erred when it granted judicial review and vacated the ALJ's order in this regard. But we agree with the district court that TitleMax's statutory violation was not "willful" and thus did not warrant the statutory sanctions imposed by the ALJ. Accordingly, we affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

In 2014, TitleMax offered a 210-day title loan to its customers in Nevada. This traditional 210-day loan agreement complied with NRS 604A.445(3) in that it lasted 210 days, payments were charged in installments, the payments were "calculated to ratably and fully amortize the entire amount of principal and interest" in the 210 days, there were no extensions to the loan, and there were no balloon payments. NRS 604A.445(3). These loans further included a contracted rate of interest, which was calculated into each payment. *See id.* An example of such a loan is reproduced in this table:

Traditional 210-Day Title Loan for $5,800 at 133.7129%[3]

Month	Payment	Amount Toward Interest	Amount Toward Principal
1	$1,230.45	$705.82	$524.63
2	$1,230.45	$564.65	$665.80

[2]NRS 604A.210 and NRS 604A.070 were also significantly amended in 2017. 2017 Nev. Stat., ch. 274, §§ 3-4, at 1439. As above, we consider the statutes as they applied at the time of the relevant events.

[3]This table is derived from a "representative loan transaction" provided in the record for a customer who borrowed $5,800 with an APR of 133.7129% on January 17, 2015, from TitleMax. This information was not provided to the customer in table format, nor did it explain the amount that would be applied toward interest and principal.

3	$1,230.45	$520.96	$709.49
4	$1,230.45	$403.32	$827.13
5	$1,230.45	$312.57	$917.88
6	$1,230.45	$201.65	$1,028.80
7	$1,230.46	$104.19	$1,126.27
Totals	$8,613.16	$2,813.16	$5,800.00

In 2014, TitleMax also began offering a "Grace Period Payment Deferment Agreement," marketed as an amendment and modification to the 210-day loan. Under the GPPDA, TitleMax collected seven months of interest-only payments calculated based on a static principal balance and then collected seven months of payments amortizing principal. An example of a GPPDA offered on the $5,800 loan at 133.7129% described above is reproduced in this table:

GPPDA for $5,800 at 133.7129%[4]

Month	Payment	Amount Toward Interest	Amount Toward Principal
1	$637.42	$637.42	$00.00
2	$637.42	$637.42	$00.00
3	$637.42	$637.42	$00.00
4	$637.42	$637.42	$00.00
5	$637.42	$637.42	$00.00
6	$637.42	$637.42	$00.00
7	$637.42	$637.42	$00.00
8	$828.57	$00.00	$828.57
9	$828.57	$00.00	$828.57
10	$828.57	$00.00	$828.57
11	$828.57	$00.00	$828.57
12	$828.57	$00.00	$828.57

[4]This table is derived from the table provided to the same customer in his Grace Period Payments Deferment Agreement. However, the table provided to him only stated his monthly payment (column 2 in the table above); the table did not explain the amount applied toward interest and principal or show that the first seven payments were "interest only" payments and the last seven payments were "principal only" payments.

13	$828.57	$00.00	$828.57
14	$828.58	$00.00	$828.58
Totals	$10,261.94	$4,461.94	$5,800

Critically, under the GPPDA, customers had the opportunity to make smaller monthly payments but the loan term was prolonged by seven months. Additionally, while the interest *rate* did not deviate from the contracted rate of interest under the GPPDA, the *amount* of interest paid by customers grew because the interest amount was calculated on a static principal balance rather than an amortizing principal that gradually decreased over the life of the loan.

The Nevada Department of Business and Industry, Financial Institutions Division (FID), through its Commissioner, regulates licensed title lenders in Nevada, including TitleMax. *See generally* NRS 604A.035; NRS 604A.402 (2007). The FID conducted its 2014 annual examination of TitleMax and issued a report on TitleMax's statutory and regulatory compliance. The FID concluded that the GPPDA violated NRS 604A.445, the statute regulating 210-day title loans, and NRS 604A.210, the statute regulating grace periods, because it charged customers "additional" interest beyond the 210 days' worth of interest provided for in the original title loan agreement and therefore constituted an impermissible "extension" of the loan. It issued a "Needs Improvement" rating[5] to TitleMax and instructed TitleMax to stop offering the GPPDA. In a February 9, 2015, letter, TitleMax responded that the GPPDA complied with NRS 604A.445(3) and NRS 604A.210 because it created a "customer friendly" "grace period of deferment" that was offered "gratuitously" to customers and that customers were free to make prepayments or make payments as originally scheduled even if they had elected the GPPDA. TitleMax argued that the GPPDA created a true "grace period" because it gave customers an opportunity to make smaller monthly payments. The FID replied that it "stands by its position" regarding the GPPDA. At a follow-up inspection in early 2015, the FID found that TitleMax had continued to offer the GPPDA and issued an "Unsatisfactory" rating to TitleMax. TitleMax filed a declaratory relief action in district court, seeking interpretation of NRS 604A.445 and NRS 604A.210,[6] and the FID

[5]The record in this case indicates that the FID issues one of three ratings when it conducts annual examinations: satisfactory, needs improvement, and unsatisfactory.

[6]After the FID issued its "Needs Improvement" rating at the 2014 inspection and before the 2015 inspection was completed, TitleMax filed a declaratory relief action in district court, seeking an interpretation of NRS 604A.445 and NRS 604A.210. The district court dismissed the declaratory relief action, finding

brought the underlying administrative disciplinary action against TitleMax, alleging that TitleMax violated NRS 604A.445(3) and NRS 604A.210.[7]

After a three-day hearing in the administrative disciplinary action, an ALJ determined that the GPPDA violated NRS Chapter 604A because it extended the original 210-day loan and allowed TitleMax to charge additional interest. Accordingly, the ALJ ordered TitleMax to cease and desist offering the GPPDA. Further, pursuant to NRS 604A.900, the ALJ sanctioned TitleMax for willfully violating NRS 604A.445(3) and NRS 604A.210 by ordering that every GPPDA entered into after December 18, 2014 (the final date of the 2014 inspection), was void. Consequently, TitleMax was not entitled to collect, receive, or retain any principal, interest, or other charges with respect to loans entered into after this date. TitleMax petitioned the district court for judicial review. The district court granted TitleMax's petition and vacated the ALJ's order. This appeal by the FID follows.

DISCUSSION

This court's role in reviewing a petition for judicial review of an administrative agency's decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). An administrative agency's factual findings are reviewed for clear error or an abuse of discretion and must be supported by substantial evidence. NRS 233B.135(3)(e), (f); *Elizondo*, 129 Nev. at 784, 312 P.3d at 482. Legal conclusions, however, are reviewed de novo. *State, Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 735, 265 P.3d 666, 669 (2011). That being said, this court has "repeatedly recognized the authority of agencies . . . to interpret the language of a statute that they are charged with administering; as long as that interpretation is reasonably consistent with the language of the statute, it is entitled to deference in the courts." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006). Accordingly, if the FID's interpretation of NRS Chapter 604A is "within the language of the statute," then this court will defer to that interpretation. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). When interpreting a statute, we look first to its plain language. *See Robert E. v. Justice Court*, 99 Nev. 443, 445,

---

TitleMax had not exhausted its administrative remedies. This court reversed that order, holding that the district court erred because TitleMax raised only issues of statutory interpretation and thus exhaustion of administrative remedies was not required. *TitleMax of Nev., Inc. v. State, Dep't of Bus. & Indus., Fin. Insts. Div.*, Docket No. 69807 (Order of Reversal and Remand, October 4, 2017). Before TitleMax could litigate its declaratory relief action, the FID brought the underlying administrative disciplinary action.

[7]TitleMax stopped offering the GPPDA on new loans in December 2015.

664 P.2d 957, 959 (1983). If the language is clear and unambiguous, we do not look beyond it. *Id.*

TitleMax's GPPDA violates NRS Chapter 604A

Under NRS 604A.445, title lenders can offer two types of title loans to customers: a 30-day loan that can be extended up to six times in 30-day increments, *see* NRS 604A.445(1), (2); or a 210-day loan that cannot be extended, *see* NRS 604A.445(3). The 30-day loan allows the title lender to extend the 30-day term six times, and each extension provides 30 days of unamortized interest for a possible total of 210 days of unamortized interest. NRS 604A.445(1), (2). The 210-day loan prohibits unamortized interest by requiring "ratably and fully amortize[d]" interest. NRS 604A.445(3)(b). The 210-day loan also cannot be extended beyond the date for paying the loan in full under the loan agreement's original terms. NRS 604A.445(3)(c); *see also* NRS 604A.065(1) (defining "extension"). However, a lender may offer a grace period on a 210-day title loan. *See* NRS 604A.070 (2005). A grace period is "any period of deferment offered gratuitously by a licensee to a customer if the licensee complies with the provisions of NRS 604A.210." *Id.* NRS 604A.210, in turn, provides that a title lender cannot "charge the customer . . . [a]ny additional fees or *additional interest* on the outstanding loan during such a grace period." (Emphasis added.) An extension does not include a grace period, just as a grace period does not include an extension. NRS 604A.065(2); NRS 604A.070(2). In sum, grace periods and extensions are mutually exclusive, and for a 210-day loan, grace periods are permissible but extensions are not.[8]

In 2014, TitleMax offered a 210-day loan and the GPPDA as an "amendment and modification" to that loan. TitleMax argues that the GPPDA does not violate NRS 604A.445(3) or NRS 604A.210. It argues that the GPPDA is a "period of deferment offered gratuitously" under NRS 604A.070 and therefore a permissible grace period. It asserts that as a grace period, the GPPDA is only governed by NRS 604A.070 and NRS 604A.210, not NRS 604A.445(3), which governs the 210-day loan. Additionally, it maintains that the GPPDA complies with the plain language of NRS 604A.210, which states that a lender "shall not charge the customer . . . *additional* interest" for a grace period. (Emphasis added.) In particular, TitleMax argues that during the grace period, it can charge unamortized interest at the *same rate* set forth in the original 210-day loan agreement because interest at the same *rate* is not "additional" interest. Conversely, the FID asserts that NRS 604A.070 and NRS 604A.210 must be read in conjunction with NRS 604A.445(3), because a title lender can-

[8]To be clear, title lenders may offer a deferment that extends the life of the loan beyond 210 days. However, that deferment must be a permissible grace period pursuant to NRS 604A.070 and NRS 604A.210 rather than an impermissible extension pursuant to NRS 604A.065 and NRS 604A.445(3)(c).

not offer a standalone "grace period" without any connection to an existing loan agreement. Consequently, the FID contends that the GPPDA violates NRS 604A.445(3) because it charges *unamortized* interest. Additionally, the FID argues that the GPPDA effectively increases the contractual interest *amount* beyond the 210 days' worth of interest permitted under NRS 604A.445(3). Because the GPPDA increases the *amount* of interest that TitleMax collects beyond the 210 days' worth permitted under NRS 604A.445(3)(b), the FID asserts that the GPPDA charges the customer "additional interest" in violation of NRS 604A.210 and therefore constitutes an impermissible "extension" of the original 210-day title loan.

We agree with the FID and conclude that its interpretation fits squarely within the statutory language. First, as a title loan, the GPPDA *is* governed by NRS 604A.445, in addition to NRS 604A.070 and NRS 604A.210, and when read together, the statutes show that the GPPDA is an impermissible "extension" that charges impermissible "additional interest." The GPPDA must comply with the provisions that apply to the loan it is modifying and thus must comply with NRS 604A.445(3). NRS 604A.445(3) clearly states that the payments on a 210-day loan must ratably and fully amortize the entire amount payable on the loan. That restriction on a 210-day title loan cannot be circumvented by offering a grace period that effectively recalculates the payments during the original term of the loan so that they no longer "ratably and fully amortize the *entire* amount of principal *and interest* payable on the loan." NRS 604A.445(3)(b) (emphasis added). To be sure, NRS 604A.210(2) contemplates that interest may be charged during a grace period; it just cannot be "additional." Although NRS Chapter 604A does not define "additional,"[9] when read in harmony with NRS 604A.445, NRS 604A.210 contemplates that "additional" is informed by the repayment schedule of the original loan—a loan in which the principal is to reduce with each payment so that the principal is paid fully, along with the interest. *Cf. Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes." (internal quotation marks omitted)).

Payments on a loan under the GPPDA *never ratably amortize*, not during the first 210 days where payments are only used to pre-

[9]We reject TitleMax's reliance on NRS 604A.210's legislative history, which indicates that when the statute was enacted in 2005, the original draft read "[*a*]*ny* . . . interest" but was changed during the drafting process to "*additional* interest." *See* Assembly Daily Journal, 73d Leg., at 84 (Nev., April 25, 2005) (amendments to A.B. 384); Assembly Daily Journal, 73d Leg., at 63 (Nev., April 26, 2005) (amendments to A.B. 384); 2005 Nev. Stat., ch. 414, § 23, at 1686. While this drafting change indicates that the Legislature anticipated that some interest could be charged during a grace period, TitleMax does not cite to, nor can this court discern, any legislative history suggesting that the word "additional" was intended to refer to *rate* and not *amount*.

vent the accrual of interest and not during the second 210 days where payments are applied to reduce principal. Under a 210-day title loan agreement envisioned by NRS 604A.445(3)(b), each monthly payment reduces both the principal and accruing interest according to an amortization schedule. This does not occur under the GPPDA. The FID argues that when TitleMax charges only interest for the first seven months under the GPPDA, it changes the contractual amount of interest, which is capped at 210 days' worth of amortized interest. This interpretation is supported by the plain language of NRS 604A.445. *See Taylor*, 129 Nev. at 930, 314 P.3d at 951; *Robert E.*, 99 Nev. at 445, 664 P.2d at 959. Additionally, the GPPDA's "grace period" does not actually *defer* a payment because the customer is making payments of "additional interest" during that period. *See* NRS 604A.070. Rather, after the first 210 days of charging *unamortized* interest, the GPPDA redirects payments toward the principal portion of the loan balance. This is a loan extension under the plain language of NRS 604A.065, which is forbidden by NRS 604A.445(3)(c). As a result, we conclude that the ALJ did not err when she concluded that TitleMax's GPPDA violated NRS 604A.445 and NRS 604A.210 and that the district court, in turn, erred when it granted the petition for judicial review and vacated the ALJ's order in this regard.

Sanctions were not appropriate under NRS 604A.900 because TitleMax did not willfully violate NRS Chapter 604A

A lender may not recover principal, interest, or other fees with respect to a loan where the lender has *willfully* entered a loan agreement, sought payment, or committed any other act in violation of NRS Chapter 604A. NRS 604A.900(1). The ALJ concluded that TitleMax willfully violated NRS 604A.445(3) and NRS 604A.210. As sanctions, she ordered TitleMax to cease and desist offering the GPPDA, that "every GPPDA entered into after December 18, 2014, [was] void, and TitleMax [was] not entitled to collect, receive or retain any principal, interest or other charges or fees with respect to those loans." The ALJ relied on the fact that TitleMax continued to offer the GPPDA after the FID gave TitleMax a "Needs Improvement" rating for violating NRS 604A.445(3) to find that TitleMax had acted willfully. The district court, however, concluded that even if TitleMax's interpretation of the statutes was not correct, at a minimum it was reasonable. The district court granted judicial review and reversed both the ALJ's finding that TitleMax willfully violated the statutory regulations and the ALJ's NRS 604A.900 sanctions. "Construction of a statute, including its meaning and scope, is a question of law, which this court reviews de novo." *Century Steel, Inc. v. State, Div. of Indus. Relations*, 122 Nev. 584, 588, 137 P.3d 1155, 1158 (2006).

NRS Chapter 604A does not define "willfully," and this court has yet to interpret the term in the context of NRS 604A.900. However, we have observed that "'[w]illful' is a word 'of many meanings, its construction often being influenced by its context.'" *In re Fine*, 116 Nev. 1001, 1021, 13 P.3d 400, 413 (2000) (quoting *Screws v. United States*, 325 U.S. 91, 101 (1945)). "As a general rule, the word denotes an act which is intentional, or knowing, or voluntary, rather than accidental." *Id.* In the context of NRS 604A.900 and the conduct at issue here, the question is whether TitleMax acted reasonably in determining its obligations under the applicable statutes, engaging in a reasonable legal disagreement with the agency through the available avenues. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988) ("If an employer acts reasonably in determining its legal obligation, its actions cannot be deemed willful . . . ."); *Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 188 & n.9 (3d Cir. 1988) (concluding that an employer who did not change its pay plan even after the Labor Secretary declared the plan improper under the Fair Labor Standards Act did not commit a "willful" violation of the law because the question of whether the plan was compliant with the Act was a close call); *see also* NRS 686B.1762 (defining "willful" in the insurance context as "with actual knowledge or belief that the act or omission constitutes a violation and with specific intent to commit the violation"); NRS 281A.170 (explaining that in the ethics in government context, a "willful violation" occurs when a public officer or employee "[a]cted intentionally and knowingly; or . . . [w]as in a situation where this chapter imposed a duty to act and the public officer or employee intentionally and knowingly failed to act"); *In re Fine*, 116 Nev. at 1022, 13 P.3d at 414 (concluding that, in a judicial discipline matter, "willful misconduct occurs when the actor knows he or she is violating a judicial canon or rule of professional conduct and acts contrary to that canon or rule in spite of such knowledge").

We conclude that TitleMax did not willfully violate NRS Chapter 604A by offering the GPPDA because its interpretation of the pertinent statutes was reasonable. While we conclude that the GPPDA violated NRS 604A.445 and NRS 604A.210, TitleMax's actions following the 2014 inspection tellingly demonstrate that it did not know if it was violating the applicable statutes and that it took active steps to discern whether the GPPDA ran afoul of the statutory scheme. Those steps included the following: consulting with counsel to determine whether the GPPDA violated NRS Chapter 604A, filing a declaratory relief action in the district court for clarification of the law, and making a good faith effort in its February 9 letter to resolve the issues with the GPPDA that the FID raised in the 2014 inspection. These steps taken by TitleMax demonstrate that it was faced with a difficult choice: it was aware of the GPPDA's effects, believed the GPPDA complied with NRS Chapter 604A, knew that the FID disagreed with that legal interpretation, and then used all

available avenues to challenge the FID's decision, including filing an action for declaratory relief. *See Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 188 & n.9 (3d Cir. 1988) ("[P]rivate parties must retain a right to disagree with the Secretary's interpretation of the regulations, especially here where the question is a close one. Such disagreement is not willfulness."); *see also Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 680 (1st Cir. 1998) (opining that a "knowing" violation of the Fair Labor Standards Act should not "preclude[ ] legitimate disagreement" between an employer and the regulating agency because doing so would put the putative employer in the untenable position of either accepting the agency's position or risk a finding of a willful violation of the Act). We conclude this cannot amount to a "willful" violation under NRS 604A.900(1). Therefore, the ALJ erred in concluding that TitleMax willfully violated the applicable statutes. As such, we affirm the district court's order vacating the sanctions imposed by the ALJ under NRS 604A.900.[10]

CONCLUSION

While marketed as a "modification" or "amendment" to a 210-day title loan, the GPPDA offered by TitleMax in 2014 and 2015 was an impermissible extension of its 210-day loan in violation of the plain language of NRS 604A.445. The GPPDA circumvented the statutory requirement that 210-day loans "ratably and fully amortize the entire amount of principal and interest payable on the loan," and as a result, charged the borrower "additional interest" in violation of NRS 604A.210. Accordingly, the district court erred when it granted the petition for judicial review to vacate the ALJ's order in this regard. However, we agree with the district court that TitleMax did not "willfully" violate the applicable statutes and affirm the district court's order insofar as it vacated the sanctions that the ALJ imposed pursuant to NRS 604A.900. We therefore reverse the district court order granting judicial review to the extent that it vacated the ALJ's determination that TitleMax violated NRS 604A.445 and NRS 604A.210 and imposed administrative fines, but we affirm the order to the extent that it vacated the sanctions imposed for willful conduct under NRS 604A.900.

Gibbons, C.J., and Pickering, Hardesty, Parraguirre, Cadish, and Silver, JJ., concur.

---

[10]TitleMax additionally argues that the FID should be estopped from arguing that TitleMax acted willfully because the FID engaged in improper ad hoc rulemaking. It also argues the sanctions were excessive and based on loans not before the court. We need not consider these arguments because they are moot in light of our conclusion regarding willfulness.

SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company; and COPPER RIDGE COMMUNITY ASSOCIATION, Appellants, *v.* U.S. BANK, N.A., a National Banking Association, as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4; and NV WEST SERVICING, LLC, a Nevada Limited Liability Company, as Trustee for Nashville Trust 2270, Respondents.

No. 74532

September 26, 2019 449 P.3d 461

Appeal from a district court summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Reversed and remanded.

Kim Gilbert Ebron and *Athanasios E. Agelakopoulos, Jacqueline A. Gilbert, Howard C. Kim*, and *Diana S. Ebron*, Las Vegas, for Appellant SFR Investments Pool 1, LLC.

Alverson, Taylor & Sanders and *Kurt R. Bonds* and *Trevor R. Waite*, Las Vegas, for Appellant Copper Ridge Community Association.

Snell & Wilmer LLP and *Andrew M. Jacobs, Kelly H. Dove*, and *Holly E. Cheong*, Las Vegas, for Respondent U.S. Bank, N.A.

Noggle Law PLLC and *Robert B. Noggle*, Las Vegas, for Respondent NV West Servicing, LLC.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

In this homeowners' association (HOA) foreclosure case, the homeowner filed for bankruptcy protection under Chapter 11, which imposed an automatic stay on actions against her real property. The HOA subsequently sold the property at a foreclosure sale in violation of the stay. The purchaser, appellant SFR Investments Pool 1, LLC, sought to quiet title and obtained a retroactive annulment of the stay, which has the legal effect of validating the sale. The district court nevertheless set aside the sale on equitable grounds and granted summary judgment in favor of respondent U.S. Bank, N.A., finding that the HOA's foreclosure sale being conducted in violation

of the bankruptcy stay on the property was evidence of unfairness and the sale price was inadequate.

We conclude that, although the retroactive annulment means that the sale did not legally violate the bankruptcy stay, it was reasonable for the district court to consider the bankruptcy stay in determining whether there was unfairness in the HOA foreclosure sale at the time it was held. However, the mere fact that the foreclosure sale was held in violation of the bankruptcy stay is not by itself evidence of unfairness. Because U.S. Bank failed to produce any evidence showing how the sale's violation of the automatic stay constituted unfairness, we reverse the district court's grant of summary judgment to U.S. Bank. Furthermore, because SFR met its burden of showing that the HOA foreclosure sale complied with the procedures in NRS Chapter 116, which is conclusive proof that title vests with SFR, we remand with instructions for the district court to grant summary judgment in favor of SFR.

FACTS AND PROCEDURAL HISTORY

The property at issue is located in a Nevada neighborhood governed by an HOA. The previous homeowner obtained a loan from Wells Fargo Bank for $331,500 and eventually defaulted on the loan. In 2010, Wells Fargo recorded a notice of default and election to sell under the deed of trust, and then assigned the beneficial interest in the deed of trust to U.S. Bank. In July 2010, a notice of trustee's sale was recorded but, before U.S. Bank could sell the property, the homeowner filed for Chapter 11 bankruptcy protection in California, which resulted in an automatic stay on actions impacting the property. With this knowledge, U.S. Bank filed a motion for relief from the automatic stay so that it could foreclose upon the property, and the bankruptcy court granted it.

In July 2012, shortly before U.S. Bank was granted relief from the bankruptcy stay, Nevada Association Services (NAS), as an agent for the HOA, recorded a notice of delinquent assessment lien and then recorded its own notice of default and election to sell under the HOA lien. NAS never requested relief from the automatic stay from the bankruptcy court. On March 1, 2013, NAS, on behalf of the HOA, held a foreclosure sale where SFR purchased the property for $14,000, in violation of the automatic stay. U.S. Bank did not attend the sale or attempt to stop it. A week after the HOA's foreclosure sale, U.S. Bank proceeded with its own foreclosure sale of the property by filing a notice of trustee's sale and, several months later, held a foreclosure sale and sold the property to respondent NV West Servicing, LLC.

SFR filed a complaint for quiet title and injunctive relief against U.S. Bank on March 22, 2013. U.S. Bank asserted counterclaims against SFR, seeking, amongst other things, declaratory relief and

quiet title. It also brought a third-party complaint, bringing NAS and the HOA into the action.

The parties moved for summary judgment in January 2017. SFR argued that the HOA's foreclosure sale had extinguished U.S. Bank's deed of trust and that the trustee's deed to SFR was conclusive proof that the sale was conducted in compliance with NRS Chapter 116, so as to vest title in SFR. U.S. Bank argued, among other things, that the HOA's foreclosure sale was void for violating the bankruptcy stay, and, even if it was not void, it was voidable because the sale had been commercially unreasonable. U.S. Bank claimed that it had had no reason to believe that NAS or the HOA would, or could, foreclose on the HOA lien without first seeking leave of the bankruptcy court, and also that it did not know about the HOA sale because it did not receive notice until five days after the sale. In its opposition, SFR asserted that it had just filed a motion in the bankruptcy court for a retroactive annulment of the automatic stay, which was pending while the district court considered the summary judgment motions. It also argued that the HOA had provided notice of the foreclosure sale to U.S. Bank by way of Wells Fargo, who was the servicer for the loan on behalf of the trustee at that time, and there was no irregularity in the sale process.

On May 15, 2017, the bankruptcy court issued a limited order retroactively annulling the bankruptcy stay. The order specifically stated that any acts taken by SFR "to enforce its remedies regarding the [p]roperty do not constitute a violation of the stay," and provided the same relief "for any and all actions in support of the foreclosure taken with respect to the [p]roperty by the [HOA and its agent]." After the district court received the bankruptcy court's order, it ordered supplemental briefing on the impact of the retroactive annulment on equitable relief. U.S. Bank supplemented its initial briefing by arguing that the bankruptcy court's decision to retroactively annul the automatic stay does not mean that the sale was fair, especially when the HOA clearly violated the stay whereas U.S. Bank delayed its own foreclosure proceedings to first obtain relief from the stay, in accordance with the law. It further argued that the sale price, which was just 6 percent of the property's fair market value, was grossly inadequate, and that the automatic stay dissuaded higher bidders from offering a commercially reasonable price based on knowledge that the sale could be declared void for violating the stay. SFR argued that it had not known about the bankruptcy stay at the time of the HOA sale, that U.S. Bank provided no evidence the bankruptcy stay was considered by SFR or any other potential bidder when SFR bid on the property, and that there was legally no violation of the stay because it was retroactively annulled.

The district court granted U.S. Bank's motion for summary judgment. It determined that, though SFR had purchased the property from the HOA in violation of an automatic stay, the sale was no

longer void because the bankruptcy court had retroactively annulled the stay. The district court then applied *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963), to determine that the sale should be set aside on equitable grounds. The court found that the sale price was inadequate in light of both the fair market value of the property and the initial amount originally loaned for the property, and that the HOA foreclosure sale conducted in violation of the bankruptcy stay constituted evidence of fraud, oppression, or unfairness related to the sale. The district court explained that it was reasonable for U.S. Bank to expect that any party seeking to foreclose on the property would first need to seek relief from the automatic stay, and that U.S. Bank could not have reasonably foreseen at the time of the sale that years later SFR would obtain a retroactive annulment of the stay. The district court never made specific findings that the stay affected the sale price. Thus, the district court set aside the HOA foreclosure sale. SFR[1] appealed.

DISCUSSION

We review a district court's decision to grant summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if "the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law." *Id*. (alteration and internal quotation marks omitted). All evidence "must be viewed in a light most favorable to the nonmoving party." *Id*. The party opposing a properly presented and supported summary judgment motion must "show the existence of a genuine issue of material fact." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007); *see also* NRCP 56(e). If the opposing party bears the burden of persuasion on the issue at trial, "the party moving for summary judgment may satisfy the burden . . . by . . . 'pointing out . . . that there is an absence of evidence to support the nonmoving party's case.'" *Cuzze*, 123 Nev. at 602-03, 172 P.3d at 134 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

The filing of a bankruptcy petition imposes an automatic stay against the debtor's property. 11 U.S.C. § 362(a) (2012). In *LN Management LLC Series 5105 Portraits Place v. Green Tree Loan Servicing LLC*, we recognized that "a sale conducted during an automatic stay in bankruptcy proceedings is invalid." 133 Nev. 394, 395, 399 P.3d 359, 359 (2017). However, we did not address the impact on a sale where the bankruptcy court later issues a retroactive annulment of the stay. This type of relief from a stay "ratif[ies] retroactively any violation of the automatic stay which would otherwise be void." *In re Schwartz*, 954 F.2d 569, 573 (9th Cir. 1992)

[1]The HOA similarly appealed and joined in SFR's arguments on appeal.

(discussing the bankruptcy court's power under 11 U.S.C. § 362(d), and explaining that "[i]f a creditor obtains retroactive relief under section 362(d), there is no violation of the automatic stay"). Therefore, the effect of SFR obtaining a retroactive annulment of the stay is that the otherwise void HOA sale, which violated the stay at the time it was made, is now valid.

The district court recognized the legal effect of the annulment and the validity of the HOA foreclosure sale in light of the retroactive annulment, but nevertheless, it relied on the HOA's violation of the stay to set aside the foreclosure on equitable grounds. Specifically, the district court determined that equity lay in favor of U.S. Bank because the inadequate sale price, coupled with the HOA foreclosure sale being conducted in violation of the automatic stay, constituted evidence of fraud, oppression, or unfairness related to the sale.

SFR takes issue with the district court's consideration of the bankruptcy stay as part of its equity analysis after the stay had been retroactively annulled by the bankruptcy court. SFR further argues that the district court erred in setting aside the foreclosure sale because the sale price was not inadequate and U.S. Bank provided no evidence that the sale was unfair or that any unfairness brought about the sale price.

A foreclosure sale may be set aside if the price obtained is greatly inadequate and the sale is affected by some irregularity, such as evidence of fraud, oppression, or unfairness. *Golden*, 79 Nev. at 514, 387 P.2d at 995; *see also Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon (Shadow Canyon)*, 133 Nev. 740, 748-49, 405 P.3d 641, 647-48 (2017) (reaffirming this rule from *Golden*). Before granting equitable relief, the court "must consider the entirety of the circumstances that bear upon the equities." *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 63, 366 P.3d 1105, 1114 (2016). "This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief." *Id.* at 64, 366 P.3d at 1115.

SFR purchased the property for $14,000, which was 6.1 percent of its fair market value, $228,000. Despite this low purchase price, we will not set aside a sale unless the low price is "account[ed] for and br[ought] about" by fraud, oppression, or unfairness in the sales process. *Golden*, 79 Nev. at 514, 387 P.2d at 995 (internal quotation marks omitted). The district court found the sale during the stay was unfair because, at the time of the sale, it was reasonable of U.S. Bank to expect that the HOA would seek relief from the automatic stay before foreclosing, and it was not reasonably foreseeable that the HOA's sale would become valid years later by retroactive annulment.

First, we conclude that even though the sale did not legally violate the retroactively annulled stay, it was proper of the district court to

consider the stay in balancing the equities, as the court must consider all of the circumstances surrounding the sale. *See Shadow Wood*, 132 Nev. at 63-64, 366 P.3d at 1114-15. The fact that the sale was in violation of a bankruptcy stay at the time the sale was held may be relevant to U.S. Bank's failure to act and the sale price. *See, e.g.*, *Golden*, 79 Nev. at 516, 387 P.2d at 995 (accounting for a list of irregularities that could justify a district court setting aside a sale, including selling property in a manner that prevents it from selling for full value). For example, it would be reasonable for a lender not to attend a foreclosure sale if it believes that the sale is being conducted in violation of a bankruptcy stay. And, it is possible that selling a home in violation of a bankruptcy stay, even if the stay is later retroactively annulled, could prevent bidders from attending the auction or offering a fair price.

However, we conclude that though the violation of the bankruptcy stay could hypothetically have been an unfairness that resulted in an inadequate sale price, U.S. Bank provided no evidence to show that it constituted an unfairness in this case. As the party challenging the foreclosure, U.S. Bank had the burden of establishing that the sale should be set aside on equitable grounds. *See Res. Grp., LLC ex rel. E. Sunset Rd. Tr. v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 49, 437 P.3d 154, 156 (2019) (explaining that where "the purchaser demonstrated superior title by showing that it paid the sales price following a valid foreclosure sale," the party challenging the foreclosure has the burden of showing that the sale should be set aside).

U.S. Bank provided no evidence in the record to demonstrate that it chose not to protect its security interest or to attend the HOA foreclosure sale because of the automatic stay. Even assuming that a bank would not reasonably attend a foreclosure sale that violated an automatic stay, U.S. Bank failed to present a factual basis that the sale was unfair.[2] It is established bankruptcy law that a retroactive annulment of a bankruptcy stay validates an otherwise void sale; therefore, the lawful action itself was not evidence of unfairness. *See In re Schwartz*, 954 F.2d at 573. U.S. Bank's counsel advanced arguments in its pleadings and in the hearings before the district court, but there is no evidence that any irregularity in the foreclosure proceedings affected the sale price. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014) (stating that "[a]rguments of counsel[, however,] are

[2]While there may be information in the record demonstrating that the property's sale price at U.S. Bank's subsequent foreclosure sale a few months later was much higher, the district court did not make this finding, and the parties do not raise this point before the court. *Shuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 438, 245 P.3d 542, 545 (2010) ("[S]earch[ing] the entire record, even though the adverse party's response does not set out the specific facts or disclose where in the record the evidence for them can be found, is unfair." (quoting *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001)).

not evidence and do not establish the facts of the case" (second alteration in original) (internal quotation marks omitted)); *see also Wood*, 121 Nev. at 732, 121 P.3d at 1031 (observing that a party opposing summary judgment must "do more than simply show that there is some metaphysical doubt as to the operative facts" (internal quotation marks omitted)). Thus, we conclude that summary judgment for U.S. Bank was not proper because U.S. Bank failed to meet its burden to show that no genuine issue of material fact remained. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.[3] We conclude further that summary judgment for SFR was proper[4] because the record supports that the sale was properly, lawfully, and fairly carried out in compliance with NRS Chapter 116 and nothing in the record demonstrates why U.S. Bank failed to attend the sale or otherwise protect its interest in the property or how the automatic stay affected the sale price. *See Shadow Canyon*, 133 Nev. at 746, 405 P.3d at 646 (noting statutory presumptions in favor of the record titleholder and that the HOA's foreclosure sale complied with NRS Chapter 116's provisions).

Accordingly, we reverse the district court's grant of summary judgment to U.S. Bank and remand with instructions for the district court to grant summary judgment in favor of SFR.

Gibbons, C.J., and Pickering, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.

---

[3]SFR argues for the first time in its reply brief that the bankruptcy court had sole jurisdiction to enforce and annul the stay, and the district court lacked the power and jurisdiction to grant relief in light of the annulment order. We decline to entertain these arguments. *See Bongiovi v. Sullivan*, 122 Nev. 556, 569 n.5, 138 P.3d 433, 443 n.5 (2006) (declining to consider arguments raised for the first time in a reply brief); *see also* NRAP 28(c) (limiting a reply brief to answering any matter set forth in the opposing brief).

SFR also argues that it is a bona fide purchaser and would be harmed by setting aside the foreclosure. Because we reverse the district court's grant of summary judgment to U.S. Bank, we decline to reach this issue.

[4]U.S. Bank argued before the district court that it lacked notice as an independent reason it should have been granted summary judgment. The district court did not rely on this argument and it is not advanced on appeal. Because U.S. Bank has not advanced the notice argument on appeal, it is waived. *See* NRAP 28(b); NRAP 28(a)(10)(A)-(B) (requiring the respondent to state its contentions and reasons why it should succeed on appeal); *see also Hillman v. I.R.S.*, 263 F.3d 338, 345 (4th Cir. 2001) (Hamilton, J., dissenting) ("[C]ommon sense dictates that if the [respondents] waived their right to have this court consider their alternative argument on appeal, they have also waived their right to have the district court now, following resolution of the appeal, consider it in the first instance."); *United States v. Guillen-Cruz*, 853 F.3d 768, 777 (5th Cir. 2017) (considering appellees' argument forfeited when they failed to raise it in their brief and "the facts supporting the [appellees'] argument . . . were readily available prior to briefing").