under the statutes if a private cause of action for unpaid wages is implied. The determinative factor is always whether the Legislature intended to create a private judicial remedy. We conclude that the Legislature intended to create a private cause of action for unpaid wages pursuant to NRS 608.140. It would be absurd to think that the Legislature intended a private cause of action to obtain attorney fees for an unpaid wages suit but no private cause of action to bring the suit itself. *See Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 336, 302 P.3d 1108, 1114 (2013) ("In order to give effect to the Legislature's intent, [this court] ha[s] a duty to consider the statute[s] within the broader statutory scheme harmoniously with one another in accordance with the general purpose of those statutes." (internal quotation marks omitted)). The Legislature enacted NRS 608.140 to protect employees, and the legislative scheme is consistent with private causes of action for unpaid wages under NRS Chapter 608.

Neville's NRS Chapter 608 claims involve allegations that wages were unpaid and due to him at the time he brought his suit before the district court. Moreover, in his complaint, Neville tied his NRS Chapter 608 claims with NRS 608.140. Thus, we conclude that Neville has and properly stated a private cause of action for unpaid wages. As a result, granting Terrible Herbst's motion to dismiss pursuant to NRCP 12(b)(5) was improper. Accordingly, we grant Neville's petition for extraordinary writ relief and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order dismissing Neville's claims.

Cherry, C.J., and Gibbons, Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.

LIBORIUS I. AGWARA, Petitioner, *v.* THE STATE BAR OF NEVADA; and SOUTHERN NEVADA DISCIPLINARY BOARD, Respondents.

No. 70888

December 7, 2017 406 P.3d 488

Original petition for a writ of mandamus or prohibition challenging two subpoenas duces tecum served on petitioner.

Petition granted in part and denied in part, with instructions.

William B. Terry, Chartered, and *William B. Terry*, Las Vegas, for Petitioner.

State Bar of Nevada and *Stephanie A. Tucker Barker* and *Janeen V. Isaacson*, Las Vegas, for Respondents.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

In this original petition for a writ of mandamus or prohibition we are asked to consider whether an attorney can assert his Fifth Amendment right against self-incrimination to quash subpoenas issued by the State Bar that seek production of client accounting records and tax records. With regard to the requested client accounting records, we adopt the three-prong test under *Grosso v. United States*, 390 U.S. 62 (1968), to conclude that the right against self-incrimination does not protect petitioner from disclosure. However, with regard to the requested tax records, we conclude that the Southern Nevada Disciplinary Board must hold a hearing to determine how the subpoenaed tax records are relevant and material to the State Bar's allegations that petitioner mismanaged his client trust account and whether there is a compelling need for those records. Accordingly, we deny the petition in part and grant it in part.

FACTS AND PROCEDURAL HISTORY

In April 2014, petitioner Liborious I. Agwara, Esq., testified at his personal bankruptcy proceedings that he had not implemented a reliable or identifiable system of accounting for his client trust account. Counsel for petitioner's bankruptcy proceedings and the presiding bankruptcy judge advised respondent State Bar of Nevada of petitioner's potential ethical violations. As a result, the State Bar opened a grievance file to investigate petitioner's trust account management. Moreover, the bankruptcy court froze petitioner's Nevada State Bank trust account.

The State Bar then obtained petitioner's trust account records from Nevada State Bank, which indicated that he transacted client monies through a Wells Fargo Bank operating account while his Nevada State Bank trust account was frozen. The State Bar also obtained records from Wells Fargo Bank which revealed that petitioner commingled his client, personal, and law practice funds through his operating account.

Approximately one month after the bankruptcy court lifted the freeze on petitioner's Nevada State Bank trust account, petitioner opened a Wells Fargo Bank trust account. Wells Fargo Bank records established that petitioner routinely failed to fully distribute client funds deposited into this trust account. In response to the bank records obtained from Nevada State Bank and Wells Fargo Bank, cou-

pled with petitioner's testimony from his bankruptcy proceedings, the State Bar served petitioner with two subpoenas duces tecum.

The first subpoena sought documents evidencing the creation and applicable termination of the attorney-client relationship with regard to certain individuals, documents relating to the settlement or distribution of funds through the Nevada State Bank trust account, and accounting records for this account. The first subpoena also sought production of certain personal and business tax returns, "with schedules, W-2's, and 1099's issued to [petitioner's] employees, contract personnel or other entities for the tax years 2009, 2010, 2011, 2012, 2013 and 2014." Petitioner objected to the first subpoena and refused to produce the requested documents by invoking his Fifth Amendment privilege against self-incrimination.

The second subpoena sought documents evidencing the creation and applicable termination of the attorney-client relationship involving transactions through the Wells Fargo Bank trust account, documents relating to the settlement or distribution of funds through this account, and accounting records. The second subpoena also sought the same documents and records for petitioner's operating account at Wells Fargo Bank. Petitioner objected to the second subpoena and filed a motion to quash, again asserting his Fifth Amendment right.

Ultimately, the chairman of respondent Southern Nevada Disciplinary Board ordered petitioner to comply with the first subpoena and set a telephonic hearing with regard to the second subpoena. However, the chairman later vacated the hearing after determining that the parties' submitted briefs were sufficient to reach a decision. Thereafter, the chairman rejected petitioner's objections to the second subpoena. The State Bar filed a formal disciplinary complaint against petitioner. This petition for writ relief followed.

DISCUSSION

This court has original jurisdiction to grant a writ of mandamus or prohibition, and issuance of such extraordinary relief is solely within this court's discretion. Nev. Const. art. 6, § 4; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). "A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion." *We the People Nev. v. Miller*, 124 Nev. 874, 879, 192 P.3d 1166, 1170 (2008); *see also* NRS 34.160. A writ of prohibition is the counterpart to a writ of mandamus and "may be issued to compel a person or body exercising judicial functions to cease performing beyond its legal authority." *Halverson v. Miller*, 124 Nev. 484, 487, 186 P.3d 893, 896 (2008); *see also* NRS 34.320. Additionally, "this court has in-

herent supervisory authority over the State Bar of Nevada, and" has "the power to fashion an appropriate remedy" to ensure that "all members of the State Bar of Nevada, and all its functionaries, perform their duties properly," and therefore has the power to consider a petition for writ relief arising from a State Bar matter. *O'Brien v. State Bar of Nev.*, 114 Nev. 71, 73, 952 P.2d 952, 953 (1998) (internal quotation marks omitted); *see also* SCR 76(1) (providing that "[t]he state bar is under the exclusive jurisdiction and control of the supreme court"). We therefore exercise our discretion to consider this petition for a writ of mandamus or prohibition. *See Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 171, 252 P.3d 676, 679 (2011) (recognizing the availability of extraordinary writ relief to prevent blanket discovery orders issued without regard to relevance of the information sought or discovery orders compelling disclosure of privileged information).

Petitioner argues that he has a Fifth Amendment right to refuse to produce the documents requested by both subpoenas. Conversely, respondents argue that the Fifth Amendment privilege does not shelter petitioner from producing the requested documents and that compliance with both subpoenas is necessary to protect the public.

"This court applies a de novo standard of review to constitutional challenges." *Grupo Famsa v. Eighth Judicial Dist. Court*, 132 Nev. 334, 337, 371 P.3d 1048, 1050 (2016) (internal quotation marks omitted). Additionally, "[t]his court reviews a district court's interpretation of a statute or court rule . . . de novo, even in the context of a writ petition." *Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006). "When a rule is clear on its face, we will not look beyond the rule's plain language." *Morrow v. Eighth Judicial Dist. Court*, 129 Nev. 110, 113, 294 P.3d 411, 414 (2013).

The Self-Incrimination Clause of the Fifth Amendment, which applies to the states through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *see also* Nev. Const. art. 1, § 8(1).

With regard to client accounting records, the Supreme Court Rules provide that "[a]ctive members of the State Bar of Nevada shall deposit all funds held in trust in this jurisdiction in . . . trust accounts." SCR 78.5(1)(a) (internal quotation marks omitted). Moreover, "[e]very lawyer engaged in the practice of law in the State of Nevada shall maintain and preserve for a period of at least five years, after final disposition of the underlying matter, the records of the accounts . . . and make such records available to the State Bar for inspection upon request." SCR 78.5(1)(b). Finally, "[e]very active member of the State Bar shall, as a condition of maintaining active membership in the State Bar, be conclusively deemed to have

consented to the reporting and production requirements mandated by this Rule." SCR 78.5(5).

In addition to the SCR, the Nevada Rules of Professional Conduct similarly state that "[a]ll funds received or held for the benefit of clients by a lawyer or firm . . . shall be deposited in . . . a trust account." RPC 1.15(a). Further, "[c]omplete records of such account funds . . . shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation." *Id.* Violation of the RPC constitutes professional misconduct. RPC 8.4(a).

State bar counsel is required to "[i]nvestigate all matters involving possible attorney misconduct . . . called to bar counsel's attention, whether by grievance or otherwise." SCR 104(1)(a). In investigating possible attorney misconduct, bar counsel may compel the production of pertinent documents by subpoena. SCR 110(1). "Whenever any person subpoenaed . . . to provide documents pursuant to Rule 78.5(1)(b) . . . refuses . . . to provide the requested documents, that person shall be deemed in contempt of the disciplinary board." SCR 110(3).

As a member of the State Bar, petitioner is required to comply with the SCR and the RPC. In particular, these rules require petitioner to maintain client funds in a trust account, keep records of client accounts, and provide such records to the State Bar upon request. *See* SCR 78.5(1)(a)-(b); RPC 1.15(a). Although lawyers are not excluded from asserting their Fifth Amendment right against self-incrimination, *Spevack v. Klein*, 385 U.S. 511, 514 (1967) (recognizing the threat of disbarment and loss of professional standing as powerful forms of compulsion), we must determine, as a matter of first impression before this court, if this privilege protects petitioner from disclosing client accounting records the SCR and RPC require him to maintain and preserve.

We take this opportunity to adopt the required records doctrine under *Grosso v. United States*, 390 U.S. 62 (1968), to reach our conclusion. This doctrine precludes a person from asserting their constitutional privilege against self-incrimination if: (1) the purpose of the inquiry is essentially regulatory, (2) the person asserting the privilege regularly maintained the records sought, and (3) the records have a public aspect. *See id.* at 67-68 (citing *Shapiro v. United States*, 335 U.S. 1 (1948)). "Generally, the doctrine is regarded as an exception rather than a threshold test to determine whether there is a privilege." Deborah F. Buckman, Annotation, *Construction and Application of Required Records Doctrine*, 21 A.L.R.7th, Art. II § 2 (2017). The reasoning behind this exception to the Fifth Amendment right against self-incrimination is long-standing:

> The principle applies not only to public documents in public offices, but also to records required by law to be kept in order

> that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There, the [Fifth Amendment] privilege, which exists as to private papers, cannot be maintained.

Shapiro, 335 U.S. at 17 (quoting *Wilson v. United States*, 221 U.S. 361, 380 (1911)).

In adopting the required records doctrine and specifically applying it to the production of records and documents in bar matters, we now join other jurisdictions. For example, in examining the three elements under the required records doctrine, the Court of Appeals of Maryland held that an attorney could not invoke the Fifth Amendment privilege against self-incrimination to avoid producing certain client and financial records subpoenaed in a bar disciplinary matter. *Unnamed Attorney v. Attorney Grievance Comm'n of Md.*, 708 A.2d 667, 679 (Md. App. 1998). First, the court determined that "rules relating to admission to the Bar demonstrate that the purpose of the Attorney Grievance Commission's inquiry is regulatory." *Id.* Second, the court determined that "the records and documents sought to be obtained by the subpoena are required and customarily kept by persons engaging in the practice of law." *Id.* Third, the court determined that "the records subpoenaed have public aspects," as "one of the purposes of attorney disciplinary proceedings is to protect the public." *Id.*; *see Matter of Kenney*, 504 N.E.2d 652, 657-58 (Mass. 1987); *see also Fla. Bar v. White*, 384 So. 2d 1266, 1267 (Fla. 1980) (stating that records "required to be maintained by The Florida Bar . . . are deemed to be affected with a public interest, necessary to be maintained for the protection of the public as well as The Florida Bar"); *La. State Bar Ass'n v. Chatelain*, 513 So. 2d 1178, 1183 (La. 1987) (stating that "[w]hile attorneys' records may not be public documents, they do have 'public aspects' in that the public at large has an interest in the integrity of the profession and clients in particular have an interest in how an attorney handles money which belongs to them").

In applying the required records doctrine to the client accounting records requested in the case at hand, all three elements are similarly satisfied. First, the purpose of respondents' inquiry into petitioner's client accounting records is clearly regulatory because the State Bar is responsible for investigating instances of possible attorney misconduct called to its attention as part of the State Bar's self-regulating function. Second, petitioner, as the person asserting his Fifth Amendment privilege, should have regularly maintained client accounting records as required. Third, the client accounting records sought have a public aspect because mandating compliance

protects the public and the integrity of the legal profession. Therefore, because the requested client accounting records meet the elements of the required records doctrine enunciated in *Grosso*, the Fifth Amendment does not protect petitioner from disclosure of client accounting records. Our holding is consistent with the holdings from other jurisdictions addressing the issue. *See, e.g.*, *Unnamed Attorney*, 708 A.2d at 668; *White*, 384 So. 2d at 1267. For all of the foregoing reasons, we deny petitioner's petition with regard to production of client accounting records.

Next, we address petitioner's contention that the Fifth Amendment also protects him from production of tax records. Production of tax records is "clearly appropriate" under many circumstances. *Hetter v. Eighth Judicial Dist. Court*, 110 Nev. 513, 519, 874 P.2d 762, 765 (1994). However, due to policy considerations, "both state and federal courts have subjected discovery requests for income tax returns to a heightened scrutiny." *Id.* at 519, 874 P.2d at 765-66. Accordingly, this court has recognized that federal courts have required that the requested tax returns reasonably appear relevant and material to the issue at hand. *Id.* at 520, 874 P.2d at 766. "In most instances, it has been held that production of a tax return should not be ordered unless there appears to be a compelling need for the information it contains, such as is not otherwise readily obtainable." *Id.* (internal citation omitted). "While this state does not recognize a privilege for tax returns . . . public policy suggests that tax returns or financial status not be had for the mere asking." *Id.*

Here, it is unclear whether the circumstances warrant production of tax records, and it is additionally unclear whether such a broad request is justified.[1] Accordingly, we cannot determine whether production of the tax records is clearly appropriate or if the tax records are reasonably relevant and material to the issue at hand. *See id.* at 520, 874 P.2d at 765-66. Further, we cannot determine whether there is a compelling need for the tax records or if respondents are merely asking for the tax records. *See id.* at 520, 874 P.2d at 766. Therefore, we direct the Southern Nevada Disciplinary Board to hold a hearing to determine how the tax records are relevant and material to the

[1]Although it is unnecessary for this court to decide whether the Fifth Amendment protects petitioner from production of tax records given our resolution of this issue, we note that other jurisdictions hold that "the existence and possession of [records normally kept] has no testimonial significance" and "[t]herefore, the production of the documents is not incriminating for purposes of the Fifth Amendment." *Unnamed Attorney*, 708 A.2d at 676-77 (where an attorney moved to quash the state bar disciplinary commission's subpoena for client and financial records by asserting that production of such documents would violate his Fifth Amendment privilege against self-incrimination); *see Matter of Kenney*, 504 N.E.2d at 658 (where the court disagreed with an attorney who argued that the act of producing financial statements is testimonial).

State Bar's allegations that petitioner mismanaged his client trust account and to assess whether there is a compelling need for the records. Based on the foregoing, we deny petitioner's petition for writ relief with regard to the requested client accounting records; however, we grant his petition for writ relief with regard to the requested tax records and direct the clerk of this court to issue a writ of prohibition directing the Southern Nevada Disciplinary Board to vacate its order to the extent it required petitioner to comply with the first subpoena that sought disclosure of tax records and to hold a hearing, consistent with this opinion. Finally, because both subpoenas requested client accounting records, we deny petitioner's writ of mandamus requesting this court to quash the two subpoenas.

Cherry, C.J., and Gibbons, Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.

In the Matter of the Parental Rights as to T.L., Minor Child.

TONYA M., Appellant, *v.* WASHOE COUNTY DEPARTMENT OF SOCIAL SERVICES, Respondent.

No. 72563

December 7, 2017 406 P.3d 494

Appeal from a district court order terminating appellant's parental rights as to a minor child. Second Judicial District Court, Family Court Division, Washoe County; Egan K. Walker, Judge.

Dismissed.

Jeremy T. Bosler, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Appellant.

Christopher J. Hicks, District Attorney, and *Jeffrey S. Martin*, Chief Deputy District Attorney, Washoe County, for Respondent.

Before Hardesty, Parraguirre and Stiglich, JJ.

OPINION

By the Court, Stiglich, J.:

In this appeal we consider a parent's standing to challenge the court's placement decision following the termination of her parental rights where the parent entered into a stipulation agreeing to the termination of her parental rights but reserving the right to participate in a contested pre-termination hearing regarding the child's place-

ment. We conclude that, because the parent no longer has parental rights as to the minor child and does not challenge the termination of those rights, she lacks standing to challenge the district court's placement decision. We must therefore dismiss this appeal.

FACTS AND PROCEDURAL HISTORY

Respondent Washoe County Department of Social Services (WCDSS) sought to terminate appellant Tonya M.'s parental rights as to her minor child, who had already been removed from Tonya's care and was living with a foster family.[1] WCDSS later found a family that wanted to adopt the minor child, but Tonya wanted the child placed with a relative. Ultimately, WCDSS and Tonya entered into a stipulation wherein Tonya would be allowed to participate in the contested placement hearing, and, following that hearing, she would relinquish her parental rights. The stipulation further provided that if Tonya did not relinquish her parental rights following the contested placement hearing, the district court would enter an order, based on previous testimony, concluding that termination of Tonya's parental rights was in the minor child's best interest. Tonya also stipulated to waive any right to challenge the order terminating her parental rights.

Tonya participated in the contested placement hearing and testified in support of the child being placed with her relative. In its placement order, however, the district court declined to place the child with Tonya's relative and instead placed the child with the adoptive family. Thereafter, Tonya did not relinquish her parental rights, and the district court entered an order terminating her parental rights. This appeal followed.

DISCUSSION

In her opening brief, Tonya challenges the district court's placement decision. She asserts that the district court failed to make the written findings of fact this court required in *Clark County District Attorney v. Eighth Judicial District Court*, 123 Nev. 337, 348, 167 P.3d 922, 929 (2007) (reviewing a placement decision for an abuse of discretion and holding that, "[i]n rendering its placement decision, the district court must make written findings with respect to any credibility issues and with regard to its ultimate conclusion regarding the child's best interest"). She does not challenge the stipulation or the district court order terminating her parental rights. WCDSS argues that Tonya lacks standing to challenge the placement decision because her parental rights have been terminated and, therefore, this case must be dismissed. Because appellate standing is

[1]The father's parental rights have also been terminated and are not at issue in this appeal.

required for this court to have jurisdiction to hear Tonya's argument, we address it first. *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994) (addressing standing and holding that "this court has jurisdiction to entertain an appeal only where the appeal is brought by an aggrieved party" (emphasis omitted)).

Standing to challenge the placement order

Only "[a] party who is aggrieved by an appealable judgment or order" has standing to appeal to this court. NRAP 3A(a); *Estate of Hughes v. First Nat'l Bank of Nev.*, 96 Nev. 178, 180, 605 P.2d 1149, 1150 (1980). In order to be aggrieved, " 'either a personal right or right of property [must be] adversely and substantially affected' by a district court's ruling." *Ginsburg*, 110 Nev. at 446, 874 P.2d at 734 (quoting *Estate of Hughes*, 96 Nev. at 180, 605 P.2d at 1150). The grievance must be substantial in that the district court's decision imposes an injustice, or illegal obligation or burden, on the party, or denies the party an equitable or legal right. *Webb v. Clark Cty. Sch. Dist.*, 125 Nev. 611, 617, 218 P.3d 1239, 1244 (2009). For the reasons discussed below, we conclude that Tonya lacks standing to challenge the placement decision.

Tonya's parental rights have been terminated

In this case, the right that Tonya implicitly asserts was substantially affected by the district court's ruling is her parental right to participate in "the companionship, care, custody[,] and management" decisions related to her child's upbringing. *In re Parental Rights as to M.F.*, 132 Nev. 209, 212, 371 P.3d 995, 998 (2016) (quoting *Stanley v. Illinois*, 405 U.S. 645, 650-51 (1972), for the proposition that a parent's interest in his or her child's upbringing is important and "undeniably warrants protection"). As WCDSS argues, however, Tonya acquiesced to the termination of those rights. Indeed, not only did Tonya enter into a stipulation wherein she agreed to the termination of her parental rights and waived her right to challenge that termination, she also explicitly stated in her briefs on appeal that she "is not contesting the termination order." By not raising any challenge to the termination of her parental rights, she has waived such a challenge and the parent-child relationship has been severed. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (arguments not raised in an opening appellate brief are waived); *In re Parental Rights as to N.D.O.*, 121 Nev. 379, 384, 115 P.3d 223, 226 (2005) (characterizing the termination of parental rights as a civil penalty that "severs the parent-child relationship"). Thus, we conclude that Tonya's parental rights have clearly been terminated.

Tonya lacks standing to challenge the district court's placement order

Having concluded that Tonya's parental rights have been terminated, we now turn to the district court's placement decision. WCDSS argues that because Tonya's parental rights have been terminated, she no longer has any substantial interest that could be affected by the court's placement decision. We agree.

In the stipulation, Tonya acquiesced to the termination of her parental rights. A stipulation is no different from a contract in that the parties can bargain for or waive specific rights. *See Grisham v. Grisham*, 128 Nev. 679, 685, 289 P.3d 230, 234-35 (2012) (providing that a stipulation in a family law case is treated as a contract subject to general contract principles). In this case, Tonya failed to bargain to retain her right to challenge the termination decision and, in fact, did not raise any argument against the termination of her parental rights in her briefs to this court. By acquiescing to the termination of her parental rights in these regards, Tonya relinquished the only interest in her child that could render her aggrieved by the district court's order declining to place the child with her relative.[2]

Other jurisdictions have come to similar conclusions. In California, a father appealed the district court's decision declining to place the child with the father's relative. *In re K.C.*, 255 P.3d 953, 954 (Cal. 2011). The father did not, however, challenge the district court's decision to terminate his parental rights. *Id.* at 956. By failing to challenge the termination of his parental rights, the California court concluded that the father had "no remaining, legally cognizable interest in [the child's] affairs, including his placement." *Id.*; *see also Cesar V. v. Superior Court*, 111 Cal. Rptr. 2d 243, 251-52 (Ct. App. 2001) (concluding that a father lacked standing to appeal a placement decision because he had stipulated to the termination of his right to reunify with his minor child, and thus he no longer had an interest that was affected by the placement decision). A Utah court rendered a similar decision when parents attempted to challenge their children's placement with nonrelatives without also challenging the termination of their parental rights. *In the Interest of J.S.*, 272 P.3d 169, 170 (Utah Ct. App. 2012) ("Parents do not chal-

[2]A stipulation could be crafted wherein the parent would only agree to the termination of her parental rights if the court placed the child with a relative. The stipulation before this court, however, contains no such conditional language. Rather, it provides that, in exchange for being allowed to participate in the placement hearing, Tonya would stipulate to the termination of her parental rights and also waive her right to challenge the termination of her parental rights. Tonya received exactly what she bargained for—she was allowed to participate in the contested placement hearing in support of placing her child with her relative, and her parental rights were terminated.

lenge the juvenile court's determination that there were sufficient grounds to terminate their parental rights. As a result of the termination of their parental rights, Parents are unable to demonstrate that they have a legally protected interest in the children's custody."); *accord In the Interest of D.B.*, 483 N.W.2d 344, 346 (Iowa Ct. App. 1992) (holding that because the mother did not challenge the termination of her parental rights on appeal, "she cannot be said to have been prejudiced or aggrieved by the placement order. A party who is not aggrieved by a judgment or other final ruling has no right to appeal."); *In re Adoption/Guardianship of L.B.*, 145 A.3d 655, 674 (Md. Ct. Spec. App. 2016) (holding that the termination of parental rights means "the parent has no standing to challenge future matters regarding the child," but recognizing an exception when the parent challenges the termination of their parental rights on appeal); *Ryder v. State*, 917 S.W.2d 503, 505 (Tex. App. 1996) (holding that because the mother's parental rights had been terminated and she had not appealed that decision, she had no standing to appeal the outcome of a placement review hearing).[3] Based on the foregoing, we conclude that Tonya lacks standing to bring this appeal and it therefore must be dismissed.

Our prior order denying writ relief did not confer standing on Tonya

In attempting to refute WCDSS's standing argument, Tonya relies on this court's order that denied her previously filed petition for a writ of mandamus challenging the district court's placement decision because she had an adequate remedy in the form of a direct appeal from the final order adjudicating her parental rights. *See Tonya M. v. Second Judicial Dist. Court*, Docket No. 70931 (Order Denying Petition for Writ of Mandamus, September 16, 2016). Tonya now argues that if this court were to conclude that she lacked standing to challenge the placement decision, it would cause a "wonderland" result wherein she was not entitled to writ relief because she could pursue an appeal and she is not entitled to appellate relief because she lacks standing.

Tonya's reliance on our prior order denying writ relief is misplaced. To be entitled to the extraordinary remedy of writ relief, the party seeking relief must not have a "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.330 (prohibition); *see also* NRS 34.170 (mandamus). Our prior order denying writ relief correctly concluded that Tonya had the right to appeal a final

[3]Thus, even without the stipulation, the fact that Tonya failed to contest the termination in her briefs on appeal is fatal and would still prevent her from having standing to challenge the placement decision because her interest in her child's placement is born directly out of her overarching parental rights. *See K.C.*, 255 P.3d at 956 (recognizing that termination of parental rights also terminates the parent's interest in the child's placement).

order terminating her parental rights, and therefore properly denied writ relief because an appeal is an adequate remedy in the ordinary course of the law. *See Rawson v. Ninth Judicial Dist. Court*, 133 Nev. 309, 316, 396 P.3d 842, 847 (2017) ("We have long held that the right to an appeal is generally a plain, speedy, and adequate remedy that precludes writ relief."). Entitlement to appellate relief, however, requires both standing and an appealable order. *See* NRAP 3A(a) (requiring both that the party appealing be aggrieved and that the order or judgment being challenged be appealable for an appeal to be taken). Our order denying writ relief merely referenced the latter requirement because an order terminating parental rights constitutes "[a] final judgment" that is appealable under NRAP 3A(b)(1), which in turn precludes writ relief. *See Tonya M.*, Docket No. 70931; *Rawson*, 133 Nev. at 316-17, 396 P.3d at 847-48. The prior order did not, and could not, address whether Tonya would have standing to bring a later appeal as that would depend on whether Tonya was aggrieved by the district court's ultimate decision. Accordingly, Tonya's argument in this regard fails.

Despite our conclusion that Tonya lacks standing to challenge the district court's placement decision because she acquiesced to the termination of her parental rights, we are concerned that the record does not reveal whether Tonya was informed of this possible consequence to her stipulation. We therefore encourage parties and counsel negotiating such stipulations to ensure that the parents are fully aware of the rights they are forgoing when they agree to terminate their parental rights.

CONCLUSION

We conclude that Tonya lacks standing to challenge the district court's placement decision as to her minor child because she stipulated to the termination of her parental rights, waived her right to challenge the termination, and failed to challenge the stipulation and waiver on appeal. By acquiescing to the termination of her parental rights in those regards, Tonya no longer has any legal interest in her child's placement and cannot be aggrieved by the district court's placement decision. Accordingly, we dismiss this appeal.[4]

Hardesty and Parraguirre, JJ., concur.

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[4]Because we conclude that Tonya lacks standing, we cannot rule on her arguments regarding the district court's placement decision. Nevertheless, we observe that although the district court made oral findings at the hearing, the court's order lacked the written findings required by *Clark County District Attorney*, 123 Nev. at 348, 167 P.3d at 929 (requiring the district court to make written findings regarding the child's best interest and any credibility issues to support its placement decision).

TROY LEE MULLNER, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 71030

December 7, 2017 406 P.3d 473

Appeal under NRAP 4(c) from a judgment of conviction, pursuant to guilty plea, of burglary, two counts of robbery, coercion, two counts of burglary while in possession of a deadly weapon, two counts of robbery with use of a deadly weapon, attempted burglary, and possession of a firearm by ex-felon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Affirmed.

Jean J. Schwartzer, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jonathan VanBoskerck*, Chief Deputy District Attorney, Clark County, for Respondent.

Before Douglas, Gibbons and Pickering, JJ.

OPINION

By the Court, Pickering, J.:

Appellant Troy Lee Mullner appeals his convictions for burglary, robbery, coercion, burglary while in possession of a deadly weapon, robbery with use of a deadly weapon, attempted burglary, and possession of a firearm by an ex-felon. We affirm.[1]

Mullner's Sentence as an Habitual Criminal

Mullner argues that the district court should not have considered his prior conviction from 1984 in sentencing him as an habitual criminal because the conviction is stale and stems from an offense he committed as a minor. Mullner also asks this court to adopt a rule prohibiting a district court from considering juvenile offenses charged up to adult convictions in habitual criminal sentencing, a rule he contends is supported by *State v. Javier C.*, 128 Nev. 536, 289 P.3d 1194 (2012). We review a trial court's adjudication of a defendant as an habitual criminal under an abuse-of-discretion standard. *See Sessions v. State*, 106 Nev. 186, 190, 789 P.2d 1242, 1244 (1990).

[1]Mullner's conviction was previously affirmed by this court in an unpublished order. The State filed a motion to publish our order, which we grant. We issue this opinion in place of our prior unpublished order. NRAP 36(f).

Mullner's Previous Convictions Were Not Stale

A district court may disregard prior convictions that are stale, trivial, or where habitual criminal adjudication "would not serve the purposes of the statute or the interests of justice." *Id.* at 190, 789 P.2d at 1244 (quoting *French v. State*, 98 Nev. 235, 237, 645 P.2d 440, 441 (1982)) (reversing habitual criminal conviction where a defendant's prior felony convictions were 23 to 30 years old and for non-violent crimes). Mullner's three prior convictions span a period of 30 years, and are all for violent crimes. Further, Mullner's oldest convictions were for burglary and robbery, the same offenses he most recently committed. Thus, unlike *Sessions*, Mullner's prior convictions indicate he is a "career criminal[ ] who pose[s] a serious threat to public safety." *Id*. at 191, 789 P.2d at 1245. Accordingly, the district court did not abuse its discretion in rejecting Mullner's argument that his 1984 conviction was too stale to use for habitual criminal sentencing.

Mullner's Prior Conviction Resulting From an Offense Committed as a Minor Could Be Used for Habitual Criminal Sentencing

The district court did not abuse its discretion in using Mullner's charged-up conviction for habitual criminal sentencing. When a juvenile is convicted and sentenced as an adult, that conviction can enhance a defendant's punishment as an habitual criminal, provided the court had general jurisdiction to sentence the juvenile as an adult. 24 C.J.S. *Criminal Procedure and Rights of Accused* § 2462 (2016); *see also United States v. Graham*, 622 F.3d 445, 455-61 (6th Cir. 2010) (juvenile conduct for which the accused was charged and sentenced as an adult used as a prior felony for third strike); *Womack v. State*, Docket No. 61127 (Order of Affirmance, February 13, 2013) (prior felony conviction committed as a juvenile used for habitual criminal sentencing).

Mullner's argument that our decision in *State v. Javier C.* supports a rule prohibiting the use of such convictions in habitual criminal sentencing is unpersuasive. In *Javier C.*, the court held that the criminal statute for battery committed by a prisoner, NRS 200.481(2)(f), did not apply to an adjudicated juvenile delinquent because he was not a "prisoner" under the definition of NRS 193.022, which requires custody in the criminal context, and neither juvenile justice proceedings nor a delinquent adjudication are criminal in nature. 128 Nev. at 539-41, 289 P.3d at 1196-97. Here, the habitual criminal statute applies to a defendant previously convicted of "[a]ny felony," without regard for whether the conviction could have been (but was not) pursued as a juvenile offense. NRS 207.010(1)(b). A statute's plain meaning controls its interpretation, *see Bergna v. State*, 120 Nev. 869, 873, 102 P.3d 549, 551 (2004), and we find no ambiguity in the habitual criminal statute that would support reading it as Mullner

asks us to do. Accordingly, we decline to adopt a ruling prohibiting a district court from considering felony convictions originating from juvenile offenses in habitual criminal sentencing.

Mullner's Sentence Does Not Violate the Eighth Amendment

Mullner argues that his sentence is disproportionate because he did not cause any physical harm and stole only a few thousand dollars. The district court has "wide discretion" in its sentencing decisions. *Allred v. State*, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

Mullner's sentence does not violate the Eighth Amendment. Mullner's three prior felonies entitled the court to sentence him as a large habitual criminal to: (1) life without the possibility of parole, (2) life with the possibility of parole after a minimum of 10 years, or (3) a definite term of 25 years, with eligibility for parole after a minimum of 10. NRS 207.010(1)(b). Mullner's sentence of 31 years to life fits within the statutory scheme and is not disproportionate because it is based on ten separate counts for violent crimes, including burglary and robbery with the use of a deadly weapon. *Allred*, 120 Nev. at 420, 92 P.3d at 1253 ("A sentence within the statutory limits is not 'cruel and unusual punishment unless . . . the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'") (quoting *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996)).

Cumulative Error

Individually harmless errors may be cumulatively harmful and warrant reversal. *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). This court considers "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Id.* (quoting *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)). Because Mullner failed to establish any error on this appeal, there is none to cumulate.

AFFIRMED.

Douglas and Gibbons, JJ., concur.

JOSHUA CALEB SHUE, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 67428

December 14, 2017 407 P.3d 332

Appeal from a judgment of conviction, pursuant to a jury verdict, of child abuse and neglect, 29 counts of use of a child in the production of pornography, 10 counts of possession of visual presentation

depicting the sexual conduct of a child, and open or gross lewdness. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Affirmed in part, reversed in part, vacated in part, and remanded.

[Rehearing denied February 23, 2018]

Howard Brooks, Public Defender, and *William M. Waters*, Deputy Public Defender, Clark County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Jonathan VanBoskerck*, Chief Deputy District Attorney, and *Ryan J. MacDonald*, Deputy District Attorney, Clark County, for Respondent.

Before the Court En Banc.

OPINION

By the Court, Parraguirre, J.:

NRS 200.710(2) criminalizes the knowing use of "a minor to be the subject of a sexual portrayal in a performance." Likewise, NRS 200.730 criminalizes the knowing and willful possession of "any film, photograph or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal." For the purposes of these statutes, NRS 200.700(4) defines "[s]exual portrayal" as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value."

In this appeal, we are asked to consider the appropriate units of prosecution under NRS 200.710(2) and NRS 200.730. Specifically, we first consider whether the State improperly charged appellant Joshua Shue with two counts of violating NRS 200.710(2) for each video file that depicts two minors. We conclude that the term "a minor" under NRS 200.710(2) unambiguously allows for a separate conviction for each minor used in each performance, and thus, Shue's 29 convictions under NRS 200.710 are not impermissibly redundant.[1] We also consider whether Shue was improperly convicted under NRS 200.730 on a per-image basis. We conclude that under *Castaneda v. State*, 132 Nev. 434, 373 P.3d 108 (2016), the State

[1]The 29 counts relate to Shue's production of numerous video files (counts 3-4, 6-7, 9-10, 12-13, 15-16, 18-19, 21-22, 24-25, and 27-38) and a digital photo (count 2) found in his laptop. The video files are surreptitious recordings of Shue's then-girlfriend's children in the bathroom performing various bathroom activities. One of the children, H.I., was between the ages of 15 and 17, and the other, K.I., was between the ages of 11 and 13. The digital photo is an up-skirt picture of H.I.

improperly relied on a per-image unit of prosecution by failing to present evidence showing the mechanics of how Shue recorded and saved the various video files and digital images of children on his laptop. Thus, Shue is entitled to have 9 of his 10 convictions under NRS 200.730 vacated.[2]

Next, we consider whether Nevada's statutes barring the "sexual portrayal" of minors violate the First Amendment of the United States Constitution as being unconstitutionally overbroad or as a content-based restriction that fails strict scrutiny, or violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution as being impermissibly vague. We conclude that the statutes do not implicate protected speech and are not unconstitutionally vague on their face or as applied to Shue. Thus, we reject these claims.

Finally, we consider whether (1) sufficient evidence supports Shue's conviction of open or gross lewdness under NRS 201.210, and (2) any of Shue's asserted trial errors warrant reversal. We conclude that (1) there is insufficient evidence to support Shue's conviction under NRS 201.210, and (2) Shue's asserted trial errors do not warrant reversal. As such, we affirm Shue's 29 convictions under NRS 200.710(2), 1 conviction under NRS 200.730, and the single child abuse conviction under NRS 200.508. We further vacate Shue's remaining 9 convictions under NRS 200.730, and we reverse his single conviction under NRS 201.210.

FACTS AND PROCEDURAL HISTORY

In the summer of 2010, Shue began periodically staying at his then-girlfriend's residence. At that time, Shue's then-girlfriend lived with her daughter, H.I., and her two sons, K.I. and F.I. During Shue's visits, H.I. was between the ages of 15 and 17, K.I. was between the ages of 11 and 13, and F.I. was between the ages of 10 and 12. In August 2012, Shue approached H.I. from behind and used a small digital camera to take a picture underneath her skirt. Shue showed H.I. the picture, and she asked him to delete it. Later that night, Shue kissed H.I. on the mouth without her consent. H.I. reported both incidents to the police the next day.

Thereafter, the police interviewed Shue and mentioned the possibility of searching his computer, and he indicated that such a search would reveal some things that are not "on the up-and-up." The police then obtained a warrant to search Shue's residence, and they seized Shue's digital camera and laptop. Shue's digital camera revealed a deleted up-skirt photo of H.I., and his laptop contained photographic

[2]The 10 counts relate to Shue's possession of the video files of K.I. in the bathroom performing various bathroom activities (counts 5, 8, 11, 14, 17, 20, 23, and 26), an image of one young male fellating another young male (count 40), and images of a boy with his genitalia and buttocks exposed (count 41).

images of underage males performing sexual activities or with their genitalia and buttocks exposed. Shue's laptop also contained several videos of H.I. and K.I. in the bathroom. Each video surreptitiously captures H.I., K.I., or both, fully nude performing bathroom activities. Shue appears in some of the videos, where he is either setting up or manipulating the camera.

A grand jury returned an indictment against Shue, charging him as follows: 1 count of child abuse and neglect under NRS 200.508 for taking an up-skirt photo of H.I., inappropriately kissing her, and surreptitiously recording her while she engaged in bathroom activities (count 1); 29 counts of use of a child in the production of pornography under NRS 200.710(2) for surreptitiously recording H.I. and K.I. while they were engaged in bathroom activities (counts 3-4, 6-7, 9-10, 12-13, 15-16, 18-19, 21-22, 24-25, and 27-38), and taking an up-skirt photo of H.I. (count 2); 10 counts of possession of a visual representation of sexual conduct or sexual portrayal of a child under 200.730 for possession of video files of K.I. performing bathroom activities (counts 5, 8, 11, 14, 17, 20, 23, and 26), a digital image of one young male fellating another young male (count 40), and images of a boy with his genitalia and buttocks exposed (count 41); and 1 count of open or gross lewdness under NRS 201.210 for inappropriately kissing H.I. (count 39).

The trial jury found Shue guilty on all counts, and Shue received a life sentence with parole eligibility beginning after 10 years. The district court entered a judgment of conviction, from which Shue now appeals.

DISCUSSION

On appeal, Shue argues that (1) 8 of his 29 convictions under NRS 200.710(2) are impermissibly redundant, (2) *Castaneda v. State* requires this court to reverse 9 of his 10 convictions under NRS 200.730, (3) Nevada's statutes barring the sexual portrayals of minors are unconstitutional, (4) the State presented insufficient evidence to support his conviction of open or gross lewdness, and (5) his asserted trial errors warrant reversal. We address these arguments in turn.

Shue's convictions under NRS 200.710(2) are not impermissibly redundant

At issue here are those counts wherein a single video file resulted in two charges against Shue under NRS 200.710(2) because the videos captured both H.I. and K.I.[3] Shue argues that 8 of his 29

[3]There are 16 charges against Shue fitting that description: (1) counts 3 and 4 relate to file 0058, (2) counts 6 and 7 relate to file 0031, (3) counts 9 and 10 relate to file 0005, (4) counts 12 and 13 relate to file 0007, (5) counts 15 and 16 relate to file 0006, (6) counts 18 and 19 relate to file 0057, (7) counts 21 and 22 relate to file 0089, and (8) counts 24 and 25 relate to file 0124.

convictions under NRS 200.710(2) are impermissibly redundant because he can only be penalized for *each performance* proved.[4] The State counters that Shue can be charged for *each minor* used in each performance. We agree with the State; therefore, we affirm Shue's 29 convictions under NRS 200.710(2).

As an initial matter, we construe Shue's argument as a unit of prosecution determination. *See Castaneda*, 132 Nev. 434, 436-37, 373 P.3d 108, 110 (2016). "[D]etermining the appropriate unit of prosecution presents an issue of statutory interpretation and substantive law." *Id.* at 437, 373 P.3d at 110 (internal quotation marks omitted). "[W]e review questions of statutory interpretation de novo." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). "[W]hen a statute is clear on its face," we must afford the statute its plain meaning. *Id.* (internal quotation marks omitted).

NRS 200.710(2) makes it a category A felony when a person "knowingly uses, encourages, entices, coerces or permits *a minor* to be the subject of a sexual portrayal in a performance." (Emphasis added.) In *Castaneda*, we observed that courts interpreting criminal statutes for the proper unit of prosecution have consistently found them ambiguous when "the object of the offense has been prefaced by the word 'any.'"[5] 132 Nev. at 439, 373 P.3d at 111 (internal quotation marks omitted). Those courts reasoned that the word "any" can be interpreted "to fully encompass (*i.e.*, not necessarily exclude any part of) plural activity, and thus fails to unambiguously define the unit of prosecution in singular terms." *Id.* (internal quotation marks omitted). In contrast to the word "any," the term "a minor" under NRS 200.710(2) plainly denotes the object of the offense in singular terms and necessarily precludes any contemplation of the plural. Thus, we conclude that NRS 200.710(2) plainly defines the proper unit of prosecution as each distinct minor who is the subject of a sexual portrayal in a performance.

In light of the appropriate unit of prosecution under NRS 200.710(2), we conclude that Shue was properly convicted for each minor depicted in each video file, and we affirm all 29 of his convictions under NRS 200.710(2).

Shue is entitled to have 9 of his 10 convictions under NRS 200.730 vacated

Shue argues that 9 of his 10 convictions under NRS 200.730 must be vacated pursuant to *Castaneda v. State* because the State did not

[4]Shue raised this argument in a pretrial habeas petition, which the district court rejected.

[5]We note *Castaneda* was issued after Shue was charged and convicted under NRS 200.730, and thus, the district court did not have this court's guidance on the present matter.

allege or prove that he possessed the disputed images and video files at different times or locations. We agree.

Shue did not raise this argument below; however, we exercise our discretion to consider it. *Walch v. State*, 112 Nev. 25, 30, 909 P.2d 1184, 1187 (1996). "To amount to plain error, the error must be so unmistakable that it is apparent from a casual inspection of the record. In addition, the defendant must demonstrate that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice." *Martinorellan v. State*, 131 Nev. 43, 49, 343 P.3d 590, 593 (2015) (internal quotation marks and citations omitted).

In *Castaneda*, we interpreted NRS 200.730 to determine the proper unit of prosecution for cases involving the possession of child pornography. 132 Nev. at 437, 373 P.3d at 110. NRS 200.730 criminalizes the knowing and willful possession of "'*any film, photograph or other visual presentation* depicting a person under the age of 16 years as the subject of a sexual portrayal or engaging in . . . sexual conduct.'" *Id.* at 437, 373 P.3d at 110 (quoting NRS 200.730). We held that the word "any" was ambiguous because it could mean "(1) one; (2) one, some, or all regardless of quantity; (3) great, unmeasured, or unlimited in amount; (4) one or more; and (5) all." *Id*. at 438, 373 P.3d at 111 (internal quotation marks omitted). Therefore, it was unclear whether NRS 200.730's plain text allows a person to be charged for each image (i.e., if "any" means one), or for each instance that a person possessed child pornography (i.e., if "any" means one or more). *Id.* After determining that "other legitimate tools of statutory interpretation" provided no material guidance, *id.* at 439-42, 373 P.3d at 111-14, we held that the rule of lenity required "any" to be construed in the accused's favor such that the charges under NRS 200.730 could not be brought on a per-image basis. *Id.* at 443, 373 P.3d at 114 ("We recognize the policy goals behind tying punishment to the number of child victims depicted in, and thus harmed by, the images possessed. Consistent with the rule of lenity, though, we are obligated to construe statutes that contain ambiguity in the proscribed conduct in the accused's favor."). As such, we held that "simultaneous possession at one time and place of [multiple] images depicting child pornography constituted a single violation of NRS 200.730." *Id.* at 444, 373 P.3d at 115. Accordingly, we vacated all but one of the defendant's convictions under NRS 200.730. *Id.* at 446, 373 P.3d at 116.

Like in *Castaneda*, here, the State pursued Shue's convictions under NRS 200.730 on a theory that Shue could be charged and convicted on a per-image basis for each of the files found on his laptop. First, the State's closing argument shows it sought to secure convictions for possessing child pornography on a per-image/video basis. Second, Shue's indictment and the submitted jury instructions indicate that possession counts 5, 8, 11, 14, 17, 20, 23, 26, and 40

specify a particular file underlying each possession charge, as opposed to a specific date or location.

The State argues that 8 of the 10 possession counts are distinguishable from *Castaneda* because H.I. testified that each video was created on a different day, thus providing sufficient evidence of distinct acts of possession. We disagree because the State failed to clarify the mechanics of how Shue recorded and saved the files.[6] For example, it is unknown whether Shue (1) recorded for a period, transferred the videos onto his computer, and then returned the camera to the bathroom; or (2) recorded continuously over a long period of time before transferring everything onto his laptop at once. Instead of presenting evidence of distinct acts of possession, the State relied on the circumstances surrounding the video recordings, primarily that the events depicted on the videos occurred on different days, to infer distinct acts of possession. That inference alone, however, is insufficient to establish "distinct crimes of possession" in light of our holding in *Castaneda*. *Id.* at 444, 373 P.3d at 115.

Considering the unit of prosecution set forth in *Castaneda* and the record in this case, we conclude that Shue could be convicted of no more than one count of possessing child pornography. The error is clearly prejudicial. We therefore affirm 1 conviction (count 40) for violation of NRS 200.730 and vacate the other 9 possession convictions (counts 5, 8, 11, 14, 17, 20, 23, 26, and 41).

Nevada's statutes barring the "sexual portrayals" of minors do not violate the First Amendment or the Due Process Clause of the United States Constitution

On appeal, Shue argues that Nevada's statutes barring the sexual portrayals of minors violate the First Amendment as being unconstitutionally overbroad because they "potentially criminalize[ ] all manner of visual images of minors." We disagree.[7]

"The constitutionality of a statute is a question of law that we review de novo." *Cornella v. Justice Court*, 132 Nev. 587, 591, 377 P.3d 97, 100 (2016) (internal quotation marks omitted). "Statutes are presumed to be valid, and the burden is on the challenging party to demonstrate that a statute is unconstitutional." *Id.* (internal quotation marks omitted). Moreover, "[t]his court construes statutes, if reasonably possible, so as to be in harmony with the constitution." *Id.* (internal quotation marks omitted); *see also State v. Castaneda*,

[6]Although Detective Vicente Ramirez testified that it is possible to determine when a video or image file is created, modified, or last accessed on a computer, he further testified that he was unable to provide the download dates for the video files of H.I. and K.I.

[7]Although Shue did not raise this constitutional issue below, we exercise our discretion to consider it on appeal. *McCullough v. State*, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

126 Nev. 478, 481, 245 P.3d 550, 552 (2010) (providing that "we adhere to the precedent that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality" (internal quotation marks omitted)).

"Whether or not a statute is overbroad depends upon the extent to which it lends itself to improper application to protected conduct." *Scott v. First Judicial Dist. Court*, 131 Nev. 1015, 1018, 363 P.3d 1159, 1162 (2015) (internal quotation marks omitted). In particular, "the overbreadth doctrine invalidates laws that infringe upon First Amendment rights." *Id.* (internal quotation marks omitted). Moreover, "[w]e have held that even minor intrusions on First Amendment rights will trigger the overbreadth doctrine"; however, "we have warned that the overbreadth doctrine is strong medicine and that a statute should not be void unless it is substantially overbroad in relation to the statute's plainly legitimate sweep." *Id.* (internal quotation marks omitted). Finally, an overbroad statute may nonetheless be saved by adopting "a limiting construction or partial invalidation [that] narrows [the statute] as to remove the seeming threat or deterrence to constitutionally protected expression." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (internal quotation marks omitted).

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). When "construing a statute, our analysis begins with its text," and we will "attribute the plain meaning to a statute that is not ambiguous." *Sheriff v. Andrews*, 128 Nev. 544, 546, 286 P.3d 262, 263 (2012) (internal quotation marks omitted).

NRS 200.700(4) defines "'[s]exual portrayal'" as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." The United States Supreme Court has defined "prurient" as "a shameful or morbid interest in nudity, sex, or excretion," or involving "sexual responses over and beyond those that would be characterized as normal." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985) (internal quotation marks omitted). Thus, NRS 200.700(4) plainly defines sexual portrayal as the depiction of a minor in a manner that appeals to a shameful or morbid interest in the sexuality of the minor, and which does not have serious literary, artistic, political, or scientific value, according to the views of an average person applying contemporary community standards. As explained below, we conclude that Nevada's statutes barring the sexual portrayal of minors are not overbroad because the type of conduct proscribed under NRS 200.700(4) does not implicate the First Amendment's protection.

In *Osborne v. Ohio*, the United States Supreme Court upheld the constitutionality of an Ohio statute proscribing nude depictions of minors "because the statute, as construed by the Ohio Supreme Court on [the appellant's] direct appeal, plainly survives overbreadth scrutiny."[8] 495 U.S. 103, 113 (1990). In particular, the Ohio Supreme Court interpreted the statute to prohibit "the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged."[9] *Id.* (internal quotation marks omitted). Thus, "[b]y limiting the statute's operation in this manner, the Ohio Supreme Court avoided penalizing persons for viewing or possessing innocuous photographs of naked children." *Id.* at 113-14.

Here, NRS 200.700(4)'s definition of "sexual portrayal" necessarily involves a depiction meant to appeal to the prurient interest in sex. Moreover, the phrase, "which does not have serious literary, artistic, political or scientific value," sufficiently narrows the statute's application to avoid the proscription of innocuous photos of minors. NRS 200.700(4); s*ee also Osborne*, 495 U.S. at 113 n.10 ("So construed, the statute's proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography." (internal quotation marks omitted)). Finally, the type of conduct that Shue was con-

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[8]The relevant Ohio statute provides that

> (A) No person shall do any of the following:
>
> . . . .
>
> (3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:
>
> (a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.
>
> (b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

Osborne, 495 U.S. at 106-07 (quoting Ohio Rev. Code Ann. § 2907.323(A)(3) (1989)).

[9]The majority in *Osborne* notes that the dissent took issue with Ohio's definition of nudity to include depictions of other body parts beyond the genitals. 495 U.S. at 114 n.11. However, the majority explained that such "distinction between body areas and specific body parts is [not] constitutionally significant"; rather, "[t]he crucial question is whether the depiction is lewd." *Id.*

victed of pursuant to NRS 200.710(2)—surreptitiously recording his then-girlfriend's minor children naked in the bathroom performing bathroom activities and taking an up-skirt photo of one of the children—is clearly proscribed under the statute's plain language and does not implicate the First Amendment's protection. *See New York v. Ferber*, 458 U.S. 747, 757 (1982) (providing that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance" and that the United States Supreme Court has therefore "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights").

As such, Nevada's statutes barring the sexual portrayal of minors necessarily demonstrate a "core of constitutionally unprotected expression to which it might be limited," *City of Houston v. Hill*, 482 U.S. 451, 468 (1987) (internal quotation marks omitted). Because NRS 200.700(4) does not implicate protected speech under the First Amendment, we conclude that Nevada's statutes barring the sexual portrayal of minors are not overbroad.[10]

There is insufficient evidence to support Shue's open or gross lewdness conviction

Shue argues that there is insufficient evidence to support his open or gross lewdness conviction under NRS 201.210. We agree.

"[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). Therefore, "the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Milton v. State*, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995) (internal quotation marks omitted).

[10]Shue also argues on appeal that Nevada's statutes barring the sexual portrayal of minors (1) violate the First Amendment as a content-based restriction that fails strict scrutiny, and (2) violate the Due Process Clause as being impermissibly vague. Because we conclude that such statutes do not implicate protected speech under the First Amendment, we reject the first argument. We also reject the second argument and conclude that the statutes are not unconstitutionally vague on their face or as applied to Shue. First, Shue's conduct was clearly proscribed under the statutes. *See Sheriff v. Martin*, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983) ("A challenger who has engaged in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."). Furthermore, Shue has failed to satisfy his burden and demonstrate that "vagueness so permeates the text" of the statutes such that they "would still be invalid if void in most circumstances." *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 513, 217 P.3d 546, 554 (2009).

Count 39 of the indictment charged Shue with committing open or gross lewdness by "inappropriately kissing said [H.I.] on the mouth." The trial testimony surrounding the kiss is very limited, but, viewing it in the light most favorable to the prosecution, it is as follows: (1) Shue kissed H.I. on the mouth without her permission; (2) Shue's kiss made H.I. feel uncomfortable and scared; (3) H.I. could not recall whether the kiss was a "peck" or a deeper kiss; and (4) Shue later told police that he found H.I. attractive, but that he would never act on that attraction.

NRS 201.210 criminalizes "[a] person who commits any act of open or gross lewdness." Although the statutory language provides little guidance, this court's precedent has more fully defined "open," "gross," and "lewdness." *See Berry v. State*, 125 Nev. 265, 280-82, 212 P.3d 1085, 1095-96 (2009), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 483, 245 P.3d 550, 554 (2010). "Lewd" has an ordinary, well-established definition: (1) "pertaining to sexual conduct that is obscene or indecent; tending to moral impurity or wantonness," (2) "evil, wicked or sexually unchaste or licentious," and (3) "preoccupied with sex and sexual desire; lustful." *Id.* at 281, 212 P.3d at 1096 (internal quotation marks omitted). The words "open" and "gross" modify the word "lewdness," *id.* at 280-81, 212 P.3d at 1095-96; therefore, criminal liability under NRS 201.210 requires some underlying lewd act.

Here, even after viewing the evidence in the light most favorable to the prosecution, there is no evidence that Shue committed a lewd act when he kissed H.I. A kiss on the mouth, without more, does not constitute lewd conduct because it is not lustful or sexually obscene. Although the circumstances surrounding the kiss may be inappropriate, there is simply insufficient testimony about the nature of the kiss. In addition, the State's indictment alleged that the kiss itself was the lewd act. Thus, in light of the evidence, we hold a rational fact-finder could not conclude beyond a reasonable doubt that Shue's kiss constituted a lewd act. Therefore, we reverse Shue's conviction of open or gross lewdness.[11]

Finally, we have considered Shue's other assignments of error and conclude that they are without merit or do not warrant relief.[12]

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[11]Shue also argues that there is insufficient evidence to support his other convictions under NRS 200.710(2), NRS 200.730, and NRS 200.508 (child abuse). Having considered these arguments, we conclude that there is sufficient evidence to support Shue's other convictions.

[12]Specifically, Shue argues that (1) the district court erroneously instructed the jury, (2) the State committed prosecutorial misconduct, (3) the district court improperly allowed a lay witness to provide expert testimony, (4) Count 1 of his indictment failed to adequately notify him of the State's theory of prosecution for child abuse under NRS 200.508, and (5) the district court erred in limiting the scope of his cross-examination of H.I.

CONCLUSION

We conclude that (1) Shue's 29 convictions under NRS 200.710(2) are not impermissibly redundant; (2) pursuant to *Castaneda v. State*, the State did not establish multiple distinct violations of NRS 200.730, and therefore we vacate 9 of Shue's 10 convictions under NRS 200.730; (3) Nevada's statutes barring the production or possession of images depicting the sexual portrayal of minors do not violate the First Amendment or the Due Process Clause of the United States Constitution; (4) there is sufficient evidence to support Shue's convictions under NRS 200.710(2), NRS 200.730, and NRS 200.508, but not NRS 201.210; and (5) none of Shue's asserted trial errors warrant reversal.

Thus, we affirm Shue's 29 convictions under NRS 200.710(2) (counts 2-4, 6-7, 9-10, 12-13, 15-16, 18-19, 21-22, 24-25, and 27-38), his remaining conviction under NRS 200.730 (count 40), and his single conviction under NRS 200.508 (count 1). However, we vacate his other 9 convictions under NRS 200.730 (counts 5, 8, 11, 14, 17, 20, 23, 26, and 41), and we reverse his single conviction under NRS 201.210 (count 39). Accordingly, we remand for entry of an amended judgment of conviction consistent with this opinion.

Cherry, C.J., and Douglas, Gibbons, Pickering, Hardesty, and Stiglich, JJ., concur.

THE STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF PUBLIC AND BEHAVIORAL HEALTH, MEDICAL MARIJUANA ESTABLISHMENT PROGRAM, Appellant, *v.* SAMANTHA INC., dba SAMANTHA'S REMEDIES, a Domestic Corporation, Respondent.

No. 71123

December 14, 2017 407 P.3d 327

Appeal from a district court order denying a petition for judicial review. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Vacated and remanded.

Adam Paul Laxalt, Attorney General, and *Linda C. Anderson*, Chief Deputy Attorney General, Carson City, for Appellant.

Cooper Levenson, P.A., and *Kimberly R. Maxson-Rushton*, Las Vegas, for Respondent.

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

The Nevada Department of Health and Human Services appeals from an order granting the petition for judicial review filed by respondent Samantha Inc. under NRS Chapter 233B, the Nevada Administrative Procedure Act (APA). NRS 233B.130 limits the right to petition for judicial review under the APA to "contested cases." Because the application process provided by NRS 453A.322 does not constitute a contested case as defined by NRS 233B.032, the district court did not have authority to grant APA-based relief. We therefore vacate the district court's order granting the petition for judicial review and remand with instructions to grant the Department's motion to dismiss Samantha's petition for judicial review.

I.

The Division of Public and Behavioral Health, Medical Marijuana Establishment Program is a part of Nevada's Department of Health and Human Services. The Department evaluates applications to operate medical marijuana dispensaries and issues "registration certificates" to successful applicants. NRS 453A.322 (governing the registration of medical marijuana establishments); *see* NRS 453A.116(4) (including medical marijuana dispensaries in the definition for "medical marijuana establishment"). A "[m]edical marijuana establishment registration certificate" is "a registration certificate that is issued by the Department pursuant to NRS 453A.322 to authorize the operation of a medical marijuana establishment." NRS 453A.119. The Department accepts applications for registration certificates once a year over the course of 10 business days. NRS 453A.324(5). The Department can issue up to 40 certificates for Clark County dispensaries, NRS 453A.324(1)(a), but only 12 of those certificates can be allotted to establishments located in the City of Las Vegas. NRS 453A.326(1).[1]

The Department evaluates and ranks applications according to considerations set forth in NRS 453A.328 and accompanying regulations. *See* NRS 453A.322; NRS 453A.328; NRS 453A.370; *see also* NAC 453A.306; NAC 453A.310; NAC 453A.312(1). The highest scoring applicants receive registration certificates until the available permits are exhausted. NAC 453A.310(1); NAC 453A.312(1). Samantha submitted an application, but its score did not rank high enough to receive a Las Vegas registration certificate.

[1]The Legislature amended NRS Chapter 453A effective July 2017. Unless otherwise specified, this opinion refers to the 2014 version of Chapter 453A.

Samantha petitioned for judicial review of the Department's decision not to issue it a registration certificate. Its petition was based exclusively on the Nevada Administrative Procedure Act, stating: "This Petition for Judicial Review is filed pursuant to [NRS] 233B.130, which provides for judicial review of contested final decisions in Administrative Agency Cases. *See*, NRS 233B.032." Only the Department, not any of the other applicants, was named as the respondent.

In response, the Department moved to dismiss, arguing that the APA only affords judicial review in contested cases, which the marijuana dispensary application process does not involve. The district court denied the Department's motion and ordered the Department to submit its confidential protocols for reviewing applications. The district court then re-reviewed Samantha's application and concluded that the Department's scoring of Samantha's application was not based on substantial evidence and that the Department's application process, particularly its review of Samantha's application, was arbitrary and capricious. In its order granting judicial review, the district court directed the Department to reevaluate Samantha's application using criteria different from those used for other applicants and to issue a registration certificate to Samantha if the revised score placed Samantha in the top 12 Las Vegas applicants.

The Department appeals, challenging both the district court's denial of its motion to dismiss and its decision on the merits. We sustain the Department's challenge to the district court's denial of its motion to dismiss and vacate the district court's decision on that basis, without reaching the merits.

II.

A.

A party seeking to challenge an administrative agency's decision may pursue such judicial review as is available by statute or, if appropriate, equitable relief. *Compare Crane v. Cont'l Tel. Co.*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989) ("Courts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review."), *with* Richard J. Pierce Jr., *Administrative Law Treatise*, 1700 (5th ed. 2010) ("[Equitable remedies] have become the most common nonstatutory remedies for unlawful agency action."). The availability of a legal remedy depends on the statutes comprising the jurisdiction's Administrative Procedure Act and the agency-specific statutes involved. *Crane*, 105 Nev. at 401, 775 P.2d at 706 ("When the legislature creates a specific procedure for review of administrative agency decisions, such procedure is controlling."); *see Mineral Cty. v. State, Bd. of Equalization*, 121 Nev. 533, 536, 119 P.3d 706, 707-08 (2005) (harmonizing judicial review provi-

sions in Nevada APA and NRS Chapter 361). Equitable remedies, such as declarative and injunctive relief, or a petition for mandamus, may be available "in the discretion of the court and only when legal remedies, such as statutory review, are not available or are inadequate." Pierce, *supra*, at 1701.

Samantha challenged the denial of its medical marijuana registration certificate in the district court through a petition for judicial review pursuant to Nevada's APA, NRS Chapter 233B. The procedures and requirements that apply to a petition for judicial review under the APA are set out specifically in NRS Chapter 233B and include directions for joinder of parties, NRS 233B.130(2)(a); transmittal of the agency record, NRS 233B.131; and the scope and extent of available judicial review, NRS 233B.135. Because Samantha did not seek equitable or declaratory relief from the district court, we evaluate this appeal solely on the basis of Samantha's entitlement to judicial review under the APA and the laws governing medical marijuana, NRS Chapter 453A.

B.

NRS 233B.130 provides that a party is entitled to judicial review of an administrative decision when identified as a party of record by an agency and aggrieved by a final decision in a contested case. The Department argues that its decision to deny Samantha a certificate of registration for a medical marijuana establishment did not result from a contested case, so the district court lacked the authority to consider Samantha's petition for judicial review. Samantha responds that nothing suggests the Legislature intended to preclude judicial review, citing federal cases that establish a "presumption of availability" of judicial review of agency decisions. *E.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). But, with the exception of *Checker Cab Co. v. State*, Nevada has not endorsed this presumption. *Compare* 97 Nev. 5, 8, 621 P.2d 496, 498 (1981) ("All presumptions are in favor of a right to judicial review for those who are injured in fact by agency action."), *with Private Investigator's Licensing Bd. v. Atherley*, 98 Nev. 514, 515, 654 P.2d 1019, 1020 (1982) ("Pursuant to the [APA], not every administrative decision is reviewable.").

NRS 233B.130(1)(a) affords a right of judicial review to a party of record in an administrative proceeding who is "[a]ggrieved by a final decision in a contested case." NRS 233B.032 defines a contested case as:

> a proceeding, including but not restricted to rate making and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed.

Giving NRS 233B.130 and NRS 233B.032 their plain meaning, only final agency decisions from a proceeding requiring an opportunity for a hearing or imposing an administrative penalty are judicially reviewable contested cases. *See Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007) ("When the language of a statute is unambiguous, the courts are not permitted to look beyond the statute itself when determining its meaning.").

This court previously held that when the statutory scheme governing an administrative proceeding fails to require notice and opportunity for a hearing, the agency's final decision in that proceeding was not made in a contested case and thus was not subject to judicial review. *See Citizens for Honest & Responsible Gov't v. Sec'y of State*, 116 Nev. 939, 952, 11 P.3d 121, 129 (2000) (statutes governing Secretary of State's review of recall petition did not require notice or hearing, thus decision was not reviewable under the APA as a contested case); *State of Nevada, Purchasing Div. v. George's Equip. Co.*, 105 Nev. 798, 804, 783 P.2d 949, 953 (1989) (statute providing discretionary hearing within 10 days of unsuccessful bid to purchase property from the State did not create a contested case); *Atherley*, 98 Nev. at 515, 654 P.2d at 1020 (denial of private investigator's license was not a contested case because no notice or hearing was required before decision). This court is "loath to depart from the doctrine of stare decisis and will overrule precedent only if there are compelling reasons to do so." *City of Reno v. Howard*, 130 Nev. 110, 113-14, 318 P.3d 1063, 1065 (2014) (internal quotations omitted).

The Legislature codified this interpretation in the context of judicial review of licensing procedures[2] at NRS 233B.127 (2009), which provides "[w]hen the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply." The Legislature amended this statute in 2015, further clarifying that NRS 233B.130 "do[es] not apply to the grant, denial or renewal of a license unless notice and opportunity for hearing are required by law to be provided to the applicant before the grant, denial or renewal of the license." While this amendment post-dates and does not apply to Samantha's case, it supports our interpretation of NRS 223B.130. 2B Norman J. Singer & Shambie Singer, *Sutherland Statutory Construction* § 49.8 (7th ed. 2014) ("Where a statute has received a contemporaneous and practical interpretation, and is then reenacted as interpreted, the interpretation carries great weight.").

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[2]NRS 223B.034 defines "license" as "the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law." Samantha applied for a certificate of registration for a medical marijuana establishment pursuant to NRS 453A.322. Thus, the provisions in NRS Chapter 233B governing licenses apply.

Therefore, the APA only provides for judicial review under NRS 233B.130 of final agency decisions in contested cases. While this creates a gap in the availability of judicial review for exercises of agency authority, this is well-established as legislative prerogative. *See* Pierce, *supra*, at 1578 ("Except in the context of constitutional rights, the role of the courts is to enforce and to render more effective the limits on administrative discretion created by the politically accountable Branches of government to the extent that those Branches have requested the assistance . . . ."); *see also Dalton v. Specter*, 511 U.S. 462, 465-66 (1994) (military base closing decisions under the Defense Base Closure and Realignment Act committed to the President's unreviewable discretion); *Roberts v. R.R. Ret. Bd.*, 346 F.3d 139, 140-41 (5th Cir. 2003) (railroad retirement board's refusal to reopen a prior claim is not reviewable because statute only provides review to "any final decision . . . made after a hearing," joining the Fourth, Sixth, Seventh, and Tenth Circuits).

When Nevada adopted its APA in 1965, it drew from the 1961 Model State Administrative Procedure Act. *See* Model State Admin. Procedure Act of 1961, 15 U.L.A. 181 (2000) (amended 1981, 2010) ("[T]he Nevada act is a substantial adoption of the major provisions of the Revised 1961 Model State Administrative Procedure Act"). Later versions of the Model State Administrative Procedure Act have addressed the unreviewable agency discretion created by the prerequisite of a contested case to judicial review. Model State Admin. Procedure Act § 5-106, 15 U.L.A. 125 cmt. (1981) ("[The 1961 Act] did not address the question of standing to seek judicial review of agency action that is neither a rule nor a contested case decision. This Act provides a single type of judicial review of agency action."); Model State Admin. Procedure Act § 501, 15 U.L.A. 66 (2010) (providing judicial review for "final agency action"). And other jurisdictions have adopted statutes providing for judicial review of "uncontested cases." *See* Iowa Code § 17A.19 (2017); Mo. Rev. Stat. § 536.150 (2017); Or. Rev. Stat. § 183.484 (2017); Wyo. R. App. P. 12.04 (2017); *cf. Mich. Ass'n of Home Builders v. Dir. of Dep't of Labor & Econ. Growth*, 750 N.W. 2d 593, 595 (Mich. 2008) (recognizing that pursuant to Michigan Compiled Laws § 24.203(3)'s definition of contested case, "a non-contested case would therefore encompass administrative determinations that do not fall within the definition of a contested case," and providing judicial review of a non-contested case).

Because Nevada has not amended its APA, our law grants a district court authority to consider a petition for judicial review only from a final decision in a contested case. Stare decisis and NRS 233B.032's plain language compel this interpretation, and we cannot justifiably alter it. The question, then, is whether the application process to receive a certificate of registration for a medical marijuana establishment amounts to a contested case.

C.

NRS Chapter 453A and NAC 453A.300-.352 provide the statutory provisions and regulations governing the registration of medical marijuana establishments. The Department argues that the application process to receive a registration certificate for a medical marijuana establishment is not a contested case because it does not require notice and an opportunity for a hearing. Samantha argues that the Legislature's express grant of judicial review in provisions like NRS 453A.210(6), regarding individual applications for a medical marijuana identification card, indicates the Legislature's intent to provide judicial review for the medical marijuana establishment registration certificates.

The statutory and regulatory provisions governing medical marijuana establishments do not envision any form of hearing regarding the Department's decisions reviewing and ranking registration certificate applications. *See* NRS 453A.322-.344; NAC 453A.300-.352. Instead, NRS Chapter 453A provides judicial review in just two circumstances: (1) the denial of a petition to the Department to add a disease or condition that qualifies for medical marijuana treatment, NRS 453A.710; and (2) the denial of an application for an individual medical marijuana identification card, NRS 453A.210(6). This limited designation of judicial review indicates the Legislature precluded judicial review for all other decisions under NRS Chapter 453A, except those that are contested cases. *See* 2A Norman J. Singer & Shambie Singer, *Sutherland Statutory Construction* § 47.23 (7th ed. 2014) (under the canon of construction *expressio unius est exclusio alterius*, courts should infer that omissions were purposeful).

The Legislature created NRS Chapter 453A long after the APA. Because this court "assumes that, when enacting a statute, the Legislature is aware of related statutes," and NRS Chapter 453A references review under the APA, *see* NRS 453A.210, the Legislature's exclusion of judicial review for a registration certificate in NRS Chapter 453A appears deliberate. *City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 402, 399 P.3d 352, 356 (2017). Had the Legislature wanted to provide for judicial review of the registration certificate process, it needed to address such matters as notice and the opportunity to be heard, *see* NRS 233B.121(1) & (2), the creation of a reviewable record, *see* NRS 233B.121(7), the issuance of a final agency decision, *see* NRS 233B.125, and the parties required to be included as respondents in district court, *see* NRS 233B.130(2), none of which it did.

III.

Our holding that a disappointed applicant for a medical marijuana establishment registration certificate does not have a right to judi-

cial review under the APA or NRS Chapter 453A does not place the Department's processes beyond the reach of the judiciary. As the Department itself acknowledges, other forms of judicial relief, including but not limited to mandamus and declaratory relief, may be available if warranted. *See Atherley*, 98 Nev. at 515-16, 654 P.2d at 1020 (considering whether the disappointed license applicant demonstrated his entitlement to mandamus, even though his license application did not qualify as a contested case that supported judicial review under the APA); *George's Equip. Co.*, 105 Nev. at 804, 783 P.2d at 953 (affirming district court's decision denying judicial review under the APA and independently reviewing its decision to grant injunctive relief). The problem in this case is that the district court—and Samantha—proceeded exclusively under the provision NRS Chapter 233B makes for judicial review of a final decision in a contested case. Thus, we do not have in this case, as we did in *Atherley* or *George's Equipment*, a record by which to evaluate whether alternative relief by way of declaratory judgment, mandamus, or some other means may be warranted.

In sum, the APA does not afford Samantha the right of review it sought, and Samantha did not plead or establish a basis for declaratory, mandamus, or other equitable relief. We therefore vacate the judgment of the district court and remand this matter to the district court with instructions to grant the Department's motion to dismiss Samantha's petition for judicial review.

Cherry, C.J., and Douglas, Gibbons, Hardesty, Parraguirre, and Stiglich, JJ., concur.