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OPINIONS AND ORDERS

MEMORANDUM* OPINION, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (OCTOBER 18, 2023)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA NEVADA TRANSPORTATION INC.,

Plaintiff-Appellant,

v.

NEVADA TRANSPORTATION AUTHORITY, Division of the Nevada Department of Business and Industry,

Defendant-Appellee.

No. 22-15823

D.C. No. 3:21-cv-00358-LRH-CLB

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted June 6, 2023
San Francisco, California

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: MILLER and KOH, Circuit Judges, and CHRISTENSEN,** District Judge.

MEMORANDUM

Sierra Nevada Transportation, Inc. (SNT) appeals from the district court's dismissal of its action under 42 U.S.C. § 1983 against the Nevada Transportation Authority (NTA). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We "review de novo an order granting a motion to dismiss for failure to state a claim, 'accept[ing] the complaint's well-pleaded factual allegations as true, and construe[ing] all inferences in the plaintiff's favor.'" *Bolden-Hardge v. Office of Cal. State Controller*, 63 F.4th 1215, 1220 (9th Cir. 2023) (quoting *Koala v. Khosla*, 931 F.3d 887, 894 (9th Cir. 2019)). "[Q]uestions of standing are reviewed de novo." *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010).

1. SNT lacks standing to challenge the application of the NTA's licensing requirement to SNT's transportation of airline crews. SNT seeks declaratory and injunctive relief to bar the NTA from taking any future enforcement action against SNT for transporting airline crews to and from Reno-Tahoe International Airport. A party seeking prospective relief "has standing to sue where the threatened injury is real, immediate, and direct." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

** The Honorable Dana L. Christensen, United States District Judge for the District of Montana, sitting by designation.

Thus, to survive a motion to dismiss, SNT must plead "enough factual matter (taken as true)" to raise a plausible inference that it faces a real and immediate threat of injury going forward. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). SNT has not pleaded such facts.

The NTA has stated, both before this court and the district court, that a motor carrier's prearranged transportation of airline crews in connection with their work is exempt from the NTA's licensing requirement. Notwithstanding that authoritative statement of the agency's enforcement policy, SNT alleges that on one occasion the NTA did take enforcement action against SNT after it transported an airline crew without a state-issued certificate of public convenience and necessity. "[P]ast wrongs" such as this "do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." *Lyons*, 461 U.S. at 103. Rather, we have identified "two ways in which a plaintiff can demonstrate that . . . injury is likely to recur. First, a plaintiff may show that the defendant had, at the time of the injury, a written policy, and that the injury stems from that policy. Second, the plaintiff may demonstrate that the harm is part of a pattern of officially sanctioned . . . behavior." *Mayfield*, 599 F.3d at 971 (second alteration in original) (internal quotations and citations omitted). SNT has made neither showing.

First, SNT has not identified a written policy under which the NTA expressly claims authority to enforce its licensing requirement against motor carriers engaged in the prearranged transportation of airline crews. The NTA did send an email in July 2019 in which it stated that any motor carrier transporting

passengers between two locations in Nevada is subject to the NTA's licensing requirement, even where one of those locations is the airport. But the NTA has explained that it construes that policy in accord with the District of Nevada's 2009 decision in *Brown's Crew Car of Wyoming LLC v. Nevada Transportation Authority*, No. 2:08-cv-00777, 2009 WL 1240458, at *13 (D. Nev. May 1, 2009) (holding that "rail-crew transportation services are wholly in interstate commerce").

SNT's own amended complaint shows that the NTA has, consistent with its representations to this court, interpreted its policy not to apply to the transportation of airline crews. According to the complaint, on the one occasion in 2020 that SNT was fined after transporting an airline crew, the NTA justified the fine on the ground that "the flight crew was not in uniform and thus there was no way for the NTA to know whether the passengers were actually pilots." SNT alleges that "proof was shown that the passengers were pilots." But even accepting that allegation as true, it shows, at most, that the NTA failed to honor its own exemption on one occasion. It does not raise a plausible inference that the exemption is a lie.

Nor is the NTA's airline-crew exemption "a mere litigation position." *Lopez v. Candaele*, 630 F.3d 775, 788 (9th Cir. 2010). The NTA appears to have exempted airline crews from enforcement actions even at the time that it fined SNT in 2020—hence the language in the complaint alleging that NTA "assert[ed] that the flight crew was not in uniform and thus there was no way for the NTA to know whether the passengers were actually pilots." That language suggests that the

NTA's official policy has been, at all relevant times (including at the time the complaint was filed), to exempt the transportation of airline crews from its licensing requirements.

Second, because SNT alleges only one instance in which it was fined after transporting an airline crew, it has not shown that the harm it suffered was part of a pattern of officially sanctioned behavior. Because SNT can show neither such a pattern nor a written policy authorizing the conduct it complains of, SNT cannot show the "real and immediate threat of injury necessary to make out a case or controversy" with respect to its transportation of airline crews. *Lyons*, 461 U.S. at 103; *see also Mayfield*, 599 F.3d at 971.

2. We assume without deciding that SNT's pre-arranged transportation of out-of-state passengers from the Reno airport to destinations in Nevada and back constitutes interstate commerce. Even so, SNT has failed to state a claim under the Commerce Clause. "[T]he power to regulate commerce in some circumstances [is] held by the States and Congress concurrently." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018); *see also National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012). "[T]wo primary principles . . . mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *Wayfair*, 138 S. Ct. at 2090–91; *see also National Pork Producers Council v. Ross*, 6 F.4th 1021, 1026 (9th Cir. 2021), *aff'd*, 143 S. Ct. 1142 (2023).

SNT does not claim that the NTA's licensing requirement is discriminatory, and the requirement does not impose an undue burden on interstate commerce. "Where [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Applying this test, we have held that the Commerce Clause generally does not preempt state licensing requirements related to public safety. *Kleenwell Biohazard Waste & General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 392, 398 (9th Cir. 1995). The NTA's licensing requirement is "state legislation in the field of safety where the propriety of local regulation has long been recognized." *Pike*, 397 U.S. at 143 (quoting *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 796 (1945) (Douglas, J., dissenting)); *see* Nev. Rev. Stat. § 706.391.

SNT argues that, under the Commerce Clause, a State cannot grant one motor carrier an exclusive right to transport passengers to and from an airport. But the NTA has granted no such exclusive right; it has merely established a licensing requirement. SNT claims that the NTA "imposes difficult, costly, and time-consuming hurdles to obtaining a certificate of public necessity and convenience." But "[t]he mere fact that a firm engaged in interstate commerce will face increased costs as a result of complying with state regulations does not, on its own, suffice to establish a substantial burden on interstate commerce." *Ross*, 6 F.4th at 1032 (quoting *Ward v. United Airlines, Inc.*, 986 F.3d 1234, 1241–42 (9th Cir. 2021)).

3. SNT challenges the district court's refusal to grant SNT leave to amend its complaint to name the individual members of the NTA Board of Commissioners as defendants. Because amendment would be futile, the district court did not err. *See Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043, 1046 (9th Cir. 2006).

AFFIRMED.

PARTIAL CONCURRENCE AND PARTIAL DISSENT, JUSTICE KOH (OCTOBER 18, 2023)

KOH, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's conclusion that Sierra Nevada Transportation, Inc ("SNT") failed to plausibly allege that the Nevada Transportation Authority ("NTA") violated the Commerce Clause by applying state licensing requirements to SNT's prearranged transportation of out-of-state passengers. I respectfully dissent, though, from the majority's decision to deny SNT standing to challenge the application of those requirements to the transportation of airline crews. In my view, SNT has pleaded sufficient facts to establish standing at the motion to dismiss stage.

As described in the operative complaint, SNT is a Nevada corporation, domiciled in California. As relevant here, SNT provides transportation to and from Nevada's Reno-Tahoe International Airport ("the Airport") to three types of customers: (1) airline crews, who book through an out-of-state third party; (2) out-of-state business and vacation travelers, who book through travel agents or other third parties; and (3) customers who have directly booked SNT's services for prearranged trips. SNT is registered with the Federal Motor Carrier Safety Administration and, in California, with the California Public Utilities Commission. SNT alleges that the NTA had previously declined to "enforce its regulatory powers against companies providing prearranged ground transportation as one leg of a continuous interstate trip."

In July 2019, the NTA's nonenforcement policy changed. The NTA set forth its new policy in an email to companies that operated transportation services from the Airport. The new policy, representing the "view of [the] agency" after "lengthy internal discussions," is unequivocal and without exception:

> ANY land transportation which begins in Nevada (even if it is at the Airport) and terminates at another location in Nevada (even if THAT is at the airport) will be considered INTRAstate transportation (Point to point within Nevada)—subject to citation and the impoundment of the vehicle used for any non-certified carrier.

The NTA further explained that it "will immediately begin enforcing the Nevada Statutes in the manner described—which is ANY point to point trips within Nevada require certification from the Nevada Transportation Authority."[1]

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[1] Indeed, the complaint alleges that the NTA enforced this policy against SNT or similar companies on at least three occasions between July 2019 and the filing of this lawsuit in September 2021. First, as discussed below, the NTA issued a citation to SNT for transporting an airline crew from the Airport to their hotel in July 2020. Second, in July 2021, the NTA detained SNT's driver, impounded SNT's vehicle, and issued SNT a citation for transporting an NBC employee on a prearranged trip from Lake Tahoe to the Airport without a certificate of public convenience and necessity. Third, in July 2021, the NTA detained the driver of a similar transportation company, impounded the company's vehicle, and cited the company for transporting a passenger from Lake Tahoe to the Airport without a certificate of public necessity.

Although the majority must acknowledge the existence of this unequivocal written position, the majority still confoundingly concludes that "SNT has not identified a written policy under which the NTA expressly claims authority to enforce its licensing requirement against motor carriers engaged in the prearranged transportation of airlines crews." The majority apparently reaches that conclusion by relying on a so-called "exemption," which is in fact the NTA's representation to this court and the district court that notwithstanding the plain and unequivocal language of the written policy, the NTA "absolutely would not knowingly take enforcement action relative to passenger transportation involving an airline crew."[2] The majority calls this an "authoritative statement of the agency's enforcement policy" but does not support this characterization with any legal authority or record support.

Our case law makes clear that although an "enforcing authority['s] express[] interpret[ation] [of a] challenged law as not applying to the plaintiffs' activities" can show that plaintiffs lack standing, "the government's disavowal must be more than a mere litigation position." *Lopez v. Candaele*, 630 F.3d 775, 788 (9th Cir. 2010) (discussing pre-enforcement challenges); *accord EQT Prod. Co. v. Wender*, 870 F.3d 322, 331 (4th Cir. 2017) ("The County stipulated

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[2] The NTA contends that this position stems from the District of Nevada decision in *Brown's Crew Car of Wyo. LLC v. Nev. Transp. Auth.*, No. 2:08-cv-00777, 2009 WL 1240458 (D. Nev. May 1, 2009). However, the NTA's 2019 written policy and its 2020 enforcement decision to apply that policy to SNT's transportation of an airline crew both postdated the 2009 decision in *Brown's Crew Car*.

during this litigation that it does "not intend for the Ordinance to apply" to storage at EQT's conventional wells, but again, the County's litigation position cannot override the plain text of the Ordinance when it comes to establishing a credible threat of enforcement . . . for purposes of establishing standing." (citation omitted)). Further, finding that SNT lacks standing based on the NTA's disavowal contravenes the well-established principle that standing is determined at the time of the filing of the complaint. *See, e.g.*, *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007).

When the complaint was filed, the NTA had a written policy providing that it would regulate "ANY point to point trips within Nevada." SNT has alleged that it was cited pursuant to that policy for transporting an airline crew from the Airport to their hotel in July 2020. The complaint alleges that even though "proof was shown that the passengers were pilots" at the subsequent hearing, the NTA "imposed a $1,000 fine" because "there was no way for the NTA to know whether the passengers were actually pilots." The majority's discussion of that incident shows its commitment to construing the facts in the NTA's favor, notwithstanding its recognition that the facts must be construed in the light most favorable to SNT at the motion to dismiss stage. The majority impermissibly draws inferences in favor of the NTA by casting the July 2020 citation as an indication that the NTA did not intend to cite companies for transporting airline crews. Properly viewed in the light favorable to SNT, however, these facts show that the NTA not only had a written policy plainly covering transportation of

airline crews; it also knowingly applied that policy to the transportation of airline crews.

Nothing in the record shows that the enforcement policy changed between July 2020 and the filing of the complaint. An "ongoing policy coupled with [the plaintiff's] past injury establishes a 'real and immediate threat' of [the plaintiff's] injury occurring again," sufficient to confer standing. *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1082 (9th Cir. 2004); *see also Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 986 (9th Cir. 2007) ("Where, as here, 'the harm alleged is directly traceable to a written policy . . . there is an implicit likelihood of its repetition in the immediate future.'" (quoting *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001))).

By reaching the merits, the majority implicitly recognizes that SNT has standing to pursue prospective relief related to other classes of out-of-state passengers even in the absence of a "pattern of officially sanctioned behavior." *See Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010). The only differences between those classes and the airline crews are the lack of any enforcement as to one of those classes (those who book directly with SNT) and the NTA's representation in this litigation that it will not enforce its policy against airline crews. Thus, the majority credits the moving party's litigation position over a written policy clearly covering the challenged action, coupled with an actual history of past enforcement. Because the complaint plausibly alleges that the NTA is fining transportation companies for transporting airline crews, and the NTA acknowledges that it cannot do so under the Interstate Commerce Clause, I would remand for the

district to court to grant injunctive and declaratory relief as to the transportation of airline crews.

ORDER, U.S. DISTRICT COURT FOR THE DISTRICT OF NEVADA (MAY 18, 2022)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SIERRA NEVADA TRANSPORTATION INC.,

Plaintiff,

v.

NEVADA TRANSPORTATION AUTHORITY, DIVISION OF THE NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY,

Defendant.

Case No. 3:21-cv-00358-LRH-CLB

Before: Larry R HICKS
United States District Judge.

SUMMARY ORDER

Before the Court is Defendant Nevada Transportation Authority's ("NTA") motion to dismiss Plaintiff Sierra Nevada Transportation, Inc.'s ("SNT") first amended complaint ("FAC") (ECF No. 11). SNT filed a response (ECF No. 15), to which NTA filed a reply (ECF No. 16). For the reasons articulated below, the Court grants the motion.

I. Background

This matter involves a dispute between the NTA and SNT regarding the scope of the NTA's jurisdiction to regulate ground transportation within the State of Nevada.

Among other things, the NTA is charged with promoting safe and economic conditions in motor transportation and regulates motor carriers within the State of Nevada. The NTA derives its regulatory authority under Nevada Revised Statutes ("NRS") Chapter 706. Specifically, the NTA may "make necessary and reasonable regulations governing the administration of [Chapter 706]," which includes the licensing and regulation of motor carriers. *See also* NRS 706.171 (general powers of the NTA); NRS 706.758 (advertising requirements of motor carriers); NRS 706.758 (enforcement actions against carriers). Chapter 706 also requires that motor carriers operating within intrastate commerce carry a certificate of public convenience and necessity issued by the NTA. *See* NRS 706.386 (outlining persons required to obtain a certificate to operate within the State of Nevada).

One such motor carrier, SNT, is a California corporation that operates an airport limousine service providing ground transportation by prearranged trips for passengers to and from the Reno-Tahoe International Airport ("RNO") in Reno, Nevada. ECF No. 9 at 3. SNT's primary business consists of three types of bookings: (1) airline crews scheduled through a company in New York; (2) out-of-state business and vacation travelers booked by travel agents and other third-party companies; and (3) trips prearranged and paid for in advance directly by the passenger. *Id.* SNT brings passengers from RNO to a destination in

Nevada or, in some instances, Lake Tahoe, California *Id.* at 5. SNT does not operate a public facing taxi service for trips around Reno. *Id.*

Relevant to this matter, on July 15, 2019, the NTA sent a communication to motor carriers, including SNT's predecessor, Lakeshore, that: "ANY [sic] land transportation which begins in Nevada (even if it is at the Airport) and terminates at another location in Nevada (even if THAT [sic] is at the airport) will be considered INTRAstate [sic] transportation (Point to point within Nevada)—subject to citation and the impoundment of the vehicle used for any non-certified carrier." ECF No. 9 at 10.

Disagreeing with the NTA's interpretation of what constituted "intrastate" travel, Lakeshore sought a declaratory order or advisory opinion, pursuant to Nevada Administrative Code ("NAC") § 706.980, finding that its business involved "interstate" travel, as its travelers came from out of state and then were taken to their final destination in Nevada. *Id.* at 11. According to Lakeshore, this meant its services were governed under federal law that preempted any state regulatory regime. *Id.*

Addressing the matter at its July 22, 2020 hearing, the NTA Commissioners voted to deny Lakeshore's request for a declaratory order or advisory opinion. *Id.* at 12. According to the Commissioners, the NTA lacked jurisdiction to interpret federal law. *Id.* Moreover, the NTA asserted that under NRS Chapter 706, transportation between two points in Nevada is considered "intrastate" rather than "interstate" and is therefore subject to NTA registration, licensing, rate, and other regulatory requirements. *Id.* at 13. Following the Commissioners' decision, the NTA both

fined and impounded SNT's vehicles on three separate occasions between July 12, 2020 and July 6, 2021 for not carrying a certificate of public convenience and necessity issued by the NTA. *Id.* at 13–14. Two of these matters are in dispute and ongoing within the administrative appeal process under NRS 233B. *Id.*

SNT now sues for declaratory relief pursuant to 42 U.S.C. § 1983 for a violation of its rights under the Commerce Clause on the basis that the NTA lacked jurisdiction to issue certificates of public convenience because its authority was pre-empted by federal law. Specifically, SNT requests that this Court declare that SNT's transportation business, including transportation wholly within Nevada, is interstate commerce governed by federal law. ECF No. 1 at 16. Furthermore, SNT requests that this Court issue a permanent injunction, prohibiting the NTA from taking any enforcement action of any nature against SNT for conducting its business. *Id.* Lastly, SNT seeks reasonable attorney fees and costs in bringing this action. *Id.*

II. Legal Standard

A party may seek the dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a legally cognizable cause of action. *See* Fed. R. Civ. P. 12(b)(6) (stating that a party may file a motion to dismiss for "failure to state a claim upon which relief can be granted[.]"). To survive a motion to dismiss for failure to state a claim, a complaint must satisfy the notice pleading standard of Federal Rule 8(a)(2). *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). Under Rule 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is

entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8(a)(2) does not require detailed factual allegations; however, a pleading that offers only "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" is insufficient and fails to meet this broad pleading standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

To sufficiently allege a claim under Rule 8(a)(2), viewed within the context of a Rule 12(b)(6) motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference, based on the court's judicial experience and common sense, that the defendant is liable for the alleged misconduct. *See id.* at 678-679 (stating that "[t]he plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.") (internal quotation marks and citations omitted). Further, in reviewing a motion to dismiss, the court accepts the factual allegations in the complaint as true. *Id.* However, bare assertions in a complaint amounting "to nothing more than a formulaic recitation of the elements of a . . . claim . . . are not entitled to an assumption of truth." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 698)

(internal quotation marks omitted). The court discounts these allegations because "they do nothing more than state a legal conclusion— even if that conclusion is cast in the form of a factual allegation." *Id.* "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Id.*

III. Discussion

After reviewing the NTA's motion to dismiss, the Court has identified three chief arguments as to why the FAC must be dismissed: (1) that SNT has failed to exhaust its administrative remedies and the claims are not ripe for judicial review; (2) that the NTA is entitled to section 1983 immunity; and (3) that SNT mischaracterizes the scope of the NTA's jurisdiction under the Commerce Clause. Each of these arguments will be addressed in turn.[1]

A. Administrative Exhaustion and Ripeness

The NTA maintains that, because there exist ongoing controversies between the NTA and SNT

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[1] In its motion to dismiss, the NTA also alleges improper service of the FAC, as well as a time bar under the relevant statute of limitations. Both of these arguments fail. First, as to proper service, four days after the FAC was filed, both the Chairperson of the NTA and the Attorney General of the State of Nevada were served. *See* ECF Nos. 12–13. Service was in accordance with the statutory scheme found under NRS 41.031. Second, a statute of limitations does not apply when a party, as here, seeks prospective relief. *See City of Fernley v. State*, 366 P.3d 699, 707–08 (2016) (holding the same).

regarding the scope of the NTA's jurisdiction, SNT has failed to exhaust its administrative remedies and this matter is not ripe for judicial review. Specifically, the NTA points to administrative proceedings surrounding the citations SNT received on three separate occasions between July 12, 2020 and July 6, 2021 for not carrying a certificate of public convenience.

The ripeness doctrine defines the limits of this Court's jurisdiction to adjudicate certain disputes. *See, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) ("Ripeness reflects constitutional considerations that implicate 'Article III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction.'") (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)). Ripeness concerns prevent this Court from entangling itself in abstract disagreements by adjudicating disputes too early. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). For example, as a general rule, only "final agency action[s]" are subject to judicial review. *See Dalton v. Specter*, 511 U.S. 462, 469 (1994).

As such, in Nevada, before a party seeks judicial review of an agency's decision, it must first exhaust its administrative remedies; failure to do so deprives this Court of subject matter jurisdiction. *Malceon Tobacco, LLC v. State ex rel. Dep't of Taxation*, 59 P.3d 474, 475–76 (Nev. 2002). Still, exceptions exist to the exhaustion doctrine. First, a court has discretion not to require exhaustion of administrative remedies where the issues relate solely to the interpretation or constitutionality of a statute. *State of Nevada v. Glusman*, 651 P.2d 639, 644 (Nev. 1982). And second,

exhaustion is not required when a reliance on administrative remedies would be futile. *See Nevada Dep't of Taxation v. Scotsman Mfg. Co.*, 849 P.2d 317, 319 (Nev. 1993); *Saif Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 1441 (9th Cir. 1990).

Here, SNT, citing the second exception, maintains that the NTA's position on interstate versus intrastate travel has been settled and any attempt to argue otherwise via administrative processes would be futile. The SNT relies on the comments of the NTA Commissioner Asad who, at the conclusion of the July 22, 2020 hearing, told Lakeshore's counsel that:

> As I said at the beginning of this discussion, we do not have jurisdiction to interpret federal law that may be subject to more than one interpretation. So why don't you go to District Court, ask for a dec [sic] relief action, that will exhaust your administrative remedies, then you take that up to federal court. I mean, I'm not going to tell you how to practice law but that's what I would do.

ECF No. 9 at 12.

Based on this admission, it seems that the NTA Commissioners' position on the issue in question is already set. The NTA Commissioners made clear that the question of whether the NTA has jurisdiction over Lakeshore (and therefore SNT) cannot be determined by the NTA alone as it would require them to interpret federal law. Thus, according to the NTA, even if it had interpreted federal law, not only would the comments have been dicta (because they do not claim to have jurisdiction to conduct such an analysis), but it is likely that it would have reached a result maintaining

the status quo and found that Lakeshore's business constituted intrastate travel. Therefore, factual issues surrounding pending administrative proceedings will not change the NTA's legal position at issue in this matter. For these reasons, SNT is not precluded under the exhaustion requirement from raising its claims before this Court.

B. Section 1983 Immunity

In its amended complaint, SNT seeks declaratory and injunctive relief against the NTA, as well as reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1983 ("Section 1983"). ECF No. 9 at 17. In its motion to dismiss, the NTA argues that it is entitled to Section 1983 immunity because it is not a "person" as envisioned by the statute. ECF No. 11 at 18. In its opposition to the motion, SNT counters that individuals in their official capacities are appropriately named in Section 1983 claims if the plaintiff seeks prospective declaratory and injunctive relief. ECF No. 15 at 14. With that principle in mind, SNT asks this Court to allow it to amend its complaint to include individuals in their official capacity at the NTA. *Id.* at 15.

Section 1983 is an integral piece to the enforcement of federal constitutional rights. The statute authorizes private parties to sue municipalities, state and local officials, and other defendants who acted under color of state law. *See* 42 U.S.C. § 1983. Notably, Section 1983 authorizes claims for relief only against a "person" who has acted under color of state law. *Id.* Neither a state nor its officials acting in their official capacities are "persons" under Section 1983, and therefore the statute does not ordinarily provide a

cause of action against those entities or individuals. *Will v. Michigan State Police*, 491 U.S. 58, 71 (1989). However, the general rule is subject to one exception: when an individual in their official capacity is sued for prospective declaratory and injunctive relief, the action is properly brought under Section 1983. *Wolfe v. Strankman*, 392 F.3d 358, 365 (9th Cir. 2004); *see also Donrey Media Group v. Ikeda*, 959 F.Supp. 1280 (D. Haw. 1996) ("If the plaintiff asks the federal court to enjoin the official's future unconstitutional conduct, the Eleventh Amendment presents no bar, because unconstitutional actions by state officials cannot be authorized by a state.").

Here, SNT seeks declaratory and injunctive relief against the NTA: a political agency of the State of Nevada, not an individual state official. However, recognizing that it failed to name individuals in their official capacities at the NTA as required by Section 1983, SNT in its response states that, with leave of court "[it] could amend to substitute the Commissioners of the NTA Board as defendants in place of the NTA and proceed forward with its [claims]." ECF No. 15 at 18. Normally the Court would be inclined to grant SNT's request to amend its complaint. However, issues surrounding its substantive legal arguments, as discussed below, caution against granting such a request as it would merely lead to a futile filing. Therefore, because SNT has not raised claims against individuals in their official capacity at the NTA, the Court will dismiss the Section 1983 claims brought against the NTA.

C. The Commerce Clause and SNT's Motor Carrier Services

The crux of this matter surrounds the relationship between the Commerce Clause and the type of motor carrier services that SNT provides. The first amended complaint states that SNT's business consists of three types of bookings: (1) airline crews scheduled through a company in New York; (2) out-of-state business and vacation travelers booked by travel agents and other third-party companies; and (3) trips prearranged and paid for in advance directly by the passenger. ECF No. 9 at 3. The question before this Court is whether the character of those trips is such that they can be classified as interstate even though they do not cross state lines. If the trips are considered interstate travel as argued by SNT, the NTA may be foreclosed from regulating them under the Commerce Clause.

The Commerce Clause is violated when a state action "unjustifiably . . . discriminate[s] or burden[s] the interstate flow of articles of commerce." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013) (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994)). In the local transportation context, the "ultimate test" as to whether the interstate flow of articles of commerce is involved "is whether the local transportation service is an 'integral step in the interstate movement.'" *Mateo v. Auto Rental Co.*, 240. F.2d 831, 833 (9th Cir. 1957) (quoting *United States v. Yellow Cab. Co.*, 332 U.S. 219, 229 (1947), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)).

In answering this question, the Supreme Court in *United States v. Yellow Cab. Co.* examined whether the transportation of passengers between railroad stations in Chicago was considered interstate travel for the purposes of the Sherman Act. 332 U.S. at 228. At that time, passengers making interstate railroad trips through Chicago had to disembark from a train at one railroad station, travel to another railroad station blocks away, and board a different train. *Id.* To mitigate the difficulty of this task for its customers, the railroad companies contracted with a shuttle service to transport passengers and their luggage between railroad stations. *Id.* In evaluating the interstate character of these trips, the Court held that:

> When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character.

Id. at 228–29. In reaching this conclusion, the Supreme Court placed special emphasis on the fact that the shuttle service contracted exclusively with the railroad companies and did not provide its services to the general public. *Id.*

In a more modern context, the D.C. Circuit analyzed a similar situation in *Pennsylvania Public Utility Com. v. United States* involving airlines. 812 F.2d 8 (D.C. Cir. 1987). In that case, United Airlines contracted with a transport company to bring its employees from Baltimore Washington Airport to a hotel in Columbia, Maryland, and back again. *Id.* at 9. Normally, federal regulators do not have jurisdiction

over "transportation of passengers by motor vehicle incidental to transportation by aircraft." *Id.* at 11–13 (quoting 49 U.S.C. 13506(a)(8)(A)). Nevertheless, the Court found that the tips constituted interstate travel because there was an "explicit contract" with United Airlines and the transport company to take the airline employees to temporary accommodations before returning them to the airport to resume their interstate journey. *Id.* at 11. Like the Supreme Court in *Yellow Cab*, the D.C. Circuit found it relevant that United Airlines and the transport company had an exclusive arrangement to provide the travel at issue. *Id.*

Another division of this Court reached a similar conclusion in *Brown's Crew Car of Wyoming LLC v. Nevada Transp. Authority*, 2009 U.S. Dist. LEXIS 39469 (D. Nev. 2009). There, the Court evaluated whether a service that transports rail crews only in Nevada at the request of a railroad company constituted interstate commerce. *Id.* at *35. The Court found that because the rail-crew transportation service contracted only with the interstate rail carrier, and all of the services performed for the railroads were an integral part of the operation of the trains' interstate journey, then the services were wholly in interstate commerce. *Id.* The Court also found it material that the rail-crew transport service ensured that the trains operated under the requirements of federal law and union rules. *Id.*

With these legal principles and factual circumstances in mind, this Court finds that some aspects of SNT services constitute interstate travel, and some aspects of its services are intrastate travel. To start with, trips with airline crews scheduled through a company in New York directly involve interstate travel as

they implicate federal law and union rules as articulated in the case law above. As a result, the NTA concedes that it will not enforce its laws against SNT's trips that involve flight crews. ECF No. 11 at 12. Despite this concession, according to SNT's first amended complaint, the NTA imposed a $1,000 fine against it based on a trip involving a flight crew that was not in uniform and therefore there was no way for the NTA to know whether the passengers were pilots. ECF No. 9 at 13. However, that assertion, while true for the purposes of this order on the motion to dismiss, ultimately demonstrates the NTA's intent to not enforce its laws against trips clearly shown to involve airline crews. Accordingly, the Court finds that aspect of SNT's business is not implicated for the purposes of this matter.

Still, trips for out-of-state business and vacation travelers booked by travel agents and other third-party companies, and trips prearranged and paid for in advance directly by the passengers constitute intrastate travel properly regulated by the NTA. The Court reaches this conclusion because neither of these services involve a contract with an interstate transportation provider to accommodate its employees. *See Pennsylvania Public Utility Com.*, 812 F.2d 8 (D.C. Cir. 1987) (airlines); *Brown's Crew Car of Wyoming LLC*, 2009 U.S. Dist. LEXIS 39469 (D. Nev. 2009) (railroad companies). Rather, SNT contracts with these individual travelers to pick them up in Nevada and drop them off in Nevada. And while these transactions may occur across state lines, the purely local use of the actual transportation does not constitute interstate commerce. *See Mateo*, 240 F.2d

at 833 (stating that the determination whether plaintiff engaged in commerce "must be guided by practical considerations, not technical conceptions."). Consequently, the Court finds that SNT's transportation services for individuals that are not airlines crews are wholly intrastate and the Court will dismiss this action.

IV. Conclusion

IT IS THEREFORE ORDERED that the NTA's motion to dismiss (ECF No. 11) is GRANTED.

IT IS FURTHER ORDERED that the NTA's earlier motion to dismiss (ECF No. 5) is DENIED as moot.

IT IS SO ORDERED.

DATED this 18th day of May, 2022.

/s/ Larry R Hicks
United States District Judge

STATUTORY PROVISIONS

42 U.S.C. § 1983
Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985
Conspiracy to Interfere with Civil Rights

(1) Preventing Officer from Performing Duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any

State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing Justice; Intimidating Party, Witness, or Juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving Persons of Rights or Privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either

directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (SEPTEMBER 20, 2021)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SIERRA NEVADA TRANSPORTATION INC.,

Plaintiff,

v.

STATE OF NEVADA ex rel. its NEVADA TRANSPORTATION AUTHORITY,

Defendant.

Case No. 3:21-cv-00358-LRH-CLB

COMES NOW Plaintiff Sierra Nevada Transportation Inc., by its counsel, Law Offices of Mark Wray, and for its First Amended Complaint against Defendant State of Nevada ex rel. its Nevada Transportation Authority alleges as follows:

JURISDICTION

1. This Court has jurisdiction of this action under 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States, specifically, the United States Constitution, Article I, Section 8, Clause 3 ("Commerce Clause") and the Motor Carrier Act, including 49 U.S.C. § 13501, which confers

jurisdiction on the Federal Motor Carrier Safety Administration ("FMCSA") to regulate interstate motor carrier transportation, and 42 U.S.C. §§ 1983 and 1988, which remedy violations of rights secured by the Constitution and laws of the United States by persons acting under the color of state law.

2. As a result of having jurisdiction over this matter, this Court may declare the rights and legal relations of Plaintiff and Defendant under the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and order appropriate injunctive relief pursuant to 42 U.S.C. § 1983.

VENUE

3. Venue is proper under 28 U.S.C. § 1391(b)(1), because Defendant is domiciled in the District of Nevada, where the acts alleged herein occurred, and Plaintiff Sierra Nevada Transportation ("SNT") is a Nevada corporation doing business in Washoe County, Nevada whose rights were violated in Nevada.

PARTIES

4. Plaintiff Sierra Nevada Transportation, Inc. ("SNT") is a corporation duly organized and existing under the laws of the State of Nevada registered as a foreign corporation in the State of California whose principal office, place of business and commercial domicile is located in South Lake Tahoe, California.

5. Defendant State of Nevada ex rel. its Nevada Transportation Authority ("NTA"), is an administrative agency of the Department of Business and Industry of the State of Nevada which regulates intrastate

motor passenger transportation under Chapter 706 of Nevada Revised Statutes.

FACTS

6. SNT operates an airport limousine service providing ground transportation by prearranged trips for passengers traveling in interstate commerce to and from Reno-Tahoe International Airport ("Reno airport") in Reno, Nevada. SNT also operates to and from Sacramento International Airport, San Francisco International Airport and various private jet centers in both Nevada and California.

7. At all relevant times, SNT has been properly registered with the FMCSA pursuant to 49 U.S.C. § 13902 as a motor passenger carrier with permits USDOT 3306211 and MC1049408. These permit numbers are placed on each of SNT's vehicles.

8. At all relevant times SNT has been appropriately registered with the California Public Utilities Commission for prearranged ground transportation under permit number TCP0038729.

9. SNT's business consists of three types of bookings to and from Reno Tahoe airport:

(a) airline crews scheduled through a company in New York,

(b) out-of-state business and vacation travelers booked by travel agents or other third party companies; and

(c) trips prearranged and paid for in advance directly by the passenger.

10. In the case of airline crews, SNT's pick-ups are scheduled by a company in New York that contracts directly with the airlines. SNT typically picks up the airline crew at the Reno airport as scheduled and transports the crew to a hotel in Reno, returning as scheduled to transport the crew back to the airport. The New York company takes all reservations and sends SNT a schedule two weeks in advance for the following month. For example, SNT receives the schedule for the entire month of February on January 15th. The New York company bills the airlines and pays SNT typically about 30 to 45 days after the month is complete.

11. In the case of prearranged trips booked by travel agencies or other third parties for out-of-state business and vacation travelers, these trips are booked through national and international third party ground transportation companies, travel agents, casinos, medical transportation providers and others. The travel is arranged and paid for by the third party companies. The third party company sends SNT a schedule for transporting the client to and from the airport in Reno. On occasion the schedule will consist of a pick-up at Reno airport and travel to a hotel, then at a later time in the same day or next day, a pick-up from the hotel for a meeting, and from the meeting back to the airport. Occasionally when conventions are in town, a charter is pre-arranged, weeks to a few days in advance, as directed, for a 6-to-12 hour block each day for several days and then back to the airport. In the case of Harrah's Casino at Lake Tahoe, for example, Harrah's prearranges a package which includes a pick-up at Reno airport to the hotel and then the return trip to the airport. All these third parties bill

the customers. SNT is paid monthly, usually 30-45 days after the end of the month in which the trips occur.

12. On rare occasions, prearranged transportation is booked in advance directly by a passenger. SNT will receive a call directly from a passenger who is traveling from out-of-state who wishes to prearrange ground transportation from the airport to a hotel or resort, or the passenger is already in the Reno area and wishes to prearrange transportation to the airport to fly out-of-state. In most cases such arrangements are made weeks or months in advance, though they are sometimes arranged a day or two in advance. Nevertheless, the pick-up is prearranged and paid for in advance as one leg of an interstate trip.

13. Plaintiff does not advertise or operate a taxi service for the public or pick up random fares for trips to points around Reno or any other community.

14. In each instance where SNT transports a passenger to or from Reno airport, it is one leg of a continuous interstate journey involving air and ground transportation that is prearranged in advance.

15. SNT's prearranged bookings result in passengers being transported by SNT from the Reno airport to a destination either in California or in Nevada.

16. If the prearranged ground transportation provided by SNT is from the Reno airport to a point in Nevada, SNT's leg of the trip may be within a single state, but it is a segment of a continuous, prearranged interstate journey for the passenger, and SNT is therefore operating its leg of the trip in interstate commerce.

17. Since the late 1970's, when motor carrier regulatory reform was begun, there have been numerous cases filed by carriers seeking declaratory and injunctive relief on the basis that their single state transportation is interstate and thus subject to regulation exclusively by federal, not state, agencies.

18. A long-established and consistent body of case law supports SNT's assertion that prearranged transportation of passengers to and from Reno airport is but one segment of a continuous interstate journey, and thus subject only to regulation by the FMCSA. These precedents include:

(a) *Southerland v. St. Croix Taxicab Association*, 315 F.2d 364 (3rd Cir. 1963). In *Southerland* the court held that transporting passengers between the airport and their hotels in St. Croix pursuant to prearranged contracts with third parties, including travel agents and others, was the continuation of an interstate trip and that the attempt to restrict transportation from the airport solely to a local taxi company registered with the territorial government violated the Commerce Clause of the United States Constitution.

(b) *Charter Limousine, Inc. v. Dade County Board of County Commissioners*, 678 F.2d 586 (5th Cir. 1982). Dade County granted an exclusive franchise to a local taxi company for ground transportation of passengers from the airport. The plaintiff was a limousine service operating through a nationwide system that scheduled pickups of passengers arriving on interstate flights whose ground transportation was prepaid as part of a tour package

or other prearrangement. The court held that the plaintiff was operating within the stream of interstate commerce and Dade County's attempt to prevent the plaintiff from operating at the airport violated the Commerce Clause.

(c) *Pennsylvania Public Utility Commission v. ICC*, 812 F.2d 8 (D.C.Cir. 1987). The plaintiff provided ground transportation pursuant to a contract with United Airlines to take flight crews from the airport to overnight accommodations in the same state. The court held this service was interstate commerce and exempt from the state's ability to regulate.

(d) *Walters v. Am. Coach Lines of Miami, Inc.*, 575 F.3d 1221, 1224-25 (11th Cir. 2009). A private motor carrier holding all the authorizations from the FMCSA necessary to be an interstate passenger motor carrier was providing transportation primarily within the state of Florida by shuttling cruise ship passengers between the airports in Miami and Fort Lauderdale and local hotels and cruise ship ports pursuant to a written contract with the cruise lines. Ground transportation was included as part of the overall cruise package and not priced separately. The cruise lines would provide the motor carrier with weekly manifests listing the expected time, date, and number of passengers for each shuttle trip. The carrier received all of its payments from the cruise lines rather than the passengers. The court

found that single-state transportation between the airport and a cruise ship and between cruise ships and hotels and airports all were interstate because of agreements with travel agents and cruise lines contemplating that ground transportation would be but one segment in a continuous interstate or international move.

(e) *East West Resort Transportation v. Binz*, 494 F.Supp.2d 1197 (D.Colo. 2007). Plaintiff was a federally licensed motor carrier of passengers operating exclusively in Colorado, providing transportation to and from Denver International Airport and Eagle Airport to and from various Colorado ski resorts. The state attempted an enforcement action against the carrier for charging and advertising rates different than those approved and on file with the state. The carrier sued for declaratory relief pursuant to 42 U.S.C. § 1983 and sought attorneys fees pursuant to 42 U.S.C. § 1988 for violation of its rights under the Commerce Clause on the basis that the state lacked jurisdiction because its authority was preempted by federal law. The court granted the declaratory relief sought by the carrier, noting that "[t]here is no genuine dispute here that passengers traveling from outside of Colorado to a ski resort do not end their journey at the airport, they end their interstate journey at the resort . . . This kind of prearranged system, like that in Charter Limousines, is sufficiently linked to the

overall interstate journey to qualify as interstate."

(f) *Brown's Crew Car of Wyo. LLC v. Nevada Transportation Authority*, 2009 U.S. Dist. LEXIS 39469; 2009 WL 1240458 (D.Nev. 2009). In *Brown,* the NTA failed in its attempt to enforce Chapter 706 of Nevada Revised Statutes against another interstate motor carrier in Nevada. The plaintiff, a motor carrier licensed by the FMCSA, operated in Nevada under contract with Union Pacific Railroad to transport relief crews to the rail line. Vehicles were dispatched from a centralized operations center in Kansas. The NTA sought to regulate the plaintiff's operations, and the plaintiff filed suit in federal court seeking declaratory and injunctive relief. Citing to *Southerland, Charter Limousine* and *Pennsylvania PUC, supra*, Chief U.S. District Judge Roger L. Hunt held that the plaintiff's services were an integral part of the train's interstate journey and wholly in interstate commerce, thus subjecting the plaintiff to regulation exclusively by the FMCSA and not by the NTA.

19. In general, the federal regulatory scheme for motor carriers promotes competition in interstate commerce, encourages free market entry and requires less ongoing regulatory compliance, in comparison to the highly restrictive regulatory scheme adopted by the state of Nevada and administered and enforced by the NTA.

20. Under the Nevada regulatory framework, the NTA oversees a system that considers competition as potentially "detrimental to the . . . motor carrier business" in the state (NRS 706.151(e)). Hence, while obtaining federal licensing is relatively simple, the state imposes difficult, costly, and time-consuming hurdles to obtaining a certificate of public necessity and convenience or a permit to operate as a contract carrier.

21. SNT's principal Priscilla Wilson spent years unsuccessfully attempting to obtain a certificate of public convenience and necessity through SNT's predecessor company, Lakeshore Pacific Enterprises, Inc. ("Lakeshore"), a federally-licensed limousine company serving Reno airport. Trying to get a permit to operate from the NTA is only one of many daunting obstacles under a system that values protectionism over competition.

22. SNT is informed and believes that several years ago officials of the NTA attended a training course sponsored by the FMCSA to educate the state officials on the scope of federal preemption in interstate commerce for motor carriers. Perhaps out of respect for the long line of judicial precedents, some of which are mentioned above, the NTA did not attempt to enforce its regulatory powers against companies providing prearranged ground transportation as one leg of a continuous interstate trip.

23. In August of 2018, however, an NTA investigator paid a visit to one of Lakeshore's customers, Caesars Entertainment, which at that time owned Harrah's, and told the transportation manager for Harrah's that it was unlawful for Lakeshore to deliver passengers point-to-point in Nevada from the Reno

airport to Harrah's and return. As a result of this NTA investigator's visit, Caesars Entertainment ceased booking travel through Lakeshore for a period of time thereafter.

24. On July 15, 2019, the NTA sent a communication to companies, including SNT's predecessor, Lakeshore, that operated limousine services from Reno airport. Dave Gravel, a supervisory investigator for the NTA, wrote:

> *I'm sending you a quick email to let you know that our agency has had much discussion about interstate versus intrastate transportation – especially when it involves the airport.*
>
> *We have had some lengthy internal discussions, and what we have decided will be our enforcement direction moving forward is this:*
>
> *ANY land transportation which begins in Nevada (even if it is at the Airport) and terminates at another location in Nevada (even if THAT is at the airport) will be considered INTRAstate transportation (Point to point within Nevada) – subject to citation and the impoundment of the vehicle used for any non-certificated carrier. I believe that you were previously given an opinion that if the pickup or drop off was at the Airport for an out-of-state traveler, and that land transportation was pre-arranged to go to or arrive from a hotel in Nevada, that would be considered interstate transportation. This*

> *opinion will not be the [sic] our enforcement stance moving forward.*
>
> *Please understand that after much discussion, that is not going to be the view of our agency moving forward, and we will immediately begin enforcing the Nevada Statutes in the manner described – which is ANY point to point trips within Nevada require certification from the Nevada Transportation Authority. Although you may feel differently, I feel it is important for you to understand how our enforcement will be handled moving forward.*

25. In response to Investigator Gravel's email, and pursuant to Nevada Administrative Code ("NAC") § 706.980, which allows the NTA to "consider applications for declaratory orders or advisory opinions concerning the applicability of any statutory provision or any regulation or decision of the Authority," on January 23, 2020, Lakeshore formally requested for a declaratory order or advisory opinion from the NTA Board of Commissioners. The Commissioners at that time were George Assad, Dawn Gibbons and David Newton. After citing provisions of constitutional, statutory and case law, Lakeshore's request stated:

> *My client is challenging the constitutionality, enforceability and validity of the NTA's new direction as applied to my client's limousine business. My client transports travelers from Reno Tahoe Airport to various destinations in California and Nevada pursuant to common third-party booking of prearranged and prepaid transportation. The passengers are interstate travelers along the entire route until they reach their destination. Accordingly,*

the entirety of the trip is in interstate commerce. The service provided by my client is controlled by federal law. The NTA may not require certification from my client.

Because my client is challenging the NTA's new direction as applied to my client's services, I have advised my client to first exhaust any administrative remedies it may have before pursuing its other remedies. To the extent NAC 706.780's [sic] provision for a declaratory order or advisory opinion is considered an administrative remedy, my client wishes to apply for that remedy. It is our understanding that this request pursuant to NAC 706.780 [sic] shall be considered at your next regular meeting. Please advise us of the date, time and place of the meeting so that we may introduce ourselves to the Commission and appear before you to support our application. Thanks in advance for your anticipated cooperation and we look forward to hearing from you.

26. At its July 22, 2020 hearing, the NTA Commissioners voted to deny Lakeshore's request for a declaratory order or advisory opinion. The NTA Commissioners were guided by their legal counsel, who spoke at the hearing and emphatically asserted that the NTA can only issue declaratory orders or advisory opinions as to Nevada law. The Commissioners and their counsel proclaimed during the hearing and on the record that the NTA lacks jurisdiction to interpret federal law, and specifically, lacks jurisdiction to interpret whether federal law pre-empts state law.

27. At the conclusion of the July 22, 2020 hearing, Commissioner Asad told Lakeshore's counsel:

> *As I said at the beginning of this discussion, we do not have jurisdiction to interpret federal law that may be subject to more than one interpretation. So why don't you go to District Court, ask for a dec relief action, that will exhaust your administrative remedies, then you take that up to the federal court. I mean, I'm not going to tell you how to practice law but that's what I would do.*

28. The official position of the NTA is therefore that the NTA is powerless to interpret federal law and that the NTA lacks jurisdiction to opine on whether the NTA's attempt to enforce state regulations against SNT violates the Commerce Clause of the United States Constitution.

29. The NTA's refusal to acknowledge the applicability of the United States Constitution and well established federal law, and the NTA's official position that it cannot offer an opinion on federal law, has consequences for this action. To defend against SNT's instant *Complaint for Declaratory and Injunctive Relief* would require the NTA to take a legal position on the interpretation of federal law, which, according to the NTA Commissioners and their legal counsel, the NTA cannot do. The NTA is therefore unable to contest, debate or otherwise defend this action. Specifically, the NTA cannot present any challenge to the applicability of the federal Constitutional, statutory and case law on which SNT's instant complaint is based.

30. Looking solely at state law, the NTA asserts as its policy, practice and custom that under NRS Chapter 706, that to the extent SNT's service involves motor transportation wholly between two points in Nevada (i.e., does not cross a state line), such transportation is considered "intrastate" rather than "interstate" and therefore is subject to NTA registration, licensing, rate and other regulatory requirements, without regard to any federal law to the contrary.

31. SNT and other limousine companies with federal licensing authority therefore must attempt to keep operating under the constant threat that under the NTA's policy, practice and custom, their vehicles will be impounded, their drivers detained, and their companies fined for being engaged in alleged "intrastate" commerce without the permission of the NTA.

32. On July 12, 2020, SNT picked up a flight crew at Reno airport according to SNT's standard prearranged contract with the airline provided ground transportation to the crew's hotel. For this trip, the NTA issued SNT a citation for not having the NTA's certificate of public convenience and necessity. At the ensuing hearing, proof was shown that the passengers were pilots, though they were deadheading and thus not wearing uniforms. The NTA nonetheless imposed a $1,000 fine, asserting that the flight crew was not in uniform and thus there was no way for the NTA to know whether the passengers were actually pilots.

33. On July 6, 2021, NTA investigators observed a vehicle owned and operated by Sunset Limousine ("Sunset") at Reno airport. Sunset operates in interstate commerce in essentially the same manner as SNT. In his report, the NTA investigator stated that Sunset's owner "has been advised several times that he is not

to provide intrastate passenger transportation services to include point to point transportation from the Reno Tahoe International Airport to another location within the state of Nevada." After detaining the vehicle, two NTA investigators confronted the female passenger, who advised them that she had made arrangements through a travel agency for transportation from Reno airport to Edgewood Resort at Lake Tahoe, Nevada. Her statement was confirmed by paperwork in the vehicle. The two investigators impounded the vehicle and issued a citation for operating without a certificate of public necessity from the NTA. Sunset also was cited for unlawful "Advertising without a valid CPN" because Sunset's website allegedly states that it transports to other locations in Nevada from Reno airport.

34. Also on July 6, 2021, on a round trip prearranged and paid for by Harrah's Casino, SNT picked up an NBC employee at Reno airport who had flown in from Portland for the celebrity golf tournament at Lake Tahoe, Nevada. SNT provided the ground transportation for the NBC official up to Lake Tahoe. On the return trip on July 12, 2021 for his flight back to Portland, the NTA detained SNT's driver and impounded the vehicle at the airport while issuing a citation for engaging in alleged "intrastate" transportation from one point in Nevada to another point in Nevada without having a certificate of public convenience and necessity from the NTA. The citation was also issued for "unlawful advertising" for not having a certificate of public convenience and necessity. A towing fee of $460 had to be paid to retrieve the vehicle from impound and SNT is facing an additional fine.

DECLARATORY AND INJUNCTIVE RELIEF

35. After SNT filed its complaint in this action, the NTA granted SNT's request to postpone the hearing on the July 12, 2021 citation involving the Portland passenger, which had been scheduled to be heard August 18, 2021. The hearing on the citation was postponed specifically due to the pendency of the instant action seeking a declaration of the rights of SNT and NTA with respect to prearranged interstate travel.

36. As a result of the NTA's unlawful policy, practice and custom to regulate SNT's interstate transportation services, SNT is subjected to the ongoing threat of harm, by having its vehicles impounded and paying fines for engaging in lawful and federally-licensed business activity. SNT is also subject to ongoing harm in the uncertainty that SNT faces in its ability to solicit customers for additional contracts for the transportation of passengers which involves going between two points in Nevada. SNT is therefore losing potential future revenues it would otherwise earn by being able to solicit the business of customers going from the airport to Lake Tahoe or to destinations in Reno or elsewhere in Nevada.

37. The NTA's unconstitutional enforcement policy prevents SNT from taking advantage of the benefits to be expected as a federally-licensed motor carrier, set forth in the National Transportation Policy at 49 U.S.C. § 13101, such as the opportunity to make the most productive use of its equipment resources, the opportunity to earn adequate profits, and the opportunity to be a part of a sound, safe, and competitive privately owned motor carrier system.

38. SNT has been deprived of rights secured by the Constitution and laws of the United States by the NTA's policy and practice of regulating interstate commerce by issuing citations, impounding vehicles, and requiring payments of fines and impound fees for operating as an interstate motor carrier without the NTA's certificate of public convenience and necessity.

39. The NTA has formally pronounced, as a matter of policy and practice, that no challenge to the NTA's authority by SNT will be countenanced, that SNT must seek relief in district court if it wants any relief and at all, and therefore, SNT has no adequate legal remedy aside from the declaratory and injunctive relief sought in this action.

40. Declaratory relief is proper because the case is ripe for decision and SNT is being subjected to an ongoing threat on a daily basis of unlawful impoundment of its property and prevention of its ability to do business in plain violation of the law.

41. A substantial controversy exists on a substantive dispute between SNT and the NTA as to the scope of the U.S. Constitution's Commerce Clause and its protection of SNT from purported regulation by the NTA.

42. SNT and the NTA have adverse legal interests in that SNT seeks to operate without regulation by the NTA and the NTA seeks to regulate SNT's operations.

43. The parties' dispute is sufficiently immediate and real to warrant the issuance of a judgment, which the NTA has recognized by officially inviting SNT to obtain a district court decision as to the rights and liabilities of the parties.

44. SNT requests that this Court declare that SNT's transportation, including but not limited to transportation from point-to-point within Nevada as part of a passenger's single, continuous interstate journey, as set forth above, is transportation in interstate commerce within the meaning of the Motor Carrier Act, as amended, and therefore, the NTA is violating the Constitutional rights of SNT by impounding SNT's vehicles and issuing fines against SNT on grounds that SNT must obtain a certificate of public convenience and necessity.

45. SNT requests that the Court issue a permanent injunction, prohibiting the NTA from taking any enforcement action of any nature against SNT for conducting its business as set forth herein.

46. SNT has incurred attorneys fees and costs in bringing this action for vindication of its civil rights and is entitled to award of reasonable fees and costs pursuant to 42 U.S.C. § 1988.

WHEREFORE, SNT respectfully prays:

1. For judgment in its favor and against the NTA;

2. For a judicial declaration that SNT's transportation, including but not limited to transportation from point-to-point within Nevada as part of a passenger's single, continuous interstate journey, as set forth above, is transportation in interstate commerce within the meaning of the Motor Carrier Act, as amended, and therefore does not require a certificate of public convenience and necessity from the NTA and which

renders SNT subject to exclusive jurisdiction of the FMCSA as to licensing;

3. For a preliminary and permanent injunction, restraining and enjoining the NTA, its agents, servants, employees and all persons in active concert and participation with them from seeking to enforce, by any means, NTA licensing requirements for motor contract carriers under the Nevada Revised Statutes and the Nevada Administrative Code applicable to the operations of licensed carriers in a manner inconsistent with this Court's declaratory judgment;
4. For reasonable attorneys fees;
5. For costs of suit; and
6. For all other appropriate relief.

LAW OFFICES OF MARK WRAY

By /s/ Mark Wray
Attorneys for Plaintiff
Sierra Nevada Transportation, Inc.

DATED: September 20, 2021