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STATE OF WASHINGTON
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NO. 83745-7

SUPREME COURT OF THE STATE OF WASHINGTON

ZDI GAMING, INC.,

Respondent,

v.

THE STATE OF WASHINGTON, by and through the
WASHINGTON STATE GAMBLING COMMISSION,

Petitioner.

**SUPPLEMENTAL BRIEF OF PETITIONER
THE STATE OF WASHINGTON AND THE WASHINGTON
STATE GAMBLING COMMISSION**

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I. NATURE OF THE CASE

This case arises out of an ongoing effort to evade Washington's ban on slot machines. As part of that effort, Respondent ZDI Gaming, Inc. ("ZDI") created an electronic pull-tab dispensing device that mimics the looks, sounds, and play of a modern electronic slot machine. The Washington State Gambling Commission (the "Commission"), consistent with its constitutional and statutory mandates to narrowly construe The Gambling Act (the "Act"), issued a Final Declaratory Order holding that the device did not comply with the regulations governing pull-tab gambling activities. On August 25, 2009, the Court of Appeals, Division II, issued an opinion overturning the Final Declaratory Order. For the reasons addressed below, the Court of Appeals' decision was in error.

This case presents the following issues:

1. Did the Court of Appeals err in holding: a) that the clear and unambiguous term "jurisdiction," as used in RCW 9.46.095,¹ must be construed to mean "venue" in order to be constitutional; and, b) that Pierce County Superior Court had jurisdiction to hear this matter?

2. Did the Court of Appeals err when it substituted its own definition of the term "cash" for that of the Commission, after previously acknowledging that the Commission's existing regulatory definition of

¹ RCW 9.46.095 provides that no court, other than the Thurston County Superior Court, has jurisdiction to hear "any action or proceeding" against the Commission.

that term was reasonable, within its scope of authority, consistent with the Act, and entitled to substantial deference?

3. Did the Court of Appeals err by: a) shifting the burden of proof from ZDI to the Commission; and, b) holding that the Commission's Final Declaratory Order was not supported by substantial evidence?

II. STATEMENT OF THE CASE

A. Applicable Constitutional And Statutory Provisions.

Article II, section 26 of the Washington State Constitution vests the Legislature with exclusive authority to waive or limit the State's sovereign immunity. Moreover, statutes enacted by the Legislature that condition or limit sovereign immunity, such as RCW 9.46.095, must be narrowly construed in favor of the State.² Additionally, Washington's people, laws, and courts have long recognized that gambling is a social and economic evil that the Legislature has plenary authority to prohibit or strictly limit. Washington State Const. art. II, § 24; RCW 9.46.010.³ In fact, as adopted in 1889, article II, section 24 of the State Constitution banned all gambling. It was not until 1973 that the Legislature, acting pursuant to a 1972 amendment to the Constitution, enacted the Act

² *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992); *Klickitat Co. v. State*, 71 Wn. App. 760, 765, 862 P.2d 629 (1993).

³ *State ex rel. Schafer v. Spokane*, 109 Wash. 360, 362-63, 186 Pac. 864 (1920) (quoting *Ex Parte Dickey*, 76 W.Va. 576, 85 S.E. 781 (1915)); *Northwest Greyhound Kennel Ass'n, Inc. v. State*, 8 Wn. App. 314, 320, 506 P.2d 878, review denied, 82 Wn.2d 1004 (1973).

(Chapter 9.46 RCW), which permits some limited forms of gambling under highly regulated circumstances.⁴ In multiple sections of the Act, the Legislature specifically prohibited the use of gambling devices in general, and slot machines in particular. *See, e.g.*, RCW 9.46.0241, .215, .231.

B. Factual History.

1. ZDI's "faux" slot machine.

ZDI manufactures and distributes the "VIP," a device that electronically dispenses and reads pull-tabs,⁵ while mimicking the sounds and displays of an electronic slot machine. AR 411, ¶¶ 6, 8. In March, 2005, as part of an on-going effort to convert a pull-tab dispenser into the functional equivalent, for player purposes, of a slot machine, ZDI asked Commission staff to review⁶ a new version of the VIP device that would electronically credit pull-tab winnings to a "cash card" purchased from a pull-tab retailer. After examining the device, Commission staff concluded that the cash card proposal did not comply with the definition of "cash," as

⁴ Article II, section 24, as amended, continues to prohibit all gambling, absent approval of a supermajority vote of either the Legislature or the electorate.

⁵ A pull-tab is a paper ticket or "tab" that conceals numbers or symbols from view until opened or revealed. WAC 230-14-010. Certain numbers or symbols in each series of pull-tabs are predetermined prize winners. *Id.*; AR 410, ¶ 2. The traditional game of pull-tabs, when operated and played in accordance with all applicable state laws and regulations, is an authorized gambling activity in Washington. RCW 9.46.070, .110. The Act defines "pull-tabs" to be the game as it existed in July 1973, and then expressly authorizes the Commission to revise and further define the game through its regulations. RCW 9.46.0273. Such a regulation, former WAC 230-30-070(1) (repealed effective December 31, 2007), required that pull-tab prizes be paid "in cash or in merchandise."

⁶ The Commission does not license pull-tab dispensing devices.

that term was used in former WAC 230-30-070(1). AR 21-23.

2. The administrative proceedings.

On September 21, 2005, ZDI filed a Petition for Declaratory Relief. AR 1-7. An Administrative Law Judge (“ALJ”) subsequently issued an order holding that “cash,” as used in the regulations, meant “currency or a universally accepted currency substitute” and that ZDI’s cash card proposal did not satisfy the “universally accepted” requirement. AR 420, ¶¶ 16, 17. After considering ZDI’s subsequent Petition for Review, the Commission entered a Final Declaratory Order upholding the ALJ’s findings and conclusions on that issue. AR 961-65.

3. The Petition for Judicial Review.

On September 11, 2006, ZDI appealed the Final Declaratory Order to Pierce County Superior Court. CP 348-59.⁷ The Commission moved to dismiss based on RCW 9.46.095, which provides that Thurston County Superior Court has exclusive jurisdiction over actions against the Commission. CP 327-42. The court denied the motion, holding that RCW 9.46.095 relates to venue rather than jurisdiction, and transferred the case to Thurston County Superior Court. CP 4-5; 12/1/06 RP 14-15. The

⁷ Shortly thereafter, the Commission, citing RCW 9.46.095, notified ZDI that Pierce County Superior Court did not have jurisdiction to hear the matter and offered ZDI the opportunity to timely re-file the case in Thurston County. *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Comm’n*, 151 Wn. App. 788, 799 (2009); CP 6-7, 9. Despite having received fair and timely notice of this jurisdictional defect, ZDI specifically declined to refile the lawsuit. *Id.*

Thurston County court subsequently reversed the Final Declaratory Order and the Commission timely appealed. CP 1046-47.

On August 24, 2009, the Court of Appeals, Division II, issued an opinion upholding the ultimate result in the Thurston County Superior Court's decision. *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Comm'n*, 151 Wn. App. 788 (2009). The court held that article IV, section 6 of the State Constitution required that the term "jurisdiction," as used in RCW 9.46.095, must necessarily be construed to mean "venue" in order for that statute to be constitutional. *Id.* at 804-5. The court further held that the Commission's determination that ZDI's cash card proposal did not comply with the regulatory definition of "cash" was not supported by substantial evidence. *Id.* at 809-10. This Court issued an order granting the Commission's Petition For Review on March 3, 2010.

III. ARGUMENT

A. **The Court Of Appeals' Decision Fails To Recognize The Legislature's Right To Condition Waivers Of Sovereign Immunity And To Harmonize Applicable Jurisdictional Provisions Of The State Constitution.**

1. **Article II, section 26 grants the Legislature the exclusive authority to condition the State's sovereign immunity.**

Article II, section 26 of the Washington Constitution authorizes the Legislature to "direct by law, in what manner, **and in what courts**, suits may be brought against the state." (Emphasis added). It grants the

Legislature the exclusive authority to waive or condition the state's sovereign immunity.⁸ Waivers of sovereign immunity are strictly construed in favor of the sovereign. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34, 112 S. Ct. 1011, 117 L.Ed. 2d 181 (1992). Consequently, statutes that condition or limit a state's waiver of sovereign immunity should not be interpreted more broadly than the statutory language requires. *Klickitat County v. State*, 71 Wn. App. 760, 765, 862 P.2d 629 (1993). When a statute provides a conditional, partial waiver of sovereign immunity, the party seeking relief against the state must do so "in the manner provided by the statute." *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 52, 905 P.2d 338 (1995) (quoting *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 575, 403 P.2d 880 (1965)).

Exercising the authority granted by article II, section 26, the Legislature enacted RCW 9.46.095 to conditionally limit the State's waiver of sovereign immunity for actions against the Commission. RCW 9.46.095 provides, in pertinent part, that:

⁸ This Court has long recognized the Legislature's exclusive authority under article II, section 26 of the State Constitution to limit the State's waiver of sovereign immunity by specifying which courts shall have jurisdiction over claims against the State. *See State ex rel. Shomaker v. King County Superior Court*, 193 Wash. 465, 469, 76 P.2d 306 (1938) ("[I]t is well settled that an action cannot be maintained against the state without its consent, and when the state does so consent, it may fix the forum in which it may be sued."); *see also O'Donoghue v. State*, 66 Wn.2d 787, 789, 405 P.2d 258 (1965) ("Since the state, as sovereign, must give the right to sue, it follows that it can prescribe the limitations upon that right.")

No court of the state of Washington other than the superior court of Thurston county shall have jurisdiction over any action or proceeding against the commission or any member thereof for anything done or omitted to be done in or arising out of the performance of his or her duties under this title: PROVIDED, That an appeal from an adjudicative proceeding involving a final decision of the commission to deny, suspend, or revoke a license shall be governed by chapter 34.05 RCW, the Administrative Procedure Act.

(Emphasis added). For all actions or proceedings against the Commission that fall outside the scope of the narrowly drafted proviso,⁹ RCW 9.46.095 supplies both the basis for subject matter jurisdiction and a concomitant waiver of sovereign immunity in the superior court of Thurston County. *See United States v. Park Place Assoc., Ltd.*, 563 F.3d 907, 924, (9th Cir. 2009) (“[T]he theory of sovereign immunity under which a court entertains a suit...against the government may limit, or perhaps even determine, the venues in which there is subject matter jurisdiction.”¹⁰

⁹ Contrary to ZDI’s assertions, this case does not involve a decision to deny, suspend, or revoke a license. *See Answer to Petition at 4-6.* This matter is an administrative declaratory judgment action seeking a declaration regarding the meaning of the regulatory term “cash.” *ZDI Gaming, Inc.*, 151 Wn. App. at 798-800. The Commission licenses machine *manufacturers and distributors*, but does not license the equipment itself. *Compare* RCW 9.46.310 (requiring gambling equipment manufacturers and distributors to hold a license) and WAC 230-16-001 (burden is upon manufacturers and distributors to ensure that gambling equipment complies with Washington’s gambling laws and regulations). Accordingly, this case does not fall within the exception contained in RCW 9.46.095 and the APA venue provisions are not applicable.

¹⁰ A waiver of sovereign immunity means the government is amenable to suit in a court properly possessing jurisdiction; it does not guarantee a forum. *Park Place Assoc.* at 923. “Conversely, the mere existence of a forum does not waive sovereign immunity.” *Id.* at 924. Absent a waiver of sovereign immunity, the government and its agencies are shielded from suit. *FDIC v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). The terms of the government’s consent to be sued in any court defines that

Contrary to article II, section 26, and the requirement that waivers of sovereign immunity be narrowly interpreted in favor of the State, the Court of Appeals erroneously concluded that a “constitutional reading” of RCW 9.46.095 requires that the clearly stated term “jurisdiction” be construed to mean “venue.” *ZDI Gaming, Inc.*, 151 Wn. App. at 804. In reaching this conclusion, the Court of Appeals failed to recognize that the State’s consent to be sued in Thurston County superior court, set forth in RCW 9.46.095, delineates that court’s jurisdiction to entertain such suits. *See FDIC v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L.Ed.2d 308 (1994).

2. Article II, section 26 and article IV, section 6 can be harmonized to support the jurisdictional requirement of RCW 9.46.095.

The Court of Appeals relied upon *Shoop v. Kittitas County*,¹¹ and *Dougherty v. Dep’t of Labor & Indus.*¹² to conclude that the term “jurisdiction” must be interpreted to mean “venue.” *ZDI Gaming, Inc.*, 151 Wn. App. at 802-3. In reaching this result, the court erroneously reasoned that granting a superior court exclusive jurisdiction over claims against the Commission would conflict with article IV, section 6. *Id.* The court, however, failed to recognize that determining the meaning of the

court’s jurisdiction to entertain the suit. *Id.* Sovereign immunity is, therefore, jurisdictional in nature.” *Id.*

¹¹ 149 Wn.2d 29, 65 P.3d 1194 (2003).

¹² 150 Wn.2d 310, 76 P.3d 1183 (2003).

term “jurisdiction” in RCW 9.46.095 necessarily required the court to harmonize the meanings of article II, section 26 and article IV, section 6.

When confronted with competing constitutional provisions, each provision “must be interpreted in the light of the entire document, and not sequestered from it, and none is to be considered alone.” *Northshore Sch. Dist. No. 417 v. Kinnear*, 84 Wn.2d 685, 714, 530 P.2d 178 (1974), *overruled on other grounds by Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978) (citations omitted). The court “while giving full effect to all provisions of the constitution,” must “harmonize whenever possible any seeming conflicting provision so the whole constitution is left intact.” *Kinnear*, 84 Wn. 2d at 715. Although past decisions of this Court have relied upon either article II, section 26 or article IV, section 6 in determining whether a statute controls jurisdiction or venue, the application of these two provisions to RCW 9.46.095 can be harmonized to readily uphold the statute’s jurisdictional requirement.

a. Prior decisions of this Court.

In *State ex rel. Shomaker v. King County Superior Court*, 193 Wash. 465, 76 P.2d 306 (1938), this Court considered whether Rem. Rev. Stat. § 886, a statute similar to RCW 9.46.065, conferred jurisdiction or

dictated venue.¹³ *Id.* In concluding that Rem. Rev. Stat. § 886 conferred jurisdiction on Thurston County Superior Court, the Court relied upon article II, section 26 of the Washington Constitution, and stated that “[t]he rule is well settled that an action cannot be maintained against the state without its consent, and when the state does so consent, it may fix the forum in which it may be sued.” *Id.* at 469. Three years later, the Court reexamined the statute in *State ex rel. Thielicke v. Superior Court for Thurston County*, 9 Wn.2d 309, 114 P.2d 1001 (1941) and concluded that:

[t]he decisions of this court have uniformly indicated that we regard Rem. Rev. Stat., § 886, as a statute of jurisdiction rather than merely one of venue. . . . [W]hen a suit against the state is commenced in a superior court outside Thurston county, such court does not have jurisdiction of the action.

Thielicke, 9 Wn.2d at 311 (citations omitted).¹⁴ In holding that Rem. Rev. Stat. § 886 is a statute of jurisdiction, not venue, the *Shomaker* and *Thielicke* Courts referenced the power of the Legislature to condition waivers of sovereign immunity contained in article II, section 26, and focused on the Legislature’s inclusion of the reference to “Thurston

¹³ Rem. Rev. Stat. § 886 provided that “[a]ny person or corporation having any claim against the state of Washington shall have a right of action against the state in the superior court of Thurston county.” This statute was recodified as RCW 4.92.010, and was subsequently amended to eliminate Thurston County Superior Court as the exclusive court in which an action could be commenced. *J.A. v. State*, 120 Wn. App. 654, 659, 86 P.3d 202 (2004). In 1973, the statute was amended to provide a right of action against the state “in the superior court,” and the phrase “of Thurston County” was eliminated. *Id.*

¹⁴ Unlike RCW 9.46.095, Rem. Rev. Stat. § 886 did not expressly reference “jurisdiction.” Nonetheless, the *Shomaker* and *Thielicke* Courts concluded that both statutes controlled jurisdiction. The State’s consent to be sued in Thurston County superior court in each instance defined that court’s jurisdiction to entertain the suit.

County.”¹⁵

In *Shoop v. Kittitas County*, 149 Wn.2d 29, 65 P.3d 1194 (2003), this Court examined whether former RCW 36.01.050, requiring all actions against a county be commenced in the superior court of the defendant county or the adjoining counties, was a statute of jurisdiction or venue. In holding that RCW 36.01.050 controlled venue, the Court relied upon article IV, section 6 of the State Constitution, and concluded that the provision “precludes any subject matter restrictions as among superior courts.” *Shoop*, 149 Wn.2d at 37. Thereafter, in *Dougherty v. Dep’t of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003), when construing RCW 54.52.110, the Court again noted that “[g]enerally, all superior courts have precisely the same subject matter jurisdiction.” However, it also stated that “[u]nless mandated by the clear language of the statute, we generally decline to interpret a statute’s procedural requirements regarding location of filing as jurisdictional.” *Id.* at 317 (emphasis added).

As the *Dougherty* Court noted, a court will generally decline to interpret a statute’s procedural requirements regarding location of filing as

¹⁵ In *J.A.*, the Court of Appeals, Division II, confronted the issue of jurisdiction versus venue in the context of RCW 4.92.010. *J.A.*, 120 Wn. App. 654. The *J.A.* court acknowledged the decision in *Thielicke*, in which an earlier version of the same statute was determined to control jurisdiction, not venue. *Id.* at 660. The *J.A.* court then went on to conclude that the Legislature’s “removal of the reference to ‘Thurston County’ leaves the jurisdictional portion of the statute without limits, thereby conferring subject matter jurisdiction to hear cases against the State on all superior courts.” *Id.*

jurisdictional, unless mandated by the clear language of the statute. *Dougherty*, 150 Wn.2d at 137. This narrow exception, based on the language of the statute being examined, enables the court to give meaning to the general grant of subject matter jurisdiction contained in article IV, section 6, while giving equal meaning to the authority of the legislature under article II, section 26 to specify the court in which an action against the state may be maintained.

b. The language of RCW 9.46.095 clearly and explicitly references the term “jurisdiction.”

In considering only article IV, section 6, the court below failed to recognize that the language of RCW 9.46.095 mandates that the filing requirement in the statute be interpreted as jurisdictional. *See Dougherty*, 150 Wn.2d at 137. By construing the statute otherwise, the Court of Appeals’ holding that “jurisdiction” must be construed to mean “venue” violates the basic principles of statutory construction.¹⁶

To ascertain whether the Legislature actually intended RCW

¹⁶ In interpreting a statute, a court should not ignore clear statutory language or strain to find an ambiguity where the language of the statute is clear. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n*, 140 Wn.2d 615, 632, 999 P.2d 602 (2000). Unambiguous terms in statutes should always be given their plain meaning. *See Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 752, 953 P.2d 88 (1998). “[T]he court should assume that the Legislature meant exactly what it said.” *Geschwind v. Flanagan*, 121 Wn.2d 833, 841; 854 P.2d 1061 (1993) (citing *King Cy. v. Taxpayers of King Cy.*, 104 Wn.2d 1, 5, 700 P.2d 1143 (1985)). “[N]o part of a statute should be deemed inoperative or superfluous unless it is the result of obvious mistake or error.” *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 13, 810 P.2d 917, 817 P.2d 1359 (1991) (citations omitted). The interpreting court is obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh. *Geschwind*, 121 Wn.2d at 841.

9.46.095 to confer jurisdiction, this Court needs to look no further than the actual text. The term “jurisdiction” in RCW 9.46.095 is unambiguous.¹⁷ Indeed, there is no clearer way for the legislature to signal that it means subject matter jurisdiction, as opposed to venue, than by using that very term in the statute. Not only did the Legislature actually use the term “jurisdiction,” but like former Rem. Rev. Stat. § 886 analyzed in *Shomaker* and *Thielicke*, the Legislature also identified a single superior court in which all actions **must** be filed. Therefore, in the context of the entire statute, “jurisdiction” was clearly meant to convey “the power of the court to hear and determine the class of action to which a case belongs.” *State v. Buchanan*, 138 Wn.2d 186, 196, 978 P.2d 1070 (1999); *Dougherty*, 150 Wn.2d at 315. By construing “jurisdiction” to mean venue, the Court of Appeals injected ambiguity where none exists and rendered the phrase “other than the superior court of Thurston County” superfluous.

Furthermore, even if the term “jurisdiction” in RCW 9.46.095 was,

¹⁷ The Courts in *Shomaker* and *Thielicke* both concluded that Rem. Rev. Stat. § 886 was a statute of jurisdiction, rather than venue, based on the clear language of that statute. See *Shomaker*, 193 Wash. 465; *Thielicke*, 9 Wn.2d 309. Unlike RCW 9.46.095, Rem. Rev. Stat. § 886 did not use the term “jurisdiction.” *Id.* However, both statutes expressly provide that the superior court of Thurston County is the only superior court in which an action may be maintained. *Id.*; see also *J.A.*, 120 Wn. App. at 660 (stating that removal of the reference to “Thurston County” in earlier versions of RCW 4.92.010 “leaves the jurisdictional portion of the statute without limits, thereby conferring subject matter jurisdiction to hear cases against the State on all superior courts.”) In contrast, the statutes at issue in *Dougherty* and *Shoop*, which were found to relate to venue, permitted the claims at issue to be filed at multiple locations.

somehow, ambiguous, reference to the legislative history of the statute clearly dispels any such ambiguity.¹⁸ Article II, section 24 of the State Constitution prohibits all gambling not approved by a supermajority of the legislature or electorate. Through an exercise of the power granted by article II, section 24, a supermajority of the Legislature adopted the Act, including the provisions of RCW 9.46.095. When the Legislature adopted RCW 9.46.095 in 1981, eight years after the Act was initially enacted, it noted that it had not previously limited “jurisdiction” over actions brought against the Commission. 1981 Final Legislative Report, 47th Wash. Leg., at 150. The Legislature recognized that granting exclusive jurisdiction to a single superior court enabled that court to develop expertise in the area of gambling law and ensured that the Commission would not have to defend against possibly conflicting rulings by courts throughout the State.¹⁹ Moreover, had the Legislature’s use of the term “jurisdiction” been the result of mistake or error, the Legislature could have changed the term to “venue” when it subsequently amended the statute in 1989, but it

¹⁸ It is inappropriate for a court to look to the legislative history where the intent can clearly be divined from the plain language of the statute. *Eastlake Cmty. Council v. City of Seattle*, 64 Wn. App. 273, 279, 823 P.2d 1132 (1992).

¹⁹ See *State ex rel. Price v. Peterson*, 198 Wash. 490, 499, 88 P.2d 842 (1939), superseded on other grounds by statute, as stated in *State ex rel. Hollenbeck v. Carr*, 43 Wn.2d 632, 262 P.2d 966 (1953) (recognizing that the Legislature may designate a specific superior court to hear a particular type of action in order to prevent conflicts that might arise if the action “could be brought in any or all counties of the state”).

did not do so.²⁰ See Laws of 1989, ch. 175, § 41, p. 799.

RCW 9.46.095 clearly and unequivocally grants Thurston County superior court exclusive jurisdiction over actions filed against the Commission.²¹ The Court of Appeals' interpretation of "jurisdiction" in RCW 9.46.095 to mean "venue" contravenes the stated intent of the Legislature. The Court of Appeals' decision must be reversed.

B. The Commission's Interpretation Of The Term "Cash" Is Presumed Correct And Is Entitled To Substantial Deference.

Judicial review of a final administrative order is conducted pursuant to standards set forth in the APA, Chapter 34.05 RCW, and applicable case law. When reviewing an administrative order, the meaning of a regulation, like the meaning of a statute, is reviewed *de novo*. *Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 137 Wn. App. 592, 598, 154 P.3d 287 (2007). However, when an agency, like the Commission, administers a special field of law and exercises quasi-judicial powers because of its expertise in that area, substantial weight is accorded to the agency's interpretation of the governing statutes

²⁰ The Legislature has clearly, and repeatedly, demonstrated that it is familiar with the distinction between "venue" and "jurisdiction" through its use of the term "venue" in other statutes. See, e.g., RCW 4.12.025(3) (specifying "venue" where corporations may be sued); RCW 4.92.010 (specifying the "venue[s]" in which persons may bring a cause of action against the State).

²¹ Other state agencies operate under statutes with similar jurisdictional restrictions. See, e.g., RCW 82.32.180 (Department of Revenue); RCW 29A.32.090(3)(a), 29A.72.240 (Secretary of State); RCW 80.50.140(1) (Energy Facility Site Evaluation Council).

and legislative intent. *Overton v. Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981). “[W]hen the construction of an administrative regulation rather than a statute is at issue, deference is even more clearly in order.” *Hayes v. Yount*, 87 Wn.2d 280, 289, 552 P.2d 1038 (1976) (quoting *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965)). “[I]t is well settled that due deference must be given to the specialized knowledge and expertise of an administrative agency.” *Dep’t Pub. of Ecology v. Pub. Util. Dist. No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993); *aff’d*, 511 U.S. 700 (1994); *Port of Seattle v. Pollution Control Hrgs. Bd.*, 151 Wn.2d 568, 595, 90 P.3d 659 (2004).

In determining whether the Commission’s findings were supported by substantial evidence, the Court of Appeals improperly substituted its own definition of the term “cash” for that adopted by the Commission. In its Final Declaratory Order, the Commission interpreted “cash” to mean currency or a universally accepted currency substitute. The Court of Appeals held that this narrow definition was reasonable and consistent with the enabling statute, and advanced the purposes of The Gambling Act.²² *ZDI Gaming, Inc.*, 151 Wn. App. at 807-9. Moreover, the Court of

²² The court noted, without explanation, that the use of vouchers and chips is allowed in connection with some other (*i.e.* not pull-tab) gambling activities. *ZDI*, 151 Wn. App. at 807. The use of vouchers and gambling chips is specifically permitted in connection with certain poker and “house-banked” card games, like blackjack. *See* WAC 230-15-553 (defining certain vouchers as a “cash substitute” for the purposes of

Appeals acknowledged that the ZDI cash card proposal does not meet this definition of cash: “the ZDI cash card is not, in and of itself, cash or a universally accepted equivalent” *Id.* at 809. Without discussion, the Court of Appeals then inexplicably went on to state that the Commission’s requirement that a currency substitute be “universally accepted” is a “distinction without a difference.” The court then expanded the definition of “cash” to include not only currency or a universally accepted currency substitute, but also any currency substitute that is not universally accepted, but has been purchased with currency or a universally accepted currency substitute. *Id.* Utilizing its own new and greatly expanded definition, the Court of Appeals then concluded that “[t]he record does not support the Commission’s determination that ZDI cash cards are not cash equivalents satisfying its regulatory definition.” *Id.* at 809-10.

Although well-settled authority establishes that due deference must be given to the specialized knowledge and expertise of an administrative agency, and that a reviewing court may not substitute its interpretation of a term for the meaning given to it by the agency, the Court of Appeals has,

particular card games); WAC 230-15-110 (standards for gambling chips); WAC 230-15-111 (regulation governing the destruction and disposal of gambling chips); WAC 230-15-505 to -530 (regulations governing the sale and transfer of gambling chips). However, their use has never been allowed in connection with pull-tabs, an entirely separate and distinct type of gambling activity. Compare WAC 230-14 (regulations governing pull-tab gambling and pull-tab gambling licensees) and WAC 230-15 (regulations governing card game gambling and card game gambling licensees). Gambling chips and vouchers are intentionally treated differently in the card game regulations and card room licensees are subjected to heightened regulatory, accountability, and security requirements. *Id.*

nonetheless, substituted its own definition of “cash” for that of the Commission. In so doing, the Court of Appeals ignored the Commission’s authority to regulate and define the game of pull-tabs.²³ By ignoring the Commission’s definition of “cash” and substituting its own, the Court of Appeals effectively changed the gambling laws and then used that change to resolve this matter in favor of ZDI.

C. The Court Of Appeals Improperly Shifted The Burden Of Proof To The Commission.

“[F]airness to parties and the need for a fair trial are important not only in criminal but also in civil proceedings, both of which require due process.” *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1151 (9th Cir. 2001). In concluding that the Commission failed to establish that ZDI’s cash card did not meet the court’s newly created definition of cash, the Court of Appeals erroneously shifted the burden of proof to the Commission. *See ZDI Gaming, Inc.*, 151 Wn. App. at 809-10. By improperly shifting the burden to the Commission, the court deprived it of a fair hearing on review.

Under the APA, when a court reviews an administrative decision, the agency action is presumed correct and “the burden of demonstrating the invalidity of the agency action is on the party asserting invalidity.”

²³ The Act specifically defines “pull-tabs” to be the game as it existed in July 1973, and then expressly authorizes the Commission to revise and further define the game through its regulations. RCW 9.46.0273.

RCW 34.05.570(1)(a). Accordingly, the findings and conclusions in the Commission's Final Declaratory Order that ZDI's cash card was not a universally accepted currency equivalent are presumed correct and ZDI bears the burden of establishing that they are not supported by substantial evidence.²⁴ See RCW 34.05.570(1)(a) and (3)(e).

The Court of Appeals did not point to any evidence in the record contradicting the Commission's finding that the proposed cash card was not a universally accepted currency equivalent.²⁵ Rather, it summarily concludes that the "evidence does not support [the Commission's] determination that ZDI's cash card does not satisfy this otherwise defensible regulatory definition." *ZDI Gaming, Inc.*, 151 Wn. App. at 809-10. Erroneously, the court did not presume the validity of the Commission's action and properly place the burden on ZDI to prove its invalidity. Instead, it ruled against the Commission based on a perceived lack of evidence to disprove ZDI's bald assertion that its cash card was a universally accepted currency equivalent. By doing so, the court effectively shifted the burden of proof from ZDI to the Commission in contravention of RCW 34.05.570 and deprived the Commission of a fair

²⁴ The Court of Appeals repeatedly found that the Commission's definition of "cash" as either "currency" or "a universally accepted currency equivalent" was reasonable, consistent with the intent of The Gambling Act, and entitled to deference. *ZDI Gaming, Inc.*, 151 Wn. App. at 808-9.

²⁵ In fact, in its opinion, the Court of Appeals specifically held that ZDI's cash card is not a universally accepted currency equivalent. *Id.* at 809.

hearing.²⁶ The Court of Appeals should be reversed.

IV. CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Court reverse the decision of the Court of Appeals and affirm the Final Declaratory Order previously entered by the Commission.

RESPECTFULLY SUBMITTED this 2nd day of April, 2010.

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²⁶ Even if the issue of universal acceptance had been in dispute, the Court of Appeals' conclusion that the Commission's finding is not supported by substantial evidence is patently incorrect. For example, the Final Declaratory Order finds that:

The difficulty with a cash card is that it's valid at only one location. It is impossible to take the cash card from [a casino] to a Harley Davidson dealer and purchase a new helmet. The cash card must be converted back into actual cash to be useful at another location. Even if the cards do not expire, and the issuing merchant is required to convert the remaining balance on a card to actual cash upon request, cash cards are not cash because they require an additional step on the part of the consumer to utilize in any other location.

AR 420-21 (Conclusion of Law #17). This finding is clearly supported by substantial evidence in the record. *See* AR 794-797 (colloquy establishing that ZDI cash cards operate in a manner identical to gift cards offered by retail outlets); AR 877 ("you can go back to the cashier and you can get money off of [the cash card], in that establishment, nowhere else."); AR 886-87 (use of cash card is restricted to the establishment that issued the card).