No. _____

In The
Supreme Court of the United States

SHAC, LLC, d/b/a SAPPHIRE; DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a DÉJÀ VU SHOWGIRLS; LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a LITTLE DARLINGS; K-KEL, INC., d/b/a SPEARMINT RHINO GENTLEMEN'S CLUB; and D. WESTWOOD, INC., d/b/a TREASURES,

Petitioners,

v.

NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; NEVADA STATE BOARD OF EXAMINERS; and MICHELLE JACOBS, in her Official Capacity Only,

Respondents.

On Petition For A Writ Of Certiorari To The Nevada Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a state statute that directly and specifically taxes constitutionally protected live entertainment, that exempts from taxation numerous and various types of live entertainment based upon the content of the expression, and that was intentionally legislatively gerrymandered with twenty-six exemptions so that the vast majority of the tax burden falls on a small and disfavored group of taxpayers, violate, on its face, the First Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

In addition to the Petitioners, plaintiffs below included D.I. Food & Beverage of Las Vegas, LLC, d/b/a Scores, Olympus Garden, Inc., d/b/a Olympic Garden, and The Power Company, Inc., d/b/a Crazy Horse Too Gentlemen's Club.

RULE 29.6 STATEMENT

SHAC, LLC, is a privately held limited liability company, with SHAC MT, LLC, being its parent company. None of the membership interests of either SHAC, LLC, or SHAC MT, LLC, are held by a publicly traded company.

Déjà Vu Showgirls, L.L.C., is a privately held limited liability company, with Imagination Corporation its parent company. None of Déjà Vu Showgirls, L.L.C.'s membership interests, and none of Imagination Corporation's stock, are held by a publicly traded company.

Little Darlings of Las Vegas, L.L.C., is a privately held limited liability company, with Old Variety, Inc., its parent company. None of Little Darlings of Las Vegas, L.L.C.'s membership interests, and none of Old Variety, Inc.'s stock, are held by a publicly traded company.

K-Kel, Inc., is a privately held corporation. It has no parent corporation, and none of its shares are held by a publicly traded company.

RULE 29.6 STATEMENT – Continued

D. Westwood, Inc., is a privately held corporation. It has no parent corporation, and none of its shares are held by a publicly traded company.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The decision of the Nevada Supreme Court for which review is sought is reported as *Déjà Vu Showgirls of Las Vegas, LLC v. Nevada Department of Taxation*, 334 P.3d 392 (Nev. 2014), and appears at App. 1-22. The underlying unreported ruling of the Clark County [Nevada] District Court, denominated as Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Counter-Motion for Summary Judgment, appears at App. 23-43.

Other decisions that inform the need for this Court to review the issues herein at this time include the Order of the United States District Court for the District of Nevada dismissing Petitioners' constitutional challenges to the state tax at issue (App. 44-52); the Ninth Circuit United States Court of Appeals' Memorandum opinion affirming that ruling (App. 53-54); the October 12, 2007 ruling of the Nevada Tax Commission (App. 55-60); the Order [of the Clark County [Nevada] District Court] Denying Motion for Preliminary Injunction Without Prejudice (App. 61-63); the Amended Order of the Clark County [Nevada] District Court dismissing Plaintiffs' "as applied" challenges and precluding any further discovery (App. 64-68); the Order [of the Clark County [Nevada] District Court] Granting Plaintiffs' Application for Leave to Present Additional Evidence to the Nevada Tax Commission (App. 69-70); the September 6, 2012 Decision Letter of the Nevada Tax Commission (App. 71-81); the Hearing Officer's Order on Remand (App. 82-92); the February 12, 2014 Decision Letter of the

Nevada Tax Commission (App. 93-101); and the decision of the Nevada Supreme Court issued contemporaneously with the ruling for which review is sought, affirming the dismissal of Plaintiffs' second state court suit (reported at 334 P.3d 387 (Nev. 2014) and appearing at App. 102-15).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the decision of the Nevada Supreme Court.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment I

"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble. . . ."

Amendment XIV, Section 1

" . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws."

UNITED STATES CODE

The provisions of the Tax Injunction Act, 28 U.S.C. § 1341, and the Civil Rights Act, 42 U.S.C. § 1983, are set forth at App. 116-17.

NEVADA CONSTITUTION

Nev. Const. Art. 3, § 1 dealing with the separation of powers of government appears at App. 118, and Nev. Const. Art. 6, § 6 dealing with the jurisdiction of the state district courts appears at App. 119-20.

NEVADA REVISED STATUTES

The Nevada Live Entertainment Tax challenged here is set forth in NRS 368A.010-368A.370 (the entirety appearing at App. 118-58). Verbatim excerpts include:

> **NRS 368A.200: Imposition and amount of tax; liability and reimbursement for payment; ticket for live entertainment must indicate whether tax is included in price of ticket; exemptions from tax.**
>
> 1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided. If the live entertainment is provided at a facility with a maximum occupancy of:
>
>   (a) Less than 7,500 persons, the rate of the tax is 10 percent of the admission charge to the facility plus 10

percent of any amounts paid for food, refreshments and merchandise purchased at the facility.

(b) At least 7,500 persons, the rate of the tax is 5 percent of the admission charge to the facility.

* * *

NRS 368A.020. "Admission charge" defined

"Admission charge" means the total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided. The term includes, without limitation, an entertainment fee, a cover charge, a table reservation fee, or a required minimum purchase of food, refreshments or merchandise.

NRS 368A.060. "Facility" defined

1. "Facility" means:

(a) Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:

(1) An establishment that is not a licensed gaming establishment; or

(2) A licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or

any combination of slot machines and games within those respective limits.

(b) Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment.

* * *

NRS 368A.090. "Live entertainment" defined

1. "Live entertainment" means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present.

2. The term:

(a) Includes, without limitation, any one or more of the following activities:

* * *

(2) Dancing performed by one or more professional or amateur dancers or performers;

* * *

NRS 386A.280. Injunction or other process to prevent collection of tax prohibited; filing of a claim is condition precedent to maintaining action for refund

1. No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.

2. No suit or proceeding may be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined unless a claim for refund or credit has been filed.

Excerpts of Nevada's judicial review statutes (NRS 233B.130 and 233B.135) are found at App. 121-23; excerpts of Nevada's statute dealing with judicial review of decisions of the Nevada Tax Commission (NRS 360.245) appear at App. 124; Nevada's Taxpayers' Bill of Rights is found at NRS 360.291 (App. 125); NRS 372.680, dealing with actions for refunds from decisions of the Nevada Tax Commission, is found at App. 158.

NEVADA ADMINISTRATIVE CODE

Relevant portions of the Nevada Administrative Code applicable to the Nevada Tax Commission

administered portion of the Live Entertainment Tax include NAC 368A.120 and 368A.170 (App. 160-62); and NAC 360.135, concerning subpoenas in the Nevada Tax Commission, appears at App. 159-60.

NEVADA RULES OF CIVIL PROCEDURE

Excerpts of Nevada Rules of Civil Procedure Rule 41 are found at App. 163.

STATEMENT OF THE CASE

On July 22, 2003, Nevada (the governmental Respondents here are sometimes collectively referred to simply as the "State") enacted Chapter 368A of the Nevada Revised Statutes, which imposed, subject to numerous and various exceptions discussed below, an excise tax on "admissions" to any facility that provided defined "live entertainment" ("Chapter 368A," the "Live Entertainment Tax," the "LET," or simply the "Tax"). The "trigger" for being required to pay the Tax is whether an admission charge must be paid before a patron can enter the premises. NRS 368A.200(1), 368A.020, and 368A.060, and NAC 368A.120 (App. 126-28, 141, 160). The Tax is upon, *inter alia*, that admission charge. NRS 368A.200(1) (App. 141).

As originally enacted, the LET was not applicable, under the terms of NRS § 368A.200(5)(d), to live

entertainment in a non-gaming[1] establishment if the facility in which the live entertainment was provided had a maximum seating capacity of less than 300 persons. However, on June 17, 2005, Chapter 368A was amended to, among other things, reduce the "seating capacity" exemption from 300 down to an "occupancy load" of 200 persons. The purpose of this amendment was to specifically extend the LET to a number of adult entertainment nightclubs that were not then subject to the Tax. Other amendments included expanding the categories of live entertainment that were exempted from the Tax, and in particular those that were deemed to be "family oriented." App. 125-58 reflects the entire current version of Chapter 368A, including the 2005 amendments.

The legislative history demonstrates that the purpose of enacting the LET was to specifically tax adult nightclubs. That record is critical here because later in discovery, the State explicitly pointed to those chronicles as constituting part of its responses to various interrogatory questions asking about the persons or businesses meant to be taxed by Chapter 368A, the purpose of the various 2005 statutory amendments, and the governmental interests meant

[1] The LET is administered in two different fashions; one for licensed gaming establishments by the State Gaming Control Board and Nevada Gaming Commission, and the other for non-gaming places of business by the Department of Taxation and the Nevada Tax Commission.

to be furthered by the LET and the various exceptions thereto.[2] App. 164-75.

That legislative record reflects, for example, one Senator observing that the Tax might be used as a method of limiting "this type of business" (App. 179); another Senator commenting that the 2005 amendments to Chapter 368A were necessary because the original 2003 Bill "didn't adequately bring in a group some of us intended to be covered, which are the striptease clubs that have proliferated, particularly in southern Nevada" (App. 181; *accord* App. 176); a committee Chairwoman noting that she was "concerned that if we just put live adult entertainment that might be held unconstitutional," that putting the phrase "adult entertainment" on the law "*puts a big red flag on it for the courts*," that the state was getting "the most revenue from adult entertainment clubs . . . the highest amount paid under the live entertainment tax," that "*everything else pales in comparison*" to how much the adult nightclubs were bringing in under the LET, and that the next highest amount was the "race tracks" (App. 183-84) (emphasis added); that, nevertheless, NASCAR racing and other sporting events were then *exempted* from

[2] Consequently, this is not a circumstance where the Petitioners would be asking the Court to invalidate a law on the basis of illicit legislative motive predicated upon the comments of a few legislators. *See, e.g., Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). *But see* App. 20 n.10 (in the decision under review here, the Nevada Supreme Court rejects any relevance of this legislative history).

the tax by the 2005 amendments because they were believed by the legislators to be "*family oriented*" (App. 177-78, 182, 185); and that decreasing the seating capacity in NRS 368A.200(5)(d) in order to bring more adult cabarets into the Tax was to make up for revenues that would be lost by exempting out the race track (App. 178, 185).

Discovery also disclosed various internal memoranda confirming that the adult nightclubs were the target of the LET. App. 190-95.

Chapter 368A states that it does not apply to live entertainment that Nevada "is prohibited from taxing under the Constitution, laws or treaties of the United States. . . ." NRS 368A.200(5)(a) (App. 142). In addition, while purporting to apply to virtually all forms of live entertainment (*see* NRS 368A.090) (App. 129-30), because of the targeted focus on adult nightclubs, the LET is statutorily gerrymandered in such a fashion so that the non-gaming aspects of the Tax apply to adult nightclubs and little else. There are *twenty-six* separate exemptions to the LET, which are incorporated by a series of exclusions to the definition of "live entertainment" under NRS 368A.090(b) (App. 130-32), and specific exceptions to taxation found in NRS 368A.200(5) (App. 142-45). Petitioners set out below only those exclusions from taxation which are dependent upon the content of the entertainment at issue.

The exceptions to the definition of "live entertainment" in NRS 368A.090(b) include:

(1) "Instrumental or vocal music . . . in a restaurant, lounge or similar area *if such music does not routinely rise to the volume that interferes with casual conversation* and if such music *would not generally cause patrons to watch as well as listen*";

(2) Occasional performances by employees whose primary job function is that of "preparing, selling or serving food, refreshments or beverages to patrons . . . ";

(3) Performances occurring in certain gaming establishments " . . . *as long as the performers stroll continuously throughout the facility*";

(4) Performances occurring in certain gaming establishments "*which enhance the theme of the establishment or attract patrons to the areas of the performances* . . . ";

* * *

(7) "*Animal behaviors* induced by animal trainers or caretakers primarily for the purpose of education and scientific research"; and

(8) Occasional activity, including dancing, that "[d]oes not constitute a performance," is not advertised as entertainment, that "[*p*]*rimarily serves to provide ambience to the facility*," and is not conducted by an entertainer. (All emphasis added).

The exemptions from Tax contained in NRS 368A.200(5) include:

* * *

(c) Boxing contests;

* * *

(h) "Music performed by *musicians who move constantly through the audience* if no other form of live entertainment is afforded to the patrons";

* * *

(k) Certain *food and product demonstrations*;

(l) "*Live entertainment that is incidental to an amusement ride, a motion simulator or a similar digital, electronic, mechanical or electromechanical attraction*";

* * *

(o) *NASCAR Nextel Cup Series races*, or its successor racing series, and all races associated therewith;

(p) *Baseball games* conducted by professional minor league baseball players; and

(q) Live entertainment provided in a restaurant which is *incidental* to any other activities conducted in the restaurant or which only serves as *ambience* so long as there is no charge to the patrons for that entertainment.

No suit may be filed under Chapter 368A to recover taxes alleged to have been erroneously or illegally collected unless an administrative claim for refund has been filed with the Nevada Department of Taxation (the "Department"). NRS 368A.280(2) (App. 153). Appeals from Department decisions are taken to the Nevada Tax Commission (the "Commission"). NRS 360.245 (App. 124). A taxpayer aggrieved by a decision of the Commission must "bring an *action against the Department* on the grounds set forth in the claim" within *90 days* of the Commission's decision. NRS 368A.290(1)(b) (emphasis added) (App. 153). *See also* NRS 368A.300(3)(b) (App. 154) (same). Failure to do so "constitutes a waiver of any demand against the State on account of alleged overpayments." NRS 368A.290(3) (App. 153). In addition, NRS 368A.280(1) (App. 152) precludes any court from entering an injunction or other legal process preventing the collection of the Tax.

In April of 2006, Petitioners (establishments in Las Vegas that present a variety of female performance dance; some of which is fully clothed, some of which is topless, and some of which – for those Petitioners not subject to Nevada liquor laws – is at times fully nude) filed suit in federal district court challenging the LET's constitutionality (the "Federal Action"). The State filed a motion to dismiss, claiming that the Tax Injunction Act (28 U.S.C. § 1341; hereinafter sometimes "TIA"; App. 116) precluded the lawsuit because the Nevada state court and administrative systems provided, in the words of the statute, a

"plain, speedy and efficient remedy." In so arguing, the State asserted to the federal district court as follows:

> Within ninety days of denial by the Commission of a taxpayer's appeal of a claim for refund, the taxpayer may *bring an action in court*. *NRS 368A.290*. By default, jurisdiction for such *actions* lies in the District Court. Nev. Const. Art. 6, § 6, NRS 4.370.

App. 198 (emphasis added).[3]

Subsequently, in response to Petitioners' argument that NRS 368A.280(1) precluded them from obtaining injunctive relief and possibly declaratory relief as well, the State cited *State v. Scotsman Mfg. Co. Inc.*, 849 P.2d 317 (Nev. 1993);[4] asserting that it "[w]ould support the proposition that *declaratory relief is available* notwithstanding NRS 368A.280(1)." App. 202 n.2 (emphasis added). Relying on *Scotsman* and concluding that NRS 368A.280(1) "does not prevent a judicial challenge either to the collection of the tax or the constitutionality of the statute authorizing

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[3] The State made similar claims later to the Ninth Circuit on appeal. App. 206. In so doing, it cited, as the sole remedies available to the Petitioners, the provisions contained in NRS 368A.290 and 368A.300. *Id*.

[4] *Scotsman* held that when constitutional rights were at stake, an aggrieved taxpayer need not exhaust administrative remedies before seeking judicial redress and that the litigant at issue there could even bring claims that were statutorily out of time. 849 P.2d at 319-20.

the tax," the federal district court dismissed Petitioners' Federal Action. App. 44-52. The Ninth Circuit affirmed in a three-paragraph ruling made without oral argument. App. 53-54.

As a result of the dismissal of the Federal Action, Petitioners filed a similar lawsuit in Nevada state court on December 19, 2006 (the "First State Action"), and ultimately raised both facial and "as applied" federal and state constitutional challenges therein. App. 2-3, 6, and 213. In addition, because of the time constraints set out in Chapter 368A, a number of the Petitioners (referred to here as the "SHAC Petitioners") were then required, pursuant to NRS 368A.280(2), to undertake the state administrative refund process as a predicate for the filing of a refund suit in state court.

After filing their first set of administrative requests for refund to the Department, all of which were denied, those entities appealed to the Commission. The Commission upheld the refund request denials in October of 2007 (App. 55-60).[5] Thereafter, in accordance with 368A.290 and 368A.300(3)(b), *the very statutes that the Respondents had cited to the*

[5] Subsequent to the first set of refund requests, each Petitioner (and every other similar business disputing the Tax) has been periodically filing requests for refunds in order to preserve their refund rights under Chapter 368A. Each of these has been held in abeyance by the Department pending the resolution of these actions. *See* representative letter at App. 216-17. There are now scores of these pending.

federal courts as providing a "plain, speedy, and efficient" remedy so as to divest the federal district court of jurisdiction to hear Petitioners' constitutional claims, the Petitioners filed suit in state court on January 9, 2008 against the Department (as required by NRS 368A.290(1)(b)) seeking a judicial determination on their claims for refund (the "Refund Action").

On June 5, 2008, Petitioners filed a motion in the First State Action to preliminarily enjoin the enforcement of the LET.[6] The parties also commenced discovery. In March of 2009, Petitioners propounded interrogatories and document production requests upon the Respondents, which led to a series of lengthy discovery dispute proceedings. In addition, after two oral arguments and *2 years and 7 months* later, the state court denied the motion for preliminary injunction without prejudice on January 3, 2011. App. 61-63. The First State Action and the Refund Action were "coordinated," and ultimately consolidated for determination.

Petitioners then scheduled the depositions of various state officials who the Respondents had

[6] Petitioners felt that such relief could potentially be granted irrespective of the statutory prohibition set forth in NRS 368A.280(1), because such a prohibition arguably violates the constitutional separation of powers among the branches of government. *See, e.g.*, Nev. Const. Art. 3, § 1 (App. 118), and Art. 6, § 6 (App. 119-20) (authority of the state district courts to issue injunctive relief). *Cf. City of Norwood v. Horney,* 853 N.E.2d 1115 (Ohio 2006) (legislative statutes cannot divest courts of their constitutional authority).

identified in discovery to be the most knowledgeable persons to answer certain questions concerning the LET. Before those could occur, the Nevada Supreme Court decided a case known as *Southern California Edison v. First Judicial District*, 255 P.3d 231 (Nev. 2011).

The issue there was whether a claimant for a use tax refund was entitled to a trial de novo in the state district courts (NRS 372.680 (App. 158), similar to NRS 368A.290(1)(b) here, permitting such an aggrieved taxpayer to initiate an "action" against the Department) or just a petition for judicial review ("PJR") pursuant to NRS 233B.130 (App. 121) of the state's Administrative Procedures Act ("APA"), which provided for "a more deferential review of the Commission's decision." 255 P.3d at 232. The court noted that its earlier decision in *Saveway v. Cafferata*, 760 P.2d 127 (Nev. 1988) "suggested that claimants receive a trial de novo . . . ," 255 P.3d at 233, but concluded that because of subsequent statutory changes to the APA and the general tax statutes (*see* NRS 360.245 (App. 124)),[7] the "action" referenced in NRS 372.680 meant a limited PJR under NRS 233B.130. *Id.* Nevertheless, the court also found that the state was judicially estopped from restricting Edison to a PJR proceeding because it had "told Edison that trial

[7] The LET and its *specific* refund action provisions contained in NRS 368A.290 and 368A.300 were enacted *after* all of these other statutory changes. *See* further discussion, *infra*.

de novo would be available if Edison was unhappy with the Commission's decision."[8] *Id*. at 233.

Based upon that ruling, the Defendants requested the Clark County District Court to dismiss the Refund Action as having been improperly filed (contending that Petitioners should have, rather, sought judicial review from the Commission's decision by way of a PJR instead of filing an original action as specified by NRS 368A.290 and 368A.300). At a hearing on August 23, 2011, the Clark County District Court indeed dismissed the Refund Action based upon *Southern California Edison*; permitted the Petitioners an opportunity to file a belated PJR pursuant to NRS 233B.130 in lieu of the Refund Action; declared that the First State Action would proceed only as a facial challenge (apparently believing that the PJR would serve as the "as applied" challenge); and precluded all further discovery in the matter (including depositions that had been scheduled to occur later that week) by concluding that the same was not warranted in a facial attack. App. 64-68. Under Nevada law, a PJR limits the court to

[8] The Court also noted that the Department had taken inconsistent positions with different taxpayers at to which avenue of judicial redress was appropriate and that the Department had admitted that it had "no consistent position" of the proper avenue for judicial relief, and observed that "[i]t appears that the Department has adopted a new policy for refund cases." 255 P.3d at 234. The court accepted the discretionary petition of Edison's because of the "resulting confusion and potential disparate application of the law. . . ." *Id*.

review of the administrative record below, and no discovery is permitted. NRS 233B.135 (App. 122-23).

As a result of that ruling, the SHAC Petitioners filed a PJR in the Clark County District Court. The judge assigned to that action ruled that because they had rightfully relied on the status of the law prior to *Southern California Edison,* the SHAC Petitioners were entitled to a remand to the Commission in order to supplement their evidentiary record before final disposition of their claims. App. 69-70. Upon remand, the Commission ordered that additional documentary materials could be considered, but refused to permit Petitioners to take any depositions or any further discovery. It also submitted the matter to an Administrative Law Judge ("ALJ") for consideration. App. 71-81. The ALJ denied Petitioners' request for a hearing, found that the new documents did not alter the prior ruling of the Commission, and rejected all arguments of the Petitioners. App. 82-92. The Commission affirmed that ruling. App. 93-101. That matter is now back before the Clark County District Court for consideration on the SHAC Petitioners' PJR. As of January 1, 2015, Nevada has constituted an intermediate appellate court. Consequently, the judicial appeals of the PJR will continue for a number of years.

Meanwhile in the First State Action, the parties filed cross-motions for summary judgment. A mere 3 days short of Nevada's "5 year rule" by which a case must absolutely be brought to trial or dismissed with prejudice (*see* N.R.C.P. Rule 41(e); App. 163), the

Clark County District Court denied Petitioners' motion and granted the Respondents' motion, concluding that the legislative history referenced above was irrelevant because the court was limited to a review of only the text of the statute in adjudicating Petitioners' facial challenge. The court upheld the constitutionality of the Tax by finding it to be "content neutral." App. 23-43; 244-45.

Petitioners appealed to the Nevada Supreme Court (the state not having an intermediate appellate court at the time), which, on September 18, 2014, issued two rulings concerning these cases.

In the first ruling (the subject of this petition), the court rejected Petitioners' facial challenge both under the federal and state constitutions, and concluded that the lower court was correct in dismissing the Petitioners' as applied challenge because they had not exhausted their administrative remedies. App. 1-22. While acknowledging that the LET "is not a generally applicable sales tax" (App. 19), the court nevertheless concluded that *rational basis scrutiny applied and that the Tax was therefore presumed to be constitutional* (App. 21), and asserted that the LET is not "actually a tax on live entertainment" because it, rather, only "imposes an excise tax on business transactions which neither inhibits nor burdens the expressive conduct occurring at live-entertainment facilities." App. 13-14. In rejecting the argument that the tax discriminates based upon content, the court concluded that the exemptions do not actually "refer to content" and that "multiple facilities furnishing

adult-oriented live entertainment, such as boxing and charity events, are exempted." App. 17 (citing NRS 368A.200(5)(b)-(c)). The court did not place *any burden* on the State to explain the differential taxation as reflected by the 26 exemptions.

In the other decision, the court ruled that the specific judicial redress provisions specified in the LET (NRS 368A.290 and 368A.300) are not exempt from the requirements of the APA, and in particular NRS 233B.130 (the PJR statute). The court also ruled that the actions of the State did not judicially estop it from asserting this position. The dismissal of the Refund Action was thus affirmed. App. 102-15.

The court reached these conclusions irrespective of the representations made by the State to the federal courts in order to switch jurisdiction to the Nevada courts; the fact that the LET refers to the aggrieved claimant as a "*plaintiff*" (NRS 368A.300(4) and (5)) as opposed to the APA's reference to the pleading as a "*petition*" (NRS 233B.130(2)); the fact that the Tax provides for a *90 day* period in which to initiate the "action" (NRS 368A.290(1)(b) and 368A.300(3)(b)) as opposed to the APA's requirement to file a PJR within *30 days* (NRS 233B.130(2)(c)); the fact that Chapter 368A requires an action to be initiated "*against the Department*" (NRS 368A.290(1)(b) and 368A.300(3)(b)) as opposed to the APA which requires the litigant to "[n]ame as *respondents the agency and all parties to the administrative proceeding*" (NRS 233B.300(2)(a)); the fact that the LET and its specific judicial redress provisions were adopted *after* the

amendments to the APA and the general taxation statutes, which served as the basis for the decision in *Southern Consolidated Edison*;[9] and irrespective of the Nevada Taxpayer's Bill of Rights (NRS 360.291; App. 125), which states that taxpayers have the right to have taxing statutes that are "of doubtful validity or effect" construed in their favor.

This petition, seeking review of the final judgment of the Nevada Supreme Court upholding the facial constitutionality of Chapter 368A, follows.

REASONS FOR GRANTING THE PETITION

This Court has stated that the power to tax the exercise of a constitutional right "is the power to control or suppress its enjoyment." *Murdock v. Commonwealth of Pennsylvania,* 319 U.S. 105, 112 (1943). In light of the current economic climate – where many governmental units are under acute financial distress and are looking for easy ways to increase tax revenues that do not create political friction – those engaged in controversial, unpopular, or disfavored speech, and who do not then possess the political clout to derail the enactment of abusive legislation, present easy targets for the imposition of significant,

[9] Prior to these cases, the Nevada Supreme Court had long held that when a specific statute is adopted *after* a general law has already been in effect, the more specific law controls. *See, e.g., Cauble v. Beemer*, 177 P.2d 677, 686-88 (Nev. 1947).

and in some circumstances draconian, taxes directly targeting such activities. Such is the case here.

Yet, proper and timely judicial redress for taxpayers aggrieved by an unconstitutional state tax statute is far from certain (as demonstrated by the events here). Under the Tax Injunction Act, federal jurisdiction to enjoin an unconstitutional state tax statute – even one specifically directed at First Amendment rights – does not exist when there is a "plain, speedy and efficient remedy . . . in the courts of that state." 28 U.S.C. § 1341. That state remedy has to be "swift and certain." *Hibbs v. Winn*, 542 U.S. 88, 108 n.10 (2004). A federal district court and the Ninth Circuit both held that Petitioners possessed such a "swift and certain" remedy under Nevada law.

However, Petitioners' First State Action was filed in December 2006, the administrative process began in February 2007, and the Refund Action case was initiated in January 2008, and while Petitioners now have a definitive ruling on their case to facially challenge Chapter 368A, there is no end to this constitutional odyssey yet in sight. Nevertheless, the Petitioners are being required to remit literally millions of dollars in taxes each year without being able to obtain any forms of judicial redress.

Moreover, state "remedies" in these types of cases may be evaluated by administrators who possess neither the background nor qualifications to address the sensitive constitutional rights at stake, and by elected judges who may be subject to political and

institutional pressures (from which life-tenured federal judges are insulated)[10] to uphold these types of targeted taxes in order to both preserve the revenue stream of state and local tax dollars and to placate the greater citizenry whose own taxes would not then have to be raised.

In addition, the avenues of state redress may prove to be utterly illusory. Injunctive relief, such as that which is necessary to protect First Amendment rights from irreparable injury, may not be available, as is the case here. An award of damages may also be beyond reach (Petitioners' damage claim being dismissed below under this Court's TIA jurisprudence). And, aggrieved taxpayers may actually be unable to obtain reimbursement of illegally collected taxes in a refund proceeding *even if the tax law is ultimately found to be unconstitutional*; a dim prospect also facing these Petitioners.

Because the Nevada Supreme Court has decided an important federal constitutional question in a way that appears to conflict with virtually every decision by this Court that touches upon speech-targeted taxes, because of the federal and state law impediments that may prohibit aggrieved taxpayers from being able to obtain timely and effective judicial relief to redress their constitutional injuries, and because

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[10] *See, e.g., Kaufman v. United States,* 394 U.S. 217, 225-26 (1969); and *Butler v. McKellar*, 494 U.S. 407, 427 n.8 (1990) (Brennan, J., dissenting).

these types of targeted taxes are rapidly popping up throughout the country, the constitutionality of this newest form of expression-specific taxation should be settled by this Court. Review is essential to address a serious and, as demonstrated below, recurring problem of First Amendment jurisprudence that escapes lower federal court scrutiny because of the comity limitations found in the TIA. The petition should therefore be granted under Sup. Ct. Rule 10(c).

I. THE NEVADA SUPREME COURT INCORRECTLY DECIDED AN IMPORTANT AND RECURRING QUESTION OF FEDERAL CONSTITUTIONAL LAW

While a generally applicable tax is usually found to be constitutional as applied to expressive activities, *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378 (1990), a tax laid specifically upon protected expression is considered to be a form of prior restraint, is subject to strict scrutiny, and is "presumptively unconstitutional." *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 112-14 (1943); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983). This Court has held that there are primarily three ways a tax may violate the First Amendment.

First, a direct tax specifically on First Amendment freedoms is unconstitutional.

> *Freedom of speech*, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. . . . *[I]t could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional*.

Murdock, 319 U.S. at 108, 111 (emphasis added).

Second, a tax that targets a narrowly defined group of speakers is unconstitutional.

> A tax is also suspect if it targets a small group of speakers.
>
> * * *
>
> The danger from a scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from a content-based regulation: It will distort the market for ideas.

Leathers v. Medlock, 499 U.S. 439, 447-48 (1991).

Third, a *content-based tax* is unconstitutional. *Leathers*, 499 U.S. at 447 ("Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech"). "[O]fficial scrutiny of the content of [speech] as the basis for imposing a tax is entirely incompatible with" First Amendment guarantees. *Arkansas Writers' Project,*

Inc. v. Ragland, 481 U.S. 221, 230 (1987) (clarification added).

On its face and irrespective of the particular type of entertainment presented by these Petitioners, the LET should promptly fail constitutional scrutiny. It is a tax laid specifically and solely on live entertainment; an activity that is itself protected by the First Amendment.[11] The legislative history acknowledges that the amount of tax that other types of businesses pay under the LET "pales in comparison" to the taxes that the Petitioners and similar facilities remit every year, and further establishes that the adult nightclubs were in fact the specific target of this Tax.[12] App. 176-89. And, finally, whether or not certain live entertainment is taxed – hence whether it falls within many of the 26 exceptions – is certainly dependent upon the content of that entertainment.

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[11] *See, e.g., Winters v. New York*, 333 U.S. 507, 510 (1947) (entertainment itself is protected by the First Amendment); *Zacchini v. Scripts-Howard Broadcast Co.*, 433 U.S. 562, 578 (1977) (human cannonball performance protected); and *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (nude dancing protected expression).

[12] It should also not be lost on this Court that because of the 7,500 seating capacity distinction contained in NRS 368A.200(1), the casinos in Nevada are taxed at only a 5% of admissions, while the adult nightclubs are taxed at a *10%* rate of not only their admissions, *but their sales of food, refreshments, and merchandise as well*.

Yet, the decision of the Nevada Supreme Court aptly demonstrates that further elaboration from this Court on these jurisprudential issues is warranted.

For example, the court's comment that the "*admissions*" tax as found in Chapter 368A is not "actually a tax on live entertainment" because it only "imposes an excise tax on business transactions which neither inhibits nor burdens the expressive conduct occurring at live-entertainment facilities," seems to be directly at odds with this Court's pronouncement in *Minneapolis Star* that even a targeted "'use tax' on the cost of paper and ink products consumed in the production of a publication" is subject to enhanced scrutiny under the First Amendment. 460 U.S. at 582-93.

Similarly, its conclusion (App. 13, 21) that while the LET is admittedly "not a generally applicable sales tax" (App. 19) it should nevertheless be analyzed under rational basis scrutiny pursuant to *Jimmy Swaggart Ministries* (general state sales tax not unconstitutional as applied to religious ministry), stretches that ruling beyond the bounds of recognition. *See also Minneapolis Star*, 460 U.S. at 581-82 (Court emphasizing the "general applicability" of a tax is what insulates it from First Amendment scrutiny).

Moreover, its conclusion that the exceptions to the Tax are not content specific certainly conflicts with how other courts are reading the decisions of this Court. *Compare, e.g.*, the boxing exception in NRS 368A.200(5)(c), *with U.S. Satellite Broadcasting*

Co. v. Lynch, 41 F.Supp.2d 1113, 116, 1120-23 (E.D. Cal. 1999) (direct tax on boxing *is* a content based tax and therefore unconstitutional).

Finally, its complete rejection of the legislative history to Chapter 368A runs contrary to the decisions of this Court on this topic. See *Minneapolis Star*, 460 U.S. at 579-80 (citing *Grosjean v. American Press Co. Inc*., 297 U.S. 233 (1936) (2% tax on gross receipts from newspaper advertising unconstitutional), with this Court noting that the result therein was most likely the result of a censorial intent as demonstrated by the legislative history). *See also Church of Lukumi Babalu Aye, Inc. v. Haileah*, 508 U.S. 520, 535, 540 (1993) (facial discrimination of a law may be demonstrated by its legislative history and practical effect, with the Court referring to this as "*relevant evidence*") (emphasis added).

Even if the particular form of entertainment engaged in by the Petitioners is taken into consideration for the constitutional analysis here, these targeted taxes still seem to be invalid under this Court's jurisprudence. Specifically, as Justice Kennedy points out in his controlling opinion in the "adult" zoning decision of *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425 (2002) (plurality):[13] "A city may not

[13] Under *Marks v. United States,* 430 U.S. 188 (1977), the Circuits have generally held that Justice Kennedy's concurring opinion represents the constitutional "holding" of the plurality decision in *Alameda Books. See, e.g.*, *729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 491 (6th Cir. 2008); *Annex Books,*

(Continued on following page)

regulate the secondary effects of speech by suppressing the speech itself. *A city may not, for example impose a content-based fee or tax*. . . . This is true even if the government purports to justify the fee by reference to secondary effects."[14] *Id*. at 445 (emphasis added, citations omitted).[15]

Nevertheless, these types of speech-targeted taxes are not being swiftly invalidated, with this Court, so far, declining review. *See, e.g., Combs v. Texas Entertainment Association, Inc.*, 347 S.W.3d 277 (Tex. 2011), *cert. denied*, 132 S.Ct. 1146 (2012) (upholding under the federal constitution a $5.00 per person tax on admissions to defined "sexually oriented businesses");

Inc. v. City of Indianapolis, 581 F.3d 460, 465 (7th Cir. 2009); *SOB, Inc. v. County of Benton,* 317 F.3d 856, 861-62 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003); and *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County,* 337 F.3d 1251, 1269 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004).

[14] Of course, here, the Tax is not predicated upon any claim of adverse secondary effects; in fact throughout this litigation the Respondents have disclaimed any intent to specifically tax adult nightclubs (the irrefutable legislative history to the contrary notwithstanding).

[15] *Accord, id*. at 450 ("This reasoning would as easily justify a content-based tax: Increased prices will reduce demand, and fewer customers will mean fewer secondary effects. *But a content-based tax may not be justified in this manner*") (Kennedy, J., concurring) (emphasis added); and *id*. at 451 ("It is true that cutting adult speech in half would probably reduce secondary effects proportionally. But again, a promised proportional reduction does not suffice. *Content-based taxes could achieve that*, yet these are *impermissible*") (Kennedy, J., concurring) (emphasis added).

Bushco v. Utah State Tax Comm'n, 225 P.3d 153 (Utah 2009), *cert. denied*, 131 S.Ct. 455 (2010) (upholding a 10% gross receipts tax on nude entertainment); *Pooh-Bah Enters., Inc. v. County of Cook*, 905 N.E.2d 781 (Ill.), *cert. denied*, 130 S.Ct. 258 (2009) (upholding a "small venues" exception to its "live performances tax" that does not permit "adult entertainment cabarets" to be included in the exclusion); and *677 New Louden Corporation v. St. of N.Y. Tax Appeals Tribunal*, 979 N.E.2d 1121 (N.Y. 2012), *cert. denied*, 134 S.Ct. 422 (2013) ("live dramatic, choreographic or musical" exception to "amusement tax," which was construed not to apply to adult nightclubs, was constitutional). *See also Texas Entertainment Ass'n, Inc. v. Combs*, 431 S.W.3d 790 (Tex. App. 2014), *reh'g overruled* (June 2, 2014), *rev. denied* (Tex. Nov. 21, 2014) (upholding the Texas tax discussed above under the state constitution).

This has engendered more governmental entities to consider enacting, or actually enacting, such targeted taxes.[16] Yet, the judicial proceedings referenced

[16] *See, e.g.*, Illinois Live Adult Entertainment Facility Surcharge Act, 35 Ill. Comp. Stat. 175 (2012); A.B. 2912 (N.Y. Jan. 22, 2013) (a bill to establish a surcharge on "sexually oriented media"); H.B. 2119 (W. Va. Feb. 13, 2013) (a bill to impose an excise tax on "the sale or rental of obscene materials"); and S.B. 595 (Mich. Oct. 2, 2013) (bill to assess a $3 tax per customer entering adult entertainment businesses). *See also* S.B. 380 (Nev. Mar. 18, 2013) (apparently concerned about the constitutionality of the statutes at bar, a proposal to impose a fee on "certain live adult entertainment businesses").

immediately above demonstrate that the constitutionality of these laws is far from certain. For example, in *677 New Louden*, decided by a slim 4-3 vote, the dissent noted that the selectivity of taxing what some may consider "lowbrow dance" while exempting from taxation what may be "highbrow," "raises significant constitutional problems." 979 N.E.2d at 1123-25. *See also Combs v. Texas Entertainment Association, Inc*., 287 S.W.3d 852 (Tex. App. 2009) (2-1 ruling that Texas' "sexually oriented business" tax was unconstitutional under the federal constitution, before that decision was overturned by the Texas Supreme Court); *Pooh-Bah Enters., Inc. v. County of Cook*, 881 N.E.2d 552 (Ill. App. 1st Dist., 5th Div. 2007) (3-0 ruling that the Illinois tax was unconstitutional before that decision was reversed by the Illinois Supreme Court); and *Bushco*, 225 P.3d at 172-76 (detailed dissent by Utah's Chief Justice arguing the unconstitutionality of the state's "nude entertainment" tax).

In addition, the scope of the current drive to specifically tax controversial but protected expression does not end with adult nightclubs. A number of states are currently considering enacting, for example, taxes upon deemed "violent" video games notwithstanding what should have been the definitive word on such content-based regulations in *Brown v.*

Entertainment Merchants Ass'n, 131 S.Ct. 2729 (2011).[17]

Because of the questionable rulings by a number of states courts of last resort on these important matters of constitutional jurisprudence, because of the recent rise in the number of these types of expression-targeted laws that are appearing across the country (particularly as more state courts uphold such laws), and because of the potential inability – as discussed in the section immediately below – of aggrieved taxpayers to obtain timely and meaningful judicial relief from tax statutes that this Court has acknowledged are forms of prior restraints that can undeniably cause irreparable harm to First Amendment liberties, it is essential for this Court to provide clear guidance in this area of jurisprudence so that important First Amendment rights are not further sacrificed. The Petition should be granted.

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[17] *See, e.g.*, H.D. 3579 (Mass. Apr. 3, 2013) ($1 tax on M-rated video games and music with "explicit lyrics"); H.B. 5735 (Conn. Jan. 23, 2013) (a bill to establish a 10% sales tax on M-rated video games); H.B. 157 (Mo. Jan. 14, 2013) (a bill to place a 1% excise tax on "violent" video games); H.B. 893 (Mo. Mar. 26, 2013) (a bill to impose a $1.00 excise tax on "violent" video games rated "T," "M," or "AO"). *See also* A.B. 2982 (N.Y. Jan. 22, 2013) (a bill to impose a special tax on the sale and rental of video games and on movie theater admissions to combat childhood obesity).

II. THE TAX INJUNCTION ACT, STATE PROCEDURAL HURDLES, AND THIS COURT'S § 1983 JURISPRUDENCE, IN COMBINATION, CAN RENDER IT IMPOSSIBLE FOR THESE PETITIONERS AND THOSE SUBJECT TO SIMILAR STATUTES TO OBTAIN *ANY* FORM OF MEANINGFUL JUDICIAL RELIEF, EVEN IF A SPEECH-TARGETED TAX IS ULTIMATELY FOUND TO BE UNCONSTITUTIONAL

Under normal circumstances, litigants faced with a law that arguably violates their First Amendment rights have a veritable array of potential judicial remedies available to them. Injunctive relief can be used to preclude the incurrence of irreparable harm. Declaratory relief can be obtained to provide the judiciary's proclamation of the law's illegality. And, of course, damages are usually available when an unconstitutional law causes financial injury. All of these various remedies are normally available under 42 U.S.C. § 1983 (App. 116-17). Moreover, if the constitutionally offensive provision is a tax-imposition law, return of the impermissibly collected taxes would also be a logical and likely form of judicial redress.

Here, however, because of a confluence of the Tax Injunction Act, Nevada statutes and administrative rules, and this Court's § 1983 jurisprudence, these Petitioners may not be able to obtain *any* of these

forms of judicial relief, *even if the LET is ultimately found to be unconstitutional*.

First, while the infringement of First Amendment rights, even for a minimal period of time, creates irreparable harm (*Elrod v. Burns*, 427 U.S. 347, 373 (1976)), and while the very purpose of affording the remedy of an injunction is to preclude irreparable harm from occurring in the first place (*Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57 (1975)), the TIA divests the federal district courts of jurisdiction to enjoin a state tax statute where a "plain, speedy and efficient remedy may be had in the courts of such State." App. 116. The lower federal courts here have decided that such a remedy indeed exists, irrespective of the fact that Petitioners are now entering their *ninth* year of state court litigation.

Second, in a series of rulings under the TIA, culminating with *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582 (1995), this Court has concluded that when adequate state remedies were considered to exist, an aggrieved taxpayer could not obtain injunctive relief under § 1983 *even in state court*, regardless of whether the tax may be admittedly invalid under the federal Constitution. Moreover, the prohibition of permitting relief under the federal Civil Rights Act in either federal or state court is not limited to issuing injunctions. It extends to the granting of declaratory relief as well as to the awarding of damages. 515 U.S. at

586-91.[18] Indeed, as a result, the Clark County District Court below dismissed out all of Petitioners' § 1983 damage claims. App. 68.

Third, while this Court noted in *National Private Truck Council* that there "*may be*" exceptions to the preclusive effect of the TIA in certain circumstances, including when irreparable injury will be produced (515 U.S. at 591 n. 6), and observed that nothing the Court said therein "prevents a State from empowering its own courts to issue injunctions and declaratory relief even when a legal remedy exists" (*id*. at 592), here the State of Nevada goes in the *exact opposite direction* and specifically precludes, via NRS 368A.280(1) (App. 152), the entry of an injunction "or other legal or equitable process" that prevents the collection of the Tax. This Court has noted that these

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[18] *See also Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) (TIA's prohibition of injunctions extended to declaratory judgments regarding the constitutionality of state taxes); *California v. Grace Brethren Church*, 475 U.S. 393, 407-11 (1982) (TIA precludes federal district courts from awarding such declaratory judgments); *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 36-37 (1990) (non-jurisdiction under the TIA exists as long as the state provides either a "predeprivation" process (*e.g*., an injunction) or "postdeprivation" relief (*e.g*., a refund)); *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 116 (1981) (TIA precludes federal courts from awarding damages under § 1983 regarding unconstitutional state taxes when state law furnishes an adequate legal remedy); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 68-69 (1989) (refund action against unconstitutional state tax could not proceed under § 1983).

types of judicial redress restrictions are "common practice" in state tax statutes. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 523 (1981) (quoting S. Rep. No. 1035, 75th Cong., 1st Sess., 1 (1937)).

Fourth, the Respondents have asserted in the *state proceedings* below that even if the LET is found to be unconstitutional, the Petitioners may in fact be precluded from even being able to obtain a *refund* of the (then) illegally collected taxes. In the first hearing before the Commission, the State raised (App. 218) for the first time, and irrespective of their representations to the federal courts, the spectre of NAC 368A.170(2) (App. 161), which dictates that any over-collection (including improper collection) of tax "must, if possible, be refunded by the taxpayer to the patron from whom it was collected." *See also* App. 219 (similar). The taxpayer is required to use "all practical methods to determine any amount to be refunded pursuant to subsection 2 and the name and address of the person to whom the refund is to be made." NAC 368A.170(3)(a) (App. 161-62).[19] If the taxpayer cannot do this, *the illegally collected taxes are actually remitted to the state!* NAC 368A.170(4). App. 162.

[19] Basically, this would require the Petitioners to keep records of the name and address of every customer who passed through their doors; a virtually impossible task. At a subsequent Commission proceeding, the SHAC Petitioners each submitted an affidavit attesting to the fact that they did not increase fees to customers to pay the LET, and that the taxes were paid, rather, out of the general operating revenues of the businesses. *See* App. 219-20, and representative affidavit at App. 221-23.

Thereafter and throughout the litigation below, the Respondents maintained their position that unless the Petitioners had collected the personal information of each and every customer so that they could give the taxes back to them, the Petitioners could not obtain a refund *even if the LET was declared to be unconstitutional*. App. 224-32. In fact, the Respondents used this assertion in an effort to obtain discovery from the Petitioners *in the Refund Action* aspect of the proceedings below (App. 233-38), even though they then later asserted (successfully, as it turned out) that Petitioners could not litigate such an original action and were, rather, relegated to a PJR proceeding where discovery was simply not permitted. Consequently, these Petitioners may be unable to obtain a refund of even unconstitutionally collected taxes.

Finally, while aggrieved taxpayers of speech-targeted taxes may, in light of the decisions of this Court referenced above, be relegated to litigating their constitutional claims in state administrative agencies (at least initially), this Court has long-noted that the constitutionality of legislative enactments has "generally been thought beyond the jurisdiction of administrative agencies. . . ." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (citing *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (quoting *Oestereich v. Selective Serv. System Local Bd. No 11*, 393 U.S. 233, 242 (1968)) (Harlan, J., concurring in the result)).

Yet, under Nevada law that is exactly where the Petitioners are supposed to bring their as applied

constitutional claims. *See, e.g.*, *Malecon Tobacco, LLC v. Department of Taxation,* 59 P.3d 474, 475-77 (Nev. 2002) (Nevada Supreme Court citing to and relying upon *Thunder Basin Coal*, and concluding that requiring factual development in administrative agencies is proper in regard to as applied constitutional challenges). Nevertheless, in the most recent Commission hearing on these matters, one commissioner even commented that he was "not sure this is the right forum" to address Petitioners' constitutional arguments. App. 240.

More importantly, unlike in a court of law, the ability of aggrieved taxpayers to obtain discovery in the Nevada Tax Commission is discretionary. *See* NAC 360.135 (App. 159-60). Here, the Commission did not permit the Petitioners to take *any* depositions or undertake any further discovery once the Refund Action was dismissed and the Petitioners then relegated, rather, to a PJR proceeding. App. 79. Unlike an original judicial action where de novo judicial review was available (*i.e.*, the Refund Action), a PJR proceeding is confined to the record in the administrative agency, and judicial review is limited in scope. NRS 233B.135. App. 122-23. This is now how Petitioners' supposed "as applied" constitutional challenge will be adjudicated by the state courts; *without a single deposition ever having been taken*.

The proceedings below demonstrate how the convergence of various procedural doctrines may render it extremely difficult, if not in some circumstances impossible, to adequately protect First Amendment

rights from being infringed by an unconstitutional state tax.

As a result of the cumulative effect of these various doctrines of judicial restraint, the Petitioners have now passed the *eighth* anniversary of the filing of the First State Action, and they must continue to pay oppressive taxes that they contend are blatantly unconstitutional. The longer this Court refrains from providing specific guidance on these matters of critical First Amendment law, the more potentially unconstitutional taxes are paid that Petitioners may never be able to recoup. In addition, as more of these types of onerous speech-targeted tax statutes are enacted across the county, other taxpayers are similarly facing an array of procedural hurdles that may render it impossible for them to obtain appropriate judicial redress.

For these reasons, this Court should grant the petition.

III. THE TYPE OF TAXES AT ISSUE ARE NOT SUBJECT TO THE POLITICAL CONSIDERATIONS RECOGNIZED BY THIS COURT THAT OTHERWISE RESTRAIN THE LEGISLATIVE BRANCH OF GOVERNMENT FROM ENACTING OPPRESSIVE TAXATION LAWS

It is clear from its text that the LET is not a generally applicable, "across-the-board," tax. It only taxes live entertainment, and then exempts out from

taxation a wide variety of that type of expression. As this Court noted in *Minneapolis Star*:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. *When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.*

460 U.S. at 585 (emphasis added).

This Court subsequently summarized these political constraints as follows:

> We noted that the general applicability of any burdensome tax law helps to ensure that it will be met with widespread opposition. When such a law applies only to a single constituency, however, *it is insulated from this political constraint*.

Leathers, 499 U.S. at 445 (emphasis added).

The enactment of the type of tax at issue, specifically directed and/or legislatively gerrymandered to apply only – or primarily – to controversial or politically unpopular expression, is simply free from the practical constraints upon the legislative process noted by this Court in *Minneapolis Star* and *Leathers*. Because of the political ease of enacting such potentially oppressive laws, it is incumbent upon this

Court to promptly exercise its ultimate authority to provide clear guidance on this quickly-expanding area of targeted taxes upon First Amendment protected expression.

CONCLUSION

Legislatures are free from political pressures to enact taxes that apply to controversial or disfavored expression. Once such laws are enacted, aggrieved taxpayers are subject to a myriad of judicial restraint doctrines that may make it difficult, or even impossible, for them to obtain timely and effective relief from the courts. The important constitutional issues discussed herein are unresolved, and as such the petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: December 17, 2014

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130 Nev., Advance Opinion 73

IN THE SUPREME COURT
OF THE STATE OF NEVADA

DEJA VU SHOWGIRLS OF LAS VEGAS, LLC, A NEVADA LIMITED LIABILITY COMPANY, D/B/A DEJA VU SHOWGIRLS; LITTLE DARLINGS OF LAS VEGAS, D/B/A LITTLE DARLINGS; K-KEL, INC., D/B/A SPEARMINT RHINO GENTLEMEN'S CLUB; OLYMPUS GARDEN, INC., D/B/A OLYMPUS [sic] GARDEN; SHAC, LLC, D/B/A SAPPHIRE; THE POWER COMPANY, INC., D/B/A CRAZY HORSE TOO GENTLEMEN'S CLUB; AND D. WESTWOOD, INC., D/B/A TREASURES,
Appellants,
vs.
NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; AND THE STATE OF NEVADA BOARD OF EXAMINERS,
Respondents.

No. 60037

(Filed Sep. 18, 2014)

Appeal from a district court summary judgment rejecting a facial challenge to the constitutionality of Nevada's Live Entertainment Tax and denying

injunctive relief as to the enforcement of that tax. Eighth Judicial District Court, Clark County, Elizabeth Goff Gonzalez, Judge.

Affirmed.

Lambrose Brown and William H. Brown, Las Vegas; Shafer and Associates and Bradley J. Shafer, Lansing, Michigan, for Appellants Deja Vu Showgirls of Las Vegas, LLC; Little Darlings of Las Vegas; K-Kel, Inc.; Olympus Garden, Inc.; The Power Company, Inc.; and D. Westwood, Inc.

Greenberg Traurig, LLP, and Mark E. Ferrario and Brandon E. Roos, Las Vegas, for Appellant SHAC, LLC.

Catherine Cortez Masto, Attorney General, Blake A. Doerr and David J. Pope, Senior Deputy Attorneys General, and Vivienne Rakowsky, Deputy Attorney General, Carson City, for Respondents.

BEFORE THE COURT EN BANC.

OPINION

By the Court, DOUGLAS, J.:

In this opinion, we consider whether, on its face, Nevada's Live Entertainment Tax violates free speech rights under Article 1, Section 9 of the Nevada Constitution or the First Amendment to the United States Constitution. We also address whether the district court was required to entertain appellants'

as-applied challenge to the Tax when they failed to exhaust their administrative remedies on that issue. Regarding appellants' facial challenge, we conclude that the Tax does not violate the First Amendment as related to speech (*i.e.,* dance), and we therefore affirm the district court's summary judgment as to this issue. As for appellants' as-applied challenge, we hold that appellants were required to exhaust their administrative remedies on this issue before seeking relief in the district court, and thus, we affirm the district court's dismissal of the as-applied challenge for lack of subject matter jurisdiction.

BACKGROUND

In 2003, the Nevada Legislature enacted the Live Entertainment Tax, which imposes an excise tax on certain business transactions completed at facilities providing "live entertainment." *See* NRS 368A.200(1). "'Live entertainment' means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present." NRS 368A.090(1). Nevada's Live Entertainment Tax (NLET) imposes a ten-percent tax on any amounts paid for admission and for food, refreshments, and merchandise provided within a live-entertainment facility having a maximum occupancy of less than 7,500 persons. NRS 368A.200(1). When a live-entertainment facility has a maximum occupancy

of at least 7,500 persons, however, NLET only imposes a five-percent tax on admission charges. *Id.*

At its inception, NLET provided ten exemptions dependent on, *inter alia,* the location and size of a facility providing live entertainment, the entity status of a provider,[1] and, in several instances, the type of entertainment provided.[2] NRS 368A.200(5) (2003). Among other things, the 2003 version of NLET included an exemption for "[l]ive entertainment that [was] not provided at a licensed gaming establishment if the facility in which the live entertainment [was] provided [had] a maximum seating capacity of less than 300." NRS 368A.200(5)(d) (2003). The initial statutory scheme also provided an exemption for gaming establishments "licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment [was] provided [had] a maximum seating capacity of less than 300." NRS 368A.200(5)(e) (2003).

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[1] NLET exempted "[l]ive entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization. . . ." from being subject to the tax. NRS 368A.200(5)(b) (2003).

[2] NLET also exempted "[a]ny boxing contest or exhibition governed by the provisions of chapter 467 of NRS" from being subject to the tax. *See* NRS 368A.200(5)(c) (2003).

Since its enactment, the Legislature has amended NLET's provisions on multiple occasions. In 2005, the Legislature, among other things, created eight exceptions to NLET's definition of "live entertainment."[3] NRS 368A.090(2)(b) (2005). Additionally, the Legislature changed the maximum seating capacity language in NRS 368A.200(5)(d)-(e) (2003) to "maximum occupancy," and reduced that provision's occupancy from 300 to 200. NRS 368A.200(5)(d)-(e) (2005). The Legislature also added six new exemptions, including exempting certain National Association for Stock Car Auto Racing (NASCAR) events from being subject to the tax. NRS 368A.200(5)(k)-(p) (2005). Two years later, the Legislature added another exemption from the tax for professional minor league baseball contests, events, and exhibitions. NRS 368A.200(5)(p) (2007).[4]

In April 2006, appellants, which are all exotic dancing establishments, filed suit against respondents in the United States District Court for the District of Nevada seeking a declaration that NLET

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[3] For example, the statute was amended to exclude "[t]elevision, radio, closed circuit or Internet broadcasts of live entertainment" and "[a]nimal behaviors induced by animal trainers or caretakers primarily for the purpose of education and scientific research" from NLET's definition of "live entertainment." NRS 368A.090(2)(b)(5), (7) (2005).

[4] In the Legislature's 2007 amendment, NRS 368A.200(5)(p) (2005) was moved to NRS 368A.200(5)(q), with the baseball exemption designated as NRS 368A.200(p). 2007 Nev. Stat., ch. 547, § 1, at 3434.

is facially unconstitutional for violating the First Amendment to the United States Constitution, an injunction against its enforcement, and a refund of all taxes paid under the statute. The federal district court later dismissed this action on respondents' motion, concluding that appellants had failed to show that Nevada's state court and administrative systems deprived them of a plain, speedy, and efficient remedy. Appellants appealed that decision to the United States Court of Appeals for the Ninth Circuit, which later affirmed the lower court's determination.

While the appeal of the dismissal of their federal action was still pending before the Ninth Circuit, appellants filed a de novo action in the Eighth Judicial District Court seeking a declaration that NLET is facially unconstitutional, injunctive relief, a refund of all taxes paid under NLET, and attorney fees and costs (Case 1). Appellants later amended their complaint in Case 1 to include an as-applied constitutional challenge to NLET. Even though Case 1 was pending in the district court, appellants K-Kel, Olympus Garden, SHAC, The Power Company, and D. Westwood filed individual tax refund requests with the Nevada Department of Taxation pursuant to NRS 368A.260(1) on the ground that NLET was facially unconstitutional under the First Amendment. The Department later denied these refund requests and the Nevada Tax Commission affirmed the Department's decision by a written order entered on October 12, 2007, determining that NLET was facially constitutional.

Based on the Department's and Commission's denials of their refund requests, appellants filed a second de novo action in the Eighth Judicial District Court on January 9, 2008 (Case 2). In this complaint, appellants argued that NLET was facially unconstitutional and sought a refund, declaratory and injunctive relief, and damages. Nearly three years later, appellants amended their Case 2 complaint to include an as-applied challenge to NLET. The district court then entered an order coordinating Cases 1 and 2 and consolidating their declaratory relief claims.

After hearing arguments on respondents' renoticed motion for partial summary judgment and motion to dismiss the as-applied challenge, the district court entered an order limiting Case 1 to only appellants' facial challenge to NLET and permanent injunction request. In doing so, the district court dismissed the pending as-applied challenge in Case 1 for lack of subject matter jurisdiction based on appellants' failure to exhaust their administrative remedies and dismissed Case 2 in its entirety, also on subject matter jurisdiction grounds, because appellants had filed a de novo action instead of a petition for judicial review per NRS 233B.130. Appellants subsequently appealed the dismissal of Case 2 to this court, and that appeal is before us in the companion case addressed in *Deja Vu Showgirls v. State, Department of Taxation* (*Deja Vu I*), 130 Nev. ___, ___ P.3d ___ (Adv. Op. No. 72, September 18, 2014).

Appellants and respondents ultimately filed competing motions for summary judgment on the

remaining issues in Case 1. The district court granted respondents' summary judgment motion, denying appellants' summary judgment motion in the process. The district court concluded that NLET did not facially violate the First Amendment because it is a content-neutral and generally applicable tax that does not target constitutionally protected activity. In making its determination, the district court only considered the statute's language. Additionally, as a consequence of its decision, the district court necessarily rejected appellants' request for a permanent injunction.

DISCUSSION

I.

We first address whether the district court erred by dismissing appellants' as-applied challenge from Case 1 for lack of subject matter jurisdiction.

In Nevada, a district court lacks subject matter jurisdiction to consider a taxpayer's claim for judicial relief unless that taxpayer has exhausted its administrative remedies. *State v. Scotsman Mfg. Co., Inc.,* 109 Nev. 252, 254, 849 P.2d 317, 319 (1993).[5] We have

[5] *Scotsman* uses "subject matter jurisdiction" with reference to a party's failure to exhaust administrative remedies. We note but do not decide the question of whether the failure to exhaust administrative remedies is jurisdictional or a claim prerequisite. *See* II Richard J. Pierce, *Jr., Administrative Law Treatise* §§ 15.2, 15.3 (5th ed. 2010 & Supp. 2014).

recognized limited exceptions to that rule, however, when a statute's interpretation or constitutionality is at issue, or when the initiation of administrative proceedings would be futile. *Id.* at 255, 849 P.2d at 319. With those exceptions in mind, appellants contend that the district court improperly dismissed their as-applied challenge to NLET because that challenge involved constitutional issues.[6] Whether the district court erred by dismissing appellants' as-applied challenge for lack of subject matter jurisdiction is a question of law that we review de novo. *See Ogawa v. Ogawa,* 125 Nev. 660, 667, 221 P.3d 699, 704 (2009).

It is undisputed that appellants failed to exhaust their administrative remedies for their as-applied constitutional challenge. And while appellants argue that there is a general exception for claims involving constitutional issues, this argument ignores the distinction drawn by Nevada authority between facial and as-applied challenges in this context. *See Malecon Tobacco, L.L.C. v. State ex rel. Dep't of Taxation,* 118 Nev. 837, 841, 59 P.3d 474, 477 (2002). While

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[6] We reject appellants' assertion that initiating administrative proceedings for their as-applied constitutional challenge to NLET before the Department would have been futile because they offer no cogent argument. *See Berkson v. LePome,* 126 Nev. ___, ___, 245 P.3d 560, 566 (2010) (stating that "[i]t is well established that this court need not consider issues not supported by cogent argument . . . "). Appellants' one-sentence argument on this issue does not support the proposition that the Department, having never had appellants' as-applied challenge before it, would not have fully considered that challenge if it had been properly raised.

facial constitutional challenges may bypass the administrative exhaustion requirement, we have held that as-applied constitutional challenges hinging on factual determinations cannot. *Id.* In making that determination, we reasoned that given an agency's expertise in the area of the dispute, it is in the best position to make the factual determinations necessary to resolve that dispute. *See id.* at 840-41, 59 P.3d at 476-77. Thus, because appellants failed to raise their as-applied challenge to NLET before the Department – a challenge that hinges on factual determinations not yet made – we conclude that they were required to exhaust their administrative remedies, and therefore, we affirm the district court's dismissal of appellants' as-applied challenge.

II.

With appellants' as-applied challenge no longer before us, we now consider whether NLET is facially unconstitutional for violating free speech rights (*i.e.,* dance) under Article 1, Section 9 of the Nevada Constitution or the First Amendment to the United States Constitution.[7]

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[7] We note that Article 1, Section 9 of the Nevada Constitution "affords no greater protection to speech activity than does the First Amendment to the United States Constitution." *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't,* 120 Nev. 712, 722, 100 P.3d 179, 187 (2004). Accordingly, our resolution of appellants' challenge to NLET based on the United States Constitution also resolves appellants' challenge under the Nevada Constitution.

This court reviews constitutional challenges to a statute de novo. *Busefink v. State,* 128 Nev. ___, ___, 286 P.3d 599, 602 (2012). In the First Amendment context, there is a "strong presumption in favor of duly enacted taxation schemes." *Leathers v. Medlock,* 499 U.S. 439, 451 (1991). As the Supreme Court has stated, "Inherent in the power to tax is the power to discriminate in taxation," and thus, "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Id.* (internal quotation omitted). Accordingly, in such circumstances, a statute's "presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Id.* at 451-52 (internal quotations omitted).

When making a facial challenge to a statute, the challenger generally bears the burden of demonstrating that there is no set of circumstances under which the statute would be valid. *See Busefink,* 128 Nev. at ___, 286 P.3d at 602. But if a court concludes that a heightened level of scrutiny applies, the general presumption regarding a statute's constitutionality is reversed, and the State bears the burden of demonstrating the statute's constitutionality.[8] *See United*

[8] Although not discussed by the parties, we note that appellants' allegation that NRS 368A.200 violates the First Amendment satisfies the preliminary state actor requirement. *See S.O.C., Inc. v. Mirage Casino-Hotel,* 117 Nev. 403, 409-10, 23 P.3d 243, 247 (2001) (explaining that the First Amendment, applied to the states through the Fourteenth Amendment, only

(Continued on following page)

States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 817 (2000). With the aforementioned standards in mind, our analysis will focus on determining what level of scrutiny applies in our review of NLET's constitutionality.

A.

Before reaching the heart of this appeal, we must first dispose of appellants' assertion that, under *Murdock v. Pennsylvania,* 319 U.S. 105 (1943), NLET violates the First Amendment because it directly taxes live entertainment, which they maintain is categorically protected under the First Amendment. In *Murdock,* multiple Jehovah's Witnesses challenged their convictions for violating an ordinance that prohibited all soliciting and canvassing without first obtaining a license by paying a flat license tax. 319 U.S. at 106-07. In concluding that the ordinance was unconstitutional as applied to the petitioners, and therefore reversing their convictions, the Supreme Court recognized that "a person cannot be compelled to purchase, through a license fee or a license tax, the privilege freely granted by the constitution." *Id.* at 114 (internal quotation omitted).

Appellants' interpretation and application of the *Murdock* case to NLET is fundamentally flawed. First, the tax at issue in *Murdock* was a flat license

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provides protection from a government's abridgment of free speech rights).

tax, which was required to be paid before the petitioners in that case could exercise their rights under the First Amendment. The Supreme Court specifically distinguished that kind of tax from taxes on income, property, and other taxes that relate to the scope of activities or realized revenues. *Id.* at 112-13. Appellants' attempt to expand the applicability of *Murdock*'s holding to NLET, which is an excise tax on admission fees and the sale of certain products, disregards this distinction. Moreover, appellants' expansion argument was expressly rejected by the Court in a later decision that limited *Murdock*'s holding "to apply only where a flat license tax operates as a prior restraint on the free exercise of religious beliefs." *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.,* 493 U.S. 378, 389 (1990) (holding that California's six-percent sales tax on retail sales of personal property was not unconstitutional as applied to a religious organization's sale of religious books, tapes, records, and nonreligious materials).

Second, in making their facial challenge, appellants rely on the unsubstantiated assertion that NLET, in all of its applications, infringes on the First Amendment by regulating protected activities because entertainment is presumptively protected as a category. In rejecting appellants' argument, we note that NLET does not regulate live entertainment. Moreover, despite its misnomer, NLET does not actually tax live entertainment. Instead, it imposes an excise tax on business transactions which neither inhibits nor burdens the expressive conduct occurring

at live-entertainment facilities. *See* NRS 368A.200. Therefore, because NLET does not operate as a prior restraint on constitutionally protected activities, we reject appellants' arguments on this issue. *See Jimmy Swaggart Ministries,* 493 U.S. at 386.

B.

The remainder of our analysis addresses appellants' arguments that NLET is a differential tax of speakers protected under the First Amendment that triggers strict scrutiny because it discriminates on the basis of the content of taxpayer speech, targets a small group of speakers, and threatens to suppress speech. Accordingly, we will address those arguments in that order.

Preliminarily, we recognize that the degree of protection afforded to erotic dance under the First Amendment is uncertain. *See City of Las Vegas v. Eighth Judicial Dist. Court,* 122 Nev. 1041, 1052, 146 P.3d 240, 247 (2006) ("Arguably, erotic dance is expressive conduct that communicates, which could be deserving of some level of First Amendment protection."). This uncertainty arises from the Supreme Court's plurality opinion in *Barnes v. Glen Theatre, Inc.,* which states that "nude dancing . . . is expressive conduct within the *outer perimeters* of the First Amendment," and therefore is subject to only an intermediate level of scrutiny. 501 U.S. 560, 565-67 (1991) (emphasis added). To the extent that nude dancing is protected under the First Amendment, we

acknowledge that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Young v. Am. Mini Theatres, Inc.,* 427 U.S. 50, 70 (1976) (plurality opinion). With that said, we note that the line of cases that appellants rely on and that we use in the remainder of this disposition deal exclusively with taxes on the press, which raise "concerns about censorship of critical information and opinion." *Leathers,* 499 U.S. at 447. Accordingly, we are confident that if NLET satisfies those legal standards, the statute is constitutional on its face.

We now turn to appellants' assertion that NLET discriminates based on the content of taxpayer speech. Appellants contend that, in enacting and amending NLET, the Legislature discriminated against taxpayers providing adult-oriented entertainment and favored taxpayers presenting family-oriented live entertainment. In making this argument, appellants focus on NRS 368A.090's exceptions to the definition of "[l]ive entertainment" and NRS 368A.200(5)'s exemptions for certain live entertainment facilities identified by their size, location, entity status, and in some cases, the type of entertainment being provided. Appellants allege that NLETs exemptions for NASCAR, professional baseball, and boxing events are examples of content-based discrimination. Respondents disagree, arguing that NLET is a generally applicable tax and not discriminatory, and that no classifications are based on the content of taxpayers' messages.

We begin our consideration of appellants' arguments by emphasizing that "a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas." *Leathers,* 499 U.S. at 450. Thus, a tax that discriminates between speakers on a basis other than ideas is not by itself constitutionally suspect. To determine whether a taxing statute discriminates on the basis of ideas, we primarily look to the statute's language and secondarily consider the difference in the messages of those who are and are not being taxed. *See id.* at 449.

For example, in *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221 (1987), the Supreme Court looked to the language of Arkansas's tax on receipts from sales of tangible personal property and concluded that the tax violated the First Amendment because it discriminated based on the content of taxpayer speech. In reaching this conclusion, the Court focused on the tax's content-based exemption for religious, professional, trade, and sports publications. *See id.* at 224, 229-31. The Court emphasized that Arkansas's tax "is particularly repugnant to First Amendment principles" because "a magazine's *tax status depends entirely on its content.*" *Id.* at 229 (emphasis added).

Unlike the tax at issue in *Arkansas Writers,* it cannot be said that whether a live-entertainment provider is subject to NLET depends exclusively or even primarily on the content of the entertainment being provided. *See generally* NRS 368A.090; NRS 368A.200. While NLET exempts certain performances,

the statute's language does not refer to the content of any taxpayer's message. *See Leathers,* 499 U.S. at 449. Additionally, the Supreme Court has expressed that discrimination among taxpayers, whether those taxpayers are speakers or nonspeakers, is inherent and permissible in creating tax classifications that allow states the flexibility needed to fit their tax programs to local needs. *See id.* at 451. Although, as appellants point out, several exemptions include speakers, *i.e.,* NASCAR, boxing, and professional baseball events, unless based on those speakers' ideas, such discrimination is insufficient to make NLET constitutionally suspect. *Id.* at 444, 451.

Having analyzed NLET's language, we now consider the messages of those who are and are not taxed under the statute. Appellants argue that NLET's exemptions and exceptions are based on family-oriented versus adult-oriented messages provided at live entertainment facilities. This assertion lacks merit. Many facilities providing what appellants would classify as family-oriented live entertainment are subject to NLET, including concert venues, circuses, and fashion shows. *Compare* NRS 368A.090(2)(a), *and* 368A.200(1), *with* NRS 368A.090(2)(b), *and* NRS 368A.200(5). Additionally, multiple facilities furnishing adult-oriented live entertainment, such as boxing and charity events, are exempted. NRS 368A.200(5)(b)-(c). Thus, facilities subject to NLET provide a variety of entertainers who in turn bring diverse messages. Based on NLET's language and the messages of those who are and are

not taxed under its provisions, we conclude that the statute does not discriminate based on the content of taxpayer speech.

Appellants next argue that NLET, through its exceptions and exemptions, impermissibly targets a small group of speakers, including appellants, to bear the full burden of the tax. We disagree.

In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 579, 592 (1983), the Supreme Court concluded that a use tax resembled a "penalty for a few" and was unconstitutional because only 13 publishers producing 16 out of 374 paid circulation papers were obligated to pay the tax. Later, in *Arkansas Writers,* the Court determined that the sales tax at issue was unconstitutional, in part, because at most only three publications were obligated to pay the tax. *See* 481 U.S. at 229. Further, as explained by the Court in a different case, "[t]he danger from a tax scheme that targets a small number of speakers is the danger of censorship. . . ." *Leathers,* 499 U.S. at 448.

As will be explained below, closer by comparison to this case is *Leathers v. Medlock.* In *Leathers,* the Supreme Court considered the constitutionality of Arkansas's state sales tax on tangible property and specified services that excluded or exempted certain segments of the media and not others. *Id.* at 441-42. Cable service providers challenged the tax after they became subject to its provisions by a legislative amendment. *Id.* at 442. In concluding that Arkansas's

tax was constitutional and did not impermissibly target a small group of speakers, the Court determined that the use tax was of general applicability and posed no danger of censorship given the wide variety of programming subject to its provisions. *See id.* at 447, 449.

Although NLET is not a generally applicable sales tax like the tax addressed in *Leathers,* it reaches a much broader base than the taxes at issue in *Arkansas Writers* and *Minneapolis Star.* As evidence, the record demonstrates that in 2004 over 90 live-entertainment facilities were subject to and paid taxes under NLET. These tax payments came from a variety of live entertainment establishments, including raceways, nightclubs, performing arts centers, gentlemen's clubs, and facilities hosting sporting and one-time events. While we acknowledge that these numbers were from 2004 and thus predate NLET's additional exemptions and exceptions, we remain convinced that, even with those amendments, NLET does not impermissibly target a small group of speakers and therefore does not pose any danger of censorship.[9]

Appellants lastly claim that based on its exemptions and exceptions, the only possible purpose behind

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[9] We note that the 2005 amendments to the exemptions found in NRS 368A.200(5)(d)-(e) reducing the qualifying maximum occupancy levels from 300 to 200 actually expanded NLET's tax base. 2005 Nev. Stat., ch. 484, § 10, at 2483; 2005 Nev. Stat., ch. 9, § 38, at 142.

NLET was to suppress speech.[10] But this assertion ignores the idea that "[i]nherent in the power to tax is the power to discriminate in taxation," and that unless "a classification is a hostile and oppressive discrimination against particular persons and classes," it will not trigger heightened scrutiny. *Leathers,* 499 U.S. at 451-52 (internal quotations omitted).

In *Leathers,* the Supreme Court determined that Arkansas's choice to exclude and exempt certain media from a generally applicable tax was not hostile or oppressive because it did not suggest an intention to suppress any ideas. *Id.* at 452-53. Similarly, the Nevada Legislature has decided to exempt and exclude certain venues and live entertainment from an otherwise broadly applicable tax. A facial examination of NLETs provisions reveals that this taxation scheme is neither directed at nor presents the danger of suppressing particular ideas. *See generally* NRS Chapter 368A. Moreover, nothing in the record gives

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[10] Appellants also assert that the Legislature's inclusion of exotic dancing establishments was intentional and therefore unconstitutional. We note that delving into legislative intent in this context is neither required nor prudent. We agree with the Supreme Court when it stated, "[i]nquiries into congressional motives or purposes are a hazardous matter," and such speculation should not be the basis of voiding legislation "which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *United States v. O'Brien,* 391 U.S. 367, 383-84 (1968). Accordingly, we decline appellants' invitation to scrutinize NLET's legislative history.

us reason to believe that NLET poses any danger of suppressing ideas.

Because NLET does not discriminate on the basis of the content of taxpayer speech, target a small group of speakers, or otherwise threaten to suppress ideas or viewpoints, we determine that heightened scrutiny does not apply. Instead, rational basis review applies, and the statute is presumed to be constitutional. We conclude that NLET is constitutional on its face because appellants have failed to demonstrate that NLET is not rationally related to a legitimate government purpose. *See Hamm v. Arrowcreek Homeowners' Ass'n,* 124 Nev. 290, 301, 183 P.3d 895, 903-04 (2008); *see also Arata v. Faubion,* 123 Nev. 153, 159-60, 161 P.3d 244, 249 (2007) (explaining that as long as a reasonable factual situation can be conceived to justify it, a statute will be upheld under rational basis review).

Based on the foregoing analysis, we affirm the district court's decisions dismissing appellants' as-applied challenge to NLET and concluding that NLET is facially constitutional.[11]

/s/ Douglas, J.
Douglas

[11] We have considered all of appellants' other arguments, including those seeking additional discovery and an injunction, and conclude that they lack merit.

We concur:

/s/ Gibbons, C.J.
Gibbons

/s/ Pickering, J.
Pickering

/s/ Hardesty, J.
Hardesty

/s/ Parraguirre, J.
Parraguirre

/s/ Cherry, J.
Cherry

/s/ Saitta, J.
Saitta

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C. d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentleman's Club, OLUMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores,

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only,

Defendants.

Case No. 06A533273
Dept. No. XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT

(Filed Dec. 16, 2011)

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olympic Garden*; SHAC, LLC, d/b/a *Sapphire*; THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*; D. WESTWOOD, INC., d/b/a *Treasures*; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*; Plaintiffs, v. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

DEFENDANT'S [sic] Motion for Summary Judgment in the above-captioned matter came on for hearing on November 8, 2011;

David J. Pope, Senior Deputy Attorney General, Blake A. Doerr, Senior Deputy Attorney General, and Vivienne Rakowsky, Deputy Attorney General appeared on behalf of the Defendants; and,

William J. Brown, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs; and, Mark

E. Ferrario appeared on behalf of Plaintiff SHAC, LLC.

PROCEDURAL BACKGROUND

PLAINTIFFS are owners of a number of exotic dancing establishments. Pursuant to NRS 368A.140(2), the Nevada Gaming Control Board along with the Nevada Gaming Commission administer the Live Entertainment Tax (LE Tax) with regard to licensed gaming establishments and the Department of Taxation administers the LE Tax with regard to all other establishments. DEFENDANTS are the various agencies of the State of Nevada that administer the LE Tax as to non gaming establishments.

On December 19, 2006, PLAINTIFFS filed a Complaint under case No. 06A533273 in the 8th Judicial District for Clark County Nevada. In their Complaint, the PLAINTIFFS alleged that the LE Tax, established by Title 32, Chapter 368A of the Nevada Revised Statutes was an impermissible, unconstitutional infringement by the State of Nevada on constitutionally protected expression. PLAINTIFFS sought as their remedy: (1) an injunction enjoining the DEFENDANTS from enforcing the provisions of the LE Tax; (2) a refund of all LE Tax payments which they paid for January, February, March and April 2004; (3) a declaration that the LET is unconstitutional; and (4) an award for damages, costs and fees pursuant to 42 U.S.C. §1988.

In January 2007, apparently realizing that claims for refund of taxes must be submitted to the administering agency, a certain group of PLAINTIFFS made a request for a refund of the LE Tax which they paid for January, February, March and April 2004. The Department of Taxation denied the refund requests. The PLAINTIFFS who had requested refunds appealed the Department's denial to the Nevada Tax Commission on the grounds that the LE Tax was unconstitutional. The Nevada Tax Commission affirmed the Department's decision.

In late 2007, a separate, nearly-identical Complaint was filed and assigned Case No. 08A554970. As the matters progressed, the claims for injunctive relief were consolidated while the remaining claims were coordinated. Pursuant to this Court's Order from the hearing held on August 23, 2011, PLAINTIFFS claims were all dismissed except for the facial challenge to the LE Tax.

History of the Tax

Admission charges, food, drink, and merchandise sales in establishments where exotic dancing takes place have been taxed in Nevada for many years. The LE Tax was enacted in 2003, when the 20th Special Session of the Nevada State Legislature approved and the Governor signed Senate Bill No. 8 ("SB 8"). The LE Tax replaced the Casino Entertainment Tax which replaced the Federal Cabaret Tax. *See* Nevada

State Attorney General's Opinion No. 85-17, which states in pertinent part:

> The original casino entertainment tax was passed in 1965 at the urging of Governor Grant Sawyer as a revenue measure, Journal of the Senate, 53d Sess., at 619-26 (Nev. Apr. 3. 1965). The original casino entertainment tax was based upon the federal cabaret tax. NRS 463.401(1) (1965) was very similar in language to 26 U.S.C. § 4232(b) (1964), which provided the definition of "roof garden, cabaret, and other similar places" for the imposition of the federal cabaret tax.

See also, Cashman Photo Concessions and Labs, Inc. v. Nev. Gaming Comm'n, 91 Nev. 424, 427, 538 P.2d 158, 159 (1975) (casino entertainment tax was derived from federal cabaret tax statute).

The statutory provisions governing the former Casino Entertainment Tax were contained in chapter 463 of NRS and were repealed in 2003 by the enactment of the LE Tax. S.B. 8 expanded the Casino Entertainment Tax to include non-gaming establishments. Cabarets where nude and semi-nude dancing occurs have existed in Las Vegas for many years and the Casino Entertainment Tax was applied to the admission, food, beverage and merchandise charges to those facilities. Thus, prior to the enactment of the LE Tax, admission charges to nude dancing establishments were only being taxed when the activity was performed in a gaming establishment.

As a result of the 2003 enactment of the Live Entertainment Tax, Plaintiffs K-Kel, Inc., Olympus Garden, Inc., SHAC, LLC, The Power Company, Inc., D.Westwood, Inc., and D.I. Food & Beverage of Las Vegas, LLC, became subject to the tax as of January 1, 2004, and have paid the tax thereafter. In 2005, the State of Nevada enacted certain modifications to the Live Entertainment Tax by way of Assembly Bill No. 554 (Regular Session of the 73rd Legislature) and Senate Bill No. 9 (22nd Special Session), which collectively modified the language of NRS 368A.200(5)(e) to thereafter provide that the Live Entertainment Tax did not apply to live entertainment provided at a facility that "has a maximum occupancy of less than 200 persons." As a result of the 2005 modifications to the Live Entertainment Tax, Plaintiffs Deja Vu Showgirls of Las Vegas, LLC, and Little Darlings of Las Vegas, LLC, became subject to the tax as of July 1, 2005, and have paid the tax thereafter. All of Plaintiffs' facilities have a maximum occupancy and a maximum seating capacity of less than 7,500 persons, and, at all relevant times, Plaintiffs have been subject to the Live Entertainment Tax at a rate of "10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility," pursuant to NRS 368A.200(1)(b).

ISSUE

Is the LE Tax a facially unconstitutional regulatory measure which infringes on the PLAINTIFFS

constitutionally-protected rights of freedom of speech and/or expression?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Legislation Is Presumed Constitutional

All acts passed by the Legislature are presumed to be valid until the contrary is clearly established, and courts will only interfere when the Constitution is clearly violated. *List v. Whisler,* 99 Nev. 133, 137, 660 P.2d 104, 106 (1983). Even "[i]n case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." *Id.*

The LE Tax statute was duly enacted by the Nevada Legislature and is presumed constitutional until the contrary is clearly established. Here, the Plaintiffs did not demonstrate that LE Tax statute was unconstitutional.

The Facial Validity of a Statute is a Question of Law

A statute will be declared facially invalid only if it is void in all of its applications. *Wash. State Grange,* 552 U.S. at 449-50. If a statute has a plainly legitimate sweep, it must be upheld against a facial challenge even if the statute hypothetically could raise constitutional questions when applied to a

specific set of circumstances. *Id.*; *Crawford v. Marion County Election Bd.,* 553 U.S. 181, 202 (2008); *Flamingo Paradise Gaming,* 125 Nev. Adv. Op. 39, 217 P.3d at 558 n.14. The Court may decide a facial challenge on summary Judgment as a matter of law. *See Flamingo Paradise Gaming,* 125 Nev. Adv. Op. 39, 217 P.3d at 549-51.

When deciding a facial challenge to the constitutionality of a statute, the Court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange,* 552 U.S. at 449-50. Even if the statute "may be subject to as-applied challenges once the statute is enforced against a particular party . . . it is improper in the context of a facial challenge review to consider these hypothetical situations." *Flamingo Paradise Gaming,* 125 Nev. Adv. Op. 39, 217 P.3d at 558 n.14. As further explained by the United States Supreme Court:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

United States v. Salerno, 481 U.S. 739, 745 (1987).

Because the remaining issue in this matter was the facial challenge, the matter before the court was a pure question of law.

Summary Judgment is Appropriate Where No Material Issues of Fact Exist

Under NRCP 56, the Court must grant the moving party summary judgment when the allegations in the complaint and other evidence on file, after being viewed in a light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains for trial and the moving party is entitled to judgment as a matter of law. *Turner v. Mandalay Sports Entm't,* 124 Nev. Adv. Op. 20, 180 P.3d 1172, 1174 (2008).

The Court may decide a facial challenge to the constitutionality of a statute on summary judgment because such a challenge does not present any issues of material fact, but presents only issues of law. *Flamingo Paradise Gaming, LLC v. Chanos,* 125 Nev. Adv. Op. 39, 217 P.3d 546, 549-51 (2009). The Court finds that there exists no genuine issue as to any material fact relative to Plaintiffs' facial constitutional challenges to the Live Entertainment Tax. Because Plaintiffs' remaining claims are limited to a facial challenge to the Live Entertainment Tax, this Court finds that it is limited to a review of the language of the Live Entertainment Tax statute, only, and is precluded from reviewing and/or considering any legislative history or other documentation submitted

by the Plaintiffs in support of their motion for summary judgment.

While Nude Dancing is Entitled to Some Level of Constitutional Protection, Exactly What That Level Is Has Not been Clearly Established

The US Supreme Court has addressed the issue of constitutional protection of nude dancing in a number of cases. In *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S. Ct. 2456 (1991), the Court addressed a statute that required go-go dancers to wear pasties and a G-string. The *Barnes* court held that "go-go dancing" was expressive conduct within the outer perimeters of the First Amendment. In *City of Erie,* the Court stated that, while being "in a state of nudity" is not an inherently expressive condition, nude dancing is entitled to some level of constitutional protection. *City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S.Ct. 1382 (2000).

> Scholars have grappled with the problem of the uncertain status of nude dancing and adult entertainment under the First Amendment. Professor Lawrence Tribe noted that "no Court has yet squarely held that sexually explicit but non-obscene speech enjoys less than full First Amendment protection." Tribe, *American Constitutional Law* §§ 12-18, p. 938 (2d Ed.1988). Although his comment was made prior to *Barnes,* the observation continues to be accurate today. Professor Erwin Chemerinsky views Supreme Court

> precedent as according sexually explicit expression "low-value" status. Chemerinsky, *Constitutional Law* § 11..3.4.4, p. 836-41 (1st Ed.1997). Professors Gerald Gunther and Kathleen Sullivan suggest that even in cases where courts do not explicitly treat sexual expression as lower-value speech, the decisions have implicitly treated such speech as a "subordinate species" in their tolerance of content-specific regulation.

Gunther and Sullivan, *Constitutional Law* § 5(D), p. 1155-56 (13th Ed.1997). *See also* Chemerinsky, *Constitutional Law Principles and Policies,* Second Edition, 2002, at p. 989 et seq. (explaining that nude dancing is protected by the First Amendment but is treated as being "low value" expression and thus the government has latitude to regulate such expression).

PLAINTIFFS argued that their activities are entitled to full First Amendment protection. That position is not supported by the above cited authority. Because the LE Tax is not a tax on nude dancing or other First Amendment protected activity, PLAINTIFFS assertion that the LE Tax statute should be subjected to the highest level of statutory scrutiny is erroneous.

THE LE TAX IS NOT A REGULATORY FEE

The LE Tax is not a regulatory measure at all and it does not tax speech but rather the privilege of entering an establishment where any form of live entertainment is performed. The determination of

whether a charge is characterized as a "fee" or a "tax" requires the court to consider the "true purpose" of the charge. *Clean Water Coalition v. The M Resort, LLC,* ___ Nev. ___, 255 P.3d 247, 257 (2011). A tax is intended to increase overall revenue, or be used to provide a general public benefit. *Id.* at 256, 258. A "fee," on the other hand, is a charge that "(1) applies to the direct beneficiary of a particular service, (2) is allocated directly to defraying the costs of providing the service, and (3) is reasonably proportionate to the benefit received." *Id.* at 257. Even an "incidental" regulatory feature of a charge will not overcome the "true purpose" of the charge as a revenue generator for the general fund. *Id.* at 258, citing *Douglas County Contractors v. Douglas County,* 112 Nev. 1452 (1996) (invalidating ordinance as impermissible tax despite being held out as regulatory fee when charge had effect of generating revenue for public improvement project).

Here, the statutory language of NRS 368A.200 clearly and unambiguously states that the tax which is being imposed is an "excise tax on admission to any facility in this State where live entertainment is provided." Consequently, the true purpose of the LE Tax is to tax.

The LE Tax is not a direct tax on constitutionally protected activity

The LE Tax is a tax on the price of admission, food, drink, and merchandise charges at facilities

where live entertainment is performed and not a direct tax on constitutionally protected activity.

For LE Tax purposes, live entertainment is statutorily defined as "any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present." NRS.368A.060. But, the LE Tax taxable event occurs only when the business collects an admission charge or other payment when admission charges are collected. NRS 368A.200(1) provides: [T]here is hereby imposed an excise tax on admissions to any facility in this State where live entertainment is provided.

Thus, while the label of the tax, 'Live Entertainment Tax,' might suggest that what is being taxed is live entertainment, as stated in the statute, the LE Tax is a tax on admissions and other charges at certain establishments.

Regulatory Statutes are Subject to Different Review than Taxing Statutes

The Plaintiffs cited to numerous cases where courts subjected statutes to strict scrutiny. Those statutes were regulatory statutes whose purpose was to regulate behavior. In *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S. Ct. 2456 (1991), the Court addressed a statute that required go-go dancers to wear pasties and a G-string. The *Barnes* court held that

"go-go dancing" was expressive conduct within the outer perimeters of the First Amendment. In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382 (2000), the Court stated that, while being "in a state of nudity" is not an inherently expressive condition, nude dancing is entitled to some level of constitutional protection. And in *Colacurcio v. City of Kent,* 163 F.3d 545, 550 (9th Cir. 1998), the City of Kent, Washington enacted an ordinance which required nude dancers to perform their dances at least 10 feet away from patrons. The various courts in those matters applied strict scrutiny analysis to those statutes because their goal was to regulate behavior. This is in contrast to the LE Tax which is merely a taxing statute.

In *Adams Outdoor Advertising, Ltd. v. Borough of Stroudsburg,* 667 A.2d 21 (Pa.Cmwlth. 1995), the Commonwealth Court of Pennsylvania addressed the distinction between a regulatory statue and a taxing statute in the First Amendment context. In *Adams Outdoor Advertising, Ltd.,* the borough of Stroudsburg, Pennsylvania enacted an ordinance which taxed off-premise signs based upon the size of the sign. *Id.* The *Adams Outdoor Advertising, Ltd.* court held that the tax was not a constitutional violation. In their analysis, the Court distinguished taxes from regulations. "[U]nlike a license fee, the purpose of which is to offset the costs of regulation, a tax is imposed for the purpose of raising revenue." *Id.* at 24. "[T]he primary purpose of taxes is always to raise money for the taxing authority." Id. There is a "strong

presumption in favor of duly enacted taxation schemes." *Leathers,* 499 U.S. at 451. "[A] differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Id.* at 452. When dealing with a tax versus a regulation, the issues presented are whether the tax is uniform and whether it is an unlawful infringement upon the First Amendment rights. *Id.* When dealing with a tax, the court need not address the fact that the tax amount exceeds the reasonable costs of administration because that is not applicable to tax legislation; it only applies to challenges to license fees. *Id.*

In the instant case, the facts are even further distinguishable from those in the *Adams Outdoor Advertising, Ltd.* case in that an incidental purpose of that statute was to limit the size of signs and not solely to generate revenue. The sole purpose of the LE Tax is to generate revenue and not to regulate First Amendment protected behavior. Evidence of this is the fact that nothing in chapter 368A of NRS authorizes the Department to supervise or regulate the PLAINTIFFS' First Amendment activities and the payment of the tax is not a condition precedent to exercise any constitutionally protected act. Further evidence that chapter 368A of NRS is strictly a tax and not a regulatory measure is the fact that the US District Court dismissed the PLAINTIFFS' Complaint on the grounds that the federal court lacked jurisdiction based on the Tax Injunction Act because the issue presented was strictly a taxing measure. That

decision was later affirmed by the 9th Circuit Court of Appeals.

Because the LE Tax is strictly a taxing statute, it is subject to rational basis review.

The State May Tax Admission to Taxpayers' Businesses, Therefore PLAINTIFFS are not Exempt from Taxation Pursuant to NRS 368A.200(5)

There is a "strong presumption in favor of duly enacted taxation schemes." *Leathers,* 499 U.S. at 451. "[A] differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Id.* at 452. With respect to taxing statutes, "[a]ny reasonable doubt about the applicability of an exemption must be construed against the taxpayer." *Sierra Pac. Power Co. v. Dep't of Taxation,* 96 Nev. 295, 297, 607 P.2d 1147, 1148 (1980).

Pursuant to NRS 368A.200(5)(a), "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions" is exempt from the LE Tax. Since the State of Nevada is not prohibited by the Constitution, law or treaties of the Untied [sic] States or the Nevada Constitution from taxing the admissions and other charges at issue in this case, the exemption is not applicable.

Nevada's LE Tax Is A Broad-Based, Content-Neutral Generally Applicable Tax And Is Not A Facially Unconstitutional Direct Tax On The Exercise Of Constitutional Freedoms

Where a regulatory measure is a regulation of speech, it may either be content neutral or content based. The U.S. Supreme Court has articulated the following as the test for whether a regulation is content neutral:

> The principal inquiry in determining content neutrality, in speech cases generally and in **time**, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added). "In determining whether a governmental regulation of speech is content based, our principal inquiry is whether the government adopted the regulation because of its disagreement with the message to be conveyed by the speech." *Adams Outdoor Adver., Ltd.,* 667 A.2d 21 at 27, *citing Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288 (1984). The government's purpose in enacting the legislation is the Court's controlling consideration and if that purpose is unrelated to the content of the

speech, then the regulation is content neutral. *Ward,* 491 U.S. 781. If on the other hand, the purpose of the regulation is related to the content of the speech, or if, in determining whether the regulation applies, one must look to the content of the speech, then, absent a compelling reason offered by the government, it will be found to be unconstitutional. *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221 (1987).

Pursuant to NRS 368A.200, the LE Tax is imposed on admission to any facility in the state of Nevada where live entertainment is provided regardless of the content of that entertainment and, therefore, the LE Tax is content-neutral.

Taxing Statutes Which Contain Exemptions and Exceptions are Not Per Se Invalid

There is a "strong presumption in favor of duly enacted taxation schemes." *Leathers,* 499 U.S. at 451. "[A] differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Id.* at 452. There is no indication that the classifications set forth in NRS chapter 368A are for purposes other than optimizing tax revenues. "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Id.* (citations omitted). In *Madden,* 309 U.S. at 87-88, 60 S.Ct. at 408, the United States Supreme Court announced the following rule:

> The broad discretion as to classification possessed by a legislature in the field of taxation

> has long been recognized . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

(citations omitted).

The LE Tax, on its face, is not directed at, nor does it present the danger of, suppressing particular ideas. Nevada's LE Tax was enacted to raise revenues. It cannot be argued that the LE Tax limits the ability of exotic dancers or for that matter any other entertainers, to express themselves. Nor does it prevent patrons from attending.

With regard to the exemptions, the Nevada Legislature has chosen simply to exclude or exempt certain establishments from the LE Tax. Nothing about the choice to exempt certain live entertainment from the tax suggests an interest in censoring the

expressive activities of either nude dancing or clothed entertainment. *See Leathers v. Medlock,* 499 U.S. 439, 453, 111 S.Ct. 1438, 1447 (1991) ("[t]he Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax").

Nevada's LE Tax Classifications Are Not Unconstitutionally Overbroad or Vague

A statute is void for vagueness and therefore in violation of the Due Process Clause of the Fourteenth Amendment if it "(1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited and (2) authorizes or encourages arbitrary and discriminatory enforcement." *City of Las Vegas v. Eighth Judicial Dist. Court of State ex rel. County of Clark,* 122 Nev. 1041, 146 P.3d 240, 245 (2006).

The LE Tax does not seek to prohibit any type of conduct and therefore it cannot be argued that taxing statute is void for vagueness because ordinary people can't understand what conduct it prohibits. Nor does the LE Tax authorize or encourage arbitrary or discriminatory enforcement. Moreover, this issue was not raised by the PLAINTIFFS and PLAINTFFS [sic] presented no facts or argument that the LE Tax was either overbroad or vague.

The Court finds that because Plaintiffs have not succeeded on the merits, there is no basis for the Court to grant injunctive relief, and the Court makes no findings or conclusions regarding whether, as

contended by Plaintiffs, the anti-injunction provision contained in N.R.S. §368A.280(1) is contrary to the authority granted to the district courts by Article 6, Section 6, of the Nevada Constitution or the separation of powers set forth in Article 3, Section 1, of the Nevada Constitution.

The Court hereby orders Defendants' Motion for Summary Judgment is GRANTED and, the matter having been disposed of, the trial date is hereby vacated.

IT IS SO ORDERED.

DATED this 16th day of December, 2011.

/s/ Elizabeth G. Gonzalez
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DEJA VU SHOWGIRLS OF LAS VEGAS, L.L.C. d/b/a DEJA VU SHOWGIRLS; LITTLE DARLINGS OF LAS VEGAS, L.L.C. d/b/a LITTLE DARLINGS; K-KEL, INC. d/b/a SPEARMINT RHINO GENTLEMAN'S CLUB; OLUMPUS GARDEN, INC. d/b/a OLYMPIC GARDEN; SHAC, L.L.C. d/b/a SAPPHIRE; THE POWER COMPANY, INC., d/b/a CRAZY HORSE TOO GENTLEMEN'S CLUB; D. WESTWOOD, INC. d/b/a TREASURES; and D.I. FOOD AND BEVERAGE OF LAS VEGAS, L.L.C., d/b/a SCORES,

Plaintiff(s),

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION and NEVADA STATE BOARD OF EXAMINERS,

Defendant(s).

2:06-cv-0480-RLH-RJJ

ORDER
(Motion to Dismiss – #12)

(Filed Jul. 28, 2006)

Before the Court is Defendants' **Motion to Dismiss Amended Complaint** (#12, filed May 10, 2006). Plaintiffs' Opposition (#16) was filed June 5, 2006. Defendants' Reply (#17) was filed June 14, 2006.

The Motion will be granted.

BACKGROUND

This suit arises from a statute enacted by the Nevada State legislature, 20th Special Session, in 2003, which, *inter alia,* replaced the casino entertainment tax with a tax on all live entertainment. The provisions of the live entertainment tax were placed in Chapter 368A of the Nevada Revised Statutes ("NRS") and were further amended by the Nevada State Legislature in 2005.[1]

Plaintiffs, who operate establishments at which "live performance dance entertainment" is provided, contend that the Live Entertainment Tax violates their rights under the First and Fourteenth Amendments of the United States Constitution as a restraint on speech and a violation of substantive due process. They seek declaratory relief concerning the constitutionality of the tax and their non-obligation to pay it, and seek an injunction against its enforcement

[1] The Live Entertainment Tax applies to certain gaming and non-gaming facilities. NRS 368A.060 AND 368A200. The Department of Taxation administers the tax with respect to entities without gaming licenses. The Gaming Commission administers the tax with regard to gaming licensees.

and seek damages under 42 U.S.C. § 1983, including a refund of taxes paid.

Defendants' Motion to Dismiss challenges this Court's jurisdiction, invoking 28 U.S.C. § 1341 (the "Tax Injunction Act" or "TIA"), which states that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Defendants also contend, based upon the pleadings and requirements of the Tax Injunction Act, that Plaintiffs have failed to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(1) and (6).

STANDARD OF REVIEW

Rule 8 (Fed. R. Civ. P.) requires every complaint to contain "a short and plain statement of the grounds upon which the court's jurisdiction depends." Local Rule LR 8-1 requires that, "The first allegation of any complaint . . . shall state the statutory or other basis of claimed federal jurisdiction and the facts in support thereof. Federal courts are courts of *limited jurisdiction.* They have no inherent or general subject matter jurisdiction. They can adjudicate only those cases which the Constitution and Congress authorize. These are usually only those which involve a federal question, the United States is a party or where there is diversity of citizenship and certain criteria are met. *Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375 (1994). The Plaintiffs bear the burden of proof by a

preponderance of evidence that federal subject-matter jurisdiction exists. *Mortensen v. First Federal Sav. and Loan Ass'n,* 549 F.2d 884, 891 (3rd Cir. 1977).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see also Yamaguchi v. U.S. Dept. of the Air Force,* 109 F.3d 1475, 1481 (9th Cir. 1997). All factual allegations set forth in the complaint "are taken as true and construed in the light most favorable to [p]laintiffs." *Epstein v.. Washington Energy Co.,* 83 F.3d 1136, 1140 (9th Cir. 1999). Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984); *see also McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 810 (9th Cir. 1988).

DISCUSSION

The United States Supreme Court has held, in a fairly recent decision, that the Tax Injunction Act "shields state tax collections from federal-court restraints," and "was designed expressly to restrict the jurisdiction of the district courts of the United States

over suits relating to the collection of State taxes." *Hibbs v. Winn,* 542 U.S. 88, 104 (2004).

Drawing a clear distinction between tax credits (over which the district courts have jurisdiction) and actions seeking to avoid payment of taxes or to otherwise interfere with state tax collection, *Hibbs* took great pains to reaffirm a long line of its decisions which denied jurisdiction to U.S. district courts in cases where the purpose of the suit was to avoid the payment of taxes – usually on constitutional grounds – or seek a refund for taxes already paid. *See e.g., Rosewell v. LaSalle National Bank,* 451 U.S. 1011 (1981) (two-year delay of tax refund was still a plain, speedy and efficient remedy to preclude federal district court jurisdiction under Tax Injunction Act); *Fair Assessment in real Estate Association, Inc. v. McNary,* 454 U.S. 100 (1981) (comity and TIA barred taxpayers' suit for damages under § 1983); *California v. Grace Brethren Church,* 457 U.S. 393 (1982) (TIA prohibits federal district court from enjoining or declaring unconstitutional state tax laws where plain, speedy and efficient remedy available); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n,* 515 U.S. 582 (1995) (district court cannot enjoin, suspend or restrain the assessment or collection of taxes under State law, where plain, speedy and efficient remedy may be had in State courts).

The Ninth Circuit likewise has held that the Tax Injunction Act barred federal court consideration of a complaint involving the constitutionality of California Proposition 13. *Marvin F. Poer and Company, v.*

Counties of Alameda, 725 F.2d 1234 (1984). In that case, the Circuit Court stated that, "federal courts have generally dismissed cases in which plaintiffs have sought both injunctive or declaratory relief and a refund or damages." *Citing Bland v. McHann,* 463 F.2d 21 (5th Cir. 1972, *cert. denied,* 410 U.S. 966); *City of Burbank v. State of Nevada,* 548 F.2d 708 (9th Cir. 1981); and *Dillon v. State of Montana,* 634 F.2d 463 (9th Cir. 1980).

The *Hibbs* Court went to significant lengths to explain that it responds to State governments' need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference and the legal right that the disputed taxes be determined in a suit for refund. 542 U.S. at 103. The Court also noted that two of the purposes of the Act was to eliminate disparities between large out-of-state corporations and in-state taxpayers in what their remedies should be; and, to stop taxpayers, with the aid of a federal injunction, from withholding large sums thereby disrupting state government finances. *Id.* at 104. The Tax Injunction Act was "shaped by state and federal provisions barring anticipatory actions by taxpayers to stop the tax collector from initiating collection proceedings," training "its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." *Id.* at 104-105. The Court noted that "federal-court relief would have operated to reduce the flow of state tax revenue," and acknowledged that "the principal purpose of the TIA

was to 'limit drastically' federal-court interference with 'the collection of [state] taxes.'" *Id.* at 105-106.

Plaintiffs' Opposition attempts to argue that First Amendments rights enjoy a special protection from improper taxation, fee assessment or licensing requirements. They cite cases in support of this argument, including Supreme Court cases. This Court does not question the decisions in those cases, but they are inapposite to the jurisdictional issue here. In their lead-off case, they cite *Fair Assessment in real Estate Ass'n, Inc. v. McNary,* which the *Hibbs* case cites as noted above. However, this case is contrary to Plaintiffs' argument. In *McNary,* the dismissal on jurisdictional grounds was affirmed.

The other cases cited either do not address taxation collection issues, or they involve cases where the proper jurisdictional route was taken, *i.e.,* they were pursued through *State courts,* up through State Supreme Courts and then to the Supreme Court of the United States. Those cases adopted the procedure mandated by the Tax Injunction Act!

Another argument attempted by Plaintiffs is that there is no remedy in the State courts. This argument is based upon NRS 368A.280(1), which states:

> No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of this State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or

> any amount of tax, penalty or interest required to be collected.

First, it should be noted that the foregoing statute does not preclude a taxpayer from pursuing the established procedures for contesting a tax or seeking a refund.

Second, the language of the statute does not, as Plaintiffs suggest, preclude judicial recourse in the State court. It merely prevents a preemptive strike, that is an action to enjoin the collection of the taxes. It does not prevent a judicial challenge either to the collection of the tax or the constitutionality of the statute authorizing the tax. Indeed, the Nevada Supreme Court, in a case involving a statute which precluded any suit whatever unless an administrative claim had been filed, held that notwithstanding the statute, the California corporation could bring the suit to challenge the tax. *State v. Scotsman Mfg. Co. Inc.,* 109 Nev. 252, 849).2d 317 (1993). This decision strongly suggests that declaratory relief is available in State court notwithstanding NRS 368A.280(1).

At any rate, Plaintiffs have not alleged in their complaint, with specific facts, that there exists no "plain," speedy or efficient remedy available under the laws or through the courts of the State of Nevada. Accordingly, Plaintiffs have neither established jurisdiction nor stated a claim upon which relief can be granted by this Court. This case clearly is a case designed to enjoin or restrain the assessment or collection of a tax under a State law and further seeks

damages, including a refund of taxes. It clearly falls within the purpose of the Tax Injunction Act and removes this Court's jurisdiction.

Defendants also argue that they are not "persons" for the purposes of Section 1983 and therefore no claim under that section can lie against them. Although the Court need not address this argument, it notes that the assertion is correct.

Defendants also argue that they are immune from this suit pursuant to the provisions of the Eleventh Amendment of the Constitution. In this case the State of Nevada has not waived its Eleventh Amendment Immunity, nor is such a waiver alleged or pled. Nor do Plaintiffs allege that Congress has abrogated the State's Eleventh Amendment immunity under these circumstances. This is clearly a suit against the State of Nevada and its agencies.

For all the foregoing reasons, the Court finds that Defendants' Motion to Dismiss has merit and must be granted.

IT IS THEREFORE ORDERED that **Motion to Dismiss Amended Complaint** (#12) is GRANTED.

Dated: July 25, 2006.

/s/ Roger L. Hunt
ROGER L. HUNT
United States
District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEJA VU SHOWGIRLS OF LAS VEGAS, L.L.C., dba Deja Vu Showgirls; et al., Plaintiffs-Appellants, v. NEVADA DEPARTMENT OF TAXATION; et al., Defendants-Appellees.	No. 06-16634 D.C. No. CV-06-00480-RLH MEMORANDUM* (Filed May 20, 2008)

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, District Judge, Presiding

Submitted May 15, 2008**
San Francisco, California

Before: O'SCANNLAIN and HAWKINS, Circuit Judges, and SELNA***, District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable James V. Selna, United States District Judge for the Central District of California, sitting by designation.

Deja Vu appeals from the district court's judgement which dismissed a 42 U.S.C. § 1983 challenge to Nevada's Live Entertainment Tax, on the grounds that the Tax Injunction Act, 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."), deprived it of jurisdiction.

Deja Vu has failed to establish that there is any defect in the Nevada court and administrative system which deprives it of "a plain, speedy and efficient remedy" to challenge Nevada's Live Entertainment Tax. *See Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503 (1981). Therefore, the district court did not have jurisdiction.

Under the circumstances, we need not reach the state sovereign immunity issue.

AFFIRMED.

[SEAL]

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IN THE MATTER OF: The Appeal of Olympic [sic] Gardens, Inc., D.I. Food & Beverage of Las Vegas, Shac, LLC, D. Westwood, Inc., K-Kel, Inc., The Power Co., Inc. ("Appellants") from the Department of Taxation's Denial of their refund request pursuant to NRS 368A.260

The above matter came before the Nevada Tax Commission ("the Commission") for hearing on August 6, 2007. Bradley Shafer, Esq. and Dianna Sullivan, Esq. appeared on behalf of Appellants. Senior Deputy Attorney General David J. Pope and Deputy Attorney General Dennis Belcourt appeared on behalf of the Department of Taxation ("the Department").

The Commission hereby makes the following Findings of Fact. Conclusions of Law and Decision.

FINDINGS OF FACT

1. Appellants, as providers of live entertainment, are or have been taxpayers under NRS chapter 368A, through which is imposed the Live Entertainment Tax ("LET").

2. Appellants filed timely requests for refunds pursuant to NRS 368A.260 for the tax periods of January, February 2004, March 2004 and April 2004, claiming that the LET is facially

unconstitutional, that it unconstitutionally targets them or their message, and that they are entitled to refunds for the taxes paid by them, pursuant to NRS 368A.200(5)(a).

3. The Department denied Appellants' requests.

4. Appellants filed timely appeals from the Department's denials of their refund requests.

5. In this appeal, Appellants contend that a tax on live entertainment is per se unconstitutional, that the LET is rendered unconstitutional by the number of statutory exemptions, which Appellants claim make the tax one targeted at live adult entertainment, and that the legislative record shows an intent to tax based on content, to the detriment of providers of live adult entertainment.

6. If any Finding of Fact is more properly classified as a Conclusion of Law, then it shall be deemed such.

CONCLUSIONS OF LAW

1. NRS 368A.200(5)(a) exempts from the live entertainment tax "(l)ive entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution."

2. Entertainment can be a form of speech protected under the First Amendment of the United States Constitution and Article I, section 9 of the Nevada Constitution.

3. The United States and Nevada Constitutions do not forbid taxation of live entertainment as such.

4. NRS 368A.090 contains a definition of live entertainment. Regulations and an amendment to NRS 368A.090 define what is not live entertainment.

5. NRS 368A.200, as initially enacted in 2003 and as amended in 2005 and 2007, contains exemptions from the live entertainment tax.

6. A tax that targets a small group of speakers may violate the United States and Nevada constitutional protections against infringement of speech.

7. The live entertainment tax under NRS chapter 368A is an extension of the former casino entertainment tax (NRS chapter 463). It is imposed on an array of types of entertainment, both at licensed gaming establishments and other locations. It therefore does not target a small group of speakers.

8. A tax that constitutes a "regulation of speech because of disagreement with the message which it conveys" may violate the United States and Nevada constitutional protections against infringement of speech. *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989).

9. The definition in NRS 368A.090, the exemptions in NRS 368A.200, and other provisions of NRS chapter 368A delineating the scope of the tax are reasonable classifications for tax purposes and do not appear to be aimed at

any message that may be contained in the entertainment by Appellants or any other speakers. See *Madden v. Kentucky*, 309 U.S. 83, 87-88, 60 S.Ct. 406, 408 (1940) (providing, "[i]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification").

10. Mention by legislators of taxability of live adult entertainment under a proposed bill that was subsequently enacted does not prove that the bill was enacted because of disagreement with the message provided by live adult entertainment.

11. Statements by legislators with respect to a bill' that would have taxed live adult entertainment as a separate class, where the bill did not pass, does not prove the intent of a separate bill that did not select live adult entertainment.

12. If any Conclusion of Law is more properly classified as a Finding of Fact, then it shall be deemed such.

DECISION

After due deliberation, and based on the foregoing, the Commission denied the appeal.

FOR THE COMMISSION:

/s/ [Illegible]
DINO DICIANO
Executive Director
Nevada Department of Taxation

cc: David Pope, Sr. Deputy Attorney General
Dennis Belcourt, Deputy Attorney General
Taxpayers (via regular mail)

ORDR
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DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a *Déjà Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, LLC d/b/a *Little Darlings*, K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*, OLYMPUS GARDEN, INC., d/b/a *Olympic Garden*, SHAC, LLC, d/b/a *Sapphire*, THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*, D. WESTWOOD, INC., d/b/a *Treasures*, and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a/ *Scores*, Plaintiff(s), vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA	Case No. A533273 Dept. No. IX **ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION WITHOUT PREJUDICE** (Filed Jan. 13, 2011) Date of Hearing: July 31, 2008 Time of Hearing: 9:00 a.m.

STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only,

Defendants.

DISTRICT COURT
CLARK COUNTY NEVADA

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION came on for hearing only July 31, 2008;

David J. Pope, Senior Deputy Attorney General, and Blake A. Doerr, Deputy Attorney General, appeared on behalf of the Defendants;

Diana Sullivan, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs;

The Court, having considered the papers and pleadings as well as the oral argument finds:

That the Plaintiffs cannot meet the elements of showing they have suffered irreparable harm;

That this decision is not a statutory denial based on NRS 372.670 but is based upon the facts and law presented; and hereby orders:

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION is DENIED without prejudice. [Further, this Court notes the separation of powers issue has not been ruled upon herein.] /s/ J.P.T.

DATED this 13th day of January, 2011.

IT IS SO ORDERED.

/s/ Jennifer P. Togliatti
Jennifer Togliatti
DISTRICT COURT JUDGE

Respectfully submitted:

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Attorney General

By: /s/ Blake Doerr
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DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentleman's Club, OLUMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC.,	Case No. 06A533273 Dept. No. XI *Coordinated with:* Case No. 08A554970 Dept. No. XI

d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores,

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only,

Defendants.

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olympic Garden*; SHAC, LLC, d/b/a *Sapphire*; THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*; D. WESTWOOD, INC., d/b/a *Treasures*; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*;

Plaintiffs,

v.

AMENDED ORDER

(Filed Dec. 19, 2011)

Case No. 08A554970
Dept. No. XI

NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS,

Defendants.

AMENDED ORDER

DEFENDANTS' RE-NOTICED MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. §1983 and DEFENDANTS' MOTION TO COMPEL came on for hearing on August 23, 2011;

David J. Pope, Senior Deputy Attorney General, Blake A. Doerr, Senior Deputy Attorney General, and Vivienne Rakowsky, Deputy Attorney General appeared on behalf of the Defendants; William J. Brown, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs; Mark E. Ferrario appeared on behalf of Plaintiff SHAC, LLC.

The Court having first requested that Defendants' motion for partial summary judgment and motion to dismiss be re-noticed and having considered the papers and pleadings regarding the re-noticed motion and the motion to compel, as well as the oral argument presented by all parties, hereby orders:

DEFENDANTS' RE-NOTICED MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. §1983 is granted in part and denied in part.

With regard to Defendants' motion to dismiss and/or motion for partial summary judgment in Case #08A554970 ("Case 2"), this Court finds that the Defendants timely raised the question regarding the procedural posture of the case and based on the Nevada Supreme Court's decision in *Southern California Edison,* 127 Nev.Adv.Op. 22 (2011) all claims are dismissed and Case 2 shall proceed as a petition for judicial review pursuant to Chapter 233B of the NRS. The Court having tolled the statute of limitations for thirty-three (33) days to allow Plaintiffs thirty-three (33) days to file a petition for judicial review, Plaintiffs shall have thirty-three (33) days from August 23, 2011 to file a petition for judicial review pursuant to NRS 233B.130, *et seq*.

With regard to Defendants' motion to dismiss and/or for partial summary judgment in Case #06A533273 ("Case 1"), the motion is granted and all other claims including the "as applied" challenge, the refund claims and the official capacity claim against Michelle Jacobs are dismissed and Case 1 shall proceed as a facial challenge for declaratory relief only. Briefs are to be filed within thirty (30) days.

With regard to Defendants' motion to dismiss and/or for partial summary judgment regarding all 42 U.S.C. §1983 damages claims, the motion is granted and all such damages claims are dismissed from Case 1 and Case 2.

With regard to Plaintiffs motion to remand Case 2 to the Nevada Tax Commission, the motion is denied.

With regard to DEFENDANTS' MOTION TO COMPEL, this Court finds that any further discovery would be inappropriate and is hereby ordered cancelled.

IT IS SO ORDERED.

DATED this 19th day of December, 2011.

/s/ Jennifer P. Togliatti
DISTRICT COURT JUDGE
for Judge Gonzalez

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Blake Doerr
BLAKE A. DOERR
Senior Deputy Attorney General

DISTRICT COURT

CLARK COUNTY, NEVADA

***

K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club; OLYMPUS GARDEN, INC., d/b/a Olympic Garden; SHAC, L.L.C., d/b/a Sapphire; THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club; D. WESTWOOD, INC., d/b/a Treasures; D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a Scores, DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a Déjà vu; and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a Little Darlings, Petitioners, v. STATE OF NEVADA, ex rel. DEPARTMENT OF TAXATION and TAX COMMISSION, Respondents.	Case No.: A-11-648894-J Dept. No.: XXX **ORDER GRANTING PLAINTIFFS' APPLICATION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION** (Filed Feb. 1, 2012)

PETITIONERS' Application for Leave to Present Additional Evidence to the Nevada Tax Commission

in the above-captioned matter came on for hearing on December 9, 2011.

David J. Pope, Senior Deputy Attorney General, Blake A. Doerr, Senior Deputy Attorney General, and Vivienne Rakowsky, Deputy Attorney General appeared on behalf of the Respondents; and,

William J, Brown, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Petitioners; and, Mark E. Ferrario appeared on behalf of Petitioner SHAC, LLC.

The Court having considered the papers and pleadings as well as the oral argument, hereby ORDERS:

Petitioner's Application for leave to present additional evidence to the Nevada Tax Commission is GRANTED so the administrative agency can look at additional evidence and do one of the following: Amend the Findings of Fact, Conclusions of Law dated Oct. 12, 2007, Reverse the Decision, or Affirm the Decision.

IT IS SO ORDERED.

DATED this 24 day of January, 2012.

/s/ Jerry A. Weise
DISTRICT COURT JUDGE

[SEAL]

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BRIAN SANDOVAL
Governor
ROBERT R BARENGO
Chair, Nevada Tax Commission
CHRISTOPHER G. NIELSEN
Executive Director

DECISION LETTER

September 6, 2012

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IN THE MATTER OF: K-KEL, ET AL.'S OPPORTUNITY, PURSUANT TO DISTRICT COURT ORDER DATED JANUARY 24, 2012, TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION SO THAT THE COMMISSION CAN AMEND THE FINDINGS OF FACT, CONCLUSIONS OF LAW DATED OCTOBER 12, 2007, REVERSE THE DECISION OR AFFIRM THE DECISION, AND CONSIDERATION OF TAXPAYER'S REQUEST FOR SUBPOENAS FOR DEPOSITIONS

Dear Messrs. Brown and Ferrario:

The above matter came before the Nevada Tax Commission ("Commission") for hearing on June 25, 2012. Senior Deputy Attorney General David Pope and Deputy Attorney General Vivienne Rakowsky appeared on behalf of the Respondent, Department of Taxation ("Department"). For the Petitioners, Mark E. Ferrario, Esq. appeared on behalf of Shac, LLC and William H. Brown, Esq. appeared on behalf of K-Kel dba Spearmint Rhino, The Power Company dba Crazy Horse Too Gentlemen's Club, D. Westwood,

Inc. dba Treasures, Olympus Garden, Inc. dba Olympic Garden, DI Food and Beverage of Las Vegas dba Scores, Déjà vu Showgirls of Las Vegas, LLC dba Déjà vu, and Little Darlings of Las Vegas LLC, dba Little Darlings. The entire record of the administrative proceedings was provided to and considered by the Commission in the proceeding, and forms the basis of these findings of fact and conclusions of law.

The Commission hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This matter was before this Commission in July and August of 2007 and, on October 12, 2007, the Commission issued Findings of Fact, Conclusions of Law and a Decision.

2. Déjà vu Showgirls of Las Vegas, LLC dba Déjà vu and Little Darlings of Las Vegas LLC, dba Little Darlings stated that they are not part of this proceeding and are not part of the Petition for Judicial Review that is before the District Court (Case #A-11-648894-J). In fact, Déjà vu and Little Darlings did not appear before this Commission in 2007, are not parties to the administrative record, were not aggrieved by the final decision and, therefore, are not parties to this proceeding and shall be stricken from the caption. NRS 233B.130.

3. On or about September 23, 2011, following the dismissal of their District Court case (Case #08A554970), Petitioners filed a

Petition for Judicial Review in District Court (Case #A-11-648894-J) pursuant to the relevant court order dated December 19, 2011.

4. On or about September 28, 2011, Petitioners filed a motion pursuant to NRS 233B.131 requesting the Court grant them permission to present additional evidence to the Commission in order to supplement the administrative record with information obtained through discovery in the District Court case (Case #06A533273), i.e. documents identified as Bates Nos. DV00001 through DV001510, which were not part of the administrative record.

5. The Court granted the motion to present additional evidence, stating that the matter is remanded to allow the Commission to "look at additional evidence and do one of the following: Amend the Findings of Fact, Conclusions of Law dated October 12, 2007, Reverse the Decision, or Affirm the Decision." *District Court Order dated January 24, 2012*.

6. On or about June 14, 2012, in anticipation of the matter being presented to this Commission on remand, the Petitioners requested that the Department issue subpoenas in order to allow them to question three witnesses and thereafter supplement the record with what would be newly obtained testimony.

7. Petitioners argued that their rights to discovery, which they waited to conduct during the District Court proceedings that were dismissed, were curtailed by the decision in

Southern Cal. Edison v. First Judicial Dist. Court, 127 Nev. Adv. Op 22, 255 P.3d 231 (May 26, 2011) which clarified that appeals of final decisions of this Commission must proceed as petitions for judicial review.

8. During the administrative proceeding that took place in 2007, this Commission continued the hearing for one month to allow the parties to provide all evidence that they wanted considered by the Commission. The parties were told that this was their final opportunity to supplement the record.

9. Petitioners provided an additional 568 pages of evidence that was fully reviewed and considered by the Commission prior to rendering the administrative decision in October 2007.

10. Petitioners were or should have been aware of the provisions of the Nevada Administrative Procedures Act, NRS Chapter 233B.

11. In addition, NAC 360.135 and NAC 360.145 allowed Taxpayers to request subpoenas and depositions before this matter was presented to this Commission in 2007. Nonetheless, Petitioners failed to ask for subpoenas or depositions when this matter was before the Commission in 2007.

12. Pursuant to NRS 233B.131, when considering a motion to allow a party to present additional evidence to the Commission, a district court must determine whether the additional evidence is material and whether there are good reasons for the party to have failed to

present the evidence to the Commission the first time.

13. In order to determine that the additional evidence is material and that there were good reasons for the failure to present the evidence to the Commission in 2007, it was necessary for the District Court Judge to have reviewed the proposed additional evidence existing at the time of the motion hearing.

14. At the hearing, the District Court Judge stated, "My inclination is that there is good cause and that the evidence is material, and I would prefer that the tax commission review everything before I review it." *Transcript from Motion Hearing Argued to District Court on December 9, 2011,* p, 5-6.

15. The Judge reasoned that, because he is limited to a review of the record of the administrative proceeding, if there is a question as to whether or not something should be in the record he is inclined to allow the administrative agency the opportunity to review it so that he has all the evidence when he performs judicial review. *Id.* at 11.

16. Both the Petitioners and Respondents provided competing proposed orders to the District Court Judge. Petitioners twice stated in their proposed order that discovery would be reopened and depositions allowed. The Judge did not sign the petitioner's proposed order which would have allowed the reopening of discovery and depositions.

17. The Judge signed an order which stated that the matter would be remanded to the Commission to allow the Commission to "look at additional evidence and do one of the following: Amend the Findings of Fact Conclusions of Law dated October 12, 2007, Reverse the Decision or Affirm the Decision." *District Court Order* dated January 24, 2012.

18. If any Finding of Fact is more properly classified as a Conclusion of Law, then it shall be deemed as such.

CONCLUSIONS OF LAW

1. Pursuant to NRS 233B.131, the District Court must find materiality in the additional evidence and good cause for the failure to present the evidence in order to allow a petitioner to supplement the administrative record with additional evidence.

2. The District Court found materiality with regard to Bates Nos. DV00001 through DV001510 and the administrative record shall be supplemented with these documents.

3. With regard to the request for additional discovery, in administrative matters discovery is allowed to the extent that the relevant regulations allow it. *Dutchess Business Servs., Inc. v. Nev. State Bd. of Pharmacy,* 124 Nev. 701, 713-714, 191 P.3d 1159 (2008).

4. Although NAC 360.135 allows subpoenas and NAC 360.145 allows depositions, during

the administrative proceedings in 2007 the Petitioners failed to ask for subpoenas or depositions and therefore waived the right to pursue these methods of discovery.

5. There is no due process violation because the Petitioners had the right to ask for subpoenas and depositions in 2007 and failed to do so and nothing prohibited them from requesting such discovery regardless of how they may have later chosen to proceed after receiving a final decision from the Commission.

6. The Commission has no obligation to reinstate the right to request subpoenas and depositions.

7. Pursuant to NRS Chapter 233B.130(1), the remedy for a party aggrieved by a final agency decision is judicial review.

8. Pursuant to the Nevada Supreme Court's decision in *Malecon Tobacco, LLC v. Dept. of Taxation,* 118 Nev. 837, 840-842 (2002), "as applied" constitutional challenges requiring factual determinations must be decided by the administrative agency.

9. Pursuant to NRS 360.245 and NRS 233B.135(3), this matter is being remanded to an Administrative Law Judge (hereinafter "ALJ") with the entire record including the additional documents obtained through discovery in the District Court case which are identified as Bates Nos. DV00001 through DV001510. The ALJ shall review the additional evidence, along with the original

record, and determine whether the findings of fact, conclusions of law and final decision issued in 2007 should be amended, reversed or affirmed.

10. Upon appeal of the decision of the ALJ, this Commission will either affirm, reverse or modify the decision. NRS 360.245; NRS 233B.135.

11. If any Conclusion of Law is more properly classified as a Finding of Fact, then it shall be deemed as such.

DECISION

1. The requested subpoenas will not be issued and additional discovery and/or depositions will not be permitted.

2. The administrative record is supplemented with the additional evidence that was not considered by the Commission in 2007 but was thereafter obtained through discovery in the Disrict Court case and existing on January 12, 2012 at the time that the Court made the decision to remand the matter to the Commission, i.e. Bates Nos.DV00001 through DV001510.

3. This matter is remanded to an ALJ with instructions to review the additional evidence and the original record and do one of the following: amend the Findings of Fact, Conclusions of Law and Decision dated October 12, 2007, reverse the decision or affirm the decision.

4. If a party is aggrieved by the decision of the ALJ, that party may appeal the decision to this Commission pursuant to NRS 360.245.

FOR THE COMMISSION

/s/ Deonne E. [Illegible] for:
CHRISTOPHER G. NIELSEN
Executive Director
Nevada Department of Taxation

cc: Vivienne Rakowsky, Deputy Attorney General
David Pope, Senior Deputy Attorney General
Blake Doerr, Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, with postage prepaid to:

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Dated at Carson City, Nevada, the 6th day September 2012.

/s/ Erin Fierro
Erin Fierro

STATE OF NEVADA
DEPARTMENT OF TAXATION

In the Matter of: K-Kel, Inc., Olympus Garden, Inc., Shac, LLC, The Power Company, Inc., D. Westwood, Inc., D.I. Food & Beverage of Las Vegas, LLC, Petitioners.	Live Entertainment Tax Refund Requests HEARING OFFICER'S ORDER ON REMAND

K-Kel, Inc. dba Spearmint Rhino Gentlemen's Club, Olympus Garden, Inc. dba Olympic Garden, Shac, LLC dba Sapphire, The Power Company dba Crazy Horse Too Gentlemen's Club, D. Westwood, Inc. dba Treasures, and D.I. Food & Beverage of Las Vegas, LLC dba Scores (collectively as "Petitioners") operated exotic dancing establishments or adult entertainment venues in Las Vegas, Nevada. The businesses offered entertainment in the form of live dance performances and sold alcoholic beverages. Petitioners charged their patrons admission charges to enter the venues. Petitioners did not offer gaming and had occupancy ratings between 200 and 7400 persons. The businesses operated from January 2004 through April 2004.

Petitioners requested refunds of live entertainment taxes ("LET") paid to the Nevada Department of Taxation ("Department") for the periods January

2004 through April 2004.[1] Petitioners based their refund requests on claims that 1) the LET was a facially unconstitutional tax on First Amendment activities and 2) Petitioners were exempt from paying the tax pursuant to NRS 368A.200(5)(a) because they provided "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions."

The Department denied the refund requests and the matter proceeded on appeal to the Nevada Tax Commission ("Commission"), where the denials were upheld.[2] Petitioners then appealed to the District Court. In September 2011, Petitioners requested the District Court grant them the opportunity to submit 1510 pages of additional documents into the record. The District Court remanded the matter to the Commission to review the additional documents and determine whether those documents changed the Commission's October 12, 2007 decision.

During their June 25, 2012 presentation to the Commission regarding the District Court remand and the additional documents, Petitioners requested the Commission grant them the opportunity to depose

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[1] In lieu of reciting the tortured procedural history of this matter from its inception, only the relevant events leading to this review and order will be discussed.

[2] Petitioners' Refund Requests have been consolidated on appeal.

three witnesses. Their request was denied. By its decision letter dated September 6, 2012, the Commission referred this matter to the undersigned "with the entire record including the additional documents obtained through discovery in the District Court case which are identified as Bates Nos. DV00001 through DV001510. The ALJ shall review the additional evidence, along with the original record, and determine whether the findings of fact, conclusions of law and final decision issued in 2007 should be amended, reversed or affirmed."

Upon learning that this matter had been referred to the undersigned, Petitioners submitted a letter to the undersigned dated August 13, 2013 in which Petitioners renewed their requests for depositions and requested further unspecified discovery.[3] Petitioners also requested a hearing before the undersigned because Petitioners "would not presume to impose such a task," the task of reviewing the additional 1510 pages of documents, on the undersigned. Rather, Petitioners would use the hearing to "distill and clarify exactly what portions of these documents are relevant, and why." Notwithstanding Petitioners' attempt to avoid a review by the undersigned of the

[3] Petitioners based this request on an argument that the Commission's September 12, 2012 written decision did not accurately reflect the Commission's oral decision. Petitioners have had 11 months to challenge the September 12, 2012 order or to request clarification from the Commission. They have chosen not to do so and this is not the proper forum for that issue.

very documents which Petitioners fought so hard to include in the record and despite Petitioners' surprising admission that the documents are to some degree repetitious, unclear, and irrelevant, the undersigned has reviewed the 1510 pages as ordered by the Commission.

Petitioners' additional documents included extensive legislative and regulatory histories surrounding the enactment and subsequent amendment of NRS 368A and the corresponding provisions of NAC 368A. Petitioners also included legislative history regarding SB 247 (2005), which was intended to amend 368A but was not enacted. Finally, the production included documents generated by the Department: requests for information from taxpayers concerning the LET, informational letters and educational materials regarding the LET, various statistical breakdowns concerning non-gaming LET revenue collected by the Department, and internal memoranda responding to requests for statistical information regarding LET.

Petitioners have not offered any persuasive legal support for their argument that this tax on admission charges and sales runs afoul of the First Amendment. Rather, their arguments appear to be based upon the idea that the Department's application of the tax discriminates against Petitioners' adult entertainment venues in some respect, or that the tax itself is so burdensome to Petitioners as to imperil their freedom of speech and expression. These new arguments indicate that sometime after filing their Refund Requests, Petitioners shifted their focus from a

facial challenge of the LET to an as-applied challenge. A facial challenge is a "claim that a statute is always unconstitutional on its face- that is, that it always operates unconstitutionally." Black's Law Dictionary 244 (8th ed. 2004). An as-applied challenge is a "claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party." *Id.* When Petitioners asked the court to examine factually how the LET impacts one business versus another, Petitioners proposed an as-applied challenge to the LET.

In this regard, Petitioners alleged that they bore a disproportionate tax burden, presumably because their adult entertainment venues paid more LET than did other non-gaming entertainment venues. While they may have paid more LET in absolute terms when compared to other non-gaming venues, Petitioners have failed to develop any facts to show that this was unconstitutional in some respect.

LET is an excise tax which functions like a sales tax on the gross receipts from admission charges and retail sales of prepared food, alcohol and merchandise. LET is imposed as a fixed percentage of the gross receipts from admission charges and sales. Therefore, a business with more revenue from admission charges and sales will necessarily pay more LET than a business with less revenue from admission charges and sales. If Petitioners paid more in LET, it was only because they generated more revenue from sales and admission charges than did other entertainment venues. In absolute terms, Petitioners' LET

liability increased as their sales and admissions revenue increased. In relative terms, Petitioners' LET liability was identical to that of the next taxpayer.

Since LET is imposed upon gross receipts as opposed to net receipts, it may disproportionately impact a business with narrow operating margins unless the tax is passed on to or borne by patrons or consumers. Petitioners have not alleged that they had narrow operating margins or that there were any practical or legal impediments that prevented them from passing the tax burden on to their patrons as allowed by NRS 368A. To the contrary, their sales figures would suggest that their patrons happily shouldered the burden of the tax.

In their efforts to show that they paid more LET than other entertainment venues, Petitioners have actually undermined their own arguments that the LET is punitive or discriminatory. If the LET were punitive or discriminatory toward Petitioners, one would reasonably expect Petitioners' receipts from admissions and sales to have declined as compared to the admissions and sales of competing entertainment venues. Petitioners have not shown that their admissions and sales declined relative to those of competing entertainment venues, nor have they attempted to show that such a decline will likely occur in the future. Petitioners cannot demonstrate that the LET unconstitutionally burdens adult entertainment because they cannot show that the application of the tax puts their venues at a competitive or commercial

disadvantage when compared with other entertainment venues. Likewise, Petitioners cannot demonstrate that the tax is so burdensome that it imperils free speech and freedom of expression at their venues. To the contrary, the tax appears to have had no discernible impact upon Petitioners' ability to conduct live dance performances at their venues.

Petitioner's also argued there was an illicit intent on the part of the legislature to target the tax toward adult entertainment venues. The Commission's October 12, 2007 decision specifically addressed Petitioners' allegations of an illicit legislative motive and held that "[m]ention by legislators of taxability of live entertainment under a proposed bill that was subsequently enacted does not prove that the bill was enacted because of disagreement with the message provided by live adult entertainment." Petitioners' presentation of more pages of legislative history does not alter this conclusion. With regard to the legislative history pertaining to SB 247 (2005) which was not enacted, the Commission ruled that "[s]tatements by legislators with respect to a bill that would have taxed live adult entertainment as a separate class, where the bill did not pass, does not prove the intent of a separate bill that did not select live entertainment." Petitioners' second presentation of the same information and argument does not change the Commission's conclusion.

Neither Petitioners' documents nor their as-applied constitutional challenges compel amendments to the Commission's October 12, 2007 decision.

Petitioners failed to allege or demonstrate incorrect application of the LET provisions to Petitioners or that the Department applied a peculiar interpretation of the LET to Petitioners. Other than the more expansive LET statistics presented, there are no additional facts to assist in determining if Petitioners have been subjected to an unconstitutional application of LET. And the few additional facts presented fail to establish Petitioners' claims. Frankly, it is difficult to imagine that there might be facts to support Petitioners' assertions. Petitioners' position that the Nevada legislature enacted the LET in an attempt to suppress entertainment in Nevada, the lifeblood of this tourism-dependent state, borders on the absurd.

ORDER

Based upon the foregoing, and GOOD CAUSE APPEARING THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Petitioners' August 13, 2013 requests that the undersigned exceed the scope of the Commission's September 6, 2012 decision by: 1) convening a hearing in this matter, 2) allowing Petitioners to depose three witnesses, and 3) allowing Petitioners to engage in additional unspecified discovery are denied.

2. Petitioner's additional documents Bates DV000001 through DV001510 are insufficient to change the October 12, 2007 decision of the Commission. The

Commission's October 12, 2007 decision is hereby affirmed.

DATED this 27th day of August, 2013.

/s/ Dena Smith
Dena C. Smith
Administrative Law Judge

APPEAL RIGHTS

You may appeal this decision to the Nevada Tax Commission provided that you file a notice of appeal within thirty (30) days after the date of service of this decision upon you. Although notice of the appeal need not be in any particular format, it must be in writing, must clearly state your desire to appeal this decision, and must be filed with the executive staff of the Department of Taxation within thirty (30) days after the date of service of this decision. In this regard, you are advised to mail or personally deliver any notice of appeal to the attention of

Lezlie Helget, Supervising Auditor II
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Pursuant to NRS 360.245, this decision will become final thirty (30) days after service upon you unless you file a notice of appeal within those thirty (30) days.

All the above general information is provided to you pursuant to NRS 360.2925 and as a matter of courtesy only. You, or your counsel, should ascertain with more particularity the regulatory or statutory requirements pertinent to your further appeal rights.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Hearing Officer's Order on Remand in the matter of K-Kel, Inc. et. al. Live Entertainment Tax Refund Request, upon all parties of record in this proceeding as follows:

By mailing a copy thereof via certified mail, properly addressed, with postage prepaid to:

Certified Mail: 7011 2000 0001 5246 0539
William H. Brown, Esq.
Law Offices of William H. Brown, Ltd.
6029 S. Ft. Apache Rd., Ste. 100
Las Vegas, NV 89148

Certified Mail: 7011 2000 0001 5246 0546
Mark E. Ferrario, Esq.
Greenberg Traurig, LLP
3773 Howard Hughes Pkwy., Ste. 400 N.
Las Vegas, NV 89169

By electronic mail to:

William H. Brown, Esq. at
wbrown@lambrosebrown.com

Mark E. Ferrario, Esq. at ferrariom@gtlaw.com

Vivienne Rakowsky, Deputy Attorney General,
Counsel for Nevada Department of Taxation,
at VRakowsky@ag.nv.gov

Christopher G. Nielsen, Executive Director,
Nevada Department of Taxation

Nevada Tax Commission Members

Dated at Henderson, Nevada, this 27th day of August, 2013.

Sharyn Warr
Signature

[SEAL]

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DEPARTMENT OF TAXATION
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BRIAN SANDOVAL
Governor
ROBERT R BARENGO
Chair, Nevada Tax Commission
CHRISTOPHER G. NIELSEN
Executive Director

DECISION LETTER

February 12, 2014

Mr. William H. Brown
Lambrose Brown, PLLC
300 S. 4th St., Ste. 1020
Las Vegas, Nevada 89101

CERTIFIED MAIL:
7012 3460 0003 1673 0427

Mr. Mark Ferrario
Greenberg Traurig, LLP
3773 Howard Hughes Pkwy., Ste. 400 N
Las Vegas, Nevada 89169

CERTIFIED MAIL:
7012 3460 0003 1673 0434

IN THE MATTER OF: K-KEL, ET AL.'S OPPORTUNITY, PURSUANT TO DISTRICT COURT ORDER DATED JANUARY 24, 2012, TO PRESENT ADDITIONAL EVIDENCE TO THE NEVADA TAX COMMISSION SO THAT THE COMMISSION CAN AMEND THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION DATED OCTOBER 12, 2007, REVERSE THE DECISION OR AFFIRM THE DECISION, AND CONSIDERATION OF TAXPAYER'S REQUEST FOR SUBPOENAS FOR DEPOSITIONS, ADDITIONAL DISCOVERY AND A HEARING.

The above matter came before the Nevada Tax Commission ["Commission"] on December 9. 2013. Senior Deputy Attorney General Blake Doerr appeared on behalf of the Respondent, Department of Taxation ["Department"]. For the Petitioners, Brandon Roos, Esq. appeared on behalf of Shac, LLC and William H. Brown, Esq. appeared on behalf of K-Kel dba Spearmint Rhino, The Power Company dba Crazy Horse Too Gentlemen's Club, D. Westwood, Inc. dba Treasures, Olympus Garden, Inc. dba Olympic Garden, DI Food and Beverage of Las Vegas dba

Scores, Déjà vu Showgirls of Las Vegas, LLC dba Déjà vu, and Little Darlings of Las Vegas, LLC, dba Little Darlings. The entire record considered on remand (including the additional 1,510 pages identified as Bates DV000001 through DV001510), was provided to and considered by the Commission in the proceeding, and form the basis of these findings of fact and conclusions of law.

RELEVANT FINDINGS AND PROCEDURAL HISTORY

This matter is pending before the District Court for Judicial Review of the Commission's October 12, 2007 Findings of Fact, Conclusions of Law and Decision in the above entitled matter (Case No. A-11-648894-J). *See* October 12, 2007 Findings of Fact, Conclusions of Law and Decision, attached hereto as Exhibit "A". On or about September 26, 2011, the Petitioners requested leave of the District Court to present additional evidence to the Nevada Tax Commission in order to enlarge the Administrative Record. *See* District Court Order dated January 24, 2012, attached hereto as Exhibit "B".

On or about June 14, 2012, Petitioners requested that the Commission issue subpoenas and allow three depositions. On June 25, 2012, a hearing was held before the Nevada Tax Commission. *See* Transcript of Hearing, attached hereto as Exhibit "C". Following the hearing, the Nevada Tax Commission Ordered:

1. The requested subpoenas will not be issued and additional discovery and/or depositions will not be permitted.

2. The administrative record is supplemented with the additional evidence that was not considered by the Commission in 2007 but was thereafter obtained through discovery in the District Court case and existing on January 12, 2012 at the time that the Court made the decision to remand the matter to the Commission, i.e. Bates Nos.DV00001 through DV001510.

3. This matter is remanded to an ALJ with instructions to review the additional evidence and the original record and do one of the following: amend the Findings of Fact, Conclusions of Law and Decision dated October 12, 2007, reverse the decision or affirm the decision.

4. If a party is aggrieved by the decision of the ALJ, that party may appeal the decision to this Commission pursuant to NRS 360.245.

See Findings of Fact, Conclusions of Law and Order dated September 6, 2012 attached hereto as Exhibit "D".

Per the Commission's Order, the matter was submitted to Administrative Law Judge Dena Smith. On August 13, 2013, Petitioners requested that Judge Smith convene a hearing in the matter, allow Petitioners to depose three witnesses and allow the Petitioners to engage in additional unspecified discovery. The production of additional information

identified as Bates DV000001 through DV001510, included legislative history, including legislative history pertaining to SB 247 (2005) which was not enacted, along with documents generated by the Department, such as, requests for information from taxpayers concerning the LET, informational letters and educational materials regarding the LET, various statistical breakdowns concerning non-gaming LET revenue collected by the Department, and internal memoranda responding to requests for statistical information regarding LET.

On August 21, 2013, after reviewing more than 1,500 documents submitted for review, and noting that the Petitioners had amended their claims to include an "as applied" challenge sometime after the initial decision was issued, Judge Smith issued the Hearing Officer's Order on Remand and found:

> The Petitioners waited 11 months to argue that the Commission's written decision of December 12, 2012 did not accurately represent the Commission's oral decision. Petitioners never made a request for clarification to the Commission. The Petitioners have waived their right to do so. Additionally, this Remand is not the proper forum to raise this issue.
>
> The Petitioners' attempt to avoid a review of the very documents which Petitioners fought so hard to include in the record, by stating that a hearing would be used to "distill and clarify exactly what portions of these documents are relevant, and why," is an admission that the documents are to some degree repetitious, unclear, and irrelevant.

Petitioners have not offered any persuasive legal support for their argument that a tax on adult entertainment runs afoul of the First Amendment. Petitioners alleged that they bore a disproportionate tax burden, presumably because their adult entertainment venues paid more LET than did other non-gaming entertainment venues. While they may have paid more LET in absolute terms, Petitioners have failed to develop any facts to show that this was unconstitutional in some respect.

LET is an excise tax which functions like a sales tax on the gross receipts from admission charges and retail sales of prepared food, alcohol and merchandise. LET is imposed as a fixed percentage of the gross receipts from admission charges and sales.

A business with more revenue from admission charges and sales will necessarily pay more LET than a business with less revenue from admission charges and sales. If Petitioners paid more in LET, it was only because they generated more revenue from sales and admission charges than did other entertainment venues. Petitioners' LET liability was identical to that of the next taxpayer.

Petitioners have not shown that their sales declined relative to those of competing entertainment venues. Accordingly, LET is not punitive or discriminatory.

LET does not unconstitutionally burden adult entertainment. The application of the tax does not place the Petitioners' venues at a competitive or

commercial disadvantage when compared with other entertainment venues.

The tax is not so burdensome that it imperils free speech and freedom of expression.

The Commission's October 12, 2007 decision specifically addressed Petitioners' allegations of an illicit motive by the Nevada Legislature to target the tax towards adult entertainment venues, and held that "[m]ention by legislators of taxability of live entertainment under a proposed bill that was subsequently enacted does not prove that the bill was enacted because of disagreement with the message provided by live adult entertainment." Petitioners' presentation of more pages of legislative history does not alter this conclusion.

Neither Petitioners' documents nor their as-applied constitutional challenges compel any amendments to the Commission's October 12, 2007 decision.

There are no additional facts that show that Petitioners have been subjected to an unconstitutional application of LET. And the few additional facts presented fail to establish Petitioners' claims.

Petitioners' position that the Nevada legislature enacted the LET in an attempt to suppress entertainment in Nevada, the lifeblood of this tourism-dependent state, borders on the absurd.

Judge Smith ordered:

1. Petitioners' August 13, 2013 request that the Hearing Officer exceed the scope of the

Commission's September 6, 2012 decision by: 1) convening a hearing in this matter, 2) allowing Petitioners to depose three witnesses, and 3) allowing Petitioners to engage in additional unspecified discovery are denied.

2. Petitioners' additional documents Bates DV000001-DV001510 are insufficient to change the October 12, 2007 decision of the Commission. The Commission's October 12, 2007 decision is hereby affirmed.

See Hearing Officer's Order on Remand, attached hereto as Exhibit "E"

On September 24, 2013, Petitioners' timely appealed the Hearing Officer's Order. In order to expedite the matter and in order to allow this matter to return to District Court, the parties entered into a Stipulation that further oral argument or a hearing before the Commission would not be necessary to assist the Commission in addressing the Hearing Officer's Order on Remand affirming the Commission's prior decision. The parties stipulated:

1. The matter shall be submitted to the Nevada Tax Commission for Decision on the entire record and without additional briefing, oral argument or hearing;

2. By submitting the matter to the Commission, the parties do not intend to waive any arguments appropriately raised in the underlying proceedings or in any other proceedings related to these Taxpayers' challenges to the tax at issue in this matter.

3. Following the decision of the Commission, this matter shall be returned for further proceedings in Clark County Nevada District Court Case No. A-11-648894-J (Dept. No. 30) as determined by the Court.

See Stipulation, attached hereto as Exhibit "F".

On December 9, 2013, the Commission considered the Hearing Officer's Decision and the aforementioned Stipulation. *See* Transcript of Hearing, attached hereto as Exhibit "G".

DECISION

The Commission hereby grants the Stipulation (Exhibit "E"), affirms its Findings of Fact, Conclusions of Law and Decision dated October 12, 2007 (Exhibit "A"), as well as all findings and conclusions of law contained in the Hearing Officers Order on Remand (Exhibit "E") in their entirety.

FOR THE COMMISSION

/s/ [Illegible]
CHRISTOPHER NIELSEN
Executive Director
Nevada Department
of Taxation

cc: Vivienne Rakowsky, Deputy Attorney General
David Pope, Senior Deputy Attorney General
Blake Doerr, Senior Deputy Attorney General

130 Nev., Advance Opinion 72

IN THE SUPREME COURT
OF THE STATE OF NEVADA

DEJA VU SHOWGIRLS OF LAS VEGAS, LLC, A NEVADA LIMITED LIABILITY COMPANY, D/B/A DEJA VU SHOWGIRLS; LITTLE DARLINGS OF LAS VEGAS, D/B/A LITTLE DARLINGS; K-KEL, INC., D/B/A SPEARMINT RHINO GENTLEMEN'S CLUB; OLYMPUS GARDEN, INC., D/B/A OLYMPUS [sic] GARDEN; SHAC, LLC, D/B/A SAPPHIRE; THE POWER COMPANY, INC., D/B/A CRAZY HORSE TOO GENTLEMEN'S CLUB; AND D. WESTWOOD, INC., D/B/A TREASURES,
Appellants,
vs.
NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; AND THE STATE OF NEVADA BOARD OF EXAMINERS,
Respondents.

No. 59752

(Filed Sep. 18, 2014)

Appeal from a district court order dismissing a tax action for failure to properly follow administrative procedures by filing a petition for judicial review in

the district court. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Affirmed.

Greenberg Traurig, LLP, and Mark E. Ferrario and Brandon E. Roos, Las Vegas,
for Appellant SHAC, LLC.

Lambrose Brown and William H. Brown, Las Vegas; Shafer and Associates and Bradley J. Shafer, Lansing, Michigan,
for Appellants Deja Vu Showgirls of Las Vegas, LLC; Little Darlings of Las Vegas; K-Kel, Inc.; Olympus Garden, Inc.; The Power Company, Inc.; and D. Westwood, Inc.

Catherine Cortez Masto, Attorney General, David J. Pope and Blake A. Doerr, Senior Deputy Attorneys General, and Vivienne Rakowsky, Deputy Attorney General, Carson City,
for Respondents.

BEFORE THE COURT EN BANC.

OPINION

By the Court, DOUGLAS, J.:

In this opinion, we address whether the district court erred by concluding that, after exhausting their administrative remedies for seeking a refund under Nevada's Live Entertainment Tax (NLET), appellants were limited to a petition for judicial review, rather than a de novo action. We also consider whether the

district court committed error by refusing to invoke judicial estoppel in lieu of granting respondents' motion to dismiss the underlying de novo action for lack of subject matter jurisdiction. We conclude that the district court properly limited appellants to a petition for judicial review and was correct in refusing to invoke judicial estoppel. Accordingly, we affirm the district court's decision.

BACKGROUND

This appeal involves the same parties as the appeal in *Deja Vu Showgirls v. State, Department of Taxation,* 130 Nev. ___, ___ P.3d ___ (Adv. Op. No. 73, September 18, 2014) (hereinafter *Deja Vu II*). However, unlike *Deja Vu II,* which primarily addresses whether NLET violates the First Amendment to the United States Constitution, this appeal focuses on the procedural processes available to a claimant challenging an unfavorable decision regarding his or her tax refund request.

On April 18, 2006, appellants filed suit in the United States District Court for the District of Nevada seeking a declaration that NLET is facially unconstitutional, an injunction against its enforcement, and a refund for all taxes paid under the statute. The federal court dismissed that suit because appellants failed to show that Nevada's court and administrative

systems deprived them of a plain, speedy, and efficient remedy.[1]

On December 19, 2006, following the dismissal of their federal case, appellants filed a de novo action (Case 1) in the Eighth Judicial District Court seeking similar remedies to those sought in federal court, including declaratory and injunctive relief, damages, attorney fees, and costs. Appellants later amended their Case 1 complaint to include an as-applied constitutional challenge to NLET. While Case 1 was pending in district court, appellants K-Kel, Olympus Garden, SHAC, The Power Company, and D. Westwood filed individual tax refund requests with the Nevada Department of Taxation (the Department), arguing that NLET is facially unconstitutional for violating the First Amendment. The Department denied those refund requests on April 3, 2007, and the Nevada Tax Commission (the Commission) affirmed the Department's decision by written order on October 12, 2007.

On January 9, 2008, appellants filed a second de novo action in the Eighth Judicial District Court challenging the administrative denials of their refund requests. In this new action (Case 2), appellants sought declaratory and injunctive relief, the refund of taxes paid, and damages based on NLET's alleged facial unconstitutionality. Appellants later amended

[1] The United States Court of Appeals for the Ninth Circuit later affirmed that dismissal.

their Case 2 complaint to include an as-applied constitutional challenge to NLET – that issue having never been raised during their administrative proceedings. Because of their similarities, the district court consolidated the declaratory relief claims in Cases 1 and 2, and coordinated the remaining issues in those cases.

Thereafter, on respondents' motion for partial summary judgment, the district court limited Case 1 to appellants' facial constitutional challenge to NLET and permanent injunction request, and dismissed appellants' remaining Case 1 claims, including their as-applied challenge. In that same order, the district court dismissed the entirety of Case 2 for lack of subject matter jurisdiction because appellants failed to follow proper procedure when they filed a de novo action in the district court after the completion of their administrative proceedings, rather than filing a petition for judicial review as required by NRS 233B.130. This appeal challenging the district court's dismissal of Case 2 followed.[2]

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[2] Following their Case 2 appeal, the district court resolved all of appellants' remaining Case 1 claims, and appellants subsequently appealed from that determination. Appellants' challenge to the resolution of their Case 1 claims is addressed in the companion case. *Deja Vu II,* 130 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 73, September 18, 2014).

DISCUSSION

Nevada law required appellants to file a petition for judicial review

On appeal, appellants argue that the district court erred by dismissing their case for failure to file a petition for judicial review in line with the Nevada Administrative Procedure Act (APA) found in NRS Chapter 233B because their de novo action was properly brought in district court per NRS 368A.290. Respondents disagree, asserting that, when read together, the APA and NRS 368A.290 required appellants to challenge the denial of their refund request through a petition for judicial review and not the de novo action initiated below.

Whether a party must file a petition for judicial review when challenging a decision by the Commission that denies a refund-of-taxes-paid request under NLET is a question of statutory construction that we review de novo, *see PERS v. Reno Newspapers, Inc.,* 129 Nev. ___, ___, 313 P.3d 221, 223 (2013), and requires us to consider how the APA and NRS 368A.290 relate.

In enacting the APA, the Legislature stated that the chapter's purpose is "to establish minimum procedural requirements for the regulation-making and adjudication procedure of all agencies . . . and for judicial review of both functions, except those agencies expressly exempted pursuant to the provisions of this chapter." NRS 233B.020(1). Neither the Department nor the Commission is exempted from the APA's

purview. NRS 233B.039. In line with its purpose, the APA provides that a party aggrieved by a final agency decision in a contested case who is identified as a party of record by an agency in an administrative proceeding is entitled to review of that decision by filing a *petition for judicial review* in the appropriate court. *See* NRS 233B.130(1)-(2). Moreover, the APA states that its provisions "are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which [NRS Chapter 233B] applies." NRS 233B.130(6).

It is undisputed that appellants are parties of record aggrieved by a final agency decision in a contested case, and that "[a] decision of the Nevada Tax Commission is a final decision for the purposes of judicial review." NRS 360.245(5). Furthermore, we have construed NRS 360.245(5) and NRS 233B.130(6) as meaning "that all final decisions by the Commission be subject to the provisions of NRS Chapter 233B." *S. Cal. Edison v. First Judicial Dist. Court,* 127 Nev. ___, ___, 255 P.3d 231, 235-36 (2011) (holding that a petition for judicial review is the sole remedy after a final decision by the Commission). Accordingly, absent explicit legislative direction to the contrary, the APA's procedures, including the requirement to file a petition for judicial review, apply to all final Commission decisions, including those addressing refund requests under NLET. *See id.*; NRS 233B.020; NRS 233B.130(6).

Recognizing that a party aggrieved by a final Commission decision is limited to a petition for judicial review, we now consider whether the Legislature provided an exception to that rule in NLET's relevant provision. NRS 368A.290 provides:

> 1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by:
>
> . . . .
>
> (b) The Nevada Tax Commission, the claimant may bring an action against the [Nevada Tax] Department on the grounds set forth in the claim.
>
> 2. An action brought pursuant to subsection 1 must be brought in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his or her principal place of business or a county in which any relevant proceedings were conducted by the Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> . . . .

A review of NRS 368A.290 makes clear that nothing in that statute provides an exception to the express statutory requirement identified in *Edison* that a tax claimant can seek review of a final Commission decision only by filing a petition for judicial review under NRS 233B.130. *Edison,* 127 Nev. at ___,

255 P.3d at 237. And contrary to appellants' position, nothing in NRS 368A.290 indicates that the Legislature intended to allow taxpayers seeking refunds under NLET to file a de novo action, rather than a petition for judicial review.

Accordingly, the sole remedy for a taxpayer aggrieved by a final decision from the Commission concerning a tax refund request under NRS Chapter 368A is to file a petition for judicial review pursuant to NRS 233B.130. Based on this determination, we conclude that the district court did not err by determining that it lacked subject matter jurisdiction to consider the de novo challenge below because NRS 368A.290 required appellants to file a petition for judicial review.[3] *See Edison,* 127 Nev. at ___, 255 P.3d at 233, 237; *see also Kame v. Emp't Sec. Dep't,* 105 Nev. 22, 25, 769 P.2d 66, 68 (1989) (stating that noncompliance with statutory requirements for judicial review of an administrative decision divests a court of jurisdiction and is grounds for dismissal).[4] Having

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[3] Appellants' contention that *Edison* cannot be applied to their de novo action because the underlying case was active at the time this court decided *Edison* lacks merit. *See Leavitt v. Siems,* 130 Nev. ___, ___, 330 P.3d 1, 5 (2014) (rejecting an argument that a decision issued after the close of trial could not be applied to a party's case because "retroactivity is the default rule in civil cases").

[4] With regard to appellants Deja Vu and Little Darlings, the record demonstrates that these parties failed to exhaust their administrative remedies before filing the underlying de novo action. Thus, the district court lacked subject matter jurisdiction over their claims and we necessarily affirm the dismissal of

(Continued on following page)

made this determination, we now consider whether judicial estoppel barred the district court from dismissing appellants' action despite their failure to file a petition for judicial review.

The district court correctly declined to apply judicial estoppel

Judicial estoppel is an equitable doctrine used to protect the judiciary's integrity and is invoked by a court at its discretion. *See NOLM, L.L.C. v. Cnty. of Clark,* 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). Whether judicial estoppel applies is a question of law that we review de novo. *Id.*

We have explained that judicial estoppel "should be applied only when a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage." *Id.* (alteration in original) (internal quotation omitted); *see also Edison,* 127 Nev. at ___, 255 P.3d at 237. Notably, judicial estoppel "does not preclude a change in position that is not intended to sabotage the judicial process." *Edison,* 127 Nev. at ___, 255 P.3d at 237; *NOLM, L.L.C.,* 120 Nev. at 743, 100 P.3d at 663. Moreover, we have stated that

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these parties, albeit for reasons other than those relied on by the district court. *See Malecon Tobacco, L.L.C. v. State ex. rel. Dep't of Taxation,* 118 Nev. 837, 839, 59 P.3d 474, 475-76 (2002); *see also Bongiovi v. Sullivan,* 122 Nev. 556, 575 n.44, 138 P.3d 433, 447 n.44 (2006). Accordingly, we need not address arguments presented by Deja Vu and Little Darlings.

> [j]udicial estoppel may apply when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position . . . ; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Edison, 127 Nev. at ___, 255 P.3d at 237 (second alteration in original) (internal quotation omitted).

In *Edison,* despite concluding that a petition for judicial review constituted the taxpayer's sole remedy for challenging the denial of its refund request, we ordered the district court to permit a de novo action because judicial estoppel barred the Department from changing its position with respect to the taxpayer. *Id.* at ___, 255 P.3d at 237-38. In that case, we recognized that the Department, both in the present and past, took inconsistent positions in quasi-judicial proceedings regarding the means of review available to a taxpayer wanting to challenge a refund denial. *Id.* at ___, 255 P.3d at 237. Notably, in *Edison,* the Department stated in its brief to the Commission that the taxpayer could file a de novo action against the Department under NRS 372.680. *Id.* Additionally, an administrative law judge from the Department told the parties' counsel that "[i]n the event that this matter is appealed to district court, it will be reviewed de novo and additional discovery will likely be allowed at that time." *Id.* (alteration in original)

(internal quotation omitted). Yet, in the proceedings before this court, the Department reversed its position and asserted that de novo review was unavailable to challenge the Commission's denial of a refund request. *Id.* at ___, 255 P.3d at 234. Based on those facts, we concluded that judicial estoppel applied because "it would be highly inequitable to . . . allow the Department to change its position," and therefore, ordered the court to grant the taxpayer a trial de novo in district court. *Id.* at ___, 255 P.3d at 237-38.

Here, appellants contend that, under *Edison,* the district court was required to apply judicial estoppel and preclude dismissal for failure to file a petition for judicial review because respondents engaged in inconsistent actions both generally as a department and specifically in this case. In reply, respondents assert that appellants' case is distinguishable from *Edison* on this issue because respondents never intentionally misled appellants into believing that their remedy was a trial de novo. We agree with respondents' position.

Unlike the taxpayer in *Edison,* appellants have failed to show that respondents made any statement during a judicial or quasi-judicial proceeding promising or providing for a reasonable probability that de novo review would be available to appellants. Instead, the record shows that as early as their federal district court case in 2006, respondents identified that a petition for judicial review was the appropriate remedy, citing to the APA. Appellants correctly note that respondents did not directly reference the APA in

their answering brief to the Ninth Circuit, but said that a taxpayer may bring an action in court within 90 days of a refund denial by the Commission. While there is arguably some ambiguity as to the nature of the action that could be brought in court, *i.e.,* whether it is a trial de novo or a petition for judicial review, respondents' representations do not amount to a misleading statement similar to those made in *Edison.* Moreover, any confusion caused by that ambiguity in these circumstances cannot be characterized as "intentional wrongdoing or an attempt to obtain an unfair advantage." *NOLM, L.L.C.,* 120 Nev. at 743, 100 P.3d at 663 (internal quotation omitted). Accordingly, we conclude that the district court committed no error by refusing to invoke judicial estoppel.

Based on the foregoing analysis, we affirm the district court's decision to dismiss this case for lack of subject matter jurisdiction.[5]

/s/ Douglas, J.
Douglas

[5] Appellants also challenge the district court's dismissal of their as-applied challenge to NLET in Case 2. Although the district court did not explain why appellants' as-applied challenge was dismissed, the dismissal was nonetheless proper because the district court lacked subject matter jurisdiction over that challenge as appellants failed to raise this issue during their administrative proceedings. *See Deja Vu II,* 130 Nev. ___, ___ P.3d ___ (Adv. Op. No. 73, September 18, 2014). We have considered all of appellants' other arguments and conclude that they lack merit.

We concur:

/s/ Gibbons, C.J.
Gibbons

/s/ Pickering, J.
Pickering

/s/ Hardesty, J.
Hardesty

/s/ Parraguirre, J.
Parraguirre

/s/ Cherry, J.
Cherry

/s/ Saitta, J.
Saitta

United States Code Annotated
Title 28. Judiciary and Judicial Procedure
(Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction
(Refs & Annos)

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I. Generally

§ 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.

Nevada Revised Statutes Annotated
The Constitution of the State of Nevada (Refs & Annos)
Article 3. Distribution of Powers

§ 1. Three separate departments; separation of powers; legislative review of administrative regulations

1. The powers of the Government of the State of Nevada shall be divided into three separate departments, – the Legislative, – the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

2. If the legislature authorizes the adoption of regulations by an executive agency which bind persons outside the agency, the legislature may provide by law for:

(a) The review of these regulations by a legislative agency before their effective date to determine initially whether each is within the statutory authority for its adoption;

(b) The suspension by a legislative agency of any such regulation which appears to exceed that authority, until it is reviewed by a legislative body composed of members of the Senate and Assembly which is authorized to act on behalf of both houses of the legislature; and

(c) The nullification of any such regulation by a majority vote of that legislative body, whether or not the regulation was suspended.

Nevada Revised Statutes Annotated
The Constitution of the State of Nevada (Refs & Annos)
Article 6. Judicial Department

§ 6. District Courts: Jurisdiction; referees; family court

1. The District Courts in the several Judicial Districts of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts. They also have final appellate jurisdiction in cases arising in Justices Courts and such other inferior tribunals as may be established by law. The District Courts and the Judges thereof have power to issue writs of Mandamus, Prohibition, Injunction, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction. The District Courts and the Judges thereof shall also have power to issue writs of Habeas Corpus on petition by, or on behalf of any person who is held in actual custody in their respective districts, or who has suffered a criminal conviction in their respective districts and has not completed the sentence imposed pursuant to the judgment of conviction.

2. The legislature may provide by law for:

(a) Referees in district courts.

(b) The establishment of a family court as a division of any district court and may prescribe its jurisdiction.

Nevada Revised Statutes Annotated
Title 18. State Executive Department
(Chapters 223-233J)
Chapter 233B. Nevada Administrative Procedure Act (Refs & Annos)
Adjudication of Contested Cases

§ 233B.130. Judicial review; requirements for petition; statement of intent to participate; petition for rehearing

1. Any party who is:

(a) Identified as a party of record by an agency in an administrative proceeding; and

(b) Aggrieved by a final decision in a contested case,

is entitled to judicial review of the decision. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute. Any preliminary, procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy.

2. Petitions for judicial review must:

(a) Name as respondents the agency and all parties of record to the administrative proceeding;

(b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred; and

(c) Be filed within 30 days after service of the final decision of the agency.

Cross-petitions for judicial review must be filed within 10 days after service of a petition for judicial review.

3. The agency and any party desiring to participate in the judicial review must file a statement of intent to participate in the petition for judicial review and serve the statement upon the agency and every party within 20 days after service of the petition.

* * *

6. The provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies.

Nevada Revised Statutes Annotated
Title 18. State Executive Department
(Chapters 223-233J)
Chapter 233B. Nevada Administrative Procedure Act (Refs & Annos)
Adjudication of Contested Cases

§ 233B.135. Judicial review: Manner of conducting; burden of proof; standard for review

1. Judicial review of a final decision of an agency must be:

(a) Conducted by the court without a jury; and

(b) Confined to the record.

In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.

2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.

3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) Arbitrary or capricious or characterized by abuse of discretion.

Nevada Revised Statutes Annotated
Title 32. Revenue and Taxation (Chapters 360-377B)
Chapter 360. General Provisions (Refs & Annos)
Administration

§ 360.245. Decision of Department final unless appealed to Nevada Tax Commission; time for appeal; service of decision; review of certain decisions; judicial review; adoption of regulations by Nevada Tax Commission; transmission of notice of certain decisions on appeal

1. Except as otherwise provided in this title:

(a) All decisions of the Executive Director or other officer of the Department made pursuant to this title are final unless appealed to the Nevada Tax Commission.

(b) Any natural person, partnership, corporation, association or other business or legal entity who is aggrieved by such a decision may appeal the decision by filing a notice of appeal with the Department within 30 days after service of the decision upon that person or business or legal entity.

* * *

5. A decision of the Nevada Tax Commission is a final decision for the purposes of judicial review. The Executive Director or any other employee or representative of the Department shall not seek judicial review of such a decision.

* * *

Nevada Revised Statutes Annotated
Title 32. Revenue and Taxation (Chapters 360-377B)
Chapter 360. General Provisions (Refs & Annos)
Rights and Responsibilities of Taxpayers

§ 360.291. Taxpayers' Bill of Rights

1. The Legislature hereby declares that each taxpayer has the right:

* * *

(o) To have statutes imposing taxes and any regulations adopted pursuant thereto construed in favor of the taxpayer if those statutes or regulations are of doubtful validity or effect, unless there is a specific statutory provision that is applicable.

2. The provisions of this title and title 57 of NRS and NRS 244A.820, 244A.870, 482.313 and 482.315 governing the administration and collection of taxes by the Department must not be construed in such a manner as to interfere or conflict with the provisions of this section or any applicable regulations.

* * *

Nevada Revised Statutes Annotated
Title 32. Revenue and Taxation (Chapters 360-377B)
Chapter 368A. Tax on Live Entertainment
General Provisions

§ 368A.010. Definitions

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020

to 368A.115, inclusive, have the meanings ascribed to them in those sections.

§ 368A.020. "Admission charge" defined

"Admission charge" means the total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided. The term includes, without limitation, an entertainment fee, a cover charge, a table reservation fee, or a required minimum purchase of food, refreshments or merchandise.

§ 368A.030. "Board" defined

"Board" means the State Gaming Control Board.

§ 368A.040. "Business" defined

"Business" means any activity engaged in or caused to be engaged in by a business entity with the object of gain, benefit or advantage, either direct or indirect, to any person or governmental entity.

§ 368A.050. "Business entity" defined

1. "Business entity" includes:

(a) A corporation, partnership, proprietorship, limited-liability company, business association, joint venture, limited-liability partnership, business trust and their equivalents organized under the laws of this State or

another jurisdiction and any other type of entity that engages in business.

(b) A natural person engaging in a business if that person is deemed to be a business entity pursuant to NRS 368A.120.

2. The term does not include a governmental entity.

§ 368A.053. "Casual assemblage" defined

"Casual assemblage" includes, without limitation:

1. Participants in conventions, business meetings or tournaments governed by chapter 463 of NRS, and their guests; or

2. Persons celebrating a friend's or family member's wedding, birthday, anniversary, graduation, religious ceremony or similar occasion that is generally recognized as customary for celebration.

§ 368A.055. "Commission" defined

"Commission" means the Nevada Gaming Commission.

§ 368A.060. "Facility" defined

1. "Facility" means:

(a) Any area or premises where live entertainment is provided and for which consideration is collected

for the right or privilege of entering that area or those premises if the live entertainment is provided at:

(1) An establishment that is not a licensed gaming establishment; or

(2) A licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits.

(b) Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment.

2. "Facility" encompasses, if live entertainment is provided at a licensed gaming establishment that is licensed for:

(a) Less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, any area or premises where the live entertainment is provided and for which consideration is collected, from one or more patrons, for the right or privilege of entering that area or those premises, even if additional consideration is collected for the right or privilege of entering a smaller venue within that area or those premises; or

(b) At least 51 slot machines or at least 6 games, any designated area on the premises of the licensed gaming establishment within which the live entertainment is provided.

§ 368A.070. "Game" defined

"Game" has the meaning ascribed to it in NRS 463.0152.

§ 368A.080. "Licensed gaming establishment" defined

"Licensed gaming establishment" has the meaning ascribed to it in NRS 463.0169.

§ 368A.090. "Live entertainment" defined

1. "Live entertainment" means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present.

2. The term:

(a) Includes, without limitation, any one or more of the following activities:

(1) Music or vocals provided by one or more professional or amateur musicians or vocalists;

(2) Dancing performed by one or more professional or amateur dancers or performers;

(3) Acting or drama provided by one or more professional or amateur actors or players;

(4) Acrobatics or stunts provided by one or more professional or amateur acrobats, performers or stunt persons;

(5) Animal stunts or performances induced by one or more animal handlers or trainers, except as otherwise provided in subparagraph (7) of paragraph (b);

(6) Athletic or sporting contests, events or exhibitions provided by one or more professional or amateur athletes, sportsmen or sportswomen;

(7) Comedy or magic provided by one or more professional or amateur comedians, magicians, illusionists, entertainers or performers;

(8) A show or production involving any combination of the activities described in subparagraphs (1) to (7), inclusive; and

(9) A performance involving one or more of the activities described in this paragraph by a disc jockey who presents recorded music. For the purposes of this subsection, a disc jockey shall not be deemed to have engaged in a performance involving one or more of the activities described in this paragraph if the disc jockey generally limits his or her interaction with patrons to introducing the recorded music, making announcements of general interest to patrons, and explaining, encouraging or directing participatory activities between patrons.

(b) Excludes, without limitation, any one or more of the following activities:

(1) Instrumental or vocal music, which may or may not be supplemented with commentary by the musicians, in a restaurant, lounge or similar area if such music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen;

(2) Occasional performances by employees whose primary job function is that of preparing, selling or serving food, refreshments or beverages to patrons, if such performances are not advertised as entertainment to the public;

(3) Performances by performers of any type if the performance occurs in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, as long as the performers stroll continuously throughout the facility;

(4) Performances in areas other than in nightclubs, lounges, restaurants or showrooms, if the performances occur in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers

is limited to seating at slot machines or gaming tables;

(5) Television, radio, closed circuit or Internet broadcasts of live entertainment;

(6) Entertainment provided by a patron or patrons, including, without limitation, singing by patrons or dancing by or between patrons;

(7) Animal behaviors induced by animal trainers or caretakers primarily for the purpose of education and scientific research; and

(8) An occasional activity, including, without limitation, dancing, that:

(I) Does not constitute a performance;

(II) Is not advertised as entertainment to the public;

(III) Primarily serves to provide ambience to the facility; and

(IV) Is conducted by an employee whose primary job function is not that of an entertainer.

§ 368A.097. "Shopping mall" defined

"Shopping mall" includes any area or premises where multiple vendors assemble for the primary purpose of selling goods or services, regardless of whether consideration is collected for the right or privilege of entering that area or those premises.

§ 368A.100. "Slot machine" defined

"Slot machine" has the meaning ascribed to it in NRS 463.0191.

§ 368A.110. "Taxpayer" defined

"Taxpayer" means:

1. If live entertainment that is taxable under this chapter is provided at a licensed gaming establishment, the person licensed to conduct gaming at that establishment.

2. Except as otherwise provided in subsection 3, if live entertainment that is taxable under this chapter is not provided at a licensed gaming establishment, the owner or operator of the facility where the live entertainment is provided.

3. If live entertainment that is taxable under this chapter is provided at a publicly owned facility or on public land, the person who collects the taxable receipts.

§ 368A.115. "Trade show" defined

"Trade show" means an event of limited duration primarily attended by members of a particular trade or industry for the purpose of exhibiting their merchandise or services or discussing matters of interest to members of that trade or industry.

§ 368A.120. Natural persons who are deemed to be business entities

A natural person engaging in a business shall be deemed to be a business entity that is subject to the provisions of this chapter if the person is required to file with the Internal Revenue Service a Schedule C (Form 1040), Profit or Loss From Business Form, or its equivalent or successor form, or a Schedule E (Form 1040), Supplemental Income and Loss Form, or its equivalent or successor form, for the business.

Administration

§ 368A.130. [Repealed]

§ 368A.140. Duties of Board, Commission and Department; applicability of chapters 360 and 463 of NRS

1. The Board shall collect the tax imposed by this chapter from taxpayers who are licensed gaming establishments. The Commission shall adopt such regulations as are necessary to carry out the provisions of this subsection. The regulations must be adopted in accordance with the provisions of chapter 233B of NRS and must be codified in the Nevada Administrative Code.

2. The Department shall:

(a) Collect the tax imposed by this chapter from all other taxpayers; and

(b) Adopt such regulations as are necessary to carry out the provisions of paragraph (a).

3. For the purposes of:

(a) Subsection 1, the provisions of chapter 463 of NRS relating to the payment, collection, administration and enforcement of gaming license fees and taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

(b) Subsection 2, the provisions of chapter 360 of NRS relating to the payment, collection, administration and enforcement of taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

4. To ensure that the tax imposed by NRS 368A.200 is collected fairly and equitably, the Commission, the Board and the Department shall:

(a) Jointly, coordinate the administration and collection of that tax and the regulation of taxpayers who are liable for the payment of the tax.

(b) Upon request, assist the other agencies in the collection of that tax.

§ 368A.150. Establishment of amount of tax liability when Board or Department determines that taxpayer is acting with intent to defraud State or to evade payment of tax

1. If:

(a) The Board determines that a taxpayer who is a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Board shall establish an amount upon which the tax imposed by this chapter must be based.

(b) The Department determines that a taxpayer who is not a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Department shall establish an amount upon which the tax imposed by this chapter must be based.

2. The amount established by the Board or the Department pursuant to subsection 1 must be based upon the tax liability of business entities that are deemed comparable by the Board or the Department to that of the taxpayer.

§ 368A.160. Maintenance and availability of records for determining liability of taxpayer; liability to taxpayer of lessee, assignee or transferee of certain premises; penalty

1. Each person responsible for maintaining the records of a taxpayer shall:

(a) Keep such records as may be necessary to determine the amount of the liability of the taxpayer pursuant to the provisions of this chapter;

(b) Preserve those records for:

(1) At least 5 years if the taxpayer is a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; or

(2) At least 4 years if the taxpayer is not a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; and

(c) Make the records available for inspection by the Board or the Department upon demand at reasonable times during regular business hours.

2. The Commission and the Department may adopt regulations pursuant to NRS 368A.140 specifying the types of records which must be kept to determine the amount of the liability of a taxpayer for the tax imposed by this chapter.

3. Any agreement that is entered into, modified or extended after January 1, 2004, for the lease, assignment

or transfer of any premises upon which any activity subject to the tax imposed by this chapter is, or thereafter may be, conducted shall be deemed to include a provision that the taxpayer required to pay the tax must be allowed access to, upon demand, all books, records and financial papers held by the lessee, assignee or transferee which must be kept pursuant to this section. Any person conducting activities subject to the tax imposed by NRS 368A.200 who fails to maintain or disclose his or her records pursuant to this subsection is liable to the taxpayer for any penalty paid by the taxpayer for the late payment or nonpayment of the tax caused by the failure to maintain or disclose records.

4. A person who violates any provision of this section is guilty of a misdemeanor.

§ 368A.170. Examination of records by Board or Department; payment of expenses of Board or Department for examination of records outside State

1. To verify the accuracy of any report filed or, if no report is filed by a taxpayer, to determine the amount of tax required to be paid:

(a) The Board, or any person authorized in writing by the Board, may examine the books, papers and records of any licensed gaming establishment that may be liable for the tax imposed by this chapter.

(b) The Department, or any person authorized in writing by the Department, may examine the books, papers and records of any other person who may be liable for the tax imposed by this chapter.

2. Any person who may be liable for the tax imposed by this chapter and who keeps outside of this State any books, papers and records relating thereto shall pay to the Board or the Department an amount equal to the allowance provided for state officers and employees generally while traveling outside of the State for each day or fraction thereof during which an employee of the Board or the Department is engaged in examining those documents, plus any other actual expenses incurred by the employee while the employee is absent from his or her regular place of employment to examine those documents.

§ 368A.180. Confidentiality of records and files of Board and Department

1. Except as otherwise provided in this section and NRS 239.0115 and 360.250, the records and files of the Board and the Department concerning the administration of this chapter are confidential and privileged. The Board, the Department and any employee of the Board or the Department engaged in the administration of this chapter or charged with the custody of any such records or files shall not disclose any information obtained from the records or files of the Board or the Department or from any examination, investigation or hearing authorized by the provisions of this chapter. The Board, the Department

and any employee of the Board or the Department may not be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceeding.

2. The records and files of the Board and the Department concerning the administration of this chapter are not confidential and privileged in the following cases:

(a) Testimony by a member or employee of the Board or the Department and production of records, files and information on behalf of the Board or the Department or a taxpayer in any action or proceeding pursuant to the provisions of this chapter, if that testimony or the records, files or information, or the facts shown thereby, are directly involved in the action or proceeding.

(b) Delivery to a taxpayer or his or her authorized representative of a copy of any report or other document filed by the taxpayer pursuant to this chapter.

(c) Publication of statistics so classified as to prevent the identification of a particular person or document.

(d) Exchanges of information with the Internal Revenue Service in accordance with compacts made and provided for in such cases.

(e) Disclosure in confidence to the Governor or his or her agent in the exercise of the Governor's general supervisory powers, or to any person authorized to audit the accounts of the Board or the Department in

pursuance of an audit, or to the Attorney General or other legal representative of the State in connection with an action or proceeding pursuant to this chapter, or to any agency of this or any other state charged with the administration or enforcement of laws relating to taxation.

Imposition and Collection

§ 368A.200. Imposition and amount of tax; liability and reimbursement for payment; ticket for live entertainment must indicate whether tax is included in price of ticket; exemptions from tax

1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided. If the live entertainment is provided at a facility with a maximum occupancy of:

(a) Less than 7,500 persons, the rate of the tax is 10 percent of the admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility.

(b) At least 7,500 persons, the rate of the tax is 5 percent of the admission charge to the facility.

2. Amounts paid for:

(a) Admission charges collected and retained by a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or by a nonprofit

corporation organized or existing under the provisions of chapter 82 of NRS, are not taxable pursuant to this section.

(b) Gratuities directly or indirectly remitted to persons employed at a facility where live entertainment is provided or for service charges, including those imposed in connection with the use of credit cards or debit cards, which are collected and retained by persons other than the taxpayer are not taxable pursuant to this section.

3. A business entity that collects any amount that is taxable pursuant to subsection 1 is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount.

4. Any ticket for live entertainment must state whether the tax imposed by this section is included in the price of the ticket. If the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.

5. The tax imposed by subsection 1 does not apply to:

(a) Live entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution.

(b) Live entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C.

§ 501(c), or a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS.

(c) Any boxing contest or exhibition governed by the provisions of chapter 467 of NRS.

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

(f) Merchandise sold outside the facility in which the live entertainment is provided, unless the purchase of the merchandise entitles the purchaser to admission to the entertainment.

(g) Live entertainment that is provided at a trade show.

(h) Music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons.

(i) Live entertainment that is provided at a licensed gaming establishment at private meetings or dinners attended by members of a particular organization or

by a casual assemblage if the purpose of the event is not primarily for entertainment.

(j) Live entertainment that is provided in the common area of a shopping mall, unless the entertainment is provided in a facility located within the mall.

(k) Food and product demonstrations provided at a shopping mall, a craft show or an establishment that sells grocery products, housewares, hardware or other supplies for the home.

(l) Live entertainment that is incidental to an amusement ride, a motion simulator or a similar digital, electronic, mechanical or electromechanical attraction. For the purposes of this paragraph, live entertainment shall be deemed to be incidental to an amusement ride, a motion simulator or a similar digital, electronic, mechanical or electromechanical attraction if the live entertainment is:

(1) Not the predominant element of the attraction; and

(2) Not the primary purpose for which the public rides, attends or otherwise participates in the attraction.

(m) Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of an admission charge or the purchase of any food, refreshments or merchandise.

(n) An outdoor concert, unless the concert is provided on the premises of a licensed gaming establishment.

(o) Beginning July 1, 2007, race events scheduled at a race track in this State as a part of the National Association for Stock Car Auto Racing Nextel Cup Series, or its successor racing series, and all races associated therewith.

(p) Beginning July 1, 2007, a baseball contest, event or exhibition conducted by professional minor league baseball players at a stadium in this State.

(q) Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambience so long as there is no charge to the patrons for that entertainment.

6. The Commission may adopt regulations establishing a procedure whereby a taxpayer that is a licensed gaming establishment may request an exemption from the tax pursuant to paragraph (q) of subsection 5. The regulations must require the taxpayer to seek an administrative ruling from the Chair of the Board, provide a procedure for appealing that ruling to the Commission and further describe the forms of incidental or ambient entertainment exempted pursuant to that paragraph.

7. As used in this section, "maximum occupancy" means, in the following order of priority:

(a) The maximum occupancy of the facility in which live entertainment is provided, as determined by the State Fire Marshal or the local governmental agency that has the authority to determine the maximum occupancy of the facility;

(b) If such a maximum occupancy has not been determined, the maximum occupancy of the facility designated in any permit required to be obtained in order to provide the live entertainment; or

(c) If such a permit does not designate the maximum occupancy of the facility, the actual seating capacity of the facility in which the live entertainment is provided.

§ 368A.210. [Repealed]

§ 368A.220. Filing of reports and payment of tax; deposit of amounts received in State General Fund

1. Except as otherwise provided in this section:

(a) Each taxpayer who is a licensed gaming establishment shall file with the Board, on or before the 24th day of each month, a report showing the amount of all taxable receipts for the preceding month or the month in which the taxable events occurred. The report must be in a form prescribed by the Board.

(b) All other taxpayers shall file with the Department, on or before the last day of each month, a report

showing the amount of all taxable receipts for the preceding month. The report must be in a form prescribed by the Department.

2. The Board or the Department, if it deems it necessary to ensure payment to or facilitate the collection by the State of the tax imposed by NRS 368A.200, may require reports to be filed not later than 10 days after the end of each calendar quarter.

3. Each report required to be filed by this section must be accompanied by the amount of the tax that is due for the period covered by the report.

4. The Board and the Department shall deposit all taxes, interest and penalties it receives pursuant to this chapter in the State Treasury for credit to the State General Fund.

§ 368A.230. Extension of time for payment; payment of interest during period of extension

Upon written application made before the date on which payment must be made, the Board or the Department may, for good cause, extend by 30 days the time within which a taxpayer is required to pay the tax imposed by this chapter. If the tax is paid during the period of extension, no penalty or late charge may be imposed for failure to pay at the time required, but the taxpayer shall pay interest at the rate of 0.75 percent per month from the date on which the amount would have been due without the extension until the

date of payment, unless otherwise provided in NRS 360.232 or 360.320.

§ 368A.240. Credit for amount of tax paid on account of certain charges taxpayer is unable to collect; violations

1. If a taxpayer:

(a) Is unable to collect all or part of an admission charge or charges for food, refreshments and merchandise which were included in the taxable receipts reported for a previous reporting period; and

(b) Has taken a deduction on his or her federal income tax return pursuant to 26 U.S.C. § 166(a) for the amount which the taxpayer is unable to collect,

the taxpayer is entitled to receive a credit for the amount of tax paid on account of that uncollected amount. The credit may be used against the amount of tax that the taxpayer is subsequently required to pay pursuant to this chapter.

2. If the Internal Revenue Service disallows a deduction described in paragraph (b) of subsection 1 and the taxpayer claimed a credit on a return for a previous reporting period pursuant to subsection 1, the taxpayer shall include the amount of that credit in the amount of taxes reported pursuant to this chapter in the first return filed with the Board or the Department after the deduction is disallowed.

3. If a taxpayer collects all or part of an admission charge or charges for food, refreshments and merchandise for which the taxpayer claimed a credit on a return for a previous reporting period pursuant to subsection 2, the taxpayer shall include:

(a) The amount collected in the charges reported pursuant to paragraph (a) of subsection 1; and

(b) The tax payable on the amount collected in the amount of taxes reported,

in the first return filed with the Board or the Department after that collection.

4. Except as otherwise provided in subsection 5, upon determining that a taxpayer has filed a return which contains one or more violations of the provisions of this section, the Board or the Department shall:

(a) For the first return of any taxpayer that contains one or more violations, issue a letter of warning to the taxpayer which provides an explanation of the violation or violations contained in the return.

(b) For the first or second return, other than a return described in paragraph (a), in any calendar year which contains one or more violations, assess a penalty equal to the amount of the tax which was not reported.

(c) For the third and each subsequent return in any calendar year which contains one or more violations,

assess a penalty of three times the amount of the tax which was not reported.

5. For the purposes of subsection 4, if the first violation of this section by any taxpayer was determined by the Board or the Department through an audit which covered more than one return of the taxpayer, the Board or the Department shall treat all returns which were determined through the same audit to contain a violation or violations in the manner provided in paragraph (a) of subsection 4.

Overpayments and Refunds

§ 368A.250. Certification of excess amount collected; credit and refund.

If the Department determines that any tax, penalty or interest it is required to collect has been paid more than once or has been erroneously or illegally collected or computed, the Department shall set forth that fact in its records and shall certify to the State Board of Examiners the amount collected in excess of the amount legally due and the person from whom it was collected or by whom it was paid. If approved by the State Board of Examiners, the excess amount collected or paid must, after being credited against any amount then due from the person in accordance with NRS 360.236, be refunded to the person or his or her successors in interest.

§ 368A.260. Limitations on claims for refund or credit; form and contents of claim; failure to file claim constitutes waiver; service of notice of rejection of claim

1. Except as otherwise provided in NRS 360.235 and 360.395:

(a) No refund may be allowed unless a claim for it is filed with:

(1) The Board, if the taxpayer is a licensed gaming establishment; or

(2) The Department, if the taxpayer is not a licensed gaming establishment.

A claim must be filed within 3 years after the last day of the month following the reporting period for which the overpayment was made.

(b) No credit may be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the Board or the Department within that period.

2. Each claim must be in writing and must state the specific grounds upon which the claim is founded.

3. Failure to file a claim within the time prescribed in this chapter constitutes a waiver of any demand against the State on account of overpayment.

4. Within 30 days after rejecting any claim in whole or in part, the Board or the Department shall serve notice of its action on the claimant in the manner

prescribed for service of notice of a deficiency determination.

§ 368A.270. Interest on overpayments; disallowance of interest

1. Except as otherwise provided in this section and NRS 360.320, interest must be paid upon any overpayment of any amount of the tax imposed by this chapter in accordance with the provisions of NRS 368A.140.

2. If the overpayment is paid to the Department, the interest must be paid at the rate set forth in, and in accordance with the provisions of, NRS 360.2937.

3. If the Board or the Department determines that any overpayment has been made intentionally or by reason of carelessness, the Board or the Department shall not allow any interest on the overpayment.

§ 368A.280. Injunction or other process to prevent collection of tax prohibited; filing of claim is condition precedent to maintaining action for refund

1. No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.

2. No suit or proceeding may be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been filed.

§ 368A.290. Action for refund: Period for commencement; venue; waiver

1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by:

(a) The Commission, the claimant may bring an action against the Board on the grounds set forth in the claim.

(b) The Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim.

2. An action brought pursuant to subsection 1 must be brought in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his or her principal place of business or a county in which any relevant proceedings were conducted by the Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

3. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments.

§ 368A.300. Rights of claimant upon failure of Board or Department to mail notice of action on claim; allocation of judgment for claimant

1. If the Board fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Commission within 30 days after the last day of the 6-month period.

2. If the Department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Nevada Tax Commission within 30 days after the last day of the 6-month period.

3. If the claimant is aggrieved by the decision of:

(a) The Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

(b) The Nevada Tax Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

4. If judgment is rendered for the plaintiff, the amount of the judgment must first be credited towards any tax due from the plaintiff.

5. The balance of the judgment must be refunded to the plaintiff.

§ 368A.310. Allowance of interest in judgment for amount illegally collected

In any judgment, interest must be allowed at the rate of 3 percent per annum upon the amount found to have been illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment, or to a date preceding the date of the refund warrant by not more than 30 days. The date must be determined by the Board or the Department.

§ 368A.320. Standing to recover

A judgment may not be rendered in favor of the plaintiff in any action brought against the Board or the Department to recover any amount paid when the action is brought by or in the name of an assignee of the person paying the amount or by any person other than the person who paid the amount.

§ 368A.330. Action for recovery of erroneous refund: Jurisdiction; venue; prosecution

1. The Board or the Department may recover a refund or any part thereof which is erroneously made and any credit or part thereof which is erroneously allowed in an action brought in a court of competent

jurisdiction in Carson City or Clark County in the name of the State of Nevada.

2. The action must be tried in Carson City or Clark County unless the court, with the consent of the Attorney General, orders a change of place of trial.

3. The Attorney General shall prosecute the action, and the provisions of NRS, the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings.

§ 368A.340. Cancellation of illegal determination

1. If any amount in excess of $25 has been illegally determined, either by the person filing the return or by the Board or the Department, the Board or the Department shall certify this fact to the State Board of Examiners, and the latter shall authorize the cancellation of the amount upon the records of the Board or the Department.

2. If an amount not exceeding $25 has been illegally determined, either by the person filing a return or by the Board or the Department, the Board or the Department, without certifying this fact to the State Board of Examiners, shall authorize the cancellation of the amount upon the records of the Board or the Department.

Miscellaneous Provisions

§ 368A.350. Prohibited acts; penalty

1. A person shall not:

(a) Make, cause to be made or permit to be made any false or fraudulent return or declaration or false statement in any report or declaration, with intent to defraud the State or to evade payment of the tax or any part of the tax imposed by this chapter.

(b) Make, cause to be made or permit to be made any false entry in books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

(c) Keep, cause to be kept or permit to be kept more than one set of books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

2. Any person who violates the provisions of subsection 1 is guilty of a gross misdemeanor.

§ 368A.360. Revocation of gaming license for failure to report, pay or truthfully account for tax

Any licensed gaming establishment liable for the payment of the tax imposed by NRS 368A.200 who willfully fails to report, pay or truthfully account for the tax is subject to the revocation of its gaming license by the Commission.

§ 368A.370. Remedies of State are cumulative

The remedies of the State provided for in this chapter are cumulative, and no action taken by the Commission, the Board, the Department or the Attorney General constitutes an election by the State to pursue any remedy to the exclusion of any other remedy for which provision is made in this chapter.

Nevada Revised Statutes Annotated
Title 32. Revenue and Taxation (Chapters 360-377B)
Chapter 372. Sales and Use Taxes (Refs & Annos)
Overpayments and Refunds

§ 372.680. Action for refund: Time to sue; venue of action; waiver

1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his or her principal place of business or a county in which any relevant proceedings were conducted by the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

2. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments.

Nevada Administrative Code
Chapter 360. Revenue and Taxation: Generally
Practice Before The Nevada Tax Commission
Hearings on Petitions for Redetermination

§ 360.135. Subpoenas. (NRS 360.090, 360.370)

1. Subject to the restrictions imposed by NRS 360.240, a subpoena requiring the attendance of a witness from any place in the State to any designated place of a hearing for the purpose of taking testimony may be issued by the hearing officer.

2. A party desiring to subpoena a witness must submit an application in writing to the hearing officer stating the reasons why a subpoena is requested.

3. The hearing officer may require that a subpoena requested by a party for the production of books, waybills, papers, accounts or other documents be issued only after the submission of an application in writing, which specifies as clearly as may be, the books, waybills, papers, accounts or other documents desired.

4. The hearing officer, upon receipt of an application for a subpoena, shall:

(a) Grant the application and issue the subpoena;

(b) Deny the application; or

(c) Schedule a hearing to decide whether to grant or deny the application.

5. All costs incident to the subpoenas issued at the request of the petitioner must be paid by the

petitioner, and the hearing officer may demand payment of the costs before the issuance of a subpoena.

Nev. Admin. Code ch. 368A, s. 120

Nevada Administrative Code
Chapter 368A. Tax on Live Entertainment
Administration of Tax by Department of Taxation

Current through November 2007, Supplement 2007-3

NAC 368A.120 Applicability of tax: Live entertainment status; sale of food, refreshments or merchandise. (NRS 360.090, 368A.140)

1. Live entertainment status commences when any patron is required to pay an admission charge before he is allowed to enter a facility, regardless of when the live entertainment actually commences.

2. Live entertainment status ceases at the later of:

(a) The conclusion of the live entertainment; or

(b) The time when a facility for which an admission charge was required is completely vacated by admitted patrons or is opened to the general public free of any admission charge.

3. The tax applies to the sale of food, refreshments or merchandise at a facility with a seating capacity of less than 7,500, even if patrons are unable to see, hear or enjoy live entertainment from the location within the facility where the food, refreshments or merchandise is sold.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.120, NV ADC 368A.120

Nev. Admin. Code ch. 368A, s. 170

Nevada Administrative Code
Chapter 368A. Tax on Live Entertainment
Administration of Tax by Department of Taxation

Current through August 1, 2007, Supplement 2007-2

NAC 368A.170 Over-collection of tax: Duties of taxpayer and Department. (NRS 360.090, 368A.140)

1. As used in this section, "over-collection" means any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of *NRS 368A.200*, or any amount in excess of the amount of the applicable tax as computed in accordance with subsections 1 to 4, inclusive, of *NRS 368A.200*.

2. Any over-collection must, if possible, be refunded by the taxpayer to the patron from whom it was collected.

3. A taxpayer shall:

(a) Use all practical methods to determine any amount to be refunded pursuant to subsection 2 and the name and address of the person to whom the refund is to be made.

(b) Within 60 days after reporting to the Department that a refund must be made, make an

accounting to the Department of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.

4. If a taxpayer is unable for any reason to refund an over-collection, the tax-payer shall pay the over-collection to the Department.

5. If an audit of a taxpayer reveals the existence of an over-collection, the Department shall:

(a) Credit the over-collection toward any deficiency that results from the audit, if the taxpayer furnishes the Department with satisfactory evidence that the taxpayer has refunded the over-collection as required by subsection 2.

(b) Within 60 days after receiving notice from the Department that a refund must be made, seek an accounting of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.170, NV ADC 368A.170

NEVADA
Rules of Civil Procedure, Rule 41

RULE 41. DISMISSAL OF ACTIONS

* * *

(e) Want of Prosecution. * * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of any party, or on the court's own motion, after due notice to the parties, unless such action is brought to trial within 5 years after the plaintiff has filed the action, except where the parties have stipulated in writing that the time may be extended. * * * A dismissal under this subdivision (e) is a bar to another action upon the same claim for the relief against the same defendants unless the court otherwise provides.

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, Defendants.	Case No. A533273 Dept. No. IX **NEVADA DEPARTMENT OF TAXATION'S RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANTS**

TO: Plaintiffs; and

TO: Shafer & Associates, P.C., attorney of record for Plaintiffs:

Defendants, NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS and MICHELLE JACOBS by and through its attorney Catherine Cortez Masto, Attorney General, and Blake Doerr, Deputy Attorney General, hereby responds to Plaintiff's First Set of interrogatories and states as follows:

* * *

INTERROGATORY NUMBER 7

Identify the person or persons most knowledgeable about the persons or business entities meant to be taxed by the Live Entertainment Tax.

RESPONSE TO INTERROGATORY NUMBER 7

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, and subject to the prohibitions of NRS 40.025 and NRS 368A.180: this Responding Party asserts as follows:

Dino DiCianno
Executive Director
Department of Taxation

As to the non-objectionable portion of this Interrogatory, entities who provide "live entertainment" is defined by NRS 368A.090. *See* Answer to Interrogatory 5. *See* all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);
http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).
http://vvww.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);
http://vvww.leg.state.nv.us/73rd/Reports/History.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 8

Identify the person or persons most knowledgeable of the purposes for each and every one of the exceptions to the definition of "live entertainment" set forth in NRS 368A.090. Should you conclude that the person most knowledgeable differs depending on the

legislative act, list the person most knowledgeable regarding each legislative act.

RESPONSE TO INTERROGATORY NUMBER 8

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, subject to the prohibitions of NRS 40.025 and NRS 368A.180:

Michelle Jacobs
Tax Examiner II
Department of Taxation

See all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19th Special/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

* * *

INTERROGATORY NUMBER 10

Identify the person or persons most knowledgeable of the purposes for each and every one of the exceptions to the application of the Live Entertainment Tax set forth in NRS 368A.200. Should you conclude that the person most knowledgeable differs depending on the legislative act, list the person most knowledgeable regarding each legislative act.

RESPONSE TO INTERROGATORY NUMBER 10

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, and subject to the prohibitions of NRS 40.025 and NRS 368A.180:

Michelle Jacobs
Tax Examiner II
Department of Taxation

The entities who provide "live entertainment" are defined in NRS 368A.090. *See* all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);
http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).
http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);
http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType= 1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 11

Identify the person or persons most knowledgeable of the purposes for each and every one of the exceptions to the application of the Live Entertainment Tax or to the definition of "live entertainment" created by any regulation or policy of the Department. Do not duplicate responses to previous interrogatories.

In the event that different persons are most knowledgeable regarding different changes, list such individuals separately together with any changes with regard to which the person is most knowledgeable.

RESPONSE TO INTERROGATORY NUMBER 11

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, duplicative, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, presumes facts not in evidence, presents an incomplete hypothetical, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows

As to the non-objectionable portion of this interrogatory, and subject to the prohibitions of NRS 40.025 and NRS 368A.180:

Michelle Jacobs
Tax Examiner
Department of Taxation

The entities who provide "live entertainment" are defined in NRS 368A.090. *See* all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);
http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).
http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);
http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType= 1&BillNo=554 (AB 544).

Discovery is continuing.

* * *

INTERROGATORY NUMBER 16

Identify the person or persons most knowledgeable regarding the purpose(s) of changing the maximum seating capacity/maximum occupancy specified by (present) NRS 368A.200(5)(d) and (e) from 300 to 200.

RESPONSE TO INTERROGATORY NUMBER 16

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, presumes facts not in evidence, presents an incomplete hypothetical, and is overly burdensome as it would require expensive

review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory:

Dino DiCianno
Executive Director
Department of Taxation

See all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);
http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).
http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);
http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType= 1&BillNo=554 (AB 544).

Discovery is continuing.

* * *

INTERROGATORY NUMBER 21

Identify each and every governmental interest meant to be served by the enactment or operation of the Live Entertainment Tax.

RESPONSE TO INTERROGATORY NUMBER 21

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is confidential and privileged pursuant to NRS 368A.180 and NRS 49.025, asks for information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of records. The Interrogatory additionally seeks information that is obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, the purpose of the Live Entertainment Tax is to generate revenue for the state. See NRS Chapter 368A, NAC, chapter 368A, see *also* all public access legislative history documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType= 1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 22

Identify each and every governmental interest meant to be served by the enactment of each and every one of the exceptions and exemptions to the Live Entertainment Tax.

RESPONSE TO INTERROGATORY NUMBER 22

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is confidential and privileged pursuant to NRS 368A.180, asks for information which is lot reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of records. The Interrogatory additionally seeks information that is obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, the purpose of the Live Entertainment Tax is to generate revenue for the state. See NRS Chapter 368A, NAG Chapter 368A, *see also* all public access legislative history documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);
http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).
http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);
http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType= 1&BillNo=554 (AB 544).

Discovery is continuing.

* * *

SENATE BILL 247: Revises provisions governing tax on live entertainment. (BDR 32-680)

SENATOR TITUS:

After two Special Sessions, many late nights, a lot of political battles, some Supreme Court decisions and some pretty messy compromises, we came up with a tax package that was quickly found to be full of problems. One of those problems was with the entertainment tax, which turned out to be a bookkeeping nightmare. It also failed to generate the anticipated revenue, and it did not adequately bring in a group some of us intended to be included, namely, the striptease clubs which have proliferated in southern Nevada. For those reasons, I introduce a reform for the entertainment tax, which is what is before you today in *S.B. 247*. Since I was one of the ones who pushed to include the striptease clubs, I felt some obligation to try to clean up the mess made in that last bill.

I have handed out an amendment, which is, in effect, a rewrite of *S.B. 247* (*Exhibit H, original is on file at the Research Library*, I have also handed out a packet of letters in support of the new entertainment tax (*Exhibit I*). These letters come from people who produce sporting events, which will be excluded from the entertainment tax under the new bill, as I will explain. There are letters from the Las Vegas 51's

baseball team, Las Vegas Motor Speedway, Wranglers hockey team and Feld Entertainment, Incorporated, which sponsors circuses.

Under the new bill, you will virtually take the old entertainment tax and divide it into two parts, or, two taxes. We will call one live entertainment and the other, adult entertainment. We will go over the details of the live-entertainment tax first, which is a continuation of the old tax, but with some revisions. The live-entertainment tax would apply only to nonrestricted gaming facilities, and would be administered by the Gaming Control Board. Sporting events that occur in gaming facilities would be exempt, but the bill would leave in place the 10-percent charge on admissions, drink, food, and souvenirs. This would eliminate the seating requirement and eliminate any facilities other than gaming facilities with nonrestricted licenses.

The second part of the bill deals with the adult-entertainment tax, which is defined in section 11. It would charge the same 10 percent on everything; drinks, admissions and souvenirs, in nonrestricted gaming and in non-gaming facilities that provide adult entertainment. It would be administered by the Department of Taxation and would include houses of prostitution.

This new approach is better than the old live-entertainment tax for several reasons. It eliminates the seating requirements which were problematic in the old bill. It also eliminates sporting events, which

are family-oriented and have a lot of local attendance. Having this exemption will help us get a second National Association for Stock Car Auto Racing, Incorporated, (NASCAR) race, which everybody seems to love, as well as a professional baseball team in Las Vegas. * * * Any loss in revenue that might occur from eliminating sporting events, which were only charged 5 percent on admission anyway, will be more than made up for in an increase in revenue from adult entertainment.

* * *

SENATOR LEE:

I know this bill is very important, but it seems like we are selectively going after a group or a business. No matter what business it is, I have a challenge with understanding that type of activity.

TAYLOR DEW: (National Hula Girls)

As you recall, the live-entertainment tax last Session was meant only to tax adult entertainment, but unintentionally affected us Hula Girls, Elvis impersonators, jugglers, singers, bands and virtually every type of entertainer. Obviously, the wording will need to be changed. There have been some compromises proposed by the Nevada Gaming Control Board, the State Gaming Commission and the Department of Taxation, but those were shot down.

* * *

SENATOR LEE:

Would it be possible, if the State did not want proliferation of this type of business but also realizes it is here, for the State to then charge a fee? In other words, could the State say, "If you are going to be in this type of business, there will be a $250,000 fee for you to be in business in the State of Nevada?"

* * *

MINUTES OF THE MEETING OF THE ASSEMBLY COMMITTEE ON COMMERCE AND LABOR

Seventy-Third Session
May 16, 2005

The Committee on Commerce and Labor was called to order at 2:09 p.m., on Monday, May 16, 2005. Chairwoman Barbara Buckley presided in Room 4100 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4406 of the Grant Sawyer State Office Building, Las Vegas, Nevada. *Exhibit A* is the Agenda. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Ms. Barbara Buckley, Chairwoman
Mr. John Oceguera, Vice Chairman
Ms. Francis Allen
Mr. Bernie Anderson
Mr. Morse Arberry Jr.
Mr. Marcus Conklin
Mrs. Heidi S. Gansert
Ms. Chris Giunchigliani
Mr. Lynn Hettrick
Ms. Kathy McClain
Mr. David Parks
Mr. Richard Perkins
Mr. Bob Seale
Mr. Rod Sharer

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Senator Michael Schneider, Clark County
Senatorial District No. 11
Senator Dennis Nolan, Clark County
Senatorial District No. 9
Senator Dean Rhoads, Northern Nevada
Senatorial District
Senator Dina Titus, Clark County
Senatorial District No. 7

* * *

Senate Bill 247 (1st Reprint): Revises provisions governing tax on live entertainment. (BDR 32-680)

Senator Dina Titus, Clark County Senatorial District No. 7:

The tax package from the 2003 Legislative Session included the entertainment tax, which quickly proved a bookkeeping nightmare. It also failed to generate the revenue we had anticipated and it didn't adequately bring in a group some of us intended to be covered, which are the striptease clubs that have proliferated, primarily in southern Nevada. It did, however, introduce us to the touring hula girls who are constantly before us and were helpful in bringing some of the problems with the original bill to our attention. For those reasons, I've introduced *S.B. 247* as a reform of the entertainment tax.

The amended bill sets up parallel entertainment taxes, a live entertainment tax, and an adult entertainment tax. The live entertainment tax applies only to non-restricted gaming facilities. It's administered by the Gaming Control Board and exempts sporting events that occur in non-restricted gaming facilities, keeping the same tax that was in place before, at 10 percent on admission, drinks, food, and souvenirs.

The adult entertainment tax in Section 11 provides a tax at 10 percent on everything in non-restricted gaming and non-gaming facilities that offer live adult entertainment, which is defined in Section 8 of the statute. It would be administered by the Department of Taxation and it does not include houses of prostitution.

This eliminates seating requirements, which were problematic in the original bill. It eliminates sporting events, which are family oriented. We believe those are attended by local families, and eliminating this would help to get a second

* * *

NASCAR race, an all-star basketball game, and a baseball team. It also eliminates taverns and restaurants that have occasional entertainment on weekends such as a piano player or a small band. It will do a better job of capturing adult live entertainment because it eliminates that 300 seating requirement.

* * *

There was some testimony on the Senate side by a group of naturists. I thought that meant people who hiked and picked flowers, but in the old days you called them nudist colonies. Certainly the intent of the live entertainment tax was not to get nudist colonies, but to get striptease clubs. If there's some way you can accommodate them, that is fine too.

* * *

Chairwoman Buckley:

My biggest concern with the bill is its constitutionality. We already had an Assembly bill we passed that exempts the *Star Trek* ride. Now someone is claiming the free pens they give you at a convention should be taxed, so we put that in there. We clarified the strolling and the hula girls, and I don't think anyone opposes the Resort Association language (*Exhibit D*). We can clarify that wasn't the intent and everyone supports that. A lot of that was already in the Assembly bill that we sent to Ways and Means. I'm concerned that if we just put live adult entertainment, that might be held unconstitutional. I wonder if a better approach might be to pick out a few more things like the racetrack and sporting events, but to delineate all those separate ones and leave it like that. We could fix and refine the language to make sure we're more careful and more able to describe things that might be caught up rather than to put into our statute the phrase "adult entertainment," which puts a big red flag on it for the courts. What are your thoughts on that?

* * *

Chairwoman Buckley:

I wonder if we could do it in a way that's a little broader but gets at the problems so we would avoid losing the revenue. We're getting the most revenue from adult entertainment clubs, which is $6 million dollars, the highest amount paid under the live entertainment tax. The next one is race tracks at $1.5 million, but everything else pales in comparison to how much they're bringing in now, and I would hate to give them back their $6 million. Perhaps with the severability clause, but I hate to bring back anything we might want to fix now in terms of getting them excluded from the bill. It sounds like the goals are pretty much the same.

Senator Titus:

I agree with that. The 300-seat requirement has kept a lot of those clubs from paying. If you decide to amend this and do something with it, be sure to keep that in mind because that's where a lot of the revenue is. The Fiscal Division in the Senate argued that if you eliminate some of the family-oriented businesses like NASCAR and you take out the 300-seat at the same time, that will more than make up for any lost revenue.

* * *

MINUTES OF THE
SENATE COMMITTEE ON TAXATION

Seventy-third Session
June 5, 2005

* * *

ASSEMBLY BILL 554 (2nd Reprint): Makes various changes to provisions governing taxation. (BDR 32-1344)

ANTHONY F. SANCHEZ (Las Vegas Motor Speedway):

You have before you an issue previously heard by this Committee. It was Senator Titus's bill, *Senate Bill (S.B.) 247*.

SENATE BILL 247 (1st Reprint): Revises provisions governing tax on live entertainment. (BDR 32-680)

MR. SANCHEZ:

Due to the lack of progress on *S.B. 247*, we have been working to add a provision in *A.B. 554*. This was passed out of the Assembly this morning.

The bottom of Page 6 has an exemption regarding the National Association for Stock Car Auto Racing (NASCAR). The way it is currently written indicates if there are two or more races in a calendar year, the second race is exempt. The concern on the part of the Las Vegas Motor Speedway is due to an administrative inefficiency. The track sells its tickets all at the same time, so the Speedway would have to tax all races except the second one.

We have worked with and spoken to leadership in the Assembly as well as the Senate and are proposing an amendment (*Exhibit C*) which would delete the second race exemption and propose both races be exempt for the next biennium. The first rate that would impact would probably be a March 2008 race.

* * *

SENATOR COFFIN:

Does this bill contain anything about the topless clubs?

MR. SANCHEZ:

Assembly Bill 554 does have live entertainment aspects, but more to entertainment places inside casinos.

SENATOR COFFIN:

Does *A.B. 554* include everything but the topless clubs?

MR. SANCHEZ:

There was a lot more in *S.B. 247* not contained in *A.B. 554* which is much more streamlined and condensed. It has less information than *S.B. 247*.

SENATOR COFFIN:

Where are the topless clubs in this bill?

GEORGE W. TREAT FLINT (Nevada Brothel Owners Association):

I have an intimate relationship with this bill and its verbiage since the last Session. On page 6 of *A.B. 554*, the topless clubs would be covered under lines 1 through 3, unless they have an occupancy capacity of less than 300. The major men's cabarets are covered under that section. I have been told by the Department of Taxation that the major places create approximately $7 million a year. Most of the smaller clubs could probably be brought into *A.B. 554* if you amend the section to read a total occupancy of 200 rather than 300. To protect my client, I do not want you to bring the occupancy number down too much lower than 200 or you will have my clients back in this tax law.

SENATOR COFFIN:

It is my understanding that some of the topless clubs get out of being taxed by removing a few seats. We should consider the possibility of reducing the seating capacity so these highly profitable, legitimate businesses could help pay their share of the budget. Has there been any discussion about that?

* * *

SENATOR COFFIN:

I would like to ask Charles Chinnock from the Tax Department a few questions on this legislation. Mr. Chinnock, what happened after the last Session with regard to the men's cabarets?

CHARLES CHINNOCK (Executive Director, Department of Taxation):

Many jurisdictions, whether fire marshals or the building code departments that oversee the facilities, found increased safety concerns with the 300-seating capacity. From the building and safety officials' standpoint, they would much rather see less occupancy than greater occupancy. If you had 300 or greater seating capacity, they were willing to adjust that seating capacity from the standpoint it was a safer venue to reduce that capacity. It became an easy issue for them to reduce the seating capacity

SENATOR COFFIN:

Are you saying they reduced the seating number to avoid the tax in the interest of safety?

Mr. CHINNOCK:

Yes, it was in the interest of safety.

SENATOR COFFIN:

If we changed the language to lower the amount, would we unintentionally include entities we do not want to tax?

MR. CHINNOCK:

I do not know how to answer that. We did not do a study of a breaking point below the 300-seating capacity. The other bills were all or nothing with respect to adult entertainment.

SENATOR COFFIN:

If we are going to take action on *A.B. 554* on the Senate Floor, would it be possible to amend it at that time to lower the 300-seat capacity to 200?

WILLIAM BIBLE (Nevada Resort Association):

I really cannot assist you with this issue because the taxes would apply to venues associated with gaming. The seating capacity in *A.B. 554* is for areas not on gaming premises.

SENATOR TOWNSEND:

With regard to the 300 seating and the budget, the lower we make it, the more revenue we would generate as opposed to having an effect on them. There should be no fiscal note. My limited knowledge of this corresponds with Senator Coffin. This puts our Department of Taxation and the auditors in a tough situation. We have to remember, at the end of the day, we have those individuals who will be responsible for implementing this law. Senator Coffin's proposal meets the original intent of what this Committee and the Assembly debated. Obviously, we do not want to create a problem for Mr. Flint's clients. That was never the issue.

DINO DICIANNO

From: Campbell, Barbara Smith [bcampbell@mrgmail.com]

Sent: Tuesday, November 18, 2003 9:34 AM

To: [redacted]

Subject: RE: LET Comment Letter

[redacted]

We are going to incorporate the following into our proposed draft language.

(Under section 11(4)(b))

1. Instrumental or vocal music, which may or may not be supplemental with commentary by the musicians, in a restaurant, lounge or similar area if such music does not routinely rise to a volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen;

2. Instrumental or vocal music performed in restaurants by employees whose primary job function is that of preparing or serving food, refreshments or beverages to patrons if such instrumental or vocal music is not advertised as entertainment to the public.

Under Section 11(7)

"Casual assemblage" includes, but is not limited to:

(a) Participants in conventions, business meetings or tournaments and their guests; or

(b) Persons celebrating a friend's or family member's wedding, birthday, anniversary, graduation, religious ceremony or similar occasion that is generally recognized as customary for celebration.

The DAG has concerns about your recommended language in Ambient Entertainment #3. In summary, he feels that the language may lead to the exemption of "entertainers" at the Gentlemen Clubs. Therefore, we did not incorporate it in our draft. We certainly welcome comments at the hearing.

Ambient Entertainment #4 appears to be appropriate under the GCB. I'm not sure that it is appropriate for Tax. Again, we welcome your comments.

Barbara Smith Campbell
3950 Las Vegas Blvd. South
Las Vegas, Nevada 89119
702-632-7770 LV office
702-597-2952 LV fax
775-328-9553 Reno Office
775-328-9505 Reno fax

[REDACTION DONE BY STATE BEFORE PRODUCING THIS DOCUMENT]

MEMORANDUM

Date: November 9, 2004

To: Chuck Chinnock

From: Cathy Chambers

CC: Dino Di Cianno

Subject: Live Entertainment tax information for LCB on Gentlemen's Clubs

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The total number of Gentlemen's Clubs statewide is approximately 33. There are 4 in the Reno District all with seating capacity of less than 300; 2 in the Elko District both of which are currently below 300 seating capacity; Las Vegas District has the majority with 27 clubs operating. Of the 27 clubs, 2 have been referred to Gaming Control Board for LET registration, 16 have seating capacity of less than 300, and 9 with seating capacity of 300 to 7,499. Carson district does not have any of these specific types of clubs, only brothels with capacity for less than 300 patrons. See attached worksheet for reporting information.

[redacted] **DISTRICT**

Cathy:

[redacted] have consulted on this question and we agree on the following Gentlemen's Clubs in our District.

[redacted] Originally (before LET) [redacted] Definitely room to expand seating capacity.

[redacted] Originally (before LET) [redacted] No reasonable room to expand.

[redacted] Originally (before LET) [redacted] Definitely room to expand seating capacity.

[redacted] Originally (before LET) [redacted] No reasonable room to expand.

[redacted]

[redacted] **DISTRICT**

We only have two "Gentlemen's Clubs". They [redacted] and [redacted]

[redacted] is on the exempt list, and I have verified that their seating capacity is [redacted]

[redacted] opened after we put the LET database together. It has [redacted]. I did a field visit when they first opened as they had indicated [redacted]. They do have more [redacted] but the owner told me that he was [redacted]. The seating capacity of that area would be about 60. I will do a field visit after they open this afternoon to verify that they are using that area for the dancers.

[redacted] Revenue Officer III
Nevada Department of Taxation
Compliance Division

[REDACTIONS DONE BY STATE
BEFORE PRODUCING THIS DOCUMENT]

DINO DICIANNO

From: Dino Dicianno
[dicianno@tax.state.nv.us]

Sent: Sunday, April 24, 2005 4:45 PM

To: 'stevens@lcb.state.nv.us'

Cc: Ghiggert, Gary

Subject: SB 247

Importance: High

Chris Janzen asked me take a look at the fiscal impact of Senator Titus's new version of SB 247. There is no question that the focus of the bill is to tax for LET all adult entertainment, except for brothels. Currently the vast majority of the revenue that we collect comes from the gentlemen's clubs that have a seating capacity greater than 300. For example, $1.2 million from nightclubs, $1.4 million from raceways, $1.0 million from performing arts, $5.2 million from gentlemen's clubs; for a total collected of about $9.0 million. The remaining venues are minor (i.e., sporting events, etc.). By removing the seating capacity and eliminating the other types of venues you would then capture all of the remaining gentlemen clubs that are currently not paying. There is no question that they are a cash cow for LET. My best guess is that the fiscal impact of the revised SB 247 would be either a wash with a distinct possibility of a potential LET venue gain. Those types of venues will not disappear because of the additional tax burden; they will probably expand since the customer is the one

paying the tax. What that gain in LET would be is difficult to estimate at such a short notice. In my mind it will be at least $4.0 million. In addition, there would be a gain in sales tax collected at the ten percent level by including all of the gentlemen's clubs. I trust this helps. Call me if you need anything further.

Dino DiCianno,
Deputy Director – Compliance
Department of Taxation
Phone: (775) 684-2070
Fax: (775) 684-2020

ASSEMBLY COMMITTEE/
WAYS & MEANS
DATE: 5-26-05 **EXHIBIT**: E
SUBMITTED BY: Senator Titus

E1 of 12

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DÈJÁ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a *DÈJÁ VU SHOWGIRLS*; LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a *LITTLE DARLINGS*; K-KEL, INC. d/b/a/ *SPEARMINT RHINO GENTLEMAN'S CLUB*; OLYMPUS GARDEN, INC. d/b/a *OLYMPIC GARDEN*; SHAC, L.L.C. d/b/a *SAPPHIRE*; THE POWER COMPANY, INC., d/b/a *CRAZY HORSE TOO GENTLEMEN'S CLUB*; D. WESTWOOD, INC. d/b/a *TREASURES*; and D.I. FOOD AND BEVERAGE OF LAS VEGAS, L.L.C., d/b/a *SCORES*	**Case No. CV-S-06-00480-RLH-RJJ**
Plaintiffs,	
v.	
NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, and NEVADA STATE BOARD OF EXAMINERS,	
Defendants.	

MOTION TO DISMISS AMENDED COMPLAINT

Come now Defendants, the Nevada Department of Taxation ("the Department") the Nevada Tax Commission ("the Commission"), and the Nevada State Board of Examiners ("the Board"), hereinafter collectively referred to as "Defendants." through their attorneys, Attorney General George Chanos and Deputy Attorney General Dennis L. Belcourt, and move this Court for dismissal of the Amended Complaint for Declaratory and Injunctive Relief, Damages, and Attorney's Fees and Costs ("Amended Complaint"). This Motion is made under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure on the grounds that the Amended Complaint fails to state a claim for relief as to Defendants under 42 USC §1983, that assertion of the claims for damages in Federal Court is barred under the Eleventh Amendment to the United States Constitution, and that this Court lacks jurisdiction to consider the relief sought, by virtue of the Tax Injunction Act (28 USC §1381). This motion is based on the following memorandum of points and authorities and on the record herein.

MEMORANDUM OF POINTS AND AUTHORITIES

* * *

a. The Remedy is Plain

A remedy is plain if it is not uncertain. *Rosewell v. LaSalle National Bank,* 450 U.S. 503, 516-517, 101

S.Ct. 1221, 1231 (1981). NRS Chapter 368A provides a well-defined remedy.

The Department is required to cause a refund of taxes that have been paid more than once or have been erroneously or illegally collected. NRS 368A.250.

A taxpayer has 3 years after the last day of the month following the reporting period to file a claim for a refund with the Department. NRS 368A.260(1). Filing a timely claim is a prerequisite to maintaining a suit for refund or credit. NRS 368A.280(2). A taxpayer may appeal to the Commission a denial of his claim by the Department. NRS 360.245. If the Department does not mail a decision within six months of when a claim is filed, the taxpayer may treat the claim as denied and appeal to the Commission within thirty days after the last day of the six month period. NRS 368A.300(2).

Within ninety days of denial by the Commission of a taxpayer's appeal of a claim for refund, the taxpayer may bring an action in court. NRS 368A.290. By default, jurisdiction for such actions lies in the District Court, Nev. Constit., Art. 6, § 6, NRS 4.370. Therefore, the Nevada Supreme Court has original appellate jurisdiction. Nev. Constit., Art. 6, § 4. *See*, *also,* NRS 233B.150.

If it were not otherwise crystal clear that the issue of constitutionality of the Live Entertainment Tax may be raised in court, it is made clear by an exemption in NRS 368A.200(5)(a). That provision exempts live entertainment that the State of Nevada

"is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution."

Plaintiffs have a clear opportunity to be heard at the administrative level and in court by making a claim for a refund. If judgment is rendered for the Plaintiffs, they would be entitled to a credit against amounts they owe and a refund of the balance. NRS 368A.300(4) and (5). With certain exceptions, prevailing taxpayers are entitled to interest from the date of payment.[3]

The Amended Complaint cites NRS 368A.280(1) as indicating lack of a remedy. That provision states that

> No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.

The foregoing provision has not yet been construed by the Nevada Supreme Court. Even were it construed to prohibit every remedy other than the

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[3] The rates are (a) six per cent, if by way of judgment (NRS 369A.310) and (b) the Nevada prime lending rate plus two per cent, under other circumstances (NRS 360.3295.). Exceptions are found in NRS 368A.270.

refund procedures allowed under NRS 368A.250-.320, the refund procedures are adequate. There is no requirement that taxpayers be afforded more than that. The United States Supreme Court has stated:

> Because we do not believe that Congress intended federal injunctions and declaratory judgments to disrupt state tax administration when state refund procedures are available, we decline to find an exception in the Tax Injunction Act for the appellees' claims. Accordingly, because the appellees could seek a refund of their state unemployment insurance taxes, and thereby obtain state judicial review of their constitutional claims, we hold that their remedy under state law was "plain, speedy and efficient" within the meaning of the Tax Injunction Act, and consequently, that the District Court had no jurisdiction to issue injunctive or declaratory relief.

California v. Grace Brethren Church, 457 U.S. 393, 417, 102 S.Ct. 2498, 2512-3 (1982).

* * *

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DÈJÁ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a *DÈJÁ VU SHOWGIRLS*; LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a *LITTLE DARLINGS*; K-KEL, INC. d/b/a/ *SPEARMINT RHINO GENTLEMAN'S CLUB*; OLYMPUS GARDEN, INC. d/b/a *OLYMPIC GARDEN*; SHAC, L.L.C. d/b/a *SAPPHIRE*; THE POWER COMPANY, INC., d/b/a *CRAZY HORSE TOO GENTLEMEN'S CLUB*; D. WESTWOOD, INC. d/b/a *TREASURES*; and D.I. FOOD AND BEVERAGE OF LAS VEGAS, L.L.C., d/b/a *SCORES* Plaintiffs, v. **NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, and NEVADA STATE BOARD OF EXAMINERS,** Defendants.	**Case No. CV-S-06-00480-RLH-RJJ** **Reply To Plaintiffs' Opposition to Motion to Dismiss**

REPLY TO MOTION TO DISMISS AMENDED COMPLAINT

Come now Defendants, the Nevada Department of Taxation ("the Department"), the Nevada Tax Commission ("the Commission"), and the Nevada State Board of Examiners ("the Board"), hereinafter collectively referred to as "Defendants," through their attorneys, Attorney General George Chanos and Deputy Attorney General Dennis L. Belcourt, and reply to Plaintiffs' Opposition to their Motion to Dismiss.

MEMORANDUM OF POINTS AND AUTHORITIES

* * *

a. Plainness of Remedy

Plaintiffs have not met their burden of pleading or proving jurisdiction based on the lack of a plain remedy. Plaintiffs allege only the limitations of relief in NRS 368A.280(1), which provision appears to bar injunctive relief and is interpreted by Plaintiffs to bar declaratory relief,[2] In a patently unreasonable interpretation, Plaintiffs also interpret said provision to

[2] *But see State v. Scotsman Mfg. Co. Inc.,* 109 Nev. 252, 849 P.2d 317 (1993) *(Scotsman II),* which, along with *Scotsman Manufacturing* Co., *Inc. v. State of Nevada,* 107 Nev. 127, 808 P.2d 517 (1991) *(Scotsman I),* involved a similar statute and would support the proposition that declaratory relief is available notwithstanding NRS 368A.280(1).

bar any judicial remedy whatsoever as to the validity of the tax in question.

* * *

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DÈJÁ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a *DÈJÁ VU SHOWGIRLS*; LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a *LITTLE DARLINGS*; K-KEL, INC. d/b/a/ *SPEARMINT RHINO GENTLEMAN'S CLUB*; OLYMPUS GARDEN, INC. d/b/a *OLYMPIC GARDEN*; SHAC, L.L.C. d/b/a *SAPPHIRE*; THE POWER COMPANY, INC., d/b/a *CRAZY HORSE TOO GENTLEMEN'S CLUB*; D. WESTWOOD, INC. d/b/a *TREASURES*; and D.I. FOOD AND BEVERAGE OF LAS VEGAS, L.L.C., d/b/a *SCORES* Plaintiffs/Appellants, v. **NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, and NEVADA STATE BOARD OF EXAMINERS,** Defendants/Appellees.	No. 06-16634 D.C. No. CV-S-06-00480 (RLH) (RJJ) **APPELLEES' ANSWERING BRIEF**

* * *

2. The Clubs have a Plain, Speedy and Efficient Remedy Under State Law

The Complaint does not allege the lack of a plain, speedy and efficient remedy. The remedy is measured by procedural, not substantive, sufficiency. *Age Intern, Inc. v. Miller,* 830 F.Supp. 1484, 1492 (N.D.Ga. 1993). State remedies must afford an opportunity for a hearing and judicial determination at which Constitutional challenges to the tax may be raised, but may require exhaustion of administrative remedies. *Id.*

(a.) The Remedy is Plain

The Amended Complaint does not allege the lack of a plain remedy. At most, it cites to Nev. Rev. Stat. § 368A.280(1), which, when read with the other provisions of Nev. Rev. Stat. Chapter 368A, appended to the Amended Complaint as an exhibit, and case law, do not indicate the lack of a plain remedy.

A remedy is plain if it is not uncertain, *Rosewell v. LaSalle National Bank,* 450 U.S. 503, 516-517, 101 S.Ct. 1221, 1231 (1981). Nev. Rev. Stat. Chapter 368A provides a well-defined remedy.

The Department is required to cause a refund of taxes that have been paid more than once or have been erroneously or illegally collected. Nev. Rev. Stat. § 368A.250.

A taxpayer has 3 years after the last day of the month following the reporting period to file a claim for a refund with the Department. Nev. Rev. Stat.

§ 368A.260(1). Filing a timely claim is a prerequisite to maintaining a suit for refund or credit. Nev. Rev. Stat. § 368A.280(2). A taxpayer may appeal to the NTC a denial of his claim by the Department. Nev. Rev. Stat. § 360.245. If the Department does not mail a decision within six months of when a claim is filed, the taxpayer may treat the claim as denied and appeal to the NTC within thirty days after the last day of the six month period. Nev. Rev. Stat. § 368A.300(2).

Within ninety days of denial by the NTC of a taxpayer's appeal of a claim for refund, the taxpayer may bring an action in court. Nev. Rev. Stat. § 368A.290. Jurisdiction for such actions lies in the District Court. Nev. Const., art. 6, § 6,[3] Nev. Rev. Stat. § 4.370.[4] Therefore, the Nevada Supreme Court has original appellate jurisdiction. Nev. Const., art. 6, § 4.

If it were not otherwise crystal clear that the issue of constitutionality of the Live Entertainment Tax may be raised in court, it is made clear by an exemption in Nev. Rev. Stat. § 368A.200(5)(a). That provision exempts live entertainment that the State of Nevada "is prohibited from taxing under the

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[3] This section of the Nevada Constitution provides in pertinent part: "The District Courts in the several Judicial Districts of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts.")

[4] Action for tax refund not among listed bases for justice court jurisdiction.

Constitution, laws or treaties of the United States or the Nevada Constitution."

The Clubs have a clear opportunity to be heard at the administrative level and in court by making a claim for a refund. If judgment is rendered for the Clubs, they would be entitled to a credit against amounts they owe and a refund of the balance. Nev. Rev. Stat. § 368A.300(4) and (5). With certain exceptions, prevailing taxpayers are entitled to interest from the date of payment.[5]

The Amended Complaint cites Nev. Rev. Stat. § 368A.280(1) as indicating lack of a. remedy. That provision states as follows:

> No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.

The foregoing provision has not yet been directly construed by the Nevada Supreme Court.[6] Even were

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[5] The rates are (a) six percent, if by way of judgment (Nev. Rev. Stat. § 368A.310) and (b) the Nevada prime lending rate plus two per cent, under other circumstances (Nev. Rev. Stat. § 360.2935.). Exceptions are found in Nev. Rev. Stat. § 368A.270.

[6] Nev. Rev. Stat. § 368A.280(1) was manifestly drawn from provisions in the Nevada sales tax chapters, Nev. Rev. Stat.

(Continued on following page)

it construed to prohibit every remedy other than the refund procedures allowed under Nev. Rev. Stat. §§ 368A.250-368A.320, the refund procedures are efficient. There is no requirement that taxpayers be afforded more than that. The United States Supreme Court has stated:

> Because we do not believe that Congress intended federal injunctions and declaratory judgments to disrupt state tax administration when state refund procedures are available, we decline to find an exception in the Tax Injunction Act for the appellees' claims. Accordingly, because the appellees could seek a refund of their state unemployment insurance taxes, and thereby obtain state judicial review of their constitutional claims, we hold that their remedy under state law was "plain, speedy and efficient" within the meaning of the Tax Injunction Act, and consequently, that the District Court had no jurisdiction to issue injunctive or declaratory relief.

California v. Grace Brethren Church, 457 U.S. 393, 417, 102 S.Ct. 2498, 2512, 2513 (1982).

It is clear, therefore, that Nev. Rev. Stat. Chapter 368A confers upon the taxpayer a plain remedy in the form of the right to bring an action in state district court upon denial of a claim for refund by the NTC.

Chapter 372 and 374. *See* Nev. Rev. Stat. § 372.670 and Nev. Rev. Stat. § 374.675.

The District Court properly rejected the Clubs' efforts to nullify Nev. Rev. Stat. § 368A.290-.300 through a misinterpretation of Nev. Rev. Stat. § 368A.280. E.R. 47. The District Court further noted that the Nevada Supreme Court had specifically recognized a judicial remedy in the face of parallel language in Nev. Rev. Stat. Chapters 372 and 374. *State, Nevada Dept. of Taxation v. Scotsman Mfg. Co., Inc.,* 109 Nev. 252, 849 P.2d 317 (1993), E.R. 48.[7]

Scotsman involved an action for declaratory relief by a taxpayer challenging application of the sales tax to it. The various components of the sales tax in Nevada are governed by procedures set forth in Nev. Rev. Stat. Chapters 372 and 374, which contained provisions with respect to judicial review that are almost identical to those in Nev. Rev. Stat. Chapter 368A. For example, Nev. Rev. Stat. § 372.670 and Nev. Rev. Stat. § 374.675, applicable to the sales taxes, and Nev. Rev. Stat. § 368A.280(1), applicable to the Live Entertainment tax, are substantially identical:

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[7] Even if *Scotsman* is merely persuasive, not determinative, of the State court's interpretation of Nev. Rev. Stat. § 368A.280(1), it should carry sufficient weight against the Clubs' unproven arguments concerning the lack of a remedy. *Cf. Franchise Tax Board v. Alcan Aluminum Limited,* 493 U.S. 331, 341, 110 S.Ct. 661, 667 (1990) (Supreme Court declined to assume that California court would not afford opportunity to seek relief, noting California intermediate appellate decision supportive of such an opportunity).

Sales Taxes

Nev. Rev. Stat. § 372.670: "No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this chapter of any tax or any amount of tax required to be collected."

Sales Taxes

Nev. Rev. Stat. § 374.675: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against the State, a county, any officer thereof to prevent or enjoin the collection under this chapter of any tax or any amount of tax required to be collected."

Live Entertainment Tax

Nev. Rev. Stat. § 368A.280(1): "No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected."

Applying the sales tax law to the matter before it, the Nevada Supreme Court in *Scotsman* found not only that the taxpayer was entitled to challenge the Constitutionality of the tax as applied to it, but, under the circumstances, it could do so without

having exhausted administrative remedies. *Id.* at 255-6, 849 P.2d at 320-1.

The Clubs take the position that Nev. Rev. Stat. § 368A.280(1) should be construed to bar any judicial remedy for taxpayers. In doing so, the Clubs do not harmonize Nev. Rev. Stat. § 368A.280(1) with the remedy clearly laid out in Nev. Rev. Stat. § 368A.290, they do not distinguish *Scotsman,* and they do not cite any other Nevada legal authority in support of their position. The Clubs' instead attempt to apply Tax Injunction Act decisions to interpret Nev. Rev. Stat. § 368A.280(1) in order to preclude any judicial remedy whatsoever. However, the Tax Injunction Act has its own unique gloss, which is heavily based on legislative history. *See, e.g., California v. Grace Brethren Church, supra,* 457 U.S. at 417, 102 S.Ct. at 2512-3 (1982). The Clubs provide no basis for applying this gloss to Nev. Rev. Stat. § 368A.280(1).

Under the circumstances, the District Court's interpretation of Nev. Rev. Stat. § 368A.280(1) as merely preventing "preemptive strikes" (E.R. 47) is clearly more in accord with Nevada law. It does no violence to the judicial remedy laid out in Nev. Rev. Stat. § 368A.290. It is wholly consistent with *Scotsman*.

In summary, it is incumbent on the Clubs to demonstrate that their remedy is uncertain. *Franchise Tax Board v. Alcan Aluminum Limited, supra,* 493 U.S. at 341, 110 S.Ct. at 667. They have failed to do so.

* * *

DISTRICT COURT, CLARK COUNTY, NEVADA

DEJA VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a *Deja Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a *Little Darlings*, K-KEL, INC., d/b/a/ *Spearmint Rhino Gentleman's Club*, OLYMPUS GARDEN, INC., d/b/a *Olympic Garden*, SHAC, L.L.C. d/b/a *Sapphire*, THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*, D. WESTWOOD, INC., d/b/a *Treasures*, and D.I. FOOD AND BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*,

Plaintiffs,

v.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, and NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only,

Defendants.

CASE NO.: A533273
DEPT. NO.: IX
DOCKET NO.: ___

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, DAMAGES, AND ATTORNEY FEES AND COSTS

(Filed Dec. 19, 2012)

NOW COMES Plaintiffs, Deja Vu Showgirls of Las Vegas, L.L.C., d/b/a *Deja Vu Showgirls*, Little Darlings of Las Vegas, L.L.C., d/b/a *Little Darlings*, K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club,* Olympus Garden, Inc., d/b/a *Olympic Garden,* SHAC, L.L.C., d/b/a *Sapphire,* The Power Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club,* D. Westwood, Inc., d/b/a *Treasures,* and DI. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* (collectively referred to herein as the "Plaintiff"), by and through their attorneys, and state for their complaint against Defendants Nevada Department of Taxation, Nevada Tax Commission, Nevada State Board of Examiners, and Michelle Jacobs in her official capacity only (collectively referred to herein as the "Defendants"), as follows:

* * *

36. The Plaintiffs all present upon their business premises some form of live "exotic" performance dance entertainment. Some of the Plaintiffs present live clothed and "topless" female performance dance entertainment, and others of the Plaintiffs present live clothed, "topless" and fully nude female performance dance entertainment; all of which is non-obscene. The non-obscene performance dance entertainment presented on the establishments operated by the Plaintiffs constitutes speech and expression, as well as a form of assembly, protected by not only Article I, §§ 9 and 10, of the Nevada Constitution, but the First and Fourteenth Amendments to the United States Constitution, as well.

* * *

39. Plaintiffs have filed this action in order to protect their fundamental constitutional rights from infringement by the enforcement of Chapter 368A, which they contend is unconstitutional on its face as it imposes a tax directly on "live entertainment;" an activity which is protected by Article I, §§ 9 and 10 of the Nevada Constitution as well as the First and Fourteenth to the United States Constitution. Chapter 368A is therefore a direct tax on "First Amendment" freedoms, and in particular on live exotic performance dance entertainment.

* * *

[SEAL]

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JIM GIBBONS
Governor

THOMAS R. SHEETS
Chair, Nevada
Tax Commission

DINO DICIANNO
Executive Director

March 21, 2008

Diana L. Sullivan
Ghanem Sullivan
930 South Fourth Street, Suite 210
Las Vegas, NV 89101

Re: K-Kel, Inc.
Request for Refund of Live Entertainment Tax

Dear Ms. Sullivan:

This letter is sent to acknowledge receipt of the notice of appeal filed on behalf of the above-referenced

taxpayer (hereinafter "Taxpayer") in response to the Department's letter, dated February 5, 2008, denying Taxpayer's claim for refund. Taxpayer had requested a refund of Live Entertainment Tax for the period of December 2004.

This letter is also sent to notify Taxpayer that the Department will hold Taxpayer's case in abeyance pending the outcome of the case known as K-Kel, Inc., d/b/a Spearmint Rhino Gentlemen's Club, et al. vs. Nevada Department of Taxation, et al., Case No. A554970, currently pending in the District Court, Clark County, as the issues in both cases are substantially similar.

In the meantime, should Taxpayer decide to discontinue its pursuit of a refund, please withdraw the appeal in writing.

Should you have any questions, please call me at (775) 684-2070.

Sincerely,

/s/ Christopher Nielsen
Christopher G. Nielsen
Deputy Executive Director

STATE OF NEVADA

TAX COMMISSION

TELECONFERENCED OPEN MEETING

MONDAY, JULY 9, 2007

CARSON CITY AND LAS VEGAS, NEVADA

* * *

[30] [ATTORNEY DAVID POPE FOR NEV. DEPT. OF TAXATION]: It's also important to mention NAC 368A.170 which requires that if it is determined that a refund is appropriate in this case, that the taxpayer would first have to establish that any amounts of the refund could be or have been actually refunded to the patrons of the taxpayer, and there has been no indication in this case that there is any ability of the taxpayer to refund that money to the patrons.

With that, the Department has nothing further.

* * *

STATE OF NEVADA
TAX COMMISSION
TELECONFERENCED OPEN MEETING
MONDAY, AUGUST 6, 2007
CARSON CITY AND LAS VEGAS, NEVADA

* * *

[9] MR. POPE [FOR THE DEPARTMENT]: To the extent that the tax is applicable it's to be collected from the patrons of the gentlemen's clubs, and in fact, there is to be an accounting or should have been an accounting by the gentlemen's club six days after they indicated that they were entitled to a refund.

I think that they may have some approach to that and it may lead to further argument, so I think it's still an issue that is applicable and we'll have to address.

* * *

[10] [MR. SHAFER FOR THE TAXPAYERS]:

* * *

However, in an effort just to make sure that I had an appropriate record, what I did and I gave this to Mr. Belcourt this morning, I have prepared affidavits on behalf of four of the clients in the time period that we had for the taxpayers, in the time period we had that talks about the fact that the tax is taken out of the receipts of the business for the admissions which, depending upon the way the tax operates and the definition of admission, also includes merchandise, food and refreshments.

Now, I guess what the Commission, I'm sorry, what the Department would say is that if a customer buys Coca-Cola, for us to get a refund of this tax, we have to get the name and address of every person buying a Coca-Cola or a beer coming in the facility and I don't think any of you in your real life experiences have ever had anytime where you went to buy food and drink and had to give your name and address, and that doesn't happen here.

What the affidavits say is that none of the facilities have raised their admission fees in order to recoup the tax, the tax merely is deducted out of the general receipts of the business and it's the businesses' money that [11] we're trying to get back.

* * *

BEFORE THE NEVADA TAX COMMISSION

IN RE:	)
OLYMPUS GARDEN, INC., D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, SHAC, L.L.C., D. WESTWOOD, INC., K-KEL, INC., THE POWER COMPANY, INC.	)
Appellants.	)

AFFIDAVIT OF PETER FEINSTEIN

Peter Feinstein, being first duly sworn, deposes and says:

1. I am an adult resident of the State of California, and I make this affidavit based upon personal knowledge.

2. I am the Managing Member of SHAC, LLC, doing business as *Sapphire*, located at 3025 Industrial Road, Las Vegas, Nevada, 89109.

3. Since the Live Entertainment Tax was imposed upon SHAC, LLC, in 2004, it has not raised its admission charge, or its costs for food, beverage or merchandise, in amounts equivalent to the Live Entertainment Taxes due on such charges, as a way to recoup the Live Entertainment Taxes owed on such charges/purchases. SHAC, LLC has, however, raised the prices on such charges/purchases in amounts equivalent to its competitors in the Las Vegas area, but this increase was not based on the

Live Entertainment Tax. In addition, SHAC, LLC, has never assessed, and the customers of SHAC, LLC, have never paid, an "add on" fee, whether segregated or not, for admission charges, food, refreshments and merchandise, in order to account for the Live Entertainment Taxes owed on such charges/purchases.

4. SHAC, LLC, pays the Live Entertainment Tax by simply determining the amount of revenues for taxable admission charges, food, refreshments and merchandise, and remitting the appropriate statutory percentage of those charges/purchases to the Nevada Tax Department. As such, the Live Entertainment Taxes that have been paid by SHAC, LLC, have come out of the revenues that the club would have otherwise realized, have reduced the profits of the club commensurately, and do not represent some sort of additional charge to the customer as a separate fee for the amount of the Live Entertainment Tax due. Consequently, any refund of the Live Entertainment Taxes that have been paid to date are owed exclusively to SHAC, LLC, and not to the customers of its club.

FURTHER DEPONENT SAYETH NOT.

Dated: ~~August~~ July 31, 2007 /s/ Peter Feinstein
Peter Feinstein

Subscribed and sworn to before me this 1 day of August, 2007.

/s/ David Starrett

Notary Public, Clark County, Nevada
My commission expires May 9, 2009

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

DEJA VU SHOWGIRLS OF LAS VEGAS, LLC, et al. Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION NEVADA TAX COMMISSION, et al., Defendants.	CASE NO. A-533273 DEPT. NO. 9 Coordinated With: A-554970 **Transcript of Proceedings**

BEFORE THE
HONORABLE JENNIFER TOGLIATTI,
DISTRICT COURT JUDGE

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION/SEPARATION OF POWERS ISSUE, DISCOVERY ISSUES; AND TRIAL SCHEDULING ISSUES

THURSDAY, DECEMBER 9, 2010

* * *

[33] MS. RAKOWSKY [FOR THE NEV. DEPT. OF TAXATION]: Thank you. First of all,

* * *

Secondly, with regards to the issue of him not getting refunds, I believe Mr. Shafer's kind of, misquoting

the [34] statute as far as the ability for the Department to give refunds. The imposition of the tax is contained in NRS 368(a).200. And Sections 3 and 4, it says that a business entity that collects an amount taxable pursuant to Subsection 1 is liable for the tax imposed. But it's entitled to collect the reimbursement for any person.

So in other words, they have to pay that tax on the admission. They can collect it separately from their patrons, or they can include it in the ticket price and then make out the check. It says any ticket for live entertainment must stay with the tax imposed by this sections, including the price of the ticket. If the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.

He says his – his people have not been collecting the tax, they've been paying it. So if he can verify the fact that that LET tax has come out of the pockets of his clients, he's entitled to – he – he will be entitled to refund if he wins this case, with interest.

THE COURT: Have you done discovery on that?

MR. SHAFER: She wasn't there at the proceeding.

MS. RAKOWSKY: I'm reading the statute, Your Honor, I was reading the statute.

MR. SHAFER: I – you know, all – all I can say is the first I ever heard of the NAC was when – I

don't remember [35] which one of you guys brought it up. One of them brought it up at the administrative proceeding. We had a – for some reason, and I don't remember why it was, we had an adjournment of the administrative proceeding for a few weeks, maybe a month or something, and in that time, you know, I talked to my clients and we submitted affidavits in regard to what went on.

And I believe in one of the pleadings we point out that in the ruling of, if I'm using the word "commissioners" is correct, one of the commissioners said, and I would also note that – and I'm-paraphrasing – because they didn't comply with the NAC they wouldn't be entitled to the refund anyway. And that's something that you or your successor is going to have to make a determination on.

Now, you know, I'm not saying that right or wrong. I'm saying what they argued as a way to preclude us from trying to get back our tax refund in the administrative proceeding that is directly in front of Your Honor by way of appeal.

THE COURT: So was that argued?

MR. POPE [FOR THE DEPARTMENT]: Your Honor, I was part of the administrative proceeding along with another deputy, Dennis BelCourt, an so Mr. Doerr and Ms. Rakowsky were not there. And, you know, I think one of the things that plaintiffs are going to have to show is how they did handle that – that issue. Did they include the tax and did they have a sign on [36] the wall or did they not?

And – and, you know, we haven't gotten to that point yet.

THE COURT: And because if they did not, then the State's Position would be what?

MR. POPE: Well, I'm not sure, and I don't know that we're here to say that today. But it depends upon what they did and what evidence they have to show what they did.

THE COURT: Well, let me ask you this. If you took a position before in an administrative proceeding, is it your – is it your –

MR. POPE: I'm not sure if we took it in administrative proceeding or, I mean, took a position, or if what Mr. Shafer just said, a commissioner recited a regulation. I don't recall, Your Honor, I'm not – I'm not sure.

* * *

[37] MR. DOERR [FOR THE DEPARTMENT]: The refund can go back to the person who [38] paid it. That may be – and for sales and use tax purposes, that's the customer that's not the retailer.

THE COURT: Is there anything that doesn't allow a company to pay it and just – I mean, your – is it going to be the State's position oh, its included in the – it's included in the price –

MR. DOERR: Well –

THE COURT: – of the ticket –

MR. DOERR: Well, Your Honor –

THE COURT: – and they didn't keep that information. You haven't taken a position on that one way or another you're saying to me?

MR. DOERR: I'm not saying that. I'm saying that in fact, I believe in our first argument, I argued that I don't think it could ever be construed to have been not paid by their customer. It's the customer who bears the burden of the tax, the retailer under sales and use tax, the club in this case, is the collection agent. They're not the payer, they're the remitter. They remit the tax. They don't pay the tax, they get it from their client –

THE COURT: So hypothetically someone has a – has an issue before the tax commissioner or commission, and is there a history of – of commissioner decisions where there have been refunds when – when there wasn't specific patron information or was it – were they denied? I mean, that's [39] pretty simple. I'm thinking this isn't – might be the first constitutional challenge, but it can't be the first challenge of a taxpayer for a refund.

MR. DOERR: I believe – I'm not sure it's ever gotten there. If the taxpayer shows the Department that they have given the money back, and it's defined in the statute what they're supposed to do and how they're supposed to make that proof, we don't go to the commission. They've shown that they gave it back to the person who paid it. They need to

have an affidavit from the person saying, I paid it and they gave me my tax money back.

So they have to pay the money out of their pocket back to their customer, then come to us for the refund. I'm not sure it's ever gone to the commission where they've shown that.

MR. SHAFER: And – and –

MR. DOERR: The Department decides that. Now, it probably hasn't been done with respect to a live entertainment tax.

MR. SHAFER: I don't think so.

MR. DOERR: Because this is a new one. This is – this is younger, but I can tell you with respect to sales and use tax, the law speaks to who can get the refund.

Now, again, Your Honor, I would suggest that the whole issue, that this really should not be here about facts. [40] This should – that issue about the refund should be here on a Petition for Judicial Review. And we've considered filing a motion to sever that part off and letting the Constitution – constitutional argument go forward here.

THE COURT: I understand, but to some degree they are intertwined because from the – from, you know –

MR. DOERR: I understand.

THE COURT: – here – I Mean, you know, in its incredibly basic layman terms, you know, your position is there's a speedy adequate remedy at law, money with interest, just like every other, you know, money with interest, judge.

MR. SHAFER: Just like every other state.

THE COURT: And if they choose not to keep track of who's paying it because, you know, it's – it's – it chills the strip club patronage, then that's their decision. That's basically what you're arguing to me.

MS. RAKOWSKY: On the other hand, if this is declared unconstitutional it's a whole different issue. That means that the statute doesn't exist. That means that the reg doesn't exist. So – so we're not totally precluding this because if this is declared unconstitutional it's gone. It's gone for everybody. It's not just gone for 14 people.

THE COURT: Well, if it's declared unconstitutional, then it doesn't matter whether you wrote down the name of the person –

[41] MS. RAKOWSKY: Right.

THE COURT: – who paid or not.

MS. RAKOWSKY: Because – because the statute – and that's what –

THE COURT: Or maybe it does. Does it?

MR. SHAFER: Unless you can't enjoin it.

THE COURT: How many – how many tax – how many tax law – how many – how many states have collected tax on something that's been later declared unconstitutional and that the – the state said, you know, we know it wasn't – it wasn't supposed to be your money so we're not giving it back to you, we'll have an abandoned property fund or a – you know, we'll – I mean, how – how – has that ever happened –

MR. POPE: Your Honor –

THE COURT: – in the history of ever and – and how was it managed?

MR. POPE: I don't have statistics, but it goes to who has the right to request the refund. So in – in the sales and used tax context, the incidents of the tax is ultimately on the consumer, but the retailer has the burden to collect and remit the tax. And so if – if the retailer has collected the tax, then they have to show that they've given it back to the customer before they can request the refund.

In this case, you know, I don't know that it's been so clearly decided with the LET. I don't know that it's ever [42] gone there.

MR. DOERR: And I think the commission said, we don't think this is unconstitutional, you don't get a refund. So that issue – you know, again, I think that that question should be here on judicial review.

MR. POPE: What the – what the statute says, Your Honor, is a business entity that collects

any amount that is taxable, pursuant to the LET, is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount.

MS. RAKOWSKY: So they're paying – it's a pay first. They're paying it. They're entitled to collect it if they want, but if they don't want it, they still have to pay it.

MR. SHAFER: Your Honor

MR. DOERR: It comes from the customer.

MR. SHAFER: Your Honor –

MR. DOERR: The receipts, it comes from the customer.

MR. SHAFER: I can't even get the State of Nevada to have one consistent argument of whether we are the payer or the remitter. If we are the remitter, and we can't show that we can give it back to the customer, which I'm acknowledging we can't, because I've told you that in the record are affidavits to that effect, we don't get it back.

* * *

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà vu Showgirls, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a Little Darlings, K-KEL, INC. d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, L.L.C., d/b/a Sapphire, THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club, D. WESTWOOD, INC., d/b/a Treasures, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a Scores, Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, Defendants.	Case No. 06A533273 Dept. No. XI *Coordinated with:* Case No. 08A554970 Dept. No. XI **DEFENDANTS' MOTION TO COMPEL ON AN ORDER SHORTENING TIME** (Filed Aug. 16, 2011)

K-KEL, INC. d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic Garden*; SHAC, L.L.C., d/b/a *Sapphire*; THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*; D. WESTWOOD, INC., d/b/a *Treasures*, and D.I. FOOD & BEVERAGE OF LAS VEGAS, L.L.C., d/b/a *Scores*,	)	Case No. 08A554970
Plaintiffs,	)	Dept. No. XI
v.	)	
NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS,	)	
Defendants.	)	

COMES NOW, Defendants, NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only (hereinafter collectively "Department"), by and through its attorneys, Catherine Cortez Masto, Attorney General, and Vivienne Rakowsky, Deputy Attorney General, and hereby moves this Court for an Order to Compel Plaintiffs pursuant to NRCP 34 and 37 to produce documents pursuant to the Request for Production served on May 25, 2011. This Motion is based on all pleadings and papers on file, the

attached Memorandum of Points and Authorities and any oral arguments the Court may allow at the time of the hearing on this matter.

DATED this 15th day of August, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Vivienne Rakowsky
DAVID J. POPE
Senior Deputy Attorney General
BLAKE A. DOERR
Senior Deputy Attorney General
VIVIENNE RAKOWSKY
Deputy Attorney General
Attorneys for Defendants

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III. ARGUMENT

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In this case, as soon as the Defendants received the responses, Defendants immediately contacted counsel for Shac, LLC and counsel for the Plaintiffs and requested EDCR 2.34 conferences. Separate conferences were held with counsel for Shac, LLC and counsel for the Plaintiffs. During the course of both telephonic conferences, counsel for the Defendants discussed the scope of discovery allowed under the Rules of Civil Procedure and further explained the

Defendants' reasoning and statutory basis for the requests, stating: 1) no audit had been performed and the numbers had to be verified pursuant to NRS 360.236 and NRS 368A.250; 2) pursuant to NAC 368A.170 it is necessary to determine whether the club owner or the patron paid the tax; 3) because the Plaintiffs have claimed in the Complaint that the statute has chilled their speech and had an impact on their business, it is necessary to compare the amount of business prior to and since the adoption of LET; and 4) before processing any refunds, it is necessary to determine if the taxpayer owes any other tax. NRS 360.236. (Any overpayment must be credited against any other such tax or fee then due from the taxpayer or other person before any portion of the overpayment may be refunded).

* * *

The Department must also determine whether the club collected the LET tax from its customers or whether the club paid the LET tax without collecting from its customers. Nevada Administrative Code 368A.170 specifically applies to the LET and provides:

> **NAC 368A.170 Over-collection of tax: Duties of taxpayer and Department.** (NRS 360.090, 368A.140)
>
> 1. As used in this section, "over-collection" means any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of NRS 368A.200, or any amount in excess of

the amount of the applicable tax as computed in accordance with subsections 1 to 4, inclusive, of NRS 368A.200.

2. Any over-collection must, if possible, be refunded by the taxpayer to the patron from whom it was collected.

3. A taxpayer shall:

(a) Use all practical methods to determine any amount to be refunded pursuant to subsection 2 and the name and address of the person to whom the refund is to be made.

(b) Within 60 days after reporting to the Department that a refund must be made, make an accounting to the Department of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.

4. If a taxpayer is unable for any reason to refund an over-collection, the taxpayer shall pay the over-collection to the Department.

5. If an audit of a taxpayer reveals the existence of an over-collection, the Department shall:

(a) Credit the over-collection toward any deficiency that results from the audit, if the taxpayer furnishes the Department with satisfactory evidence that the taxpayer has refunded the over-collection as required by subsection 2.

(b) Within 60 days after receiving notice from the Department that a refund must be made, seek an accounting of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

All of this information would be fleshed out with the discovery requested through the Defendants Request for Production Documents, Ex. "A"

* * *

STATE OF NEVADA

TAX COMMISSION

TELECONFERENCED OPEN MEETING

MONDAY, JUNE 25, 2012

CARSON CITY, NEVADA

THE BOARD:	ROBERT BARENGO, Chairman JOHN MARVEL, Member JOAN LAMBERT, Acting Chairman DAVID TURNER, Member ANN BERSI, Member ROBERT JOHNSON, Member CRAIG WITT, Member
FOR THE DEPARTMENT:	CHRISTOPHER NIELSEN, Executive Director TERRY RUBALD Chief, Division of Assessment Standards ERIN FIERRO Management Assistant
FOR THE BOARD:	JENNIFER CRANDALL, Sr. Deputy Attorney General

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[90] ACTING CHAIRMAN LAMBERT: Excuse me, can we get a second before we discuss this motion? Whoops, I think I just stopped a second, so maybe we just better have open discussion.

MEMBER TURNER: Ultimately I believe what the taxpayers are arguing is that the application of the live entertainment tax to this industry is unconstitutional. I'm not even sure that's a ruling this Commission is empowered to make. I'm not sure this is the right forum for that argument and that conclusion.

* * *

[92] CHAIRMAN BARENGO: Yeah, because it's – well, now it's a de novo on the record, it's de novo. And, you know, the court seem to want to make sure that we – I'm not clear what the court's rulings is and I don't really understand what they were saying.

So I don't know what we're – how to address it. I've read and read and read – reread and I don't just – it seems to me the court was just kind of saying, well, I don't want to dismiss this case so I'll let you have – you know, maybe there's some additional evidence. I don't know what that meant.

* * *

[97] ACTING CHAIRMAN LAMBERT: Thank you. Commissioner Johnson, would you like to make your motion again?

MEMBER JOHNSON: Yes, I would. The motion – my motion consists of two things. First of all, to deny any additional discovery or depositions. That's the first part of my motion.

The second part of my motion is that all the evidence that was presented to or made available or existed at the time the court remanded the matter back to the Commission be considered by the Commission in determining whether the original decision should be amended, modified or sustained.

And following our practice of what we did in the Harrah's matter, remanding or taking that additional evidence, presenting it to an ALJ to review, have the parties participate or make their presentation to the ALJ and then have the ALJ come up with a proposed decision that either amend, modifies or sustains our original decision.

ACTING CHAIRMAN LAMBERT: Thank you. Is there –

MEMBER JOHNSON: That's the second part of my motion.

ACTING CHAIRMAN LAMBERT: Is there a second?

[98] MEMBER TURNER: I'll second to get it off the table.

ACTING CHAIRMAN LAMBERT: Thank you. We have a motion and a second and now we get to see what happens to it. Is there any other discussion on this motion, is everybody clear what it does?

CHAIRMAN BARENGO: I want to make just sure – Commissioner Johnson, what you're intending is is that that application to take leave of

evidence, that material contained in the application for additional evidence is all the ALJ will be considering?

MEMBER JOHNSON: All of the – all the new evidence, whatever evidence existed at the time of the initial decision's part of the record.

CHAIRMAN BARENGO: And what they'd asked, because they outlined in – what they were at in their petition, so just those things?

MEMBER JOHNSON: That's correct. With no new depositions.

CHAIRMAN BARENGO: Thank you.

ACTING CHAIRMAN LAMBERT: Is everybody ready to vote? Let's start with Commissioner Marvel?

MEMBER MARVEL: Aye.

ACTING CHAIRMAN LAMBERT: Commissioner Turner?

MEMBER TURNER: Aye.

[99] ACTING CHAIRMAN LAMBERT: Commissioner Witt?

MEMBER WITT: Aye.

ACTING CHAIRMAN LAMBERT: Commissioner Bersi?

MEMBER BERSI: No.

ACTING CHAIRMAN LAMBERT: Commissioner Barengo?

CHAIRMAN BARENGO: No.

ACTING CHAIRMAN LAMBERT: Commissioner Johnson?

MEMBER JOHNSON: Aye.

ACTING CHAIRMAN LAMBERT: And acting chair votes aye. Five to two, the motion passes. Thank you.

(Motion carries.)

ACTING CHAIRMAN LAMBERT: And thanks to all the parties.

MR. FERRARIO: Thank you.

MR. POPE: Thank you.

* * *

DISTRICT COURT
CLARK COUNTY, NEVADA

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LITTLE DARLINGS OF LAS VEGAS, LLC, et al.	
Plaintiffs,	CASE NO. A-533273
vs.	DEPT. NO. XI
NEVADA DEPARTMENT OF TAXATION, et al.,	**Transcript of Proceedings**
Defendants.	

BEFORE THE
HONORABLE ELIZABETH GONZALEZ,
DISTRICT COURT JUDGE

HEARING ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TUESDAY, NOVEMBER 8, 2011

* * *

[23] THE COURT: Thank you.

[24] The Court finds that it is inappropriate where a statute is clear on its face to consider the legislative history. Here Chapter 368(a) is not unclear. Therefore, the Court will not consider the comments of the legislators made during the hearings.

While the exemptions are numerous, the live entertainment tax is content neutral as a taxing

measure, and I find that facially it is not unconstitutional.

* * *