IN THE SUPREME COURT FOR STATE 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 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, LLC, d/b/a *Scores*,

Appellants,

vs.

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

Respondents.

Supreme Court Case No. 59752

District Court Case No. A558787

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[1] Because the case below (A554970) and "Case 1" (A533273) were coordinated (Order of August, 4, 2010, App.Apx. 1699-1702) and later consolidated (Order of April 6, 2011, App.Apx. 2638-2640) the relevant documents for both actions are included in an abundance of caution.

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EXHIBIT 4

287 S.W.3d 852
(Cite as: 287 S.W.3d 852)

Court of Appeals of Texas,
Austin.
Susan COMBS, Comptroller of Public Accounts of the State of Texas, and Greg Abbott, Attorney General of the State of Texas, Appellants
v.
TEXAS ENTERTAINMENT ASSOCIATION, INC. and Karpod, Inc., Appellees.

No. 03-08-00213-CV.
June 5, 2009.

Background: Sexually oriented business and an association representing the interests of sexually oriented businesses brought action for declaratory and injunctive relief, challenging constitutionality of tax imposed on businesses that offer live, nude entertainment in the presence of alcohol. The 345th Judicial District Court, Travis County, Scott H. Jenkins, J., found tax unconstitutional under the First Amendment and enjoined the Comptroller of Public Accounts from collecting or assessing the tax. Comptroller and Attorney General appealed.

Holdings: The Court of Appeals, Diane M. Henson, J., held that:
(1) tax was based on the content of expressive conduct, and thus was subject to strict scrutiny;
(2) association was not precluded on the basis of sovereign immunity from bringing declaratory action challenging constitutionality of tax; and
(3) request for declaratory judgment was not a redundant remedy, even though tax code permitted taxpayers to seek a return of taxes paid under protest and an injunction prohibiting the assessment or collection of a tax.

Affirmed.

J. Woodfin Jones, C.J., concurred and filed opinion.

David Puryear, J., dissented and filed opinion.

West Headnotes

[1] Constitutional Law 92 ⚿1559

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1559 k. Offensive, Vulgar, Abusive, or Insulting Speech. Most Cited Cases

The fact that constitutionally protected speech may be offensive to some does not justify its suppression; in fact, it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⚿1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases

Constitutional Law 92 ⚿1518

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1518 k. Strict or Exacting Scrutiny; Compelling Interest Test. Most Cited Cases

Content-based restrictions on speech are presumptively invalid and subject to strict scrutiny. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ⚿1053

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1053 k. Strict or Heightened Scrutiny; Compelling Interest. Most Cited Cases

In order to withstand strict scrutiny, a statute must be narrowly tailored to promote a compelling government interest. (Per Diane M. Henson, J., with one justice concurring in judgment.)

[4] Constitutional Law 92 ⚿1512

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases

Constitutional Law 92 ⚿1514

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1514 k. Narrow Tailoring Requirement; Relationship to Governmental Interest. Most Cited Cases

A content-neutral restriction on speech withstands intermediate scrutiny if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⚿1512

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases

Constitutional Law 92 ⚿1513

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1513 k. Governmental Disagreement with Message Conveyed. Most Cited Cases

Constitutional Law 92 ⚿1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based, for purposes of analysis under the First Amendment, while laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral; the principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⚿1517

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases

Rules are generally considered content-based, for purposes of analysis under the First Amendment, when the regulating party must examine the speech to determine if the restriction applies. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ⚿2201

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2201 k. Nude Dancing in General. Most Cited Cases

While nude dancing falls only within the outer ambit of the First Amendment's protection, it is nevertheless protected as expressive conduct. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

A tax based on the content of speech does not become more constitutional under the First Amendment because it is a small tax. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

Differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

A tax is constitutionally suspect under the First Amendment if it targets a small group of speakers; the fear is censorship of particular ideas or viewpoints. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

A tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

A selective taxation scheme in which an entity's tax status depends entirely on the content of its speech is particularly repugnant to First Amendment principles. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[13] **Constitutional Law 92 ⚷1572**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

Differential taxation based on content is subject to strict scrutiny under the First Amendment. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[14] **Constitutional Law 92 ⚷1572**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

A taxing statute is content-based, for purposes of analysis under the First Amendment, if it singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[15] **Constitutional Law 92 ⚷1572**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

Where taxing authorities must necessarily examine the content of the message that is conveyed, such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[16] **Constitutional Law 92 ⚷2239**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2236 Intoxicating Liquors
92k2239 k. Nudity in General. Most Cited Cases

Tax imposed on businesses offering live, nude entertainment in the presence of alcohol was based on the content of expressive conduct, and thus was subject to strict scrutiny under the First Amendment, even though tax was directed at reducing the secondary effects of sexually oriented businesses, and a sexually oriented business owner could avoid the tax by choosing not to allow the consumption of alcohol on the premises; thus, in light of concession by Comptroller of Public Accounts and the Attorney General that tax could not survive strict scrutiny, tax was unconstitutional under the First Amendment. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1; V.T.C.A., Bus. & C. §§ 47.051-47.056.

[17] **Constitutional Law 92 ⚷2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases

The intermediate scrutiny applied to zoning reg-

ulations aimed at decreasing secondary effects of sexually oriented businesses does not apply to differential taxation statutes, and thus an intent to reduce secondary effects does not preclude the proper application of strict scrutiny to a content-based tax on expressive conduct. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[18] **Constitutional Law 92 ⚿1613**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(C) Trade or Business
92k1613 k. Intoxicating Liquors. Most Cited Cases

Intoxicating Liquors 223 ⚿5.1

223 Intoxicating Liquors
223I Power to Control Traffic
223k5 States
223k5.1 k. In General. Most Cited Cases

A state's regulatory power over the sale and use of alcoholic beverages under the Twenty-first Amendment cannot be used to shield the suppression of speech from First Amendment scrutiny. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amends. 1, 21.

[19] **Constitutional Law 92 ⚿1572**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

The power to ban speech pursuant to a government's police power does not presuppose the power to impose a tax disincentive on such speech. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[20] **Constitutional Law 92 ⚿1058**

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1058 k. Denial of Benefits as Constitutional Violation. Most Cited Cases

Even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely, including those that demand the surrender of a constitutional right. (Per Diane M. Henson, J., with one justice concurring in judgment.)

[21] **Constitutional Law 92 ⚿2239**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2236 Intoxicating Liquors
92k2239 k. Nudity in General. Most Cited Cases

Intoxicating Liquors 223 ⚿16

223 Intoxicating Liquors
223II Constitutionality of Acts and Ordinances
223k16 k. Taxation. Most Cited Cases

Even if considered content neutral for First Amendment purposes, tax imposed on businesses that offer live, nude entertainment in the presence of alcohol could not survive intermediate scrutiny because it was not narrowly tailored to further a substantial governmental interest; majority of proceeds resulting from the tax were allocated to purposes bearing no relation to the negative secondary effects the State claimed it was seeking to correct. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1; V.T.C.A., Bus. & C. §§ 47.051-47.056.

[22] **Constitutional Law 92 ⚿1505**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General

92k1505 k. Narrow Tailoring. Most Cited Cases

In determining whether a restriction on speech is narrowly tailored, for purposes of intermediate scrutiny under the First Amendment, the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[23] **Declaratory Judgment 118A ⚿44**

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory Remedy. Most Cited Cases

While the tax code does provide a remedy for taxpayers seeking to challenge the legality of a tax, such a challenge may also be brought in a suit for declaratory relief under the Texas Uniform Declaratory Judgments Act (UDJA). V.T.C.A., Tax Code §§ 112.052, 112.101; V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

[24] **States 360 ⚿191.9(2)**

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.9 Particular Actions
360k191.9(2) k. Declaratory Judgment. Most Cited Cases

Declaratory-judgment actions against state officials challenging the constitutionality of a statute do not implicate the sovereign-immunity doctrine because they are not considered suits against the State. V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

[25] **Costs 102 ⚿194.40**

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.40 k. Declaratory Judgment. Most Cited Cases

Declaratory Judgment 118A ⚿44

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory Remedy. Most Cited Cases

Sexually oriented business's request for declaratory judgment regarding constitutionality of tax imposed on businesses that offer live, nude entertainment in the presence of alcohol was not a redundant remedy, and thus award of attorney fees to business under Uniform Declaratory Judgments Act (UDJA) was not improper, even though tax code permitted taxpayers to seek a return of taxes paid under protest and an injunction prohibiting the assessment or collection of a tax; at the time of trial, business had not paid the tax under protest or filed a written protest, because the first tax payments were not yet due, and at the time the UDJA claim was filed, business had a constitutional right to a declaratory judgment regarding its tax liability. V.T.C.A., Tax Code §§ 112.052, 112.053, 112.101; V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

[26] **Declaratory Judgment 118A ⚿44**

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory Remedy. Most Cited Cases

If a party requests a declaration under the Uniform Declaratory Judgments Act (UDJA) that goes beyond its request under the tax code for a return of taxes paid under protest and an injunction prohibiting the assessment or collection of the tax, the UDJA claim is not considered a redundant remedy. V.T.C.A., Tax Code §§ 112.052, 112.101; V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

West Codenotes
Held UnconstitutionalV.T.C.A., Bus. & C. §§ 47.051, 47.052, 47.053, 47.054, 47.055, 47.0551, 47.056.
***856** James C. Ho (argued), Danica L. Milios, James C. Todd, Christine Monzingo, for Susan Combs,

Comptroller of Public Accounts of the State of Texas, and Greg Abbott, Attorney General of the State of Texas.

Craig T. Enoch (argued), G. Stewart Whitehead, Peter A. Nolan, Elliot Clark, Randall D. Chapman, Douglas M. Becker, Antoinette D. "Toni" Hunter, L. Monique Gonzalez, for Texas Entertainment Association, Inc. and Karpod, Inc.

Before Chief Justice JONES, Justices PURYEAR and HENSON.

OPINION

DIANE M. HENSON, Justice.

The Comptroller of Public Accounts and the Attorney General of the State of Texas [FN1] appeal the trial court's judgment in a suit for declaratory and injunctive relief brought by Texas Entertainment Association, Inc. ("TEA"), and Karpod, Inc. The trial court's judgment declared subchapter B of chapter 47 of the business and commerce code unconstitutional and permanently enjoined the Comptroller from assessing or collecting the tax imposed by that subchapter. [FN2] *See* Tex. Bus. & Com.Code Ann. §§ 47.051-.056 (West Supp.2008). Because we hold that subchapter B violates the First Amendment to the United States Constitution, we affirm the trial court's judgment.[FN3] *See* U.S. Const. amend. I.

FN1. Because the appellants' interests are aligned, we will refer to them collectively as "the Comptroller."

FN2. For purposes related to TEA and Karpod's state constitutional claims, the parties dispute whether the assessment at issue in this case is properly considered a tax or a fee. We will adopt the language of the trial court's order, which refers to the assessment as a tax. However, because we need not reach the state constitutional claims in this appeal, we express no opinion on whether the assessment imposed by subchapter B is properly considered a tax or a fee.

FN3. After oral argument was heard in this case, both sides requested leave to file post-submission briefs. Those motions are hereby granted.

BACKGROUND

In 2007, the Texas Legislature enacted chapter 47, subchapter B, of the business and commerce code, which imposes a tax "on a sexually oriented business in an amount equal to $5 for each entry by each customer admitted to the business." Tex. Bus. & Com.Code Ann. § 47.052(a). The statute further defines a sexually oriented business ("SOB") as:

> a nightclub, bar, restaurant, or similar commercial enterprise that:
>
> (A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and
>
> ***857** (B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

Id. § 47.051(2). As a result, the tax applies only to businesses that permit alcohol consumption in the presence of live, nude entertainment. "Nude" is defined as "entirely unclothed" or "unclothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks." *Id.* § 47.051(1). A business subject to the tax is not required to impose the tax on its customers, but may use its discretion in determining how it will derive the money required to pay the tax. *Id.* § 47.052(c). The legislature allocated the first $25 million in revenue received from the SOB tax to the State's sexual assault program fund and the remaining revenue to the Texas health opportunity pool to fund health insurance for low-income Texans. *Id.* §§ 47.054-.055. The SOB tax went into effect on January 1, 2008.[FN4]

FN4. During the 2007 session, the legislature also repealed chapter 47 of the business and commerce code, effective April 1, 2009, as part of a nonsubstantive statutory revision program. *See* Act of May 15, 2007, 80th Leg., R.S., ch. 885, § 2.47(a)(1), 2007 Tex. Gen. Laws 1905, 2082. Subchapter B of chapter 47 was enacted without reference to this repeal.

In response to the enactment of subchapter B, Karpod, a sexually oriented business, and TEA, an association representing the interests of sexually oriented businesses in Texas, filed suit for declaratory and injunctive relief against the Comptroller, asserting that the tax violated the state and federal constitutions. After a bench trial, the trial court issued a declaratory judgment that the statute violated the First Amendment to the United States Constitution, permanently enjoined the Comptroller from collecting or assessing the tax, and awarded attorneys' fees in favor of TEA and Karpod.[FN5] This appeal followed.

FN5. In light of its finding that the statute is unconstitutional under the First Amendment, the trial court declined to reach TEA and Karpod's state constitutional claims.

DISCUSSION

On appeal, the Comptroller argues (1) that the SOB tax does not violate the First Amendment, (2) that the SOB tax does not violate the Texas Constitution, (3) that sovereign immunity bars suit by TEA, and (4) that the trial court erred in awarding attorneys' fees.

The First Amendment

[1] We note at the outset that "the fact that protected speech may be offensive to some does not justify its suppression." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). In fact, "it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 87, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion) (Stewart, J., dissenting).

[2][3][4] In conducting our First Amendment analysis, we must first determine whether the SOB tax is subject to strict or intermediate scrutiny. Content-based restrictions on speech are presumptively invalid and subject to strict scrutiny. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality opinion). In order to withstand strict scrutiny, a statute must be narrowly tailored***858** to promote a compelling government interest. *See, e.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). The Comptroller concedes that the SOB tax cannot survive a strict scrutiny analysis, arguing instead that the tax is content-neutral and therefore subject to intermediate scrutiny. A content-neutral restriction on speech withstands intermediate scrutiny "if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (citing *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

[5][6] "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based," while "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). The principal inquiry in determining content neutrality "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Rules are generally considered content-based when the regulating party must examine the speech to determine if the restriction applies. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984).

[7] While nude dancing "falls only within the outer ambit of the First Amendment's protection," it is nevertheless protected as expressive conduct. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). In arguing that the SOB tax is subject to intermediate scrutiny, the Comptroller points to cases in which the U.S. Supreme Court has applied intermediate scrutiny to zoning restrictions aimed at the secondary effects of businesses offering adult entertainment. *See Alameda Books*, 535 U.S. at 434, 122 S.Ct. 1728 (plurality opinion) (zoning ordinance prohibiting more than one "adult entertainment business" in single building); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48,

106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (zoning ordinance restricting location of adult movie theaters); *Young*, 427 U.S. at 71-72, 96 S.Ct. 2440 (plurality opinion) (same).

[8] Unlike the restrictions at issue in *Alameda Books*, *Renton*, and *Young*, the SOB tax is not a zoning restriction, but a tax on businesses that offer live, nude entertainment in the presence of alcohol.[FN6] The U.S. Supreme Court has suggested that zoning restrictions directed to secondary effects of speech are inherently different from other types of restrictions on speech. *See Alameda Books*, 535 U.S. at 449, 122 S.Ct. 1728 (plurality opinion) ***859** (Kennedy, J., concurring) [FN7] ("[Z]oning regulations do not automatically raise the specter of impermissible content discrimination ... because they have a prima facie legitimate purpose: to limit the negative externalities of land use.... [T]hese sorts of ordinances are more like a zoning restriction on slaughterhouses and *less like a tax on unpopular newspapers.*") (emphasis added); *Young*, 427 U.S. at 62, 73 n. 35, 96 S.Ct. 2440 (plurality opinion) (stating that the zoning ordinance's restrictions are so minimal that "the market for this commodity is essentially unrestrained" and that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech"). Because zoning ordinances are distinguishable from other restrictions on speech, we do not find the First Amendment analyses applied in zoning cases to be particularly relevant to the present case. *See Alameda Books*, 535 U.S. at 445, 122 S.Ct. 1728 (plurality opinion) (Kennedy, J., concurring) (stating that city could regulate secondary effects of adult entertainment businesses with zoning ordinance, but could not suppress the speech itself by, "for example, imposing a content-based fee or tax").

> FN6. While the Comptroller characterizes the SOB tax as a "modest fee" of five dollars per customer, "the level of the fee is irrelevant. A tax based on the content of speech does not become more constitutional because it is a small tax." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 136, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

> FN7. Because Justice Kennedy concurred in the judgment of the Court on the narrowest grounds, his concurrence represents the Court's holding in *Alameda Books*. *See Marks v. United States*, 430 U.S. 188, 194, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation marks and citation omitted).

Furthermore, while the Supreme Court has held that bans on public nudity should be reviewed with intermediate scrutiny as content-neutral restrictions, the public-nudity bans at issue in those cases did not single out a specific class of First Amendment speakers, as the SOB tax does. *See Pap's A.M.*, 529 U.S. at 290, 120 S.Ct. 1382 (plurality opinion) ("By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity."); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 571, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion) ("Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board.... Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.").

[9][10][11] Having found the cases involving zoning restrictions and total nudity bans inapplicable to the present case, we now turn to the body of law addressing differential taxation of First Amendment speakers. The SOB tax targets a small group of taxpayers engaged in expression protected by the First Amendment, even if only marginally so. *See Barnes*, 501 U.S. at 566, 111 S.Ct. 2456 (plurality opinion). A tax imposed on a small group of First Amendment speakers, particularly a group conveying a message that the taxing body might consider undesirable, carries a greater risk of suppressing speech than a zoning ordinance because "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 4 Wheat. 316, 17 U.S. 316, 431, 4 L.Ed. 579 (1819). As the Supreme Court stated in *Leathers v. Medlock*:

> [D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.... A tax is also suspect if it ***860** targets a small group of speakers. Again, the fear is censor-

ship of particular ideas or viewpoints. 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.

499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991) (citations omitted). "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983).

[12][13][14][15] A selective taxation scheme in which an entity's tax status depends entirely on the content of its speech is "particularly repugnant to First Amendment principles." *Arkansas Writers' Project*, 481 U.S. at 229, 107 S.Ct. 1722. As a result, differential taxation based on content is subject to strict scrutiny. *Id.* at 231. A taxing statute is content-based if it "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991). Where taxing authorities must necessarily examine the content of the message that is conveyed, "[s]uch official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible" with the First Amendment. *Arkansas Writers' Project*, 481 U.S. at 230, 107 S.Ct. 1722.

[16] Testimony at trial revealed that in order to determine whether the SOB tax should be assessed against a particular taxpayer, representatives from the Comptroller's office would be required to examine the content of the expressive conduct. For example, Steven White, a program specialist in the Comptroller's tax policy division, testified that if a play involving nudity was held at a bar or other establishment that serves alcohol, the owner of the establishment would not be subject to the SOB tax because "the main ingredient of the performance is not necessarily that of live nude entertainment." White also testified that a comedy show involving nudity at a venue where alcohol is sold would not trigger the SOB tax, because "the essence of that performance is not necessarily one of live nude entertainment." White further explained that a bar hosting a "wet t-shirt contest" or a bar at which bartenders periodically perform dance routines and become nude as defined by the statute would be subject to the tax. Similarly, Emma Fuentes, an auditor in the Comptroller's office testified, "Using my own judgment, I would look at the taxpayer we're auditing. If it's like a theater that puts on plays and concerts I would think that maybe this fee was not appropriate for them ... [b]ecause the whole essence of the transaction to me would be for somebody to go see a play and not so much a sexually oriented business." These examples reveal that the SOB tax is not imposed in all incidents where live nude entertainment occurs in the presence of alcohol, but only in those situations in which the taxing authority-the Comptroller-determines, after examining the content of the expression, that it represents the "essence" of live nude entertainment. This type of differential taxation based on content is precisely the type of restriction warranting strict scrutiny in *Arkansas Writers' Project*, *Minneapolis Star*, and *Simon & Schuster*.

[17] The bulk of the testimony at trial focused on the Comptroller's argument that the SOB tax is aimed at reducing the secondary effects of sexually oriented businesses.*861 However, a tax on speech is not necessarily content-neutral simply because it is aimed at secondary effects. *See Forsyth County*, 505 U.S. at 134, 112 S.Ct. 2395. While intermediate scrutiny is applied to zoning regulations aimed at decreasing secondary effects, zoning regulations are distinguishable from differential taxation statutes, as previously discussed. *See Alameda Books*, 535 U.S. at 449, 122 S.Ct. 1728 (plurality opinion) (Kennedy, J., concurring) (stating that designation of zoning restrictions on adult entertainment businesses as "content-neutral" is legal fiction used because "[t]he zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional"). In light of this distinction, evidence that the SOB tax is aimed at reducing secondary effects of sexually oriented businesses does not preclude the proper application of strict scrutiny in this case.

[18] The Comptroller also argues that the State has the power to categorically ban nude dancing or the sale of alcohol in the presence of nude dancing, and therefore the SOB tax must be constitutionally permissible because it is less restrictive than a total ban. First, the Supreme Court cases relied upon by the Comptroller for the proposition that the State may ban

nude dancing altogether refer, as previously discussed, to content-neutral bans on nudity in general, rather than specific prohibitions on nude dancing. *See Pap's A.M.*, 529 U.S. at 290, 120 S.Ct. 1382 (plurality opinion); *Barnes*, 501 U.S. at 566, 571, 111 S.Ct. 2456 (plurality opinion). Second, with regard to the power to ban alcohol in the presence of nude dancing, the Supreme Court held in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), that "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." In other words, a state's regulatory power over the sale and use of alcoholic beverages under the Twenty-first Amendment cannot be used to shield the suppression of speech from constitutional scrutiny. *See id.*[FN8]

> FN8. We note that the Court's holding in *44 Liquormart* did not foreclose the possibility of a state using its inherent police power to place restrictions on the sale of alcohol in the presence of nude dancing. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). However, such use of a state's police power must satisfy First Amendment scrutiny. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 80, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion) (Powell, J., concurring) (stating that "no aspect of the police power enjoys immunity from searching constitutional scrutiny").

[19] Furthermore, we disagree with the Comptroller's *a fortiori* argument that if a government may, in the interest of public safety, ban alcohol in the presence of nude dancing, it may also impose a tax on establishments that provide alcohol in the presence of nude dancing. The reason this argument fails is best addressed by the following analogy posited by the U.S. Supreme Court:

> [T]he situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in ***862** a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.

Nollan v. California Coastal Comm'n, 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). As this hypothetical suggests, the power to ban speech pursuant to a government's police power does not presuppose the power to impose a financial disincentive on such speech. This reasoning is even more applicable in the present case because the act of shouting fire in a crowded theater, unlike nude dancing, is not subject to First Amendment protection at all. *See Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

[20] The Supreme Court has held that while a government has the power to regulate the use and sale of alcohol, it "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially his interest in freedom of speech." *44 Liquormart*, 517 U.S. at 513, 116 S.Ct. 1495 (internal quotation marks and citation omitted). "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' " *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)). This is precisely what the State seeks to do in the present case. By conditioning the ability to sell alcohol on the forfeiture of a First Amendment right, the State attempts to produce a result-the imposition of a content-based tax on speech-which it could not command directly.[FN9]

> FN9. The fact that there is no constitutional right to provide alcohol in the presence of nude dancing is immaterial because "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely," including those that demand the surrender of a constitutional right. *Perry v.*

Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

Furthermore, we disagree with the Comptroller's characterization of the SOB tax as an alcohol regulation, rather than a tax on speech. While it is true that a sexually oriented business owner may avoid the tax by choosing not to allow the consumption of alcohol on the premises, this aspect of the SOB tax is insufficient to transform a content-based tax into a content-neutral alcohol regulation. In reviewing the plain language, context, and legislative history of the relevant statutory provisions, we are not convinced that "the statute's predominant purpose is with regulating the service of alcohol," as was the case in *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 309 (5th Cir.2007), in which the Fifth Circuit applied intermediate scrutiny to a provision of the Texas Alcoholic Beverage Code prohibiting sexually oriented businesses from obtaining private club permits from the Texas Alcoholic Beverage Commission (TABC) to serve alcohol in dry counties. *See* Tex. Alco. Bev.Code Ann. § 32.03(k) (West 2007). In *Illusions*, the Fifth Circuit held that the statute at issue was "part of a 'web' of alcohol regulations," which are unrelated to the suppression of speech, and emphasized the statutory context of the prohibition within the alcoholic beverage code, where it appears alongside other provisions allowing TABC to regulate the sale of alcohol. 482 F.3d at 309; *see also id.* at 308 (concluding "that § 32.03(k) is ***863** subject to intermediate scrutiny because its predominant purpose, as exhibited by its plain text and its place within the Texas Alcoholic Beverage Code, is unrelated to the suppression of speech").

The SOB tax, on the other hand, is not part of a "web" of alcohol regulations imposed by the alcoholic beverage code, but appears in chapter 47 of the business and commerce code, which governs sexually oriented businesses. The SOB tax is remitted to the Comptroller, *see* Tex. Bus. & Com.Code Ann. § 47.053, and, unlike the statutory provision at issue in *Illusions*, does not involve the regulatory oversight of TABC.[FN10] The original version of the SOB tax proposed in the legislature and passed by the House of Representatives made no mention of alcohol at all. *See* Tex. H.B. 1751, 80th Leg., R.S. (2007) (as passed by House, May 9, 2007). The bill was later amended in the Senate to restrict the pool of taxpayers to those sexually oriented businesses that allowed alcohol on the premises. *See* S.J. of Tex., 80th Leg., R.S. 3043 (2007). As TEA and Karpod point out in their briefs, this change mirrored a similar amendment originally proposed in the House, *see* H.J. of Tex., 80th Leg., R.S. 3573 (2007), after a hearing before the House Ways and Means Committee, in which there was some discussion regarding the additional audit burden that the SOB tax would impose on the Comptroller's office, the convenience of "joining forces" with TABC for audit purposes, and the logistical difficulties in auditing sexually oriented businesses that are not regulated by TABC.[FN11] *See* Hearing on Tex. H.B. 1751 Before the House Comm. on Ways & Means, 80th Leg., R.S. 39-42 (March 14, 2007). Beyond this discussion regarding the efficiency and convenience of combining the audit resources of TABC and the Comptroller's office, the legislative history of subchapter B of chapter 47 of the business and commerce code includes no references to the regulation of alcohol.

FN10. TABC is authorized to "exercise all powers, duties, and functions conferred by" the alcoholic beverage code, and "shall inspect, supervise, and regulate every phase of the business of manufacturing, importing, exporting, transporting, storing, selling, advertising, labeling, and distributing alcoholic beverages, and the possession of alcoholic beverages for the purpose of sale or otherwise." Tex. Alco. Bev.Code Ann. § 5.31 (West 2007).

We note also that chapter 183 of the tax code, which imposes a tax on gross receipts derived from the sale of "mixed beverages," includes a "conflict of rules" provision to govern conflicts between regulations issued by TABC and those issued by the Comptroller in the collection of the tax. *See* Tex. Tax Code Ann. § 183.052 (West 2008). No similar provision appears in the SOB tax statute, suggesting that the legislature did not contemplate the exercise of TABC's regulatory authority in connection with the SOB tax.

FN11. During the hearing, a representative from the Comptroller's office testified that the SOB tax would create "an additional audit burden" and stated that "these particular

establishments are regulated by the TABC and they are subject to audit already by the TABC," so "[h]opefully we can join forces with the TABC." When asked, "Is the bill specifically tied to those entities that are selling liquor? If it is not, how are you going to [audit] the entities that don't sell liquor?" the Comptroller's representative answered, "Well, I believe we would be on our own on that case."

Reviewing the SOB tax provisions in their statutory context, we conclude that, unlike the provision at issue in *Illusions*, the predominant purpose of the SOB tax is not to regulate the service of alcohol. *See* 482 F.3d at 309, 310 n. 7 (concluding that statute has predominant purpose of regulating alcohol and is therefore content-neutral because "the text of the statute and its statutory context" suggest that it "is more in the nature of a typical alcohol regulation" and less in the nature of a law suppressing speech). Despite the limitation of *864 the SOB tax burden to businesses that allow the consumption of alcohol, the SOB tax remains a content-based differential tax burden on protected speech, and is subject to strict scrutiny. *See, e.g., Arkansas Writers' Project*, 481 U.S. at 230, 107 S.Ct. 1722 (stating that such tax burdens are "entirely incompatible" with First Amendment).

[21][22] The Comptroller concedes that the SOB tax cannot withstand strict scrutiny. As the trial court stated in its judgment, "Defendants failed to-and conceded that they cannot-meet their burden to show that [the tax] is necessary to serve a compelling state interest and narrowly tailored for that purpose." In light of the Comptroller's concession and our determination that the SOB tax is a content-based tax subject to strict scrutiny, we hold that the SOB tax is unconstitutional under the First Amendment.[FN12] The Comptroller's first issue is overruled. Having found the SOB tax unconstitutional under the First Amendment, we need not reach the Comptroller's second issue regarding Karpod and TEA's state constitutional claims.

FN12. Even if we were to consider the SOB tax to be content-neutral, it would fail constitutional muster under the intermediate-scrutiny standard because it is not narrowly tailored to further a substantial governmental interest. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (citing *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). In determining whether a restriction on speech is narrowly tailored, "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct." *Ward v. Rock Against Racism*, 491 U.S. 781, 801, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). In the present case, the majority of the proceeds resulting from the SOB tax are allocated for a purpose that, while laudable, bears no relation to the overall problem that the State claims it is seeking to correct-the negative secondary effects of nude dancing when combined with alcohol. While the first $25 million in revenue per biennium is allocated to the sexual assault program fund, the remainder-and the vast majority-of the revenue is dedicated to providing health insurance to low-income individuals. *See* Tex. Bus. & Com.Code Ann. §§ 47.054-.055 (West Supp.2008). The Comptroller presented no evidence at trial of a link between a lack of health insurance and nude dancing where alcohol is consumed. Because the State has imposed a tax on protected speech and allocated only a fraction of the proceeds to combat secondary effects, there is "an inadequate nexus between the regulation and the interest sought to be served." *Clark*, 468 U.S. at 299 n. 8, 104 S.Ct. 3065; *see also Ward*, 491 U.S. at 799, 109 S.Ct. 2746 ("Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.").

Sovereign Immunity

In its third issue on appeal, the Comptroller argues that TEA, as an organization that is not subject to the SOB tax, is barred from bringing suit on the basis of sovereign immunity. *See State v. Holland*, 221 S.W.3d 639, 643 (Tex.2007) ("Absent an express waiver of its sovereign immunity, the State is generally immune from suit."). The Comptroller asserts that TEA cannot take advantage of the waiver of sovereign immunity found in the tax-protest provisions of the tax code because these provisions apply only to taxpayers. *See* Tex. Tax Code Ann. §§ 112.052, .101 (West 2008); *see also Rylander v. Bandag Licensing Corp.*,

18 S.W.3d 296, 302 (Tex.App.-Austin 2000, pet. denied) ("The Tax Code provides a statutory remedy for taxpayers who contend a tax is unlawful or may not legally be demanded.").

[23][24] While the tax code does provide a remedy for taxpayers seeking to challenge the legality of a tax, such a challenge may also be brought in a suit for declaratory relief under the Texas Uniform Declaratory Judgments Act (UDJA), ***865** Tex. Civ. Prac. & Rem.Code Ann. §§ 37.001-.011 (West 2008), as TEA has done in the present case. *See Bandag Licensing*, 18 S.W.3d at 303. This Court has held that "[a] suit seeking a declaratory judgment that a state agent is acting pursuant to an unconstitutional law is not an action against the State barred by sovereign immunity." *Rylander v. Caldwell*, 23 S.W.3d 132, 136 (Tex.App.-Austin 2000, no pet.).[FN13] Declaratory-judgment actions against state officials challenging the constitutionality of a statute "do not implicate the sovereign-immunity doctrine" because they are not considered "suits against the State." *Texas Natural Res. Conservation Com'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex.2002). Because the present case falls within this category of cases for which the sovereign-immunity doctrine does not apply, we hold that TEA is not barred from bringing suit.[FN14] The Comptroller's third issue on appeal is overruled.

FN13. The Comptroller argues that *Caldwell* contradicts the Texas Supreme Court's decision in *W.D. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838 (1958). However, in *Dodgen*, the court expressly distinguished between suits "to compel performance of or to enforce rights arising out of a contract with a state agency," which are considered suits against the State for purposes of sovereign immunity, and suits seeking a determination of a person's rights when state officials act outside their lawful authority, which are not considered suits against the State for sovereign-immunity purposes. 308 S.W.2d at 840. This Court's holding in *Caldwell* is consistent with this distinction.

FN14. On appeal, the Comptroller does not contest TEA's associational standing to bring suit. *See Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (requirements for associational standing).

Attorneys' Fees

[25] In its fourth issue on appeal, the Comptroller argues that Karpod is not entitled to attorneys' fees under the UDJA because its UDJA claim is redundant to the legal remedy provided by the tax-protest provisions of the tax code. *See* Tex. Tax Code Ann. §§ 112.052, .101. The Comptroller contends that Karpod improperly brought its UDJA claim solely as a vehicle to obtain attorneys' fees. *See Texas State Bd. of Plumbing Exam'rs v. Associated Plumbing-Heating-Cooling Contractors of Tex., Inc.*, 31 S.W.3d 750, 753 (Tex.App.-Austin 2000, pet. dism'd by agr.) ("It is an abuse of discretion ... to award attorney's fees under the UDJA when the statute is relied upon solely as a vehicle to recover attorney's fees.").

[26] Chapter 112 of the tax code allows taxpayers to seek a return of taxes paid under protest, *see* Tex. Tax Code Ann. § 112.052, and an injunction prohibiting the assessment or collection of a tax, *see id.* § 112.101.[FN15] If a party requests a declaration under the UDJA that goes beyond its request pursuant to the tax code, the UDJA claim is not considered a redundant remedy. *See Strayhorn v. Raytheon E-Systems, Inc.*, 101 S.W.3d 558, 572 (Tex.App.-Austin 2003, pet. denied) (distinguishing between taxpayer that "requested a statutory interpretation that went beyond its request for a tax refund," for which UDJA claim would not be redundant, and taxpayer seeking declaration that denial of refund claim was unlawful, for which UDJA claim would be redundant). In addition, the issues to be determined in a tax-protest suit "are limited to those arising from the reasons expressed in the ***866** written protest as originally filed." Tex. Tax Code Ann. § 112.053(b) (West 2008). At the time of trial, Karpod had not paid the SOB tax under protest or filed a written protest as contemplated by section 112.053 because the first SOB tax payments were not yet due.[FN16] Therefore, when Karpod's UDJA claim was filed, the constitutionality of the SOB tax was not yet a "reason[ ] expressed in the written protest" that could be raised in a tax-protest suit.[FN17] *Id.* The Texas Supreme Court has held that taxpayers have a constitutional right to obtain judicial review of tax liability by means of a prepayment declaratory action. *See R Commc'ns, Inc. v. Sharp*, 875 S.W.2d 314, 317-18 (Tex.1994) (holding tax code provision prohibiting declaratory actions and requiring taxpayers to seek relief through protest suit to be unconstitutional); *see*

also Bandag Licensing, 18 S.W.3d at 305 (tax code provision prohibiting award of attorneys' fees in declaratory-judgment action is "an unconstitutional barrier to access to the courts"). At the time Karpod's UDJA claim was filed, it had a constitutional right to a declaratory judgment regarding its tax liability and such a declaration was not redundant to any remedy available under the tax code. As a result, the trial court did not abuse its discretion in awarding attorneys' fees under the UDJA. The Comptroller's fourth issue is overruled.

FN15. Chapter 112 also allows taxpayers to bring a refund suit, *see* Tex. Tax Code Ann. § 112.151 (West 2008), which is distinct from a tax-protest suit, *see id.* § 112.052 (West 2008). Karpod did not seek a refund under section 112.151.

FN16. The trial court's judgment declaring the tax unconstitutional was issued on March 28, 2008, and the order awarding attorneys' fees was issued April 11, 2008. Karpod did not pay the tax under protest or file its written protest letter until April 21, 2008, the date that the first SOB tax payments became due.

FN17. TEA, for that matter, had no access to a tax-protest suit at any time during this litigation because it is not a taxpayer for SOB tax purposes. As a result, TEA's claim under the UDJA is not a redundant remedy preventing an award of attorneys' fees.

CONCLUSION

We affirm the trial court's judgment declaring that subchapter B of chapter 47 of the business and commerce code is unconstitutional and permanently enjoining assessment and collection of the tax.

Concurring Opinion by Chief Justice JONES.
Dissenting Opinion by Justice PURYEAR.

CONCURRING OPINION

J. WOODFIN JONES, Chief Justice.

Although I agree that strict scrutiny is the appropriate standard to apply in this case and concur in the decision to affirm the trial court's judgment, I write separately to address the issue raised by the parties concerning the use and relevance of post-enactment evidence in determining the statute's predominant purpose.

Our First Amendment analysis proceeds in three parts. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality op.) (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46, 47-49, 51-54, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). The first question, whether the challenged law imposes a complete ban or is instead a "time, place, and manner" regulation, *see id.*, is not in contention here, as the parties agree that the fee or tax at issue is the latter. The second question in the analysis is whether the restriction is content-neutral or content-based, *see id.*; the answer to this question determines what level of scrutiny should be applied, *see* City of Erie v. Pap's A.M., 529 U.S. 277, 278, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality op.). A content-based***867** regulation is considered presumptively invalid and is subject to strict scrutiny. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230-31, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). Government regulation of speech or other expressive activity is content-neutral and subject only to intermediate scrutiny if it is adopted not "because of disagreement with the message it conveys," but for reasons unrelated to the content of the speech. Hill v. Colorado, 530 U.S. 703, 720, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). Even in cases when a regulation has an incidental effect on some speakers or messages but not others, however, it will be deemed content-neutral and reviewed under intermediate scrutiny if its predominant purpose was aimed at perceived harmful secondary effects of the speech, rather than at its content. Alameda Books, 535 U.S. at 434, 122 S.Ct. 1728; City of Renton, 475 U.S. at 48-49, 106 S.Ct. 925. After determining the level of scrutiny, the third part of the analysis involves applying the appropriate constitutional standard to decide whether the regulation is narrowly tailored to promote a compelling governmental interest (strict scrutiny), *see* Arkansas Writers' Project, 481 U.S. at 231, 107 S.Ct. 1722, or narrowly drawn to further a substantial governmental interest unrelated to the suppression of free speech (intermediate scrutiny), *see* Turner Broad. Sys. v. Federal Commc'ns Comm'n, 512 U.S. 622, 662, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).

I agree with Justice Henson that, in the present case, the level-of-scrutiny inquiry (*i.e.*, "question two") can properly be decided by considering the plain text of the statute at issue and its statutory context. *See, e.g.*, *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 310 (5th Cir.2007) (holding that statute's predominant purpose could be determined by considering text and statutory context). In addition to those factors, I believe it is also appropriate at this stage of the inquiry to look beyond whether the statute is content-based or content-neutral on its face and consider evidence regarding whether the statute's predominant purpose was to regulate speech or to address secondary effects. *See City of Renton*, 475 U.S. at 48-49, 106 S.Ct. 925. To the extent that Justice Henson's opinion suggests that secondary-effects analysis is or should be confined strictly to cases involving zoning regulations, I do not adopt that view. Given that, in determining the content neutrality of any statute under the First Amendment, "[t]he government's purpose is the controlling consideration," *Ward*, 491 U.S. at 791, 109 S.Ct. 2746, it would be unwise to ignore evidence regarding whether the government's actual purpose was to combat negative secondary effects. Accordingly, I see no reason to analyze and decide cases in which protected speech is regulated through imposition of a tax any differently from cases in which it is regulated by a zoning restriction or other means.

As the Eleventh Circuit has observed, while the Supreme Court has stated that zoning ordinances and public-nudity ordinances should be reviewed under distinct standards, "the Court also has sometimes collapsed the two categories into a single, overarching category of regulatory action targeting the negative 'secondary effects' of non-obscene adult entertainment and drawn conclusions about this single category." *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee City*, 337 F.3d 1251, 1255 (11th Cir.2003). "Additionally, the Court has occasionally borrowed specific doctrines*868 developed in one category of case to apply to the other." *Id.* at 1255-56 (citing *Alameda Books*, 535 U.S. at 434, 122 S.Ct. 1728 (plurality op.) (relying on Court's holding in *Pap's A.M.*, a case involving public-nudity ordinance, to explicate evidentiary showing necessary to sustain adult-entertainment zoning ordinance); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 583-84, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring) (relying on evidentiary standard described in *Renton*, a zoning case, to explicate evidentiary showing necessary to sustain public-nudity ordinance)).[FN1] Therefore, I would hold that the *Renton* test may be applied here and that question two of that test may be decided by considering evidence relevant to the issue of whether the legislature's predominant purpose in enacting the statute was to address secondary effects.

> FN1. *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 281-82, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality op.) (applying *Renton's* secondary-effects doctrine to justify non-zoning restrictions); *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (citing *Renton* for proposition that "[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" in non-zoning context). The federal courts of appeals have followed suit. *See, e.g.*, *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 556 (5th Cir.2006) (holding that city ordinance requiring sexually oriented businesses to enforce proximity provisions between nude dancers and patrons was content-neutral because "the ordinance's predominate concern is for secondary effects"); *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1013 (9th Cir.2004) (equating second question of *Renton* test to determination of whether statute was designed to combat secondary effects of adult entertainment industry); *G.M. Enters., Inc. v. Town of St. Joseph*, 350 F.3d 631, 637 (7th Cir.2003) (focusing level-of-scrutiny inquiry solely on whether ordinances targeted secondary effects of sexually oriented businesses and opting not to decide whether ordinances were content-based or content-neutral).

In the present case, the trial court made several written fact findings relating to the absence of evidence that the statute's predominant purpose was to combat secondary effects of combining nude dancing and alcohol:

> The author of HB 1751, State Representative Ellen Cohen, testified before the House Ways & Means Committee that she claimed no link between sexual assault and the businesses responsible for the fees to

be paid.

The House Research Organization's Bill Analysis claimed no link between sexual assault and the business responsible for the fees to be paid.

There is no evidence that the Legislature actually considered or saw any studies claiming a link between sexual assault and the sexually oriented businesses that are responsible for the SOB Tax.

Victoria Camp's testimony indicated that materials supporting the existence of such links were made available to certain legislators, but no evidence showed that any legislator had actually considered or even seen those materials.

There is no evidence that studies about sexually oriented businesses were created, consulted, or reviewed by the Legislature prior to enacting HB 1751.

The State does not challenge those findings in this appeal. The trial court also made the following conclusion of law:

> If reliance by the Legislature on some pre-enactment evidence of links between secondary effects and protected speech is a constitutional requirement (as is suggested, not expressly held, by Supreme Court case law), the SOB Tax must be held unconstitutional because no evidence indicating that the Legislature***869** actually considered any evidence of such links was presented at trial.

The State argues that, in making the foregoing findings and conclusion, the trial court created a "false distinction" between pre- and post-enactment evidence, which led it to determine that the State's "evidence of a link between the combination of alcohol and nude dancing and sexual assault" was insufficient. Relying on Justice Souter's concurring opinion in *Barnes* and two Fifth Circuit decisions, *see* *Fantasy Ranch*, 459 F.3d at 560; *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162, 175 (5th Cir.2003), the State argues that the Supreme Court has never required the government to produce "pre-enactment evidence" of legislative purpose in order to meet its burden of showing that a statute is content-neutral. The State's reliance on these cases is inapposite.

While Justice Souter did urge that "the appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional," *see id.* at 582, 111 S.Ct. 2456, his comments were made in the context of a discussion of question three of the *Renton* analysis-whether the government satisfied the intermediate-scrutiny standard by producing sufficient evidence of a link between the challenged regulation and the asserted interest in combating secondary effects. Likewise, the statements in the cited Fifth Circuit cases regarding the use of post-enactment evidence were made in the context of question-three discussions.[FN2] But inquiring into whether a statute's *purpose* was to address secondary effects is wholly distinct from inquiring into whether the statute can be *justified* on the basis that it actually furthers an important or substantial governmental interest in combating negative secondary effects; the former determines the level of scrutiny to be applied, while the latter determines whether the statute passes constitutional muster under the applicable standard. Although I agree that post-enactment evidence may be considered in answering question three, and is often essential to that inquiry, it is far from clear that post-enactment evidence-even evidence directly relevant to purpose-may properly be considered in answering question two. *See, e.g., Illusions*, 482 F.3d at 310 n. 7 (declining to address question of whether district court erred in relying on state's post-enactment assertion of secondary-effects purpose as basis for applying intermediate scrutiny, having decided that statute was content-neutral based on its plain text and statutory context); *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 171-72 (2d Cir.2007) (concluding that *Renton* permits consideration only of pre-enactment evidence at question-two stage); *Dream Palace*, 384 F.3d at 1013-14 (same); *Peek-A-Boo Lounge*, 337 F.3d at 1268 & n. 16 (same); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 862 (8th Cir.2003) (same); *D.H.L. Assocs., Inc. v. O'Gorman*, 199 F.3d 50, 57-58 (1st Cir.1999) (same); *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 690 (10th Cir.1998) (same).

> FN2. *See* *Fantasy Ranch*, 459 F.3d at 560-61 (discussing post-enactment evidence in determining whether ordinance furthered important or substantial government interest); *N.W. Enters. Inc. v. City of Houston*, 352

> F.3d 162, 175 (5th Cir.2003) (holding same and noting that question-two stage is not appropriate point to require legislature "to show evidence of negative secondary effects and of the new regulations' efficacy" because "[d]isputes over the effectiveness of the proposed regulations are properly reserved for the final prong of the *Renton* analysis").

Irrespective of whether courts may properly consider post-enactment evidence ***870** of purpose in answering question two, however, all of the State's post-enactment evidence in this case was relevant to the issue of whether the statute can be justified (question three), not its purpose (question two). As the trial court explained in its detailed findings of fact, the record in this case does not contain evidence-either pre- or post-enactment-that the legislature's predominant purpose in enacting the statute was to combat perceived negative secondary effects of combining alcohol and nude dancing. Thus, the State's argument that the trial court created a false distinction between pre- and post-enactment evidence is unavailing, because no evidence was produced showing that the legislature's purpose was aimed at secondary effects.

In sum, I agree with Justice Henson that the text and context of the statute show that it is a content-based restriction. Therefore, in the absence of any evidence that the legislature's predominant purpose was to address secondary effects, the statute may not be deemed content-neutral and must be reviewed under strict scrutiny, *see City of Renton*, 475 U.S. at 48-49, 106 S.Ct. 925, which the State has conceded it cannot meet.

I join the "Sovereign Immunity" and "Attorneys' Fees" sections of Justice Henson's opinion.

DISSENTING OPINION

DAVID PURYEAR, Justice.

Because I believe that the statutory scheme at issue in this case should have been reviewed using intermediate scrutiny rather than strict scrutiny and because I believe that the statute does not violate the First Amendment, I respectfully dissent from the result reached by the majority.

As mentioned in Justice Henson's opinion, section 47.052 of the business and commerce code provides as follows: "A fee is imposed on a sexually oriented business in an amount equal to $5 for each entry by each customer admitted to the business." Tex. Bus. & Com.Code Ann. § 47.052(a) (West Supp.2008) (emphasis added). The code defines "sexually oriented business" as follows:

> a nightclub, bar, restaurant, or similar commercial enterprise that:
>
> (A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and
>
> (B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

Id. § 47.051(2) (West Supp.2008); *see also id.* § 47.051(1) (West Supp.2008) (defining "nude"). Accordingly, the code imposes a fee on businesses that provide nude erotic entertainment and permit the consumption of alcohol on the their premises. By requiring all the conditions to be satisfied before a fee may be imposed, the code necessarily exempts establishments that provide erotic entertainment but do not allow for the consumption of alcohol or that allow alcohol consumption but do not allow their erotic entertainers to perform fully nude. The code also requires that a large portion of the fee collected be given to the State's sexual assault program fund. *Id.* § 47.054 (West Supp.2008).

First Amendment

The statute in question, by its terms, does not specifically impose restrictions on the type of erotic entertainment performers may engage in or that patrons may observe. In other words, the statute does not address the expressive nature of the entertainment at issue. Instead, the statute affects the ability of businesses to combine***871** the entertainment and the consumption of alcohol. Although no specific limits on expression are imposed, the statute still has First Amendment implications because it affects the manner in which businesses may provide erotic expression. *See Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 307 (5th Cir.2007). In light of this, I would analyze the constitutionality of the statute by employing traditional First Amendment jurispru-

dence; however, I would note that while this type of regulation does have First Amendment implications, live erotic entertainment "falls only within the outer ambit of the *First Amendment's* protection." City of Erie v. Pap's A. M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); *see also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter J., concurring) (distinguishing between societal interest in protecting erotic expression and greater interest in protecting "untrammeled political debate"); Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (explaining that nude dancing at bars "involves only the barest minimum of protected expression"); Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 707 (7th Cir.2003) (noting that nude dancing is only given diminished protection under First Amendment); *see also* Fantasy Ranch Inc. v. City of Arlington, 459 F.3d 546, 554 (5th Cir.2006) (explaining that although live erotic entertainment is protected by First Amendment, governments can regulate it).[FN1]

FN1. In her opinion, Justice Henson agrees that the type of expressive conduct at issue in this case only barely falls within the protections of the First Amendment. However, rather than concluding that the conduct's placement on the edge of protected speech subjects the behavior to less constitutional protection, she confusingly concludes that the type of expressive conduct at issue in this case warrants the highest judicial scrutiny, presumably higher than that afforded to behaviors more truly expressive in nature, to prevent unfair suppression.

Alcohol Prohibitions for Sexually Oriented Businesses

As a preliminary matter, I would note that a state may, in an effort to combat secondary effects associated with sexually oriented businesses, entirely prohibit the consumption of alcohol within sexually oriented businesses. *See* Ben's Bar, 316 F.3d at 706, 728 (7th Cir.2003) (upholding constitutionality of ordinance that prohibited consumption of alcohol within sexually oriented businesses); *see also* 181 South Inc. v. Fischer, 454 F.3d 228, 233-34 (3d Cir.2006) (concluding that regulation prohibiting erotic expression at locations licensed to sell alcohol did not violate First Amendment). If a state may completely prohibit the consumption of alcohol within sexually oriented businesses, it seems logical to assume that a state may also impose less exacting alcohol restrictions on sexually oriented businesses provided that the restriction is also designed to combat negative secondary effects. *Cf.* Pap's A.M., 529 U.S. at 301, 120 S.Ct. 1382 (upholding city ordinance that imposed restriction that was less onerous than complete ban on erotic dancing and noting that there may be more than one method for government to choose to address serious problems associated with sexually oriented businesses).

The statute at issue in this case imposes a fee on establishments providing erotic entertainment and allowing their customers to consume alcohol. There can be little doubt that a fee is less restrictive than an absolute ban,[FN2] and as discussed ***872** more thoroughly later, the statute was designed to address potential negative secondary effects arising from the pairing of erotic entertainment and alcohol consumption by providing revenue for the State's sexual assault program fund. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 511, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (stating proposition that greater governmental powers include lessor ones); *cf.* New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 717, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (explaining that state's ability to ban sale of alcohol entirely encompasses lesser power to ban sale of alcohol at certain locations).[FN3] I can find no compelling distinction between statutes designed to curb potential negative secondary effects by prohibiting, in their entirety, the pairing of alcohol consumption and erotic entertainment and statutes designed to curb unwanted secondary effects by imposing a fee on establishments allowing the two activities that would render the later unconstitutional but the former constitutional. Consequently, I fail to see how the majority can conclude that the statute at issue violates the First Amendment.

FN2. Regardless of the amount of the fee, the imposition of a fee for engaging in certain activities is less restrictive than banning the activity in its entirety because individuals have the option of engaging in the activity by paying the fee. Although businesses may challenge the amount of the fee as being excessive, those arguments are fundamentally different than challenging the State's authority to impose the fee at all.

FN3. Justice Henson tries to dismiss the State's "greater power includes the lesser power" by relying on a hypothetical described in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). In that case, the Supreme Court noted that a state could prohibit people from shouting the word "fire" in crowded theaters without violating the First Amendment because the prohibition would fall within a state's power to protect the public safety. *Id.* at 837, 107 S.Ct. 3141. However, the Court also theorized that a state could not adopt the ban but also allow individuals to violate the ban if they chose to contribute $100 to the state treasury. *Id.* The Court noted that the second situation would amount to a lesser restriction than a total ban but also concluded that the addition to the ban would be unrelated to the purpose of protecting the public safety and would, in fact, alter the purpose of the ban. *Id.* In effect, the Court reasoned that the imposition of the fee was improper because imposing the fee would not further the state's interest in encouraging public safety. In other words, the Court determined that "the condition substituted for the prohibition [would] utterly fail[ ] to further the end advanced as the justification for the prohibition." *Id.*

The fee at issue in this case is unlike the one described above because the fee in this case is designed to further the same interest that a total ban on erotic entertainment and alcohol consumption would accomplish: minimizing potential negative secondary effects resulting from the consumption of alcohol and the viewing of erotic entertainment. Accordingly, the fee at issue in this case is actually more similar to the other hypothetical described in *Nollan*, in which the Court theorized that because a state could refuse to issue a building permit in order to protect public's interest in a beach, the State could also legitimately grant the permit but impose limitations designed to protect the public's interest in that property. *Id.* at 836-37, 107 S.Ct. 3141.

Intermediate Scrutiny Applies

Once it has been determined that a statute regulates activity protected by the First Amendment, courts must then determine what level of scrutiny to employ when reviewing the statute. As a preliminary matter, I would note that courts often apply intermediate scrutiny to governmental regulations of sexually oriented businesses. *See Fantasy Ranch*, 459 F.3d at 555 (5th Cir.2006) (listing various instances in which courts have applied intermediate scrutiny); *see also 729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 504 (6th Cir.2008) (explaining that regulations pertaining to sexually oriented businesses are reviewed under intermediate rather than strict scrutiny due to "the peculiar ***873** 'secondary effects' associated with adult businesses"). When determining whether to apply intermediate or strict scrutiny, courts look to the purpose of the regulation at issue. *Illusions*, 482 F.3d at 308. If the statute "is intended to suppress expressions contained in erotic dancing, then it is subject to strict scrutiny," but if the statute "has a purpose unrelated to the suppression of speech, then it is subject to intermediate scrutiny." *Id.*

Although the statute at issue in this case mentions "live nude entertainment" and "live nude performances," the statute imposes no direct limitation on the type of expression that may be exhibited through erotic entertainment. *Cf. id.* at 309 (explaining that fact that statute "references content" does not necessarily mean that statute is "intended to suppress speech, even without a legislative record to suggest a purpose unrelated to speech"). Moreover, it only imposes a fee if a sexually oriented business decides to pair erotic entertainment with the consumption of alcohol. In other words, a business may avoid any imposition of the fee described in the statute by not allowing its customers to consume alcohol. *See id.* (noting that fact that sexually oriented business could remove itself from reach of regulation by not allowing alcohol consumption weighs in favor of determination that regulation should be reviewed under intermediate scrutiny). Accordingly, the statute seems concerned with the regulation of alcohol or the regulation of the pairing of alcohol and erotic entertainment rather than the suppression of any specific erotic expression. *Cf. Ben's Bar*, 316 F.3d at 726 (explaining that regulation prohibiting consumption of alcohol within sexually oriented business was "not a restriction on erotic expression, but a prohibition of nonexpressive conduct (i.e., serving and consuming alcohol) during the presentation of expressive conduct").

For these reasons, I believe that the statute has a purpose unrelated to the suppression of expression and is, therefore, subject to intermediate scrutiny. *Cf.* Sammy's of Mobile Ltd. v. City of Mobile, 140 F.3d 993, 996 (11th Cir.1998) (noting that ordinances prohibiting sale or consumption of alcohol at sexually oriented business are content-neutral and should he analyzed under intermediate scrutiny).

This conclusion is also supported by the fact that courts have reviewed regulations pertaining to sexually oriented businesses and imposing more significant restrictions under intermediate scrutiny. For example, courts have employed intermediate scrutiny when reviewing regulations limiting the locations in which sexually oriented businesses may operate. *See, e.g.*, City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality opinion) (applying intermediate scrutiny to ordinance that prohibited more than one sexually oriented business per building and did not contain a provision exempting preexisting businesses); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (utilizing intermediate-scrutiny test when reviewing regulation limiting the locations in which adult movie theaters may operate).

In addition, courts have also employed intermediate scrutiny when reviewing limitations placed on actual erotic expression. *See, e.g.*, Fantasy Ranch, 459 F.3d at 557 (applying intermediate scrutiny to ordinance imposing proximity limitations, which required performers to be six feet away from customers or to be separated from their customers by wall); Hang-On, Inc. v. City of Arlington, 65 F.3d 1248, 1254-55 (5th Cir.1995) (applying intermediate scrutiny when reviewing statute prohibiting contact between erotic entertainers*874 and customers). Furthermore, the Supreme Court has applied intermediate scrutiny when reviewing the constitutionality of an ordinance prohibiting public nudity, which had the effect of requiring erotic entertainers to wear minimal attire. Pap's A.M., 529 U.S. at 296-302, 120 S.Ct. 1382.

Finally, courts have employed intermediate scrutiny to review complete bans on the consumption of alcohol within sexually oriented businesses. *See* Ben's Bar, 316 F.3d at 722. Similarly, intermediate scrutiny has been applied to a statute that completely prohibited the issuance or renewal of alcohol permits for sexually oriented businesses located inside dry political subdivisions. Illusions, 482 F.3d at 303, 307, 310; *see* Tex. Alco. Bev.Code Ann. § 32.03(k) (West 2007); *see also* Tex. Elec.Code Ann. § 501.021 (West Supp.2008) (allowing voters to determine whether to allow sale of alcohol within political subdivision).

The statute at issue in this case does not require sexually oriented businesses to move from their current locations, imposes no direct limitation on the type of erotic expression entertainers may provide, and does not completely ban the consumption of alcohol within a sexually oriented business. Rather, the statute imposes a fee on a sexually oriented business only if it chooses to allow the consumption of alcohol on its premises. Nothing in the cases relied upon by either of the other two justices convinces me that a more exacting standard should be employed to review a statute that has a more modest impact on First Amendment expression than the regulations described above.

The Statute Survives Intermediate Scrutiny

Having determined that the statute in question in this case should be reviewed under intermediate scrutiny, I would then determine whether the statute may be upheld under that level of scrutiny. In the context at issue in this case, a regulation satisfies intermediate scrutiny if it was issued "pursuant to a legitimate governmental power"; "does not completely prohibit adult entertainment"; "is aimed not at the suppression of expression, but rather at combating negative secondary effects"; and "is designed to" further a "substantial governmental interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest." Illusions, 482 F.3d at 311.

There is no dispute that the legislature has the authority to regulate both alcohol consumption and sexually oriented businesses. *Cf.* Ben's Bar, 316 F.3d at 722 (explaining that regulation of alcohol consumption falls within state's police powers). In addition, as described earlier, the statute in question does not completely ban erotic entertainment. *Cf.* California v. LaRue, 409 U.S. 109, 118-19, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) (upholding constitutionality of regulation that prohibited certain types of erotic expression in bars and noting that state did not ban the expression entirely, but merely prohibited it in establishments that allow for the consumption of alcohol). Consequently, the first two elements are met.

Regarding the third element, as described previously, nothing in the statute directly addresses any aspect of erotic expression; rather, the statute addresses the pairing of erotic expression with the consumption of alcohol. Moreover, rather than prohibiting any particular act of expression, the statute simply imposes a fee on establishments that desire to allow the consumption of alcohol on their premises and that provide erotic entertainment.

Furthermore, the statute attempts to address some of the potentially negative secondary effects from the pairing of alcohol*875 and erotic expression by using a portion of the total fees collected to provide revenue for the State's sexual assault program fund. Additionally, the legislative history for the statute demonstrates that the purpose of the statute was to provide funding for programs alleviating the impact of secondary effects. *See* Senate Research Ctr., Bill Analysis, Tex. H.B. 1751, 80th Leg., R.S. (2007) (stating that fee will be used to fund "programs that relate to sexual assault prevention, intervention, and research"); House Research Org., Bill Analysis, Tex. H.B. 1751, 80th Leg., R.S. (2007) (listing various sexual assault programs that money raised by fee could be used for). Although the effect of the fee on potential secondary effects may be more attenuated than a complete ban on alcohol consumption within businesses providing erotic entertainment would be, a state must be given a reasonable opportunity to experiment with solutions to serious problems affecting its populace. *See* Pap's A.M., 529 U.S. at 301, 120 S.Ct. 1382.

In light of the preceding, I would conclude that the statute is aimed at combating negative secondary effects and is not aimed at the suppression of expression. *Cf.* Fantasy Ranch, 459 F.3d at 557 (concluding that intermediate scrutiny was appropriate because the ordinance was "predominately targeted to the prevention of secondary effects, not to the suppression of symbolic expression"). For the reasons that follow, I would also conclude that the fourth element is satisfied.

To satisfy the "substantial interest" requirement of the final element, the State must present some evidence demonstrating a connection "between the combination of alcohol [consumption] and erotic dancing and negative secondary effects." Illusions, 482 F.3d at 312-13; *see* Fantasy Ranch, 459 F.3d at 561 (requiring only that regulation be supported by evidence that could reasonably be viewed as relevant to effects in question). However, the burden on the State is very light, Illusions, 482 F.3d at 312, and the State is not required to prove that its regulation is the only way to combat potential negative secondary effects, *see* Alameda Books, 535 U.S. at 437, 122 S.Ct. 1728.

The link between sexually oriented businesses and negative secondary effects has been discussed in various cases, Pap's A.M., 529 U.S. at 300, 120 S.Ct. 1382 (noting that crime and other safety issues are caused by "presence of nude dancing establishments"), and courts have also identified a state's interest in combating these effects as a substantial interest, *see, e.g.*, Barnes, 501 U.S. at 583, 111 S.Ct. 2456 (Souter, J., concurring) (concluding that states have substantial interest in preventing negative secondary effects associated with sexually oriented businesses). In fact, the Supreme Court has reasoned that governments are not required to obtain new evidence regarding negative secondary effects when passing new regulations for sexually oriented businesses and may instead rely on evidence previously discovered, including evidence summarized in prior cases. Pap's A.M., 529 U.S. at 296-97, 120 S.Ct. 1382. In addition, the legislature has specifically identified a link between sexually oriented businesses and negative secondary effects. In particular, the legislature has determined that it is appropriate to impose regulations on sexually oriented businesses that are not imposed on other businesses because "sexually oriented businesses may be detrimental to the public health, safety, and welfare by contributing to ... the growth of criminal activity." Tex. Loc. Gov't Code Ann. § 243.001(a) (West 2005).

Although the link between sexually oriented businesses and negative secondary *876 effects has been previously established, evidence was also presented at trial suggesting a link between sexually oriented businesses and the types of behavior that the sexual assault fund is designed to combat. *See* Barnes, 501 U.S. at 582, 111 S.Ct. 2456 (Souter J., concurring) (explaining that when determining whether statute is constitutional, courts should focus on whether there is current governmental interest and not on whether interest was thoroughly articulated when regulation was issued); Fantasy Ranch, 459 F.3d at 560 (stating that governments may justify enactment of regulation

with evidence presented at trial). In fact, the district court found that the State "presented persuasive trial evidence supporting a possible link between the business activity subject to the tax and the secondary effects addressed by the sexual assault program fund." Specifically, expert testimony was introduced stating that viewing erotic entertainment while consuming alcohol increases the likelihood that sexually assaultive behaviors might ensue. Moreover, various expert witnesses also stated that it was reasonable for legislators to conclude that there is a causal link between viewing erotic entertainment while consuming alcohol and sexually assaultive behavior.

For these reasons, I would conclude that the State has a substantial interest in combating negative secondary effects and that the statute at issue furthers that interest. *See Illusions*, 482 F.3d at 312 (explaining that courts must determine whether substantial interest exists and whether regulation facilitates that interest).

Regarding the restrictive component of the final element, as mentioned previously, the statute at issue imposes no affirmative ban on any expressive conduct. Instead, the statute imposes a fee on establishments providing erotic entertainment that also allow their patrons to consume alcohol. Nothing prohibits businesses from continuing to provide erotic entertainment and allow patrons to consume alcohol provided that the businesses pay the fee. Alternatively, businesses may continue to provide erotic entertainment without paying the fee if they stop allowing their customers to consume alcohol or if they require their performers to wear minimal clothing. *See Pap's A.M.*, 529 U.S. at 301, 120 S.Ct. 1382 (commenting that requiring performers to wear minimal clothing has *de minimus* impact on erotic expression).

Given that the statute does not directly target any type of expressive conduct, that the statute provides multiple avenues in which businesses may continue providing erotic entertainment, and that courts have upheld other regulations actually limiting the type of erotic expression that may be conveyed, *see id.* at 284, 301, 120 S.Ct. 1382 (upholding ordinance requiring dancers to wear minimal attire while engaged in erotic entertainment); *Hang On*, 65 F.3d at 1256-57 (stating that ordinance prohibiting contact between customers and erotic performer did not burden protected expression more than is essential to "interest in preventing prostitution, drug dealing, and assault"), I would conclude that the statute's restriction on expressive conduct is no greater than is essential.

Having determined that all four prongs of intermediate scrutiny were satisfied, I would hold that section 47.052 of the business and commerce code does not violate the First Amendment of the federal constitution.[FN4]

FN4. Because the district court concluded that the statute violated the First Amendment, it made no determination regarding the Association's other attacks on the statute. Having found that the statute does not violate the First Amendment, I would reverse the judgment of the district court and remand the case for consideration of the other issues raised in the case.

Tex.App.-Austin,2009.
Combs v. Texas Entertainment Ass'n, Inc.
287 S.W.3d 852

END OF DOCUMENT

Vernon's Texas Statutes and Codes Annotated Currentness
Business and Commerce Code (Refs & Annos)
Title 4. Miscellaneous Commercial Provisions (Refs & Annos)
Chapter 47. Sexually Oriented Businesses (Refs & Annos)
Subchapter B. Fee Imposed on Certain Sexually Oriented Businesses
→ § 47.051. Definitions

In this subchapter:

(1) "Nude" means:

(A) entirely unclothed; or

(B) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks.

(2) "Sexually oriented business" means a nightclub, bar, restaurant, or similar commercial enterprise that:

(A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and

(B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

§ 47.052. Fee Based on Admissions; Records

(a) A fee is imposed on a sexually oriented business in an amount equal to $5 for each entry by each customer admitted to the business.

(b) A sexually oriented business shall record daily in the manner required by the comptroller the number of customers admitted to the business. The business shall maintain the records for the period required by the comptroller and make the records available for inspection and audit on request by the comptroller.

(c) This section does not require a sexually oriented business to impose a fee on a customer of the business. A business has discretion to determine the manner in which the business derives the money required to pay the fee imposed under this section.

§ 47.053. Remission of Fee; Submission of Reports

Each quarter, a sexually oriented business shall:

(1) remit the fee imposed by Section 47.052 to the comptroller in the manner prescribed by the comptroller;

and

(2) file a report with the comptroller in the manner and containing the information required by the comptroller.

§ 47.054. Allocation of Certain Revenue for Sexual Assault Programs

The comptroller shall deposit the first $25 million received from the fee imposed under this subchapter in a state fiscal biennium to the credit of the sexual assault program fund.

§ 47.055. Allocation of Additional Revenue

(a) The comptroller shall deposit all amounts received from the fee imposed under this subchapter after the first $25 million in a state fiscal biennium in the Texas health opportunity pool established under Subchapter N, Chapter 531, Government Code. Money deposited in the pool under this section may be used only to provide health benefits coverage premium payment assistance to low-income persons through a premium payment assistance program developed under that subchapter.

(b) This section takes effect only if Senate Bill No. 10, Acts of the 80th Legislature, Regular Session, 2007, becomes law and the Texas health opportunity pool is established under that Act. If that Act does not become law, or that Act becomes law but the pool is not established, this section has no effect, and the revenue is deposited as provided by Section 47.0551.

§ 47.0551. Allocation of Additional Revenue

(a) The comptroller shall deposit all amounts received from the fee imposed under this subchapter after the first $25 million in a state fiscal biennium to the credit of the premium payment assistance account. The premium payment assistance account is an account in the general revenue fund that may be appropriated to the Health and Human Services Commission only to provide health benefits coverage premium payment assistance to low-income persons through a program developed by the commission.

(b) This section takes effect only if Senate Bill No. 10, Acts of the 80th Legislature, Regular Session, 2007, does not become law, or that Act becomes law, but the Texas health opportunity pool is not established under that Act. If that Act becomes law and the pool is established, this section has no effect, and the revenue is deposited as provided by Section 47.055.

§ 47.056. Administration, Collection, and Enforcement

The provisions of Subtitle B, Title 2, Tax Code, apply to the administration, payment, collection, and enforcement of the fee imposed by this chapter.

END OF DOCUMENT

EXHIBIT 5

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

April 2, 2008

Opinion No. 08-78

Legality of Privilege Tax On Entry of Customers into Adult-Oriented Establishments

QUESTION

Is proposed legislation, House Bill 2676, which would impose a state privilege tax only on adult-oriented establishments for each entry by a customer, defensible in court?

OPINION

The proposed state privilege tax to be imposed only on adult-oriented establishments for each entry by a customer would likely be held unconstitutional.

ANALYSIS

The opinion of this Office has been requested as to the legality of proposed legislation, House Bill 2676, which would amend the Adult-Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401, *et seq.*, to impose a "five dollar ($5.00) [state] privilege tax . . . for each entry by each customer admitted to adult cabarets or adult[-]oriented establishments." HB 2676, Section 2(a). "Such tax shall be in addition to all other taxes imposed on any such customer." *Id.* The businesses would be required to record daily the number of customers admitted and remit the tax quarterly to the adult-oriented establishment boards[1] for their respective counties. *Id.*, Sections 2(b) and 3(a). The incidence of the tax would be on the adult-oriented establishment, not the customer, since the businesses would not be required to impose the tax directly on the customers, but would have discretion to determine the manner in which each business derives the money required to pay the tax. *Id.*, Section 2(c). The county adult-oriented establishment boards would remit the tax proceeds to the Treasurer for deposit into a special account created in the State General Fund. *Id.*, Sections 3(b) and 5. "Moneys from such account shall be appropriated solely for the purpose of making grants to public and private agencies for the victims of sexual abuse and victims of domestic violence." *Id.*, Section 5. These grants would be administered by the Division of Resource Development and Support in the Department of Finance and Administration. *Id.*

[1] Typically a county does not have an adult-oriented establishment board unless it has voted, pursuant to Tenn. Code Ann. § 7-51-1120, to make the separate Tennessee Adult-Oriented Establishment Registration Act, Tenn. Code Ann. § 7-51-1101, *et seq.*, operative in that county. The Registration Act is effective in a particular county only "upon the contingency of a two-thirds (2/3) vote of the county legislative body. By contrast, the Adult-Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401, *et seq.*, applies in all counties.

Courts recognize that non-obscene adult-oriented entertainment falls marginally within the scope of free speech protection. The United States Supreme Court has explained:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest 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 that inspired Voltaire's immortal comment. [2]

Young v. American Mini Theaters, Inc., 427 U.S. 50, 70-71, 96 S.Ct. 2440, 2452 (1976), *rehearing denied* (subjecting the commercial exploitation of sexually-oriented material to zoning requirements found to be a constitutionally valid time, place or manner regulation under the First Amendment). Further, as noted, *in City of Erie, et al. v. Pap's A.M. d/b/a Kandyland*, 529 U.S. 277, 289, 120 S. Ct. 1382 (2000)(plurality opinion),

> Being " in a state of nudity" is not an inherently expressive condition.. . . [H]owever, nude dancing of the type at issue here is expressive conduct, although we think it falls within the outer ambit of the First Amendment's protection.

Traditionally, a governmental regulation of adult-oriented entertainment (which is intended to address generally recognized deleterious secondary effects) is analyzed under intermediate scrutiny to ensure it does not unduly impair the exercise of First Amendment rights. "[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny," one which was first enunciated as a four-step test in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673 (1968). To withstand constitutional scrutiny, then, (1) the [Act or] Ordinance must have been enacted within [the government's] constitutional power; (2) the [Act or] Ordinance must further a substantial governmental interest; (3) the interest must be unrelated to the suppression of speech[3]; and (4) the [Act or] Ordinance may pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998)(upheld constitutionality of Tennessee's Adult-Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401, *et seq.)* (citing *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673); *see Deja Vu of Nashville v. Metropolitan Gov't of Nashville and Davidson County, Tenn.* 274 F.3d 377, 391-92 (6th Cir. 2001)(applied intermediate scrutiny test in addressing

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[2]Voltaire, referring to a suggestion that the violent overthrow of tyranny might be legitimate, said: "I disapprove of what you say, but I will defend to the death your right to say it."

[3] The Sixth Circuit recognizes that ordinances aimed at regulating adult entertainment businesses may constitute content-based regulations, but that "a distinction may be drawn between adult [businesses] and other kinds of [businesses] without violating the government's paramount obligation of neutrality" when the government seeks to regulate only the secondary effects of erotic speech, and not the speech itself. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998).

constitutionality of Nashville adult-oriented establishment licensing ordinance).[4]

"[A]n ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state activity. [Such a fee is not excessive, even if it is more than nominal, so long as it is] reasonably related to the expenses incident to the administration of the ordinance." *Northeast Ohio Coalition for the Homeless v. City of Cleveland,* 105 F.3d 1107, 1109-10 (6th Cir.1997); *quoted in Deja Vu of Nashville,* 274 F.3d at 395-96. The license and permit fees in Tennessee's Adult-Oriented Establishment Registration Act, at Tenn. Code Ann.§ 7- 51-1118, have been found reasonably related to the cost of administering and enforcing that law and were deemed constitutionally valid.[5]

The proposed state privilege tax that is the subject of this Opinion, however, differs from these constitutionally valid license fees associated with otherwise valid regulations intended to address deleterious secondary effects generally recognized as associated with adult-oriented establishments. The United States Supreme Court has stated that "[i]t could hardly be denied that a tax laid specifically on the exercise of [First Amendment] freedoms would be unconstitutional." *Murdock v. Commonwealth of Pennsylvania,* 319 U.S. 105, 108, 63 S. Ct. 870 (1943); *see also Northeast Ohio Coalition for the Homeless v. City of Cleveland,* 105 F.3d 1107, 1109 (6th Cir. 1997) ("It is equally clear that while the government may not tax the exercise of constitutionally protected activities, it may restrict the exercise of such activities by 'reasonable time, place, and manner regulations . . . .'"). In *Murdock,* an ordinance which required a religious group to pay a flat license fee as a condition to conducting its distribution activities was struck down as unconstitutional because the flat license fee was essentially "a flat tax imposed on the exercise of a privilege granted by the 'Bill of Rights.'" 319 U.S. at 113, 63 S. Ct. at 875. "A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Id.* The flat license tax in *Murdock* was

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[4] *See also City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 122 S.Ct. 1728 (2002)(O'Connor, J.)(applied the intermediate scrutiny test to address validity of a City of Los Angeles zoning provision prohibiting two adult uses per authorized location); *City of Erie v. Pap's A.M.,* 529 U.S. 277, 289-302, 120 S. Ct. 1382, 1391-98 (2000) (O'Connor, J., with three justices joining, and two justices concurring in the judgment)(applied the *O'Brien* intermediate scrutiny test for constitutional validity when upholding a City of Erie Public Indecency Ordinance, which had the effect of requiring exotic dancers to wear pasties and g-strings); *Barnes v. Glen Theater, Inc.,* 501 U.S. 560, 111 S.Ct. 2456 (1991)(plurality); 501 U.S. at 582, 111 S.Ct. at 2468 (Souter, J., concurring)(applied the *O'Brien* intermediate scrutiny test in rejecting a challenge to the constitutionality of Indiana's public indecency statute, which had the effect of requiring dancers at adult-oriented entertainment establishments to wear pasties and a g-string).

[5] *See Angela Kaye Belew, et al. v. Giles County Adult-Oriented Establishment Board, et al.,* No. 1-01-0139 (M.D. Tenn. Sept. 30, 2005); *Paul Friedman, et al. v. Giles County Adult-Oriented Establishment Board, et al,* No. 1-00-0065 (M.D. Tenn., Sept. 29, 2005)(Judge Higgins)(upheld state Registration Act in substantial part); *Herbert L. Odle, d/b/a Sports Club, Inc., et al. v. Decatur County, Tennessee, et al.,* No. 02-1278 (W.D. Tenn., Oct. 14, 2003) (Judge Todd) (Order granting Defendants' Motion for Summary Judgment), *aff'd in part,* 421 F. 3d 386, 387-92 (6th Cir.2005) (upheld constitutionality of state Registration Act, while striking local ordinance).

fixed in amount and was unrelated to defraying the expenses of policing the activities in question. *Id.*, 319 U.S. at 113-14, 63 S.Ct. at 875. Noting that "regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," the United States Supreme Court has rejected the justification of raising revenue for police services, which is "undoubtedly . . . an important government responsibility," as a justification for a content-based permit fee. *Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 135-36, 112 S. Ct. 2395, 2404 (1992). Moreover, "[a] tax based on the content of speech does not become more constitutional because it is a small tax." *Id.*, 505 U.S. at 136, 112 S.Ct. at 2405.

Notably, the First Amendment would not prohibit subjecting the patrons of these establishments to generally applicable taxes without creating constitutional problems. *See generally Minneapolis Star and Tribute Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581, 103 S. Ct. 1365, 1369 (1983). For example, while the State may tax newspapers, magazines, and books, it may not differentiate among them based on their content. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722 (1987); *see also Leathers v. Medlock*, 499 U.S. 439, 447-48, 111 S.Ct. 1438, 1443-44 (1991)("a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech . . . [in light of] the danger of censorship"). Thus, the State could not impose a tax only on books containing sexually-oriented content. Similarly, while the State may tax all places of amusement, it may not tax only venues that feature adult-oriented entertainment, such as erotic dancing.

In the present case, the privilege tax would apply only to patrons of adult-oriented establishments and is not a generally applicable tax, such as a state or local sales tax. The proposed legislation would not create a fee to be utilized for defraying the cost of administrating the Adult-Oriented Establishment Act. Instead it would impose a tax limited to the exercise of First Amendment rights and based on the content of the expression. In light of the foregoing authorities, it is our opinion that a court would find this state privilege tax imposed only on adult-oriented establishments for the entry of each customer to be unconstitutional.

ROBERT E. COOPER, JR.
Attorney General and Reporter

CHARLES L. LEWIS
Deputy Attorney General

STEVEN A. HART
Special Counsel

Requested by:

The Honorable Mike Turner
State Representative
37 Legislative Plaza
Nashville, TN 37243-0151

EXHIBIT 6

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)

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 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

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[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.

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.

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. . . .

. . . .

. . . .

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

Dated: July 25, 2006.

ROGER L. HUNT
United States District Judge

EXHIBIT 7

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*

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.

EXHIBIT 8

GHANEM SULLIVAN

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February 27, 2007

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AND OVERNIGHT COURIER
Nevada Department of Taxation
Attn: Michelle Jacobs
1550 College Parkway
Carson City, Nevada 89706

Re: Claim for Refund – Nevada Tax on Live Entertainment
Taxpayer: K-Kel, Inc.
Tax Period: January 2004

Dear Ms. Jacobs:

Please be advised that the undersigned represents K-Kel, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a refund of any and all Live Entertainment Taxes paid for the reporting period of January 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of [redacted] and [redacted]7100 Dollars ($[redacted]) via check #[redacted] for this reporting period, and demand is hereby made for full refund of that amount.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

1. ***Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.***

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g.*, Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, ***and live entertainment***, such as musical and dramatic works, fall within the First Amendment guarantee. . .") (emphasis added); Winters v. New York, 333 U.S.507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); Ward v. Rock Against Racism, 491 U.S. 781, 790,

109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and Zacchini v. Scripts-Howard Broadcasting Co., 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) ("...entertainment itself can be important news."). *See also* Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) ("the First Amendment affords protection to symbolic or expressive conduct as well as actual speech"). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.[1]

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to "live entertainment."[3] But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is "live") – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of "live entertainment" is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

- $ Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)
- $ Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)
- $ Live entertainment that is provided at a trade show (g)
- $ Music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons (h)
- $ Live entertainment provided in the common area of a shopping mall (j)

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[1] Because the Federal Constitution represents the "floor" level of protections that can be afforded under the State Constitution (*see* S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, ¶ 7, of the Nevada Constitution.

[2] The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

[3] Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap's A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). *See also* Schad, 452 U.S. at 65-66 ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation").

$ Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)

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

$ An outdoor concert (n)

$ Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)

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

Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:

$ Instrumental or vocal music in a restaurant, lounge or similar area if the 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 (1)

$ Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)

$ Performances in certain areas of certain licensed gaming establishments "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" (4)

$ Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. § 368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by newspapers. Noting the "[d]ifferential taxation of the press," the Court commented that it could not "countenance such treatment unless the State asserts a counterbalancing interest of ***compelling importance*** that it cannot achieve without differential taxation." Id. at 586 (emphasis added). Then, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that ". . .the State

must show that its regulation is ***necessary to serve a compelling State interest*** and is ***narrowly drawn*** to achieve that end." (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.[4]

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "***presumed unconstitutional.***" Minneapolis Star, 460 U.S. at 586 (emphasis added). *See also* Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is ***presumptively inconsistent*** with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *factally*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of $1.50 per day or $7.00 for one week. Id. at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." Id. at 108. In the case of the Nevada Tax on Live Entertainment, there is not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in Murdock that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." Id. at 111-12. The Court flatly stated that "***a state may not impose a charge for the enjoyment of a right granted by the federal constitution.***" Id. at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is

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[4] *See, e.g.*, Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the "least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. *See also* United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction . . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . . (citations deleted)). *See also* Minneapolis Star, 460 U.S. at 585 (the government must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"). Nevada cannot do that here.

indeed as potent as the power of censorship which this court has repeatedly struck down." Id. at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.[5]

2. *Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), *citing* Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, *citing* Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. Id. This scheme, like that in Minneapolis Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

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[5] While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981), the Court there was dealing with a $6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. Id. at 632. The court noted that "exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . .were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. '[F]reedom of speech. . .[must be] available to all, not merely to those who can pay their own way.' Murdock v. Pennsylvania 319 U.S. 105, at 111." Id. at 632. *See also* American Target Advertising, Inc. v. Giani, 199 F.3d 1241 (10th Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of $25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a $250.00 annual registration fee because it determined that "the fee does no more than defray reasonable administrative costs." Id. at 1249. But in terms of the requirement of posting a bond in the amount of $25,000.00, the court determined that this "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . .the chilling financial reality of the bond 'unnecessarily interfer[es] with First Amendment freedoms,' . . . and is therefore unconstitutional. . . ." Id. at 1249. (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7th Cir. 2004).

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. *See, generally*, American Multi-Cinema, Inc. v. City of Warrenville, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers, 499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

3. ***The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).***

As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general. Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

GHANEM & SULLIVAN, LLP

Elizabeth M. Ghanem for

By: Diana L. Sullivan, Esq.

EXHIBIT 9

JIM GIBBONS
Governor
THOMAS R. SHEETS
Chair, Nevada Tax Commission
DINO DICIANNO
Executive Director

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DEPARTMENT OF TAXATION
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Henderson, Nevada 89074
Phone:(702) 486-2300
Fax: (702) 486-3377

CERTIFIED MAIL: 7005 1820 0003 8673 2851

April 3, 2007

K-KEL INC
SPEARMINT RHINO
15423 E VALLEY BLVD
CITY OF INDUSTRY CA 91746

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated February 27, 2007, requesting a refund of Live Entertainment Taxes paid by K-KEL Inc. for the period ending January, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude K-KEL, Inc., DBA Spearmint Rhino, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP

JIM GIBBONS
Governor
THOMAS R. SHEETS
Chair, Nevada Tax Commission
DINO DICIANNO
Executive Director

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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,

Christopher G. Nielsen
Deputy Executive Director

EXHIBIT 11

JIM GIBBONS
Governor
THOMAS R. SHEETS
Chair, Nevada Tax Commission
DINO DICIANNO
Executive Director

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October 12, 2007

Bradley Shafer, Esq.
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Dianna L. Sullivan, Esq.
Ghanem & Sullivan
8861 W. Sahara Ave., Ste 120
Las Vegas, Nevada 89117

CERTIFIED MAIL 7003 1680 0001 3683 6538

IN THE MATTER OF: The Appeal of Olympic 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:

DINO DICIANO
Executive Director
Nevada Department of Taxation

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

EXHIBIT 12

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12/10/2010 08:42:40 AM

CLERK OF THE COURT

ORDR
CATHERINE CORTEZ MASTO
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bdoerr@ag.nv.gov
Attorneys for the Nevada Defendants

DISTRICT COURT
CLARK COUNTY NEVADA

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

Defendants.

Case No. A533273
Dept. No. IX

ORDER DENYING MOTION TO DISMISS WITHOUT PREJUDICE

Date of Hearing: July 31, 2008
Time of Hearing: 9:00 a.m.

DEFENDANTS' MOTION TO DISMISS came on for hearing on 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 hereby orders:

DEFENDANTS' MOTION TO DISMISS is DENIED without prejudice.

IT IS SO ORDERED.

DATED this 1st day of December, 2010.

Jennifer Togliatti
DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
Blake A. Doerr
Senior Deputy Attorney General

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

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12/10/2010 08:41:23 AM

CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY NEVADA

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

Defendants.

Case No. A533273
Dept. No. IX

ORDER DENYING MOTION FOR SUMMARY JUDGMENT WITHOUT PREJUDICE

Date of Hearing: November 13, 2008
Time of Hearing: 9:00 a.m.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT came on for hearing on November 13, 2008;

David J. Pope, Senior Deputy Attorney General, and Blake A. Doerr, Deputy Attorney General, appeared on behalf of the Defendants; William J. Brown, 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 and finding that material issues of fact exist, hereby orders:

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT is DENIED without prejudice.

IT IS SO ORDERED.

DATED this 9th day of December, 2010.

Jennifer Togliatti
DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: Blake Doerr
Blake A. Doerr
Senior Deputy Attorney General

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

Exhibit 13

AFF
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Co-Counsel for Plaintiffs
**Admitted Pro Hac Vice*

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 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, LLC, 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

AFFIDAVIT OF BRADLEY J. SHAFER IN SUPPORT OF PLAINTIFFS' OPPOSITION TO NEVADA DEPARTMENT OF TAXATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTARTINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983

Date of Hearing: March 15, 2011
Time of Hearing: 9:00 a.m.

The Discovery Commissioner only required the Department to provide a document for tax years 2003-2010, identifying which percentage of the total Live Entertainment Tax was paid by the gentlemen's clubs presenting adult entertainment.

7. Plaintiffs filed timely objections to the Report and Recommendation on March 3, 2010. I have flown to Nevada no fewer than six times for various hearings before this Court regarding the discovery disputes.

8. There have been depositions of representatives of the Defendants previously scheduled, but none of those depositions have taken place since Plaintiffs require the documents which are the subject of the motion to compel prior to conducting these depositions. Once those documents are obtained, Plaintiffs will then be able to take appropriate depositions, and, Plaintiffs believe, place additional evidence into the record which would be necessary to appropriately respond to the Department's motion for partial summary judgment and to dismiss.

9. Due to the procedural history of the discovery sought in this litigation, as discussed above, it is clear that Plaintiffs have not been dilatory in their pursuit of discovery.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 22nd day of February, 2011.

BRADLEY J. SHAFER, ESQ.

SUBSCRIBED AND SWORN to before me
this 22nd day of February, 2011.

Barbara S. Adkins, NOTARY PUBLIC
Clinton County, Michigan
My Commission Expires on January 31, 2013

Exhibit 14

COPY

ANS
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Sr. Deputy Attorney General
Nevada State Bar #8617
Suzanne M. Warren
Deputy Attorney General
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555 E. Washington Ave., Suite 3900
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(702) 486-3420
(702) 488-3416 fax
Attorneys for the Nevada Department of Taxation

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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, 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,

vs.

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

Defendants.

Case No. A554970

Dept. No. IX

ANSWER

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

COME NOW, Defendants Nevada Department of Taxation, Nevada Tax Commission, and Nevada State Board of Examiners, by and through their attorneys, Catherine Cortez Masto, Attorney General, David J. Pope, Senior Deputy Attorney General, and Suzanne M. Warren, Deputy Attorney General, and hereby submit their Answer to Plaintiffs' Complaint.

JURISDICTION AND VENUE

1. Answering paragraph 2, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations

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contained therein, and upon said basis, deny each and every allegation contained therein.

2. Answering paragraph 3, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

3. Answering paragraphs 4, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

PARTIES

4. Answering paragraph 5, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

5. Answering paragraph 6, 7, 8, 9, 10, 11 and 12, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

6. Answering paragraph 13, Answering Defendant Nevada Department of Taxation admits that it is a governmental entity created under the laws of the State of Nevada and that it administers and enforces the statutory provisions of Chapter 368A of the Nevada Revised Statutes, and collects the Live Entertainment Tax, for all non-gaming licensed taxpayers in Nevada. Nevada Department of Taxation further answers that it is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained in paragraph 13, and upon said basis, denies each and every remaining allegation contained therein. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

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7. Answering paragraph 14, Answering Defendant Nevada Tax Commission admits that it is a governmental entity created by the laws of the State of Nevada and that it is the head of the Department of Taxation which administers and enforces the statutory provisions of Chapter 368A of the Nevada Revised Statutes with regard to non-gaming licensed taxpayers and that it is statutorily authorized to consider and rule upon appeals of refund claims. Defendant Nevada Tax Commission also admits that it rendered the decision which Plaintiffs challenge by way of this action and further answers that it is without sufficient knowledge or information as to the remaining allegations and therefore denies the same. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

8. Answering paragraph 15, Answering Defendant State Board of Examiners admits that it is a governmental entity created under the laws of the State of Nevada, consisting of the governor, the secretary of state, and the attorney general. Answering Defendant Nevada State Board of Examiners further admits that pursuant to NRS 368A.250, it is authorized to approve refunds of amounts collected by the Nevada Department of Taxation in excess of the amount legally due. State Board of Examiners further answers that it is without sufficient knowledge or information as to any remaining allegations and therefore denies the same. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

STATEMENT OF FACTS

9. Answering paragraph 16, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

10. Answering paragraph 17, Answering Defendants admit the allegations contained therein.

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11. Answering paragraph 18, Answering Defendants admit that at some time following the enactment of Chapter 368A of the Nevada Revised Statutes administrative regulations, otherwise known as Chapter 368A of the Nevada Administrative Code, were promulgated regarding the administration and enforcement of Chapter 368A of the Nevada Revised Statutes. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained in paragraph 18 and, upon said basis, deny each and every remaining allegation contained therein.

12. Answering paragraph 19, Answering Defendant Nevada Department of Taxation admits that it collects the tax imposed by Chapter 368A from taxpayers who/which are not licensed gaming establishments. Answering Defendant Nevada Department of Taxation further admits that pursuant to NRS 368A.140 it shall adopt such regulations as are necessary to carry out this function. Other Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

13. Answering paragraph 20, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

14. Answering paragraph 21, Answering Defendants admit that the statutory sections cited therein, as they existed when enacted, speak for themselves.

15. Answering paragraph 22, Answering Defendants admit that Chapter 368A was amended by Assembly Bill No. 554 which reduced the scope of the exception as contained in NRS 368A.200(5)(d) from a maximum seating capacity limitation of 300 to 200. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining

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allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

16. Answering paragraph 23, 24, 25, 26, 27, 28, and 29, Answering Defendants admit that the Plaintiffs mentioned therein are subject to Chapter 368A of the NRS and have been and are required to pay the Live Entertainment Tax found in Chapter 368A of the NRS. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

17. Answering paragraph 30, Answering Defendants admit that live entertainment occurs at Plaintiffs' business premises. Answering Defendants further answer they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained therein and, upon said ground, deny each and every other allegation contained therein.

18. Answering paragraph 31, Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every other allegation contained therein.

19. Answering paragraph 32, Answering Defendants admit the allegations contained therein.

20. Answering paragraph 33, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

21. Answering paragraph 34, Answering Defendants admit that Plaintiffs have filed requests for refunds. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity

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of any remaining allegations contained therein and, upon said ground, deny each and every other allegation contained therein.

22. Answering paragraph 35, Answering Defendant Nevada Department of Taxation admits that it has denied the requests for refund. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

23. Answering paragraph 36, Answering Defendants admit that a hearing was scheduled before Defendant Nevada Tax Commission at which would be heard the appeals of denials of requests for refunds of the Live Entertainment Tax for tax periods January, February, March and April, 2004. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

24. Answering paragraph 37, Answering Defendants admit that the hearing was continued. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

25. Answering paragraph 38, Answering Defendants admit that the Nevada Tax Commission, after considering the argument and materials submitted, issued a written decision, dated October 12, 2007, denying Plaintiffs' appeals. Answering Defendants deny that any witness testimony was offered at the hearing before the Nevada Tax Commission.

26. Answering paragraph 39, Answering Defendants admit that any statutory sections cited therein speak for themselves. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or

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falsity of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

27. In answering paragraph 40, Answering Defendants admit that any statutory sections cited therein speak for themselves.

28. In answering paragraph 41, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE

29. In Answering paragraph 42, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

30. Answering paragraph 43, Answering Defendants admit that the excerpts from the statute appear to be the same language found in the statutes cited therein and that the statutory sections cited therein speak for themselves.

31. Answering paragraphs 44, 45 and 46, Answering Defendants admit that the statutory sections cited therein speak for themselves.

32. Answering paragraph 47, Answering Defendants admit that pursuant to NRS 368A.140(2)(a) the Nevada Department of Taxation is statutorily required to collect the Live Entertainment Tax from non-gaming licensed taxpayers and pursuant to NRS 368A.140(2)(b) is empowered to adopt such regulations as are necessary to carry out the provisions of paragraph (a).

33. Answering paragraph 48, Answering Defendants admit that the statutory sections cited therein speak for themselves.

34. Answering paragraph 49, Answering Defendants admit that pursuant to NRS 368A.200(5) the tax imposed by Chapter 368A is not applicable to a variety of circumstances and further admit that any statutory sections cited therein speak for themselves.

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35. Answering paragraphs 50 and 51, Answering Defendants admit that the statutory sections cited therein speak for themselves.

COUNT I – DECLARATORY RELIEF

36. Answering paragraph 52, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

37. Answering paragraph 53, Answering Defendants deny each and every allegation contained therein.

38. Answering paragraph 54, Answering Defendants deny each and every allegation contained therein.

39. Answering paragraph 55, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

40. Answering paragraph 56, Answering Defendants deny each and every allegation contained therein.

41. Answering paragraph 57, Answering Defendants deny each and every allegation contained therein.

COUNT II – REQUEST FOR REFUND

42. Answering paragraph 58, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

43. Answering paragraph 59, Answering Defendants deny each and every allegation contained therein.

44. Answering paragraph 60, Answering Defendants deny each and every allegation contained therein.

45. Answering paragraph 61, Answering Defendants admit that the statutory sections cited therein speak for themselves and deny each and every remaining allegation contained therein.

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COUNT III – INJUNCTIVE RELIEF

46. Answering paragraph 62, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

47. Answering paragraph 63, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

48. Answering paragraph 64, Answering Defendants admit only that they intend to enforce and carry out the provisions of Chapter 388A. Answering Defendants deny each and every remaining allegation contained therein.

49. Answering paragraph 65, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

50. Answering paragraph 66, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

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AFFIRMATIVE DEFENSES

1. Plaintiffs' Complaint fails to state a claim upon which relief may be granted.
2. Answering Defendants claim all immunities, defenses, exemptions, and limitations on liability pursuant to the provisions of Chapter 41 of the Nevada Revised Statutes.
3. Answering Defendants are entitled to qualified immunity as a matter of law.
4. Answering Defendants are not "persons" for purposes of 42 U.S.C. § 1983 and therefore no remedy in the form of monetary damages is available under that statute.
5. Answering Defendants are not "persons" for purposes of 42 U.S.C. § 1983 and therefore no remedy in the form of injunctive relief is available under that statute.

6. Pursuant to Chapter 368A of the Nevada Revised Statutes, Plaintiffs are not entitled to an injunction, writ of mandate, or any other legal or equitable process to prevent or enjoin the collection of the tax, penalty or interest imposed by Chapter 368A.

7. The Nevada Department of Taxation properly assessed tax as authorized and required by, and in accordance with, Chapter 368A of the Nevada Revised Statutes and the applicable Nevada Administrative Code provisions.

8. Answering Defendants are entitled to sovereign immunity.

9. This action is barred by Nevada Revised Statutes 41.031 and 41.0337, due to Plaintiffs' failure to name the State of Nevada as a defendant.

10. Answering Defendants allege that at the time of filing of this Answer, all possible affirmative defenses may have not been alleged pending the development of sufficient facts after reasonable inquiry; therefore, Answering Defendants reserve the right to amend this Answer to allege additional affirmative defenses if warranted by subsequent investigation.

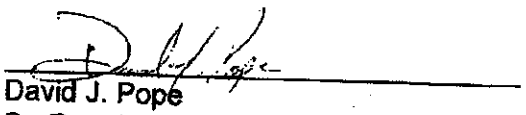
WHEREFORE, Defendants pray that this Court enter judgment in their favor and that Plaintiffs take nothing by way of their Complaint.

Dated: March 3, 2008

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By:



David J. Pope
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Attorneys for Defendants

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on March 4, 2008, I deposited in the U.S. mail, postage prepaid, via First Class Mail, a true and correct copy of the foregoing **Answer,** addressed as follows:

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
3800 Capital City Blvd., Suite 2
Lansing, MI 48906-2110

DATED this 4th day of March, 2008

By: _____
An employee of the State of Nevada,
Office of the Attorney General

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

Exhibit 15

Sec. 33. NRS 372.680 is hereby amended to read as follows:

<< NV ST 372.680 >>

372.680 1. Within 90 days after <<-the mailing of the notice of the department's action->> <<+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 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.

Exhibit 16

Senate Bill No. 362–Senator O'Connell

CHAPTER.....

AN ACT relating to taxation; prohibiting, under certain circumstances, the imposition of penalties and interest on delinquent taxes for the period during which an audit of a taxpayer is extended; revising the manner in which penalties and interest are calculated if a taxpayer has made overpayments and underpayments; providing for the appeal of any decision of the executive director or other officer of the department of taxation to the Nevada tax commission; requiring the commission to adopt certain regulations; expanding the Taxpayers' Bill of Rights; increasing the amount of taxes, penalties and interest that may be waived if a taxpayer has relied to his detriment on the advice of the department; authorizing certain actions relating to the payment of taxes to be brought in various counties; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 360 of NRS is hereby amended by adding thereto the provisions set forth as sections 2, 3 and 3.5 of this act.

Sec. 2. ***1. If an audit is conducted by the department pursuant to the provisions of this Title, the date on which the audit will be completed must be included in the notice to the taxpayer that the audit will be conducted.***

2. The date on which the audit will be completed may be extended by the department if the department gives prior written notice of the extension to the taxpayer. The notice must include an explanation of the reason or reasons that the extension is required.

3. If, after the audit, the department determines that delinquent taxes are due, interest and penalties may not be imposed for the period of the extension if the taxpayer did not request the extension or was not otherwise the cause of the extension.

Sec. 3. ***If an officer, employee or agent of the department determines that a taxpayer is entitled to an exemption or has been taxed or assessed more than is required by law, he shall give written notice of that determination to the taxpayer. The notice must:***

1. Be given within 30 days after the officer, employee or agent makes his determination or, if the determination is made as a result of an audit, within 30 days after the completion of the audit; and

2. If appropriate, include:

(a) An explanation that an overpayment may be credited against any amount due from the taxpayer; or

(b) Instructions indicating the manner in which the taxpayer may petition for a refund of any overpayment.

Sec. 3.5. ***The Nevada tax commission shall adopt regulations to carry out the provisions of NRS 360.294 and 360.417.***

Sec. 4. NRS 360.245 is hereby amended to read as follows:

360.245 1. ***Except as otherwise provided in this Title:***

(a) All decisions of the executive director or other officer of the department made pursuant to ~~[subsection 2 of NRS 360.130]~~ ***this Title*** are final unless appealed to the Nevada tax commission. ~~[as provided by law.]~~

(b) Any natural person, partnership, corporation, association or other business or legal entity ***who is aggrieved by such a decision*** may ~~[so]~~ 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.

2. Service of the decision must be made personally or by certified mail. If service is made by certified mail:

(a) The decision must be enclosed in an envelope which is addressed to the taxpayer at his address as it appears in the records of the department.

(b) It is deemed to be complete at the time the appropriately addressed envelope containing the decision is deposited with the United States Postal Service.

3. The Nevada tax commission, as head of the department, may review all ~~[other]~~ decisions made by the executive director ~~[and]~~ ***that are not otherwise appealed to the commission pursuant to this section.***

4. The Nevada tax commission may reverse, affirm or modify ~~[them.~~ ~~4.]~~ ***any decision of the department that is:***

(a) Appealed to the commission by a taxpayer pursuant to this section; or

(b) Reviewed by the commission pursuant to this section.

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.

~~[5.]~~ ***6.*** The Nevada tax commission shall provide by regulation for:

(a) Notice to ***be given to*** each county of any decision upon an appeal to the commission that the commission determines is likely to affect the revenue of the county or other local government. The regulations must specify the form and contents of the notice and requirements for the number of days before a meeting of the commission that the notice must be transmitted. ~~[to the county or counties.]~~ ***If the parties to the appeal enter into a stipulation as to the issues that will be heard on appeal, the commission shall transmit a copy of the notice to the district attorney of each county which the commission determines is likely to be affected by the decision.*** Upon receipt of such a notice, the ~~[county]~~ ***district attorney*** shall transmit a copy of the notice to each local government within the county which ~~[it]~~ ***the commission*** determines is likely to be affected by the decision. ***If there is no such stipulation, the commission shall transmit a copy of the notice, accompanied by the names of the parties and the amount on appeal, if any, to the governing bodies of the counties and***

~~[(b)]~~ *(2)* To be represented by himself or anyone who is otherwise authorized by law to represent him before the department;

~~[(c)]~~ *(3)* To make an audio recording using the taxpayer's own equipment and at the taxpayer's own expense; and

~~[(d)]~~ *(4)* To receive a copy of any document or audio recording made by or in the possession of the department relating to the determination or collection of any tax for which the taxpayer is assessed, upon payment of the actual cost to the department of making the copy.

~~[10.]~~ *(j)* To a full explanation of the department's authority to assess a tax or to collect delinquent taxes, including the procedures and notices for review and appeal that are required for the protection of the taxpayer. An explanation which meets the requirements of this section must also be included with each notice to a taxpayer that an audit will be conducted by the department.

~~[11.]~~ *(k)* To the immediate release of any lien which the department has placed on real or personal property for the nonpayment of any tax when:

~~[(a)]~~ *(1)* The tax is paid;

~~[(b)]~~ *(2)* The period of limitation for collecting the tax expires;

~~[(c)]~~ *(3)* The lien is the result of an error by the department;

~~[(d)]~~ *(4)* The department determines that the taxes, interest and penalties are secured sufficiently by a lien on other property;

~~[(e)]~~ *(5)* The release or subordination of the lien will not jeopardize the collection of the taxes, interest and penalties;

~~[(f)]~~ *(6)* The release of the lien will facilitate the collection of the taxes, interest and penalties; or

~~[(g)]~~ *(7)* The department determines that the lien is creating an economic hardship.

~~[12.]~~ *(l)* To the release or reduction of a bond ***or other form of security*** required ***to be furnished pursuant to the provisions of this Title*** by the department in accordance with applicable statutes and regulations.

~~[13.]~~ *(m)* To be free from investigation and surveillance by an officer, agent or employee of the department for any purpose that is not directly related to the administration of the provisions of this Title ~~[.]~~ ***that are administered by the department.***

~~[14.]~~ *(n)* To be free from harassment and intimidation by an officer, agent or employee of the department for any reason.

(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 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.

3. The provisions of this section apply to any tax administered and collected pursuant to the provisions of this Title or any applicable regulations by the department.

Sec. 6. NRS 360.2935 is hereby amended to read as follows:

360.2935 A taxpayer is entitled to receive on any overpayment of taxes ***, after the offset required by NRS 360.320 has been made,*** a refund together with interest at a rate determined pursuant to NRS 17.130. No interest is allowed on a refund of any penalties or interest paid by a taxpayer.

Sec. 7. NRS 360.294 is hereby amended to read as follows:

360.294 ~~[Upon]~~

1. Except as otherwise provided in subsection 2, upon proof that a taxpayer has relied to his detriment on written advice provided to him by an ***officer, agent or*** employee of the department ~~[:~~

~~1. The executive director or his designee may waive taxes, penalties and interest owed by the taxpayer in an amount not to exceed $5,000; and~~

~~2. The Nevada tax commission may waive any such taxes, penalties and interest in an amount greater than $5,000.]~~ ***or on an opinion of the attorney general:***

(a) The department may waive any tax, penalty and interest owed by the taxpayer if the taxpayer meets the criteria adopted by regulation by the Nevada tax commission pursuant to section 3.5 of this act; and

(b) If a waiver is granted pursuant to paragraph (a), the department shall prepare and maintain on file a statement which contains:

(1) The reason for the waiver;

(2) The amount of the tax, penalty and interest owed by the taxpayer;

(3) The amount of the tax, penalty and interest waived by the department; and

(4) The facts and circumstances which led to the waiver.

2. Upon proof that a taxpayer has in good faith collected or remitted taxes imposed pursuant to the provisions of this Title that are administered by the department, in reliance upon written advice provided by an officer, agent or employee of the department, an opinion of the attorney general or the Nevada tax commission, or the written results of an audit of his records conducted by the department, the taxpayer may not be required to pay delinquent taxes, penalties or interest if the department determines after the completion of a subsequent audit that the taxes he collected or remitted were deficient.

Sec. 8. NRS 360.320 is hereby amended to read as follows:

360.320 ~~[In]~~

1. Except as otherwise provided in this Title, in making a determination ***of the amount required to be paid,*** the department ~~[may]~~ ***shall*** offset overpayments for ~~[a period or periods, together with interest on the overpayments,]~~ ***a reporting period of an audit period*** against underpayments for ~~[another period or periods, against penalties, and against~~

~~the interest on underpayments.]~~ ***any other reporting period within the audit period.***

2. If it is determined that there is a net deficiency, any penalty imposed must be calculated based on the amount of the net deficiency.

3. If it is determined that:

(a) There is a net deficiency for a reporting period after offsetting any overpayment from any previous reporting period, any interest imposed on the net deficiency must be calculated before determining whether there is an overpayment or net deficiency for the next reporting period within the audit period.

(b) There is a net overpayment for a reporting period after offsetting any net deficiency from any previous reporting period, any interest to which the taxpayer is entitled must be calculated before determining whether there is an overpayment or net deficiency for the next reporting period within the audit period.

4. The provisions of this section do not apply if the taxpayer has submitted a report that shows taxes due and has not remitted the taxes due in a timely manner.

5. As used in this section, "reporting period" includes, without limitation, a calendar month, a calendar quarter, a calendar year and any other period for reporting.

Sec. 9. NRS 360.395 is hereby amended to read as follows:

360.395 1. Before a person may seek judicial review pursuant to NRS 233B.130 from a final order of the ~~[department]~~ ***Nevada tax commission*** upon a petition for redetermination, he must:

(a) Pay the amount of the determination; or

(b) Enter into a written agreement with the department establishing a later date by which he must pay the amount of the determination.

2. If a court determines that the amount of the final order should be reduced or that the person does not owe any taxes, the department shall credit or refund any amount paid by the person that exceeds the amount owed ~~[.]~~ ***, with interest determined in accordance with NRS 360.2935.***

Sec. 10. NRS 360.417 is hereby amended to read as follows:

360.417 ~~[Unless]~~ ***Except as otherwise provided in NRS 360.320 and section 2 of this act and unless*** a different penalty or rate of interest is specifically provided by statute, any person who fails to pay any tax provided for in chapter 362, 364A, 365, 369, 370, 372, 373, 374, 377, 377A, 444A or 585 of NRS, or fee provided for in NRS 482.313 or 590.700 to 590.920, inclusive, to the state or a county within the time required, shall pay a penalty of not more than 10 percent of the amount of the tax or fee which is owed, as determined by the department, in addition to the tax or fee, plus interest at the rate of 1 percent per month, or fraction of a month, from the last day of the month following the period for which the amount or any portion of the amount should have been reported until the date of payment. ***The amount of any penalty imposed must be based***

on a graduated schedule adopted by the Nevada tax commission which takes into consideration the length of time the tax or fee remained unpaid.

Sec. 11. NRS 360.4193 is hereby amended to read as follows:

360.4193 1. If a person is delinquent in the payment of any tax or fee administered by the department or has not paid the amount of a deficiency determination, the department may bring an action in a court of this state, a court of any other state or a court of the United States to collect the delinquent or deficient amount, penalties and interest. The action ~~[must]~~ *:*

(a) May not be brought if the decision that the payment is delinquent or that there is a deficiency determination is on appeal to the Nevada tax commission pursuant to NRS 360.245.

(b) Must be brought not later than 3 years after the payment became delinquent or the determination became final or within 5 years after the last recording of an abstract of judgment or of a certificate constituting a lien for tax owed.

2. The attorney general shall prosecute the action. The provisions of NRS and the Nevada Rules of Civil Procedure and Nevada Rules of Appellate Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings. In the action, a writ of attachment may issue. A bond or affidavit is not required before an attachment may be issued.

3. In the action, a certificate by the department showing the delinquency is prima facie evidence of:

(a) The determination of the tax or fee or the amount of the tax or fee;

(b) The delinquency of the amounts; and

(c) The compliance by the department with all of the procedures required by law related to the computation and determination of the amounts.

Sec. 12. NRS 361.0687 is hereby amended to read as follows:

361.0687 1. A person who intends to locate or expand a business in this state may apply to the commission on economic development for a partial abatement from the taxes imposed by this chapter on the personal property of the new or expanded business.

2. The commission on economic development may approve an application for a partial abatement if the commission makes the following determinations:

(a) The goals of the business are consistent with the goals of the commission and the community concerning industrial development and diversification.

(b) The abatement is a significant factor in the decision of the applicant to locate or expand a business in this state or the appropriate affected local government determines that the abatement will be beneficial to the economic development of the community.

(c) The average hourly wage which will be paid by the new or expanded business to its employees in this state is at least 125 percent of the average

statewide industrial hourly wage as established by the employment security division of the department of employment, training and rehabilitation on July 1 of each fiscal year.

(d) The business will provide a health insurance plan for all employees that includes an option for health insurance coverage for dependents of the employees.

(e) The cost to the business for the benefits the business provides to its employees in this state will meet the minimum requirements for benefits established by the commission pursuant to subsection ~~[8.]~~ ***9.***

(f) A capital investment for personal property will be made to locate or expand the business in Nevada which is at least:

(1) If the personal property directly related to the establishment of the business in this state is primarily located in a county whose population:

(I) Is 100,000 or more, $50,000,000.

(II) Is less than 100,000, $20,000,000.

(2) If the personal property directly related to the expansion of the business is primarily located in a county whose population:

(I) Is 100,000 or more, $10,000,000.

(II) Is less than 100,000, $4,000,000.

(g) The business will create at least the following number of new, full -time and permanent jobs in the State of Nevada by the fourth quarter that it is in operation:

(1) If a new business will be primarily located in a county whose population:

(I) Is 100,000 or more, 100 jobs.

(II) Is less than 100,000, 35 jobs.

(2) If an expanded business will be primarily located in a county whose population:

(I) Is 100,000 or more, and the business has at least 100 employees in this state, 20 jobs. An expanded business primarily located in such a county that has less than 100 employees is not eligible for a partial abatement pursuant to this section.

(II) Is less than 100,000, and the business has at least 35 employees in this state, 10 jobs. An expanded business primarily located in such a county that has less than 35 employees is not eligible for a partial abatement pursuant to this section.

(h) For the expansion of a business primarily located in a county whose population:

(1) Is 100,000 or more, the book value of the assets of the business in this state is at least $20,000,000.

(2) Is less than 100,000, the book value of the assets of the business in this state is at least $5,000,000.

(i) The business is registered pursuant to the laws of this state or the applicant commits to obtain a valid business license and all other permits required by the county, city or town in which the business operates.

(j) The proposed abatement has been approved by the governing body of the appropriate affected local government as determined pursuant to the regulations adopted pursuant to subsection ~~[8.]~~ ***9.*** In determining whether to approve a proposed abatement, the governing body shall consider whether the taxes to be paid by the business are sufficient to pay for any investment required to be made by the local government for services associated with the relocation or expansion of the business, including, without limitation, costs related to the construction and maintenance of roads, sewer and water services, fire and police protection , and the construction and maintenance of schools.

(k) The applicant has executed an agreement with the commission which states that the business will continue in operation in Nevada for 10 or more years after the date on which a certificate of eligibility for the abatement is issued pursuant to subsection 5 and will continue to meet the eligibility requirements contained in this subsection. The agreement must bind the successors in interest of the business for the required period.

3. An applicant shall, upon the request of the executive director of the commission on economic development, furnish him with copies of all records necessary to verify that the applicant meets the requirements of subsection 2.

4. The percentage of the abatement must be 50 percent of the taxes payable each year.

5. If an application for a partial abatement is approved, the commission on economic development shall immediately forward a certificate of eligibility for the abatement to:

(a) The department; and

(b) The county assessor of each county in which personal property directly related to the establishment or expansion of the business will be located.

6. Upon receipt by the department of the certificate of eligibility, the taxpayer is eligible for an abatement from the tax imposed by this chapter for 10 years:

(a) For the expansion of a business, on all personal property of the business that is located in Nevada and directly related to the expansion of the business in this state.

(b) For a new business, on all personal property of the business that is located in Nevada and directly related to the establishment of the business in this state.

7. If a business for which an abatement has been approved is not maintained in this state in accordance with the agreement required in subsection 2, for at least 10 years after the commission on economic development approved the abatement, the person who applied for the abatement shall repay to the county treasurer or treasurers who would have received the taxes but for the abatement the total amount of all taxes that were abated pursuant to this section. ~~[The]~~ ***Except as otherwise provided in NRS 360.320 and section 2 of this act, the*** person who applied for the

abatement shall pay interest on the amount due at the rate of 10 percent per annum for each month, or portion thereof, from the last day of the month following the period for which the payment would have been made if the abatement had not been granted until the date of the actual payment of the tax.

8. A county treasurer:

(a) Shall deposit any money that he receives pursuant to subsection 7 in one or more of the funds established by a local government of the county pursuant to NRS 354.611, 354.6113 or 354.6115; and

(b) May use the money deposited pursuant to paragraph (a) only for the purposes authorized by NRS 354.611, 354.6113 and 354.6115.

9. The commission on economic development shall adopt regulations necessary to carry out the provisions of this section. The regulations must include, but not be limited to:

(a) A method for determining the appropriate affected local government to approve a proposed abatement and the procedure for obtaining such approval; and

(b) Minimum requirements for benefits that a business applying for a partial abatement must offer to its employees to be approved for the partial abatement.

10. The department shall adopt regulations concerning how county assessors shall administer partial abatements approved pursuant to this section.

11. An applicant for an abatement who is aggrieved by a final decision of the commission on economic development may petition for judicial review in the manner provided in chapter 233B of NRS.

Sec. 13. NRS 361.435 is hereby amended to read as follows:

361.435 Any property owner owning property of like kind in more than one county in the state and desiring to proceed with a suit under the provisions of NRS 361.420 may, where the issues in the cases are substantially the same in all or in some of the counties concerning the assessment of taxes on such property, consolidate any of the suits in one action and bring the action in any court of competent jurisdiction in Carson City, ~~[Nevada.]~~ ***the county of this state where the property owner resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department.***

Sec. 14. NRS 361.5648 is hereby amended to read as follows:

361.5648 1. Within 30 days after the first Monday in March of each year, with respect to each property on which the tax is delinquent, the tax receiver of the county shall mail notice of the delinquency by first-class mail to:

(a) The owner or owners of the property;

(b) The person or persons listed as the taxpayer or taxpayers on the tax rolls, at their last known addresses, if the names and addresses are known; and

(c) Each holder of a recorded security interest if the holder has made a request in writing to the tax receiver for the notice, which identifies the secured property by the parcel number assigned to it in accordance with the provisions of NRS 361.189.

2. The notice of delinquency must state:

(a) The name of the owner of the property, if known.

(b) The description of the property on which the taxes are a lien.

(c) The amount of the taxes due on the property and the penalties and costs as provided by law.

(d) That if the amount is not paid by the taxpayer or his successor in interest, the tax receiver will, at 5 p.m. on the first Monday in June of the current year, issue to the county treasurer, as trustee for the state and county, a certificate authorizing him to hold the property, subject to redemption within 2 years after the date of the issuance of the certificate, by payment of the taxes and accruing taxes, penalties and costs, together with interest on the taxes at the rate of 10 percent per annum from ***the*** date due until paid as provided by law, ***except as otherwise provided in NRS 360.320 and section 2 of this act,*** and that redemption may be made in accordance with the provisions of chapter 21 of NRS in regard to real property sold under execution.

3. Within 30 days after mailing the original notice of delinquency, the tax receiver shall issue his personal affidavit to the board of county commissioners affirming that due notice has been mailed with respect to each parcel. The affidavit must recite the number of letters mailed, the number of letters returned, and the number of letters finally determined to be undeliverable. Until the period of redemption has expired, the tax receiver shall maintain detailed records which contain such information as the department may prescribe in support of his affidavit.

4. A second copy of the notice of delinquency must be sent by certified mail, not less than 60 days before the expiration of the period of redemption as stated in the notice.

5. The cost of each mailing must be charged to the delinquent taxpayer.

Sec. 15. NRS 361.570 is hereby amended to read as follows:

361.570 1. Pursuant to the notice given as provided in NRS 361.5648 and 361.565 and at the time stated in the notice, the tax receiver shall make out his certificate authorizing the county treasurer, as trustee for the state and county, to hold the property described in the notice for the period of 2 years after the first Monday in June of the year the certificate is dated, unless sooner redeemed.

2. The certificate must specify:

(a) The amount of delinquency, including the amount and year of assessment;

(b) The taxes and the penalties and costs added thereto, and that, ***except as otherwise provided in NRS 360.320 and section 2 of this act,*** interest on the taxes will be added at the rate of 10 percent per annum from the date due until paid; and

(c) The name of the owner or taxpayer, if known.

3. The certificate must state, and it is hereby provided:

(a) That the property may be redeemed within 2 years ~~[from]~~ ***after*** its date; and

(b) That, if not redeemed, the title to the property vests in the county for the benefit of the state and county.

4. Until the expiration of the period of redemption, the property held pursuant to the certificate must be assessed annually to the county treasurer as trustee, and before the owner or his successor redeems the property, he shall also pay the county treasurer holding the certificate any additional taxes assessed and accrued against the property after the date of the certificate, together with the interest on the taxes at the rate of 10 percent per annum from the date due until paid ~~[.]~~ ***, unless otherwise provided in NRS 360.320 or section 2 of this act.***

5. The county treasurer shall take certificates issued to him under the provisions of this section.

Sec. 16. NRS 361.870 is hereby amended to read as follows:

361.870 1. Any claimant aggrieved by a decision of the department or a county assessor which denies the refund claimed under the Senior Citizens' Property Tax Assistance Act may have a review of the denial before the ~~[executive director]~~ ***Nevada tax commission*** if, within 30 days after the claimant receives notice of the denial, he submits a written petition for review to the ~~[department.]~~ ***commission.***

2. Any claimant aggrieved by the denial in whole or in part of relief claimed under the Senior Citizens' Property Tax Assistance Act, or by any other final action or review of the ~~[executive director,]~~ ***Nevada tax commission,*** is entitled to judicial review thereof.

Sec. 17. (Deleted by amendment.)

Sec. 18. NRS 362.160 is hereby amended to read as follows:

362.160 1. ~~[If]~~ ***Except as otherwise provided in NRS 360.320 and section 2 of this act, if*** the amount of any tax required by NRS 362.100 to 362.240, inclusive, is not paid within 10 days after it is due, it is delinquent and must be collected as other delinquent taxes are collected by law, together with a penalty of 10 percent of the amount of the tax which is owed, as determined by the department, in addition to the tax, plus interest at the rate of ~~[1.5]~~ ***1*** percent per month, or fraction of a month, from the date the tax was due until the date of payment.

2. Any person extracting any mineral or receiving a royalty may appeal from the imposition of the penalty and interest to the Nevada tax commission by filing a notice of appeal ~~[within 30 days after the tax became due.]~~ ***in accordance with the requirements set forth in NRS 360.245.***

Sec. 19. NRS 362.230 is hereby amended to read as follows:

362.230 1. Every person extracting any mineral in this state, or receiving a royalty in connection therewith, who fails to file with the department the statements provided for in NRS 362.100 to 362.240,

inclusive, during the time and in the manner provided for in NRS 362.100 to 362.240, inclusive, shall pay a penalty of not more than $5,000. If any such person fails to file the statement, the department may ascertain and certify the net proceeds of the minerals extracted or the value of the royalty from all data and information obtainable, and the amount of the tax due must be computed on the basis of the amount due so ascertained and certified.

2. The executive director shall determine the amount of the penalty. This penalty becomes a debt due the State of Nevada and, upon collection, must be deposited in the state treasury to the credit of the state general fund.

3. Any person extracting any mineral or receiving a royalty may appeal from the imposition of the penalty to the Nevada tax commission by filing a notice of appeal ~~[within 30 days after the decision of the executive director.]~~ ***in accordance with the requirements set forth in NRS 360.245.***

Sec. 20. NRS 364A.170 is hereby amended to read as follows:

364A.170 1. A proposed business that qualifies pursuant to the provisions of this section is entitled to an exemption of:

(a) Eighty percent of the amount of tax otherwise due pursuant to NRS 364A.140 during the first 4 quarters of its operation;

(b) Sixty percent of the amount of tax otherwise due pursuant to NRS 364A.140 during the second 4 quarters of its operation;

(c) Forty percent of the amount of tax otherwise due pursuant to NRS 364A.140 during the third 4 quarters of its operation; and

(d) Twenty percent of the amount of tax otherwise due pursuant to NRS 364A.140 during the fourth 4 quarters of its operation.

2. A proposed business is entitled to the exemption pursuant to subsection 1 if:

(a) In a county whose population is 35,000 or more:

(1) The business will have 75 or more full-time employees on the payroll of the business by the fourth quarter that it is in operation;

(2) Establishing the business will require the business to make a capital investment of $1,000,000 in Nevada; and

(3) The exemption is approved by the commission on economic development pursuant to subsection 3.

(b) In a county whose population is less than 35,000:

(1) The business will have 25 or more full-time employees on the payroll of the business by the fourth quarter that it is in operation;

(2) Establishing the business will require the business to make a capital investment of $250,000 in Nevada; and

(3) The exemption is approved by the commission on economic development pursuant to subsection 3.

3. A proposed business must apply to the commission on economic development to obtain the exemption authorized pursuant to this section. The commission shall certify a business's eligibility for the exemption pursuant to this section if:

(a) The proposed business commits to the requirements of subparagraphs (1) and (2) of paragraph (a) or (b) of subsection 2, whichever is applicable; and

(b) The proposed business is consistent with the commission's plan for economic diversification and development.

Upon certification, the commission shall immediately forward the certificate of eligibility for the exemption to the Nevada tax commission.

4. Upon receipt of such a certificate, the Nevada tax commission shall include the exemption in the calculation of the tax paid by the business. A business for which an exemption is approved that does not:

(a) Have the required number of full-time employees on the payroll of the business by the fourth quarter that it is in operation; or

(b) Make the required capital investment in Nevada in the course of establishing the business,

is required to repay to the department the amount of the exemption that was allowed pursuant to this section before the business's failure to comply unless the Nevada tax commission determines that the business has substantially complied with the requirements of this section. ~~[The]~~ ***Except as otherwise provided in NRS 360.320 and section 2 of this act, the*** business is also required to pay interest on the amount due at the rate most recently established pursuant to NRS 99.040 for each month, or portion thereof, from the last day of the month following the period for which the payment would have been made had the exemption not been granted until the date of payment of the tax.

5. The commission on economic development shall adopt regulations governing the determination made pursuant to subsection 3 of a proposed business's eligibility for the exemption provided in this section.

6. The Nevada tax commission:

(a) Shall adopt regulations governing the investments that qualify for the purposes of the required capital investment pursuant to subparagraph (2) of paragraph (a) or (b) of subsection 2.

(b) May adopt such other regulations as are necessary to carry out the provisions of this section.

Sec. 21. NRS 364A.180 is hereby amended to read as follows:

364A.180 Upon written application made before the date on which payment must be made, for good cause the department may extend by 30 days the time within which a business 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 business shall pay interest at the rate most recently established pursuant to NRS 99.040 for each month, or fraction of a month, from the last day of the month following the date on which the amount would have been due without the extension until the date of payment ~~[.]~~ ***, unless otherwise provided in NRS 360.320 or section 2 of this act.***

Sec. 22. NRS 364A.260 is hereby amended to read as follows:

364A.260 1. ~~[Interest]~~ ***Except as otherwise provided in NRS 360.320, interest*** must be paid upon any overpayment of any amount of the fee or tax imposed by this chapter at the rate of one-half of 1 percent per month, or fraction thereof, from the last day of the calendar month following the period for which the overpayment was made. No refund or credit may be made of any interest imposed upon the person or business making the overpayment with respect to the amount being refunded or credited.

2. The interest must be paid:

(a) In the case of a refund, to the last day of the calendar month following the date upon which the person making the overpayment, if he has not already filed a claim, is notified by the department that a claim may be filed or the date upon which the claim is certified to the state board of examiners, whichever is earlier.

(b) In the case of a credit, to the same date as that to which interest is computed on the fee or tax or amount against which the credit is applied.

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

Sec. 23. NRS 364A.280 is hereby amended to read as follows:

364A.280 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ ***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 ~~[or Clark County]~~ ***, the county of this state where the claimant resides or maintains his 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.

Sec. 24. NRS 364A.290 is hereby amended to read as follows:

364A.290 1. If the department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may ~~[, before the mailing of notice by the department of its action on the claim,]~~ consider the claim disallowed and ***file an appeal with the Nevada tax commission within the 30 days after the last day of the 6-month period. If the claimant is aggrieved by the decision of the commission rendered on appeal, he 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.

2. If judgment is rendered for the plaintiff, the amount of the judgment must first be credited towards any fee or tax due from the plaintiff.

3. The balance of the judgment must be refunded to the plaintiff.

Sec. 25. NRS 365.310 is hereby amended to read as follows:

365.310 1. The department ~~[shall have power to]~~ ***may*** suspend, cancel or revoke the license of any dealer refusing or neglecting to comply with the provisions of this chapter.

2. If a dealer becomes delinquent in the payment of excise taxes as prescribed by this chapter to the extent that his liability exceeds the total amount of bond furnished by the dealer, the department shall suspend his license immediately.

3. Before revoking or canceling any license issued under this chapter, the department shall send a notice by registered or certified mail to the dealer at his last known address. The notice ~~[shall]~~ ***must*** order the dealer to show cause why his license should not be revoked by appearing before the department at Carson City, Nevada, or such other place in this state as may be designated by the department, at a time not less than 10 days after the mailing of the notice. The department shall allow the dealer an opportunity to be heard in pursuance of such notice, and thereafter the department ~~[shall have full power to]~~ ***may*** revoke or cancel his license.

Sec. 26. NRS 365.460 is hereby amended to read as follows:

365.460 After payment of any excise tax under protest duly verified, served on the department, and setting forth the grounds of objection to the legality of the excise tax, the dealer paying the excise tax may ***file an appeal with the Nevada tax commission pursuant to NRS 360.245. If the dealer is aggrieved by the decision of the commission rendered on appeal, he may*** bring an action against the state treasurer in ~~[the district court in and for]~~ ***a court of competent jurisdiction in*** Carson City ***, the county of this state where the dealer resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department,*** for the recovery of the excise tax so paid under protest.

Sec. 27. NRS 365.470 is hereby amended to read as follows:

365.470 1. No action authorized by NRS 365.460 may be instituted more than 90 days after ~~[the last day prescribed for the payment of the excise tax without penalty.]~~ ***a final decision is rendered by the Nevada tax commission on appeal.*** Failure to bring suit within the 90 days ~~[shall constitute]~~ ***constitutes*** a waiver of any and all demands against the state on account of alleged overpayment of excise taxes.

2. No grounds of illegality of the excise tax ~~[shall]~~ ***may*** be considered by the court other than those set forth in the protest filed at the time of the payment of the excise tax.

Secs. 28-30. (Deleted by amendment.)

Sec. 31. NRS 372.135 is hereby amended to read as follows:

372.135 ***1.*** After compliance with NRS 372.125, 372.130 and 372.510 by the applicant, the department shall ~~[grant]~~ ***:***

(a) Grant and issue to each applicant a separate permit for each place of business within the state.

(b) Provide the applicant with a full, written explanation of the liability of the applicant for the collection and payment of the taxes imposed by this chapter. The explanation required by this paragraph:

(1) Must include the procedures for the collection and payment of the taxes that are specifically applicable to the type of business conducted by the applicant, including, without limitation and when appropriate:

(I) An explanation of the circumstances under which a service provided by the applicant is taxable;

(II) The procedures for administering exemptions; and

(III) The circumstances under which charges for freight are taxable.

(2) Is in addition to, and not in lieu of, the instructions and information required to be provided by NRS 360.2925.

2. A permit is not assignable ~~[,]~~ and is valid only for the person in whose name it is issued and for the transaction of business at the place designated on it. It must at all times be conspicuously displayed at the place for which *it is* issued.

Sec. 32. NRS 372.660 is hereby amended to read as follows:

372.660 1. ~~[Interest]~~ ***Except as otherwise provided in NRS 360.320, interest*** must be paid upon any overpayment of any amount of tax at the rate of one-half of 1 percent per month from the last day of the calendar month following the period for which the overpayment was made. No refund or credit may be made of any interest imposed upon the person making the overpayment with respect to the amount being refunded or credited.

2. The interest must be paid:

(a) In the case of a refund, to the last day of the calendar month following the date upon which the person making the overpayment, if he has not already filed a claim, is notified by the department that a claim may be filed or the date upon which the claim is certified to the state board of examiners, whichever is earlier.

(b) In the case of a credit, to the same date as that to which interest is computed on the tax or amount against which the credit is applied.

Sec. 33. NRS 372.680 is hereby amended to read as follows:

372.680 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ ***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 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.

Sec. 34. NRS 372.685 is hereby amended to read as follows:

372.685 If the department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may ~~[, before the mailing of notice by the department of its action on the claim,]~~ consider the claim disallowed and ***file an appeal with a hearing officer within 45 days after the last day of the 6-month period. If the claimant is aggrieved by the decision of the hearing officer on appeal, he may, pursuant to the provisions of NRS 360.245, appeal the decision to the Nevada tax commission. If the claimant is aggrieved by the decision of the commission on appeal, he may, within 45 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.

Sec. 35. NRS 372.705 is hereby amended to read as follows:

372.705 The department may recover any refund or part of it which is erroneously made and any credit or part of it 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.

Sec. 36. NRS 372.710 is hereby amended to read as follows:

372.710 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.

Sec. 37. NRS 372.750 is hereby amended to read as follows:

372.750 1. Except as otherwise provided in this section, it is a misdemeanor for any member of the tax commission or officer , ***agent*** or employee of the department to make known in any manner whatever the business affairs, operations or information obtained by an investigation of records and equipment of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular of them, set forth or disclosed in any return, or to permit any return or copy of a return, or any book containing any abstract or particulars of it to be seen or examined by any person not connected with the department.

2. The tax commission may agree with any county fair and recreation board or the governing body of any county, city or town for the continuing exchange of information concerning taxpayers.

3. The governor may, by general or special order, authorize ***the*** examination of the records maintained by the department under this chapter by other state officers, by tax officers of another state, by the Federal Government, if a reciprocal arrangement exists, or by any other person. The information so obtained may not be made public except to the extent and in the manner that the order may authorize that it be made public.

4. Upon written request made by a public officer of a local government, the executive director shall furnish from the records of the department, the name and address of the owner of any seller or retailer who must file a return with the department. The request must set forth the social security number of the owner of the seller or retailer about which the request is made and contain a statement signed by the proper authority of the local government certifying that the request is made to allow the proper authority to enforce a law to recover a debt or obligation owed to the local government. The information obtained by the local government is confidential and may not be used or disclosed for any purpose other than the collection of a debt or obligation owed to that local government. The executive director may charge a reasonable fee for the cost of providing the requested information.

5. Successors, receivers, trustees, executors, administrators, assignees and guarantors, if directly interested, may be given information as to the items included in the measure and amounts of any unpaid tax or amounts of tax required to be collected, interest and penalties.

6. Relevant information may be disclosed as evidence in an appeal by the taxpayer from a determination of tax due.

7. At any time after a determination, decision or order of the executive director or other officer of the department imposing upon a person a penalty for fraud or intent to evade the tax imposed by this chapter on the sale, storage, use or other consumption of any vehicle, vessel or aircraft becomes final or is affirmed by the commission, any member of the commission or officer*, agent* or employee of the department may publicly disclose the identity of that person and the amount of tax assessed and penalties imposed against him.

Sec. 38. NRS 374.140 is hereby amended to read as follows:

374.140 *1.* After compliance with NRS 374.130, 374.135 and 374.515 by the applicant, the department shall ~~[grant]~~ *:*

(a) Grant and issue to each applicant a separate permit for each place of business within the county.

(b) Provide the applicant with a full, written explanation of the liability of the applicant for the collection and payment of the taxes imposed by this chapter. The explanation required by this paragraph:

(1) Must include the procedures for the collection and payment of the taxes that are specifically applicable to the type of business conducted by the applicant, including, without limitation and when appropriate:

(I) An explanation of the circumstances under which a service provided by the applicant is taxable;

(II) The procedures for administering exemptions; and

(III) The circumstances under which charges for freight are taxable.

(2) Is in addition to, and not in lieu of, the instructions and information required to be provided by NRS 360.2925.

2. A permit ~~[shall not be assignable, and shall be]~~ ***is not assignable and is*** valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. ~~[It shall]~~ ***A permit must*** at all times be conspicuously displayed at the place for which ***it is*** issued.

Sec. 39. NRS 374.357 is hereby amended to read as follows:

374.357 1. A person who maintains a business or intends to locate a business in this state may apply to the commission on economic development for an abatement from the taxes imposed by this chapter on the gross receipts from the sale, and the storage, use or other consumption, of eligible machinery or equipment for use by a business which has been approved for an abatement pursuant to subsection 2.

2. The commission on economic development may approve an application for an abatement if:

(a) The goals of the business are consistent with the goals of the commission concerning industrial development and diversification;

(b) The commission determines that the abatement is a significant factor in the decision of the applicant to locate or expand a business in this state;

(c) The average hourly wage paid by the business to its employees in this state is at least equal to the average statewide industrial hourly wage as established by the employment security division of the department of employment, training and rehabilitation on July 1 of each fiscal year;

(d) The business provides a health insurance plan for its employees that includes an option for health insurance coverage for dependents of employees;

(e) The business is registered pursuant to the laws of this state or the applicant commits to obtain a valid business license and all other permits required by the county, city or town in which the business operates;

(f) The business will provide at least 10 full-time, permanent jobs in Nevada by the fourth quarter that it is in operation; and

(g) The applicant commits to maintaining his business in this state for at least 5 years.

3. An applicant shall, upon the request of the executive director of the commission on economic development, furnish to the director copies of all records necessary for the director to verify that the applicant meets the requirement of paragraph (c) of subsection 2.

4. The commission on economic development may approve an application for an abatement which does not meet the requirements of subsection 2 if the commission determines that such an approval is warranted.

5. If an application for an abatement is approved, the taxpayer is eligible for an abatement from the tax imposed by this chapter for 2 years.

6. If an application for an abatement is approved, the commission on economic development shall immediately forward a certificate of eligibility for the abatement to the Nevada tax commission.

7. If a business for which an abatement has been approved is not maintained in this state for at least 5 years after the commission on economic development approved the abatement, the person who applied for the abatement shall repay to the department the amount of the abatement that was allowed pursuant to this section before the failure of the business to comply unless the Nevada tax commission determines that the business has substantially complied with the requirements of this section. ~~[The]~~ ***Except as otherwise provided in NRS 360.320 and section 2 of this act, the*** person who applied for the abatement shall pay interest on the amount due at the rate most recently established pursuant to NRS 99.040 for each month, or portion thereof, from the last day of the month following the period for which the payment would have been made had the abatement not been granted until the date of the actual payment of the tax.

8. The commission on economic development shall adopt regulations which it considers necessary to carry out the provisions of this section.

9. As used in this section, unless the context otherwise requires, "eligible machinery or equipment" means machinery or equipment for which a deduction is authorized pursuant to 26 U.S.C. § 179. The term does not include:

(a) Buildings or the structural components of buildings;

(b) Equipment used by a public utility;

(c) Equipment used for medical treatment;

(d) Machinery or equipment used in mining; or

(e) Machinery or equipment used in gaming.

Sec. 40. NRS 374.665 is hereby amended to read as follows:

374.665 1. ~~[Interest]~~ ***Except as otherwise provided in NRS 360.320, interest*** must be paid upon any overpayment of any amount of tax at the rate of one-half of 1 percent per month from the last day of the calendar month following the period for which the overpayment was made. ~~[; but no]~~ ***No*** refund or credit may be made of any interest imposed upon the person making the overpayment with respect to the amount being refunded or credited.

2. The interest must be paid as follows:

(a) In the case of a refund, to the last day of the calendar month following the date upon which the person making the overpayment, if he has not already filed a claim, is notified by the department that a claim may be filed or the date upon which the claim is certified to the board of county commissioners, whichever date is earlier.

(b) In the case of a credit, to the same date as that to which interest is computed on the tax or amount against which the credit is applied.

Sec. 41. NRS 374.685 is hereby amended to read as follows:

374.685 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ ***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 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 county on account of alleged overpayments.

Sec. 42. NRS 374.690 is hereby amended to read as follows:

374.690 If the department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may ~~[, prior to the mailing of notice by the department of its action on the claim,]~~ consider the claim disallowed and ***file an appeal with a hearing officer within 45 days after the last day of the 6-month period. If the claimant is aggrieved by the decision of the hearing officer on appeal, he may, pursuant to the provisions of NRS 360.245, appeal the decision to the Nevada tax commission. If the claimant is aggrieved by the decision of the commission on appeal, he may, within 45 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.

Sec. 43. NRS 374.755 is hereby amended to read as follows:

374.755 1. Except as otherwise provided in this section, it is a misdemeanor for any member of the Nevada tax commission or ~~[official]~~ ***officer, agent*** or employee of the department to make known in any manner whatever the business affairs, operations or information obtained by an investigation of records and equipment of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof, or any book containing any abstract or particulars thereof to be seen or examined by any person not connected with the department.

2. The Nevada tax commission may agree with any county fair and recreation board or the governing body of any county, city or town for the continuing exchange of information concerning taxpayers.

3. The governor may, however, by general or special order, authorize ***the*** examination of the records maintained by the department under this chapter by other state officers, by tax officers of another state, by the Federal Government, if a reciprocal arrangement exists, or by any other person. The information so obtained pursuant to the order of the governor may not be made public except to the extent and in the manner that the order may authorize that it be made public.

4. Upon written request made by a public officer of a local government, the executive director shall furnish from the records of the department, the name and address of the owner of any seller or retailer who must file a return with the department. The request must set forth the social security number of the owner of the seller or retailer about which the

request is made and contain a statement signed by the proper authority of the local government certifying that the request is made to allow the proper authority to enforce a law to recover a debt or obligation owed to the local government. The information obtained by the local government is confidential and may not be used or disclosed for any purpose other than the collection of a debt or obligation owed to that local government. The executive director may charge a reasonable fee for the cost of providing the requested information.

5. Successors, receivers, trustees, executors, administrators, assignees and guarantors, if directly interested, may be given information as to the items included in the measure and amounts of any unpaid tax or amounts of tax required to be collected, interest and penalties.

6. Relevant information may be disclosed as evidence in an appeal by the taxpayer from a determination of tax due.

7. At any time after a determination, decision or order of the executive director or other officer of the department imposing upon a person a penalty for fraud or intent to evade the tax imposed by this chapter on the sale, storage, use or other consumption of any vehicle, vessel or aircraft becomes final or is affirmed by the commission, any member of the commission or officer, ***agent*** or employee of the department may publicly disclose the identity of that person and the amount of tax assessed and penalties imposed against him.

Sec. 44. NRS 375A.170 is hereby amended to read as follows:

375A.170 If the return provided for in NRS 375A.150 is not filed within the time specified in that section or the extension specified in NRS 375A.155, then the personal representative shall pay, ***except as otherwise provided in NRS 360.320 and section 2 of this act, and*** in addition to the interest provided in NRS 375A.205, a penalty equal to 5 percent of the tax due, as finally determined, for each month or portion of a month during which that failure to file continues, not exceeding 25 percent in the aggregate, unless it is shown that there was reasonable cause for the failure to file. If a similar penalty for failure to file timely the federal estate tax return is waived, that waiver shall be deemed to constitute reasonable cause for purposes of this section.

Sec. 45. NRS 375A.195 is hereby amended to read as follows:

375A.195 If it is claimed that a deficiency has been determined in an erroneous amount, any person who is liable for the tax may ~~[,]~~ ***appeal the determination to the Nevada tax commission pursuant to NRS 360.245. If the person who is liable for the tax is aggrieved by the decision of the commission on appeal, he may,*** within 3 years after the determination was made, bring an action against the State of Nevada in the district court having jurisdiction over the estate to have the tax modified in whole or in part.

Sec. 46. NRS 375A.205 is hereby amended to read as follows:

375A.205 1. The tax imposed by NRS 375A.100 does not bear interest if it is paid before the date on which it otherwise becomes

delinquent. ~~[If]~~ ***Except as otherwise provided in NRS 360.320 and section 2 of this act, if*** the tax is paid after that date, the tax bears interest at the rate set by the executive director, from the date it became delinquent until it is paid.

2. The executive director shall set and maintain the rate of interest for late payments at the highest rate permissible pursuant to section 4 of article 10 of the Nevada constitution.

Sec. 47. NRS 375A.215 is hereby amended to read as follows:

375A.215 1. If any personal representative fails to pay any tax imposed by NRS 375A.100 for which he is liable before the date the tax becomes delinquent, he must, on motion of the department, be required by the district court having jurisdiction over the estate to execute a bond to the State of Nevada in an amount equal to twice the amount of the tax, with such sureties as the court may approve, conditioned for the payment of the tax, plus interest on the tax at the rate of interest set by the executive director pursuant to NRS 375A.205 commencing on the date the tax became delinquent, ***unless otherwise provided in NRS 360.320 or section 2 of this act. The bond must be executed*** within a certain time to be fixed by the court and specified in the bond.

2. The bond must be filed in the office of the clerk of the court, and a certified copy must be immediately transmitted to the department.

3. If the bond is not filed within 20 days after the date of the filing of the order requiring it, the letters of the personal representative affected must be revoked upon motion of the department.

Sec. 48. NRS 375A.225 is hereby amended to read as follows:

375A.225 Interest must be paid upon any overpayment of the tax due under NRS 375A.100 at the rate of interest set by the executive director pursuant to NRS 375A.205. ~~[That]~~ ***Except as otherwise provided in NRS 360.320, the*** interest must be allowed from the date on which payment of the tax would have become delinquent, if not paid, or the date of actual payment, whichever is later, to a date preceding the date of the refund by not more than 30 days, as determined by the department.

Sec. 49. NRS 375A.690 is hereby amended to read as follows:

375A.690 ~~[If]~~ ***Except as otherwise provided in NRS 360.320 and section 2 of this act, if*** the board determines that a decedent dies domiciled in this state, the total amount of interest and penalties for nonpayment of the tax, between the date of the election and the final determination of the board, must not exceed an amount determined by applying the rate of interest set by the executive director pursuant to NRS 375A.205 to the amount of the taxes due.

Sec. 50. NRS 375B.190 is hereby amended to read as follows:

375B.190 If the return required by NRS 375B.150 is not filed within the time specified in that section or the extension specified in NRS 375B.160, the person liable for the tax shall pay, ***except as otherwise provided in NRS 360.320 and section 2 of this act, and*** in addition to the interest provided in NRS 375B.250, a penalty equal to 5 percent of the tax

due, as finally determined, for each month or portion of a month during which that failure to file continues, not exceeding 25 percent in the aggregate, unless it is shown that there was reasonable cause for the failure to file. If a similar penalty for failure to file timely the federal estate tax return is waived, that waiver shall be deemed to constitute reasonable cause for purposes of this section.

Sec. 51. NRS 375B.230 is hereby amended to read as follows:

375B.230 1. If it is claimed that a deficiency has been determined in an erroneous amount, any person who is liable for the tax may ~~[,]~~ ***appeal the determination to the Nevada tax commission pursuant to NRS 360.245. If the person who is liable for the tax is aggrieved by the decision of the commission on appeal, he may,*** within 3 years after the determination was made, bring an action against the State of Nevada in the district court having jurisdiction over the property which was transferred to have the tax modified in whole or in part.

2. The department shall give notice of the deficiency determined, together with any penalty for failure to file a return, by personal service or by mail to the person filing the return at the address stated in the return, or, if no return is filed, to the person liable for the tax. Copies of the notice of deficiency may in the same manner be given to such other persons as the department deems advisable.

Sec. 52. NRS 375B.250 is hereby amended to read as follows:

375B.250 1. ~~[If]~~ ***Except as otherwise provided in NRS 360.320 and section 2 of this act, if*** the tax is paid after the due date, the tax bears interest at the rate set by the executive director, from the due date of the return.

2. The executive director shall set and maintain the rate of interest for late payments at the highest rate permissible pursuant to section 4 of article 10 of the Nevada constitution.

Sec. 53. NRS 375B.270 is hereby amended to read as follows:

375B.270 1. If any person who is liable for the tax fails to pay any portion of the tax imposed by NRS 375B.100 on or before the date the tax is due, he must, on motion of the department, be required by the district court having jurisdiction over the generation-skipping transfer to execute a bond to the State of Nevada in an amount equal to twice the amount of the tax due, with such sureties as the court may approve, conditioned upon the payment of the tax, plus interest on the tax at the rate of interest set by the executive director pursuant to NRS 375B.250 commencing on the date the tax became due, ***unless otherwise provided in NRS 360.320 and section 2 of this act. The bond must be executed*** within a time certain to be fixed by the court and specified in the bond.

2. The bond must be filed in the office of the clerk of the court, and a certified copy must be immediately transmitted to the department.

Sec. 53.2. Section 17 of Assembly Bill No. 375 of this session is hereby amended to read as follows:

Sec. 17. NRS 361.570 is hereby amended to read as follows:

361.570 1. Pursuant to the notice given as provided in NRS 361.5648 and 361.565 and at the time stated in the notice, the tax receiver shall make out ~~[his certificate authorizing]~~ ***a certificate that describes each property on which delinquent taxes have not been paid. The certificate authorizes*** the county treasurer, as trustee for the state and county, to hold ~~[the]~~ ***each*** property described in the ~~[notice]~~ ***certificate*** for the period of 2 years after the first Monday in June of the year the certificate is dated, unless sooner redeemed.

2. The certificate must specify:

(a) The amount of delinquency ~~[,]~~ ***on each property,*** including the amount and year of assessment;

(b) The taxes , and the penalties and costs added thereto, ***on each property,*** and that, except as otherwise provided in NRS 360.320 and section 2 of ***Senate Bill No. 362 of*** this ~~[act,]~~ ***session,*** interest on the taxes will be added at the rate of 10 percent per annum from the date due until paid; and

(c) The name of the owner or taxpayer ~~[,]~~ ***of each property,*** if known.

3. The certificate must state, and it is hereby provided:

(a) That ~~[the]~~ ***each*** property ***described in the certificate*** may be redeemed within 2 years after ~~[its date;]~~ ***the date of the certificate;*** and

(b) That ~~[, if not redeemed,]~~ the title to ~~[the]~~ ***each*** property ***not redeemed*** vests in the county for the benefit of the state and county.

4. Until the expiration of the period of redemption, ~~[the]~~ ***each*** property held pursuant to the certificate must be assessed annually to the county treasurer as trustee, and before the owner or his successor redeems the property, he shall also pay the county treasurer holding the certificate any additional taxes assessed and accrued against the property after the date of the certificate, together with ~~[the]~~ interest on the taxes at the rate of 10 percent per annum from the date due until paid, unless otherwise provided in NRS 360.320 or section 2 of ~~[this act.~~

~~5. The]~~ ***Senate Bill No. 362 of this session.***

5. ***A*** county treasurer shall take ~~[certificates]~~ ***a certificate*** issued to him ~~[under the provisions of]~~ ***pursuant to*** this section. ***The county treasurer may cause the certificate to be recorded in the office of the county recorder against each property described in the certificate to provide constructive notice of the amount of delinquent taxes on each property respectively. The certificate reflects the amount of delinquent taxes due on the properties described in the certificate on the date on which the certificate***

was recorded, and the certificate need not be amended subsequently to indicate the repayment of any of those delinquent taxes. The recording of the certificate does not affect the statutory lien for taxes provided in NRS 361.450.

Sec. 53.4. Section 48 of Assembly Bill No. 584 of this session is hereby amended to read as follows:

Sec. 48. NRS 360.417 is hereby amended to read as follows:

360.417 Except as otherwise provided in NRS 360.320 and section 2 of ***Senate Bill No. 362 of*** this ~~[act,]~~ ***session,*** and unless a different penalty or rate of interest is specifically provided by statute, any person who fails to pay any tax provided for in chapter 362, 364A, ~~[365,]~~ 369, 370, 372, ~~[373,]~~ 374, 377, 377A, 444A or 585 of NRS, or ***the*** fee provided for in NRS 482.313 , ~~[or 590.700 to 590.920, inclusive,]~~ to the state or a county within the time required, shall pay a penalty of not more than 10 percent of the amount of the tax or fee which is owed, as determined by the department, in addition to the tax or fee, plus interest at the rate of 1 percent per month, or fraction of a month, from the last day of the month following the period for which the amount or any portion of the amount should have been reported until the date of payment. The amount of any penalty imposed must be based on a graduated schedule adopted by the Nevada tax commission which takes into consideration the length of time the tax or fee remained unpaid.

Sec. 53.6. Section 87 of Assembly Bill No. 584 of this session is hereby amended to read as follows:

Sec. 87. NRS 365.310 is hereby amended to read as follows:

365.310 1. The department may suspend, cancel or revoke the license of any dealer ***or supplier*** refusing or neglecting to comply with the provisions of this chapter.

2. If a dealer ***or supplier*** becomes delinquent in the payment of excise taxes as prescribed by this chapter to the extent that his liability exceeds the total amount of ***the*** bond ***or bonds*** furnished by the dealer ~~[,]~~ ***or supplier,*** the department shall suspend his license immediately.

3. Before revoking or canceling any license issued under this chapter, the department shall send a notice by registered or certified mail to the dealer ***or supplier*** at his last known address. The notice must order the dealer ***or supplier*** to show cause why his license should not be revoked by appearing before the department at Carson City, Nevada, or such other place in this state as may be designated by the department, at a time not less than 10 days after the mailing of the notice. The department shall allow the dealer ***or supplier*** an opportunity to be heard in pursuance of ~~[such]~~ ***the*** notice, and thereafter the department may revoke or cancel his license.

Sec. 53.8. 1. Notwithstanding the provisions of NRS 365.470, if a person properly files an appeal with the Nevada tax commission pursuant to NRS 365.460 before January 1, 2002, and the commission fails to render a final decision on the appeal before that date, the person may commence an action against the state treasurer pursuant to NRS 365.460 not later than:

(a) April 1, 2002; or

(b) Ninety days after the last day prescribed for the payment of the excise tax without a penalty,

whichever occurs last.

2. The provisions of subsection 4 of section 54 of this act do not affect any actions commenced before January 1, 2002, against the state treasurer pursuant to NRS 365.460.

Sec. 54. 1. This section and sections 1 to 9, inclusive, 11 to 30, inclusive, 32 to 37, inclusive, and 39 to 53.8, inclusive, of this act become effective on July 1, 1999.

2. Section 10 of this act becomes effective at 12:01 a.m. on July 1, 1999.

3. Sections 31 and 38 of this act become effective on July 1, 2000.

4. Sections 26 and 27 of this act expire by limitation on December 31, 2001.

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Exhibit 17

MINUTES OF THE

ASSEMBLY Committee on Taxation

Seventieth Session

May 6, 1999

The Committee on Taxation was called to order at 1:40 p.m., on Thursday, May 6, 1999. Chairman David Goldwater presided in Room 3142 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All Exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. David Goldwater, Chairman

Mr. Roy Neighbors, Vice Chairman

Mr. Bernie Anderson

Mr. Morse Arberry, Jr.

Mr. Greg Brower

Mrs. Vivian Freeman

Ms. Dawn Gibbons

Mr. John Jay Lee

Mr. Mark Manendo

Mr. John Marvel

Mr. Harry Mortenson

Mr. Bob Price

Ms. Sandra Tiffany

COMMITTEE MEMBERS ABSENT:

Mr. John Jay Lee

GUEST LEGISLATORS PRESENT:

Senator Jon Porter, Clark County Senatorial District 1

STAFF MEMBERS PRESENT:

Ted Zuend, Fiscal Analyst

Nykki Kinsley, Committee Secretary

OTHERS PRESENT:

Bob Shriver, Executive Director,

Nevada Commission on Economic Development

Robin Holabird, Deputy Director, The Nevada Film Office

Andrea Reitan, Deputy Chief of Staff, Director of Communications,

Office of the Lieutenant Governor

Renny Ashleman, Representing

Association of Theatrical and Stage Employees Local 720

Carole Vilardo, President, Nevada Taxpayers Association

Keith Lee, Representing, Southwest Airlines

David Pursell, Executive Director, Department of Taxation

Kami Dempsey, Representing, Las Vegas Chamber of Commerce

Russ Fields, President, Nevada Mining Association

Clay Thomas, Assistant Chief, Motor Carrier Bureau,

Department of Motor Vehicles and Public Safety

Chairman Goldwater confirmed the airlines' support of the bill. Mr. Lee repeated they supported the bill with the preamble language in there. He thanked the committee for their consideration.

Chairman Goldwater closed the hearing on S.B. 287 and opened the hearing on S.B. 362.

Senate Bill 362: Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

A summary prepared by Mr. Zuend on the various changes throughout the bill was included in the recorded (Exhibit G).

Ms. Vilardo explained the Nevada Taxpayers Association requested Senator O'Connell introduce S.B. 362. It was a product of a bill the committee heard in the 1997 session, commonly known as the Taxpayers' Bill of Rights. She emphasized S.B. 362 was a complicated bill with seven major provisions drafted in analogous language. Since the bill covered Title 32 which was the administration of several taxes the language was added to insure the conformity and congruence with the rest of the bill. She provided an outline of the changes made to the bill (Exhibit H). Ms. Vilardo asked the Chair if he would like her to review the entire bill. Chairman Goldwater asked her only to examine the substantive sections.

Ms. Vilardo began by reminding the committee NRS 360 referred to the general administrative procedure of the Department of Tax and the Tax Commission. She explained section 2, page 1, line 3 through page 2, line 3 provided clarification regarding audit notification and audit extensions. Business owners accepted audits as a liability of running a business. However, if during an audit the Department of Tax requested an extension the taxpayer should not be responsible for penalties or interest accumulated during the extension. Sections 3 and 3.5 provided procedures for notifying the taxpayer of the outcome of the audit. In addition, it required the adoption of procedures concerning refunds.

Ms. Vilardo remarked section 4, page 2, lines 17 thought page 3, line 29 established an appeal process. In some instances, businesses found the Department of Tax did not have a statutory appeal process. The Department of Tax referred the aggrieved taxpayer to district court. The change allowed the taxpayer to appeal to the Tax Commission before the business and the state had incurred the legal expenses.

The next issue Ms. Vilardo referred to concerned the wording of the regulation concerning the county notification in A.B. 375 from the 1997 session. The contradictions prohibited its effectiveness. The Legislative Commission ruled they could not adopt the provision. S.B. 362 changed the language clarifying the county

notification procedures. She felt the provision would need more elaboration in the future. Ms. Vilardo's next point also related to provisions set forth in A.B. 375. In an appeal case, the Tax Commission and the Department of Tax would not file a simultaneous court action. The intent was to save money and hope the normal process for adjudication will processes all the states needs without additional burden on the business or the state.

Ms. Vilardo stated section 5 added two provisions to NRS 360.291. First, it required the Department of Tax to provide written instructions for bond procedures. Generally, a business posted a bond for the collection of sales tax. If the business went 36 consecutive months without a late payment, the business could request a reduction or release of the bond. The bill provided the taxpayer with written instructions explaining the procedures, which would reduce errors in the application process. Second, section 5 provided court cases concerning statutory conflicts regarding the collection or the remittance of taxes rewarded to the taxpayer. They based it on precedents of past court cases.

Ms. Vilardo continued explaining, section 7 had three changes, which were parallel to A.B. 12. First, it clarified the reliance upon written information from the Attorney General's Office. If the Attorney General's Office gave a taxpayer invalid information which affected their audit, the Department of Tax would not hold the taxpayer responsible for the penalty and interest for that audit. Second, it updated an older statute and increased the total amount of interest and penalties waived. The Department of Taxation suggested regulations would set the waived amount. The Tax Commission would set anything above the waived amount. To discourage abuse, the bill required a detailed report of the case to be submitted and filed.

Ms. Vilardo discussed the audit procedure. She contented the audits focused on specific business areas and did not extend to other areas. If targeted areas of the audited business were not deficient, yet another area was and discovered later, the taxpayer would not be responsible for the fine and back interest. She reported the Department of Tax would work out the procedures including a closure letter identifying the specific areas audited. Assuming the law remained the same, if they found a deficiency in the same areas during a subsequent audit the department could not collect a deficiency judgement. If it was a new area then they could collect the interest and penalties.

Ms. Vilardo described the graduated payment schedule in section 10, which they modeled after existing provisions in the proceeds chapter. Depending on the number of days of a late payment was where they started to escalate the percentage of the penalty. She believed the current 10 percent penalty for a day late payment was too harsh because they charged interest as well.

Ms. Vilardo explained section 13 provided an aggrieved taxpayer could file an appeal in Clark County as well as Carson City. It would give easier access. She commended the Tax Commission and Department of Tax for holding hearings in a location appealing to the appellant.

Ms. Vilardo remarked section 17, the net proceeds for tax on mines and minerals clarified the rights of taxpayers to file a claim for a refund. In addition, they changed provisions to conform to the provision in Assemblyman Marvel's bill. Section 18 reduced an interest rate in an overlooked section of A.B. 375 to 1 percent conforming the section to the rest of the bill. The Department of Tax, the bill drafters, and the Nevada Taxpayers Association agreed to the suggested changes clarifying sections 20 through 24, on the business tax.

Ms. Vilardo stated sections 31 through 37 amended the sale and use tax act. She remarked in most cases concerning taxes, the businesses were told for the privilege of doing business in Nevada they get to post bonds and be audited. They excepted the responsibility. However, they thought since they were audited, they had the right to know what their liabilities were for collecting the tax. They wanted detailed descriptions and definitions such as the circumstances under which services and freight charges were taxable, as well as administration exemptions. The Department of Tax needed time to prepare the information; therefore, it would become effective one year after passage. The sections also provided conforming language concerning NRS 372 and NRS 374.

Ms. Vilardo discussed sections 44 through 49 regarding NRS 375A on the estate tax. The language clarified the appeals procedures. Lastly, section 54 gave the effective dates most of which were this year.

Chairman Goldwater commended Ms. Vilardo's summary of the bill and called for questions from the committee.

Mr. Anderson questioned the filing procedure discussed in section 13. He realized Clark County had the largest population in Nevada. He asked for more clarification on the motivation for the change. He wanted to know if it was strictly because of the larger population or if there was another reason. Ms. Vilardo replied there were several reasons. Under the provisions in NRS 233B a taxpayer could file most contested cases within the appeal process with any court in the state. However, it required filing of certain cases in Carson City. She said she discussed the issue with several people at the Attorney General's Office and the Department of Taxation including Mr. Pursell. They agreed the provisions should conform to those in NRS 233B. Clark County was a reasonable choice because of the number of businesses and offices, which could handle the load. Ms. Vilardo stated she would agree to other counties across the state, if it did not create an additional burden with the Attorney General's Office.

Mr. Anderson thought it was the fact the Supreme Court was hearing appeals in Clark County. He repeated his question as to why Clark County should be the only one to receive the privilege. Ms. Vilardo referred the question to Mr. Pursell.

David Pursell, Executive Director, Department of Taxation, indicated when he spoke with Deputy Attorney General Norman Azevedo he understood they changed the provisions in the section 13 to conform with those in NRS 233B based on a population. He informed the committee if they needed further clarification he would discuss it with Mr. Azevedo and report back to them.

Mr. Anderson expressed curiosity as to why Clark County was the only county considered. He could understand if they chose it because of business registration or the appellate hearings. Ms. Vilardo remarked she requested Clark County because of the large number of cases from businesses in Clark County, which filed cases in Carson City. She said the Attorney General's Office told her Clark County would not add a fiscal note. She mentioned extending the filing to the entire state could cause the addition of a fiscal note to the bill.

Mr. Anderson asserted he did not want to impede the bill. Although, he thought the information would be helpful. Chairman Goldwater asked if either Ms. Vilardo or Mr. Pursell could provide the information for the committee. Assemblyman Marvel felt the other counties were unaffected by the addition of Clark County because they currently filed in Carson City anyway.

Kami Dempsey, Las Vegas Chamber of Commerce, testified in place of Kara Kelley. She said as an organization which represented over 6,000 businesses they were always in favor of law which eased the burdens for businesses. They were happy with the way the bill provided clear notification and greater due process for all taxpayers.

Russ Fields, President, Nevada Mining Association voiced his support for S. B. 362. He was happy with the revisions to the Taxpayers' Bill of Rights. He expressed approval of the net proceeds for tax on mines and minerals in section 17. Its inclusion was important. He thanked the Nevada Taxpayers Association and the Department of Taxation for their work on the bill.

Clay Thomas, Assistant Chief, Motor Carrier Bureau, Department of Motor Vehicles and Public Safety (DMV&PS) asked for clarification on the bill. The DMV&PS had reviewed the bill. They noticed on page 1, section 2 subsection 1, line 4 addressed provisions of the title such as using the wording the title encompasses part of what the Motor Carrier Bureau was responsible for in collecting taxes. It referenced the Department of Taxation. They wondered if it encompassed the Motor Carrier Bureau, and its function. They asked if they would still operate under their own statutes NRS 366, 702, and 482.

He informed the committee the Motor Carriers Bureau conducted over 400 audits. He explained their appeal process had four phases. Of the 400 audits they did not have any appeals beyond the second phase, their re-determination hearing. Chairman Goldwater asked if the bill would interfere with the expeditious appeals process of the Motor Carriers Bureau. Mr. Thomas replied he was unsure. The encompassing language in section 2 placed the statutes, which Motor Carriers Bureau followed under the jurisdiction of the bill. Therefore, it would allow the Tax Commission to hear the appeals of their audit. He felt the process they currently used was advantageous to the entities which used it. Chairman Goldwater thanked Mr. Thomas for calling attention to the matter. He said they would investigate it.

Chairman Goldwater confirmed the Department of Taxation acceptance of the bill. Mr. Pursell stated the department supported the bill. Chairman Goldwater closed the hearing on S. B. 362 and opened the hearing on S.B. 537.

Senate Bill 537: Revises provisions governing tax abatements for certain businesses. (BDR 32-708)

Included in the record was a summary prepared by Mr. Zuend on the various changes throughout the bill (Exhibit I).

Ms. Vilardo spoke in support of the bill. She began by telling the history behind the bill. It derived from the Legislative Committee investigation on the effects of the tax distribution. One of the issues identified after the 1997 session was the numerous tax abatements for a variety of industries. Some people referred to them as an exemption. However, exemptions exempted businesses without a qualified time period. Abatements had a specific time period. Nevertheless, from a long list compiled on property tax abatements, a bill the committee heard earlier in the session emerged. It set up parameters and criteria for the abatement. It was expanded to cover property tax, personal property tax, business tax and the sales tax.

Ms. Vilardo explained it was common for the parameters to change to fit a particular business the state wanted to attract by exempting them. Generally, the state looked at the exempting of an appealing industry then created the parameters for the abatement. Unfortunately, each time the legislature passed an abatement it did not match anything else.

As a result, Ms Vilardo became a member of a subcommittee along with Mr. Hobbs, Mr. Shriver, members of the Economic Development Committee in Reno, and Southern Nevada Development Authority, which charted out the exemptions and variations to draft legislation which would give the abatement more consistency. Ms. Vilardo told the committee she would speak generally on the bill and Mr. Shriver would speak on its specifics.

Chairman Goldwater stated they would put the bills the committee did not act on as well as those which needed amendments on the next work session document. He called for any other issues to come before the committee. Seeing none, Chairman Goldwater adjourned the meeting at 3:30 p.m.

RESPECTFULLY SUBMITTED:

Lori Fitzgerald,

Transcribing Secretary

Nykki Kinsley,

Committee Secretary

APPROVED BY:

Assemblyman David Goldwater, Chairman

DATE:

Exhibit 18

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UNITED STATES DISTRICT COURT

DISTRICT OF 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*; 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. This Court Lacks Subject Matter Jurisdiction Over the Amended Complaint Under the Tax Injunction Act

The primary purpose of the Tax Injunction Act is to "limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522, 101 S.Ct. 1221, 1233, 67 L.Ed.2d 464 (1981). The Tax Injunction Act is a withdrawal of federal court jurisdiction that cannot be waived. *S/N1 Reo Limited Liability Co. v. City of New London* 127 F.Supp.2d 287, 295-6 (D.Conn. 2000).

As such, this Court need not reach the merits of whether the live entertainment tax violates Federal Constitutional rights.[1] The sole issues on this motion are jurisdiction of the federal district court to decide the matter under the Tax Injunction Act and whether Plaintiffs are entitled to relief under section 1983 of title 42 of the United States Code and under the Eleventh Amendment of the United States Constitution. The motion concerns the proper forum for deciding the matter, not the underlying merits.

1. Plaintiffs Fail to Meet Burden of Pleading and Proving Jurisdiction

A party asserting jurisdiction in federal court has the burden of pleading and proving it. *Unicon Management Corp v. Koppers Company, Inc.*, 250 F.Supp. 850, 852 (D.C. N.Y. 1966). The burden of proof of showing lack of the state remedy in a matter subject to the Tax Injunction Act lies with the taxpayer. *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1242(11th Cir. 1991).

The items of relief requested by Plaintiffs—declaratory relief, injunctive relief, and damages—are squarely subject to the jurisdictional bar of the Tax Injunction Act, section 1341

[1] Defendants, in making the motion herein, have not taken any position on the merits on the substance of the matter.

of title 28 of the United States Code. As a further step invoking the Tax Injunction Act, the Amended Complaint alleges the existence of a remedy in state court, by citing to the relevant provisions of law. Amended Complaint, ¶1, incorporating by reference NRS Chapter 368A. Insofar as Plaintiffs seek relief that is on its face within the bar of the tax injunction act, their burden of pleading and proving jurisdiction extends beyond merely alleging a federal question. Plaintiffs bear the burden of pleading and proving that the remedy afforded under Nevada law is not plain, speedy or efficient. However, Plaintiffs have failed to meet their burdens.

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 bar any judicial remedy whatsoever as to the validity of the tax in question.

Plaintiffs' mere reference to NRS 386A.280(1) is, as a matter of law, an insufficient allegation of the lack of a plain remedy. By any reasonable interpretation of NRS Chapter 368A, Plaintiffs have a refund remedy that affords them the opportunity to have their constitutional challenges heard in state district court. A refund remedy meets the requirement for plainness, speed and efficiency contained in the Tax Injunction Act. As the U.S. Supreme Court noted in *California v. Grace Brethren Church*, 457 U.S. 393, 416, 102 S.Ct. 2498, 2512 (1982):

> (A)t the time that it passed the Tax Injunction Act, Congress was well aware that refund procedures were the sole remedy in many States for unlawfully collected taxes... (W)e do not believe that Congress intended federal injunctions and declaratory judgments to disrupt state tax administration when state refund procedures are available...

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[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).

The U.S. Supreme Court has thus already answered the question of whether the lack of injunctive or other equitable relief in state court was a sufficient basis for federal district court jurisdiction, and the answer is "no." Plaintiffs' allegations of the provisions of NRS 368A.280(1) are therefore not a sufficient pleading of lack of a plain remedy.

Notwithstanding the U.S. Supreme Court's clear pronouncement that an action for refund was in itself sufficient, Plaintiffs misconstrue the holding in *Grace Brethren Church* to suggest that the holding hinged on the availability of declaratory relief in state court. While the U.S. Supreme Court in that decision made passing references to the availability of declaratory relief in California, it did not consider the possible availability of such relief in any way vital:

> There is no dispute that appellees (taxpayers) in the present cases can seek a refund of the California unemployment tax through state administrative and judicial procedures. Once a taxpayer has sought from, and been denied by the appropriate state agency...he may file an action in Superior Court for a refund of the taxes paid, raising all argument against validity of the tax. ...If the taxpayer is unsuccessful at trial, he may appeal the decision to higher state courts and ultimately seek review in this Court. ... As the Court in *Rosewell* noted, **the "Act contemplates nothing more."**
>
> Id., at p. 413-414, 102 S.Ct. 2510-2511 (citation omitted)(emphasis added).

The issue of availability of declaratory relief, which had not been expressly ruled on by the California Supreme Court at the time of *Grace Brethren Church*, was thus not essential to the holding of the U.S. Supreme Court in that case.

As discussed at length in the moving papers, the provisions of NRS 368A.250-.320 afford taxpayers the opportunity to raise the constitutionality of the live entertainment tax in the context of a request for a refund in an administrative proceeding. That procedure is subject to judicial review. NRS 368A.290. On judicial review, a district court may set aside the agency decision if it violates constitutional or statutory provisions. NRS 233B.135(3)(a). In the event of an adverse decision in district court, the taxpayer has a right to appeal to the Nevada Supreme Court. NEV. CONST., art. 6, § 4, and NRS 233B.150. At that level, a taxpayer will get a declaration by an appellate court with regard to the Constitutionality of the tax, one way or another.

NRS 368A.280(1), ensconced as it is within the provisions setting forth the refund procedure, cannot be read to nullify the entire such procedure, as Plaintiffs would have this court read it to do. Harmonization of NRS 368A.280(1) with its surroundings is a proper method of interpretation. *Nevada State Dep't of Motor Vehicles v. Turner*, 89 Nev. 514, 517, 515 P.2d 1265 (1973). Plaintiffs' suggestion that NRS 368A.280(1) should be read to deny courts any authority to grant relief (see Plaintiff's Opposition, page 13), if accepted, would render it entirely inconsistent with NRS 368A.280(2) and NRS 368A.290, both of which clearly contemplate a day in court for taxpayers on all issues before the administrative agency.

Plaintiffs attempt to construe NRS 368A.280(1) in the same very broad fashion as the U.S. Supreme Court has construed the Tax Injunction Act. While the U.S. Court has read breadth into the Tax Injunction Act based on legislative history and against its equity backdrop (see, e.g., *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 526, 101 S.Ct. 1221, 1236 (1981)), Plaintiffs failed to bring forth any such history relating to NRS 368A.280(1) that would support their position.

Moreover, resort to rules of decisions of the Nevada Supreme Court and proper legislative construction leads to an interpretation exactly contrary to that which Plaintiffs assert. That an action for refund provides a plain remedy is supported by a decision cited by Plaintiffs, *State v. Scotsman Mfg. Co. Inc.*, 109 Nev. 252, 849 P.2d 317 (1993)(*Scotsman II*). *Scotsman II* involved a challenge to application of the local school support tax, NRS Chapter 374, to the taxpayer, a federal contractor providing housing to the Nevada Test Site. The provisions of NRS 374.635-.720 contain a refund remedy substantially the same as that found in NRS 368A.250-320.. Significantly, NRS 374.675 is almost identical to NRS 368A.280(1).[3]

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[3] Compare NRS 374.675 with NRS 368A.280(1):

NRS 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."

Under this substantially parallel legislative framework, most importantly the limitations of NRS 374.675, the Court in *Scotsman* affirmed a direct refund action of the tax, even though the taxpayer did not first pursue its remedy through the administrative levels. In doing so, the Nevada Supreme Court implicitly acknowledged that the refund remedy was available notwithstanding the limitations in NRS 374.675.[4] If the remedy of a refund action is available under NRS Chapter 374, it is available under NRS Chapter 368A, which is *in pari materia*. *State, Division of Insurance v. State Farm Mutual Auto Insurance Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000).

In summary, Plaintiffs offer an unreasonable interpretation of NRS 368A.280(1) in order to muddle a clear statutory refund procedure--in which the law makes the issue of constitutionality a basis for refund at the administrative level, fully reviewable on all legal grounds, including Constitutionality, in state court. Plaintiffs offer their unreasonable interpretation transparently for the purpose of suggesting that there is no plain remedy. Plaintiffs' assertion of jurisdiction based therein is "fatally flawed" in its legal premises and thus destined to fail." *Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys.*, Inc., 988 F.2d 1157, 1160 (Fed. Cir. 1993).

The dubiousness of Plaintiffs' concern about the plainness of the remedy is underscored by the apparent lack of any attempt on their part to pursue the refund procedure. They have not alleged, nor do they contend, in opposition to the subject motion, that they

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NRS 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."

[4] *Scotsman I and II* arguably imply declaratory relief is an available option. The Supreme Court suggested this when it noted "It (A refund) is the only effective remedy available to Scotsman; prospective relief alone (i.e., future exemption from tax) would hardly afford Scotsman a meaningful remedy for the unconstitutional deprivation of its property." *Scotsman (II), supra*, at 256, 849 P.2d at 320. When that case was earlier up on appeal, it was noted but not discussed that the suit was for declaratory relief. *Scotsman Manufacturing Co., Inc. v. State of Nevada*, 107 Nev. 127, 129, 808 P.2d 517, 518 (1991) (*Scotsman I*).

have so much as requested a refund in writing, even though the Live Entertainment Tax has been applicable as to non-gaming entertainers since 2003.

Therefore, under all authoritative judicial holdings cited in the moving and opposing memoranda of points and authorities, Plaintiffs' citation to NRS Chapter 368A.280(1), is insufficient to allege a lack of plain remedy.

b. Speediness

Plaintiffs do not allege in the complaint, nor do they offer any proof in their motion, of any delay concerning claims that they might have, let alone delay in an amount akin to that found acceptable in *Rosewell, supra.* Nor do they counter a mitigating factor present here and not in *Rosewell*--the availability of interest to the taxpayer under NRS Chapters 360 or 368A.

Rather, Plaintiffs argue a lack of speediness based on the fact that there is no absolute time limit on when the Commission must rule. This, however, is not the test under *Rosewell. Rosewell* looked to whether there is real, not hypothetical, delay. Additionally, *Rosewell* assessed speediness of the matter before it based on the duration of other proceedings. *Rosewell , supra*, 450 U.S. at 518-9, 101 S.Ct. at 1232. Likewise, Plaintiffs herein must allege and prove delay and that delay is excessive by comparison. The non-existence of a rule setting a time limit on the Commission's decisions creates only the possibility of delay, not real delay. In short, it does not prove Plaintiffs' case for them.

Furthermore, having failed to seek any remedy by way of request for refund or otherwise at the state level, Plaintiffs can hardly be believed in their assertion that such remedy is inadequate.

c. Efficiency

Plaintiffs fails to plead any basis for finding the refund remedy in NRS 368A to be inefficient. In opposition to this motion, Plaintiffs contend that the requirement of exhaustion of administrative remedies renders the state-law remedy inefficient. However, Plaintiffs fail to

cite to case law to support that a remedy is in and of itself inefficient under the Tax Injunction Act based on the requirement of exhaustion of administrative remedies.[5]

Plaintiffs further come to the erroneous conclusion that they will be required to exhaust administrative remedies that are futile, notwithstanding the holding in *Scotsman II.*, *supra*, 109 Nev. 252, 849 P.2d 317. The conclusion is erroneous for two reasons: (1) it assumes that the futility exception does not apply to the administrative remedies under NRS Chapter 368A; and (2) it assumes without proof that the administrative proceedings in fact would be futile.

The Nevada Supreme Court in *Scotsman* found two alternative scenarios of exemption from the requirement of exhaustion of administrative remedies: (1) the challenge is based on constitutional grounds, or (2) such remedies are futile. The first grounds would appear to not be present in the instant case, as the Nevada State Legislature expressly has decided that the Department of Taxation and the Commission should consider challenges to the constitutionality in the course of administrative proceedings. However, there is nothing in NRS Chapter 368A materially different from NRS Chapter 374, under consideration in *Scotsman,* which would lead to the conclusion that the legislature intended to override the futility exception.

Second, *Scotsman* does not support the proposition that administrative proceedings are futile in all cases, as suggested by Plaintiffs. Rather, it found, "under the facts" in the case before it, that such proceedings were futile because the claims were largely time-barred and the State had already taken a position as to the constitutionality of the tax at issue. *Id.* at 255-6, 849 P.2d at 320. In contrast, in the facts at hand, fewer than three years have passed since the Live Entertainment Tax became applicable to Plaintiffs, and, as such, Plaintiffs herein could still seek timely relief for all payments by way of an application for refund. Further, Plaintiffs offer no credible basis for disqualifying the Departments' administrative law

[5] Defendants, on the other hand, have cited to law. *Age Intern, Inc. v. Miller,* 830 F.Supp. 1484, 1492 (1993)

judges or the Commission from giving fair consideration to Plaintiffs' claims of unconstitutionality.

Plaintiffs further suggest that the requirements of filing monthly returns and pursuing a claim for a refund within three years somehow render the state remedy inefficient, by necessitating a number of lawsuits. Plaintiffs did not allege, and do not now substantiate, a "real risk of 'numerous suits between the same parties involving the same issues of law or fact.'" Plaintiff's Opposition to Defendants' Motion to Dismiss, page 18, lines 15-17, quoting *Matthews v. Rodgers*, 284 U.S. 521, 530, 52 S.Ct. 217, 221 (1932). On the contrary, under NRS Chapter 368A, Plaintiffs could file requests for refunds for the periods going back over the entire span of time at issue herein, and if denied, could proceed to judicial review thereon. Prospectively, there is nothing hindering consolidations. In the event that the Commission[6] or the Nevada Supreme Court were to decide that the Live Entertainment Tax were unconstitutional, that would be determinative as to Plaintiffs and similarly situated taxpayers, obviating further litigation. See NRS 360.291(1)(a) and (g) (requiring prompt refunds and consistent treatment taxpayers).

Overall, it is not required that the remedy be the best. It is respectfully submitted that Plaintiffs have an efficient remedy.

2. There is No "Facial Challenge" exception to the Tax Injunction Act

Plaintiffs assert that there is a facial challenge exception to the tax injunction act. However, they marshal no support from its legislative history. Rather they cite to *Hillsborough v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445 (1946), a decision that does not apply the Tax Injunction Act but rather looks to the equity rules in force before the Tax Injunction Act was enacted. Plaintiffs also quote *Dows v. City of Chicago*, 78 U.S. 108 (1870) (by way of *Grace Brethren Church)*, which dates back long before the Tax Injunction Act.

[6] While the taxpayer may seek judicial review of decisions by the Nevada Tax Commission, the Department may not. NRS 360.245(5) may not.

Plaintiffs' efforts to pass off decisions addressing the pre-Tax Injunction Act era as determinative of the Act's scope and meaning suffer from at least one major defect. The Tax Injunction Act was enacted to cut back on federal equity jurisdiction. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 526, 101 S.Ct. 1221, 1236 (1945)(court refused to equate "plain, speedy and efficient" remedy with "plain, adequate and complete" standard of equity). As support for that departure from prior law, the *Rosewell* court noted the persistent reasons for federal noninterference—a concern that if federal injunctive relief were unavailable that

> "(S)tate tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. "

Id. at 527, 101 S.Ct. at 1236 (quoting Justice Brennan's opinion in *Perez v. Ledesma*, 401 U.S. 82, 128, n. 17, 91 S.Ct. 674, 699 (1971), concurring in part and dissenting in part.).

Further, *Rosewell* itself distinguished *Cromwell, supra*, noting that *Cromwell* did "no more than confirm that 'the statute (the Tax Injunction Act) has its roots in equity practice.'" *Rosewell*, supra, 450 U.S. at 525, 101 S.Ct. at 1235 (citation omitted).

Over all, none of the decisions cited by Plaintiffs establish an exception to the Tax Injunction Act for facial constitutional challenges. In asserting such an exception now, Plaintiffs are therefore requesting that this Court make new law, in disregard of the U.S. Supreme Court's already-stated refusal to carve "out a special exception for taxpayers raising First Amendment claims. ..." *California v. Grace Brethren Church, supra*, 457 U.S. at 416-7, 102 S.Ct. at 2512.

3. Relief Under 42 U.S.C. §1983 Is Unavailable to Plaintiffs

Plaintiffs appear to concede that they cannot obtain damages against Defendants under section1983 of title 42 of the United States Code, since Defendants are not persons within the meaning of the statute. Rather, Plaintiffs seek leave to amend the Complaint a second time to include an official with the state government, for the purpose of seeking injunctive relief.

Aside from the fact that such claims are also barred under the Tax Injunction Act, without a proper motion for leave attaching a copy of the proposed second amended complaint, the

Court should deny the motion for failure to comply with L-R 15-1, which requires attachment of the original amended pleading.

4. Monetary Relief Is Unavailable In Federal Court Under the Eleventh Amendment.

None of the authorities cited by Plaintiffs for this Court granting monetary relief support a conclusion that the Eleventh Amendment allows claims for monetary relief against unconsenting States. The only case authority cited by Plaintiffs, *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S.Ct. 523 (1997), is not on point in the following respects: (1) it did not involve an action for monetary relief; and (2) it did not involve a state government or state officer in his official capacity, the Eleventh Amendment generally only applying to actions against states (*see, e.g., Lincoln County v. Luning*, 133 U.S. 529, 10 S.Ct. 363 (1890)), and (3) the defendant therein, City of Chicago, had itself removed to Federal Court, effectively consenting to suit in Federal Court even were it immune. *City of Chicago* thus does not stand for the proposition that this Court may award monetary relief against the Defendants absent their consent to suit under the Eleventh Amendment.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Tax Injunction Act precludes federal court jurisdiction over the subject action and that it must be dismissed as a whole. Further, Plaintiffs' claims for monetary relief must be dismissed on the grounds that Defendants are not "persons" under section 1983 of title 42 of the United States Code and that the Eleventh Amendment serves as a bar to said relief.

DATED THIS 14th day of June, 2006.

/s/ Dennis L. Belcourt
DENNIS L. BELCOURT

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada Attorney General's Office and that on the 14th day of June, 2006, I served the foregoing document via ECF to the following:

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/s/ Dennis L. Belcourt
DENNIS L. BELCOURT

Exhibit 19

CERTIFIED COPY

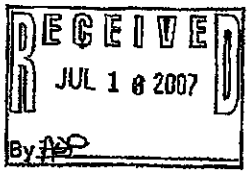
STATE OF NEVADA

TAX COMMISSION

TELECONFERENCED OPEN MEETING

MONDAY, JULY 9, 2007

CARSON CITY AND LAS VEGAS, NEVADA



THE BOARD:

THOMAS SHEETS, Chairman
HANK VOGLER, Member
JOHN MARVEL, Member
JOAN LAMBERT, Member
ROBERT BARENGO, Member
GEORGE KELESIS, Member
ANN BERSI, Member

FOR THE DEPARTMENT:

DINO DiCIANNO
Executive Director
TOM SUMMERS
Deputy Executive Director
CHRISTOPHER NIELSEN
Deputy Executive Director
ERIN FIERRO
Management Assistant

FOR THE BOARD:

JENNIFER CRANDALL
Senior Deputy Attorney General

REPORTED BY:

CAPITOL REPORTERS
BY: MARY E. CAMERON, RPR, CP
Nevada CCR #98
410 East John Street, Ste. A
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(775) 882-5322

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facility where live entertainment is provided, and the Department maintains that the LET is a generally applicable content neutral tax that presents no danger of suppressing particular ideas.

As such, the LET is subject to a rational basis review and passes constitutional muster because it's a reasonable means of raising revenue.

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.

MR. SHAFER: Thank you, Mr. Chairman and Members of the Commission. I guess I want to go back in regard to something that you said at the very end when you were talking to me about possibly supplementing the record, and I would just like to go through very briefly what we had discussed off the record a few moments ago, and that is the fact that Mr. Pope and I were having a discussion at approximately 3:30 eastern time Friday afternoon in regard to whether the Commission had in front of it the original version of the statute because the current version is different, the

Exhibit 20

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 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)

NAC 368A.170, NV ADC 368A.170

NV ADC 368A.170
END OF DOCUMENT

Exhibit 21

CERTIFIED COPY

STATE OF NEVADA

TAX COMMISSION

TELECONFERENCED OPEN MEETING

MONDAY, AUGUST 6, 2007

CARSON CITY AND LAS VEGAS, NEVADA

THE BOARD:	THOMAS SHEETS, Chairman HANK VOGLER, Member JOHN MARVEL, Member JOAN LAMBERT, Member DAVID TURNER, Member ROBERT BARENGO, Member GEORGE KELESIS, Member ANN BERSI, Member
FOR THE DEPARTMENT:	DINO DiCIANNO Executive Director CHRISTOPHER NIELSEN Deputy Executive Director ERIN FIERRO Management Assistant
FOR THE BOARD:	JENNIFER CRANDALL Senior Deputy Attorney General
REPORTED BY:	CAPITOL REPORTERS BY: MARY E. CAMERON, RPR, CP Nevada CCR #98 410 East John Street, Ste. A Carson City, Nevada, 89706 (775) 882-5322

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the taxes back to the people who paid them. I actually intended to address that first but they have not raised that in this presentation, so am I to assume that I do not have to address that?

MR. POPE: 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.

CHAIRMAN SHEETS: You ought to go ahead and address that, then.

MR. SHAFER: Thank you, Mr. Chairman. I think we are basically in the position where this NAC has never been utilized before because I think these are the first appeals of the live entertainment tax, and as I read this and all the NACs, all regulations are in our materials as I see it, it only applies when there is a determination of an over collection, number one, and I think what we're here to determine is whether we're entitled to a refund as opposed to what happens with that refund.

And to the extent that a refund is ordered, a

reversal is ordered by this Commission, I think we can address that issue, it would be appropriate to address that issue at that time if the Department still took that position.

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

we're trying to get back.

Now, irrespective of the fact that I don't believe this NAC even applies in these proceedings, you can take that representation of me as a matter of fact. I can submit the affidavits or I can put on one or two witnesses to talk about that, and I'd defer to the Commission how they want to handle that.

MR. POPE: May I respond?

CHAIRMAN SHEETS: All right.

MR. POPE: First of all, I would object even if it's just for the record to the extent that we just got these affidavits today and I'd object to the affidavits as well as any testimony.

CHAIRMAN SHEETS: Just to cut this short, we're going to accept counsel's representations with respect to the matter. That will solve the issue of the affidavits. We don't need testimony from the witnesses today.

And if as a result of the Commission's action this were to become an issue, we can come back another time and we can talk about this, even whether it's applicable or not. So let's not get caught up in a side issue. Let's talk about what we're really here to talk about this morning.

MR. POPE: So further comments should be reserved for another time on that issue?

CHAIRMAN SHEETS: That's right. If this becomes

way with --

MEMBER BARENGO: We're not regulating the dancers here.

MR. SHAFER: No, I understand, but your tax isn't on the dancers either. We have to pay the tax. We're the ones paying the tax.

MEMBER BARENGO: You collect the tax.

MR. SHAFER: I think we're paying the tax.

MEMBER BARENGO: You collect it from the person that seeks admission.

MR. SHAFER: Well, you can go through those gymnastics, but the charges as I pointed out at the very introduction of my presentation, we have not increased any of our fees in order to collect that tax. That tax is coming out of what would be the profits of the establishments.

MR. POPE: Chairman Sheets, may I make a quick comment to that?

CHAIRMAN SHEETS: Sure. Go ahead.

MR. POPE: I know we've reserved time to argue this, but the law does require that that admission charge be collected from the patrons and I believe it also requires that if it's included in the ticket or included in the admission charge, then there has to be some notification of that.

To the extent that it's not included as was

stated here today, that it's just being paid on behalf of the patrons, then I think it's difficult to say that the patrons aren't paying it even though they don't know that they are not. The law requires that it's being collected from the patrons and the appellants are paying it on behalf of the patrons.

MR. SHAFER: And because of our size we're also paying it on food, beverage and merchandise as well, and like I said at the beginning of my presentation, I'm sure you have not been in a store in your entire life where someone asked you your name or address to buyy a Coca-Cola, nor do I believe you've ever for the purchase of a Coca-Cola gotten a segregated tax bill for it.

CHAIRMAN SHEETS: Commissioner Bersi.

MEMBER BERSI: Mr. Shafer, I wasn't going to ask this question, but you are relying on legislative history a lot to make your points in your argument, and I notice in your Minneapolis Star case, the United States Supreme Court said we don't want to, and it's not our intent to, infringe on the motives of the Minnesota legislature because the illicit intent, and I think I'm getting this pretty close, the illicit intent of the legislature is not the sine qua non of a violation of the first amendment, so what do you make of that?

MR. SHAFER: Right, but respectfully I believe

problem with the legislature expanding their tax base.

In light of all that, reading the cases, the portions that I read from the cases, as well as reading the portions of the briefs I referred to, I would move that, I hope I get this correct here, I would move that we deny the refund claims; isn't that correct?

It would be a motion to deny the taxpayers' claim for refund.

CHAIRMAN SHEETS: It's a motion to deny the taxpayers' appeal of the Hearing Officer's decision or the Department's denial, I'm sorry.

MEMBER KELESIS: It would be a motion to uphold the Department's denial of the taxpayers' claims of refund.

CHAIRMAN SHEETS: There's a motion to uphold the Department's denial of the taxpayers' refund. Is there a second?

MEMBER LAMBERT: Second.

CHAIRMAN SHEETS: There's a motion and a second. Any discussion?

MEMBER TURNER: Mr. Chair, I would put one additional comment on the record. Counsel for the taxpayers, Mr. Shafer, argued that this is really a tax that's being absorbed by the businesses he represents.

It is a pass-through tax, and the businesses if the tax did not exist could reduce what they're charging to

their customers by the amount of the tax and have the same bottom line today.

Even though we didn't deal with this really in any depth during the course of our discussions with the Attorney General's office or the taxpayers' counsel, I would find in addition that a refund to the taxpayers being the clients of Mr. Shafer at this point in time would constitute an unjust enrichment at the same time.

CHAIRMAN SHEETS: There's a motion and a second. Further discussion? I guess before we vote, I just want to say a couple things and I'll let Commissioner Barengo speak too.

The Commission appreciates the depth of the materials that were provided to it and we appreciate the arguments you've made today. This is the first time since I've been on the Commission that I believe the Commission finds itself as a defendant in a lawsuit already filed attacking the same law that we are being asked to now administratively decipher.

Not that that has made any difference to the Chairman or I think to any other Commissioner, but it is a unique situation to be put into, to be a named defendant in a lawsuit and then after the fact be asked to make a determination about the underlying law.

There might have been a different way to do this,

Exhibit 22

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 KEVIN KELLY

Kevin Kelly, being first duly sworn, deposes and says:

1. I am an adult resident of the State of Nevada, and I make this affidavit based upon personal knowledge.

2. I am the President of K-Kel, Inc., doing business as *Spearmint Rhino Gentlemen's Club*, located at 3344 S. Highland Avenue, Las Vegas, Nevada, 89109.

3. Since the Live Entertainment Tax was imposed upon K-Kel, Inc., in 2004, it has not raised its admission charge, or its costs for food, refreshments 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. In addition, K-Kel, Inc., has never assessed, and the customers of K-Kel, Inc., 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. K-Kel, Inc., 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 K-Kel, Inc., 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 K-Kel, Inc., and not to the customers of its club.

FURTHER DEPONENT SAYETH NOT.

Dated: July 27, 2007

Kevin Kelly

Subscribed and sworn to before me this 27 day of July, 2007.

Notary Public, Clark County, Nevada
My commission expires 1-13-11

NOTARY PUBLIC
M. KELLEY MURPHY
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. JANUARY 13, 2011
No: 94-0478-1

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 K-Kel, Inc., and not to the customers of its club.

FURTHER DEPONENT SAYETH NOT.

Dated: July 27, 2007

Kevin Kelly

Subscribed and sworn to before me this 27 day of July, 2007.

Notary Public, Clark County, Nevada
My commission expires 1-13-11

NOTARY PUBLIC
M. KELLEY MURPHY
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. JANUARY 13, 2011
No: 94-0476-1

BEFORE THE NEVADA TAX COMMISSION

IN RE:

OLYMPUS GARDEN, INC., D.J. 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

Peter Feinstein

Subscribed and sworn to before me this 1 day of August, 2007.

Notary Public, Clark County, Nevada
My commission expires May 9, 2009

DAVID STARRETT
Notary Public, State of Nevada
Appointment No. 97-3473-1
My Appt. Expires May 9, 2009

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 ALSON LEE

Alson Lee, being first duly sworn, deposes and says:

1. I am an adult resident of the State of Nevada, and I make this affidavit based upon personal knowledge.

2. I am the General Manager of D. Westwood, Inc., doing business as *Treasures*, located at 2801 Westwood, Las Vegas, Nevada, 89109.

3. Since the Live Entertainment Tax was imposed upon D. Westwood, Inc., in 2004, it has not raised its admission charge, or its costs for food, refreshments 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. In addition, D. Westwood, Inc., has never assessed, and the customers of D. Westwood, Inc., 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. D. Westwood, Inc., 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 D. Westwood, Inc., 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 D. Westwood, Inc., and not to the customers of its club.

FURTHER DEPONENT SAYETH NOT.

Dated: July ___, 2007

Alson Lee

Subscribed and sworn to before me this 26th day of July, 2007.

Derek M. Nero

Notary Public, Clark County, Nevada
My commission expires 4/28/2009

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
DEREK M. NERO
No: 05-96553-1
My Appointment Expires April 28, 2009

BEFORE THE NEVADA TAX COMMISSION

IN RE:

OLYMPUS GARDEN, INC., D.L FOOD & BEVERAGE OF LAS VEGAS, LLC, SHAC, L.L.C., , D. WESTWOOD, INC., K-KEL, INC., THE POWER COMPANY, INC.,

Appellants.

AFFIDAVIT OF DOLORES ELIADES

Dolores Eliades, being first duly sworn, deposes and says:

1. I am an adult resident of the State of Nevada, and I make this affidavit based upon personal knowledge.

2. I am the General Manager of Olympus Garden, Inc., doing business as *Olympic Garden*, located at 1531 S. Las Vegas Boulevard, Las Vegas, Nevada, 89104.

3. Since the Live Entertainment Tax was imposed upon Olympus Garden, Inc., in 2004, it has not raised its admission charge, or its costs for food, refreshments 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. In addition, Olympus Garden, Inc., has never assessed, and the customers of Olympus Garden, Inc., 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. Olympus Garden, Inc., 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 Olympus Garden, Inc., 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 Olympus Garden, Inc., and not to the customers of its club.

FURTHER DEPONENT SAYETH NOT.

Dated: July 20, 2007

Dolores Eliades

Subscribed and sworn to before me this 30 day of July, 2007.

Marcia E Perez

Notary Public, Clark County, Nevada
My commission expires May 2, 2009

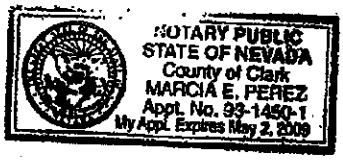

Exhibit 23

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

APPEARANCES:

FOR THE PLAINTIFFS:
WILLIAM H. BROWN, ESQ.
330 S. Third St., Ste. 860
Las Vegas, NV 89101

BRADLEY J. SHAFER, ESQ.
3800 Capitol City Blvd, Ste. 2
Lansing, MI 48906

FOR DEPT. OF TAXATION:
VIVIENNE RAKOWSKY, ESQ.
BLAKE DOERR, ESQ.
DAVID J. POPE, ESQ.
Attorney General's Office
555 E. Washington Ave., #3900
Las Vegas, NV 89101

COURT RECORDER:
YVETTE SISON-BRITT
District Court

TRANSCRIPTION BY:
VERBATIM DIGITAL REPORTING, LLC
Englewood, CO 80110
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

subject to the confidentiality provisions. And it says, Testimony by a member or employee of the Board or 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 of the records, files or information or the facts shown thereby are directly involved in the action or proceeding.

They put this evidence at issue in this case. And Your Honor, I don't want to remind you, but on two different occasions when we were here, you told Mr. Doerr, Mr. Doerr, Mr. Shafer doesn't have to, you know, rely on what you say. They're the ones that put these charts in as evidence. You denied my motion. I'm entitled to discovery of the evidence that they put in front of this Court, and that they're probably going to put in front of this Court either on a later Motion for Summary Judgment or at trial.

Now, I know some of the evidence that they've already -- you know, that they're already going to rely on because we have the Motion for Preliminary Injunction. All I'm trying to do is figure out what this is all about. I'm trying to get to the bottom of this. And Your Honor, that's why I believe this stuff is not subject to the privilege.

Again, we will -- we will agree to whatever protective order you want, attorneys eyes only, nothing goes

into a public deposition, depositions under seal. There aren't going to be people on the outside that are going to be deposed on this. Probably not, although now I have -- do have some names of some people from like the Reno Entertainment Commission, or something that I just got. So -- but setting aside that I probably won't have to depose any of those people, the people who are going to be deposed are going to be representatives of the state.

We can hold the whole trial in chambers, you know, under seal. I don't care. I'm not going out and giving any information to anyone. But I have to be able to have the data to be able to find out what it is they're relying on, what has been submitted to this Court by way of the various charts so that I can determine whether it's relevant, whether there's problems.

Your Honor, you'll also remember that in the chart, the big chart and the little chart before that, I gave you my copy that had underlines. I didn't even say I wanted breakdowns or anything. I wanted things in certain categories where I could make certain determinations of things I thought were relevant. And it wasn't like I was asking for 85 percent of what was there.

I gave you the red-line version. There were probably six categories in each one of the two. You remember there was a category for five percent live entertainment tax,

and another category, or another segregation of the ten percent, and I said I want the back-up documentation for that. And that is, I believe, what they gave you under seal in chambers however.

And that's what I'm looking for, Your Honor. And, you know, the unredacted versions of some of these pages. You know, I -- we went through -- remember when we were talking about the plans of the stealth fighter and I was showing you this, which is -- you know, I've got a couple hundred pages of this, you know. I'm not asking for that. That's not in my -- that's not even in my letter. So, Your Honor --

THE COURT: The record should reflect he showed me a black box, a page -- an eight by eleven page of papers sideways that had a big black box on it and maybe one little tiny little sentence along the bottom.

MR. SHAFER: And the record will reflect that Mr. Shafer is fanning his exhibit book where there's page after page after page of that. Thank you, Your Honor.

MR. DOERR: As opposed to the alleged disclosure of the plans for the stealth bomber, Your Honor.

MR. SHAFER: Which China already has, but that's another story.

THE COURT: Through Wikileaks.

MS. RAKOWSKY: May I please respond?

THE COURT: Yes.

MS. RAKOWSKY: Thank you. First of all, the statute allows the records of people directly involved. The people directly involved, which is different than the federal statute, this is directly involved, are the people on the title -- on the title of the pleadings. They're directly involved. And if their clients want that information and they don't have the records, we'll give them that information.

The people who are not directly involved are the other strip clubs, are the other people who pay LET, and are other taxpayers in this state who rely on the confidentiality and the privilege that's only given to the taxpayers themselves for the Department and those affiliated with the Department to keep that information confidential.

If the State were to start giving out taxpayer confidential information, it would have a huge impact on the ability to collect tax. I mean, we can't give that out. We've given him the totals. We've given Your Honor the classifications so you can see what -- how the -- it was determined that certain people are LET payers are gentlemen's club and there are other categories. We've given you the list of the -- of the businesses involved in those categories. We can't give this information to him because we can't give it out.

Secondly, with regards to the issue of him not getting refunds, I believe Mr. Shafer's kind of misquoting the

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

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: 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

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.

MR. DOERR: And Your Honor, may -- may I speak? Remember that the issue that he's speaking about, the issue of the refund, that's been adjudicated at the hearing officer and at the tax commission. He included it in his Complaint before Your Honor. We actually believe that should really be -- that issue should be here on a Petition for Judicial Review, not a bring more facts to you about this, not a rehearing of that.

That should be a review of the process. And we have talked about, as this proceeds, considering filing a motion to

have that issue severed. We think this is about the Constitution -- constitutional question. And I would like to point out --

THE COURT: Well -- I have --

MR. DOERR: -- that when Mr. Shafer --

THE COURT: -- I have a note here that says before you ever said these words, my note is, did I forget a Petition for Judicial Review, question mark. Because I'm not clear --

MR. DOERR: Well --

THE COURT: Anyway.

MR. DOERR: -- I think they're --

THE COURT: But let me just --

MR. DOERR: Okay.

THE COURT: -- let me ask you a question. I mean, part of your argument today is we never get to the Separation of Powers, judge, and we don't have to go there, speedy adequate remedy at law, the five years runs in -- and they'll have an answer and their money in a month -- in a year. Excuse me, not a month, a year.

Okay, that's the argument. But it -- but, you know, what Counsel is saying is that if you, the State, took the position that they wouldn't be entitled to these funds based upon some requirements of the Code, then it's really affording --

MR. DOERR: The refund can go back to the person who

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, it's 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

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.

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 --

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

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.

MR. POPE: Your Honor, if they collected it and remitted it, they have no harm, essentially have no standing. Why are we here?

MR. DOERR: In fact, they get a collection (indiscernible).

MR. SHAFER: Then nobody gets -- then nobody can ever get this back. Nobody can ever get this back. If that's their position, let them make that on the record, I'll change my whole case. I'll -- I'll say that, you know, we're here on behalf of the -- the customers, and the customers aren't going to do it so we have third-party standing to make a constitutional argument.

MR. POPE: But that's not why we're here today, Your Honor. We're here on a couple of things. We're on this -- this discovery issue. We're here on this preliminary injunction issue. And --

MS. RAKOWSKY: We're not here to argue the merits of this case.

MR. POPE: Or to change the claims or arguments.

MR. SHAFER: Your Honor, the question in regard to the Separation of Powers, as they stood up and argued to the Court, was that we had a just fine and dandy remedy, because we could make our request for refund. And I've just pointed out that of three attorneys, you get three different arguments from the State of Nevada in regard to what this tax is, who's

paying it, who's remitting it, who gets it back.

MR. POPE: That's his preliminary injunction argument, Your Honor. It's irrelevant, because they have the adequate remedy. And the -- the reasons the last time we were here, you said yeah, you're giving me reasons, but you're not telling me why. Well, the reasons and the why are they're combined. It's -- it's to protect the revenue collection for the State, and then those other reasons that I gave you today from that case.

You have to pay first, and sue later. It's not an irreparable harm. As long as you get your money back with interest you have not been harmed.

MR. DOERR: And remember, they're here about their -- the dancer's ability to do --

THE COURT: You know, there's the argument --

MR. DOERR: -- their first amendment activity.

THE COURT: One second. There's the argument that nothing prohibits your client from keeping track of all these people other than the incredible administrative costs that I can imagine that would take to pay back the --

MR. SHAFER: Yes.

THE COURT: -- non -- I mean, the --

MR. DOERR: Every other retailer has that opportunity and can --

MR. SHAFER: Yes.

MR. DOERR: -- or can't do that.

MR. SHAFER: Your Honor, yes, there is a reason. And we gave it to the Court previously. The U.S. Supreme Court and all the Federal Courts, they all acknowledge that people have the right to engage in First Amendment protected expression anonymously.

MR. DOERR: We agree.

MR. SHAFER: Your Honor, that is the sole basis of the Supreme Court lawsuit of last term that has all the democrats and all the unions up in arms where all these groups were able to funnel soft money into the Congressional campaigns of this year --

MR. DOERR: Is that relevant?

MR. SHAFER: -- that never have to report who that money came from. Those customers have the absolute right not to give that information.

MR. DOERR: So, Your Honor, then his client gets to keep all of their client's money. You see, if they get the refund, his client gets to keep all of his client's tax money that he got back.

MR. SHAFER: And our affidavits --

MR. DOERR: That's why the statute is set up the way it is.

MR. SHAFER: And the affidavits -- we actually have to constrain ourselves to the record at least in regard to the

administrative proceeding, the second case. And the affidavits say we never increased our door fees to account for the tax, we just paid it out of our regular revenues. That is what the affidavits say.

My clients paid that money. My clients are entitled to that money. They say through the NAC, they're not.

THE COURT: Okay. Are you --

MR. DOERR: We've said enough.

MR. POPE: Thank you, Your Honor.

THE COURT: Yes. I know you go a long time in between hearings in this matter, at least with me, so I appreciate the passion. I'm glad you come here ready to do battle and make my life miserable. Not because you don't do a good job because, quite frankly, I think you all do a great job. I just have so many decisions to make.

With regards to -- just so that I'm clear, the December 6th, 2010 letter that came to me that has 20 paragraphs you did or did not have a specific letter to the Court, just you have a general position that has been articulated very succinctly by counsel. You didn't put anything in a letter, correct?

MS. RAKOWSKY: Yes.

THE COURT: I'm not missing anything or am I?

MR. DOERR: I believe I provided that to you --

MS. RAKOWSKY: There was a chart --

Exhibit 24

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.

APPELLANTS' REPLY BRIEF IN OPPOSITION TO THE NEVADA DEPARTMENT OF TAXATION'S DENIAL OF APPELLANTS' REFUND REQUESTS

NOW COME Appellants, Olympus Garden, Inc., D.I. Food & Beverage of Las Vegas, LLC, SHAC, LLC, D. Westwood, Inc., K-Kel, Inc., and The Power Company, Inc. (also collectively referred to herein as the "Taxpayers"), by and through their attorneys, and hereby reply to the brief of the Nevada Department of Taxation (the "Department") requesting the Nevada Tax Commission (the "Commission") to uphold the Department's denial of Appellants' requests for refunds of the Live Entertainment Tax (simply the "LET") paid for the tax periods of January, February, March, and April of 2004.

I. STANDARD OF REVIEW

As there was no legal analysis set forth by the Department in its denial of the Taxpayers' requests for refunds, the Taxpayers agree that the Commission must review the Department's denial *de novo*.

II. STATEMENT OF FACTS AND HISTORICAL BACKGROUND

The Taxpayers have no major objections to the departments statement of facts and historical background other than to note that in the year 2005 the LET was modified to better capture and tax live adult entertainment and to exempt out any other significant payees under the 2003 version of the LET, other than providers of live adult entertainment. This is discussed more fully in Section III, B(3), *infra*.

III. ARGUMENT

A. THE LET IS A FACIALLY DISCRIMINATORY STATUTE THAT IS PRESUMED UNCONSTITUTIONAL

The Department contends that the LET is presumed valid until the contrary is clearly established. Dept.Br., p. 3. In response to this, the Taxpayers start by pointing out to the Commission that:

> "It is a fundamental precept of the First Amendment to the United States Constitution that all expression, whether it is written, pictorial or by way of performance, is presumptively protected against governmental interference and restraint."

Ellwest Stereo Theatre, Inc. v. Boner, 718 F. Supp. 1553,1560 (M.D.Tenn. 1989), citing Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Roaden v. Kentucky, 413 U.S. 496 (1973); and Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981).

Further, when considering the constitutionality of laws such as this, a number of important factors must be kept in mind. First, it has long been held that because of the recognized preferred position of First Amendment rights, there is no general presumption of constitutionality that would normally attach to other legislative enactments, contrary to the Department's assertion otherwise:

> "While state supreme court regulations and legislative and congressional acts are generally entitled to a presumption of constitutionality, [FN12] the preferred position of the first amendment greatly weakens such a presumption involving that amendment. See, e.g., Turchick v. United States, 561 F.2d 719, 724 (8th Cir. 1977); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973). See generally, Cahn, The Firstness of the First Amendment, 65 Yale L.J. 464 (1956). It is also inappropriate to apply such a presumption [of constitutionality] where the practical effect of doing so would be to greatly reduce the burden of proof on the part of the state in justifying its speech restrictions."
>
> FN12. However, the Supreme Court has recognized that enactments are subject to different presumptions of validity. Parham v. Hughes, 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed. 269, 274 (1979)"

Durham v. Brock, 498 F. Supp. 213, 221 (M.D. Tenn. 1980), *aff'd*, 698 F.2d 1218 (6th Cir. 1982).

Additionally, the State of Nevada has a Taxpayers Bill of Rights, which states that each taxpayer has the right "[t]o 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." N.R.S. § 360.291(1)(o) (emphasis added). The Taxpayers have established the invalidity of the LET, and there is no specific statutory provision that applies to First Amendment protected entertainment, since the interpretation of the exemption for "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitution," N.R.S. § 368A.200(5)(a), brings the Taxpayers' entertainment out of the realm of the LET.

Second, it is the government's ***general*** burden to substantiate the constitutionality of the infringement upon protected speech and expression rights, and not on the taxpayers as the Department contends. **Perry Education Ass'n. v. Perry Local Educator's Ass'n.**, 460 U.S. 37, 45 (1983) (direct infringement required strict scrutiny); and **Widmar v. Vincent**, 454 U.S. 263, 270 (1981) (incidental infringement required intermediate scrutiny).

Neither of the cases cited by the Department in arguing that LET enjoys a presumption of constitutionality - - unless the ***Taxpayers*** prove otherwise - - even involve First Amendment protected expression. It is clear that the implications on First Amendment speech modify the general burden threshold asserted by the Department, and the Department has not established otherwise.

B. THE LET IS CONTENT BASED, AND IS A FACIALLY UNCONSTITUTIONAL DIRECT TAX ON THE EXERCISE OF CONSTITUTIONAL FREEDOMS.

1. THE LET IS AN IMPERMISSIBLE TAX ON THE EXERCISE OF CONSTITUTIONAL FREEDOMS.

The Department attempts to distinguish the Taxpayers' reliance on **Murdock v. Commonwealth of Pennsylvania**, 319 U.S. 105 (1943), with reference to **Jimmy Swaggart Ministries v. Board of Equalization**, 493 U.S. 378, 385 (1990). Dept.Br., p. 3. First of all, it should be noted that in **Swaggart**, the taxpayer wanted an exemption from "a ***generally applicable*** sales and use tax" which "applies neutrally to ***all*** retail sales of tangible personal property made in California," for the religious materials distributed by his religious ministry. **Id.** at 389 (emphasis added). Here, the Taxpayers assert the unconstitutionality of a **limited** tax which is solely restricted to expression protected by the First Amendment. In addition, in the case before the Commission, the Taxpayers are arguing that they fall under a particular exemption to a law that is ***specifically***

directed at activity protected under the First Amendment.

In addition, while reaffirming its holding in **Murdock** that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment," **Swaggart**, at 386, the Supreme Court nevertheless upheld the California general sales and use tax, citing to its decision in **Follett v. Town of McCormick**, 321 U.S. 573 (1944):

> "We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities . . .a preacher is not 'free from all financial burdens of government, including taxes on income or property' and, 'like other citizens, may be subject to *general* taxation."

Swaggart, at 386-87, *citing* to **Murdock** and **Follett** (internal citations omitted) (emphasis in original). Here, the LET is most certainly ***not*** a generally applicable tax, is not a tax on income of an individual or a tax on property, nor is it a general tax applied to other citizens, as discussed by the Supreme Court. Taxpayers make no argument that they are exempt from general sales, property, and income tax. If that were the Taxpayers' argument, **Swaggart** would be applicable. Here, directly to the contrary, this Commission is asked to review a unique tax ***only*** applied to First Amendment protected activity.

The Department then attempts to discredit the Taxpayers' reliance upon **Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue**, 460 U.S. 575 (1983), by stating the case is inapplicable because it "only applies to the protections of the institution of the press, not to the more general protections of freedom of expression that Taxpayers are invoking in this matter." Dept.Br., p. 5. In support of this, the Department references a quote from Justice Potter Stewart in the **Minneapolis Star** opinion, which the Department contends demonstrates the Framers' preference towards protecting press over "general protections of freedom of expression." The Taxpayers aver in response that the Commission should hear from Thomas Jefferson himself regarding the importance of free speech ***and*** press to the Framers:

> "'(The First Amendment) thereby guard(s) in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. . . .' 8 The Works of Thomas Jefferson 464-465 (Ford ed. 1904)"

Gertz v. Robert Welch, Inc., 418 U.S. 323, 357 (1974) (clarification in original).

Moreover, at least one court has directly addressed and rejected the Department's argument that strict scrutiny only applies to selective taxation of the press. Vermont Society of Association Executives v. Milne, 779 A.2d 20, 23 (Vt. 2001) ("Because the State questions the general notion of applying heightened scrutiny to a tax directed at lobbyists, as opposed to the press, we first consider the status of lobbying as a protected First Amendment interest"). After determining that the act of lobbying was protected by the First Amendment speech guarantee, the court had no trouble concluding that the Supreme Court precedent clearly established that all taxes singling out First Amendment rights were subject to strict scrutiny:

> "The Court in Grosjean [297 U.S. 233 (1936)] emphasized, however, that a tax singling out interests protected by the First Amendment cannot stand. Id. at 244, 250, 56 S.Ct. 444 (it is settled law that freedoms of speech and press 'are rights of the same fundamental character' safeguarded against abridgment by state legislation). . . . Accordingly, the Court concluded that the abridgment clause prohibited not only laws that directly censored First Ament interests, but also laws that singled out those interests for special taxation. Id. at 248-250, 56 S.Ct. 444.
>
> * * *
>
> The United States Supreme Court has consistently adhered to this principle of disallowing special taxes that single out and burden First Amendment interests. For example, in Minneapolis Star [460 U.S. at 592], the Court Struck down, on two independent grounds, a special use tax imposed on paper and ink products consumed in the production of publications. The first ground, the one most relevant to the instant case, was that the tax singled out a First Amendment interest for special treatment. While acknowledging that the government can subject First Amendment interests to 'generally applicable' economic regulation without creating constitutional problems, the Court rejected the State's claim that the paper and ink tax was a substitute for the sales tax and thus part of a general scheme of taxation. Id. at 581, 103 S.Ct. 1365. The Court noted that its previous cases approving such economic regulation 'emphasized the *general applicability* of the challenged regulation *to all businesses*.' Id. at 583, 103 S.Ct. 1365 (emphasis added). The court reasoned that there is less concern 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. Id. at 585, 103 S.Ct. 1365. When the tax singles out a select group, however, the political constraint is absent, and 'the threat of burdensome taxes becomes acute." Id.

779 A.2d at 25-26 (emphasis in original) (parentheticals in original) (clarification added).

Further, the United Supreme Court has identified that even adult entertainment - - and not simply free press as the Department contends - - is entitled to the same protection from financial

disincentives and economic hardship. In the Supreme Court's most recent foray into "adult" entertainment jurisprudence, Justice Kennedy, in his critical concurring opinion, observed that:

> "...a city may not regulate the secondary effects of speech by suppressing the speech itself. ***A city may not, for example, impose a content- based fee or tax.***"

City of Los Angeles v. Alameda Books, 535 U.S. 425, 445 (2002) (Kennedy, J., concurring) (emphasis added). *See also* **Acorn Invs. Inc. v. City of Seattle**, 887 F.2d 219, 222 (9th Cir. 1989) (invalidating a discriminatory licensing tax involving adult businesses where the tax was not proved to be related to the costs of regulating such businesses); **TK's Video, Inc. v. Denton County**, 24 F.3d 705, 710 (5th Cir. 1994) (***"Government cannot tax First Amendment rights***, but it can exact narrowly tailored fees to defray administrative cost of regulation.").

Justice Kennedy's concurrence in **Alameda Books** is critical because most courts have noted that opinion to be the constitutional "holding" of that plurality decision of the Court pursuant to **Marks v. United States**, 430 U.S. 188 (1977).[1]

As noted above, and in their notices of appeal, the Taxpayers' activities (and the activities of any other taxpayer who presents live entertainment) are forms of expression protected by the First Amendment. In regard to these protections, it makes absolutely no difference that N.R.A. §

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[1]**Marks** is the case which describes how to discern the precedence of a plurality decision (the "holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds"). 430 U.S. at 193, *citing* **Gregg v. Georgia**, 428 U.S. 153, 169 n.15 (1976). Since the ruling in **Alameda Books**, courts have consistently held Justice Kennedy's concurring opinion to in fact be the holding of that decision. *See, e.g.*, **Ben's Bar v. Village of Somerset**, 316 F.3d 702, 721-22 (7th Cir. 2003)(challenging ordinance prohibiting the sale, use or consumption of alcohol on premises of "Sexually Oriented Businesses"); **SOB, Inc., v. County of Benton**, 317 F.3d 856, 861-62 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003)(challenging public indecency ordinance); **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)(Justice Kennedy's concurrence applied to both zoning and public nudity ordinances); **G.M. Enterprises, Inc. v. Town of St. Joseph**, 350 F.3d. 631, 637-38 (7th Cir. 2003), *cert. denied*, 125 S.Ct. 49 (2004)(the Justice's concurring opinion applying to, among other things, a dancer/patron "buffer zone" such as the one found in Chapter 6.54); and **World Wide Video of Washington, Inc. v. City of Spokane**, 368 F.3d 1186, 1193 (9th Cir. 2004) (challenging a zoning ordinance). *Cf.*, **Center for Fair Public Policy v. Maricopa County**, 336 F.3d 1153, 1163-64 (9th Cir. 2003) *cert. denied*, 541 U.S. 973 (2004)(a divided Ninth Circuit concluding that Justice Kennedy's "proportionality" test was not relevant to an hours-of-operation restriction),*cert denied*, 541 U.S. 973 (2004).

368A.200(5) limits the tax's application to for-profit entertainment. "Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive." **Cammarano v. U.S.**, 358 U.S. 498, 514 (1959). In fact, protecting one's ability to turn a profit from First Amendment activity benefits free expression, as can be readily cognized in the publication realm. *See* **Pacific Gas and Elec. Co. v. Public Utilities Com'n of California**, 475 U.S. 1, 32 (1986) (". . .protection of an author's profit incentive furthers rather than inhibits expression. . ."), *citing* **Harper & Row Publishers, Inc. v. Nation Enterprises**, 471 U.S. 539, 555-59 (1985).

Further, as a basic legal premise, a state may not impose a charge upon the exercise of a constitutional right. **Murdock**, 319 U.S. at 113. Nevertheless, a licensing fee levied upon "adult entertainment establishments" does not excessively burden First Amendment rights "so long as it is imposed as a regulatory measure to ***defray the cost of investigating the license applicant.***" **Broadway Books v. Roberts**, 642 F.Supp. 486, 493 (E.D. Tenn. 1986). The fee should be as minimal as necessary to meet the cost to the city. **Id.** The rationale for this rule is that "the power to impose a license tax on the exercise of . . . [First Amendment] freedoms is as potent as the power of censorship." **Murdock**, 319 U.S. at 113 (clarification added). "Speech cannot be ***financially burdened***, any more than it can be punished or banned, simply because it might" result in some problems to society. **Forsythe County v. Nationalists Movement**, 505 U.S. 123, 135 (1992) (emphasis added). And, "tax based on the content of speech does not become more constitutional because it is a small tax." **Id.** at 136.

The Department is certainly imposing more than a minimal fee on constitutionally protected live entertainment based on content, and has not set forth its rationale for laying that significant burden on protected expression. The burden of proving that the fees are necessary to cover the reasonable costs of the licensing scheme ***lies with the licensing authority***. *See, e.g.*, **Ellwest**, 718 F.Supp. at 1574 ; **Fly Fish, Inc. v. City of Cocoa Beach**, 337 F.3d 1301, 1315 (11th Cir. 2003) (". . . it is the City's burden to establish that its licensing fee is justified by the cost of processing the application"); and **Kentucky Restaurant Concepts, Inc. v. City of**

Louisville, 209 F.Supp.2d 672, 691-92 (W.D. Ky. 2002) (in striking down ordinance fees, the district court noted that the "principles governing whether a licensing fee is permissible are *well-established* . . ," and that the "municipality bears the burden of presenting evidence that its fee is necessary to defray the cost of administering the regulatory scheme") (emphasis added), *citing* Bright Lights, Inc. v. City of Newport, 830 F.Supp. 378, 385 (E.D. Ky. 1993), in turn *citing* Ellwest Stereo Theatre, 718 F.Supp. at 1574.

If the government does not fulfill this burden, the fee is void. *See, e.g.*, Acorn Investments, Inc. v. City of Seattle, 887 F.2d 219 (9th Cir. 1989) (Court of Appeals invalidated a $650.00 fee); Sentinel Communications Co. v. Watts , 936 F.2d 1189 (11th Cir. 1991) (evidence as to reasonableness of fee was insufficient); AAK, Inc. v. City of Woonsocket, 830 F. Supp. 99 (D.R.I. 1993) (fees for adult entertainment establishments struck down as unconstitutional). In addition, where protected speech is singled out for regulation, a heavy burden of justification is placed upon the licensing agency because "differential treatment. . . suggests that the goal of the regulation is not unrelated to suppression of expression and such a goal is presumptively unconstitutional." Minneapolis Star, 460 U.S. at 585.

This doctrine goes beyond the written word. As succinctly put by the United States Court of Appeals for the Fourth Circuit, "it is obvious that the First Amendment sets limit on the economic burdens that can be imposed upon the dissemination of protected materials," even against a store that "sold both books and films emphasizing sexual matters." Hart Bookstores, Inc. v. Edminsten, 612 F.2d 821, 827, 824 (4th Cir. 1979), ***cert. denied***, 447 U.S. 929 (1980).[2]

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[2]*See also*, United States v. National Treasury Employees Union, 513 U.S. 454, 468-69 (1995) (Court noted that "because compensation provides a significant incentive toward more expression" by artists, "by denying respondents that incentive, the honoraria ban induces them to curtail their expression" and therefore "unquestionably imposes a significant burden on expressive activity"); Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180 (1997) (the Court underwent a detailed economic analysis in determining what the First Amendment benefits and detriments were in regard to the F.C.C. "must carry" provision for cable t.v. broadcasters, and found that -- in invalidating the regulation -- an 11% decline in advertising revenues posed a "***serious risk*** of financial difficulty" and that stations would suffer "financial harm and possible ruin") (emphasis added); and Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 n.'s 7&8 (1975) (Court invalidated an ordinance that prohibited the showing of films containing nudity at drive-in theaters

The U.S. Supreme Court addressed the issue of economic impact on the First Amendment in Simon & Schuster v. Crime Victims Board, 502 U.S. 105 (1991), where it ruled unconstitutional the "Son of Sam" law which prohibited a criminal from earning a profit on books written about his or her criminal activity. The Supreme Court noted that such a regulation "imposes a financial disincentive," and that this "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." Id. at 611. Just as the state may not simply ban expression it dislikes, it cannot use financial disincentives and economic hardship to drive disfavored expression from the market.

More recently, the Supreme Court, in United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000), considered the constitutionality of a law which restricted the availability of certain cable television stations to broadcast adult material prior to 10:00 p.m. In finding the regulations unconstitutional, the Court noted that "the result was a significant restriction of communication, ***with a corresponding reduction in Playboy's revenues***." Id. at 809. (emphasis added). Even the four-member dissent (while noting that the constitutional analysis may not be the same as an absolute ban) stated that "laws that burden speech, say, ***by making speech less profitable, may create serious First Amendment issues***..." Id. at 838 (emphasis added). This case obviously does not involve the press, yet flies directly in the face of the Department's argument.

Through Chapter 368A, the exercise of these constitutional rights is *conditioned upon* and burdened by the payment of a substantial fee in the form of a tax. If the Taxpayers are unable to pay the tax imposed by Chapter 368A, they cannot then engage in the First Amendment activities encompassed by the regulations. Even though the tax is not due before the speech can be presented (a classic prior restraint situation) if the tax is high enough, it will prevent taxpayers from engaging in speech because they will be unable to make money. In light of the above jurisprudence, even free

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when the screen was visible from a public street or place, by concluding that the structural requirements necessary to comply with the ordinance would "increase the cost of showing films containing nudity;" that in certain circumstances theaters might avoid showing these movies rather than incur the additional costs; that this could result in individuals being unable to see such films; and that the ordinance was therefore unconstitutional in that it was a "restraint on free expression").

speech that is outside the realm of "free press" - - which the Department feels is the only type of "speech" that should be protected from such taxation - - is still not subject to impermissible taxation such as Chapter 368A.

2. THE LET DOES TAX DIFFERENTLY BASED UPON CONTENT

The Department's reliance on **Leathers v. Medlock**, 439 U.S. 439 (1991) is misplaced and must be rejected. The Department attempts to utilize **Leathers** to support the proposition that all tax legislation enjoys a presumption of validity and that legislatures have broad discretion to differential among speakers within those statutes however they may choose. **Leathers** does not support these propositions.

A proper understanding of **Leathers** begins with its context. **Leathers** is a continuation of **Arkansas Writers' Project**, 481 U.S. 221 (1987) ("**AWP**") and answers a very narrow question left open by **AWP**. Specifically, the **AWP** Court stated:

> "Because we hold today that the State's selective application of its sales tax to magazines is unconstitutional and therefore invalid, our ruling eliminates the differential treatment of newspapers and magazines. Accordingly, we need not decide whether a distinction between different types of periodicals presents ***an additional basis*** for invalidating the sales tax, as applied to the press."

481 U.S. at 223 (emphasis added).

Leathers simply answers this question left open by **AWP**. To be sure, the **Leathers** Court began its analysis by distinguishing the case at hand from **Grojean v. American Press Co.**, 297 U.S. 233 (1936), **Minneapolis Star & Trubune Co. v. Minnesota Comm'r of Revenue**, 460 U.S. 575 (1983), and **AWP**, *supra*. 439 U.S. 444-449. In this regard, the Court explained, "This is not a tax structure that resembles a penalty for ***particular speakers*** or particular ideas." **Id**. at 449. Hence, the Court determined that the only possible basis to deem the ***generally applicable sales tax***[3] scheme unconstitutional would be via the "additional basis" left unexplored by **AWP**:

> "Because the Arkansas sales tax presents none of the First Amendment difficulties that have lead us to strike down differential taxation in the past, cable petitioners can prevail only if the Arkansas tax scheme presents '***an additional basis***' for concluding that the State has violated petitioner' First Amendment rights. See **Arkansas**

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[3]This is why that case is not subject to the general doctrine that laws directed at First Amendment protected rights are ***presumed*** unconstitutional.

Writers', *supra*, 481 U.S. at 233...."

499 U.S. at 449 (emphasis added) (quotation in original).

In Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622 (1994), the Court clarified that whether strict scrutiny applies to a tax targeting a certain medium of speech depends on the structure of the tax. Id. at 660. Taxes which are structured like those in Minneapolis Star and AWP to target a certain medium receive strict scrutiny, even where there is no evidence of illicit motive. Id. On the other hand, generally applicable taxes that incidentally burden speech receive rational basis review, unless there is evidence of an illicit motive. Id. In this regard the Court stated:

> "It would be error to conclude, however, that the First Amendment mandates strict scrutiny for any speech regulation that applied to one medium but not others. In Leathers v. Medlock, 499 U.S. 439 (1991) for example, we upheld against First Amendment challenge the application of a ***general state tax*** to cable television services, even though the print media and scrambled satellite broadcast television services were exempted from taxation. As Leathers illustrates, the fact a law singles out a certain medium, or even the press as a whole, 'is insufficient by itself to raise First Amendment concerns.' Id., at 444. Rather, laws of this nature are 'constitutionally suspect only in certain circumstances.' Id., at 444. The taxes invalidated in Minneapolis Star and Arkansas Writers' Project, for example targeted a small number of speakers, and thus threatened to 'distort the market for ideas." 499 U.S., at 448. Although there was no evidence that an illicit governmental motive was behind either of the taxes, both were ***structured in a manner that raised suspicions*** that their objective was, in fact, the suppression of certain ideas. See Arkansas Writers' Project, *supra*, 481 U.S., at 228-229; Minneapolis Star, 460 U.S., at 585."

Turner Broadcasting, 512 U.S. at 660 (emphasis added).

The decisive question is thus whether the LET is "differential ***or*** content based on [its] face, such that improper intent could be inferred" or whether "the tax is generally applicable ***and*** content neutral on its face" Id. There can be no doubt that the LET is differential on its face like the tax in Minneapolis Star and not a generally applicable tax, like the one in Leathers, that happens to extend to live entertainment, but not other mediums of speech.[4]

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[4] It should be kept clear that the Taxpayers are facially challenging the tax as an unconstitutional differential tax on live entertainment generally and not erotic dancing specifically. The tax impermissibly singles out live entertainment for taxation, impermissibly taxes different forms of live entertainment differentially (via exemptions), and impermissibly treats venues of live entertainment differentially based on size.

A comparison of the LET to the taxes in **Minneapolis Star** and **Leathers** removes all doubt. **Leathers** involved a challenge to a an Arkansas sales "tax of general applicability." **Leathers**, 199 U.S. at 447. Specifically, "Arkansas' Gross Receipts Act imposes a 4% tax on receipts from the sale of all tangible personal property and specified services."[5] **Id.** at 441. Nevada has a similar sales and use tax, which is set forth in Chapters 360B and 372 of the Nevada Code. The taxpayers have not protested the payment of that sales and use tax and are not challenging it. Instead, the Taxpayers are challenging the LET which impermissibly ***singles out live entertainment for a special tax scheme.***

The LET is differential on its face. It singles out a single medium of speech for taxation like the tax in **Minneapolis Star**. The tax in **Minneapolis Star** was held "unconstitutional for two reasons." **Leathers**, 499 U.S. at 445. One of these reasons was that it singled out "a narrowly defined group to bear the full burden of the tax" – the press. **Id.** at 445-446 (*quoting*, **Minneapolis Star**, 460 U.S. at 592). The LET does the same, it singles out live entertainment for special taxation. This renders the tax constitutionally suspect and subjects it to strict scrutiny. There is no need to show even a scintilla of improper motive on the legislature's behalf. "**Minneapolis Star** resolved any doubts about whether direct evidence of improper censorial motive is required to invalidate a differential tax on First Amendment grounds: 'illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" **Id.** at 445 (*quoting*, **Minneapolis Star**, 460 U.S. at 592 (also stating, "We need not and do not impugn the motives of the Minnesota legislature....")). Therefore, since the structure of the LET renders it constitutionally suspect for singling out live entertainment, the LET is subject to strict scrutiny without any need for the Taxpayers to show discriminatory intent.

The LET is unconstitutional for two reasons. First, it is a specific tax - - not a general sales,

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[5] "Among the services on which the tax is imposed are natural gas, electricity, water, ice, and team utility services; telephone, telecommunications, and telegraph service; the furnishing of rooms by hotels, apartment hotels, lodging houses, and tourist camps; alteration, addition, cleaning, refinishing replacement, and repair services; printing of all kinds; ticket for admission to places of amusement or athletic entertainment, or recreational events; and fees for the privilege of having access to, or use of, amusement, entertainment, athletic, or recreational facilities." **Leathers**, 499 U.S. at 447.

income, property, or usage tax - - directed particularly at First Amendment rights. Second, by exempting out the vast majority of live entertainment, the LET is basically only aimed at a particular group of First Amendment actors. The forms of live entertainment that are actually subject to the LET and not limited are very limited. Further, the Department has failed to attempt to justify or even address the numerous other exemptions to the LET besides boxing and NASCAR.

3. THE NUMEROUS EXCEPTIONS TO THE LET AND ITS LEGISLATIVE HISTORY FIRMLY ESTABLISH DISCRIMINATORY INTENT BEHIND THE CONTENT-BASED REGULATION

Assuming, *arguendo*, that it is necessary for the Taxpayers to show discriminatory intent, such intent is clear and overwhelming in light of the numerous types of live entertainment that are exempt from the tax, leaving adult entertainment as the primary and near only taxpayer. If any doubt could remain, it is eradicated by the legislative intent, which demonstrates that this was exactly what the legislature meant to accomplish.

The Supreme Court has stated that "[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risk of view point and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." **City of Ladue v. Gilleo**, 512 U.S. 43, 52 (1994). In this case, the numerous exemptions reveal that the LET is in fact targeted principally, if not only, at adult entertainment facilities, which are protected by the First Amendment. The LET is therefore content specific; it is subject to strict scrutiny; and it is unconstitutional.

There was a similar pattern of exceptions in the case of **Church of Lukumi v. Hialeah**, 508 U.S. 520 (1993). The Church of Lukumi was a church that practiced the Santeria religion, which has animal sacrifice as one of the principle tenets of its belief system. One of the city ordinances in question was, on its face, a broad prohibition against "[W]hoever . . .unnecessarily. . . kills any animal." **Id.** at 573. It was determined, however,with both textual and as applied exceptions, that the city deemed "hunting, slaughtering of animals for food, eradication of insects and pests, and euthanasia as necessary." **Id.** at 537. The city justified the exceptions because it believed that "animal sacrifice is 'different' from the animal killings that are permitted by law []. According to

the city, it is 'self-evident' that killing animals for food is 'important'; the eradication of insects and pests is 'obviously justified'; and that euthanasia of excess animals 'makes sense'." Id. at 544. The Supreme Court determined that the city, by this pattern of exceptions, devalued the reasons given for precluding the killing of animals in a First Amendment (religious) context. Id. at 537-538. Thus, the ordinances in question, the Court determined, had "every appearance of a prohibition that society is prepared to impose upon [Santeria worshipers] but not upon itself." Id. at 545 (internal cite omitted).

Just as in the Lukumi case, the Department exempts numerous forms of live entertainment from the LET, including but not limited to: live entertainment at trade shows, shopping malls, restaurants, and amusement rides; music performed by musicians who move constantly through the audience; outdoor concerts; many performances at casinos; and vocal and instrumental music in a restaurant or lounge if the music doesn't interfere with conversation or cause patrons to watch. Yet the adult entertainment establishments are still required to pay the tax. Thus, the LET has every appearance of a prohibition that society is prepared to impose upon people engaged in erotic expression, but not upon itself. The Supreme Court established in Lukumi that such distinctions rendered a regulation unconstitutional:

> "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is ***not compelling. It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.***"

Id. at 546-547 (emphasis added, citations omitted).

There is no First Amendment protection given to NASCAR racing or boxing. Nor do people generally oppose or take issue with the type of musical or live entertainment provided in shopping malls, amusement rides, casinos, restaurants, or concerts. Yet, the LET does not apply to these activities. Instead, the LET essentially only applies to live entertainment that is in fact fully protected by the First Amendment. As is the case in Lukumi, such a tax must fail to pass constitutional scrutiny. It is also the case that such a tax "simply cannot be defended on the ground that partial prohibitions may affect partial relief." Florida Star v. B.J.F., 491 U.S. 524, 540 (1989).

Also, the Department only attempts to addresses two of the many exemptions set forth by the LET, boxing and NASCAR, without even discussing why the other forms of live entertainment are exempted. The Department cites the large amount of revenue brought in by the NASCAR races, however, no consideration is given to the amount of revenue and taxes live entertainment establishments are ***already*** paying in sales and income tax on top of the LET. The argument made by the Department is that the LET is simply a revenue generating measure, but even the legislative history of this tax demonstrates that the tax burden was simply shifted from the casinos (which are not protected activity under the Constitution) to the providers of live entertainment, which ***are*** protected by the First Amendment.

Furthermore, should any doubt remain, the legislative history unequivocally bears out the discriminatory intent of the legislature when it enacted the content-based LET. A salient example of this is the "Minutes of the Meeting of the Assembly Committee on Commerce and Labor" recorded during the 73rd Congressional Session on May 16, 2005, attached hereto as Exhibit A.[6] Since the Department was unable to located the document, the Taxpayers note that this was the committee meeting where it was debated whether to use the language "adult live entertainment" to better capture adult clubs in the amended versoin or whether that would make the target of the LET too obvious to the courts:

> **Chairwoman Buckley:**
> My biggest concern with the bill is its constitutionality.... 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 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?
>
> **Senator Titus**:

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[6] The Taxpayers duly recognize that this legislative history reflects debate on how the 2003 legislation should be modified rather than on the original enactment of the 2003 legislation. However, this does not detract from the fact the history unequivocally demonstrates that the 2003 legislation's tax burden befell live adult entertainment in a greatly disproportionate manner. Indeed, the discussion indicates that the tax failed to bring in the intended revenue because the 300-seat requirement, in action, excluded many of the adult clubs that were intended as a revenue source.

> At one time the brothels were included, so that would be broader. Your can make the argument that this is a special kind of business that poses special kinds of social problems and therefore you can attach them. It's worth doing, and if an elected court in the state wants to challenge it, that's fine. None of the parts of the Constitution are absolute and they're all subject to interpretation. They interpreted the property tax we recently passed as maybe constitutional, and we can see how flexible the Constitution is in Nevada. I think its worth the chance to put it in there.

ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess., p. 19 (May 16, 2005) (clarification added), Exhibit A.

The Minutes also elucidate that the intent behind the tax was to further ratchet up the tax burden on adult entertainment, even though adult entertainment was already paying the vast majority of the existing tax:

> **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 will do a better job of capturing adult live entertainment because it eliminates that 300 seating requirement.
>
> * * *
>
> Certainly the intent of the live entertainment tax was not to get nudist colonies, but ***to get striptease clubs.***
>
> * * *
>
> **Chairwoman Buckley:**
> I wonder if we could do it in a way that's a little broader but gets at the problems so we could 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.

Id. at 17-19 (names bolded in original) (emphasis added), Exhibit A.

This legislative history also explains that NASCAR racing and other sporting events were exempted from the bill because they were believed to be "family oriented" and not because of the "prodigious economic activity" that the Department has asserted as a pretext:

> **Senator Dina Titus, Clark County Senatorial District No. 7:**

> This eliminates seating requirements, which were problematic I 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. . . .
>
> * * *
>
> **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.

Id.

The 300-person seating requirement was, in fact, lowered to a 200-person seating requirement, even though adult entertainment was already paying four-times more in taxes that the next contributor under the LET. N.R.S. § 368A.200(5)(d),(e). The next largest contributor under the previous scheme was racetracks. Now racetracks are eliminated via the NASCAR exception and via the exception for all "[l]ive entertainment that is provided to the public in the outdoor area. . . ." N.R.S. § 368A.200(5)(o),(m). Now, in the Committee's own words, the taxes paid by any remaining providers of live entertainment that the legislature forgot to exempt "pale in comparison" to the amounts paid by adult entertainment establishments. ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess., p. 19 (May 16, 2005), Exhibit A.

Hence, the department cannot genuinely argue that this is not a content-based regulation that targets certain speech. Every path of analysis leads the LET directly to strict scrutiny.[7]

And, of course, the LET cannot survive strict scrutiny because the Department has failed to present a compelling governmental interest the tax promotes outside of raising revenues:

> "The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally. . . ."

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[7] This section as a whole also further addresses the Department's quizzical argument that the "LET classifications are not unconstitutionally overbroad," which merits no further discussion.

Minneapolis Star, 460 U.S. at 586. Since the Department has not even attempted to assert a compelling interest in taxing constitutionally protected live entertainment differently from businesses generally, the LET fails strict scrutiny and must be declared unconstitutional under the First Amendment and the correlating provisions of the Nevada Constitution.

C. THE TAXPAYERS ARE EXEMPT FROM TAXATION.

The Taxpayers have demonstrated that federal law holds that states are not permitted to impermissibly tax First Amendment protected expression. The Department again (as in its initial denial of the refund claims) does not state specifically why the Taxpayers' entertainment, which is clearly protected by the United States and Nevada Constitutions, is not exempt under N.R.S. § 368A.200(5)(a).

IV. CONCLUSION

For the reasons set forth above as well as the reasons set forth in the Taxpayers' Notices of Appeal, the Taxpayers respectfully request that this Commission reverse the Nevada Department of Taxation's denial of their request for refund of any and all Live Entertainment Taxes paid for the reporting periods of January, February, March, and April 2004, and all months forward.

Respectfully Submitted:

Dated: June 22, 2007

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CERTIFICATE OF SERVICE

I certify that I am an employee of Shafer & Associates, P.C., and that on the 22nd day of June, 2007, I served the foregoing Appellants' Reply Brief in Opposition to the Nevada Department of Taxation's Denial of Appellants' Refund Requests as indicated below:

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EXHIBIT A

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 Sherer

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

STAFF MEMBERS PRESENT:

Brenda J. Erdoes, Legislative Counsel
Diane Thornton, Committee Policy Analyst
Russell Guindon, Deputy Fiscal Analyst
Vanessa Brown, Committee Attaché

OTHERS PRESENT:

Dino DiCianno, Deputy Director, Nevada Department of Taxation
Bobbette Bond, M.P.H., Government and Community Affairs Manager, Culinary Workers Health Fund
Jack Jeffrey, Legislative Advocate, representing Southern Nevada Building and Construction Trades Council
Bob Ostrovsky, Legislative Advocate, representing Employers Insurance Company of Nevada
Nancyann Leeder, Nevada Attorney for Injured Workers, Nevada Department of Business and Industry
Valerie Rosalin, Director, Consumer Health Assistance, Office of the Governor
Robin Drew, Private Citizen, Las Vegas, Nevada
Jim Nadeau, Legislative Advocate, representing the Nevada Association of Realtors
Charlie Mack, Owner and Broker, Mack Realty Commercial Specialists, Las Vegas, Nevada; and President, Nevada Real Estate Commission
Buffy Dreiling, Legal Counsel, Nevada Association of Realtors, Reno, Nevada
Gail Anderson, Administrator, Real Estate Division, Nevade Department of Business and Industry
Joseph Johnson, Legislative Advocate, representing Independent Power Corporation, Reno, Nevada; and representing the Toiyabe Chapter of the Sierra Club
Bill Bible, President, Nevada Resort Association, Las Vegas, Nevada
Denis Neilander, Chairman, Nevada State Gaming Control Board
Terry Graves, Legislative Advocate, representing The Beach Night Club, Las Vegas, Nevada
Don Logan, President and General Manager, Las Vegas 51s Baseball Club, Las Vegas, Nevada
Joe Brown, Legislative Advocate, representing Las Vegas Motor Speedway, Las Vegas, Nevada
Chris Powell, General Manager, Las Vegas Motor Speedway, Las Vegas, Nevada

Scott Sherer, Legislative Advocate, representing Paramount Parks, Las Vegas, Nevada
Taylor Dew, Magical Hula Girls, Las Vegas, Nevada
Billy Johnson, Vice President and Chief Operating Officer, Las Vegas Wranglers, Las Vegas, Nevada
Richard Clauser, Naturist Society and The Naturist Action Committee
Sabra Smith-Newby, Legislative Advocate, representing The City of Las Vegas, Las Vegas, Nevada
Allen Lichtenstein, General Counsel, American Civil Liberties Union, Nevada
Don Soderberg, Chairman, Public Utilities Commission of Nevada
Jon Wellinghoff, Legislative Advocate, representing MGM/Mirage, Power Light Corporation, and Freus Corporation, Las Vegas, Nevada
Michael Yackira, Executive Vice President and Chief National Officer, Sierra Pacific Resources, Nevada Power, and Sierra Pacific Power Company, Nevada
Adriana Escobar-Chanos, Consumer Advocate and Chief Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General, State of Nevada
Mark Russell, Chairman, Nevada Renewable Energy and Conservation Task Force
Tim Carlson, Member, Renewable Energy Task Force
Fred Schmidt, Legislative Advocate, representing ORMAT, Sparks, Nevada
Dan Schochet, Vice President, ORMAT, Sparks, Nevada; and Geothermal Member, Nevada Renewable Energy Task Force
Robert Tretiak, Business Development Officer, International Energy Conservation, Las Vegas, Nevada

Chairwoman Buckley:
[Called the meeting to order. Roll called.] I'll open the hearing on S.B. 483.

Senate Bill 483: Establishes joint and severable liability for payment of certain taxes, interest and penalties administered by Department of Taxation. (BDR 32-394)

Dino DiCianno, Deputy Director, Nevada Department of Taxation:
Senate Bill 483 is brought to you on behalf of the Department of Taxation. The bill moves the provisions with respect to responsible party determinations from the sales tax provisions found in S.B. 372 and S.B. 374, and includes them into NRS [*Nevada Revised Statutes*] 360, which are the general administrative

Assemblyman Seale:
Are there other states on the West Coast that have an exemption on this kind of equipment as well?

Senator Rhoads:
I'm sure there are, but LCB [Legislative Counsel Bureau] staff would have to tell you that.

Chairwoman Buckley:
Thanks for that. We'll close the public hearing on S.B. 398 and open the hearing on S.B. 247.

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. This is an industry that should pay its fair share because it does put additional burdens on society in terms of law enforcement and alcohol regulation. Because these people don't pay workers' comp or any benefits, their employees often become a burden on social services of the state, so it's only fair they should contribute.

[Senator Titus, continued.] An amendment (Exhibit D) is being brought forward by the Nevada Resort Association and others who would like us to put in statute the regulations that have worked over the last 18 months. The Tax Commission did a good job of working those out, so we don't want to start that process all over again. I support putting those regulations in the statute; it's a good amendment. There's also an amendment (Exhibit E) to clarify that mechanical rides like you find in the "*Star Trek* Experience" would not be considered live entertainment. I don't have any problem with that amendment, either.

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.

If you are going to consider amendments to this bill, you might also consider amending the provision that's the severability clause. The clause says that if some part of this is found to be unconstitutional, it goes back to the old entertainment tax. We don't want that to happen, so it should be written to say if something is found unconstitutional the other part of the tax in this new bill would stand.

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

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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 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, LLC, 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

CERTIFICATE OF SERVICE

Date of Hearing: March 15, 2011
Time of Hearing: 9:00 a.m.

CERTIFICATE OF SERVICE

I hereby certify that on the February 22, 2011, the foregoing **PLAINTIFFS' OPPOSITION TO NEVADA DEPARTMENT OF TAXATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTARTINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983** was served on the party(ies) by e-mailing/delivering a copy the same by runner to the following:

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By _____
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