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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12/28/2010	Transcript – Matters/Request of Court – Entered 01/13/2012 (District Court Case Nos. A533273 and A554970)	11	2002-2018
12/09/2010	Transcript - Plaintiff's Motion for Preliminary Injunction/Separation of Powers Issue, Discovery Issues; and Trial Scheduling Issues – Entered 02/25/2011 (District Court Case Nos.: A533273 and A554970)	10	1778-1843
08/12/2010	Transcript - Plaintiffs' Objection to the Discovery Commissioner's Report and Recommendation Regarding Plaintiffs' Motion to Compel Discovery of Defendant / Nevada Department of Taxation's Opposition to Plaintiff's Objection to the Discovery Commissioner's Report and Recommendation Re: Plaintiffs' Motion to Compel Discovery of Defendants and Counter Motion to Strike – Entered 01/13/2012 (District Court Case No.: A533273)	10	1706-1769
01/13/2011	Transcript – Request of Court (Transferring Case to Judge Gonzalez) – Entered 02/25/2011 (District Court Case Nos. A533273 and A554970)	11	2026-2045
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DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	August 23, 2011

06A533273 Little Darlings Of Las Vegas LLC, K-Kel Inc, et al
vs
Nevada Dept Of Taxation, Olympus Garden Inc, et al

August 23, 2011 **9:00 AM** **All Pending Motions**

HEARD BY: Gonzalez, Elizabeth COURTROOM: RJC Courtroom 14C

COURT CLERK: Billie Jo Craig

RECORDER: Jill Hawkins

REPORTER:

PARTIES PRESENT:

Brown, William H.	Attorney
	Attorney
Doerr, Blake A.	Attorney
Ferrario, Mark E., ESQ	Attorney
Pope, David J.	Attorney
RAKOWSKY, VIVIENNE, ESQ	Attorney
Shafer, Bradley J., ESQ	Attorney

JOURNAL ENTRIES

- 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 ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983 AND TO DISMISS CASE 2 FOR FAILURE TO FILE A PETITION FOR JUDICIAL REVIEW OR ALTERNATIVELY FOR AN ORDER THAT CASE 2 PROCEED AS A JUDICIAL REVIEW...DEFENDANTS' MOTION TO COMPEL ON AN ORDER SHORTENING TIME

AS TO MOTION FOR SUMMARY JUDGMENT: Arguments by counsel. Court stated its findings, and ORDERED, Motion is GRANTED as to the issue of sole remedy. Counsel has 30 days to file a Petition for Judicial Review and matter to be randomly reassigned. The Court will make no comment

on the timeliness of the original filing and will make no comment on the extent of the record any other Judge may decide in making that decision. Opposition to be filed 30 days later. Counsel agreed to one-half day of Argument. Mr. Shafer requested the Court grant alternative relief and remand the case. COURT ORDERED, it was not inclined to do that. Upon inquiry of counsel, COURT ORDERED, further discovery is inappropriate.

AS TO DEFTS' MOTION TO COMPEL: COURT ORDERED, it had previously DISMISSED the damages.

MOT

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**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.: A533273
Dept. No.: XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON FACIAL CHALLENGE, FOR PERMANENT INJUNCTION, AND FOR RETURN OF TAXES

Date of Hearing: _____
Time of Hearing: _____

COME NOW Plaintiffs, by and through their attorneys of record, William H. Brown of the law firm of LAW OFFICES OF WILLIAM H. BROWN, ESQ., LTD., and Bradley J. Shafer, of the law firm of SHAFER & ASSOCIATES, P.C., and hereby respectfully move this Honorable Court for partial summary judgment and a permanent injunction enjoining the Defendants, and their officers, employees, agents, representatives, and all persons acting by, through, and for them, from enforcing, applying, and implementing Title 32, Chapter 368A of the Nevada Revised Statutes, for the reasons that it is unconstitutional on its face under Article I, §§ 9 and 10 of the Nevada Constitution, as well as the First and Fourteenth Amendments to the United States Constitution, and ordering the return of all taxes paid by Plaintiffs thereunder, along with interest.

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This Motion is made and based upon the Verified Complaint for Declaratory and Injunctive Relief, Damages, and Attorney Fees and Costs, the exhibits thereof, the following Points and Authorities, the exhibits and affidavit attached thereto, the submissions on file in this action, prior arguments of counsel, and the arguments of counsel to be made at the time of the hearing.

DATED this 22nd day of September, 2011

BY: */s/ William H. Brown*
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NOTICE OF MOTION

TO: Nevada Department of Taxation, Nevada Tax Commission, Nevada State Board of Examiners, and Michelle Jacobs, Defendants; and

TO: Defendants' Attorney, David Pope and Blake Doerr

PLEASE TAKE NOTICE that Plaintiffs will bring their Motion for Partial Summary Judgment on Facial Challenge, for Permanent Injunction, and for Return of Taxes for hearing before the District Court, Department XI, on the 25 of Oct, 2011, 9:00a, or as soon thereafter as counsel can be heard.

Dated this 22nd day of September, 2011.

BY: */s/ William H. Brown*
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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND AND FACTS

Plaintiffs operate commercial entertainment establishments in the City of Las Vegas, which present on their business premises live performance dance entertainment to the consenting adult public. Verified Complaint for Declaratory and Injunctive Relief, Damages, and Attorney Fees and Costs ("Comp."), at ¶¶ 27-34. The entertainment presented by the Plaintiffs constitutes speech and expression, as well as a form of assembly, protected by the First and Fourteenth Amendments to the United States Constitution,[1] as well as by Art. I, §§ 9 and 10 of the Nevada Constitution.[2] Comp., ¶ 36.

On or about July 22, 2003, the State of Nevada enacted Title 37, Chapter 368A of the Nevada Revised Statutes (hereinafter "Chapter 368A, or sometimes the "statute"), which modified the previous "Casino Entertainment Tax" and imposed, for the first time and subject to numerous and various exceptions, an excise tax on admission to any facility that provides defined "live entertainment." Comp., ¶ 22. This tax is sometimes referred to hereinafter as

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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, 23 P.3d 243 (2001)), the federal case law cited herein is applicable to Plaintiffs' Nevada constitutional challenges as well.

[2] Exotic dancing, in the form of clothed, "topless," and even fully nude entertainment, falls within the scope of the liberties, including the right to free expressive association, afforded by the First Amendment. *See, e.g.,* **Barnes v. Glen Theatre, Inc.**, 501 U.S. 560, 565(1991) (nude dancing receives protections under the Constitution); **City of Erie v. Pap's A.M.**, 529 U.S. 277, 289 (2000) (same); **Schad v. Borough of Mt. Ephraim**, 452 U.S. 61, 65-66 (1981) ("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 form official regulation"); and **Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County**, 274 F.3d 377, 396 (6th Cir. 2001), *citing* **Roberts v. United States Jaycees**, 468 U.S. 609, 622 (1984) (Court held that "the First Amendment protects the entertainers and audience members' right to free expressive association. They are certainly engaged in a 'collective effort on behalf of shared goals'").

the "Live Entertainment Tax," or simply the "LET." A copy of the version of Chapter 368A adopted in 2003 is attached hereto as Ex. 1. As originally enacted, the tax imposed by Chapter 368A was not applicable, under the terms of N.R.S. § 368A.200(5)(d), to live entertainment that was not provided at a licensed gaming establishment if the facility had a maximum occupancy of less than 300 persons. Ex. 1, § 368A.200(5)(d); and Comp., ¶ 25. However, on June 17, 2005, Chapter 368A was amended by Assembly Bill No. 554; a copy of which is attached hereto as Ex. 2. Among other things, Assembly Bill No. 554 reduced the scope of the exception as contained in N.R.S. § 368A.200(5)(d) from a maximum seating capacity limitation of 300 to 200. The stated purpose of this amendment was to specifically extend the tax obligation as contained in Chapter 368A to a number of the Plaintiffs' establishments that were not then subject to the LET. Comp., ¶ 26; and Ex. 2, § 368A.200(5)(d). For the same stated reasons, the LET was again modified in 2005, via Senate Bill 3 (Ex. 3, p. 13), to change the references in NRS 368A.200 from "seating capacity" to "occupancy." Then in 2007, via Assembly Bill 487 (Ex. 4) , the LET was modified to exempt "certain minor league baseball events . . ." (**Id**. at p. 1).

The current codified version of Chapter 368A, incorporating the amendments as contained in Assembly Bills No. 554 and 487, as well as Senate Bills, are attached hereto as Ex. 5, and unless designated to the contrary, any further references to the specific provisions of the Statute refer to the version as found as Ex. 5, while the previous version of the LET will be referred to as the "2003 LET."

The Defendants are the departments, boards, and individuals charged with enforcing Chapter 368A. They take the position that the Plaintiffs are all subject to the Statute, and the Defendants have required the Plaintiffs to pay the LET as mandated therein. Comp., ¶¶ 17-20,

27-34, 37. Contrarily, the Plaintiffs contend the tax imposed by Chapter 368A is both illegal and unconstitutional,[3] and that even if that is not the case, they are specifically exempted from paying the LET pursuant to the statutory exemptions as contained therein. Comp., ¶¶ 38-39, 53. Nevertheless, under threat of criminal prosecution and the imposition of fines and other penalties against them, Plaintiffs have all, beginning at various times, paid the LET mandated by Chapter 368A. Comp., ¶¶ 38.

Because the tax in question is specifically directed at activities protected by the First Amendment, Plaintiffs have brought their action, in part, pursuant to a federal civil rights statute, 42 U.S.C. § 1983, which permits actions at law and suits in equity to redress deprivations of constitutional rights. Comp., ¶¶ 1, 3, and 66.

II. PROCEDURAL HISTORY

In order to safeguard their constitutional rights, Plaintiffs, on April 18, 2006, filed suit in the United States District Court for the District of Nevada, Case Number CV-S-06-00480-RLH-RJJ, seeking similar remedies sought in the instant lawsuits[4]: A declaration that the LET is unconstitutional, an injunction against the enforcement of Chapter 368A, and return of the live entertainment taxes that had been paid. These same Defendants filed a motion to dismiss the federal action, claiming that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, precluded the federal court from having jurisdiction over the claims because there existed a "plain, speedy, and efficient remedy" in state court. The district court dismissed Plaintiffs' complaint on that basis (Ex. 7), and Plaintiffs appealed that dismissal to the United States Court of

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[3] Indeed, the Attorney General of Tennessee previously issued an opinion declaring that a similar tax proposed in that state would be unconstitutional. *See* Exhibit 6.

[4] As discussed herein, a subsequent action for refund, as permitted by Chapter 368A, was filed, and a Petition for Judicial Review is now pending.

Appeals for the Ninth Circuit, which affirmed the District Court's decision on May 20, 2008, in a three-paragraph order. Ex. 8.

In order to prevent their constitutional rights from further violation, Plaintiffs filed this instant action (Case No. A533273, referred to in this Motion as "Case 1") in December 2006. The Parties agreed, however, to extend the date for the Defendants to answer that complaint because, in an abundance of caution, a number these Plaintiffs filed, at approximately the same time, administrative claims for refunds.

Specifically, on February 27, 2007, within the three year statutory period under N.R.S. § 368A.260(1) for the filing of administrative refund claims, Plaintiffs K-Kel, Inc., Olympus Garden, Inc., SHAC, LLC, The Power Company, Inc., D.Westwood, Inc. and D.I. Food & Beverage of Las Vegas, LLC (identified herein as the "K-Kel Plaintiffs") filed individual requests for refunds of the LET that they had paid during certain months.[5] A redacted copy of one of those refund requests is attached as Ex. 9, which illustrates that the ***sole*** basis for the request for refund was the asserted unconstitutionality, and therefore inapplicability to the Plaintiffs, of the LET.

---

[5] Plaintiffs Deja Vu Showgirls of Las Vegas, LLC, and Little Darlings of Las Vegas, LLC (the "Deja Vu Plaintiffs"), did not become subject to the LET until Chapter 368A was amended in June of 2005, to reduce the seating capacity required for a facility to be subject to the LET from 300 to 200 persons. *See* N.R.S. § 368A.200(5)(d). Pursuant to N.R.S. § 368A.260(1), the statutory three year period for those two Plaintiffs to file their administrative requests for refunds did not then expire until mid 2008, and those Plaintiffs were not required to have, and had not yet, filed administrative claims for refund when Case 2 was filed. However, starting in August, 2008 (for the July 2005 tax period), the Deja Vu Plaintiffs began filing administrative claims for refund, and responded to the inevitable denials from the Department with monthly notices of appeal to the Commission. Subsequent to the filing of Case 2, the Department has responded to the monthly notices of appeal with identical acknowledgment letters stating that ***each appeal was being held in abeyance during the pendency of Case 2***. A sample of the Department's acknowledgment letter is attached hereto as Ex. 11.

The K-Kel Plaintiffs' requests for refunds were all summarily denied by the Nevada Department of Taxation on April 3, 2007 (example copy attached as Ex. 10). Those Plaintiffs all filed timely notices of administrative appeals, and the Nevada Tax Commission ("Commission") held hearings regarding the first set of denials in July and August of 2007. After the submission of materials and oral argument, the Commission denied Plaintiffs' appeals in October of 2007 (Ex. 12). On January 9, 2008, in accordance with N.R.S. §§ 368A.290(1)(b) and 368A.300(3)(b), which govern adverse decisions by the Commission, the K-Kel Plaintiffs timely filed a judicial complaint for refund, declaratory relief, injunctive relief, and damages. That action was assigned Case No. A554970 (referred to herein as "Case 2"). The status of that case is up in the air at present in light of recent rulings by this Honorable Court.

Plaintiffs filed an amended complaint in Case 1 on or about January 28, 2009, to add an "as applied" cause of action to the challenge against the LET. Although, at the time of filing of this instant motion formal orders had not been entered, at a hearing that occurred on August 23, 2011, this Court orally ruled on various motions brought by the Defendants. The Court issued a minute entry noting the "the Motion is GRANTED as to the issue of sole remedy," and instructing Plaintiffs to file a Petition for Judicial Review on Case 2 within 30 days. The Court also orally instructed Plaintiffs to bring the present motion within 30 days. This motion follows.

III. RELEVANT PROVISIONS OF CHAPTER 368A

Chapter 368A states, at N.R.S. § 368A.200(1), that "[e]xcept as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided." If the live entertainment is provided at a facility with a

maximum occupancy of less than 7,500,[6] the rate of tax is 10% of the admission charge to the facility plus 10% of any amounts paid for food, refreshments and merchandise purchased at the facility. If the live entertainment is provided at a facility with a maximum occupancy of at least 7,500, the rate of the tax is 5% of the admission charged to the facility. **Id.**

Chapter 368A defines an "[a]dmission charge" in N.R.S. § 368A.020 as:

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

The term "facility" is defined in N.R.S. § 368A.060 as follows:

> (a) Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:
>
> (1) An establishment that is not a licensed gaming establishment; or
>
> (2) A licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits.
>
> (b) Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment.

"[L]ive entertainment" is defined in N.R.S § 368A.090 as:

> [A]ny activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present.

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[6] All the facilities operated by the Plaintiffs have maximum occupancies of less than 7,500 persons. Comp., ¶ 35.

This definition includes, *inter alia*, "[d]ancing performed by one or more professional or amateur dancers or performers." N.R.S. § 368A.090(2)(a)(2).

Pursuant to N.R.S. § 368A.200(5), however, the tax imposed by Chapter 368A is not applicable to certain specifically listed situations. One of those exemptions includes "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitution." N.R.S. § 368A.200(5)(a).

Other provisions of Chapter 368A, and the numerous exceptions/exemptions thereto, will be discussed below.

IV. POINTS AND AUTHORITIES

A. STANDARDS FOR GRANTING INJUNCTIVE RELIEF.

The power of this Court to issue the injunctive relief requested here derives from Art. 6, § 6, of the Nevada Constitution, N.R.S. § 33.101, and N.R.C.P. § 65. Injunctive relief should certainly be granted here. All courts should hasten to grant injunctive relief where fundamental constitutional rights are involved, and where there is a chance that those rights will be curtailed or even only just "chilled." *See, e.g.*, **Sammartano v. First Judicial Dist.**, 303 F.3d 959, 973-74 (9th Cir. 2002). This is the solemn responsibility of the courts to guard and enforce each and every constitutionally protected right. **Zwickler v. Koota**, 389 U.S. 241, 248 (1967).

"Permanent injunctive relief is available where there is no adequate remedy at law . . ., where the balance of equities favors the moving party, and where success on the merits has been demonstrated." **State Farm Mut. Auto. Ins. Co. v. JafBros. Inc.**, 109 Nev. 926, 928, 680 P.2d 176, 178 (1993) (quoting 43 C.J.S. Injunctions § 16, 848 (1974)). As will be discussed below, Plaintiffs satisfy each of these standards.

B. THIS FACIAL CHALLENGE MUST EXAMINE THE LET BASED ON ITS TEXT, LEGISLATIVE HISTORY, AND EFFECT.

As it stands, the Court has limited Plaintiffs' challenge in this Case 1 to a facial challenge. A facial challenge to a law examines the constitutionally of the law without regard to its application to a particular plaintiff in a particular situation. *See, e.g.*, **Field Day, LLC v. County of Suffolk**, 463 F.3d 167, 174 (2d Cir. 2006). "Nevertheless, on a facial challenge, [a court] may still scrutinize a statute based on its text, context, and legislative history . . . ." **Brown v. Gilmore**, 258 F.3d 265, 275 (4th Cir. 2001) (pre-application challenge under the establishment clause) (clarification added). Courts frequently scrutinize the legislative history of laws to assess facial challenges. *See also* **Educational Media Co. at Virginia Tech, Inc., v. Swecker**, 602 F.3d 583, 588 (4th Cir. 2010) (governmental interest for commercial speech restriction may be gleaned from legislative history); **Community Television of Utah, Inc., v. Wilkinson**, 611 F.Supp. 1099 1107 (D.C.Utah 1985) (text, legislative history, and attorney general opinion analyzed to determine whether the Decency Act facially complied with the First Amendment).

In **Children's Healthcare Is a Legal Duty, Inc., v. Min De Parle**, 212 F.3d 1084, 1088 (8th Cir. 2000), certain taxpayers challenged Section 4454 of the Balanced Budget Act of 1997, contending it violated the First Amendment; specifically, the establishment clause. Like a tax on a defined group of speakers (**Leathers v. Medlock**, 499 U.S. 439, 445-446 (1991) (citing **Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue**, 460 U.S. 575 (1983)), "a law that on its face grants a denominational preference may be upheld only if it is supported by a compelling state interest." **Children's Healthcare**, 212 F.2d at 1090. The court duly noted that to facially discriminate, the law need not explicitly set forth the discrimination in its text. **Id**. Rather, "[s]uch discrimination can be evidenced by objective

factors such as the law's legislative history and its practical effect." **Id**. (quoted text under the heading "Facial Challenge to Section 4454") (citing **Church of Lukumi Bablu Aye, Inc., v. Haileah**, 508 U.S. 520, 535 (1993)). *Accord* **Kong v. Min de Parle**, 2001 WL 1464549, at *4 (N.D. Cal Nov. 13, 2001) ("the text, legislative history, and effect of section 4454 persuades the Court that the exemption does not facially discriminate").

Plaintiffs' challenge here is based, in part, on the **Lukumi** decision cited by the **Children's Healthcare** court. Plaintiffs contend that the structure and numerous exemptions to the LET (specifically the 10% LET), like the exemptions to the laws analyzed in **Lukumi**, demonstrate that the laws were gerrymandered to apply to gentlemen's clubs and "few if any" others. 508 U.S. 535-536. Over the course of its analysis, the High Court recognized that "[i]t becomes evident that these ordinances target Santeria sacrifice ***when the ordinances' operation is considered***. Apart from the test, the effect of a law in its real operation is ***strong evidence of its object.***" **Id**. at 535 (emphasis added). *See also* **id**. at 547 (declaring the challenged laws "void" rather than unconstitutional "as applied" to the plaintiff).

Therefore, in order to analyze the facial validity of the LET, the Court need not examine the application of the LET particularly to any of the named Plaintiffs in this action. Rather, the LET must be examined according to its text, context, legislative history, and practical effect. Each of these areas of inquiry, individually and collectively, demonstrate that the LET is facially unconstitutional under the First Amendment.

C. IT IS THE DEFENDANTS' BURDEN TO PROVE THE CONSTITUTIONALITY OF THE LET.

Taxes that raise First Amendment concerns are subject to strict constitutional scrutiny, and the ***State of Nevada*** has the burden to demonstrate the constitutionality of its taxing scheme of live entertainment. *See, e.g.*, **Arkansas Writers' Project, Inc. v. Ragland**, 481

U.S. 221, 231 (1987) ("***Arkansas faces a heavy burden*** in attempting to defend its content-based approach to taxation of magazines. ***In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end***"), *citing* **Minneapolis Star Tribune Co. v. Minnesota Comm'r of Revenue**, 460 U.S. 575, 591-92 (1983); **Clark v. City of Lakewood**, 259 F.3d 996, 1004 (9th Cir. 2001) ("***In all situations . . . the government has the burden of proof to justify burdening freedom of expression***") (all emphasis added). In addition, like all regulations that are subject to strict constitutional scrutiny, a tax upon protected expression is, as referenced above, "***presumptively unconstitutional***." **Minneapolis Star**, 460 U.S. at 585 (emphasis added). *See also* **Seres v. Lerner**, 120 Nev. 928, 936, 102 P.3d 91, 96 (2004) ("[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (citing **Simon & Schuster v. Members of New York State Crime Victims Bd.**, 502 U.S. 105, 115 (1991)).

In order to pass muster under strict scrutiny[7], the Defendants must demonstrate that the law is narrowly tailored to serve a compelling governmental interest. The burden on the State

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[7] In the alternative to applying strict scrutiny, Plaintiffs *also* ask the Court to hold the LET unconstitutional simply for being a content-based restriction on speech. In **Seres**, the Nevada Supreme Court *en banc* (save Hon. Micheal L. Douglas, 120 Nev. at 292, 102 P.3d at 92) questioned the necessity of applying the strict scrutiny analysis to content-based restrictions on speech (120 Nev. at 942, 102 P.3d at 100). The court favorably discussed Justice Kennedy's concurrence in **Simon & Schuster**, 502 U.S. at 124-126, wherein he states that when a content-based restriction on speech is present, there is no need to borrow the strict scrutiny analysis from equal protection jurisprudence. **Seres**, 120 Nev. at 292, 102 P.3d at 92. Rather, the fact that the law imposes a content based burden on speech "is itself a full and sufficient reason for holding the statute unconstitutional . . . . Borrowing the compelling interest and narrow tailoring analysis is ill advised when all that is at issue is a content based restriction." **Seres**, 120 Nev. at 292, 102 P.3d at 92 (quoting **Simon & Schuster**, 502 U.S. 124-126 (Kennedy, J. concurring). The Nevada Supreme court found this approach "inviting" but noted the parties at bar had not raised claims under the Nevada Constitution. **Id**. Plaintiffs here have raised claims under the Nevada Constitution, and ask the Court to apply the analysis

of Nevada is thus to establish that a compelling governmental interest is furthered "that it cannot achieve without differential taxation." **Minneapolis Star**, 460 U.S. at 585. More importantly, that governmental interest ***cannot*** be the simple "raising of revenue." As the Supreme Court as noted, that governmental interest "[s]tanding alone, cannot justify the discriminatory tax on First Amendment protected activities." **Id.** at 585-86. The Court has noted that the "state could raise the revenue by ***taxing businesses generally***, avoiding the censorial threat implicit in a tax that singles out" protected expression. **Id.** Here, the State of Nevada simply cannot carry the burden of demonstrating that there exists a compelling governmental interest to differentially tax certain First Amendment protected live entertainment.

D. THE LET IS FACIALLY UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I, SECTIONS 9 AND 10, OF THE NEVADA CONSTITUTION.

There are primarily three ways by which a tax may violate the First Amendment. First, a direct tax specifically on First Amendment freedoms is unconstitutional.

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

Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 108, 111 (1943) (emphasis added).

Second, a tax that targets a narrowly defined group of speakers is unconstitutional. As set forth by the Supreme Court:

> A tax is also suspect if it targets a small group of speakers.

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proposed by our Supreme Court. The LET is content-based, and should be struck on that ground alone.

* * *

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

Leathers, 499 U.S. at 447-448.

Third, a ***content-based tax*** is unconstitutional. **Leathers**, 499 U.S at 447 ("Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech"); **Seres**, 120 Nev. at 936, 102 P.3d at 96.

The Live Entertainment Tax violates the First Amendment for ***all three*** of these reasons. It is unconstitutional under the first test in that it is, *irrefutably*, a tax "laid specifically on the exercise of [First Amendment] freedoms;" that being ***live entertainment***. **Murdock**, 319 U.S. at 108 (clarification added). In regard to the second test, the large number of exemptions from the LET demonstrates that the tax targets a "narrowly defined group of speakers," and that its focus is, indeed, on one specific form, or content, of live entertainment; that being exotic dancing. In fact, the legislative history discussed below aptly demonstrates the narrow focus of the 10% portion of the LET. Third, when the text, context, legislative history, and practical effect of the LET are viewed as a whole, it is clear that the LET is a content-based tax.

1. The LET is an Unconstitutional Direct Tax on First Amendment Activities.

It is unconstitutional to ***directly*** tax the engagement in First Amendment protected activities. The Supreme Court dealt with the issue of taxing First Amendment rights in **Murdock**, where the Court analyzed the constitutionality of 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. 319 U.S. at 106. The Supreme Court explained:

> It is one thing to impose a tax on the income or property of a preacher, it is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed [here] is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. ***The power to tax the exercise of a privilege is the power to control or suppress its enjoyment.***

Id. at 105 (emphasis and clarification added).

The Court further made clear that "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 LET, there is not even the pretext of a license involved, as it is merely a ***direct imposition of a tax on First Amendment freedoms***. There is no justification of a requisite license or any form of regulation that requires funding to administer and enforce.

The Supreme Court noted 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 111-112. The Supreme Court flatly states 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 indeed as potent as the power of censorship which this Court has repeatedly struck down." **Id**. at 113.

In addition, the fact that entities subject to the LET present live entertainment for profit does not change the analysis in the least. "Those who make their living through exercise of

First Amendment rights are no less entitled to its protection than those who advocacy or promotion is not hitched to a profit motive." **Cammarano v. U.S.**, 358 U.S. 498, 514 (1959). *See also* **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, 555-559 (1985)).

There is absolutely no doubt that "live entertainment" is a category of activity presumptively protected by the First Amendment.

> 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)). **Schad**, in particular, involved a general municipal ban on "'live entertainment,' including nude dancing." 452 U.S. at 65. The Court made clear:

> By excluding live entertainment throughout the Borough, the Mount Ephraim ordinance prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments. 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.

Id. at 65-66 (citing **Joseph Burstyn, Inc. v. Wilson**, 343 U.S. 495 (1952); **Schacht v. U.S.**, 398 U.S. 58 (1970); **Jenkins v. Georgia**, 418 U.S. 153 (1974); **Southeastern Promotions,**

Ltd. v. Conrad, 420 U.S. 546 (1975); **Erznoznik v. City of Jacksonville**, 422 U.S. 205 (1975); and **Doran**, *supra*).[8]

Nevada cannot specifically tax live entertainment any more than it could ban the very same activity. There can be no doubt that he LET requires persons wishing to engage in defined "live entertainment" to pay the State of Nevada for this ability to exercise their First Amendment rights. This is "a tax laid specifically on the exercise of those freedoms" within the meaning of **Murdock**, 319 U.S. at 108. Nevada is "charg[ing] for the enjoyment of a right granted by the federal constitution." **Id**. at 112 (clarification added). The LET is plainly and facially unconstitutional under Supreme Court precedent.

2. The Live Entertainment Tax is Unconstitutional as it Applies to a "Narrowly Defined Group of Speakers" and it Discriminates Based on Content.

The LET is a direct tax upon protected expression, and only upon one form of protected expression, that which is "entertainment," and then only to that which is "live". Even within this subset of First Amendment activity, 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," based upon the ***content*** of that entertainment, is specifically and statutorily ***exempted*** from the scope of the tax. In this regard, Plaintiffs' challenge to the LET involves two related but distinguishable lines of inquiry: Whether the LET taxes a narrow group of speakers and whether the LET discriminates based on content? If the LET does either (and, here, it does ***both***), it is unconstitutional.

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the

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[8] *See also* **Winters v. New York**, 333 U.S. 507, 510 (1947) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); and **Zacchini v. Scripts-Howard Broadcasting Co.**, 433 U.S. 562, 578 (1977) *human cannonball performance) ("...entertainment itself can be important news").

> taxpayer selected. ***When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.***
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> * * *
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> Further, ***differential treatment***, unless justified by some special characteristic of the press, 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 (emphasis added).

The reason for this is simple:

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

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

An impermissible intent to discriminatorily tax based on content need not be established in order for the law to be found unconstitutional.[9] It is no surprise that when crafting a tax of dubious constitutionality, legislators will attempt to cloak their improper intentions by using seemingly benign gerrymandering, such as here, by way of "exemptions" and "exceptions." Such structuring *still* results in an unconstitutional tax. As the Supreme Court has explained:

> In **Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue**, 460 U.S. 575 [ ] (1983), we noted that it was unclear whether the result in **Grosjean** [**v. American Press Co.**, 297 U.S. 233 (1936)] depended on our perception in that case that the State had imposed the tax with the intent to penalize a selected group of newspapers or whether the structure of the tax was sufficient to invalidate it. *See* 460 U.S., at 580 [ ] (citing cases and commentary). **Minneapolis Star** resolved any

[9] However, as discussed below, the legislative history does, indeed, clearly reflect that the ***intent*** of the LET was to tax gentlemen's clubs specifically.

> doubts about whether direct evidence of improper censorial motive is required in order 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 592 [ ].

Leathers, 499 U.S. at 445 (parallel citations omitted).

In addition to its ***explicit*** content-based discrimination (discussed below), the LET attempts to use the classic and well-worn mask of impermissible gerrymandering, and that is to discriminate based upon the "size" of the speaker and/or the volume of its activity. **Grosjean** is the first example of this. In that case, the Supreme Court *invalidated* a "Louisiana law that singled out publications with weekly circulations above 20,000 for a 2% tax on gross receipts from advertising. The tax fell exclusively on 13 newspapers. Four other daily newspapers and 120 weekly newspapers with weekly circulations of less than 20,000 were not taxed." **Leathers**, 499 U.S. at 444 (citing **Grosjean**, 297 U.S. at 246-251).

Then:

> At issue in **Minneapolis Star**, was a Minnesota special use tax on the cost of paper and ink consumed in the production of publications. The tax exempted the first $100,000 worth of paper and ink consumed annually. Eleven publishers, producing only 14 of the State's 388 paid circulation newspapers, incurred liability under the tax in its first year of operation. The Minneapolis Star & Tribune Co. (Star Tribune) was responsible for roughly two-thirds of the total revenue raised by the tax. The following year, 13 publishers, producing only 16 of the State's 374 paid circulation papers, paid the tax. Again, the Star Tribune bore roughly two-thirds of the tax's burden. We found no evidence of impermissible legislative motive in the case apart from the structure of the tax itself.

Leathers, 499 U.S. at 445.

These same tools are put to task in the LET. 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, as well as entertainment provided at certain "licensed gaming establishment[s]."

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). As explained in subsection IV(D)(2)(c) below, the seating capacity was actually lowered from 300 to 200 ***specifically to increase the number of gentlemen's clubs that would be swept into the tax***. At the same time, "family-oriented" and other preferred forms of live entertainment that the legislature did not mean to "get" via the LET were then exempted from taxation.

a. The Different Rates and Subjects of Taxation Demonstrate Impermissible Gerrymandering.

The rate of taxation under the "Adult LET" is 10%. NRS § 368A.200(1)(a). The rate of taxation under the "Casino LET" is only ***5%***. NRS § 368A.200(1)(b). Moreover, under the Adult LET, the tax applies to an "admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise. . . ." NRS § 368A.200(1)(a). However, under the Casino LET, the tax ***only applies to admissions***. NRS § 368A.200(1)(b). This allows the casinos, but not Plaintiffs, to lower their tax liability simply by reducing admission charges and raising the prices for refreshments and merchandise. The functional result is obvious. The Adult LET tax rate is effectively more than twice that of the Casino LET.

The Casino LET requires payment and the filing of the applicable tax returns to the State Gaming Control Board. NRS § 368A.220(1)(a). The Adult LET requires payment and filing with the Nevada Department of Taxation. Likewise, the Casino LET imposes the duty to collect on the Gaming Control Board, while the Adult LET places the duty to collect on the Department of Taxation. NRS §§ 368A.140(1)(a) and (2)(a).

In fact, both the Gaming Control Board and the Nevada Department of Taxation each have the separate authority to promulgate rules and regulations for their respective taxes. The

Gaming Control Board has authority to promulgate rules for the imposition and collection of the Casino LET, NRS § 368A.140(1)(b), while the Department of Taxation has the authority to promulgate separate rules and regulations for the imposition and collection of the Adult LET, NRS § 368A.140(2)(b).

Similarly, claims for refunds under the Casino LET must be taken to the Gaming Control Board, while appeals under the Adult LET must be taken to the Department of Taxation. NRS §§ 368A.260(1)(a)(1) and (1)(a)(2). Appeals from denied refund claims also proceed to different entities. NRS §§ 368A.300(3)(a) and (3)(b).

Both the Gaming Control Board and the Department of Taxation have the power to inspect the books of the entities taxed under their respective taxes. However, neither has the authority to inspect the books of entities which are responsible for paying taxes to the other authority. NRS §§ 368A.170(1)(a) and (1)(b).

This bifurcation between the Casino LET and the Adult LET prevails throughout the LET. These deep and fundamental differences expose the LET for what it really is; two distinct taxes shoe-horned under the same moniker. The LET paid by Plaintiffs is entirely different than the LET paid by the Casinos, which receive far more beneficial treatment under this taxation scheme.

Thus, the structure of the LET, like the structure of the tax struck in **Minneapolis Star**, is sufficient to render the tax suspect and thereby subject to strict scrutiny. It is important to emphasize that, for the LET to be held unconstitutional, it is not necessary for the Court to be firmly convinced that the tax targets gentlemen's clubs or seeks to suppress their expression. The relevant question is whether the tax targets a certain type of expression for more burdensome taxation. In reflecting upon its **Minneapolis Star** decision, the Court explained:

> Once again, the scheme appeared to have such a ***potential for abuse*** that we concluded that it violated the First Amendment: "[W]hen the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more of a penalty for a few of the largest newspapers than an attempt to favor struggling enterprises."

Leathers, 449 at 446 (citing **Minneapolis Star**, 460 U.S. at 592) (emphasis added).

And, addressing the case before it, the **Leathers** Court found that the general Arkansas sales tax did not target the cable television plaintiffs, "nor is the tax on that structured ***so as to raise suspicion*** that it was intended to do so. Unlike the taxes involved in **Grosjean** and **Minneapolis Star**, the Arkansas tax has not selected a narrow group to bear fully the burden of the tax." 499 U.S. at 448 (emphasis added).

As explained more fully below, the LET is structured in a manner that creates an acute potential for abuse, and certainly raises the suspicion that gentlemen's clubs are being targeted for special taxation. This alone requires the tax to be subject to strict scrutiny level of review.

Moreover, under no circumstances can the LET (or the Adult LET in particular) be confused with the generally applicable taxes ultimately upheld in **Leathers**, **Regan v. Taxation with Representation of Washington**, 461 U.S. 540 (1983), or **Cammarano v. United States**, 358 U.S. 498 (1959). Those taxes were truly taxes of general applicability. For example, the tax in **Leathers** was the general Arkansas sales tax.[10] 499 U.S. at 447. **Regan** involved exemptions under the United States corporate tax code. 461 U.S. at 540 (1983) (regarding 26 U.S.C. § 501). **Cammarano** involved exemptions from the United States

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[10] "Among the services on which the tax is imposed are natural gas, electricity, water, ice, and steam utility services; telephone, telecommunications, and telegraph services; the furnishing of rooms by hotels, apartment hotels, lodging houses, and tourist camps; alteration, additional, cleaning, refinishing, replacement, and repair services; printing of all kinds; tickets 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 tax code. 358 U.S. at 499-500. The LET is not a general property, income, or corporate tax. Instead, the tax is initially triggered by only First Amendment activity, and then further discriminates among expression based on the size of the taxpayer, the activity of the taxpayer, and the content of the live entertainment.

Such a limited tax on "live entertainment" was struck in **U.S. Satellite Broadcasting Co. v. Lynch**, 41 F.Supp.2d 1113 (E.D.Cal. 1999). In that case, the state had singled out telecasts of boxing contests for special taxation, rather than "adult" entertainment or gentlemen's clubs. **Id**. at 116. The court relied heavily on **Arkansas Writers' Project** and **Leathers** to conclude that the tax was an impermissible content-based tax on First Amendment activity. **Id**. at 1120-1123. The court reasoned:

> As a threshold matter, defendants have not convinced the court that First Amendment protection does not attach to live boxing match organized, held, and televised for the purpose of entertaining live and remote viewers. The First amendment protects entertainment. **Schad**, 452 U.S. at 65 [ ]. ***It protects live entertainment, including even the expressive content of nude dancing***, **Barnes v. Glen Theatre, Inc.**, 501 U.S. 560 [ ] (1991).
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> * * *
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> Thus, it simply does not matter if the First Amendment protects or even applies to boxing. ***A tax on the dissemination of entertainment based on the content must pass strict scrutiny, regardless of its subject matter***. **Simon & Schuster**, 502 U.S. at 115 [ ]; **Arkansas Writers' Project**, 481 U.S. at 230 [ ]. The First Amendment does not protect murder, yet the court feels confident that news broadcasts of the court feels confident that news broadcasts of murder, killing, or war may not be censored to suppress their content. Nor it a hurricane protected by the First Amendment; yet a broadcast with an audience has a right under the First Amendment to broadcast images of a hurricane. Defendants' argument, that telecasts of boxing do not enjoy First Amendment protection because boxing is somehow "less valuable" than other subjects, runs contrary to every principle of the Free Speech Clause itself.
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> * * *
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> Because the undisputed facts establish the Boxing Act tax must survive strict scrutiny, defendants would at trial bear the burden of proving the tax to be "necessary to serve a compelling state interest and . . . narrowly

> drawn to achieve that end." [**Simon & Schuster**, 502 U.S.] at 118 [ ]. . . .
>
> Defendants argue that the state has a general interest in raising revenue. While this interest has been described as "critical" and "important," as a matter of law it does not justify a content-based tax on speech. **Arkansas Writers' Project**, 481 U.S. at 231-232 [ ] ("an alternative means of achieving the same interest [raising revenue] without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally"), *quoting* **Minneapolis Star** [ ] 460 U.S. [at] 586 [ ].

Id. at 1120-21 (parallel citations omitted; clarification in original and added).

The reasoning in **U.S. Satellite Broadcasting** is directly applicable to this action. There, the court identified that "the Boxing Act taxes some telecasts, and not others, based on the content of those telecasts. . . . The Boxing Act thus taxes some speech based on its content. Under **Leathers**, **Arkansas Writers' Project**, and the weight of First Amendment jurisprudence, the tax should be subject to strict scrutiny." 41 F.Supp.2d 111.

The LET is no different. It applies only to First Amendment activity, and then only according to the size of the taxpayer and the content of its speech. And, here, ironically, admissions to view boxing is ***exempted*** from the LET. *See* N.R.S. §368A.200(5)(c). This is obviously a content-based tax, which fails under strict scrutiny.

b. The Numerous Exemptions to the LET Demonstrate That the Tax is Narrowly-Directed and Discriminates Based on Content.

Initially, the definition of "live entertainment" itself contains numerous ***exceptions***, which ***exclude***, without limitation, the following activities:

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

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

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

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

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

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

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

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

(I) Does not constitute a performance;
(II) Is not advertised as entertainment to the public;
(III) ***Primarily serves to provide ambience to the facility***; and
(IV) Is conducted by an employee whose primary job function is not that of an entertainer.

N.R.S. § 368A.090(b) (emphasis added).

Then, the ***exemptions*** to the tax contained in N.R.S. § 368A.200(5) apply to:

(a) ***Live entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution.***[11]

(b) Live entertainment that is provided by or entirely for the benefit of a ***nonprofit religious, charitable, fraternal or other organization*** that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS.

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

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

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

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

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

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

(i) Live entertainment that is provided at a licensed gaming establishment at private meetings or dinners attended by members of a particular organization or by a casual assemblage if the purpose of the event is not primarily for entertainment.

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

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[11] If it is determined that Defendants cannot specifically tax Plaintiffs' protected activities, this exemption will be triggered.

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

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

(1) Not the predominant element of the attraction; and
(2) Not the primary purpose for which the public rides, attends or otherwise participates in the attraction.

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

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

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

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

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

N.R.S. § 368A.200(5) (emphasis added).

Because many of these exceptions/exemptions determine whether an entity or individual is subject to the tax based upon the ***content*** of the live entertainment (*e.g.*, boxing, baseball, NASCAR, and outdoor concerns), it is clear that the LET is a content-based tax and is subject to strict constitutional scrutiny. More specifically, these exceptions/exemptions have

been gerrymandered in such a fashion to basically ensure that with the exception of casino entertainment (which was already subject to tax (at a lower 5% rate, with the subject of the tax also being more narrow) pursuant to the prior casino entertainment tax), almost the only remaining live entertainment that is subject to the 10% tax is adult entertainment. If there is any doubt from a facial reading of the Statute that it was meant to specifically tax live adult entertainment, any such doubt is quickly eradicated by reviewing the legislative history, discussed *infra*, which clearly demonstrates such facial targeting.

It is constitutionally impermissible to apply a tax on protected expression in such a discriminatory, content-based manner. As the Supreme Court held in a case where a tax was "not evenly applied to all magazines" and treated "some magazines less favorably than others":

> Indeed, this case involves a more disturbing use of selective taxation than **Minneapolis Star**, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: ***a magazine's tax status depends entirely on its content.*** Above all else, the First Amendment means the government has no power to restrict ***expression*** because of its message, its ideas, its subject matter, or its content. . . . Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.

Arkansas Writers Project, 481 U.S. at 229 (citations omitted, emphasis in original and added).

The United States Supreme Court has further 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). There, the Court declared as unconstitutional an ordinance banning outdoor signs (as being impermissibly content-based) because the law included a

variety of exceptions of signs that were nevertheless permitted.[12] That is exactly the situation we have here – a law that is triggered by First Amendment activity, which then picks winners and losers within the medium of expression regulated (i.e., those to be taxed and those to be exempted from such taxation).

In this case, the numerous exemptions reveal that beyond casino entertainment, the LET is in fact targeted principally at adult entertainment facilities that are protected by the First Amendment. The LET is therefore targeted to a "narrowly defined group of speakers" and is undeniably content specific; it is subject to strict scrutiny; and it is invalid.

c. The Legislative History Demonstrates the Impermissible Targeting and Content-Based Nature of the Live Entertainment Tax.

The legislative history unequivocally bears out the discriminatory intent of the legislature when it enacted and amended the LET. As explained in subsection IV(B), *supra*, courts regularly examine the legislative history of a law when confronted with a facial challenge.

Indeed, legislative history and other circumstances surrounding legislative enactments have contributed to the Supreme Court finding even facially-neutral laws, including taxes, to be content-based and, therefore, unconstitutional. For example, in **Lukumi**, the Court recognized that the First Amendment prohibits "subtle departures from neutrality." 508 U.S. at

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[12] *See also* **Church of Lukumi v. Hialeah**, 508 U.S. 520, 535-540 (1993) (Court found that exemptions to three city ordinances banning the killing of animals rendered the laws to be content-based, and therefore unconstitutional, as being directed at those practicing the Santeria religion, and that the "pattern of exemptions parallels the pattern of narrow prohibitions. ***Each contributes to the gerrymander***"); and **U.S. v. Eichman**, 495 U.S. 310, 317-19 (1990) (Court found the facially neutral Flag Protection Act content-based and therefore unconstitutional because although it prohibited burning of the flag, it exempted the burning of a "worn or soiled" flag as a means of disposal. The exception was an act "traditionally associated with patriotic respect for the flag," and demonstrated content targeting by preferring patriotic rather than disrespectful acts upon a flag) (emphasis added).

534. To determine whether "the object of the law is a neutral one," the Court instructed that "we may determine the City Council's object from both direct and circumstantial evidence."[13]

> Relevant evidence includes, ***among other things***, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, ***and the legislative or administrative history, including contemporaneous statements made by members*** of the decisionmaking body.

Id. at 540 (emphasis added) (citing **Arlington Heights v. Metropolitan Housing Development Corp.**, 429 U.S. 252, 266-268 (1977)).

In addition, Plaintiffs propounded interrogatories upon the Department of Taxation directed at discovering the purposes and governmental interest to be served by the LET and, specifically the numerous exceptions and later changes to the exceptions therein. *See* Nevada Department of Taxation's Responses to Plaintiffs First Set of Interrogatories to Defendants, Ex. 13, Interrogatories 8, 9, 10, 11, 16, 17, 18, 21, and 22. In response, the Department repeatedly directed Plaintiffs to the Nevada Legislature's legislative history of Senate Bill 4 of the 19th Special Session (2003), Senate Bill 5 of the 19th Special Session (2003), Senate Bill 247 of the 73rd Session (2005), and Assembly Bill 554 of the 73rd Session (2005). **Id**.[14] An analysis of the relevant legislative history identified by the Department readily discloses that the LET was crafted to apply to a narrowly-defined group of speakers and discriminates based on content.

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[13] The analysis in **Lukumi** was undertaken specifically under the Free Exercise Clause. 508 U.S. 540. Still, the Court made clear that "[t]he principle underlying the generally applicability requirement has parallels in our First Amendment Jurisprudence." **Id**. at 543 (citing, *inter alia*, **Minneapolis Star**, 460 U.S. at 585; other citations omitted).

[14] As this Court will also recall, it recently precluded the Plaintiffs from inquiring, in depositions, as to the governmental interests meant to be furthered by the enactment of the 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 Ex. 14.[15] 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 version 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**:
>
> ***At one time*** the brothels were included, so that would be broader. ***You 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.***[16] 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 it's worth the chance to put it in there.

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[15] The Plaintiffs duly recognize that much of this legislative history reflects debate on how the 2003 legislation should be modified, rather than on the original enactment of the 2003 legislation. First, the Plaintiffs challenge the 2005 version of the LET in this action. Second, this does not detract from the fact that the legislative history unequivocally demonstrates that the 2003 legislation's tax burden befell live adult entertainment in a greatly disproportionate manner, and was ***meant to do so***. Indeed, the discussion in 2005 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***. This is certainly within "relevant evidence" identified in **Lukumi**, 508 U.S. at 540.

[16] This Court should note, of course, that brothels are ***not***, however, included in the tax at issue.

ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess., p. 19 (May 16, 2005) (emphasis and clarification added), Ex. 14.

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 non-casino 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.***[17] The next one is race tracks at $1.5 million[18], 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.***

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[17] This Court should note that these comments demonstrate that even the ***legislators*** did not consider the "casino" portion of the statutory scheme to really be part of this Live Entertainment Tax.

[18] In a time of needed tax revenues, it is, therefore, noteworthy that the *second highest source of revenue*, the racetrack, was then eviscerated by the "NASCAR Exemption" adopted in 2005 as part of the statutory revisions, discussed immediately below.

Id. at 17-19 (names bolded in original, emphasis added), Ex. 14.

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":

> **Senator Dina Titus, Clark County Senatorial District No. 7:**
>
> 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. . . .
>
> * * *
>
> **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. (emphasis added).

The 300-person seating requirement was, in fact, lowered to a 200-person seating requirement (N.R.S. § 368A.200(5)(d),(e)), even though adult entertainment was already paying four-times more in taxes that the next contributor under the LET. The next largest contributor under the previous scheme was racetracks. But racetrack revenues are now 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), and (m). Consequently, in the Committee's own words, the taxes paid by any remaining providers of live entertainment that the legislature initially 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), Ex. 14 (emphasis added).

Other historical documents from the time period leading up to the 2005 changes likewise demonstrate that when changes to the LET were proposed, the chief concern was how they would affect revenues from gentlemen's clubs. For example, on March 14, 2005, a Memorandum from Department was issued "to analyze the fiscal impact of making changes to the Live Entertainment Tax (LET)." Department of Taxation Memorandum, March 14, 2005, Ex. 15. This analysis recognized that eliminating the 300 person seating requirement would raise an additional $4,197,900 from gentlemen's clubs, and $1,614,600 from other bars and nightclubs. *See also* Untitled Revenue Analysis, Ex. 16, p. 3 (analyzing the impact of the 300-seat requirement separately for "men's clubs" from other businesses and specifically analyzing revenue to be generated from 200-seat men's clubs; no other specific category of businesses being mentioned or identified).

Another Memorandum on November 4, 2004, to Chuck Chinnock, Executive Director of the Nevada Department of Taxation, specifically identifies those gentlemen's clubs statewide that have seating capacities of less than 300. Memorandum of November 9, 2004, Ex. 17. And, in an April 24, 2005 email, Dino Dicianno, then-Executive Director of the Department of Taxation, explained:

> Chris Janzen asked me [sic] take a look at the fiscal impact of Senator Titus's new version of SB 247. ***There is no question that the focus of the bill is to tax for LET all adult entertainment, except for brothels. Currently the vast majority of the revenue that we collect comes from the gentlemen's clubs that have a seating capacity greater than 300.*** For example, 1.2 million from nightclubs, 1.4 million from raceways, 1.0 million from performing arts, 5.2 million from gentlemen's clubs; for a total collected of about 9.0 million. The remaining venues are minor (i.e. sporting events, etc.). ***By removing the seating capacity and eliminating the other venues you would ten capture all of the***

> ***remaining gentlemen [sic] clubs that are currently not paying***. There is no question that they are a cash cow for LET. My best guess is that the fiscal impact of the revised SB 247 would be either a wash with a distinct possibility of a potential LET revenue gain.

Dicianno Email of April 24, 2004, Ex. 18 (emphasis added) (submitted as Exhibit E to the Assembly Committee/Ways & Means, May 26, 2005).

The documents preceding the 2003 tax are no different. In a 2003 email from Barbara Smith Campbell to Bill Bible, it was explained that:

> The DAG has concerns about your recommended language in Ambient Entertainment #3. In summary, he feels the language may lead to the exemption of "entertainers" at the Gentlemen [sic] clubs. ***Therefore, we did not incorporate it in our draft***.

Memorandum, November 18, 2003, Ex. 19 (emphasis added).

Even the speakers before the Senate Committee implicitly understood the purpose of the 2003 LET.

> **Senator Lee:**
>
> I know this bill is very important, but ***it seems like we are selectively going after a group of businesses***. No matter what business it is, I have a challenge with understanding that type of activity.
>
> **Taylor Dew: (National Hula Girls)**
>
> ***As you recall, the live-entertainment tax last Session was meant only to tax adult entertainment***, but unintentionally affected us Hula Girls, Elvis impersonators, jugglers, singers, bands and virtually every type of entertainer. Obviously, the wording will need to be changed.

Senate Committee on Taxation, April 12, 2005, p. 24, Ex. 20 (emphasis added).

Later legislative history further confirms the same:

> **Senator Coffin:**
>
> ***Where are the topless clubs in this bill?***
>
> **George W. Treat Flint (Nevada Brother Owners Association):**

I have an intimate relationship with this bill and its verbiage since the last Session. On page 6 of A.B. 554, the topless clubs would be covered under lines 1 through 3, unless they have an occupancy capacity of less than 300. The major men's cabarets are covered under that section. I have been told by the Department of Taxation that the major places create approximately $7 million a year. ***Most of the smaller clubs could probably be brought into A.B. 554 if you amend the section to read a total occupancy of 200 rather than 300.*** To protect my client, I do not want you to bring the occupancy number down too much lower than 200 ***or you will have my clients back in this tax law.***

Senator Coffin:

It is my understanding that some of the topless clubs get out of being taxed by removing a few seats. We should consider the possibility of reducing the seating capacity so these highly profitable, legitimate businesses could help pay their share of the budget. Has there been any discussion about that?

* * *

Senator Coffin:

I would like to ask Charles Chinnock from the Tax Department a few questions on this legislation. Mr. Chinnock, what happened after the last Session ***with regard to the men's cabarets***?

Charles Chinnock (Executive Director, Department of Taxation):

Many jurisdictions, whether fire marshals or the building code departments that oversee ***these facilities***, found increased safety concerns with the 300-seating capacity. From the building and safety officials' standpoint, they would much rather see less occupancy than greater occupancy. If you had 300 or greater seating capacity, they were willing to adjust that seating capacity from the standpoint it was a safer venue to reduce that capacity. It became an easy issue for ***them*** to reduce the seating capacity.

Senator Coffin:

Are you saying ***they*** reduced the seating number to avoid the tax in the interest of safety?

Mr. Chinnock:

Yes, it was in the interest of safety.

Senator Coffin:

If we changed the language to lower the amount, ***would we unintentionally include entities we do not want to tax?***

Mr. Chinnock:

I do not know how to answer that. We did not do a study of a breaking point below the 300-seating capacity. The other bills were all or nothing ***with respect to adult entertainment***.

Senator Coffin:

If we are going to take action on A.B. 554 on the Senate Floor, would it be possible to amend it at that time to lower the 300-seat capacity to 200?

William Bible (Nevada Resort Association):

I really cannot assist you with this issue because the taxes would apply to venues associated with gaming. The seating capacity in A.B. 554 is for areas not on gaming premises.

Senator Townsend:

With regard to the 300 seating and the budget, the lower we make it, the more revenue we would generate as opposed to having an effect on ***them***. There should be no fiscal note. My limited knowledge of this corresponds with Senator Coffin. This puts our Department of Taxation and the auditors in a tough situation. We have to remember, at the end of the day. We have those individuals who will be responsible for implementing this law. ***Senator Coffin's proposal meets the original intent of what this Committee and the Assembly debated***. Obviously, we do not want to create a problem for Mr. Flint's clients. That was never the issue.

Mr. Flint:

This is not official, but ***I spoke with someone in the Department of Taxation***, and I do not have Mr. Chinnock's permission to say this on the record. ***I was told if you brought this number down to 200, you may pick up those who are avoiding or evading this at the moment***. I have been in enough of ***these places*** to know there are very few with less than 200 seats. There is a wide area you would pick up at 200, and you will still keep me harmless at this number.

SENATE COMMITTEE ON TAXATION, June 5, 2005, pp. 4, 6-7, Ex. 21 (emphasis added).

The context and legislative history to the 2003 statute and the 2005 amendments to the LET make clear that gentlemen's clubs were the focus of the bill. When other entities are discussed, it is for the purpose of making sure Nevada is not "unintentionally" taxing too many other entities. There can be no doubt that the purpose behind lowering the seating requirement from 300 to 200 was to capture gentlemen's clubs, and no one else.

Hence, it is clear that this is a narrowly targeted ***and*** a content-based tax that applies to, and indeed exempts, certain speech, and cannot pass constitutional muster.

E. PLAINTIFFS ARE ENTITLED TO PERMANENT INJUNCTIVE RELIEF.

As discussed in subsection IV(A) above, permanent injunctive relief should be granted when there is no adequate remedy at law, when the balance of equities favors the moving party, and when success on the merits has been demonstrated. Plaintiffs will discuss these three elements in reverse order.

Plaintiffs have demonstrated success on the merits for the reasons set forth above. In addition, the balance of equities clearly favors these Plaintiffs and the granting of injunctive relief. The potential harm to Plaintiffs is that as outlined above -- the deprivation of their constitutional rights. More importantly, at issue here is not the infringement of just any right, but the fundamental rights of freedom of speech and expression, which as the Supreme Court has noted, are the protections upon which all other constitutional rights depend. **Palko v. Connecticut**, 302 U.S. 319, 326-27 (1937). The public has a fundamental interest in the protection of First Amendment freedoms. "[I]t is *always* in the public interest to prevent the violation of a party's constitutional rights." **G&V Lounge, Inc. v. Michigan Liquor Control**

Com'n, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing **Gannett Co., Inc. v. DePasquale**, 443 U.S. 368, 383 (1979); and **Planned Parenthood Ass'n. v. City of Cincinnati**, 822 F.2d 1390, 1400 (6th Cir. 1987)).

The potential harm to defendant is, however, merely the inability to enforce a statute which Plaintiffs assert is constitutionally flawed. *See, e.g.,* **Books, Inc. v. Pottawattamie County, Iowa**, 978 F.Supp. 1247, 1256 (S.D. Iowa 1997) (balance of equities favors exercise of constitutionally protected rights over undeclared interest of government in that the operation of an ordinance that is "a very probable violation of Supreme Court precedent"). In addition, Nevada would not be precluded from enforcing other existing statutes, ordinances, and regulations against Plaintiffs, including all general sales and use taxes. It is undeniable, then, that the potential harm to Plaintiffs outweighs any harm to the Defendants.

The inadequacy of the remedy at law is demonstrated in at least five different ways.

First, involves the suppression of the profits of the Plaintiffs. As noted above in subsection IV(D)(1), Plaintiffs' activities are expression protected by the First Amendment. In regard to these protections, it makes absolutely no difference, as discussed above, that N.R.A. § 368A.200(5) limits the tax's application to for-profit entertainment. *See also* **Simon & Schuster**, 502 U.S. at 105 (Court invalidated law that required convicted criminals to disgorge profits made from books written about their criminal activities).

However, 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 Plaintiffs are unable to pay the tax imposed by Chapter 368A, they cannot then engage in the First Amendment activities encompassed by the regulations. In addition, if the Plaintiffs do

not pass on the tax to their customers, there is no question then that this tax directly reduces the profits of the Plaintiffs, and for this reason alone irreparably injures the Plaintiffs.

Second, if the Plaintiffs pass this tax burden onto their customers, there is still the prospect of an inadequate remedy at law. Additional tax burdens would lead, if passed onto the customers, to increases in the costs to people desiring to view such entertainment, which from basic economic theory has the significant potential of reducing the customer base (the customers themselves being imbued by First Amendment rights in order to be able to *view* such entertainment) -- and therefore reducing the engagement in First Amendment protected activities -- regarding those persons who have insufficient means to pay the increased fees in order to be able to view such entertainment. This would reduce the engagement in these First Amendment protected activities, and creates irreparable harm.

Moreover, if the tax is just paid out of the general operating budgets of the Plaintiffs' establishments (without passing the costs directly onto customers), that money could otherwise be used (if not to pay the invalid tax) to purchase, among other things, additional advertising (an activity itself protected by the First Amendment), to remodel the facilities, and to expand the physical size of such establishments; all matters that would have the tendency to *increase* the engagement in protected expression upon the premises of each of the named Plaintiffs. The Live Entertainment Tax therefore, and without question, negatively impacts upon the engagement in expressive activities. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." **Brown v. California Dept. Of Transp.**, 321 F.3d 1217, 1125-126 (9th Cir. 2003) (*quoting* **Elrod v. Burns**, 427 U.S. 347, 373 (1976) (plurality)).

Third, and related to these concerns, is the simple fact that in light of this Court's ruling dismissing out Plaintiffs' 42 U.S.C. § 1983 damage claims, the Plaintiffs face the prospect of being unable to recover any of the consequent damages that they have sustained as a result of the imposition of this tax in the past. Irreparable harm occurs when a damage award would be insufficient to remedy the Plaintiffs' injuries. **Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark**, 116 Nev. 650, 658, 6 P.3d 982 (2000). Here, Plaintiffs ***cannot*** (unless disturbed on appeal) obtain a damage award for any injuries sustained to their businesses.

Fourth, and irrespective of the *damages* discussed above, is the ***potential inability of the Plaintiffs to even recover the millions of dollars paid by Plaintiffs since 2004 in Live Entertainment Taxes if this Court ultimately rules the Statute unconstitutional or finds that the Plaintiffs are entitled to one of the statutory exemptions/exceptions.*** During the first hearing that occurred before the Nevada Tax Commission ("Commission") on July 9, 2007, the Department, through legal counsel (who is the ***same attorney*** representing the Defendants in both Cases 1 and 2), stated that it was:

> . . . important to mention N.A.C. 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 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.

Transcript (Ex. 22), page 30, lines 8-14.

N.A.C. § 368A.170 (Ex. 5) regulates the "over-collection" of the subject taxes, which is defined in part as "any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of N.R.S. 368A.200.[19]" N.A.C. § 368A.170(1). The

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[19] Subsection 5 of N.R.S. § 368A.200 states that the LET does not apply to, among other things, "[l]ive entertainment that this state is prohibited from taxing under the Constitution,

regulation states that any over-collection "must, if possible, be refunded by the taxpayer to the patron from whom it was collected." N.A.C. § 368A.170(2). The taxpayer is required to "use all practical methods to determine any amount to be refunded pursuant to subsection 2 and the ***name and address*** of the person to whom the refund is to be made." N.A.C. § 368A.170(3)(a) (emphasis added). Astonishingly, in an unbelievable bout of Orwellian logic, the regulations further dictate that if the taxpayer cannot "refund an over-collection," it must "***pay the over-collection to the department [of Taxation]***." N.A.C. § 368A.170(4) (emphasis and clarification added). Consequently, according to the very language of the regulation, ***if the State illegally collects a tax, the taxpayer is required upon the determination of illegality to nevertheless pay the illegally collected tax over to the State of Nevada!***

The initial Commission hearing was the first occasion that any of the Defendants raised the applicability of N.A.C. § 368A.170.[20] When the hearing continued on August 6, 2007, Bradley Shafer, counsel for the taxpayers and one of the attorneys for the Plaintiffs here,

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laws or treaties of the United States or the Nevada Constitution." N.R.S. § 368A.200(5)(a). Consequently, if Plaintiffs' arguments are correct that the LET violates both the federal and state Constitutions, the exemption under N.R.S. § 368A.200(5)(a) applies and there has then been an "over-collection" of the tax.

[20] It should be noted that the Defendants' position before this Court is not the same that it took in the federal courts. Defendants originally assured the federal courts that the Nevada state court proceedings allowed for a full recovery of amounts paid under the LET. Then, while the matter was pending before the Ninth Circuit, Plaintiffs' appeal of the denial of their administrative claims for refunds came before the Nevada Tax Commission. It was only then that the Department took the position that the tax was not on Plaintiffs, but their customers. Plaintiffs then moved the Ninth Circuit to supplement the record to reflect this development, which was denied. Attached hereto as Ex. 24 (which was originally attached as Exhibit 8 to Plaintiffs' Opposition to Defendant's first Motion to Dismiss in Case 1) is the Defendants' "Answering Brief" filed before the Ninth Circuit. In this document, the Defendants contend that so long as Plaintiffs have not passed the tax along to their customers (which Plaintiffs have verified they have not), Plaintiffs would be entitled to a full refund of the LET tax paid. Ex. 24, pp. 14-15, 20. Nevertheless, Plaintiffs have the significant prospect of suffering irreparable harm given that the Defendants ***now*** contend (as discussed below) that Plaintiffs may not, indeed, be entitled to a tax refund ***even if they prevail in this action.***

addressed N.A.C. § 368A.170 and the Department's insistence that in order to obtain a refund, a taxpayer has to identify each patron who paid an admission charge, or for food, drink or merchandise, and demonstrate that the taxpayer knows where the patron lives or works in order to "reimburse" the refund to that individual. He explained that:

> [W]hat 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 any time where you went to buy food and drink and had to give your name and address, and that doesn't happen here.

Transcript (Ex. 23), page 10, lines 14-21.

In addition to the arguments regarding the taxpayers' inability to locate each patron who paid an admission or who purchased food, drink or merchandise, the K-Kel Plaintiffs further informed the Commission that the tax was paid not by the patrons but, rather, by the clubs themselves. The K-Kel Plaintiffs introduced affidavits from four of the Plaintiffs which established 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." Transcript (Ex. 23), page 10-11, lines 22-25 and 1. The four affidavits submitted are attached hereto as Ex. 25.

Irrespective of these arguments of the K-Kel Plaintiffs, Senior Deputy Attorney General David Pope, ***one the defense attorneys who has filed motions for summary judgment and to dismiss in both Cases 1 and 2***, replied as follows:

> 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.

Transcript (Ex. 23), page 9, lines 5-13 (emphasis added).

Although the argument of the applicability of N.A.C. § 368A.170 was thereafter reserved by the Commission for argument at a later time (if the Plaintiffs were found to be entitled to a refund in the first place), Mr. Pope subsequently stated in the hearing:

> 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***.

Transcript (Ex. 23), pages 74-75, lines 19-25, 1-6 (emphasis added).

Commissioner Turner then verified this position:

> 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.

Transcript (Ex. 23), pages 92-93, lines 21-25, 1-2 (emphasis added).[21]

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[21] In later commenting upon the bases for the ruling denying the claims for refunds, Commissioner Turner, in adhering to his "pass-through" conceptualization of the tax, stated that he 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." Transcript (Ex. 23), page 93, lines 6-8 (emphasis added). That unjust enrichment claim was obviously predicated upon his belief that these Plaintiffs did not *pay* the tax and could not, then, equitably recoup it.

Counsel for the Defendants expressed this same position before this very Court. During the hearing held just on December 9, 2010, all three of the attorneys for the Defendants articulated three different positions regarding the applicability of N.A.C. § 368A.170 to Plaintiffs' ability to even recover a refund of the LET unconstitutionally paid to the state. Transcript of Hearing on December 9, 2010, Ex. 226, pp. 30-46.

First, Vivienne Rakowsky, who was not involved in either the federal cases or the state administrative proceedings, explained her interpretation of the ability of Plaintiffs to recover any refund based upon N.A.C. § 368A.170:

> 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 [sic], 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.
>
> [Mr. Shafer] says his - - his people have not been collecting the tax they've been paying it. So if he can verify the fact that the 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.

Transcript, Ex. 26, p. 34 (clarification added).

Next, Mr. Pope, who admitted that he was the only attorney of the trio present on behalf of the State on December 9, 2010, who was also involved in both the federal court and state administrative proceedings, made an argument disavowing his position in front of the Commission, as set forth, *supra*:

> MR. POPE: 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 on 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.

Transcript, Ex. 26, pp. 35-36 (emphasis added).

Then, it was Mr. Doerr's turn to give this Court *his* interpretation of N.A.C § 368A.170:

THE COURT: . . . 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 <u>not</u> 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 - -

Transcript, Ex. 26, p. 38 (emphasis added).

Finally, all three of the State's attorneys again gave their varying constructions of the ability of Plaintiffs to obtain a refund *at all* if Chapter 368A is found to be unconstitutional:

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.***

Transcript, Ex. 26, p. 42 (emphasis added).

Despite their arguments to the contrary, Mr. Pope then tried to argue that Plaintiffs have not established irreparable harm: "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." Transcript, Ex. 26, p. 44.

To this day, the Department has not settled on a final position on this issue. In the Nevada Department of Taxation's Opposition to Plaintiffs' Renewed Motion for Preliminary Injunction and Motion to Strike (dated March 2, 2011), the Department argued in light of its ever-changing position on this issue discussed above, that Plaintiffs were the "taxpayers" who were entitled to a refund:

> Pursuant to NRS 368A.110 the "taxpayer is the owner or operator of the facility where the live entertainment is provided. NRS 368A allows the taxpayer (owner or operator of the facility) to collect the amount taxable or pay the tax itself based on the face amount of the ticket. [ ]"
>
> In this case, the Plaintiff have provided sworn affidavits from some of the Case 2 Plaintiffs that they did not "raise[ ] the admission charge" and did not "assess" its customers with the tax. According the sworn affidavits the Plaintiffs pay "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 Deparment." *See* Plaintiffs Exhibit 19 to its Renewed Motion. ***Accordingly, NAC.170 would not apply to the Plaintiffs, because they never collected the tax***

> ***from their patrons, and therefore could never have over-collected the tax***. Thus, the Plaintiffs argument that they do not have a remedy because they do not keep records of their clients is not relevant to the refund issue in this case.
>
> Contrary to an over-colleced tax, an illegal tax is unlawful. In this case, if the LET if determined by the Court to be illegal, the ***Plaintiffs will be entitled to seek a refund***. *See* **State of Nev. v. Scotsman Mfg. Co.**, 109 Nev. 252, 256, 849 P.2d 317, 320 (1993) (the state must now undo the unlawful deprivation by refunding the tax." (internal quotations omitted); *see also* **McKesson Corp. v. Division of Alcoholic Beverages and Tobacco**, 496 U.S. 18, 19 (1990) (If a state takes the position that a taxpayer should pay the tax and then challenge the tax statute, and the taxpayer prevails because the tax is inherently unconstitutional, the Due Process clause of the Fourteenth Amendment requires the state to refund taxes already paid). [ ] ***Therefore, if the LET tax is held to be unconstitutional, the tax could be refunded.***

Id. at pp. 16-17 (footnotes omitted; emphasis supplied)

However, for purposes of Defendants' Motion to Compel on an Order Shortening Time (dated August 15, 2011), it better suited the Department to flip-flop its position, and that is exactly what it did. It argued: "Pursuant to NAC 368A.170 it is necessary to determine whether the club owner or the patron paid the tax" (**id**. at 14) and "[t]he Department must also determine whether the club collected the LET tax from it s customers or whether the club paid the LET tax without collecting from its customers (**id**. at 17) (citing NAC 368A.170).

If history is any guide, it teaches that the Department will advance any position on this issue that best suits its interest ***at that specific point in time***. Thus, upon Plaintiffs' having demonstrated that the LET is unconstitutional, history predicts that the Department will assert that the patron is the taxpayer and Plaintiffs are ineligible for a refund. Therefore, the LET must be declared unconstitutional and permanently enjoined.

If, indeed, the Defendants' position taken before the Tax Commission and this Court (that Plaintiffs cannot obtain a refund without identifying and passing the refund along to the

specific patrons who Defendants contend paid the tax) carries the day, irreparable injury will certainly exist apart from the injury to Plaintiffs' First Amendment freedoms since Plaintiffs will never be able to recover the unconstitutionally collected tax.[22]

Fifth, the regulation relied upon by the Defendants, itself, demonstrates irreparable injury. Under their interpretation of the regulation, the Plaintiffs can only obtain a refund of an unconstitutional tax if they were able to obtain and retain the ***name and address*** of every patron who enters the facility and/or who purchases any form of food, beverage, or merchandise. No entertainment venue could be expected to collect and maintain such records, particularly in light of the fact that the Constitution recognizes the right to view, hear, and engage in protected expression *anonymously*,[23] and these privacy interests are particularly relevant here where the Plaintiffs are a group of exotic dance facilities and where patrons may then have a specific interest in maintaining their anonymity. Under these circumstances, the disclosure requirements of N.A.C. § 368A.170, which the Defendants ***insist*** apply here, themselves beget a constitutional violation (compelled disclosure of private information). The prospect for irreparable harm is therefore clearly established, and an injunction is warranted.

F. PLAINTIFFS HAVE A RIGHT TO THE REQUESTED INJUNCTIVE RELIEF BECAUSE, AS A MATTER OF LAW, NO STATUTE CAN DIVEST THE COURTS OF THIS STATE OF THEIR CONSTITUTIONALLY-GRANTED AUTHORITY TO ISSUE WRITS OF INJUNCTIONS.

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[22] In addition, there is also the question, reserved by this Court, of whether the to-be-filed petition for judicial review, to take the place of Case 2, would be timely.

[23] *See, e.g.*, **Talley v. California**, 362 U.S. 60, 64-66 (1960); **Hynes v. Mayor and Council of Borough of Oradell**, 425 U.S. 610, 628 (1976); **McIntyre v. Ohio Elections Comm.**, 514 U.S. 334, 341-344 (1995); **Connection Distributing Co. v. Reno**, 154 F.3d 281, 293 (6th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999); and **Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County**, 274 F.3d 377, 394-395 (6th Cir. 2001), *cert denied*, 535 U.S. 1073 (2002).

Chapter 368A contains an anti-injunction provision (N.R.S. §368A.280(1)), which the Defendants will raise as a bar to this Court providing the relief requested by way of this motion. However, the anti-injunction provision in N.R.S. § 368A.280(1) violates the separation of powers provision of the Nevada Constitution, and is therefore unenforceable.

The Supreme Court of Ohio recently faced a similar situation in **City of Norwood v. Horney**, 853 N.E.2d 1115, 110 Ohio St.3d 353 (Ohio 2006). In **Norwood**, the court evaluated the constitutionality of a statute that "prohibit[ed] a court from enjoining the taking and using of property appropriated by the government . . . prior to appellate review of the taking." **Id**. at 1122. The court ruled the statute to be "an unconstitutional encroachment of the judiciary's constitutional and inherent authority in violation of the separation-of-powers doctrine." **Id**. at 1150.

The **Norwood** court identified the power of injunction to be an inherent power of the courts under the state constitution. **Id**. at 1148-1149. The court next recognized the authority to grant injunctive relief as judicial power that "resides exclusively in the judicial branch." **Id**. at 1148. It therefore concluded that the legislature's attempt to limit the court's inherent power of injunction violated the separation-of-powers doctrine. **Id**. at 1150.

In doing so, the Ohio Supreme Court found the following statement of the Kentucky Supreme Court to be particularly astute:

> The control over this inherent judicial power, in this particular instance the injunction, is exclusively within the constitutional realm of the courts. *As such, it is not within the purview of the legislature to grant or deny the power nor is it within the purview of the legislature to shape or fashion circumstances under which this inherently judicial power may be or may not be granted or denied.*

Id. at 1149 (emphasis in original), *citing* **Smothers v. Lewis**, 672 S.W.2d 62, 64 (Ky. 1984).

This Court should likewise find the legislature's attempt to limit or fashion the circumstances under which a court may exercise its injunctive power to be in violation of the separation of powers mandated by Article 3, § 1, of the Constitution of the State of Nevada. In Nevada, the power of injunction is not only an inherent judicial power, but it is an *explicit* power of the courts directly conferred upon them by the Nevada Constitution. Article 6, § 6, of the State Constitution vests the power to issue writs of injunction in the State's District Courts.

> . . .The District Courts and the Judges thereof have the power to issue Writs of. . . Injunction. . ., and all other Writs proper and necessary to the complete exercise of the jurisdiction.

Chapter 368A attempts to divest the judiciary of its constitutionally granted power of injunction. This provision is a patently unconstitutional violation of the separation of powers set forth in Article 3, § 1, of the State Constitution, which provides:

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

"It is fundamental to our system of government that the separate powers granted the executive, legislative and judicial departments be exercised ***without intrusion***." **City of North Las Vegas v. Daines**, 92 Nev. 292, 294, 550 P.2d 399 (1976), *citing* **Galloway v. Truesdell**, 83 Nev. 13, 422 P.2d 237 (1967) (emphasis added). This is the single most important principle "declaring and guaranteeing the liberties of the people." **Galloway**, 83 Nev. at 18. Statutes which attempt to limit or destroy the powers of the courts must ***fail***. **Goldberg v. The Eighth Judicial District Court of the State of Nevada**, 93 Nev. 614, 616-17, 572 P.2d 521 (1977), *citing* **Lindauer v. Allen**, 85 Nev. 430, 434, 456 P.2d 851 (1969).

Further, Plaintiffs' situation is one that has already been recognized to merit injunctive relief. The Nevada Supreme Court has previously addressed this issue of enjoining the collection of an impermissible tax. In **Penrose v. Whitacre**, 62 Nev. 239, 147 P.2d 887 (1944) (hereinafter "**Penrose II**"), the court stated that an injunction to prevent the collection of taxes would lie where "enforcement of the tax would lead to a multiplicity of suits, or ***produce irreparable injury***; or, if the property is real estate, throw a cloud upon the title of the complainant, or there must be some allegation of fraud. . . ." **Id.** at 245 (emphasis added) (*citing* **Wells, Fargo & Co. v. Dayton**, 11 Nev. 161, 166 (1876) (other citations omitted)). *See also* **Comm'r of International Revenue v. Shapiro**, 424 U.S. 614, 627 (1976). The Plaintiffs must also lack an adequate remedy at law. **Penrose v. Whitacre**, 61 Nev. 440, 132 P.2d 609, 617 (1942) (hereinafter "**Penrose I**").

Here, Plaintiffs meet the requirements under **Penrose II** because: (1) enforcement of Chapter 368A will cause, and indeed has caused, Plaintiffs to suffer irreparable injury; and (2) Plaintiffs lack an adequate remedy at law. These matters have been discussed in great detail above, and will not be reiterated here. Further, the actual imposition of an unconstitutional tax or fee can cause irreparable injury. *See* **Joelner v. Village of Washington Park, Illinois**, 378 F.3d 613, 620, 628 (7th Cir. 2004) (Court found that if plaintiff "cannot afford such a hefty fee, he would be forced to shut down his bookstore. Hence, there is a threat that these allegedly unconstitutionally excessive fees could cause Joelner significant irreparable harm").

It is clear that Plaintiffs are entitled to injunctive relief in this action under the binding precedents of **Penrose I** and **II**. Because Chapter 368A attempts to divest this Court of its constitutionally-given power of injunction, it is an unconstitutional abridgment of the

separation of powers doctrine contained in Article 3 § 1, of the Constitution of the State of Nevada, and is therefore invalid.

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V. CONCLUSION

Based upon the foregoing, Plaintiffs respectfully request that this Honorable Court grant this motion; declare the LET to be facially unconstitutional; enjoin the Defendants, their officers, employees, agents, and representatives, as well as all persons acting by, through, and for them, from enforcing, applying, and implementing Title 32, Chapter 368A of the Nevada Revised Statutes; and order the refunding of all taxes paid by Plaintiffs to date, together with interest.

DATED this 22nd day of September, 2011

BY: */s/ William H. Brown*

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of September, 2011, the foregoing **MOTION FOR SUMMARY JUDGMENT ON FACIAL CHALLENGE, FOR PERMANENT INJUNCTION, AND FOR RETURN OF TAXES** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

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Ex. 18	Dino Dicianno email dated April 24, 2004 – Exhibit E to Assembly Committee/Ways & Means, May 26, 2005
Ex. 19	Memorandum (or Email – to Bible) regarding proposed regulations
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WEST'S NEVADA REVISED STATUTES ANNOTATED
TITLE 32. REVENUE AND TAXATION
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
GENERAL PROVISIONS

368A.010. Definitions

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.110, inclusive, have the meanings ascribed to them in those sections.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.020. "Admission charge" defined

"Admission charge" means the total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.030. "Board" defined

"Board" means the State Gaming Control Board.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.040. "Business" defined

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.050. "Business entity" defined

1. "Business entity" includes:

(a) A corporation, partnership, proprietorship, limited-liability company, business association, joint venture, limited-liability partnership, business trust and their equivalents organized under the laws of this state or another jurisdiction and any other type of entity that engages in business.

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

2. The term does not include a governmental entity.

[FN1] See Historical and Statutory Notes below for effective date information.

→**368A.060. "Facility" defined**

"Facility" means:

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

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

→**368A.070. "Game" defined**

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

[FN1] See Historical and Statutory Notes below for effective date information.

→**368A.080. "Licensed gaming establishment" defined**

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

[FN1] See Historical and Statutory Notes below for effective date information.

→**368A.090. "Live entertainment" defined**

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

[FN1] See Historical and Statutory Notes below for effective date information.

→368A.100. "Slot machine" defined

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

[FN1] See Historical and Statutory Notes below for effective date information.

→368A.110. "Taxpayer" defined

"Taxpayer" means:

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

ADMINISTRATION

➡368A.130. Adoption by Department of regulations for determining whether activity is taxable

The Department shall provide by regulation for a more detailed definition of "live entertainment" consistent with the general definition set forth in NRS 368A.090 for use by the Board and the Department in determining whether an activity is a taxable activity under the provisions of this chapter.

[FN1] See Historical and Statutory Notes below for effective date information.

➡368A.140. Duties of Board and Department; applicability of chapters 360 and 463 of NRS

1. The Board shall:

(a) Collect the tax imposed by this chapter from taxpayers who are licensed gaming establishments; and

(b) Adopt such regulations as are necessary to carry out the provisions of paragraph (a). The regulations must be adopted in accordance with the provisions of chapter 233B of NRS and must be codified in the Nevada Administrative Code.

2. The Department shall:

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

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

3. For the purposes of:

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

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

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

1. If:

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

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

(b) Preserve those records for:

(1) At least 5 years if the taxpayer is a licensed gaming establishment or until any litigation or prosecution

pursuant to this chapter is finally determined, whichever is longer; or

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

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

2. The Board and the Department may by regulation specify the types of records which must be kept to determine the amount of the liability of a taxpayer from whom they are required to collect the tax imposed by this chapter.

3. Any agreement that is entered into, modified or extended after January 1, 2004, for the lease, assignment or transfer of any premises upon which any activity subject to the tax imposed by this chapter is, or thereafter may be, conducted shall be deemed to include a provision that the taxpayer required to pay the tax must be allowed access to, upon demand, all books, records and financial papers held by the lessee, assignee or transferee which must be kept pursuant to this section. Any person conducting activities subject to the tax imposed by NRS 368A.200 who fails to maintain or disclose his records pursuant to this subsection is liable to the taxpayer for any penalty paid by the taxpayer for the late payment or nonpayment of the tax caused by the failure to maintain or disclose records.

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

1. Except as otherwise provided in this section and NRS 360.250, the records and files of the Board and the Department concerning the administration of this chapter are confidential and privileged. The Board, the Department and any employee of the Board or the Department engaged in the administration of this chapter or charged with the custody of any such records or files shall not disclose any information obtained from the records or files of the Board or the Department or from any examination, investigation or hearing authorized by the provisions of this chapter. The Board, the Department and any employee of the Board or the Department may not be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceeding.

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

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

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

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

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

(e) Disclosure in confidence to the Governor or his agent in the exercise of the Governor's general supervisory powers, or to any person authorized to audit the accounts of the Board or the Department in pursuance of an audit, or to the Attorney General or other legal representative of the State in connection with an action or proceeding pursuant to this chapter, or to any agency of this or any other state charged with the administration or enforcement of laws relating to taxation.

[FN1] See Historical and Statutory Notes below for effective date information.

IMPOSITION AND COLLECTION

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

1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in

this state where live entertainment is provided. If the live entertainment is provided at a facility with a maximum seating capacity of:

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

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

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

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

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

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

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

(b) Live entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c).

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

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum seating capacity of less than 300.

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment is provided has a maximum seating capacity of less than 300.

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

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

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

(i) Live entertainment that is provided at a licensed gaming establishment at private meetings or dinners attended by members of a particular organization or by a casual assemblage if the purpose of the event is not primarily for entertainment.

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

6. As used in this section, "maximum seating capacity" means, in the following order of priority:

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

➡368A.210. Taxpayer to hold taxes in separate account

A taxpayer shall hold the amount of all taxes for which he is liable pursuant to this chapter in a separate account in trust for the State.

[FN1] See Historical and Statutory Notes below for effective date information.

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

1. Except as otherwise provided in this section:

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

prescribed by the Board.

(b) All other taxpayers shall file with the Department, on or before the last day of each month, a report showing the amount of all taxable receipts for the preceding month. The report must be in a form prescribed by the Department.

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

Upon written application made before the date on which payment must be made, the Board or the Department may, for good cause, extend by 30 days the time within which a taxpayer is required to pay the tax imposed by this chapter. If the tax is paid during the period of extension, no penalty or late charge may be imposed for failure to pay at the time required, but the taxpayer shall pay interest at the rate of 1 percent per month from the date on which the amount would have been due without the extension until the date of payment, unless otherwise provided in NRS 360.232 or 360.320.

[FN1] See Historical and Statutory Notes below for effective date information.

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

1. If a taxpayer:

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

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

he is entitled to receive a credit for the amount of tax paid on account of that uncollected amount. The credit may be

used against the amount of tax that the taxpayer is subsequently required to pay pursuant to this chapter.

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

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

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

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

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

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

(a) For the first return of any taxpayer that contains one or more violations, issue a letter of warning to the taxpayer which provides an explanation of the violation or violations contained in the return.Green numbers along left margin indicate location on the printed bill (e.g., 5-15 indicates page 5, line 15).

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

(c) For the third and each subsequent return in any calendar year which contains one or more violations, assess a penalty of three times the amount of the tax which was not reported.

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

[FN1] See Historical and Statutory Notes below for effective date information.

OVERPAYMENTS AND REFUNDS

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

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

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

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

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

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

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

→**368A.**270. Interest on overpayments; disallowance of interest

1. Except as otherwise provided in this section and NRS 360.320, interest must be paid upon any overpayment of

any amount of the tax imposed by this chapter in accordance with the provisions of NRS 368A.140.

2. If the overpayment is paid to the Department, the interest must be paid:

(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.

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

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

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

2. An action brought pursuant to subsection 1 must be brought in a court of competent jurisdiction in Carson City,

the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

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

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

(a) The Nevada Gaming Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

(b) The Nevada Tax Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

→368A.310. Allowance of interest in judgment for amount illegally collected

In any judgment, interest must be allowed at the rate of 6 percent per annum upon the amount found to have been

illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment, or to a date preceding the date of the refund warrant by not more than 30 days. The date must be determined by the Board or the Department.

[FN1] See Historical and Statutory Notes below for effective date information.

→**368A.**320. Standing to recover

A judgment may not be rendered in favor of the plaintiff in any action brought against the Board or the Department to recover any amount paid when the action is brought by or in the name of an assignee of the person paying the amount or by any person other than the person who paid the amount.

[FN1] See Historical and Statutory Notes below for effective date information.

→**368A.**330. Action for recovery of erroneous refund: Jurisdiction; venue; prosecution

1. The Board or the Department may recover a refund or any part thereof which is erroneously made and any credit or part thereof which is erroneously allowed in an action brought in a court of competent jurisdiction in Carson City or Clark County in the name of the State of Nevada.

2. The action must be tried in Carson City or Clark County unless the court, with the consent of the Attorney General, orders a change of place of trial.

3. The Attorney General shall prosecute the action, and the provisions of NRS, the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings.

[FN1] See Historical and Statutory Notes below for effective date information.

→**368A.**340. Cancellation of illegal determination

1. If any amount in excess of $25 has been illegally determined, either by the person filing the return or by the Board or the Department, the Board or the Department shall certify this fact to the State Board of Examiners, and the latter shall authorize the cancellation of the amount upon the records of the Board or the Department.

2. If an amount not exceeding $25 has been illegally determined, either by the person filing a return or by the Board or the Department, the Board or the Department, without certifying this fact to the State Board of Examiners, shall authorize the cancellation of the amount upon the records of the Board or the Department.

[FN1] See Historical and Statutory Notes below for effective date information.

MISCELLANEOUS PROVISIONS

→**368A.350.** Prohibited acts; penalty

1. A person shall not:

(a) Make, cause to be made or permit to be made any false or fraudulent return or declaration or false statement in any report or declaration, with intent to defraud the State or to evade payment of the tax or any part of the tax imposed by this chapter.

(b) Make, cause to be made or permit to be made any false entry in books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

(c) Keep, cause to be kept or permit to be kept more than one set of books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

2. Any person who violates the provisions of subsection 1 is guilty of a gross misdemeanor.

[FN1] See Historical and Statutory Notes below for effective date information.

→**368A.360.** Revocation of gaming license for failure to report, pay or truthfully account for tax

Any licensed gaming establishment liable for the payment of the tax imposed by NRS 368A.200 who willfully fails to report, pay or truthfully account for the tax is subject to the revocation of his gaming license by the Nevada Gaming Commission.

[FN1] See Historical and Statutory Notes below for effective date information.

→**368A.370.** Remedies of State are cumulative

The remedies of the State provided for in this chapter are cumulative, and no action taken by the Board, the Department or the Attorney General constitutes an election by the State to pursue any remedy to the exclusion of any other remedy for which provision is made in this chapter.

[FN1] See Historical and Statutory Notes below for effective date information.

NEVADA 2005 SESSION LAWS
REGULAR SESSION OF THE 73RD LEGISLATURE

Additions are indicated by Text; deletions by
~~Text~~. Changes in tables are made but not highlighted.

Ch. 484

A.B. No. 554

REVENUE AND TAXATION--ADMINISTRATION--BUSINESS, PROPERTY, AND ENTERTAINMENT

AN ACT relating to taxation; clarifying the definition of "employer" for the purpose of the tax on business; revising the provisions governing the applicability and administration of the tax on live entertainment; clarifying the provisions governing the administration of the use taxes on certain personal property acquired free of charge at public events; expanding the exemptions from the taxes on the transfer of real property; revising the provisions governing the application of sales and use taxes to retail sales of vehicles for which used vehicles are taken in trade; revising the provisions governing the application of sales and use taxes to retail sales of farm machinery and equipment; providing for the submission to the voters of the question whether the Sales and Use Tax Act of 1955 should be amended to provide an exemption from the tax for sales of vehicles for which used vehicles are taken in trade and for farm machinery and equipment; providing exemptions from certain analogous taxes; 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. NRS 363B.030 is hereby amended to read as follows:

<< NV ST 363B.030 >>

"Employer" means any employer who is required to pay a contribution pursuant to NRS 612.535 for any calendar quarter, except a financial institution, an Indian tribe, a nonprofit organization , ~~or~~ a political subdivision ; **or any person who does not supply a product or service, but who only consumes a service.** For the purposes of this section:

1. "Financial institution" has the meaning ascribed to it in NRS 363A.050.

2. "Indian tribe" includes any entity described in subsection 10 of NRS 612.055.

3. "Nonprofit organization" means a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c).

4. "Political subdivision" means any entity described in subsection 9 of NRS 612.055.

Sec. 2. Chapter 368A of NRS is hereby amended by adding thereto the provisions set forth as sections 3, 4 and 5 of this act.

Sec. 3.

"Casual assemblage" includes, without limitation:

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

guests; or

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

Sec. 4.

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

Sec. 5.

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

Sec. 6. NRS 368A.010 is hereby amended to read as follows:

<< NV ST 368A.010 >>

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.110, inclusive, **and sections 3, 4 and 5 of this act** have the meanings ascribed to them in those sections.

Sec. 7. NRS 368A.020 is hereby amended to read as follows:

<< NV ST 368A.020 >>

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

Sec. 8. NRS 368A.060 is bereby amended to read as follows:

<< NV ST 368A.060 >>

1. "Facility" means:

~~1.~~ **(a)** Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:

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

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

~~2.~~ **(b)** Any area or premises where live entertainment is pr ovided if the live entertainment is provided at any other licensed gaming establishment.

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

(a) Less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those

respective limits, any area or premises where the live entertainment is provided and for which consideration is collected, from one or more patrons, for the right or privilege of entering that area or those premises, even if additional consideration is collected for the right or privilege of entering a smaller venue within that area or those premises; or

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

Sec. 9. NRS 368A.090 is hereby amended to read as follows:

<< NV ST 368A.090 >>

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

2. The term:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(I) Does not constitute a performance;

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

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

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

Sec. 10. NRS 368A.200 is hereby amended to read as follows:

<< NV ST 368A.200 >>

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

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

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

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

3. A business entity that collects any amount that is taxable pursuant to subsection 1 is liable for the tax imposed,

but is entitled to collect reimbursement from any person paying that amount.

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

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

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

(b) Live entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c) **, or a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS.**

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

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum seating capacity of less than ~~300.~~ **200.**

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment is provided has a maximum seating capacity of less than ~~300.~~ **200.**

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

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

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

(i) Live entertainment that is provided at a licensed gaming establishment at private meetings or dinners attended by members of a particular organization or by a casual assemblage if the purpose of the event is not primarily for entertainment.

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

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

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

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

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

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

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

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

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

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

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

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

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

Sec. 11. NRS 368A.220 is hereby amended to read as follows:.

<< NV ST 368A.220 >>

1. Except as otherwise provided in this section:.

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

(b) All other taxpayers shall file with the Department, on or before the last day of each month, a report showing the amount of all taxable receipts for the preceding month. The report must he in a form prescribed by the Department.

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

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

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

Sec. 12. Cbapter 372 of NRS is hereby amended by adding thereto a new section to read as follows:

In its administration of the use tax imposed by NRS 372.185, the Department shall not consider the storage, use or other consumption in this State of tangible personal property which is:

1. Worth $100 or less; and

2. Acquired free of charge at a convention, trade show or other public event.

Sec. 13. NRS 372.7263 is hereby amended to read as follows:

<< NV ST 372.7263 >>

1. In administering the provisions of NRS 372.335, the Department shall apply the exemption for the sale of tangible personal property delivered by the vendor to a forwarding agent for shipment out of State to include:

(a) The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;

(b) The sale of farm machinery and equipment to a nonresident who submits proof to the vendor that the farm machinery and equipment will be delivered out of State not later than 15 days after the sale; and

(c) The sale of a vessel to a nonresident who submits proof to the vendor that the vessel will be delivered out of State not later than 15 days after the sale.

2. As used in this section:

(a) ~~"Agricultural use" has the meaning ascribed to it in NRS 361A.030.~~

~~(b)~~ "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

(2) Machinery or equipment only incidentally employed for ~~the agricultural use of real property.~~

~~(c)~~ **agricultural purposes.**

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

~~(d)~~ **(c)** "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 14. NRS 372.7263 is hereby amended to read as follows:

<< NV ST 372.7263 >>

~~1.~~ In administering the provisions of NRS 372.335, the Department shall apply the exemption for the sale of tangible personal property delivered by the vendor to a forwarding agent for shipment out of State to include:

~~(a)~~ **1.** The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;

~~(b)~~ **2.** The sale of farm machinery and equipment **, as defined in section 30 of this act,** to a nonresident who sub-

mits proof to the vendor that the farm machinery and equipment will be delivered out of State not later than 15 days after the sale; and

~~(c)~~ **3.** The sale of a vessel to a nonresident who submits proof to the vendor that the vessel will be delivered out of State not later than 15 days after the sale.

~~2. As used in this section:~~

~~(a) "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:~~

~~(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or~~

~~(2) Machinery or equipment only incidentally employed for agricultural purposes.~~

~~(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.~~

~~(c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.~~

Sec. 15. Chapter 374 of NRS is hereby amended by adding thereto the provisions set forth as sections 16 and 17 of this act.

Sec. 16.

In its administration of the use tax imposed by NRS 374.190, the Department shall not consider the storage, use or other consumption in a county of tangible personal property which is:

1. Worth $100 or less; and

2. Acquired free of charge at a convention, trade show or other public event.

Sec. 17.

1. There are exempted from the taxes imposed by this chapter the gross receipts from the sale, storage, use or other consumption in a county of farm machinery and equipment.

2. As used in this section:

(a) "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

(2) Machinery or equipment only incidentally employed for agricultural purposes.

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

(c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 18. NRS 374.030 is hereby amended to read as follows:

<< NV ST 374.030 >>

1. "Gross receipts" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold. However, in accordance with such rules and regulations as the Department may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor is required to pay to the county or has paid the use tax with respect to the property, and has resold the property before making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

(b) The cost of the materials used, labor or service cost, interest paid, losses or any other expense.

(c) The cost of transportation of the property before its sale to the purchaser.

2. The total amount of the sale or lease or rental price includes all of the following:

(a) Any services that are a part of the sale.

(b) All receipts, cash, credits and property of any kind.

(c) Any amount for which credit is allowed by the seller to the purchaser.

3. "Gross receipts" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) The sale price of property returned by customers when the full sale price is refunded either in cash or credit, but this exclusion does not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The price received for labor or services used in installing or applying the property sold.

(d) The amount of any tax, not including any manufacturers' or importers' excise tax, imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

~~(e) The amount of any allowance against the selling price given by a retailer for the value of a used vehicle which is taken in trade on the purchase of another vehicle.~~

4. For purposes of the sales tax, if the retailers establish to the satisfaction of the Department that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed.

Sec. 19. NRS 374.070 is hereby amended to read as follows:

<< NV ST 374.070 >>

1. "Sales price" means the total amount for which tangible property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:.

(a) The cost of the property sold.

(b) The cost of the materials used, labor or service cost, interest charged, losses, or any other expenses.

(c) The cost of transportation of the property before its purchase.

2. The total amount for which property is sold includes all of the following:

(a) Any services that are a part of the sale.

(b) Any amount for which credit is given to the purchaser by the seller.

3. "Sales price" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(h) The amount charged for property returned by customers when the entire amount charged therefor is refunded in cash or credit, except that this exclusion does not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The amount charged for labor or services rendered in installing or applying the property sold.

(d) The amount of any tax, not including any manufacturers' or importers' excise tax, imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

(e) The amount of any tax imposed by the State of Nevada upon or with respect to the storage, use or other consumption of tangible personal property purchased from any retailer.

(f) The amount of any allowance against the selling price given by a retailer for the value of a used ~~vehicle or~~ vessel which is taken in trade on the purchase of another ~~vehicle or~~ vessel.

Sec. 20. NRS 375.090 is hereby amended to read as follows:

<< NV ST 375.090 >>

The taxes imposed by NRS 375.020, 375.023 and 375.026 do not apply to:

1. A mere change in identity, form or place of organization, such as a transfer between a corporation and its parent corporation, a subsidiary or an affiliated corporation if the affiliated corporation has identical common ownership.

2. A transfer of title to the United States, any territory or state or any agency, department, instrumentality or political subdivision thereof.

3. A transfer of title recognizing the true status of ownership of the real property.

4. A transfer of title without consideration from one joint tenant or tenant in common to one or more remaining joint

tenants or tenants in common.

5. A transfer of title between spouses, including gifts, or to effect a property settlement agreement or between former spouses in compliance with a decree of divorce.

6. A transfer of title to or from a trust without consideration if a certificate of trust is presented at the time of transfer.

7. Transfers, assignments or conveyances of unpatented mines or mining claims.

8. A transfer, assignment or other conveyance of real property to a corporation or other business organization if the person conveying the property owns 100 percent of the corporation or organization to which the conveyance is made.

9. A transfer, assignment or other conveyance of real property if the owner of the property is related to the person to whom it is conveyed within the first degree of **lineal** consanguinity or affinity.

10. A conveyance of real property by deed which becomes effective upon the death of the grantor pursuant to NRS 111.109.

11. The making, delivery or filing of conveyances of real property to make effective any plan of reorganization or adjustment:

(a) Confirmed under the Bankruptcy Act, as amended, 11 U.S.C. §§ 101 et seq.;

(b) Approved in an equity receivership proceeding involving a railroad, as defined in the Bankruptcy Act; or

(c) Approved in an equity receivership proceeding involving a corporation, as defined in the Bankruptcy Act,

if the making, delivery or filing of instruments of transfer or conveyance occurs within 5 years after the date of the confirmation, approval or change.

12. The making or delivery of conveyances of real property to make effective any order of the Securities and Exchange Commission if:

(a) The order of the Securities and Exchange Commission in obedience to which the transfer or conveyance is made recites that the transfer or conveyance is necessary or appropriate to effectuate the provisions of section 11 of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79k;

(b) The order specifies and itemizes the property which is ordered to be transferred or conveyed; and

(c) The transfer or conveyance is made in obedience to the order.

13. A transfer to an educational foundation. As used in this subsection, "educational foundation" has the meaning ascribed to it in subsection 3 of NRS 388.750.

14. A transfer to a university foundation. As used in this subsection, "university foundation" has the meaning ascribed to it in subsection 3 of NRS 396.405.

Sec. 21. NRS 374.265 is hereby amended to read as follows:

<< NV ST 374.265 >>

"Exempted from the taxes imposed by this chapter," as used in NRS 374.265 to 374.355, inclusive, **and section 17 of this act** means exempted from the computation of the amount of taxes imposed.

Sec. 22. NRS 374.286 is hereby amended to read as follows:

<< NV ST 374.286 >>

1. There are exempted from the taxes imposed by this chapter the gross receipts from the sale , ~~of, and the~~ storage, use or other consumption in a county of , farm machinery and equipment . ~~employed for the agricultural use of real property.~~

2. As used in this section:

(a) ~~"Agricultural use" has the meaning ascribed to it in NRS 361A.030.~~

~~(b)~~ "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

(2) Machinery or equipment only incidentally employed for ~~the agricultural use of real property.~~

~~(c)~~ **agricultural purposes.**

(b) "Farm tractor" means a motor vehicle designed **and** used primarily for drawing an implement of husbandry.

~~(d)~~ (c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 23. NRS 374.7273 is hereby amended to read as follows:

1. In administering the provisions of NRS 374.340, the Department shall apply the exemption for the sale of tangible personal property delivered by the vendor to a forwarding agent for shipment out of State to include:

(a) The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;

(b) The sale of farm machinery and equipment to a nonresident who submits proof to the vendor that the farm machinery and equipment will be delivered out of State not later than 15 days after the sale; and

(c) The sale of a vessel to a nonresident who submits proof to tbe vendor that the vessel will be delivered out of State not later than 15 days after the sale.

2. As used in this section:

(a) ~~"Agricultural use" has the meaning ascribed to it in NRS 361A.030.~~

~~(b)~~ "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

(2) Machinery or equipment only incidentally employed for ~~the agricultural use of real property.~~

~~(c)~~ **agricultural purposes.**

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

~~(d)~~ **(c)** "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 24. NRS 374.7273 is hereby amended to read as follows:

<< NV ST 374.7273 >>

~~1.~~ In administering the provisions of NRS 374.340, the Department shall apply the exemption for the sale of tangible personal property delivered by the vendor to a forwarding agent for shipment out of State to include:

~~(a)~~ **1.** The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;

~~(b)~~ **2.** The sale of farm machinery and equipment **, as defined in section 30 of this act,** to a nonresident who submits proof to the vendor that the farm machinery and equipment will be delivered out of State not later than 15 days after the sale; and

~~(c)~~ **3.** The sale of a vessel to a nonresident who submits proof to the vendor that the vessel will be delivered out of State not later than 15 days after the sale.

~~2. As used in this section:~~

~~(a) "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:~~

~~(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or~~

~~(2) Machinery or equipment only incidentally employed for agricultural purposes.~~

~~(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.~~

~~(c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.~~

Sec. 25. Section 64 of Chapter 400, Statutes of Nevada 2003, at page 2374, is hereby amended to read as follows:

Sec. 64. NRS 374.070 is hereby amended to read as follows:

1. "Sales price" means the total amount for which tangible property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold.

(b) The cost of the materials used, labor or service cost, interest charged, losses, or any other expenses.

(c) The cost of transportation of the property before its purchase.

2. The total amount for which property is sold includes all of the following:

(a) Any services that are a part of the sale.

(b) Any amount for which credit is given to the purchaser by the seller.

3. "Sales price" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) The amount charged for property returned by customers when the entire amount charged therefor is refunded either in cash or credit; but this exclusion does not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The amount charged for labor or services rendered in installing or applying the property sold.

(d) The amount of any tax , (not including ~~, however,~~ any manufacturers' or importers' excise tax ,) imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

(e) The amount of any tax imposed by the State of Nevada upon or with respect to the storage, use or other consumption of tangible personal property purchased from any retailer.

(f) The amount of any allowance against the selling price given by a retailer for the value of a used vehicle which is taken in trade on the purchase of another vehicle.

~~4. For the purpose of a sale of a vehicle by a seller who is not required to be registered with the Department of Taxation, the sales price is the value established in the manner set forth in NRS 374.112.~~

Sec. 26. Section 138 of Chapter 400, Statutes of Nevada 2003, at page 2409, is hereby amended to read as follows:

Sec. 138. NRS ~~374.107,~~ 374.112, 374.113, 374.286, 374.291, 374.2911, 374.322 and 374.323 are hereby repealed.

Sec. 27. Section 139 of Chapter 400, Statutes of Nevada 2003, at page 2409, is hereby amended to read as follows:

Sec. 139. 1. This section and section 102 of this act become effective upon passage and approval.

2. Sections 103 to 135, inclusive, of this act become effective on July 1, 2003.

3. Sections 1 to 29, inclusive, 32 to 38, inclusive, 40 to 50, inclusive, 52 to 57, inclusive, 66, 67, 69 to 72, inclusive, 74 to 80, inclusive, 83, 84, 85, 87 to 92, inclusive, 94 to 101, inclusive, 136 and 137 of this act become effective:

(a) Upon passage and approval for the purposes of adopting regulations and performing any other preparatory administrative tasks that are necessary to carry out the provisions of this act; and

(b) On January 1, 2006, for all other purposes.

4. Sections 30 and 39 of this act become effective on January 1, 2006, only if the proposal submitted pursuant to

sections 103 to 107, inclusive, of this act is approved by the voters at the General Election on November 2, 2004.

5. Sections 31, 51, ~~58~~ **60** to 65, inclusive, 68, 73, 81, 82, 86, 93 and 138 of this act become effective on January 1, **2006,** only if the proposal submitted pursuant to sections 103 to 107, inclusive, of this act is not approved by the voters at the General Election on November 2, 2004.

Sec. 28.

At the General Election on November 7, 2006, a proposal must be submitted to the registered voters of this State to amend the Sales and Use Tax Act, which was enacted by the 47th session of the Legislature of the State of Nevada and approved by the Governor in 1955, and subsequently approved by the people of this State at the General Election held on November 6, 1956.

Sec. 29.

At the time and in the manner provided by law, the Secretary of State shall transmit the proposed Act to the several county clerks, and the county clerks shall cause it to be published and posted as provided by law.

Sec. 30.

The proclamation and notice to the voters given by the county clerks pursuant to law must be in substantially the following form:

Notice is hereby given that at the General Election on November 7, 2006, a question will appear on the ballot for the adoption or rejection by the registered voters of the State of the following proposed Act:

AN ACT to amend an Act entitled "An Act to provide revenue for the State of Nevada; providing for sales and use taxes; providing for the manner of collection; defining certain terms; providing penalties for violation, and other matters properly relating thereto." approved March 29, 1955, as amended.

THE PEOPLE OF THE STATE OF NEVADA DO ENACT AS FOLLOWS:

Section 1. The above-entitled Act, being Chapter 397, Statutes of Nevada 1955, at page 762, is hereby amended by adding thereto a new section to be designated as section 18.2, immediately following section 18.1, to read as follows:

Sec. 18.2. **"Vehicle" has the meaning ascribed to it in NRS 482.135.**

Sec. 2. The above-entitled Act, being Chapter 397, Statutes of Nevada 1955, at page 762, is hereby amended by adding thereto a new section to be designated section 55.5, immediately following section 55 to read as follows:

Sec. 55.5. **1. There are exempted from the taxes imposed by this Act the gross receipts from the sale, storage, use or other consumption in a county of farm machinery and equipment.**

2. As used in this section:

(a) "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

(2) Machinery or equipment only incidentally employed for agricultural purposes.

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

(c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 3. Section 11 of the above-entitled Act, being Chapter 397, Statutes of Nevada 1955, at page 764, is hereby amended to read as follows:

Sec. 11. **1.** "Sales price" means the total amount for which tangible property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold.

(b) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.

(c) The cost of transportation of the property ~~prior to~~ **before** itspurchase.

2. The total amount for which property is sold includes all of the following:

(a) Any services that are a part of the sale.

(b) Any amount for which credit is given to the purchaser by the seller.

3. "Sales price" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) The amount charged for property returned by customers when the entire amount charged therefor is refunded either in cash or credit ~~, but~~ **, except that** this exclusion ~~shall~~ **does** not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The amount charged for labor or services rendered in installing or applying the property sold.

(d) The amount of any tax , ~~(~~ not including ~~, however,~~ any manufacturers' or importers' excise tax , ~~)~~ imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

(e) The amount of any allowance against the selling price given by a retailer for the value of a used vehicle which is taken in trade on the purchase of another vehicle.

Sec. 4. Section 12 of the above-entitled Act, being Chapter 397, Statutes of Nevada 1955, at page 764, is hereby amended to read as follows:

Sec. 12. **1.** "Gross receipts" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold. However, in accordance with such rules and regulations as the Tax Commission may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor is required to pay to the State or has paid the use tax with respect to the property, and has resold the property ~~prior to~~ **before** making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

(b) The cost of the materials used, labor or service cos t, interest paid, losses ~~,~~ or any other expense.

(c) The cost of transportation of the property ~~prior to~~ **before** its sale to the purchaser.

2. The total amount of the sale or lease or rental price includes all of the following:

(a) Any services that are a part of the sale.

(b) All receipts, cash, credits~~,~~ and property of any kind.

(c) Any amount for which credit is allowed by the seller to the purchaser.

3. "Gross receipts" ~~do~~ **does** not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) ~~Sale~~ **The sale** price of property returned by customers when the full sale price is refunded either in cash or credit , ~~;~~ but this exclusion ~~shall~~ **does** not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The price received for labor or services used in installing or applying the property sold.

(d) The amount of any tax , ~~(~~ not including ~~, however,~~ any manufacturers' or importers' excise tax , ~~)~~ imposed by the United States upon or with respect to retail sales , whether imposed upon the retailer or the consumer.

(e) The amount of any allowance against the selling price given by a retailer for the value of a used vehicle which is taken in trade on the purchase of another vehicle.

4. For purposes of the sales tax, if the retailers establish to the satisfaction of the Tax Commission that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed.

Sec. 5. This Act becomes effective on January 1, 2007.

Sec. 31.

The ballot page assemblies and the paper ballots to be used in voting on the question must present the question in substantially the following form:

Shall the Sales and Use Tax Act of 1955 be amended to exempt from the taxes imposed by this Act on the gross receipts from the sale and the storage, use or other consumption of tangible personal property, the value of any used vehicle taken in trade on the purchase of another vehicle and to exempt from the taxes imposed by this Act on the gross receipts from the sale and the storage, use or other consumption of tangible personal property, the value of farm machinery and equipment?

Yes (BOX) No (BOX)

Sec. 32.

The explanation of the question which must appear on each paper ballot and sample ballot and in every publication and posting of notice of the question must be in substantially the following form:

(Explanation of Question)

The proposed amendment to the Sales and Use Tax Act of 1955 would exempt from the taxes imposed by this Act on the gross receipts from the sale and the storage, use or other consumption of tangible personal property, the value of any used vehicle taken in trade on the purchase of another vehicle and the value of farm machinery and equipment. The Legislature has amended the Local School Support Tax Law and the City-County Relief Tax Law to provide the same exemption for farm machinery and equipment if this proposal is adopted.

Sec. 33.

If a majority of the votes cast on the question submitted to the voters is yes, the amendment to the Sales and Use Tax Act of 1955 becomes effective on January 1, 2007. If less than a majority of votes cast on the question submitted to the voters is yes, the question fails and the amendment to the Sales and Use Tax Act of 1955 does not become effective.

Sec. 34.

All general election laws not inconsistent with this act are applicable.

Sec. 35.

Any informalities, omissions or defects in the content or making of the publications, proclamations or notices provided for in this act and by the general election laws under which this election is held must be so construed as not to invalidate the adoption of the act by a majority of the registered voters voting on the question if it can be ascertained with reasonable certainty from the official returns transmitted to the Office of the Secretary of State whether the proposed amendment was adopted by a majority of those registered voters.

<< Repealed: NV ST 368A.130, 368A.210, 374.107 >>

Sec. 36.

1. NRS 368A.130 and 368A.210 are hereby repealed.

2. NRS 374.107 is hereby repealed.

3. Sections 58 and 59 of Chapter 400, Statutes of Nevada 2003, at page 2371, are hereby repealed.

Sec. 37. 1. This section becomes effective upon passage and approval.

2. Section 22 of this act:

(a) Becomes effective upon passage and approval for the purpose of adopting regulations and on July 1, 2005, for all other purposes; and

(b) Expires by limitation on December 21, 2005.

3. Sections 1 to 12, inclusive, 15, 16, 20 and subsection 1 of section 36 of this act become effective on July 1, 2005.

4. Sections 25 to 35, inclusive, and subsection 3 of section 36 of this act become effective on October 1, 2005.

5. Sections 13 and 23 of this act become effective on January 1, 2006.

6. Sections 14, 17, 21 and 24 of this act become effective on January 1, 2007, only if the proposal submitted pursuant to sections 28 to 35, inclusive, of this act is approved by the voters at the General Election on November 7, 2006.

7. Sections 18, 19 and subsection 2 of section 36 of this act become effective on January 1, 2007, only if the proposal submitted pursuant to sections 28 to 35, inclusive, of this act is not approved by the voters at the General Election on November 7, 2006.

Approved by the Governor June 17, 2005.

NV LEGIS 484 (2005)

END OF DOCUMENT

2005 Nevada Laws 22nd. Sp. Sess. Ch. 9 (S.B. 3)

NEVADA 2005 SESSION LAWS
22ND SPECIAL SESSION
2061

Additions are indicated by **Text**; deletions by ~~Text~~. Changes in tables are made but not highlighted.

Ch. 9
S.B. No. 3
FINANCIAL ADMINISTRATION—BUSINESS TAXES—TAXPAYERS' BILL OF RIGHTS

AN ACT relating to state financial administration; making various changes regarding the applicability and administration of the requirements for a state business license, certain taxes imposed on businesses and the tax on live entertainment; establishing annual salaries for the Chairman and other members of the Nevada Tax Commission; making various changes regarding the Taxpayers' Bill of Rights; providing a Taxpayers' Bill of Rights for Taxes on Fuels; making appropriations; 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 to 6, inclusive, of this act.

Sec. 2.

"Exhibition" means a trade show or convention, craft show, sporting event or any other similar event involving the exhibition of property, products, goods, services or athletic or physical skill.

Sec. 3.

"State business license" means the business license required pursuant to NRS 360.780.

Sec. 4.

1. A natural person is not required to obtain more than one state business license for any combination of activities conducted by that person which are reported to the Internal Revenue Service for any federal tax year on two or more of the forms described in paragraph (b) of subsection 1 of NRS 360.765.

2. As used in this section, "federal tax year" means any period of 12 months for which a person is required to report income, tax deductions and tax credits pursuant to the provisions of the Internal Revenue Code and any regulations adopted pursuant thereto.

Sec. 5.

1. Except as otherwise provided in subsection 2, a person who has been issued a state business license shall submit a fee of $100 to the Department on or before:

(a) The last day of the month in which the anniversary date of issuance of the state business license occurs in each year; or

(b) Such other annual date as the Department and person may mutually agree,

unless the person submits a written statement to the Department, at least 10 days before that date, indicating that

the person will not be conducting business in this State after that date.

2. The Department may reduce the amount of any initial fee required pursuant to paragraph (b) of subsection 1 to allow credit for the remaining portion of a year for which the fee has been paid for the state business license pursuant to paragraph (a) of subsection 1 or NRS 360.780.

3. A person who fails to submit the annual fee required pursuant to this section in a timely manner shall pay a penalty in the amount of $100 in addition to the annual fee.

Sec. 6.

1. A person or governmental entity that operates a facility at which one or more exhibitions are held is responsible for the payment of a licensing fee pursuant to this section on behalf of the persons who do not have a state business license but who take part in the exhibition for a purpose related to the conduct of a business.

2. The operator of the facility shall pay the licensing fee required by subsection 1 either:

(a) On an annual basis by remitting to the Department the sum of $5,000 on or before July 1 for all the exhibitions held at that facility during the fiscal year beginning on that day; or

(b) On a quarterly basis by remitting to the Department an amount equal to the product of the total number of businesses taking part in each exhibition at the facility during a calendar quarter who do not have a state business license multiplied by the number of days on which the exhibition is held at the facility during the calendar quarter, multiplied in turn by $1.25 for each exhibition held at the facility during the calendar quarter.

3. If the operator of a facility at which an exhibition is held has not paid the licensing fee as provided in paragraph (a) of subsection 2, the operator of the facility shall, on or before the last day of each calendar quarter in which an exhibition is held at that facility, remit to the Department the licensing fee in the amount required by paragraph (b) of subsection 2 for all the exhibitions held at that facility during that calendar quarter.

4. The licensing fees due pursuant to this section must be calculated, reported and paid separately from any other fees due from the operator of the facility pursuant to this chapter.

5. The Nevada Tax Commission shall adopt such regulations as it deems necessary to carry out the provisions of this section.

Sec. 7. NRS 360.050 is hereby amended to read as follows:

<< NV ST 360.050 >>

1. ~~Each~~ **The Chairman of the Nevada Tax Commission is entitled to receive an annual salary of $27,500.**

2. Except as otherwise provided in NRS 360.010, each of the other commissioners is entitled to receive ~~a salary of not more than $80, as fixed by the Commission, for each day actually employed on the work of the Commission.~~

~~2. While engaged in the business of the Commission, each member and employee of the Commission is entitled to receive the per diem allowance and travel expenses provided for state officers and employees generally.~~ **an annual salary of $20,000.**

Sec. 8. NRS 360.291 is hereby amended to read as follows:

<< NV ST 360.291 >>

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

(a) To be treated by officers and employees of the Department with courtesy, fairness, uniformity, consistency and common sense.

(b) To a prompt response from the Department to each communication from the taxpayer.

(c) To provide the minimum documentation and other information as may reasonably be required by the Department to carry out its duties.

(d) To written explanations of common errors, oversights and violations that taxpayers experience and instructions on

how to avoid such problems.
(e) To be notified, in writing, by the Department whenever its officer, employee or agent determines that the taxpayer is entitled to an exemption or has been taxed or assessed more than is required by law.
(f) To written instructions indicating how the taxpayer may petition for:
(1) An adjustment of an assessment;
(2) A refund or credit for overpayment of taxes, interest or penalties; or
(3) A reduction in or the release of a bond or other form of security required to be furnished pursuant to the provisions of this title that are administered by the Department.
(g) Except as otherwise provided in NRS 361.485, to recover an overpayment of taxes promptly upon the final determination of such an overpayment.
(h) To obtain specific advice from the Department concerning taxes imposed by the State.
(i) In any meeting with the Department, including an audit, conference, interview or hearing:
(1) To an explanation by an officer, agent or employee of the Department that describes the procedures to be followed and the taxpayer's rights thereunder;
(2) To be represented by himself or anyone who is otherwise authorized by law to represent him before the Department;
(3) To make an audio recording using the taxpayer's own equipment and at the taxpayer's own expense; and
(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.
(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.
(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:
(1) The tax is paid;
(2) The period of limitation for collecting the tax expires;
(3) The lien is the result of an error by the Department;
(4) The Department determines that the taxes, interest and penalties are secured sufficiently by a lien on other property;
(5) The release or subordination of the lien will not jeopardize the collection of the taxes, interest and penalties;
(6) The release of the lien will facilitate the collection of the taxes, interest and penalties; or
(7) The Department determines that the lien is creating an economic hardship.
(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.
(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~~ **taxes** administered by the Department.
(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, **NRS 244A.820, 244A.870, 482.313 and 482.315 and title 57 of NRS** 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 **by the Department** pursuant to the provi-

sions of this title ~~or any applicable regulations by the Department.~~ **, NRS 244A.820, 244A.870, 482.313 and 482.315 and title 57 of NRS and any regulations adopted by the Department relating thereto.**

Sec. 9. NRS 360.292 is hereby amended to read as follows:

<< NV ST 360.292 >>

The Executive Director shall cause:

1. To be prepared in simple nontechnical terms a pamphlet setting forth the Taxpayers' Bill of Rights and a description of the regulations adopted by the Department pursuant to NRS 360.2915.

2. A copy of the pamphlet to be ~~distributed:~~

~~(a) To each taxpayer on record with the Department and to any other person upon request; and~~

~~(b) With~~ **:**

(a) Posted on an Internet website maintained by the Department;

(b) Made available to any person upon request at the offices of the Department and the Department of Motor Vehicles, and public libraries in each county of this State; and

(c) Distributed with each notice to a taxpayer that an audit will be conducted by the Department.

Sec. 10. NRS 360.760 is hereby amended to read as follows:

<< NV ST 360.760 >>

As used in NRS 360.760 to 360.795, inclusive, **and sections 2 to 6, inclusive, of this act,** unless the context otherwise requires, the words and terms defined in NRS 360.765~~, 360.770~~ and 360.775 **and sections 2 and 3 of this act** have the meanings ascribed to them in those sections.

Sec. 11. NRS 360.765 is hereby amended to read as follows:

<< NV ST 360.765 >>

1. ~~"Business" includes:~~

~~(a) A corporation, partnership, proprietorship, limited liability company, business association, joint venture, limited liability partnership, business trust and their equivalents organized under the laws of this State or another jurisdiction and any other person that conducts an activity~~ **Except as otherwise provided in subsection 2, "business" means:**

(a) Any person, except a natural person, that performs a service or engages in a trade for profit; ~~and~~

~~(b) The activities of a~~ **or**

(b) Any natural person ~~which are deemed to be a business pursuant to NRS 360.785.~~ **who performs a service or engages in a trade for profit if the person is required to file with the Internal Revenue Service a Schedule C (Form 1040), Profit or Loss From Business Form, or its equivalent or successor form, a Schedule E (Form 1040), Supplemental Income and Loss Form, or its equivalent or successor form, or a Schedule F (Form 1040), Profit or Loss From Farming Form, or its equivalent or successor form, for that activity.**

2. The term does not include:

(a) A governmental entity.

(b) A nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c).

(c) A person who operates a business from his home and ~~earns~~ **whose net earnings** from that business **are** not more than 66 2/3 percent of the average annual wage, as computed for the preceding calendar year pursuant to chapter 612 of NRS and rounded to the nearest hundred dollars.

(d) ~~A~~ **natural person whose sole business is the rental of four or fewer dwelling units to others.**

(e) A business whose primary purpose is to create or produce motion pictures. As used in this paragraph, "motion pictures" has the meaning ascribed to it in NRS 231.020.

Sec. 12. NRS 360.780 is hereby amended to read as follows:

<< NV ST 360.780 >>

1. Except as otherwise provided in subsection ~~8,~~ **7,** a person shall not conduct a business in this State unless he has a **state** business license issued by the Department.

2. An application for a **state** business license must:

(a) Be made upon a form prescribed by the Department;

(b) Set forth the name under which the applicant transacts or intends to transact business and the location of his place or places of business;

(c) ~~Declare the estimated number of employees for the previous calendar quarter;~~

~~(d)~~ Be accompanied by a fee of $100; and

~~(e)~~ **(d)** Include any other information that the Department deems necessary.

3. The application must be signed by:.

(a) The owner, if the business is owned by a natural person;.

(b) A member or partner, if the business is owned by an association or partnership; or

(c) An officer or some other person specifically authorized to sign the application, if the business is owned by a corporation.

4. If the application is signed pursuant to paragraph (c) of subsection 3, written evidence of the signer's authority must be attached to the application..

5. ~~A person who has been issued a business license by the Department shall submit a fee of $100 to the Department on or before the last day of the month in which the anniversary date of issuance of the business license occurs in each year, unless the person submits a written statement to the Department, at least 10 days before the anniversary date, indicating that the person will not be conducting business in this State after the anniversary date. A person who fails to submit the annual fee required pursuant to this subsection in a timely manner shall pay a penalty in the amount of $100 in addition to the annual fee.~~

~~6.~~ The **state** business license required to be obtained pursuant to this section is in addition to any license to conduct business that must be obtained from the local jurisdiction in which the business is being conducted.

~~7.~~ **6.** For the purposes of NRS 360.760 to 360.795, inclusive, **and sections 2 to 6, inclusive, of this act,** a person shall be deemed to conduct a business in this State if a business for which the person is responsible:

(a) Is organized pursuant to title 7 of NRS, other than a business organized pursuant to chapter 82 or 84 of NRS;

(b) Has an office or other base of operations in this State; or

(c) Pays wages or other remuneration to a natural person who performs in this State any of the duties for which he is paid.

~~8.~~ **7.** A person who takes part in ~~a trade show or convention~~ **an exhibition** held in this State for a purpose related to the conduct of a business is not required to obtain a **state** business license specifically for that event~~.~~ **if the operator of the facility where the exhibition is held pays the licensing fee on behalf of that person pursuant to section 6 of this act.**

Sec. 13. NRS 360.795 is hereby amended to read as follows:

<< NV ST 360.795 >>

1. Except as otherwise provided in this section and NRS 360.250, the records and files of the Department concerning the administration of NRS 360.760 to 360.795, inclusive, **and sections 2 to 6, inclusive, of this act,** are confidential and privileged. The Department, and any employee of the Department engaged in the administration of NRS 360.760 to

360.795, inclusive, **and sections 2 to 6, inclusive, of this act,** or charged with the custody of any such records or files, shall not disclose any information obtained from those records or files. Neither the Department nor any employee of the Department may be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceeding.

2. The records and files of the Department concerning the administration of NRS 360.760 to 360.795, inclusive, **and sections 2 to 6, inclusive, of this act,** are not confidential and privileged in the following cases:

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

(b) Delivery to a person or his authorized representative of a copy of any document filed by the person pursuant to NRS 360.760 to 360.795, inclusive~~,~~ **, and sections 2 to 6, inclusive, of this act.**

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

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

(e) Disclosure in confidence to the Governor or his agent in the exercise of the Governor's general supervisory powers, or to any person authorized to audit the accounts of the Department in pursuance of an audit, or to the Attorney General or other legal representative of the State in connection with an action or proceeding pursuant to this chapter, or to any agency of this or any other state charged with the administration or enforcement of laws relating to workers' compensation, unemployment compensation, public assistance, taxation, labor or gaming.

(f) Exchanges of information pursuant to subsection 3.

(g) Disclosure of information concerning whether or not a person conducting a business in this State has a **state** business license~~. issued by the Department pursuant to NRS 360.780.~~

3. 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.

4. The Executive Director shall periodically, as he deems appropriate, but not less often than annually, transmit to the Administrator of the Division of Industrial Relations of the Department of Business and Industry a list of the businesses of which he has a record. The list must include the mailing address of the business ~~and the approximate number of employees of the business~~ as reported to the Department.

Sec. 14. Chapter 360A of NRS is hereby amended by adding thereto the provisions set forth as sections 15, 16 and 17 of this act.

Sec. 15.

Section 16 of this act may be cited as the Taxpayers' Bill of Rights for Taxes on Fuels.

Sec. 16.

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

(a) To be treated by officers and employees of the Department with courtesy, fairness, uniformity, consistency and common sense.

(b) To a prompt response from the Department to each communication from the taxpayer.

(c) To provide the minimum documentation and other information as may reasonably be required by the Department to carry out its duties.

(d) To written explanations of common errors, oversights and violations that taxpayers experience and instructions on how to avoid such problems.

(e) To be notified, in writing, by the Department whenever its officer, employee or agent determines that the taxpayer is entitled to an exemption or has been taxed or assessed more than is required by law.

(f) To written instructions indicating how the taxpayer may petition for:

(1) An adjustment of an assessment;

(2) A refund or credit for overpayment of taxes, interest or penalties; or
(3) A reduction in or the release of a bond or other form of security required to be furnished pursuant to the provisions of chapters 365 and 366 of NRS.
(g) To recover an overpayment of taxes promptly upon the final determination of such an overpayment.
(h) To obtain specific advice from the Department concerning the taxes imposed pursuant to chapters 365, 366 and 373 of NRS.
(i) In any meeting with the Department, including an audit, conference, interview or hearing:
(1) To an explanation by an officer, agent or employee of the Department that describes the procedures to be followed and the taxpayer's rights thereunder;
(2) To be represented by himself or anyone who is otherwise authorized by law to represent him before the Department;
(3) To make an audio recording using the taxpayer's own equipment and at the taxpayer's own expense; and
(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.
(j) To a full explanation of the authority of the Department 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.
(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:
(1) The tax is paid;
(2) The period of limitation for collecting the tax expires;
(3) The lien is the result of an error by the Department;
(4) The Department determines that the taxes, interest and penalties are secured sufficiently by a lien on other property;
(5) The release or subordination of the lien will not jeopardize the collection of the taxes, interest and penalties;
(6) The release of the lien will facilitate the collection of the taxes, interest and penalties; or
(7) The Department determines that the lien is creating an economic hardship.
(l) To the release or reduction of a bond or other form of security required to be furnished pursuant to the provisions of chapters 365 and 366 of NRS by the Department in accordance with applicable statutes and regulations.
(m) To be free from harassment and intimidation by an officer, agent or employee of the Department for any reason.
(n) 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 chapters 365, 366 and 373 of NRS 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 all taxes administered and collected by the Department pursuant to the provisions of chapters 365, 366 and 373 of NRS and any regulations adopted by the Department relating thereto.

Sec. 17.

The Director of the Department shall cause:
1. To be prepared in simple nontechnical terms a pamphlet setting forth the Taxpayers' Bill of Rights for Taxes on Fuels and a description of the regulations relating thereto adopted by the Department pursuant to NRS 360A.020.

2. A copy of the pamphlet to be:
(a) Posted on an Internet website maintained by the Department;
(b) Made available to any person upon request at the offices of the Department and the Department of Taxation, and public libraries in each county of this State; and
(c) Distributed with each notice to a taxpayer that an audit will be conducted by the Department.

Sec. 18. Chapter 363A of NRS is hereby amended by adding thereto the provisions set forth as sections 19 and 20 of this act.

Sec. 19.

"Business activity" means the performance of a service or engagement in a trade for profit.

Sec. 20.

1. Except as otherwise provided in subsection 2, an employer may deduct from the total amount of wages reported and upon which the excise tax is imposed pursuant NRS 363A.130 any amount authorized pursuant to this section that is paid by the employer for health insurance or a health benefit plan for its employees in the calendar quarter for which the tax is paid. The amounts for which the deduction is allowed include:
(a) For a self-insured employer, all amounts paid during the calendar quarter for claims, direct administrative services costs, including such services provided by the employer, and any premiums paid for individual or aggregate stop-loss insurance coverage. An employer is not authorized to deduct the costs of a program of self-insurance unless the program is a qualified employee welfare benefit plan pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq.
(b) The premiums for a policy of health insurance or reinsurance for a health benefit plan for employees.
(c) Any amounts which are:
(1) Paid by an employer to a Taft-Hartley trust which:
(I) Is formed pursuant to 29 U.S.C. § 186(c)(5); and
(II) Qualifies as an employee welfare benefit plan; and
(2) Considered by the Internal Revenue Service to be fully tax deductible pursuant to the provisions of the Internal Revenue Code.
(d) Such other similar payments for health care or insurance for health care for employees as are authorized by the Department.
2. An employer may not deduct from the wages upon which the excise tax is imposed pursuant to NRS 363A.130:
(a) Amounts paid for health care or premiums paid for insurance for an industrial injury or occupational disease for which coverage is required pursuant to chapters 616A to 616D, inclusive, or 617 of NRS; or
(b) Any payments made by employees for health care or health insurance or amounts deducted from the wages of employees for such health care or insurance.
3. If the amount of the deduction allowed pursuant to this section to an employer for a calendar quarter exceeds the amount of reported wages for that calendar quarter, the excess amount of that deduction may be carried forward to the following calendar quarter until the deduction is exhausted. An employer claiming the deduction allowed pursuant to this section shall, upon the request of the Department, explain the amount claimed to the satisfaction of the Department and provide the Department with such documentation as the Department deems appropriate for that purpose.
4. As used in this section:
(a) "Claims" means claims for those categories of health care expenses that are generally deductible by employees on their individual federal income tax returns pursuant to the provisions of 26 U.S.C. § 213 and any federal regulations relating thereto, if those expenses had been borne directly by those employees.
(b) "Direct administrative services costs" means, if borne directly by a self-insured employer and reasonably allocated to the direct administration of claims:

(1) Payments for medical or office supplies that will be consumed in the course of the provision of medical care or the direct administration of claims;
(2) Payments to third-party administrators or independent contractors for the provision of medical care or the direct administration of claims;
(3) Rent and utility payments for the maintenance of medical or office space used for the provision of medical care or the direct administration of claims;
(4) Payments for the maintenance, repair and upkeep of medical or office space used for the provision of medical care or the direct administration of claims;
(5) Salaries and wages paid to medical, clerical and administrative staff and other personnel employed to provide medical care or directly to administer claims; and
(6) The depreciation of property other than medical or office supplies, used for the provision of medical care or the direct administration of claims.
(c) "Employee welfare benefit plan" has the meaning ascribed to it in 29 U.S.C. § 1002.
(d) "Employees" means employees whose wages are included within the measure of the excise tax imposed upon an employer by NRS 363A.130, and their spouses, children and other dependents who qualify for coverage under the terms of the health insurance or health benefit plan provided by that employer.
(e) "Health benefit plan" means a health benefit plan that covers only those categories of health care expenses that are generally deductible by employees on their individual federal income tax returns pursuant to the provisions of 26 U.S.C. § 213 and any federal regulations relating thereto, if those expenses had been borne directly by those employees.
(f) "Self-insured employer" means an employer that provides a program of self-insurance for its employees.

Sec. 21. NRS 363A.010 is hereby amended to read as follows:

<< NV ST 363A.010 >>

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 363A.020 to 363A.060, inclusive, **and section 19 of this act** have the meanings ascribed to them in those sections.

Sec. 22. NRS 363A.030 is hereby amended to read as follows:

<< NV ST 363A.030 >>

"Employer" means any financial institution who is required to pay a contribution pursuant to NRS 612.535 for any calendar quarter, **with respect to any business activity of the financial institution,** except an Indian tribe, a nonprofit organization or a political subdivision. For the purposes of this section:
1. "Indian tribe" includes any entity described in subsection 10 of NRS 612.055.
2. "Nonprofit organization" means a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c).
3. "Political subdivision" means any entity described in subsection 9 of NRS 612.055.

Sec. 23. NRS 363A.050 is hereby amended to read as follows:

<< NV ST 363A.050 >>

1. Except as otherwise provided in subsection 2, "financial institution" means:
(a) An institution licensed, registered or otherwise authorized to do business in this State pursuant to the provisions of chapter 604, 645B, 645E or 649 of NRS or title 55 or 56 of NRS, or a similar institution chartered or licensed pursuant to federal law and doing business in this State;

(b) Any person primarily engaged in:
(1) The purchase, sale and brokerage of securities;
(2) Originating, underwriting and distributing issues of securities;
(3) Buying and selling commodity contracts on either a spot or future basis for the person's own account or for the account of others, if the person is a member or is associated with a member of a recognized commodity exchange;
(4) Furnishing space and other facilities to members for the purpose of buying, selling or otherwise trading in stocks, stock options, bonds or commodity contracts;
(5) Furnishing investment information and advice to others concerning securities on a contract or fee basis;
(6) Furnishing services to holders of or brokers or dealers in securities or commodities;
(7) Holding or owning the securities of banks for the sole purpose of exercising some degree of control over the activities of the banks whose securities the person holds;
(8) Holding or owning securities of companies other than banks, for the sole purpose of exercising some degree of control over the activities of the companies whose securities the person holds;
(9) Issuing shares, other than unit investment trusts and face–amount certificate companies, whose shares contain a provision requiring redemption by the company upon request of the holder of the security;
(10) Issuing shares, other than unit investment trusts and face–amount certificate companies, whose shares contain no provision requiring redemption by the company upon request by the holder of the security;
(11) Issuing unit investment trusts or face–amount certificates;
(12) The management of the money of trusts and foundations organized for religious, educational, charitable or nonprofit research purposes;
(13) The management of the money of trusts and foundations organized for purposes other than religious, educational, charitable or nonprofit research;
(14) Investing in oil and gas royalties or leases, or fractional interests therein;
(15) Owning or leasing franchises, patents and copyrights which the person in turn licenses others to use;
(16) Closed–end investments in real estate or related mortgage assets operating in such a manner as to meet the requirements of the Real Estate Investment Trust Act of 1960, as amended;
(17) Investing; or
(18) Any combination of the activities described in this paragraph,

who is ~~doing~~ **conducting a** business **activity** in this State;
(c) Any other person conducting loan or credit card processing activities in this State; and
(d) Any other bank, bank holding company, national bank, savings association, federal savings bank, trust company, credit union, building and loan association, investment company, registered broker or dealer in securities or commodities, finance company, dealer in commercial paper or other business entity engaged in the business of lending money, providing credit, securitizing receivables or fleet leasing, or any related business entity, ~~doing~~ **conducting a** business **activity** in this State.
2. The term does not include a credit union organized under the provisions of chapter 678 of NRS or the Federal Credit Union Act [1].

[1] 12 U.S.C.A. § 1751 et seq.

Sec. 24. NRS 363A.120 is hereby amended to read as follows:

<< NV ST 363A.120 >>

1. There is hereby imposed an excise tax on each bank at the rate of $1,750 for each branch office **maintained by the**

bank in this State in excess of one **branch office** maintained by the bank **in each county** in this State on the first day of each calendar quarter.

2. Each bank that maintains more than one branch office **in any county** in this State on the first day of a calendar quarter shall, on or before the last day of the first month of that calendar quarter:

(a) File with the Department a return on a form prescribed by the Department; and

(b) Remit to the Department any tax due pursuant to this section for the branch offices maintained by the bank in this State on the first day of that calendar quarter.

3. For the purposes of this section:

(a) "Bank" means:

(1) A corporation or limited-liability company that is chartered by this State, another state or the United States which conducts banking or banking and trust business; or

(2) A foreign bank licensed pursuant to chapter 666A of NRS.

The term does not include a financial institution engaging in business pursuant to chapter 677 of NRS, ~~or~~ a credit union organized under the provisions of chapter 678 of NRS or the Federal Credit Union Act. **, or any person or other entity this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution.**

(b) "Branch office" means any location or facility of a bank where deposit accounts are opened, deposits are accepted, checks are paid and loans are granted, including, but not limited to, a brick and mortar location, a detached or attached drive-in facility, a seasonal office, an office on a military base or government installation, a station or unit for paying and receiving, and a location where a customer can open accounts, make deposits and borrow money by telephone or through use of the Internet, and excluding any automated teller machines, consumer credit offices, contractural [2] offices, customer bank communication terminals, electronic fund transfer units and loan production offices.

[2] So in enrolled Bill; probably should read "contractual".

Sec. 25. NRS 363A.130 is hereby amended to read as follows:

<< NV ST 363A.130 >>

1. There is hereby imposed an excise tax on each employer at the rate of 2 percent of the wages, as defined in NRS 612.190, paid by the employer during a calendar quarter with respect to employment. **in connection with the business activities of the employer.**

2. The tax imposed by this section ~~must~~ :

(a) Does not apply to any person or other entity on any wages this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution.

(b) Must not be deducted, in whole or in part, from any wages of persons in the employment of the employer.

3. Each employer shall, on or before the last day of the month immediately following each calendar quarter for which the employer is required to pay a contribution pursuant to NRS 612.535:

(a) File with the Department:

~~(1) A~~ **a** return on a form prescribed by the Department; and

~~(2) A copy of any report required by the Employment Security Division of the Department of Employment, Training and Rehabilitation for determining the amount of the contribution required pursuant to NRS 612.535 for any wages paid by the employer during that calendar quarter; and~~

(b) Remit to the Department any tax due pursuant to this section for that calendar quarter.

~~4. Except as otherwise provided in subsection 5, an employer may deduct from the total amount of wages reported and~~

~~upon which the excise tax is imposed pursuant to this section any amount authorized pursuant to this section that is paid by the employer for health insurance or a health benefit plan for its employees in the calendar quarter for which the tax is paid. The amounts for which the deduction is allowed include:~~

~~(a) For an employer providing a program of self-insurance for its employees, all amounts paid during the calendar quarter for claims, direct administrative services costs, including such services provided by the employer, and any premiums paid for individual or aggregate stop-loss insurance coverage. An employer is not authorized to deduct the costs of a program of self-insurance unless the program is a qualified employee welfare benefit plan pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq.~~

~~(b) The premiums for a policy of health insurance or reinsurance for a health benefit plan for its employees.~~

~~(c) Any amounts paid by an employer to a Taft-Hartley trust formed pursuant to 29 U.S.C. § 186(c)(5) for participation in an employee welfare benefit plan.~~

~~(d) Such other similar payments for health care or insurance for health care for employees as are authorized by the Department.~~

~~5. An employer may not deduct from the wages upon which the excise tax is imposed pursuant to this section:~~

~~(a) Amounts paid for health care or premiums paid for insurance for an industrial injury or occupational disease for which coverage is required pursuant to chapters 616A to 616D, inclusive, or 617 of NRS; or~~

~~(b) Any payments made by employees for health care or health insurance or amounts deducted from the wages of employees for such care or insurance.~~

~~6. An employer claiming the deduction allowed pursuant to subsection 4 shall submit with the return filed pursuant to subsection 3 proof of the amount paid in the calendar quarter that qualifies for the deduction. If the amount of the deduction exceeds the amount of reported wages, the excess amount may be carried forward to the following calendar quarter until the deduction is exhausted.~~

~~7. As used in this section, "employee welfare benefit plan" has the meaning ascribed to it in 29 U.S.C. § 1002.~~

Sec. 26. Chapter 363B of NRS is hereby amended by adding thereto the provisions set forth as sections 27 and 28 of this act.

Sec. 27.

"Business activity" means the performance of a service or engagement in a trade for profit.

Sec. 28.

1. Except as otherwise provided in subsection 2, an employer may deduct from the total amount of wages reported and upon which the excise tax is imposed pursuant NRS 363B.110 any amount authorized pursuant to this section that is paid by the employer for health insurance or a health benefit plan for its employees in the calendar quarter for which the tax is paid. The amounts for which the deduction is allowed include:

(a) For a self-insured employer, all amounts paid during the calendar quarter for claims, direct administrative services costs, including such services provided by the employer, and any premiums paid for individual or aggregate stop-loss insurance coverage. An employer is not authorized to deduct the costs of a program of self-insurance unless the program is a qualified employee welfare benefit plan pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq.

(b) The premiums for a policy of health insurance or reinsurance for a health benefit plan for employees.

(c) Any amounts which are:

(1) Paid by an employer to a Taft-Hartley trust which:

(I) Is formed pursuant to 29 U.S.C. § 186(c)(5); and

(II) Qualifies as an employee welfare benefit plan; and

(2) Considered by the Internal Revenue Service to be fully tax deductible pursuant to the provisions of the Internal Revenue Code.

(d) Such other similar payments for health care or insurance for health care for employees as are authorized by

the Department.

2. An employer may not deduct from the wages upon which the excise tax is imposed pursuant to NRS 363B.110:

(a) Amounts paid for health care or premiums paid for insurance for an industrial injury or occupational disease for which coverage is required pursuant to chapters 616A to 616D, inclusive, or 617 of NRS; or

(b) Any payments made by employees for health care or health insurance or amounts deducted from the wages of employees for such health care or insurance.

3. If the amount of the deduction allowed pursuant to this section to an employer for a calendar quarter exceeds the amount of reported wages for that calendar quarter, the excess amount of that deduction may be carried forward to the following calendar quarter until the deduction is exhausted. An employer claiming the deduction allowed pursuant to this section shall, upon the request of the Department, explain the amount claimed to the satisfaction of the Department and provide the Department with such documentation as the Department deems appropriate for that purpose.

4. As used in this section:

(a) "Claims" means claims for those categories of health care expenses that are generally deductible by employees on their individual federal income tax returns pursuant to the provisions of 26 U.S.C. § 213 and any federal regulations relating thereto, if those expenses had been borne directly by those employees.

(b) "Direct administrative services costs" means, if borne directly by a self-insured employer and reasonably allocated to the direct administration of claims:

(1) Payments for medical or office supplies that will be consumed in the course of the provision of medical care or the direct administration of claims;

(2) Payments to third-party administrators or independent contractors for the provision of medical care or the direct administration of claims;

(3) Rent and utility payments for the maintenance of medical or office space used for the provision of medical care or the direct administration of claims;

(4) Payments for the maintenance, repair and upkeep of medical or office space used for the provision of medical care or the direct administration of claims;

(5) Salaries and wages paid to medical, clerical and administrative staff and other personnel employed to provide medical care or directly to administer claims; and

(6) The depreciation of property other than medical or office supplies, used for the provision of medical care or the direct administration of claims.

(c) "Employee welfare benefit plan" has the meaning ascribed to it in 29 U.S.C. § 1002.

(d) "Employees" means employees whose wages are included within the measure of the excise tax imposed upon an employer by NRS 363B.110, and their spouses, children and other dependents who qualify for coverage under the terms of the health insurance or health benefit plan provided by that employer.

(e) "Health benefit plan" means a health benefit plan that covers only those categories of health care expenses that are generally deductible by employees on their individual federal income tax returns pursuant to the provisions of 26 U.S.C. § 213 and any federal regulations relating thereto, if those expenses had been borne directly by those employees.

(f) "Self-insured employer" means an employer that provides a program of self-insurance for its employees.

Sec. 29. NRS 363B.010 is hereby amended to read as follows:

<< NV ST 363B.010 >>

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 363B.020 to 363B.050, inclusive, **and section 27 of this act** have the meanings ascribed to them in those sections.

Sec. 30. NRS 363B.030 is hereby amended to read as follows:

<< NV ST 363B.030 >>

"Employer" means any employer who is required to pay a contribution pursuant to NRS 612.535 for any calendar quarter **, with respect to any business activity of the employer,** except a financial institution, an Indian tribe, a nonprofit organization or a political subdivision. For the purposes of this section:

1. "Financial institution" has the meaning ascribed to it in NRS 363A.050.
2. "Indian tribe" includes any entity described in subsection 10 of NRS 612.055.
3. "Nonprofit organization" means a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c).
4. "Political subdivision" means any entity described in subsection 9 of NRS 612.055.

Sec. 31. (Deleted by amendment.)

Sec. 32. NRS 363B.110 is hereby amended to read as follows:

<< NV ST 363B.110 >>

1. There is hereby imposed an excise tax on each employer at the rate of 0.65 percent of the wages, as defined in NRS 612.190, paid by the employer during a calendar quarter with respect to employment~~.~~ **in connection with the business activities of the employer.**

2. The tax imposed by this section ~~must~~ **:**

(a) Does not apply to any person or other entity or any wages this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution.

(b) Must not be deducted, in whole or in part, from any wages of persons in the employment of the employer.

3. Each employer shall, on or before the last day of the month immediately following each calendar quarter for which the employer is required to pay a contribution pursuant to NRS 612.535:

(a) File with the Department~~:~~

~~(1) A~~ **a** return on a form prescribed by the Department; and

~~(2) A copy of any report required by the Employment Security Division of the Department of Employment, Training and Rehabilitation for determining the amount of the contribution required pursuant to NRS 612.535 for any wages paid by the employer during that calendar quarter; and~~

(b) Remit to the Department any tax due pursuant to this chapter for that calendar quarter.

~~4. Except as otherwise provided in subsection 5, an employer may deduct from the total amount of wages reported and upon which the excise tax is imposed pursuant to this section any amount authorized pursuant to this section that is paid by the employer for health insurance or a health benefit plan for its employees in the calendar quarter for which the tax is paid. The amounts for which the deduction is allowed include:~~

~~(a) For an employer providing a program of self-insurance for its employees, all amounts paid during the calendar quarter for claims, direct administrative services costs, including such services provided by the employer, and any premiums paid for individual or aggregate stop-loss insurance coverage. An employer is not authorized to deduct the costs of a program of self-insurance unless the program is a qualified employee welfare benefit plan pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq.~~

~~(b) The premiums for a policy of health insurance or reinsurance for a health benefit plan for its employees.~~

~~(c) Any amounts paid by an employer to a Taft-Hartley trust formed pursuant to 29 U.S.C. § 186(c)(5) for participation in an employee welfare benefit plan.~~

~~(d) Such other similar payments for health care or insurance for health care for employees as are authorized by the Department.~~

~~5. An employer may not deduct from the wages upon which the excise tax is imposed pursuant to this section:~~
~~(a) Amounts paid for health care or premiums paid for insurance for an industrial injury or occupational disease for which coverage is required pursuant to chapters 616A to 616D, inclusive, or 617 of NRS; or~~
~~(b) Any payments made by employees for health care or health insurance or amounts deducted from the wages of employees for such care or insurance.~~
~~6. An employer claiming the deduction allowed pursuant to subsection 4 shall submit with the return filed pursuant to subsection 3 proof of the amount paid in the calendar quarter that qualifies for the deduction. If the amount of the deduction exceeds the amount of reported wages, the excess amount may be carried forward to the following calendar quarter until the deduction is exhausted.~~
~~7. As used in this section, "employee welfare benefit plan" has the meaning ascribed to it in 29 U.S.C. § 1002.~~

Sec. 33. Chapter 368A of NRS is hereby amended by adding thereto a new section to read as follows:

"Commission" means the Nevada Gaming Commission.

Sec. 34. NRS 368A.010 is hereby amended to read as follows:

<< NV ST 368A.010 >>

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.110, inclusive, **and section 33 of this act** have the meanings ascribed to them in those sections.

Sec. 35. NRS 368A.130 is hereby amended to read as follows:

<< NV ST 368A.130 >>

The Department shall provide by regulation for a more detailed definition of "live entertainment" consistent with the general definition set forth in NRS 368A.090 for use by **the Commission,** the Board and the Department in determining whether an activity is a taxable activity under the provisions of this chapter.

Sec. 36. NRS 368A.140 is hereby amended to read as follows:

<< NV ST 368A.140 >>

1. The Board shall:
~~(a) Collect~~ **collect** the tax imposed by this chapter from taxpayers who are licensed gaming establishments~~; and~~
~~(b) Adopt~~ **The Commission shall adopt** such regulations as are necessary to carry out the provisions of ~~paragraph (a).~~ **this subsection.** The regulations must be adopted in accordance with the provisions of chapter 233B of NRS and must be codified in the Nevada Administrative Code.
2. The Department shall:
(a) Collect the tax imposed by this chapter from all other taxpayers; and
(b) Adopt such regulations as are necessary to carry out the provisions of paragraph (a).
3. For the purposes of:
(a) Subsection 1, the provisions of chapter 463 of NRS relating to the payment, collection, administration and enforcement of gaming license fees and taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.
(b) Subsection 2, the provisions of chapter 360 of NRS relating to the payment, collection, administration and enforcement of taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

4. To ensure that the tax imposed by NRS 368A.200 is collected fairly and equitably, **the Commission,** the Board and the Department shall:
(a) Jointly, coordinate the administration and collection of that tax and the regulation of taxpayers who are liable for the payment of the tax.
(b) Upon request, assist the other ~~agency~~ **agencies** in the collection of that tax.

Sec. 37. NRS 368A.160 is hereby amended to read as follows:

<< NV ST 368A.160 >>

1. Each person responsible for maintaining the records of a taxpayer shall:
(a) Keep such records as may be necessary to determine the amount of the liability of the taxpayer pursuant to the provisions of this chapter;
(b) Preserve those records for:
(1) At least 5 years if the taxpayer is a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; or
(2) At least 4 years if the taxpayer is not a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; and
(c) Make the records available for inspection by the Board or the Department upon demand at reasonable times during regular business hours.
2. The ~~Board~~ **Commission** and the Department may ~~by regulation specify~~ **adopt regulations pursuant to NRS 368A.140 specifying** the types of records which must be kept to determine the amount of the liability of a taxpayer ~~from whom they are required to collect~~ **for** the tax imposed by this chapter.
3. Any agreement that is entered into, modified or extended after January 1, 2004, for the lease, assignment or transfer of any premises upon which any activity subject to the tax imposed by this chapter is, or thereafter may be, conducted shall be deemed to include a provision that the taxpayer required to pay the tax must be allowed access to, upon demand, all books, records and financial papers held by the lessee, assignee or transferee which must be kept pursuant to this section. Any person conducting activities subject to the tax imposed by NRS 368A.200 who fails to maintain or disclose his records pursuant to this subsection is liable to the taxpayer for any penalty paid by the taxpayer for the late payment or nonpayment of the tax caused by the failure to maintain or disclose records.
4. A person who violates any provision of this section is guilty of a misdemeanor.

Sec. 38. NRS 368A.200 is hereby amended to read as follows:

<< NV ST 368A.200 >>

1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided. If the live entertainment is provided at a facility with a maximum ~~seating capacity~~ **occupancy** of:
(a) Less than 7,500~~,~~ **persons,** the rate of the tax is 10 percent of the admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility.
(b) At least 7,500~~,~~ **persons,** the rate of the tax is 5 percent of the admission charge to the facility.
2. Amounts paid for ~~gratuities~~ **:**
(a) Admission charges collected and retained by a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or by a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS, are not taxable pursuant to this section.
(b) Gratuities directly or indirectly remitted to persons employed at a facility where live entertainment is provided or for service charges, including those imposed in connection with the use of credit cards or debit cards, which are collected

and retained by persons other than the taxpayer are not taxable pursuant to this section.
3. A business entity that collects any amount that is taxable pursuant to subsection 1 is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount.
4. Any ticket for live entertainment must state whether the tax imposed by this section is included in the price of the ticket. If the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.
5. The tax imposed by subsection 1 does not apply to:
(a) Live entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution.
(b) Live entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax–exempt organization pursuant to 26 U.S.C. § 501(c).
(c) Any boxing contest or exhibition governed by the provisions of chapter 467 of NRS.
(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum ~~seating capacity~~ **occupancy** of less than 300~~.~~ **persons.**
(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment is provided has a maximum ~~seating capacity~~ **occupancy** of less than 300~~.~~ **persons.**
(f) Merchandise sold outside the facility in which the live entertainment is provided, unless the purchase of the merchandise entitles the purchaser to admission to the entertainment.
(g) Live entertainment that is provided at a trade show.
(h) Music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons.
(i) Live entertainment that is provided at a licensed gaming establishment at private meetings or dinners attended by members of a particular organization or by a casual assemblage if the purpose of the event is not primarily for entertainment.
(j) Live entertainment that is provided in the common area of a shopping mall, unless the entertainment is provided in a facility located within the mall.
(k) Food and product demonstrations provided at a shopping mall, a craft show or an establishment that sells grocery products, housewares, hardware or other supplies for the home.
6. As used in this section, "maximum ~~seating capacity~~ **occupancy**" means, in the following order of priority:
(a) The maximum occupancy of the facility in which live entertainment is provided, as determined by the State Fire Marshal or the local governmental agency that has the authority to determine the maximum occupancy of the facility;
(b) If such a maximum occupancy has not been determined, the maximum occupancy of the facility designated in any permit required to be obtained in order to provide the live entertainment; or
(c) If such a permit does not designate the maximum occupancy of the facility, the actual seating capacity of the facility in which the live entertainment is provided.

Sec. 39. NRS 368A.290 is hereby amended to read as follows:

<< NV ST 368A.290 >>

1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by:
(a) The ~~Nevada Gaming~~ Commission, the claimant may bring an action against the Board on the grounds set forth in the claim.
(b) The Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim.
2. An action brought pursuant to subsection 1 must be brought in a court of competent jurisdiction in Carson City, the

county of this State where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

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

Sec. 40. NRS 368A.300 is hereby amended to read as follows:

<< NV ST 368A.300 >>

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

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

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

(a) The ~~Nevada Gaming~~ Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

(b) The Nevada Tax Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

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

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

Sec. 41. NRS 368A.360 is hereby amended to read as follows:

<< NV ST 368A.360 >>

Any licensed gaming establishment liable for the payment of the tax imposed by NRS 368A.200 who willfully fails to report, pay or truthfully account for the tax is subject to the revocation of his gaming license by the~~Nevada Gaming~~ Commission.

Sec. 42. NRS 368A.370 is hereby amended to read as follows:

<< NV ST 368A.370 >>

The remedies of the State provided for in this chapter are cumulative, and no action taken by **the Commission,** the Board, the Department or the Attorney General constitutes an election by the State to pursue any remedy to the exclusion of any other remedy for which provision is made in this chapter.

Sec. 43. NRS 233B.039 is hereby amended to read as follows:

<< NV ST 233B.039 >>

1. The following agencies are entirely exempted from the requirements of this chapter:

(a) The Governor.

(b) The Department of Corrections.

(c) The University and Community College System of Nevada.

(d) The Office of the Military.
(e) ~~Except as otherwise provided in NRS 368A.140, the~~ **The** State Gaming Control Board.
(f) ~~The~~ **Except as otherwise provided in NRS 368A.140, the** Nevada Gaming Commission.
(g) The Welfare Division of the Department of Human Resources.
(h) The Division of Health Care Financing and Policy of the Department of Human Resources.
(i) The State Board of Examiners acting pursuant to chapter 217 of NRS.
(j) Except as otherwise provided in NRS 533.365, the Office of the State Engineer.
(k) The Division of Industrial Relations of the Department of Business and Industry acting to enforce the provisions of NRS 618.375.
(l) The Administrator of the Division of Industrial Relations of the Department of Business and Industry in establishing and adjusting the schedule of fees and charges for accident benefits pursuant to subsection 2 of NRS 616C.260.
(m) The Board to Review Claims in adopting resolutions to carry out its duties pursuant to NRS 590.830.
2. Except as otherwise provided in subsection 5 and NRS 391.323, the Department of Education, the Board of the Public Employees' Benefits Program and the Commission on Professional Standards in Education are subject to the provisions of this chapter for the purpose of adopting regulations but not with respect to any contested case.
3. The special provisions of:
(a) Chapter 612 of NRS for the distribution of regulations by and the judicial review of decisions of the Employment Security Division of the Department of Employment, Training and Rehabilitation;
(b) Chapters 616A to 617, inclusive, of NRS for the determination of contested claims;
(c) Chapter 703 of NRS for the judicial review of decisions of the Public Utilities Commission of Nevada;
(d) Chapter 91 of NRS for the judicial review of decisions of the Administrator of the Securities Division of the Office of the Secretary of State; and
(e) NRS 90.800 for the use of summary orders in contested cases,

prevail over the general provisions of this chapter.
4. The provisions of NRS 233B.122, 233B.124, 233B.125 and 233B.126 do not apply to the Department of Human Resources in the adjudication of contested cases involving the issuance of letters of approval for health facilities and agencies.
5. The provisions of this chapter do not apply to:
(a) Any order for immediate action, including, but not limited to, quarantine and the treatment or cleansing of infected or infested animals, objects or premises, made under the authority of the State Board of Agriculture, the State Board of Health, or any other agency of this State in the discharge of a responsibility for the preservation of human or animal health or for insect or pest control;
(b) An extraordinary regulation of the State Board of Pharmacy adopted pursuant to NRS 453.2184; or
(c) A regulation adopted by the State Board of Education pursuant to NRS 392.644 or 394.1694.
6. The State Board of Parole Commissioners is subject to the provisions of this chapter for the purpose of adopting regulations but not with respect to any contested case.

Sec. 44. NRS 463.145 is hereby amended to read as follows:

<< NV ST 463.145 >>

1. ~~The~~ **Except as otherwise provided in NRS 368A.140, the** Commission shall, pursuant to NRS 463.150, adopt, amend and repeal regulations in accordance with the following procedures:
(a) At least 30 days before the initial meeting of the Commission and 20 days before any subsequent meeting at which the adoption, amendment or repeal of a regulation is considered, notice of the proposed action must be:
(1) Published in such newspaper as the Commission prescribes;

(2) Mailed to every person who has filed a request therefor with the Commission; and
(3) When the Commission deems advisable, mailed to any person whom the Commission believes would be interested in the proposed action, and published in such additional form and manner as the Commission prescribes.
(b) The notice of proposed adoption, amendment or repeal must include:
(1) A statement of the time, place and nature of the proceedings for adoption, amendment or repeal;
(2) Reference to the authority under which the action is proposed; and
(3) Either the express terms or an informative summary of the proposed action.
(c) On the date and at the time and place designated in the notice, the Commission shall afford any interested person or his authorized representative, or both, the opportunity to present statements, arguments or contentions in writing, with or without opportunity to present them orally. The Commission shall consider all relevant matter presented to it before adopting, amending or repealing any regulation.
(d) Any interested person may file a petition with the Commission requesting the adoption, amendment or repeal of a regulation. The petition must state, clearly and concisely:
(1) The substance or nature of the regulation, amendment or repeal requested;
(2) The reasons for the request; and
(3) Reference to the authority of the Commission to take the action requested.

Upon receipt of the petition, the Commission shall within 45 days deny the request in writing or schedule the matter for action pursuant to this subsection.
(e) In emergencies, the Commission may summarily adopt, amend or repeal any regulation if at the same time it files a finding that such action is necessary for the immediate preservation of the public peace, health, safety, morals, good order or general welfare, together with a statement of the facts constituting the emergency.
2. In any hearing held pursuant to this section, the Commission or its authorized representative may administer oaths or affirmations, and may continue or postpone the hearing from time to time and at such places as it prescribes.
3. The Commission may request the advice and assistance of the Board in carrying out the provisions of this section.

<< Repealed: NV ST 360.770, 360.785 >>

Sec. 45.
NRS 360.770 and 360.785 are hereby repealed.
Sec. 46.
1. There is hereby appropriated from the State General Fund to the Department of Taxation for expenses relating to the annual salaries of the Chairman and the members of the Tax Commission:

For the Fiscal Year 2005–2006	**$153,500**
For the Fiscal Year 2006–2007	$153,500

2. Any balance of the sums appropriated by subsection 1 remaining at the end of the respective fiscal years must not be committed for expenditure after June 30 of the respective fiscal years and must be reverted to the State General Fund on or before September 15, 2006, and September 21, 2007, respectively.
Sec. 47.
1. There is hereby appropriated from the State General Fund to the Department of Taxation for expenses relating to the printing of the Taxpayers' Bill of Rights:

For the Fiscal Year 2005–2006	**$2,300**
For the Fiscal Year 2006–2007	$2,300

2. Any balance of the sums appropriated by subsection 1 remaining at the end of the respective fiscal years must not be committed for expenditure after June 30 of the respective fiscal years and must be reverted to the State General Fund on or before September 15, 2006, and September 21, 2007, respectively.

Sec. 48.

1. There is hereby appropriated from the State Highway Fund to the Department of Motor Vehicles for expenses relating to the printing and mailing of the Taxpayers' Bill of Rights:

For the Fiscal Year 2005–2006	**$3,920**
For the Fiscal Year 2006–2007	$3,920

2. Any balance of the sums appropriated by subsection 1 remaining at the end of the respective fiscal years must not be committed for expenditure after June 30 of the respective fiscal years and must be reverted to the State Highway Fund on or before September 15, 2006, and September 21, 2007, respectively.

<< Note: NV ST 368A.140 >>

Sec. 49.

Any regulations adopted by the State Gaming Control Board pursuant to NRS 368A.140 or 368A.160 before July 1, 2005:

1. Remain in effect as if adopted by the Nevada Gaming Commission in accordance with the provisions of this act; and
2. May be amended or repealed by the Nevada Gaming Commission in accordance with the provisions of this act.

Sec. 50. This act becomes effective on July 1, 2005.

Approved by the Governor June 17, 2005.

NV LEGIS 9 (2005)

NV LEGIS 9 (2005)

END OF DOCUMENT

2007 Nevada Laws Ch. 547 (A.B. 487)

NEVADA 2007 SESSION LAWS
REGULAR SESSION OF THE 74TH LEGISLATURE (2007)
2159

Additions are indicated by **Text**; deletions by ~~Text~~.

Ch. 547
A.B. No. 487
TAXATION—EXEMPTIONS—ENTERTAINMENT

AN ACT relating to taxation; exempting certain professional minor league baseball events from the state tax on live entertainment; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law provides for the imposition of a state excise tax on admission to facilities where live entertainment is provided. (NRS 368A.200) **Section 1** of this bill provides an exemption from that tax for professional minor league baseball events conducted at a stadium.

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

Section 1. NRS 368A.200 is hereby amended to read as follows:

<< NV ST 368A.200 >>

368A.200 1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided. If the live entertainment is provided at a facility with a maximum occupancy of:
(a) Less than 7,500 persons, the rate of the tax is 10 percent of the admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility.
(b) At least 7,500 persons, the rate of the tax is 5 percent of the admission charge to the facility.
2. Amounts paid for:
(a) Admission charges collected and retained by a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or by a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS, are not taxable pursuant to this section.
(b) Gratuities directly or indirectly remitted to persons employed at a facility where live entertainment is provided or for service charges, including those imposed in connection with the use of credit cards or debit cards, which are collected and retained by persons other than the taxpayer are not taxable pursuant to this section.
3. A business entity that collects any amount that is taxable pursuant to subsection 1 is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount.

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

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

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

(b) Live entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS.

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

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

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

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

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

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

(i) Live entertainment that is provided at a licensed gaming establishment at private meetings or dinners attended by members of a particular organization or by a casual assemblage if the purpose of the event is not primarily for entertainment.

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

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

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

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

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

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

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

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

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

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

6. The Commission may adopt regulations establishing a procedure whereby a taxpayer that is a licensed gaming establishment may request an exemption from the tax pursuant to paragraph ~~(p)~~ **(q)** of subsection 5. The regula-

tions must require the taxpayer to seek an administrative ruling from the Chairman of the Board, provide a procedure for appealing that ruling to the Commission and further describe the forms of incidental or ambient entertainment exempted pursuant to that paragraph.

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

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

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

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

Sec. 2. This act becomes effective upon passage and approval.

Approved by the Governor June 25, 2007.

NV LEGIS 547 (2007)

NV LEGIS 547 (2007)

END OF DOCUMENT

West's Nevada Revised Statutes Annotated Currentness
Title 32. Revenue and Taxation
→ Chapter 368A. Tax on Live Entertainment
General Provisions

368A.010. Definitions

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.115, inclusive, have the meanings ascribed to them in those sections.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.020. "Admission charge" defined

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.030. "Board" defined

"Board" means the State Gaming Control Board.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.040. "Business" defined

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.050. "Business entity" defined

1. "Business entity" includes:

(a) A corporation, partnership, proprietorship, limited-liability company, business association, joint venture, limited-liability partnership, business trust and their equivalents organized under the laws of this state or another jurisdiction and any other type of entity that engages in business.

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

2. The term does not include a governmental entity.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.053. "Casual assemblage" defined

"Casual assemblage" includes, without limitation:

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

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

368A.055. "Commission" defined

"Commission" means the Nevada Gaming Commission.

368A.060. "Facility" defined

1. "Facility" means:

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

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

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

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

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.070. "Game" defined

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.080. "Licensed gaming establishment" defined

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.090. "Live entertainment" defined

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

2. The term:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(I) Does not constitute a performance;

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.097. "Shopping mall" defined

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

368A.100. "Slot machine" defined

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.110. "Taxpayer" defined

"Taxpayer" means:

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

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

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

who collects the taxable receipts.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.115. "Trade show" defined

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

Administration

368A.130. Repealed

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

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

2. The Department shall:

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

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

3. For the purposes of:

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

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

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

1. If:

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

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

(b) Preserve those records for:

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

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

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

2. The Commission and the Department may adopt regulations pursuant to NRS 368A.140 specifying the types of records

which must be kept to determine the amount of the liability of a taxpayer for the tax imposed by this chapter.

3. Any agreement that is entered into, modified or extended after January 1, 2004, for the lease, assignment or transfer of any premises upon which any activity subject to the tax imposed by this chapter is, or thereafter may be, conducted shall be deemed to include a provision that the taxpayer required to pay the tax must be allowed access to, upon demand, all books, records and financial papers held by the lessee, assignee or transferee which must be kept pursuant to this section. Any person conducting activities subject to the tax imposed by NRS 368A.200 who fails to maintain or disclose his records pursuant to this subsection is liable to the taxpayer for any penalty paid by the taxpayer for the late payment or nonpayment of the tax caused by the failure to maintain or disclose records.

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

1. Except as otherwise provided in this section and NRS 360.250, the records and files of the Board and the Department concerning the administration of this chapter are confidential and privileged. The Board, the Department and any employee of the Board or the Department engaged in the administration of this chapter or charged with the custody of any such records or files shall not disclose any information obtained from the records or files of the Board or the Department or from any examination, investigation or hearing authorized by the provisions of this chapter. The Board, the Department and any employee of the Board or the Department may not be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceeding.

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

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

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

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

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

(e) Disclosure in confidence to the Governor or his agent in the exercise of the Governor's general supervisory powers, or to any person authorized to audit the accounts of the Board or the Department in pursuance of an audit, or to the Attorney General or other legal representative of the State in connection with an action or proceeding pursuant to this chapter, or to any agency of this or any other state charged with the administration or enforcement of laws relating to taxation.

[FN1] See Historical and Statutory Notes below for effective date information.

Imposition and Collection

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

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

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

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

2. Amounts paid for:

(a) Admission charges collected and retained by a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or by a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS, are not taxable pursuant to this section.

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

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

4. Any ticket for live entertainment must state whether the tax imposed by this section is included in the price of the ticket. If

the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.

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

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

(b) Live entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS.

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

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

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

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

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

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

(i) Live entertainment that is provided at a licensed gaming establishment at private meetings or dinners attended by members of a particular organization or by a casual assemblage if the purpose of the event is not primarily for entertainment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.210. Repealed

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

1. Except as otherwise provided in this section:

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

(b) All other taxpayers shall file with the Department, on or before the last day of each month, a report showing the amount of all taxable receipts for the preceding month. The report must be in a form prescribed by the Department.

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

Upon written application made before the date on which payment must be made, the Board or the Department may, for good cause, extend by 30 days the time within which a taxpayer is required to pay the tax imposed by this chapter. If the tax is paid during the period of extension, no penalty or late charge may be imposed for failure to pay at the time required, but the taxpayer shall pay interest at the rate of 1 percent per month from the date on which the amount would have been due without the extension until the date of payment, unless otherwise provided in NRS 360.232 or 360.320.

[FN1] See Historical and Statutory Notes below for effective date information.

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

1. If a taxpayer:

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

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

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

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

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

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

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

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

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

(a) For the first return of any taxpayer that contains one or more violations, issue a letter of warning to the taxpayer which provides an explanation of the violation or violations contained in the return.Green numbers along left margin indicate location on the printed bill (e.g., 5-15 indicates page 5, line 15).

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

(c) For the third and each subsequent return in any calendar year which contains one or more violations, assess a penalty of three times the amount of the tax which was not reported.

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

[FN1] See Historical and Statutory Notes below for effective date information.

Overpayments and Refunds

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

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

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

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

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

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

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

2. If the overpayment is paid to the Department, the interest must be paid:

(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.

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

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

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

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

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

alleged overpayments.

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

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

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

(a) The Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

(b) The Nevada Tax Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.310. Allowance of interest in judgment for amount illegally collected

In any judgment, interest must be allowed at the rate of 6 percent per annum upon the amount found to have been illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment, or to a date preceding the date of the refund warrant by not more than 30 days. The date must be determined by the Board or the Department.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.320. Standing to recover

A judgment may not be rendered in favor of the plaintiff in any action brought against the Board or the Department to recover any amount paid when the action is brought by or in the name of an assignee of the person paying the amount or by any person other than the person who paid the amount.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.330. Action for recovery of erroneous refund: Jurisdiction; venue; prosecution

1. The Board or the Department may recover a refund or any part thereof which is erroneously made and any credit or part thereof which is erroneously allowed in an action brought in a court of competent jurisdiction in Carson City or Clark County in the name of the State of Nevada.

2. The action must be tried in Carson City or Clark County unless the court, with the consent of the Attorney General, orders a change of place of trial.

3. The Attorney General shall prosecute the action, and the provisions of NRS, the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.340. Cancellation of illegal determination

1. If any amount in excess of $25 has been illegally determined, either by the person filing the return or by the Board or the Department, the Board or the Department shall certify this fact to the State Board of Examiners, and the latter shall authorize the cancellation of the amount upon the records of the Board or the Department.

2. If an amount not exceeding $25 has been illegally determined, either by the person filing a return or by the Board or the Department, the Board or the Department, without certifying this fact to the State Board of Examiners, shall authorize the cancellation of the amount upon the records of the Board or the Department.

[FN1] See Historical and Statutory Notes below for effective date information.

Miscellaneous Provisions

368A.350. Prohibited acts; penalty

1. A person shall not:

(a) Make, cause to be made or permit to be made any false or fraudulent return or declaration or false statement in any report or declaration, with intent to defraud the State or to evade payment of the tax or any part of the tax imposed by this chapter.

(b) Make, cause to be made or permit to be made any false entry in books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

(c) Keep, cause to be kept or permit to be kept more than one set of books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

2. Any person who violates the provisions of subsection 1 is guilty of a gross misdemeanor.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.360. Revocation of gaming license for failure to report, pay or truthfully account for tax

Any licensed gaming establishment liable for the payment of the tax imposed by NRS 368A.200 who willfully fails to report, pay or truthfully account for the tax is subject to the revocation of his gaming license by the Commission.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.370. Remedies of State are cumulative

The remedies of the State provided for in this chapter are cumulative, and no action taken by the Commission, the Board, the Department or the Attorney General constitutes an election by the State to pursue any remedy to the exclusion of any other remedy for which provision is made in this chapter.

[FN1] See Historical and Statutory Notes below for effective date information.

Current through the 2005 73rd Regular Session and the 22nd Special Session of the Nevada Legislature
END OF DOCUMENT

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

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

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.

GHANEM & SULLIVAN
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Diana L. Sullivan
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February 27, 2007

VIA FACSIMILE (775) 684-2020
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]/100 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.

I. 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. Scripps-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

By: Diana L. Sullivan, Esq.

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

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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
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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

JIM GIBBONS
Governor
THOMAS R. SHEETS
Chair, Nevada Tax Commission
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October 12, 2007

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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)

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. A533273
Dept No. IX

NEVADA DEPARTMENT OF TAXATION'S RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANTS

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

TO: Plaintiffs; and

TO: Shafer & Associates, P.C., attorney of record for Plaintiffs:

Defendants, NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS and MICHELLE JACOBS by and through its attorney Catherine Cortez Masto, Attorney General, and Blake Doerr, Deputy Attorney General, hereby responds to Plaintiff's First Set of Interrogatories and states as follows:

It should be noted that Responding Party has not fully completed discovery in this action and has not completed preparation for trial. All of the responses contained herein are based only upon such information and documents which are presently available and specifically known to Responding Party. As discovery proceeds, witnesses, facts and evidence may be discovered which are not set forth herein, but which may be responsive to an interrogatory. Therefore, the following responses are given without prejudice to Responding Party's right to supplement the responses upon any subsequently discovered facts or witnesses which it may later recall.

Responding Party further assumes no obligation to voluntarily supplement these responses to reflect witnesses, facts and evidence following the filing of these responses other than provided by Nevada Rule of Civil Procedure 26(e). In addition, because some responses may have been ascertained by its attorneys and investigators, Responding Party may not have personal knowledge of the information from which these responses are derived.

GENERAL OBJECTIONS

1. Responding Party objects to the instructions and directions that accompany the Interrogatories to the extent that such instructions and directions tend to impose a discovery obligation beyond that required by applicable rules of civil procedure, and Responding Party refuses to comply with such instructions and directions to the extent that they attempt to impose a discovery obligation beyond that required by applicable rules of civil procedure.

2. Responding Party objects to the instructions and directions that accompany the Interrogatories to the extent that such instructions and directions call for a response that involves information that compromises attorney work product and/or information that is protected by the attorney/client privilege and/or statutes requiring confidentiality.

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

3. Responding Party objects to the Interrogatories to the extent that they utilize the terms "all", "each", or "any" concerning various subjects or events on the grounds that the Interrogatories are overly broad, unduly burdensome, onerous, and request information that is not relevant or which is not likely to lead to the discovery of admissible evidence.

Without waiving any of the foregoing objections, and reserving the right to supplement each and every one of its Responses as discovery continues, Responding Party responds as follows:

INTERROGATORY NUMBER 1

For each separate tax year from 2003 to present, please identify each and every person or business entity that paid the Live Entertainment Tax during that tax year; whether the entity is subject to the Five Percent LET or the Ten Percent LET; and specify the amount of Live Entertainment Tax paid for such year. In the event that a single entity is subject to both the Five Percent LET and the Ten Percent LET or made payments to both the Department and the Commission, identify each such payment separately.

RESPONSE TO INTERROGATORY NUMBER 1

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, improperly seeks attorney work product information, requests confidential and/or privileged information pursuant to NRS 40.025 and NRS 368A.180, asks for information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome. Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, see Exhibit "A" to Response to Plaintiffs' First Request for Production, filed concurrently herewith. Discovery is continuing.

INTERROGATORY NUMBER 2

Identify each and every person or business entity subject that paid taxes under the original version of the Live Entertainment Tax enacted in 2003 but due to any changes in the

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Live Entertainment Tax, changes or adoption of Live Entertainment Tax Regulations, or due to any Department or Commission policy, was not required to pay the Live Entertainment Tax in any subsequent year. For each person or business entity so identified, also specify the change(s) in law, regulation, or policy that resulted in the person or entity no longer being subject to the Live Entertainment Tax.

RESPONSE TO INTERROGATORY NUMBER 2

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is confidential and/or privileged pursuant to NRS 49.025 and NRS 368A.180, asks for information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of records. The Interrogatory additionally seeks information that is obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, see Exhibit "A" to Response to Plaintiffs' First Request for Production, filed concurrently herewith. Discovery is continuing.

INTERROGATORY NUMBER 3

Identify each and every person or business entity not subject to the original version of the Live Entertainment Tax, but due to any change(s) in the changes or adoption of Live Entertainment Tax Regulations, or due to any Department or Commission policy, became subject to the Live Entertainment Tax in any subsequent year. For each person or business entity so identified, also specify the change(s) in law, regulation, or policy that resulted in the person or business entity becoming subject to the Live Entertainment Tax.

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RESPONSE TO INTERROGATORY NUMBER 3

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is confidential and/or privileged pursuant to NRS 40.025 and NRS 368A.180, asks for information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of records. The Interrogatory additionally seeks information that is obtainable from another more convenient, less burdensome and less expensive source, and information already in the custody and control of the Plaintiffs.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, see Exhibit "A" to Response to Plaintiffs' First Request for Production which contains discoverable information related to the LET tax, filed concurrently herewith. Discovery is continuing.

INTERROGATORY NUMBER 4

Identify the person or persons most knowledgeable of the introduction, drafting, consideration of, revising, adopting and /or amending the Live Entertainment Tax.

RESPONSE TO INTERROGATORY NUMBER 4

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the

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right to supplement or amend this response, this Responding Party asserts as follows:

Dino DiCianno
Executive Director
Department of Taxation

As to the non-objectionable portion of this Interrogatory, see public access Legislative History documents at:

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 .

Discovery is continuing.

INTERROGATORY NUMBER 5

Identify the person or persons most knowledgeable of the introduction, drafting, consideration of, revising, adopting and /or amending any and all regulations relating to, or promulgated under, the Live Entertainment Tax.

RESPONSE TO INTERROGATORY NUMBER 5

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

Dino DiCianno
Executive Director
Department of Taxation

As to the non-objectionable portion of this Interrogatory, See public access to Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

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http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

See also regulation workshop recordings, attached to Responses to Plaintiffs' Request for Production, Exhibit "AAA".

Discovery is continuing.

INTERROGATORY NUMBER 6

Identify the person or persons most knowledgeable of the persons and entities who/which have paid the Live Entertainment Tax since the initial adoption of that statute.

RESPONSE TO INTERROGATORY NUMBER 6

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is confidential and / or privileged pursuant to NRS 40.025 and NRS 368A.180, asks for information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of records. The Interrogatory additionally seeks information that is obtainable from another more convenient, less burdensome and less expensive source, and information already in the custody and control of the Plaintiffs.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, and subject to the prohibitions of NRS 40.025 and NRS 368A.180:

Michelle Jacobs
Tax Examiner II
Department of Taxation

Discovery is continuing.

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INTERROGATORY NUMBER 7

Identify the person or persons most knowledgeable about the persons or business entities meant to be taxed by the Live Entertainment Tax.

RESPONSE TO INTERROGATORY NUMBER 7

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, and subject to the prohibitions of NRS 40.025 and NRS 368A.180: this Responding Party asserts as follows:

Dino DiCianno
Executive Director
Department of Taxation

As to the non-objectionable portion of this Interrogatory, entities who provide "live entertainment" is defined by NRS 368A.090. *See* Answer to Interrogatory 5. *See* all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 8

Identify the person or persons most knowledgeable of the purposes for each and every one of the exceptions to the definition of "live entertainment" set forth in NRS 368A.090.

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Should you conclude that the person most knowledgeable differs depending on the legislative act, list the person most knowledgeable regarding each legislative act.

RESPONSE TO INTERROGATORY NUMBER 8

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, subject to the prohibitions of NRS 40.025 and NRS 368A.180:

Michelle Jacobs
Tax Examiner II
Department of Taxation

See all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 9

Identify the person or persons most knowledgeable of the purposes for any and all legislative changes to the exceptions to the definition of "live entertainment" set forth in NRS 368A.090.

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RESPONSE TO INTERROGATORY NUMBER 9

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows

As to the non-objectionable portion of this Interrogatory:

Dino DiCianno
Executive Director
Department of Taxation

The definition for "live entertainment" is contained in NRS 368A.090. *See* all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 10

Identify the person or persons most knowledgeable of the purposes for each and every one of the exceptions to the application of the Live Entertainment Tax set forth in NRS 368A.200. Should you conclude that the person most knowledgeable differs depending on the legislative act, list the person most knowledgeable regarding each legislative act.

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RESPONSE TO INTERROGATORY NUMBER 10

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, and subject to the prohibitions of NRS 40.025 and NRS 368A.180:

Michelle Jacobs
Tax Examiner II
Department of Taxation

The entities who provide "live entertainment" are defined in NRS 368A.090. *See* all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 11

Identify the person or persons most knowledgeable of the purposes for each and every one of the exceptions to the application of the Live Entertainment Tax or to the definition of "live entertainment" created by any regulation or policy of the Department. Do not duplicate responses to previous interrogatories. In the event that different persons are most knowledgeable regarding different changes, list such individuals separately together with any

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changes with regard to which the person is most knowledgeable.

RESPONSE TO INTERROGATORY NUMBER 11

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, duplicative, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, presumes facts not in evidence, presents an incomplete hypothetical, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows

As to the non-objectionable portion of this Interrogatory, and subject to the prohibitions of NRS 40.025 and NRS 368A.180:

Michelle Jacobs
Tax Examiner II
Department of Taxation

The entities who provide "live entertainment" are defined in NRS 368A.090. See all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 12

Identify the person or persons most knowledgeable of the purposes for each and every one of the exceptions to the application of the Live Entertainment Tax or to the definition of "live entertainment" created by any regulation or policy of the Commission. In the event

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different persons are most knowledgeable regarding different changes, list such individuals separately, together with the changes with regard to which the person is most knowledgeable.

RESPONSE TO INTERROGATORY NUMBER 12

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, duplicative, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, presumes facts not in evidence, presents an incomplete hypothetical, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows

As to the non-objectionable portion of this Interrogatory:

Dino DiCianno
Executive Director
Department of Taxation

The entities who provide "live entertainment" are defined in NRS 368A.090. *See* all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 13

Identify the person or persons most knowledgeable regarding the steps by which the proposed "5% across the board" tax on live entertainment was modified to, instead, tax

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certain live entertainment at the rate of 10%, as provided by NRS 368A.200(1).

RESPONSE TO INTERROGATORY NUMBER 13

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, duplicative, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, presumes facts not in evidence, presents an incomplete hypothetical, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory:

Dino DiCianno
Executive Director
Department of Taxation

See all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 14

Identify the person or persons most knowledgeable regarding the purpose(s) of modifying the proposed "5% across the board" tax on live entertainment to, instead, tax certain live entertainment at the rate of 10%, as provided by NRS 368A.200(1).

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RESPONSE TO INTERROGATORY NUMBER 14

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, duplicative, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, presumes facts not in evidence, presents an incomplete hypothetical, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory:

Dino DiCianno
Executive Director
Department of Taxation

See all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 15

Identify each and every person or business entity that became subject to the Live Entertainment Tax as a result of NRS 368A.200 being amended" (1) to change the seating or capacity or occupancy requirement (presently NRS 368A.200(5)(d) and (e) from 300 to 200: or (2) to change the language to refer to "maximum occupancy" rather that "maximum seating capacity."

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RESPONSE TO INTERROGATORY NUMBER 15

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is confidential and privileged pursuant to NRS 49.025 and NRS 368A.180, asks for information which is not reasonably calculated to lead to the discovery of admissible evidence, presumes facts not in evidence, presents an incomplete hypothetical, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source, and information that is already in the custody and control of the Plaintiffs.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, *See* **Exhibit "B".**

Discovery is continuing.

INTERROGATORY NUMBER 16

Identify the person or persons most knowledgeable regarding the purpose(s) of changing the maximum seating capacity/maximum occupancy specified by (present) NRS 368A.200(5)(d) and (e) from 300 to 200.

RESPONSE TO INTERROGATORY NUMBER 16

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, presumes facts not in evidence, presents an incomplete hypothetical, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

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Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory:

Dino DiCianno
Executive Director
Department of Taxation

See all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 17

Identify the person or persons most knowledgeable regarding the effect(s) of changing the maximum seating capacity/maximum occupancy specified by NRS 368A.200(5)(d) and (e) from 300 to 200.

RESPONSE TO INTERROGATORY NUMBER 17

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, duplicative, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, presumes facts not in evidence, presents an incomplete hypothetical, asks for an expert opinion, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

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Las Vegas, NV 89101

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory:

Dino DiCianno
Executive Director
Department of Taxation

See all public access Legislative History documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 18

Identify the person or persons most knowledgeable regarding the purpose(s) of changing the language of (presently) NRS 368A.200(5)(d) and (e) from referring to "maximum seating capacity" to "maximum occupancy."

RESPONSE TO INTERROGATORY NUMBER 18

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, duplicative, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is not reasonably calculated to lead to the discovery of admissible evidence, presumes facts not in evidence, presents an incomplete hypothetical, and is overly burdensome as it would require expensive review of public records which are obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

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As to the non-objectionable portion of this Interrogatory:

Dino DiCianno
Executive Director
Department of Taxation

See all public access Legislative History documents at:

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 19

Identify any and all persons, business entities, or classes, who/which have requested to be exempt from the Live Entertainment Tax.

RESPONSE TO INTERROGATORY NUMBER 19

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is confidential and privileged pursuant to NRS 368A.180 and NRS 49.025, asks for information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of records. The Interrogatory additionally seeks information that is obtainable from another more convenient, less burdensome and less expensive source, and information which is already in the custody and control of the Plaintiffs.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows: The information requested is confidential and non-discoverable pursuant to NRS 40.025 and NRS 368A.180.

Discovery is continuing.

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INTERROGATORY NUMBER 20

For each business entity or class of business entities identified in the preceding interrogatory, indicate whether such entity is currently subject to taxation via presently effective version of the Live Entertainment Tax. If the business entity or class of business entities is not subject to the Live Entertainment Tax, identify the change in the Live Entertainment Tax, regulations, and/or administration responsible for the business entity or class of business entities not being presently subject to taxation.

RESPONSE TO INTERROGATORY NUMBER 20

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is confidential and privileged pursuant to NRS 368A.180 and NRS 49.025, asks for information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of records. The Interrogatory additionally seeks information that is obtainable from another more convenient, less burdensome and less expensive source, and information which is already in the possession of Plaintiffs.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows: See NRS 368A.090. *See also* Exhibit "AAA" to Response to Plaintiffs' Requests for Production and response to Interrogatory 19 above.

INTERROGATORY NUMBER 21

Identify each and every governmental interest meant to be served by the enactment or operation of the Live Entertainment Tax.

RESPONSE TO INTERROGATORY NUMBER 21

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls

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for speculation, improperly seeks attorney work product information, requests information which is confidential and privileged pursuant to NRS 368A.180 and NRS 49.025, asks for information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of records. The Interrogatory additionally seeks information that is obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, the purpose of the Live Entertainment Tax is to generate revenue for the state. See NRS Chapter 368A, NAC Chapter 368A, *see also* all public access legislative history documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 22

Identify each and every governmental interest meant to be served by the enactment of each and every one of the exceptions and exemptions to the Live Entertainment Tax.

RESPONSE TO INTERROGATORY NUMBER 22

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests information which is confidential and privileged pursuant to NRS 368A.180, asks for information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of records. The Interrogatory additionally

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seeks information that is obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, the purpose of the Live Entertainment Tax is to generate revenue for the state. See NRS Chapter 368A, NAC Chapter 368A, *see also* all public access legislative history documents at:

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1232 (SB4);

http://www.leg.state.nv.us/19thSpecial/Reports/history.cfm?ID=1234 (SB5).

http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=1877 (SB247);

http://www.leg.state.nv.us/73rd/Reports/history.cfm?DocumentType=1&BillNo=554 (AB 544).

Discovery is continuing.

INTERROGATORY NUMBER 23

Identify each and every person from the State of Nevada whose job responsibilities include administering the collection and payment of the Live Entertainment Tax.

RESPONSE TO INTERROGATORY NUMBER 23

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests employee information which is confidential and privileged, asks for information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of records. The Interrogatory additionally seeks information that is obtainable from another more convenient, less burdensome and less expensive source.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, this Responding Party asserts as follows:

As to the non-objectionable portion of this Interrogatory, all employees of the

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Department of Taxation may have some responsibility for the administration of the collection and payment of the LET.

Discovery is continuing.

INTERROGATORY NUMBER 24

Identify all persons associated with the department, commission, or Board who hold or act under the title "live entertainment tax examiner." Also, identify the person or persons responsible for overseeing the activities of the live entertainment tax examiners.

RESPONSE TO INTERROGATORY NUMBER 24

This Responding Party hereby objects to this interrogatory on grounds including, but not limited to, that the interrogatory is compound, overly broad, vague and ambiguous, calls for speculation, improperly seeks attorney work product information, requests employee information which is confidential and privileged, asks for information which is not reasonably calculated to lead to the discovery of admissible evidence, and is overly burdensome as it would require expensive review of records.

Without waiving said objections, and while reserving same, and while reserving the right to supplement or amend this response, no such title exists in the Department of Taxation, and all employees of the Department of Taxation may have some responsibility for the administration of the collection and payment of the LET.

DATED THIS 14th day of August, 2009.

CATHERINE CORTEZ MASTO
Attorney General

By: _____
Blake A. Doerr, #9001
Deputy Attorney General
David J. Pope, #8617
Sr. Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Attorneys for Nevada Department of Taxation

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

VERIFICATION

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

Dino DiCianno, Executive Director of the Department of Taxation, being first duly sworn, upon oath, deposes and says that he has read the foregoing and knows the contents thereof; that the same is true of his own knowledge, except as to those matters stated thereon upon information and belief; and as to those matters he believes them to be true.

Dated 8/13/09

Dino DiCianno, Executive Director

RUTH E. JONES
NOTARY PUBLIC
STATE OF NEVADA
No. 95-4529-1 My Appt. Exp. Aug. 11, 2012

SUBSCRIBED AND SWORN to before me this 13 day of August, 2009

NOTARY PUBLIC in and for said County and State.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2009, the foregoing NEVADA DEPARTMENT OF TAXATION'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANTS was served on the foregoing party by Federal Express, addressed to:

Federal Express Airbill #8601 4135 5818

Bradley J. Shafer
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite #2
Lansing, Michigan 48906-2110
Fax: 517-886-6565

Dated this 14th day of August, 2009

Debra Turner
An Employee of the State of Nevada

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

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, Nevada 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

sporting events, but to delineate all those separate ones and leave it like that. We could fix and refine the language to make sure we're more careful and more able to describe things that might be caught up rather than to put into our statute the phrase "adult entertainment," which puts a big red flag on it for the courts. What are your thoughts on that?

Senator Titus:
At one time, the brothels were included, so that would be broader. You 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 it's worth the chance to put it in there.

Chairwoman Buckley:
I wonder if we could do it in a way that's a little broader but gets at the problems so we would avoid losing the revenue. We're getting the most revenue from adult entertainment clubs, which is $6 million dollars, the highest amount paid under the live entertainment tax. The next one is race tracks at $1.5 million, but everything else pales in comparison to how much they're bringing in now, and I would hate to give them back their $6 million. Perhaps with the severability clause, but I hate to bring back anything we might want to fix now in terms of getting them excluded from the bill. It sounds like the goals are pretty much the same.

Senator Titus:
I agree with that. The 300-seat requirement has kept a lot of those clubs from paying. If you decide to amend this and do something with it, be sure to keep that in mind because that's where a lot of the revenue is. The Fiscal Division in the Senate argued that if you eliminate some of the family-oriented businesses like NASCAR and you take out the 300-seat at the same time, that will more than make up for any lost revenue.

Chairwoman Buckley:
Could staff obtain the fiscal information on the live entertainment tax for the Committee members? It can't be by business, but it can be by group and you can distribute that to the entire Committee. Senator Titus, we thank you for your testimony. We don't have a problem with the *Star Trek* amendment (Exhibit E); we already approved codifying the definitions.

Bill Bible, President, Nevada Resort Association [NRA], Las Vegas, Nevada:
You've seen the proposed amendment (Exhibit D) which codifies some of the existing regulations resolved in a lot of work between the Department of Taxation, the Tax Commission, the Gaming Control Board, and the Nevada Gaming Commission to resolve the less-than-perfect bill that emerged from the 2003 Legislative Session. We had a concern if S.B. 247 included or excluded it from taxation, and it doesn't exclude them, but we have a problem in outdoor venues in Laughlin and northern Nevada. Clearly in an outdoor venue, if you have some type of entertainment function that would be subject to the live entertainment tax and you pay a live admission fee, that becomes a taxable event. You also have a number of activities that take place with a band where there's no admission charge. Typically, those events have been excluded from taxation through some of the regulatory structure, but it would be helpful if we had a specific amendment that indicated that in an outdoor venue there would be no applicability of tax unless there's actually an admission charge. This created a two-part threshold which is an admission charge, and the other being live entertainment present.

Chairwoman Buckley:
That's current law?

Bill Bible:
That's current law through interpretation. This was a very complicated bill and we spent a lot of time debating and refining the various points of the various regulatory bodies, which is why we want to codify some of those existing regulations. That would at least provide additional clarity, principally in northern Nevada, but to some extent in Laughlin, where we have outdoor events on a seasonal basis.

Denis Neilander, Chairman, Nevada State Gaming Control Board:
There are a number of exemptions we've created through the rule-making process, and if the Committee chooses to codify those, that would be appropriate. Mr. Bible mentioned the situation with outdoor venues, and most of them have been excluded from the tax because they fit under one of these other exemptions in the amendment. There is no one particular provision that just addresses outdoor venues and there could be an open question about whether or not it's a taxable event even if you don't have an admission charge. The intent has been to focus on venues where there are no admission charges, and that would be an appropriate amendment. There are amendments that are currently in S.B. 392, which hasn't come over yet, but if you choose to process this legislation, the Board would be able to provide you with those amendments.

[Denis Neilander, continued.] The original legislation housed the regulation authority with the Board instead of the Nevada Gaming Commission, and that was an oversight. While the Board adopted the regulations, we did it together with the Commission and the Nevada Tax Commission, so that would go back to the way we do rulemaking, which is to say the Nevada Gaming Commission does it.

There is a provision in the existing law that requires you to place funds in a certain trust account and you'll hear from the Department of Taxation and us. That's not necessary, we've never required it before, and it would be a simple repeal of that provision.

You can read certain provisions that require the taxes be paid on a cash basis within the month they're collected, but it's probably more appropriate to give licensees the option of paying on either an accrual or cash basis. Right now, we do allow licensees to pay some of those taxes on an accrual basis, so we give them the option.

Assemblyman Anderson:
I can think of several events that take place outside in my community because of the redevelopment agency. Are you saying within an outdoor area you have one part of it with a separate entry which requires an admission fee, compared to something that is provided free of charge to everyone who's at the event? If it's part of Reno's ArtTown and if you had to come into Idylwild Park to see the entertainment show, you'd have to pay for it, but if you stand on the river, you don't have to pay for it? So if you can stand outside and see it, you don't have to pay for it, but if you enter into a special area where you have designated seating, you do have to pay for it, and therefore it's subject to the entertainment tax?

Bill Bible:
That's correct. In outdoor venues, mostly in northern Nevada or Laughlin, there has been some difficulty in the interpretation of the statute. If you conceptualize with the Rib Cook-Off, you have a "village" sponsored by the Sparks Nugget, and maybe two other licensees. In order to get into that village, you have to go through a gate to control access and pay an admission fee. There is live entertainment present, so that is subject to tax. In a different situation in the parking lot of the Hilton during Hot August Nights, there are vending stands, a bandstand, and sales of food and beverages. There was an argument that this would be subject to an entertainment tax because you could hear and see the live entertainment even though you did not pay an admission fee. Because of the way the existing regulations were interpreted by the Nevada State Gaming Control Board, they did not choose to apply the tax, but it was their legal

construction of some of the language that was adopted through the rule-making process, so we want to codify it to make it clear that in an outdoor venue, unless there's restricted access and someone is charged an admission price, there is no applicability of the tax.

Assemblyman Anderson:
If we were to take the Candy Dance in Genoa and it had music and there was an admission charge, then it would—

Bill Bible:
Under this proposal, the Candy Dance will no longer be a valid example because that's not a licensed gaming premise. If that was a licensed gaming premise, if you had to pay an admission fee and there was live entertainment, everything from the food, beverages, merchandise, and the admission fee would be subject to the entertainment tax.

Assemblyman Anderson:
The Rib Cook-Off, because it's put on by the Nugget, fits into the scenario, as does the Big Easy, which is put on by the Silver Club. But Hot August Nights doesn't because it's not put on by a casino?

Bill Bible:
It's not necessarily who sponsors, but who has control of the property and what are considered the premises of the establishment. With the Rib Cook-Off, part of that is done within the property controlled by the City of Sparks, but they've agreed to allow the Nugget and the sponsoring entities control over that particular property. It becomes a technical issue as to the applicability of the tax. If you think about them within the parking lot of the Hilton, or the parking lot of the Atlantis across Virginia Street, those are considered part of the premises of licensed gaming establishments, even though they're not within the confines of the buildings.

Assemblyman Anderson:
This bill doesn't change when we are taxing those entertainments and when we aren't?

Bill Bible:
This will clarify the existing tax and make it abundantly clear that those outdoor venues, unless there is an admission charge and live entertainment, don't have applicability with the tax.

Chairwoman Buckley:
I'm going to ask our staff to do a comprehensive document combining these proposed amendments, the ones we already approved, the clarifications on further exempting some of the folks from the live entertainment tax, and prepare it for our Ways and Means staff. We should not just say only the adult entertainment tax, but look at all the ones we want to exempt and pass it out that way. We really get into constitutional trouble. I don't have a problem with any of these amendments, including the one from the nudist colony (Exhibit D). I don't think the current term was intended to sweep into this. If we could list all the exemptions, we can re-refer this to Ways and Means, which has our other live entertainment bill. The Chairman of Ways and Means can identify fiscal impact. Most of these things we've identified are de minimus and can be passed. At some point with the larger ticket items, there might be a concern, but we should list and price them all and re-refer it to Ways and Means and have all the bills in one Committee. Is this exempted, Brenda?

Brenda Erdoes:
I don't believe it is exempted at this time. We might need to ask Mark [Stevens, Fiscal Division] if he's going to declare this eligible for exemption.

Chairwoman Buckley:
What about the other bill that Mr. Parks presented testimony on? That's definitely exempted, so maybe we can exempt this one, too, if Mark is willing to look at it. The same issues are with the Assembly committee bill, so we could combine them all after we price them all and figure out which way we're going to go. Why don't we refer without recommendation, get the complete list, and then we'll see those members in Ways and Means or on the Floor as we put them all together so we don't delay it.

Assemblywoman Giunchigliani:
I'll email Mark to see if this will qualify for an exemption at the same time.

Assemblyman Anderson:
I appreciate the fact that we want to move with some speed and dispatch, but if we don't have it exempt ahead of time, we'll have a problem, and we need at least a couple of the amendments for clarity.

Chairwoman Buckley:
We'll hold it to Wednesday or Friday, but in the meantime I'd ask staff to go ahead and work on that list.

Assemblyman Perkins:
If there's a problem with an exemption, you can always refer it back to Committee, and if you hold onto it until Wednesday or Friday and you can't get the exemption, then we'll have other issues. As Ways and Means looks at the bills collectively to see what we want to do with the live entertainment tax in the state, it's best to remove that without recommendation. If it's not exemptible, then we can refer it back to Commerce and Labor and we'll deal with it here.

ASSEMBLYWOMAN GIUNCHIGLIANI MOVED TO RE-REFER SENATE BILL 247 TO THE ASSEMBLY COMMITTEE ON WAYS AND MEANS.

ASSEMBLYMAN ANDERSON SECONDED THE MOTION.

Senator Titus:
There are a number of people who made a special trip up here to testify in favor of the bill. Would you let them come forward and put it on the record to make their trip worthwhile?

Chairwoman Buckley:
Of course.

Terry Graves, Legislative Advocate, representing The Beach Night Club, Las Vegas, Nevada:
We participated extensively during the interim hearings with the Tax Commission and the Gaming Commission on formulating the regulations. I did not have a chance to see what NRA [Nevada Resort Association] was proposing in that amendment (Exhibit D), but we certainly helped craft that. On the Senate side, we were supportive of Senator Titus's bill to try to clean up the live entertainment tax, and we appreciated her efforts.

Don Logan, President and General Manager, Las Vegas 51s Baseball Club, Las Vegas, Nevada:
We're the only professional team that's survived in Las Vegas for 23 years. We do provide the best fun, family-oriented entertainment in southern Nevada. The explosive growth and changes that have taken place down there make it more and more difficult each year, and the entertainment tax is one added burden that fell in our lap inadvertently last time. Unfortunately, we've had to pay the bill, and not having to do it would make it that much easier. Our margins

continue to shrink, and for us to provide entertainment with something real and wholesome in Las Vegas, it would help us.

Joe Brown, Legislative Advocate, representing Las Vegas Motor Speedway, Las Vegas, Nevada:
In my 40 years practicing law in Las Vegas, the term "entertainment capital" has been based on bringing tourists to Nevada and attracting them any way possible. We then get taxes from them by room taxes, sales taxes, gasoline taxes, gaming taxes, and every other way you can take money from their wallets. A few years ago, some people invested millions of dollars in a speedway and it's not the largest event in Nevada every year.

Chris Powell, General Manager, Las Vegas Motor Speedway, Las Vegas, Nevada:
I'm here in support of S.B. 247. The Las Vegas Motor Speedway provides an enormous contribution to Nevada's economy. The implementation of the live entertainment tax has proven to be unduly burdensome to our business. The passage of S.B. 247 not only will enhance our business, but it will put us back on an equal playing field with other speedways in an increasingly competitive environment. We've not yet received comparable numbers for the 2005 NASCAR Weekend; the 2004 Weekend put more than $142 million into Nevada's economy. That's a one-time expenditure that did not just affect Las Vegas Motor Speedway, but also gaming, hotels, restaurants, taxicabs, and retail shops. Furthermore, we employ roughly 2,500 people during the course of the weekend in March.

NASCAR's growth over the years has been astounding. These events routinely draw 100,000 to 175,000 people at various events across the country. Several members of the Legislature were in attendance at our March event. In the past year, speedways in the Los Angeles and Phoenix markets have been awarded with a second annual NASCAR event, an event that has put millions of dollars into their communities. A second date in Las Vegas, possibly in the fall, would be worth hundreds of millions of dollars to our state each year and would yield much more to our economy than the current live entertainment tax.

Occasionally we have issues where an event might get rained out, yet we've already paid the tax on it. As we sit here right now, there are ticket agents at the speedway who are putting numbers into computers, selling tickets, and entering in renewals for next year's event. If one day gets rained out and we have to refund money, the tax we are paying for next March's event is being paid at the end of this quarter, so it gets unwieldy. A lot of our tickets are tied to food, so the food is not taxed, but the ticket is. Another issue is a ticket may say $49, but because of our ticketing system, a $49 ticket has to be advertised

at the total price of $51.45, which is above that $50 threshold that any retailer wants to be below.

Chairwoman Buckley:
Could you tell us if the other states where other tracks are have any sort of tax?

Chris Powell:
The two markets that in the last 12 months have been awarded second NASCAR dates per year are in California in Arizona. They don't have an admissions tax.

Chairwoman Buckley:
What about ones with the first race? How does it compare to any one? Are there other places?

Chris Powell:
I'm just speaking to states whose speedways have recently been given second dates.

Chairwoman Buckley:
What other states have speedways with a tax?

Chris Powell:
Texas has some type of tax, but it's not just an admissions tax, it's everything involved in that category.

Chairwoman Buckley:
So it's more extensive than ours. The most convincing thing is last year it raised $1.5 million?

Chris Powell:
According to the Las Vegas Convention and Visitors Authority, which intercepts customers throughout the course of the event weekend, those three days in March pumped $142.5 million into the economy.

Chairwoman Buckley:
I'm saying that last year, the tax only rose. What you paid was relatively small, which means it doesn't affect the budget much; so I'm trying to make a point for you.

Scott Sherer, Legislative Advocate, representing Paramount Parks, Las Vegas, Nevada:
I appreciate your comments regarding the *Star Trek* amendment (Exhibit E). If this bill is processed in this fashion with regard to the effective date, it might make sense to make these exemptions that are being added effective upon passage and approval so they would be part of the chapter as it exists on June 30, 2005, if in fact there is any ruling on the unconstitutionality.

Chairwoman Buckley:
Let's move to Las Vegas.

Taylor Dew, Magical Hula Girls, Las Vegas, Nevada:
Lines 21 through 24 state "this bill provides that if the provisions of this bill concerning the tax on adult entertainment are held to be unconstitutional, the tax and all forms of live entertainment will be reinstated as currently set forth in provisions in NRS 368A." If this is removed, I'm in favor of this bill.

Billy Johnson, Vice President and Chief Operating Officer, Las Vegas Wranglers, Las Vegas, Nevada:
If you think the Speedway had a relatively small total in tax, wait until you hear about ours. Don Logan of the 51s was right when he said that they are the only franchise in Las Vegas to make it in 20 years. We're relatively new at two years old, going into our third season. That's a factor that we looked at when we decided to put a minor league hockey team in Las Vegas. That history in Las Vegas has been very difficult.

Our business in minor league sports tends to be fragile. In hockey, we only have 36 dates, which means we're effectively closed 11 months out of the season, so we have to capture our revenues in order to survive in a brief period of time. We only have 36 three-hour opportunities to do that. Most of our customers are families who want affordable entertainment. That's how we thrive and that's why we're fragile as a business. The tax last year meant we had to charge and pass that tax on to our customers. Oftentimes, families buy four to six season tickets at $144 for a family of four, and one season ticket holder told me last season when the tax was applied, "That's basically an electric bill for me for one month." We're here to represent our contingency of families in Las Vegas who are looking for something to do with quality time with their kids, friends, and families, to preserve that and increase our chances of surviving.

Chairwoman Buckley:
Thank you, and good luck with the Wranglers. For those of us with children who want more options, we do appreciate you, so thanks very much.

Richard Clauser, Naturist Society and The Naturist Action Committee:
We've changed the terms of what we call ourselves. "Colonies" doesn't fit anymore, so we call ourselves resorts and groups. We are not opposed to the adult entertainment tax. If you look at nudist people, probably 95 percent wouldn't go to an adult entertainment place. Our concern is that the definition of "adult entertainment" is so broad that it would encompass a lot of activities of a nudist group or resort. Our activities are family-oriented and are no different than if you went to a clothed resort; our patrons simply don't have clothes on. Our concern is that it's so broad that we need to better define what constitutes "adult entertainment." I realize there are constitutional issues if you narrow it down too much, but it's so broad it could be onerous on some of these small groups, and some are trying to help and doing good things. The Tahoe area naturists are always out there helping with causes around the Lake, and if they have a fundraiser this could conceivably apply, and that's what our concern is.

Sabra Smith-Newby, Legislative Advocate, representing the City of Las Vegas, Nevada:
I'm in support of this bill.

Allen Lichtenstein, General Counsel, American Civil Liberties Union, Nevada:
We're here to talk about the lack of constitutionality in this bill. This isn't a new issue for the courts. I dealt with an issue similar to this about 10 years ago as it related to a Clark County ordinance. The adult entertainment tax specifies a particular type of expressive content, and the courts have been very reluctant to allow that. It doesn't mean that adult entertainment venues are free from a general applicability tax, but taxing one particular type of content is not acceptable, and the courts have been clear about that. One possible exception in that is if taxes or fees can be specifically related to administrative costs for checking working cards, et cetera. This is not a revenue-neutral tax. It is not to relieve the state of certain burdens; the only exception might be to cover administrative costs. There is ample case law that proves this.

If this is passed in its current form, someone will challenge it. We at the ACLU [American Civil Liberties Union] don't involve ourselves in adult entertainment, but we would certainly lend our hand in opposing this. If it is dressed up differently, the impact is still to burden one particular type of business involving one type of content. That fact would weigh on the federal court, which would likely turn it down. The federal courts have dealt with these issues before, and we're sure this would fall as it has in other states.

Chairwoman Buckley:
I'll close the public hearing on S.B. 247. This bill is eligible for an exemption. I'd like to have the opportunity to work out the language of NRS 545, some more

exemptions, and have our Fiscal staff price it out. There are a lot of changes that will cost the state relatively little. Some changes will cost nothing at all, and that has to be part of the discussions of the money Committees.

ASSEMBLYMAN ANDERSON MOVED TO RE-REFER SENATE BILL 247 WITHOUT RECOMMENDATION TO THE ASSEMBLY COMMITTEE ON WAYS AND MEANS.

ASSEMBLYWOMAN GIUNCHIGLIANI SECONDED THE MOTION.

THE MOTION CARRIED. (Mr. Arberry and Mr. Perkins were not present for the vote.)

Chairwoman Buckley:
We'll open the hearing on S.B. 188.

Senate Bill 188 (1st Reprint): Makes various changes relating to energy. (BDR 58-364)

Don Soderberg, Chairman, Public Utilities Commission of Nevada (PUC):
Senate Bill 188 is a product of discussions that have gone on for 11 months, bringing together people involved in Nevada's energy business, energy regulation, and people with overall interest in how we are doing things. We weren't going to get together and talk about a number of regulatory issues, but we wanted to proactively address some of our bigger problems. One individual who participated in this group from the beginning was the late Richard Burdett, who was the Governor's Energy Advisor. Prior to that, he worked with us at the Commission. Mr. Burdett continually reminded us that we are spending about $3 billion a year in fossil fuels. This $3 billion for the most part is going out of the state. We kept asking ourselves what we can do about that, and we looked at the renewable portfolio standard, which was put together by the Legislature in past sessions, to reduce our dependence on fossil fuel to generate electricity. In Nevada, we're not doing a very good job of conservation.

We are called the Saudi Arabia of renewable energy in Nevada. Unfortunately, the Western United States, in which we are a leader when it comes to growth, is also the Saudi Arabia of energy waste, because over the last 25 years since the last oil crisis, we've lost the art of conserving. It's not something that is part of our daily lives and it's looked at from a dollar-and-cents point of view in

KENNY C. GUINN
Governor
BARBARA SMITH CAMPBELL
Chair, Nevada Tax Commission
CHARLES E. CHINNOCK
Executive Director

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MEMORANDUM

Date: March 14, 2005

To: Chuck Chinnock

From: Marian Henderson

CC: Lynne Knack

Subject: Request for analysis of revenue impact from making changes in the LET

A request was made to analyze the fiscal impact of making changes to the Live Entertainment Tax (LET). Two scenarios were to be explored. A summary of the analysis of the scenarios is as follows:

1) Eliminate the 300 seats threshold: This change would cause the inclusion of many of the smaller venues which are now exempt from the tax. Businesses that would now be subject to the tax would specifically include bars, nightclubs and gentlemen's clubs with a seating capacity of fewer than 300 patrons. The fiscal impact is difficult to estimate, as not all bars and nightclubs provide live entertainment, nor do they charge a cover charge for admission. We also are not able to determine whether the live entertainment is provided on a regular, periodic or one time basis. Approximately 150 businesses which fall under the 300 seat threshold responded to our initial request for information which was sent to all potential taxpayers, including approximately 20 gentlemen's clubs. Since the gentlemen's clubs remit a much higher per-capita dollar amount of tax, two separate financial analyses were conducted. Using the seating capacities and per-capita tax collected by the existing taxpayers, we estimate that approximately $1,614,600 in tax annually may be generated by the bars and nightclubs. In addition, using the same per-capita analysis of the existing gentlemen's clubs which currently have a seating capacity of fewer than 300 patrons, we estimate that an additional $4,197,900 may be generated. The estimated total additional revenue from lowering the seating threshold is approximately $5,812,500. This would be an increase of approximately 56% over the current revenue received.

2) Eliminate the 300 seats threshold and the 10% tax on food, beverage and merchandise: Approximately two-thirds of the existing tax which is collected is from the 10% tax on food, beverage and merchandise. For the first seven months of fiscal year 2005, $2,053,788 in tax was collected on food, beverage and merchandise of the total tax paid of $3,128,041. By eliminating this tax, approximately $3,520,800 would be lost annually. Using the same per-capita figures from the first example, the estimated additional revenue from bars and nightclubs which seat fewer than 300 patrons would be approximately $603,900. The estimated additional revenue from gentlemen's clubs would be approximately $3,470,840. The net estimated total additional revenue from eliminating the seating threshold and the 10% tax on food, beverage and merchandise is approximately $553,900, or an increase of about 4% over the current revenue being received.

The following is a breakdown from calendar year 2004 of Live Entertainment Tax revenue which was received from all taxpayers:

- [redacted] from one time or annual events
- [redacted] from sporting events
- [redacted] from nightclubs
- [redacted] from promoters
- [redacted] from performing arts centers
- [redacted] from raceways
- [redacted] from gentlemen's clubs
- Total tax received $8,913,795

For the first seven months of fiscal year 2005, $4,306,370 has been collected to date. The economic forum projection for this fiscal year is $8,700,000.

LET #	Business Name	ADMISSION AMOUNT	FOOD & MERCHANDISE SOLD	TOTAL TAXABLE AMOUNT
	[redacted]	122,247.00	-	122,247.00
		3,979.00	-	3,979.00
		17,906.00	0.00	17,906.00
		2,880.00	0.00	2,880.00
		21,195.00	0.00	21,195.00
		573,411.00		573,411.00
		18,752.15		18,752.15
		15,730.00	474,695.40	490,425.40
		12,647.00	487,823.10	500,470.10
		13,265.00	492,517.80	505,782.80
		15,233.00	529,719.50	544,952.50
		14,183.00	496,151.00	510,334.00
		9,650.00	432,180.40	441,830.40
		31,767.83	185,423.08	217,190.91
		22,994.02	137,942.44	160,936.46
		29,733.94	189,873.76	219,607.70
		20,730.36	185,488.13	206,218.49
		19,380.22	128,412.56	147,792.78
		55,712.97	237,968.51	293,681.48
		154,572.15	10,946.31	165,518.46
		281,180.79	32,054.43	313,235.22
		160,563.46	15,815.07	176,378.53
		3,929.00	2,425.00	6,354.00
		3,110.00	1,705.00	4,815.00
		2,020.00	3,256.00	5,276.00
		3,519.00	6,736.00	10,255.00
		2,605.00	3,993.00	6,598.00
		1,525.00	2,207.00	3,732.00
		55,017.28	6,195.75	61,213.03
		21,035.47	0.00	21,035.47
		113,068.19	13,934.47	127,002.66
		268,150.00	509,562.34	777,712.34
		268,927.27	537,602.76	806,530.03
		295,909.09	621,480.21	917,389.30
		284,827.27	676,508.66	961,335.93
		276,972.73	587,636.18	864,608.91
		187,918.18	440,145.30	628,063.48
		6,196.00	0.00	6,196.00
		207,209.00	0.00	207,209.00
		6,728.16	-	6,728.16
		3,015.00		3,015.00
		6,810.50	0.00	6,810.50
			-	-
		6,400.00		6,400.00
		-	2,324.00	2,324.00
		-	1,717.30	1,717.30
				0.00
		29,984.50	-	29,984.50
		8,595.50	0.00	8,595.50

[redacted]	294,979.00	356,704.00	651,683.00
	280,635.00	354,837.00	635,472.00
	274,574.00	381,417.00	655,991.00
	210,777.00	315,830.00	526,607.00
	266,128.00	383,843.00	649,971.00
	213,553.00	323,205.00	536,758.00
	4,554.00	-	4,554.00
	5,052.45	0.00	5,052.45
	22,066.10	0.00	22,066.10
	25,729.20	0.00	25,729.20
	62,957.50	483,947.44	546,904.94
	60,312.20	506,700.98	567,013.18
	69,264.00	607,146.81	676,410.81
	71,224.50	603,296.71	674,521.21
	64,830.50	524,124.64	588,955.14
	51,015.50	54,226.51	105,242.01
	-	60,848.66	60,848.66
	149,952.44	3,977.29	153,929.73
	121,536.20	10,708.69	132,244.89
	30,736.00	860,049.00	890,785.00
	31,553.00	975,302.00	1,006,855.00
	46,207.00	1,094,385.00	1,140,592.00
	52,618.00	1,263,807.00	1,316,425.00
	50,578.50	1,143,570.00	1,194,148.50
	44,047.00	992,920.93	1,036,967.93
	11,290.91	120,180.43	131,471.34
	9,718.18	100,886.38	110,604.56
	9,609.09	100,901.70	110,510.79
	10,845.45	101,585.53	112,430.98
	10,900.00	99,421.49	110,321.49
	4,364.65	-	4,364.65
	788.00	0.00	788.00
	29,858.00	0.00	29,858.00
	8,488.18	0.00	8,488.18
	56,941.00	7,183.00	64,124.00
	151,190.00	291,602.85	442,792.85
	156,400.00	321,523.95	477,923.95
	85,113.00	178,248.68	263,361.68
	564,924.00	113,318.30	678,242.30
	402,722.00	37,429.99	440,151.99
	660,903.86	71,802.80	732,706.66
	412,863.44	78,262.98	491,126.42
	520,125.73	52,227.02	572,352.75
	565,690.33	39,758.59	605,448.92
	883,728.37	68,260.34	951,988.71
			-
			-
			-
TOTAL	**10,742,530.31**	**20,537,882.15**	**31,280,412.46**

Average taxable sales per business =	$ 1,203,092.79
Average taxable sales per tax return =	$ 332,770.35
Average taxable sales per month =	$ 4,468,630.35
Average admission charge per business=	$ 413,174.24
Average admission charge per tax return=	$ 114,282.24
Average admission charge per month=	$ 1,534,647.19
Ave per capita on admission charge only=	20.13
Average food/drinks per business=	$ 789,918.54
Average food/drinks per tax return=	$ 218,488.11
Average food/drinks per month=	$ 2,933,983.16
Average per capita tax paid=	$ 623.27
Number of businesses under 300 seats=	150
Number of men's clubs under 300 seats=	22
Ave tax reported per men's club =	$ 578,224.22
Per capita tax per men's club=	1,049.49
Per capita X 20 clubs X 200 seats each=	$ 4,197,958.60

$3,000,000

Ave per capita X new bus. X 100 seats ea=	941,850.00
Annualized new bus=	1,614,600.00

MEMORANDUM

Date: November 9, 2004

To: Chuck Chinnock

From: Cathy Chambers

CC: Dino Di Cianno

Subject: Live Entertainment Tax information for LCB on Gentleman's Clubs

---

The total number of Gentleman's Clubs statewide is approximately 33. There are 4 in the Reno District all with seating capacity of less than 300; 2 in the Elko District both of which are currently below 300 seating capacity; Las Vegas District has the majority with 27 clubs operating. Of the 27 clubs, 2 have been referred to Gaming Control Board for LET registration, 16 have seating capacity of less than 300, and 9 with seating capacity of 300 to 7,499. Carson district does not have any of these specific types of clubs, only brothels with capacity for less than 300 patrons. See attached worksheet for reporting information.

[redacted] DISTRICT

Cathy:

[redacted] have consulted on this question and we agree on the following Gentlemen's Clubs in our District.

[redacted] Originally (before LET) [redacted] Definitely room to expand seating capacity.

[redacted] Originally (before LET) [redacted] No reasonable room to expand.

[redacted] Originally (before LET) [redacted] Definitely room to expand seating capacity.

[redacted] Originally (before LET) [redacted] No reasonable room to expand.

[redacted] DISTRICT

We only have two "Gentlemen's Clubs". They [redacted] and [redacted]

[redacted], is on the exempt list, and I have verified that their seating capacity is [redacted]

[redacted] opened after we put the LET database together. It has [redacted]. I did a field visit when they first opened as they had indicated t[redacted] They do have more [redacted], but the owner told me that he wa[redacted]e. The seating capacity of that area would be about 60. I will do a field visit after they open this afternoon to verify that they are using that area for the dancers.

[redacted] evenue Officer III
Nevada Department of Taxation
Compliance Division

DINO DICIANNO

From: Dino Dicianno [dicianno@tax.state.nv.us]
Sent: Sunday, April 24, 2005 9:43 PM
To: 'steveris@lcb.state.nv.us'
Cc: 'Ghiggeri, Gary'
Subject: SB 247
Importance: High

Chris Janzen asked me take a look at the fiscal impact of Senator Titus's new version of SB 247. There is no question that the focus of the bill is to tax for LET all adult entertainment, except for brothels. Currently the vast majority of the revenue that we collect comes for the gentlemen's clubs that have a seating capacity greater than 300. For example, $1.2 million from nightclubs, $1.4 million from raceways, $1.0 million from performing arts; $5.2 million from gentlemen's clubs; for a total collected of about $9.0 million. The remaining venues are minor (i.e., sporting events, etc.). By removing the seating capacity and eliminating the other types of venues you would then capture all of the remaining gentlemen clubs that are currently not paying. There is no question that they are a cash cow for LET. My best guess is that the fiscal impact of the revised SB 247 would be either a wash with a distinct possibility of a potential LET revenue gain. Those types of venues will not disappear because of the additional tax burden; they will probably expand since the customer is the one paying the tax. What that gain in LET would be is difficulty to estimate at such a short notice. In my mind it will be at least $4.0 million. In addition, there would be a gain in sales tax collected at the ten percent level by including all of the gentlemen's clubs. I trust this helps. Call me if you need anything further.

Dino DiCianno,
Deputy Director - Compliance
Department of Taxation
Phone: (775) 684-2070
Fax: (775) 684-2020

E 1 of 12

ASSEMBLY COMMITTEE/WAYS & MEANS
DATE: 5-26-05 EXHIBIT: E
SUBMITTED BY: SENATOR TITUS

DINO DICIANNO

From: Campbell, Barbara Smith [bcampbell@mrgmail.com]
Sent: Tuesday, November 18, 2003 9:34 AM
To: [redacted]
Subject: RE: LET Comment Letter

[redacted]

We are going to incorporate the following into our proposed draft language.

(Under section 11 (4) (b))

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

2. Instrumental or vocal music performed in restaurants by employees whose primary job function is that of preparing or serving food, refreshments or beverages to patrons if such instrumental or vocal music is not advertised as entertainment to the public.

(Under Section 11 (7)

"Casual assemblage" includes, but is not limited to:

(a) Participants in conventions, business meetings or tournaments and their guests; or

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

The DAG has concerns about your recommeded language in Ambient Entertainment #3. In summary, he feels the language may lead to the exemption of "entertainers" at the Gentlemen Clubs. Therefore, we did not incorporate it in our draft. We certainly welcome comments at the hearing.

Ambient Entertainment #4 appears to be appropriate under the GCB. I'm not sure that it is appropriate for Tax. Again, we welcome your comments.

Barbara Smith Campbell
3950 Las Vegas Blvd. South
Las Vegas, Nevada 89119
702-632-7770 LV office
702-597-2952 LV fax
775-328-9553 Reno Office
775-328-9505 Reno fax

-----Original Message-----
From: [redacted]
Sent: Monday, November 17, 2003 4:08 PM
To: Barbara Campbell
Subject: Fw: LET Comment Letter

Barbara:
Original message came back as undeliverable.
Hopefully, this comes through.
[redacted]

----- Original Message -----
From: [redacted]
To: Dino DiClanno ; Barbara Campbell
Cc: [redacted]
Sent: Monday, November 17, 2003 3:39 PM
Subject: LET Comment Letter

Chairwoman Campbell and Deputy Executive Director DiClanno:
Attached are the [redacted] comments on the latest draft of the LET Regulations.
As I indicated during our telephone conversations, both of you have done an outstanding job in developing this regulation in a manner that will help keep Nevada as the entertainment capital of the world!
We all appreciate your efforts.
[redacted]