**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,* and D. WESTWOOD, INC., d/b/a *Treasures*,

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.:** A554970

# APPELLANTS' REPLY BRIEF

## NRAP 26.1 DISCLOSURE OF DEJA VU SHOWGIRLS OF LAS VEGAS, LLC

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

A. Any publically held company that owns 10% or more of the party's stock:

None.

B. All law firms whose partners or associates have appeared for the party or are expected to appear in this Court.

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## INTRODUCTION

In Southern California Edison v. First Judicial District, 125 Nev. Adv. Op. 22, 255 P.3d 231, 234 (2011), this Court remarked that the Respondent Department of Taxation (the "Department") had "adopted a ***new policy*** for refund cases." (Emphasis added). The Department's new policy is that appeals of decisions of the Nevada Tax Commission ("NTC") under tax statutes must be confined to a petition for judicial review rather than a trial de novo. Id.

Nevertheless, the Respondents' Answering Brief labors to create the illusion that the Appellants (or "Taxpayers") knew that the only review available for a party aggrieved by a decision of the NTC, back in 2006 when the Taxpayers filed "Case 1" (Clark County District Court Case NO. A533273; Nevada Supreme Court Case No. 60037) Appellants' Appendix ("App.Apx."), Vol. 19, p. 1(Case 1 Complaint) and again in 2008 when the Taxpayers filed this action ("Case 2") below in 2008, App.Apx., Vol. 1, pp. 127-147 (Case 2 Complaint), was a petition for judicial review pursuant to NRS 233B.130. Thus, the Department surmises, the decision to file a de novo action and not a petition for judicial review was a strategic decision, taken in the face of existing law, for reasons the Department cannot explain.

The Department's position is absurd. Just like the plaintiff in Edison, the Taxpayers here sought judicial review of the NTC's denial of their claims for

refund in accordance with existing law, as espoused by the Department itself. Edison, 125 Nev. Adv. Op. 22, 255 P.3d at 234.

As in Edison, the Taxpayers should receive their trial de novo. In fact, the case here is stronger for de novo review because refund and review procedures, found in NRS 368A.290368 and A.300, for Nevada's Live Entertainment Tax (the "LET") are specific refund provisions enacted after the general sales and use tax refund provisions discussed in Edison. In addition, having taken the position that the Taxpayers would be entitled to a direct action in state court, in order to obtain a dismissal of the Taxpayer's prior proceeding the federal court, the Department is estopped from now taking a contrary position.

Further, in accordance with prior decisions of this Court, the procedural ruling in Edison – or, more accurately, a new decision regarding NRS 368A.290 – should not be applied retroactively to deprive the Taxpayers of their trial de novo.

Finally, under Malecon Tobacco, LLC, v. Dept. of Taxation, 118 Nev. 837, 59 P.3d 474 (2002), dismissal was improper because there is no requirement that the Taxpayers exhaust administrative remedies for even their "as applied" constitutional challenges, which do not require any factual determination within the expertise of the Department or NTC.

For all these reasons, the district court's decision should be reversed and the matter should be remanded for further proceedings as a de novo action.

## I. THE DEPARTMENT IS JUDICIALLY ESTOPPED FROM ASSERTING THAT THE TAXPAYERS ARE LIMITED TO A PETITION FOR JUDICIAL REVIEW.

In Edison, this Court was rightfully sensitive to the harsh effects of allowing a taxpayer to litigate its case before the Department and NTC, expecting a de novo action in the district court, only for the taxpayer to learn at the final stage that the matter is restricted to the confines of a petition for judicial review. 255 P.3d at 237 ("Further, it would be highly inequitable to now allow the Department to change its position with respect to this taxpayer"). The Department's new position is no less inequitable applied against these Taxpayers as it would have been against the taxpayer in Edison.

Generally, the determination of whether to invoke judicial estoppel requires a court to examine the factors laid out by the court in Edison:

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

255 P.3d at 237 (quoting NOLM, LLC v. County of Clark, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004)).

Still, this Court recognized that it may "invoke the doctrine at its discretion." Id. (quoting NOLM, 120 Nev. at 743, 100 P.3d at 663). Its "primary

purpose is to protect the judiciary's integrity." NOLM, 120 Nev. at 743, 100 P.3d at 663.

The Department sole argument against application of judicial estoppel is its position that it did not take contrary positions in prior judicial or quasi-judicial proceedings. This argument fails for two reasons. First, there is no requirement that the prior proceedings involve the same parties. Second, the Department has in fact taken inconsistent positions with respect to these Taxpayers.

### A. The Department Has Taken Inconsistent Positions in Numerous Judicial and Quasi-Judicial Proceedings.

On the first point, as Respondents point out (Resp. Ans. Brief, p. 29), judicial estoppel is "used by the court[s] to safeguard the judiciary's integrity rather than the litigants." New Hampshire v. Maine, 532 U.S. 742, 749-750 (2001). It prohibits parties from "deliberately changing positions according to the exigencies of the moment." Id. at 750. But, the change in position is not limited to a single case or a single series of actions among the same parties. United Nat. Ins. Co. v. Spectrum Worldwide, Inc., 555 F.3d 772, 778 (9th Cir. 2009) (citing Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 783 (9th Cir. 2001)).

For example, in Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir. 1996), the plaintiff asserted that she was unable to work when applying for workers compensation disability. The court therefore concluded that

she was estopped from asserting, in a later improper discharge claim against her union, that she was performing her job in a satisfactory fashion. Id.

Here, the Department's "policy change" extends beyond the Edison plaintiff or Taxpayers here. The Court's initial decision to take up the issue in Edison makes this abundantly clear. The Edison matter was presented to the Court on a petition for a writ of mandamus. 255 P.3d at 233. The Court recognized that a writ of mandamus is an extraordinary and discretionary remedy. Id. at 234 (citing Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989)). The Department admitted it had advised taxpayers in the past that de novo review in the district court would be available and that no consistent position had been taken from taxpayer to taxpayer. Id. The Court granted the petition, reasoning:

> Given this change in the Department's approach to refund actions, and the resulting confusion, and potential disparate application of the law, we take this opportunity to clarify the proper procedure when a taxpayer challenges a Commission decision in a refund action.

Id. (footnoting, n. 2, "during oral argument, the parties indicated that there seems to be confusion at the district court level as to whether NRS Chapter 233B applies or whether NRS 372.680 applies")[1].

[1] Compare the Departments admission reflected in Edison, 255 P.3d 234, n. 2, that there was confusion in the *district courts* with its arguments: "This is simply a case where the Clubs strategically chose to pursue a trial de novo rather than a petition for judicial review," (Resp. Ans. Breif, p. 18) and, "Thus, the existing caselaw

The confusion sown by the Department even lead the administrative law judge, in the underling proceedings in Edison, to advise Edison that de novo review and additional discovery would be available in the district court. Id. at 237. Indeed, in explaining the conduct giving rise to the application of judicial estoppel in Edison, the Court lead off with the generalized statement that, "[b]oth now and in the past, the Department has taken totally inconsistent positions in quasi judicial administrative proceedings regarding the proper procedure for ***a taxpayer*** who wishes to challenge the Department's denial of a refund claim." Id. As the emphasized language illuminates, the Court referred broadly to "a taxpayer" rather than "the taxpayer" or "Edison." Hence, the decision to apply judicial estoppel in Edison was based upon on the Department's acts beyond that particular case.

There is no doubt that the Taxpayers here filed their case with the district court during the period of confusion caused by the Department. This case was filed in 2008. App.Apx., Vol. 1, pp. 127-147(Case 2 Complaint). Yet, on May 29, 2009, even an administrative law judge was still advising taxpayers that a trial de novo was available in district court. App.Apx., Vol. 16, pp. 3009-10 (Letter of

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indicated that the PJR was the remedy" (Id. at 19). It is inconsistent, if not disingenuous, for the Department to admit confusion at the district court level during the proceedings in Edison, but now argue that the Taxpayer here must have been certain that a petition for judicial review was the proper remedy, but inexplicably chose to file a de novo action contrary to that knowledge.

Administrative Law Judge Deana C. James). *See also*, Appellant's Opening Brief, p. 24, n.12.

The Department has taken inconsistent positions on this issue in past judicial and quasi-judicial proceedings. This is an undeniable historical fact. The Court took the Edison case up on a petition on a writ of mandamus due to the "potential disparate application of the law" flowing from the "change in the Department's approach to refund actions." Edison, 255 P.3d at 234. Estopping the Department, as in Edison, from taking a position in this case that is inconsistent with its position during the time frame in which *this* case was filed, likewise prevents a disparate application of the law. Thus, the Department should be estopped from asserting that the present matter must proceed via a petition for judicial review.

### B. The Department has Taken Inconsistent Positions with Respect to the Parties to this Action.

Contrary to its arguments in Respondents' Answering Brief, the Department's position that this matter must proceed by petition for judicial review is contrary to the position it took in federal court to obtain dismissal under the federal Tax Injunction Act. 28 U.S.C. § 1341. Appellants' Opening Brief, pp. 36-43. To obtain a dismissal for lack of subject matter jurisdiction, the Department

had to demonstrate that a "plain, speedy, and efficient remedy may be had" in Nevada courts. 28 U.S.C. § 1341.

An excellent illustration of the contradictory positions taken by the Department is that once the Taxpayers field their complaints with the Clark County District Court in Case 1 and Case 2, the Department submitted those complaints to the Ninth Circuit as evidence that the Taxpayers were in fact pursuing their "plain, speedy and efficient remedy." App.Apx., Vol. 16, p. 3081. Having secured a dismissal from the federal court, the Department returned to state court to argue that the very same complaint should be dismissed for lack of subject matter jurisdiction for not being filed as a petition for judicial review.

Although the Department devotes a substantial portion of Respondents' Answering Brief attempting to explain away its position to the federal courts (id. at pp. 29-33), it fails to identify a time where it brought NRS 233B.130 – the provision in now asserts is central and requires a petition for judicial review – to the attention of the federal courts. Instead, the Department relies upon having used the phrase "judicial review" a number of times, equivocating that the phrase means the same thing as a "petition for judicial review," or was actually instructive that a petition for judicial review was the only available mechanism.

"Judicial review," is a general legal term that has more than one meaning:

> **judicial review.** (1851) **1.** A court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional. **2.** The constitutional doctrine providing for this power. **3.** A court's review of a lower court's or an administrative body's factual or legal findings.

Black's Law Dictionary (9th ed. 2009).

By contrast, a "Petition for Judicial Review," in Nevada, is a creature of statute set forth in detail in NRS 233B.130. Both the "action for refund" set forth in NRS 368A.290 and the "petition for judicial review" set forth in NRS 233B.130 fall within the general purview of "judicial review," as does the present review of district court action.

However, it was NRS. 368A.290[2] and NRS 368A.300[3] – with NRS 368A.300, in turn, referring to the claimant as the "plaintiff" – that the Department specifically cited to, with no mention of NRS 233B.130. In fact, the Department cites[4] to the very provisions which refer to the claimant (NRS 368A.300(4),(5)) as

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[2] *See, e.g.,* App.Apx., Vol. 16, p. 3024 (Motion to Dismiss Amended Complaint, Document 12, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed May 10, 2006, p. 7); App.Apx., Vol. 16, p. 3061, 3063, 3064, 3065 (Appellees' Answering Brief, 9th Cir., Docket No. 06-16634, filed January 5, 2007, p.12, 14, 15 & 16); App.App., Vol 13, p. 2423 (Reply Brief to U.S.D.C. Nevada, p. 4).

[3] *See, e.g.,* App.Apx., Vol. 16, pp. 3061 (Appellees' Answering Brief, 9th Cir., Docket No. 06-16634, filed January 5, 2007, pp.12 & 14); App.Apx., Vol. 16, pp. 3062 (Appellees' Answering Brief, 9th Cir., Docket No. 06-16634, filed January 5, 2007, p.13) (referencing "the refund procedures allowed under Nev. Rev. Stat. §§ 368A.250-368A.320 . . .").

[4] App.Apx., Vol. 16, pp. 3062 (Appellees' Answering Brief, 9th Cir., Docket No. 06-16634, filed January 5, 2007, p.13).

a "plaintiff," to assure the court that the Taxpayers would have a *remedy* in Nevada state courts. The Department, having argued specifically for "the refund procedures allowed under Nev. Rev. Stat. §§ 268A.250-368A.320"[5] and "the judicial remedy laid out in Nev. Rev. Stat. § 368A.290"[6] cannot now change course to argue that the proper source of the remedy is only NRS 233B.130.

The Department duly notes that the issue "before the federal courts was whether the Nevada administrative and judicial process, as a whole, provided a 'plain, speedy, and efficient' remedy for purposes of the Tax Injunction Act." Resp. Ans. Breif, p. 32. Yes, and the process the Department asserted to satisfy that requirement was the "the refund procedures allowed under Nev. Rev. Stat. §§ 368A.250-368A.320." The Department suggests that the petition for judicial review route of NRS 233B.130 also would have met the "plain, speedy, and efficient." That question is now academic and irrelevant. That is not the review process that the Department asserted to be in place in order to achieve dismissal of the action. The Department asserted the process in NRS 368A.250-368A.320 to be the process in place, which satisfied the standard. Thus, once the Department prevailed on this argument before the federal district court and the Ninth Circuit,

[5] App.Apx., Vol. 16, pp. 3062 (Appellees' Answering Brief, 9th Cir., Docket No. 06-16634, filed January 5, 2007, p.13).
[6] Id. at 3065 (p. 16).

the Taxpayers (as *plaintiffs*) filed an "action for refund" pursuant to the very provisions relied upon by the Department in federal court.

Therefore, because the Taxpayers followed the letter of the very refund procedures the Department championed to the federal courts to obtain dismissal of the federal action, and because the Department has also taken inconsistent positions in numerous other proceedings during the time period (as described in the preceding subsection) when the Taxpayers filed the Complaint below, it is clear that the Department has taken inconsistent positions. The decision of the district court should reversed and, as in Edison, the Department should be estopped from asserting that a NRS233B.130 petition for judicial review is the sole remedy available to *these* taxpayers for *this* action.

## II. THIS COURT'S DECISION IN EDISON DID NOT REQUIRE DISMISSAL OF THE ACTION BELOW.

In Appellants' Opening Brief (pp. 23-34), the Taxpayers explain that applying this Court's reasoning in Edison, on the interplay between NRS 233B.130 (the Nevada Administrative Procedures Act petition for judicial review provision) and NRS 372.680 (the sale and use tax refund procedures), did not apply to the relationship between NRS 233B.130 and NRS 368A.290 (the LET refund provisions). As explained therein, the reasons for this include that the LET provisions are more specific and enacted after the legislative changes to NRS

233B.130, and because such a construction would render various provisions of NRS 368A.290 to be meaningless.

In response, the Department contends that their construction results in a "harmonious" reading of NRS 372.680 and NRS 368A.290. It also argues that when the legislature enacted the LET in 2003, it intended to ascribe the same meaning to NRS 368A.290, that this Court ascribed to NRS 372.680 in its 2011 Edison decision, based on legislative modifications to NRS 233B.130 in 1997-1999.

The Department's arguments all fail. The fact that the Legislature separately set for the refund provisions of NRS 372.680 and NRS 368A.290 means that the provisions do not necessarily have the same meaning. There was no established understanding of NRS 372.680 or NRS 233B.130, in 2003, which the Legislature can be presumed to have relied upon when enacting NRS 368A.290. Finally, the Department's proffered interpretation improperly renders entire sections of NRS 368A.290-368A.300 to be superfluous.

First, the use of similar language, especially in different statutes, does not command the same result. Atlantic Cleaners & Dyers v. U.S., 286 U.S. 427, 433 (1932) ("Most words have different shades of meanings, and consequently, may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even the same sections"). *See also* Sun v.

Ashcroft, 370 F.3d 932, 939 (9th Cir. 2004) (quoting Atlantic Cleaners) *Accord* National Mines Co. v. Sixth Jud. Dist. Ct., 34 Nev. 67, 78, 116 P. 996 (1911). Even when similar terms are used in the same statute (not the case here), any presumption that a similar meaning is to be inferred "***readily yields*** whenever there is such variation . . . as reasonably to warrant the conclusion that they were employed . . . with different intent." Atlantic Cleaners, 286 U.S. at 433 (emphasis added). Here, because the language in NRS 368A.290 and NRS 372.680 appear in different statutes, no presumption applies.

Second, the Department relies on the rules that 1) a legislature is presumed to act with full knowledge of existing statutes on the same subject and 2) "when using language that has been given a particular meaning the language is adopted with the prior meaning." Resp. Ans. Breif, p. 31. Or, as stated in the decision the Department cites:

> When a legislature adopts language that has a particular meaning or *history*, rules of statutory construction also indicate that a court may presume that the legislature intended the language to have meaning consistent with the previous *interpretations* of the language.

Beazer Homes Nev., Inc., v. Eighth Judicial Dist. Ct., 120 Nev. 575, 580-581, 97 p.3d 1132, 1135-1136 (2004) (emphasis added).

This language is actually *fatal* to the Department's position. This is because it can point to no clear, authoritative judicial construction of the language of NRS

372.680 at the time NRS 368A.290 was enacted in 2003. Instead, it is left with the "history" of how refund provisions, such as NRS 372.680, were implemented at the time the LET was enacted. This history is the same sordid history explored in Edison, 255 P.3d at 234, 237. Namely, the Department and even administrative law judges, were instructing taxpayers that a trial de novo would be available in district court.

The contemporary understanding at the time the LET was enacted was that refund provisions, such as 372.680, permitted taxpayers to file actions for a trial de novo, as plaintiffs, to challenge a final decision of the NTC. Given that the Departments "policy change" did not occur until after at least 2009, it would be absurd to presume that the Legislature, in 2003, had knowledge of the 2009 policy change, or the Court's 2011 clarification of the issue in Edison. The very fact that this Court was compelled to grant a petition for a writ of mandamus to clarify the issue in 2011 eviscerates any argument to the contrary. Instead, it is far more reasonable to conclude that the Legislature acted with the prevailing understanding that the language it used provided for a trial de novo.

Moreover, if the task is to determine the legislative intent underlying a statute, "this court first examines its plain language to determine the Legislature's intent." In re George J., 128 Nev. Adv. Op. 32, 279 P.3d 187, 189-190 (2012), reh'g denied (Sept. 27, 2012) (citing State v. Lucero, 127 Nev. Adv. Op. 7, 249

P.3d 1226, 1228 (2012)). The actual language used by the Legislature in the LET is that the party challenging the decision in district court would be a "plaintiff." 368A.300(4),(5). In stark contrast, our Administrative Procedures Act repeatedly describes the petitioning party as, of course, the "petitioner." *See* NRS 233B.032, 233B.120, 233B.130, 233B.133, 233B.135 and 233B.140. The Legislature's use of different word demonstrates that it intended a different meaning. S.E.C. v. McCarthy, 322 F.3d 650, 656 (9th Cir. 2003) ("It is well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that [a legislature] intended to convey a different meaning to those words") (citing Russello v. U.S., 464 U.S. 16, 23 (1983) (other citations omitted)).

Thus, even if it were *possible* to accept that the Legislature knew, in 2003, that the language used in NRS 368A.290 only permitted a challenge to an NTC decision by way of a petition for judicial review, the use of the word "plaintiff" repeatedly in NRS 368A.300 completely dispels that possibility.

Faced with this proverbial "smoking gun," the Department scrambles to argue that simply citing to the NRS 368A.300(4)&(5)'s use of the term "plaintiff" amounts to the Taxpayers somehow raising a *new argument* on appeal. That is ridiculous. The Taxpayers consistently argued for the interpretation of NRS 368A.290-368A.300 that they presently seek, have repeatedly cited to NRS

368A.300 (it is cited in the *caption* of the Taxpayers Case 2 *Complaint*[7]), and have consistently argued that the interpretation offered by the Department would render certain terms and phrases used in NRS Chapter 368A to be superfluous.

In any event, it is "clear that in adjudicating a claim or issue pending before [an appellate court, the court has] the authority to identify and apply the correct legal standard, whether argued by the parties or not." Thompson v. Runnels, 705 F.3d 1089, 1098 (9th Cir. 2013) (citing Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991)).

> For the same reason, "parties are not limited to the precise arguments they made below." Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 379, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 130 S.Ct. 876, 893, 175 L.Ed.2d 753 (2010) (allowing plaintiffs to raise a new argument on appeal to support a "consistent claim" that a statute *violated First Amendment rights*); Engquist v. Oregon Dept. of Ag., 478 F.3d 985, 996 n. 5 (9th Cir.2007) (holding that we may hear new arguments on appeal if they are "intertwined with the validity of the claim"); United States v. Pallares–Galan, 359 F.3d 1088, 1095 (9th Cir.2004) ("[I]t is claims that are deemed waived or forfeited, not arguments."). Thus, we may consider new legal arguments raised by the parties relating to claims previously raised in the litigation.

Id. (emphasis added).

All of the Taxpayer's arguments on appeal, including the references to NRS 368A.300, are well within the scope of the arguments present below.[8] The

[7] App.Apx., Vol. 1, pp. 127.
[8] *See* App.Apx., Vol 16, pp. 2917-2970 (Plaintiffs' Opposition to Nevada Department of Taxation's Motion for Partial Summary Judgment on the Plaintiffs'

Department's assertion that the Taxpayers are raising a new argument is frivolous at best, and should not preclude full consideration and analysis of the important questions placed before the Court.

Also relating to NRS 368A.300, The Department proposes an interpretation that will render portions of the plain language of the statute to be meaningless or superfluous, in violation of the established cannon of statutory interpretation (*See* Appellants' Opening Brief, pp. 30-31). Southern Nev. Homebuilders Ass'n v. Clark County, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). The terms rendered meaningless would necessarily include the references to "plaintiff" in NRS 368A.300(4)&(5).

Finally, the Department argues that the Legislature's choice, to have sales and use tax appeals (NRS 372.680) proceed through judicial review while LET appeals proceed to a trial de novo, is an absurd result. This argument is foreclosed by the decision of Destefano v. Berkus, 121 Nev. 627, 119 P.3d 1238 (2005).

In Destefano, this Court was presented with two statutes asserted to be in conflict. 121 Nev. at 629-30, 119 P.3d at 1240. NRS 281.050 permitted a person challenging the residency of a candidate for office to bring a declaratory action in district court, while NRS 293.182 permitted the person to request that election

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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 Judicial Review).

officials remove the candidate's name from the ballot. 121 Nev. at 630, 119 P.3d at 1240. Nevertheless, the Court found that, because NRS 281.050 only applied to the residency requirement and NRS 293.182 applied to any qualification, the statutes did not conflict even though they "apply to the same subject." Id.

The Court reasoned from the maxim that the Legislature acts with presumed knowledge of existing law and stated that "without any indication that the new procedure was intended to replace any part of the existing statute . . . the new statute simply presented a *viable alternative method* . . . ." (Emphasis added). The same is true here. Although a petition for judicial review may be available for any appeal of a NTC or other administrative agency final decision, NRS 368A.290 permits challenges to NTC LET decisions to also proceed by a de novo action. This is also consistent with the rule that when the Legislature enacts a specific provision, that provision takes precedence over the general position. *See* Appellants' Opening Brief, pp. 26-28.

Based upon the foregoing, it is clear that the only interpretation that comports with the plain meaning of NRS Chapter 368A, that complies with established canons of statutory interpretation, and that comports with the contemporary understanding of what the operative language meant at the time the LET was enacted, is the conclusion that NRS 368A.290-300 permit a de novo action in the district court.

## III. THE RULE ANNOUNCED IN EDISON SHOULD NOT BE APPLIED RETROACTIVELY.

"[C]ourts give prospective effect to the overruling of a judicial precedent involving the construction of a procedural statute." Nevis v. Fidelity New York, 104 Nev. 576, 579, 763 P.2d 345, 347 (1988) ((*citing* 20 Am.Jur.2d Courts § 233 (1965); 21 C.J.S. Court § 194 (1940)). As explained in Appellants Opening Brief (pp. 31-33), the decisions of this Court counsel against applying producral rulings retroactively to limit a properly submitted request for judicial relief. (citing, Nevis, *supra*; and Vogyt v. Dennett, 105 Nev. 303, 774 P.2d 1036 (1989)).

The Nevis and Voygt decisions followed this Court's ruling in First Interstate Bank v. Shields, 102 Nev. 616, 618, 730 P.2d 429, 431 (1986), which overruled prior precedent and extended statutory protects to guarantors of a note.

Among these protections, NRS 40.455 required that a lender file for a deficiency judgment within 3 months of a foreclosure. 104 Nev. at 579, 763 P.2d at 347. Nevis, a guarantor, argued that the ruling in Shields should be given full retroactive effect, which the court rejected for the reasons stated above. 104 Nev. at 579, 763 P.2d at 347.

The Department argues that these cases are distinguishable on the grounds that the underlying statute in Nevis and Voygt, NRS 40.455 "had not changed at, or prior to, the time the court was deciding" Shields. Resp. Ans. Brief at 24.

This is a distinction without a difference. Just as the Nevis and Voygt lenders were relying on the existing judicial precedent, the Taxpayers were relying on the existing judicial precedent in Saveway v. Cafferata, 104 Nev. 402, 760 P.2d 127 (1988) and Sparks Nugget v. Department of Taxation, 124 Nev. 159, 179 P.2d 579 (2008), which indicated that trial de novo would be available on appeal of an NTC decision. *See* Appellants Opening Brief, p. 33 & n.16. In addition, the Taxpayers position was also buttressed by the existing policy of the Department at the time (discussed at length above) and procedural statutes which state Taxpayers could bring an "action" resulting in an award to the "plaintiff." NRS 368A.290 and 368A.300.

As in Nevis and Voygt subsequent to Shields, if the Court *now*, for the first time, determines that it clarification with respect to NRS 372.680 also applied to NRS 368A.290, it will be judicial precedent on the interpretation and understanding of the statute that has changed and not the statutory language itself. And, as in Nevis, the change will have happened after the Taxpayers filed suit in reliance on the existing understanding and state of the law. This is the precise situation where a procedural ruling is not to be applied retroactively.

The Department then cites to Madera v. State Ins. Sys., 114 Nev. 253, 956 P.2d 117 (1998) for the proposition that the "*presumption of prospective application of statutes* does not apply when the statute addresses only remedies."

Resp. Ans. Brief, p. 25 (emphasis). However, Madera involved an actual Legislative change during the pendency of the suit, not a shift in the understanding of existing language. 114 Nev. at 253, 956 P.2d at 120. In addition, the Madera decision was a unique situation where this Court "concluded that the statutory text reflected legislative intent that the statute be applied retroactively." Star Ins. Co. v. Neighbors, 112 Nev 773, 783, 138 P.3d 507, 513 (2006). In the absence of such an intent expressed in the statutory text, this Court in Star Ins. declined to apply a statute affecting remedies retroactively.

Here, unlike Madera, there has not been an intervening legislative change or a stated legislative purpose that a change in the law be applied retroactively. So, Madera does not apply.

Respondents also cite to Friel v. Cessna Aircraft Co., 751 F.2d 1037, 1039 (9th Cir. 1985) for the argument that the *presumption of prospective application* of statutes does not apply to statutes addressing only procedures or remedies. Resp. Ans. Brief, p. 25 (emphasis added). Again, the *intervening* change here would be in the understanding and interpretation of 368A.290 and not the statute itself. In any event, Friel is foreign authority that *conflicts* with Nevis, Voygt, and Star Ins. Thus, Friel in inapplicable and does not represent the law of Nevada.

Clearly, applying a new, post-Edison understanding of NRS 368.290 to deny Taxpayers their trial de novo, would be in violation of the prior precedents of this Court counseling against the retroactive application of procedural rulings.

## IV. THE COURT'S DECISION IN SCOTSMAN PRECLUDED THE DISMISSAL OF THE ACTION.

Nevada Department of Taxation v. Scotsman Manufacturing Company, 109 Nev. 252, 849 P.2d 317 (1993), stands for the proposition that where the challenge to a tax is based upon a constitutional violation, judicial relief must be provided. *See* Appellants' Opening Brief, pp. 44-45. The Department asserts two arguments in response, 1) that Scotsman was decided prior to the amendments to NRS 372.680 and 2) exhaustion of administrative remedied may still be required where factual determinations are necessary.

Neither of these arguments is persuasive. The whole import of the Scotsman decision is that even where the taxpayer fails to follow the appropriate refund action procedures, a court must still provide relief in the face of a constitutional violation. Indeed, the plaintiff in Scotsman had missed the three-year filing deadline. 109 Nev. at 255, 849 P.2d at 320. The State in Scotsman offered the same argument as the Department here, that "the refund procedures provide such relief and [the taxpayer] was bound to comply with them." 109 Nev. at 255, 849 P.2d at 319. The Court disagreed. 109 Nev. at 255, 849 P.2d at 320.

This being the case, the timing and amendments to NRS 372.680, and the implications for the interpretation of NRS 368A.290 are of no consequence. Because the Taxpayers assert the collection of the tax was (and is) unconstitutional, the government is obligated to provide "meaningful backward-looking relief," *i.e.*, a refund. 109 Nev. at 255, 849 P.2d at 319.

Regarding the Department's second argument, it has repeatedly acknowledged that Taxpayers are not required to exhaust administrative remedies for a facial challenge. Resp. Ans. Brief, pp. 9, 19. It also acknowledges that exhaustion is not required where there is no factual question to be resolved. Id. at 2 (citing Malecon Tobacco, LLC, v, Dept. of Taxation, 118 Nev. 837, 840-41, 59 P.3d 474 (2002)), 28 n. 19 (citing Malecon), and 38-39 (citing Malecon for the language, " . . . as applied challenges *requiring factual determination* must be decided by the administrative agency . . .") (emphasis added).

What the Department doesn't explain is: what factual issue regarding the administration of the LET required administrative fact-finding? Indeed, the Malecon decision identifies that exhaustion is not required "where the issue does not depend upon the factual determination within the agency's expertise." 118 Nev. at 840 n. 12, 59 P.3d at 476 n. 12. Yet, the constitutional question raised therein required the administrative agency to determine the "wholesale price" for

out-of-state products "on which the tax is measured." 118 Nev. at 841, 59 P.3d at 477. Thus, the taxpayer was required to exhaust.

Here, the Taxpayers are challenging the LET on the basis described in Appellants Opening Brief (pp. 18-20): it is a direct tax on First Amendment Activity, it is a differential tax on First Amendment Activity; and it is a content based tax on First Amendment Activity. In support of these arguments, the Taxpayers have propounded discovery on the legislative history, application, and collections of the LET. *See* App.Apx. 807-819 (Plaintiffs' First Set of Interrogatories to Defendants). While responsive factual materials were in custody of the Department, all that was necessary was for the Department to produce those materials. Neither the Department nor the NTC has any expertise in analyzing this information against the constitutional standard, nor have either claimed to have such expertise.

According to Malecon, 118 Nev. at 840-41, 59 P.3d at 476-477, exhaustion is not required in this situation. Therefore, Case 2 (and the as-applied portion of Case 1) should not have been dismissed because the constitutional challenges alone provide a basis for jurisdiction in the district court, no matter how NRS 368A.290 is interpreted or applied.

## CONCLUSION

For the reasons as set forth above, Plaintiffs/Appellants respectfully request

that this Honorable Court reverse the decision of the district court below, and permit Plaintiffs' claims for refund to proceed as an original action under NRS 368A.290 and 368A.300, consistent with all civil rules (including discovery).

Dated this 15th day of May, 2013.

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Appellants' Reply Brief** was filed with the Clerk of the Court for the Supreme Court for the State of Nevada on May 15, 2013. I certify that the following are registered with the Electronic Filing System through the Supreme Court for the State of Nevada and that service will be accomplished through the Electronic Filing System:

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## CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this brief complies with the formatting requirements of the NRAP 32(a)(4), the typeface requirements of the NRAP 32(a)(5) and the type style requirements of the NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2010 in Times New Roman 14.

I further certify that this brief complies with the page – or type-volume imitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of size 14 or more, and contains 5,844 words, as counted by MS Word.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of the Appellate Procedure.

Dated this 15th day of May, 2013

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