**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. 60037**

**District Court Case No.** A533273

# APPELLANTS' OPENING 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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Greenberg Traurig, LLP

Dominic P. Gentile

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Turco & Draskovich

BY: */s/ Bradley J. Shafer*
**BRADLEY J. SHAFER**
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## NRAP 26.1 DISCLOSURE OF LITTLE DARLINGS OF LAS VEGAS, L.L.C.

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.

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**NRAP 26.1 DISCLOSURE OF**
**K-KEL, INC.**

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:

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## NRAP 26.1 DISCLOSURE OF OLYMPUS GARDEN, INC.

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.

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**NRAP 26.1 DISCLOSURE OF SHAC, L.L.C.**

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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**NRAP 26.1 DISCLOSURE OF THE POWER COMPANY, INC.**

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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## NRAP 26.1 DISCLOSURE OF D. WESTWOOD, INC.

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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## NRAP 26.1 DISCLOSURE OF D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, INC.

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. D.I. Food & Beverage has requested voluntary dismissal, negating the need for NRAP 26.1(a) disclosures.

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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## JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRCP § 3A(b)(1), (2) and (8); NRS 368A.140(3)(a); and NRS 363.318(1). This is an appeal from a final judgment entered on December 16, 2011, with Notice of Entry filed December 19, 2011. The Notice of Appeal was filed on January 9, 2011.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED IN RULING THAT CHAPTER 368A IS NOT FACIALLY UNCONSTITUTIONAL AND IN, THEREBY, DENYING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS' CONSTITUTIONAL CHALLENGES TO CHAPTER 368A, IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS ON PLAINTIFFS' CLAIMS THAT CHAPTER 368A IS FACIALLY UNCONSTITUTIONAL, AND IN FAILING TO ENJOIN CHAPTER 368A.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT IT WAS LIMITED TO THE FOUR CORNERS OF THE TEXT OF CHAPTER 368A IN EVALUATING THE STATUTE'S FACIAL CONSTITUTIONALITY.

III. THE DISTRICT COURT ERRED IN PRECLUDING PLAINTIFFS FROM CONDUCTING DEPOSITIONS IN FURTHERANCE OF THEIR FACIAL CONSTITUTIONAL CHALLENGES TO CHAPTER 368A.

IV. THE "ANTI-INJUNCTION" PROVISION FOUND AT NRS 368A.280(1) VIOLATES THE SEPARATION OF POWERS PROVISION OF THE NEVADA CONSTITUTION, AND IS THEREFORE VOID.

V. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' "AS APPLIED" CONSTITUTIONAL CHALLENGE TO CHAPTER 368A.

## STATEMENT OF THE CASE

After the Nevada legislature enacted amendments in 2005 to Title 37, Chapter 368A of the Nevada Revised Statutes ("Chapter 368A," or the "Statute," with the current version thereof appearing at Addendum "A"), which imposed an excise tax upon the admission to any facility that provides "live entertainment" (the "Live Entertainment Tax," or simply the "LET"), Plaintiffs filed suit on April 18, 2006, in the United States District Court for the District of Nevada, Case Number CV-S-06-00480-RLH-RJJ, seeking, *interalia*: a declaration that the LET is unconstitutional, an injunction against its enforcement, and return the taxes paid.

The Defendants thereto (Respondents here) filed a motion to dismiss the federal action asserting that the Tax Injunction Act, 28 U.S.C. § 1341, precluded federal court 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 (App.Apx., Vol. 8, p. 1613), and Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit, who affirmed. App.Apx., Vol. 8, p. 1620.

In order to protect their constitutional rights, Plaintiffs filed the action below basically seeking the same remedies as they had requested in the federal courts

(Case No. A533273, referred to herein as "Case 1") on December 19, 2006.[1] The parties agreed to extend the date for the Defendants to answer that complaint because, in an abundance of caution, a number the Plaintiffs below filed, at approximately the same time, administrative claims for refunds as permitted under the Statute.

Specifically, on February 27, 2007, within the three-year statutory period under NRS 368A.260(1), 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.[2] *See*

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[1] 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. App.Apx., Vol. 1 p. 106.

[2] 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, in order to reduce the seating capacity required for a facility to be subject to the LET from 300 to 200 persons. *See* App.Apx. Vol. 8, p. 553 (Assembly Bill 554 modifying NRS 368A.200(5)(d). Pursuant to NRS 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 what is defined below as "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 responded to the monthly notices of appeal with identical acknowledgment letters stating that

App.Apx., Vol. 8, p. 1622 (redacted copy of one of those refund requests, illustrating that the ***sole*** basis for the requests for refund was the asserted unconstitutionality, and therefore inapplicability to the Plaintiffs, of the LET).

The K-Kel Plaintiffs' requests for refunds were all summarily denied by the Nevada Department of Taxation on April 3, 2007. App.Apx., Vol. 8, p.1628. Those Plaintiffs all filed timely notices of administrative appeals, and the Nevada Tax Commission ("Commission") held hearings in July and August of 2007. Following submission of materials and oral argument, the Commission denied the K-Kel Plaintiffs' appeals in October of 2007. App.Apx., Vol. 8, p. 1630. On January 9, 2008, in accordance with NRS 368A.290(1)(b) and 368A.300(3)(b), the K-Kel Plaintiffs timely filed a judicial complaint in the Clark County District Court for refund, declaratory relief, injunctive relief, and damages. That action was assigned Case No. A554970 ("Case 2"). On June 5, 2008, the Plaintiffs filed a motion in Case 1 to preliminarily enjoin the enforcement of Chapter 368A.

Over the next three years, the parties engaged in bi-lateral discovery. In March of 2009, Plaintiffs propounded interrogatories (App.Apx., Vol. 1, p. 188) and production requests (App.Apx., Vol. 1, p. 201) upon the Defendants. On August 17, 2009, ten days prior to the depositions of defendants representatives

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***each appeal was being held in abeyance during the pendency of "Case 2***." App.Apx., Vol. 8, p. 1629.

(App.Apx., Vol. 6, pp. 1290-1291 (2009 Deposition Notices), Plaintiffs received deficient responses (App.Apx., Vol. 2, p. 239) resulting in the filing of a motion to compel with the Discovery Commissioner. (App.Apx., Vol. 1, p. 213). Plaintiff's motion was granted and denied in part (App.Apx., Vol. 4, p. 744 (Discovery Commissioners Report and Recommendations).[3] Plaintiffs objected (App.Apx., Vol. 2, p. 459. *See* Minute Order of August 12, 2010, App.Apx., Vol. 4, p. 773. The depositions were re-noticed, ultimately for August of 2012. App.Apx., Vol. 6, p. 1289 and Vol. 9, p. 1810 (2011 Deposition Notices).

At a hearing on August 23, 2011, the District Court dismissed Case 2 based upon this Court's decision in Southern California Edison v. First Judicial District, 255 P.3d 231, 127 Nev. Adv. Op. 22 (Nev. 2011);[4] ordered Plaintiffs to file a Petition for Judicial Review in lieu of Case 2 within 30 days; ordered that Case 1 would proceed only facial challenge; and precluded all further discovery in the action.

The parties filed cross-motions for summary judgment and the court ultimately denied Plaintiffs' motion and granted the Defendants' motion concluding that she was limited to the text of the Statute for her constitutional

[3] The Commissioner's order was necessary simply to permit Plaintiffs access to information on the amount of the 5% and 10% LET paid by various categories of businesses. *See* App.Apx., Vol. 5, pp. 983-984 (charts).

[4] That ruling is on appeal to this Court as Case No.: 59752.

analysis. App.Apx., Vol. 9, pp. 1873 (Transcript of 11/8/2011, pp. 24); and 1882-1873 (Order of 12/16/2011).

This appeal follows.

## STATEMENT OF FACTS

Plaintiffs operate commercial entertainment establishments in the City of Las Vegas, that present live performance dance entertainment to the consenting adult public. App.Apx., Vol. 1, pp. 6-8 (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,[5] as well as by Art. I, §§ 9 and 10 of the Nevada Constitution.[6] App.Apx., Vol. 1, p. 7 (Comp., ¶ 36).

On July 22, 2003, the State of Nevada enacted Chapter 368A, which modified the previous "Casino Entertainment Tax" and imposed an excise tax on

[5] 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, 250 (2001)), the federal case law cited herein is applicable to Plaintiffs' Nevada constitutional challenges as well.

[6] 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, 111 S. Ct. 2456, 2460 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap's A.M., 529 U.S. 277, 289, 120 S. Ct.1382,1391(2000) (same).

admission to any facility that provides defined "live entertainment." Comp., ¶ 22. A copy of the version of Chapter 368A adopted in 2003 is found as Addendum B. As originally enacted, the LET was not applicable to live entertainment that was not provided at a licensed gaming establishment with a maximum occupancy of less than 300 persons. 368A.200(5)(d).

However, on June 17, 2005, Chapter 368A was amended by Assembly Bill No. 554 App.Apx., Vol. 8, p. 1553, which reduced the exception as contained in NRS 368A.200(5)(d) from a maximum seating capacity of 300 to 200 persons. The stated purpose of this amendment was to extend the tax obligation as contained in Chapter 368A to a number of the Plaintiffs' establishments that were not then subject to the LET. App.Apx., Vol. 1, pp. 5-6 (Comp., ¶ 26). For the same stated reasons, the LET was again modified in 2005, via Senate Bill 3 App.Apx., Vol. 8, p. 1584, to change the references in NRS 368A.200 from "seating capacity" to "occupancy." Then in 2007, via Assembly Bill 487 App.Apx., Vol. 8, p. 1590, the LET was modified to exempt "certain minor league baseball events . . . ."

The current version of Chapter 368A is attached as Addendum A, and unless designated to the contrary any further citations of the Statute refer this while the previous version is 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 have required the Plaintiffs to pay the LET. App.Apx., Vol. 1, pp. 4-5 and 6-7 (Comp., ¶¶ 17-20, 27-34, 37). Contrarily, the Plaintiffs contend the tax imposed by Chapter 368A is both illegal and unconstitutional, and that even if that is not the case, they are specifically exempted from paying the LET pursuant to the statutory exemptions contained therein. App.Apx., Vol. 1, pp. 8, 11 (Comp., ¶¶ 38-39, 53). Nevertheless, under threat of criminal prosecution and the imposition of fines and other penalties against them, Plaintiffs have paid the LET mandated by Chapter 368A. App.Apx., Vol. 1, p. 8 (Comp., ¶ 38).

## RELEVANT PROVISIONS OF CHAPTER 368A

Chapter 368A states, at NRS 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,[7] 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.

[7] All the facilities operated by the Plaintiffs have maximum occupancies of less than 7,500 persons. App.Apx., Vol. 1, p. 7 (Comp., ¶ 35).

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 NRS 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 NRS 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 NRS 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.

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

Pursuant to NRS 368A.200(5), however, the tax is not applicable to certain entertainment, one of which is "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitution." NRS 368A.200(5)(a).

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

## SUMMARY OF ARGUMENT

Chapter 368A is facially unconstitutional under the First Amendment to the United States Constitution and Nevada Constitution because it: 1) is a direct tax on First Amendment protected activities, and in particular on "live entertainment"; 2) it targets a small group of taxpayers, namely those presenting exotic dance entertainment; and 3) it differentiates upon expression that is subject to the tax and that which is not based upon content.

In analyzing Plaintiffs' facial challenges, the District court erred in refusing to consider the legislative history of Chapter 368A, as well as the "context and practical effect" of the Statute; all of which clearly demonstrates legislative intent and "gerrymandering" to impermissibly tax the Plaintiffs (and those like them) and few else.

While the District Court did not rule Chapter 368A unconstitutional, in the event that this Court does, the Statute contains a prohibition that precludes any

court from enforcing the collection of the LET. The Plaintiffs challenged this provision, which violates the separation of powers in the Nevada Constitution.

Finally, in concluding that the court was limited to reviewing only the actual text of the statutes in question, the District Court erred in precluding Plaintiffs from undertaking a series of scheduled depositions that were relevant to the constitutional inquires.

## ARGUMENT

### I. STANDARD OF REVIEW.

All of the issues before this Court involve questions of statutory constitutionality and questions of law, which are subject to *de novo* review by this Court. *See* Busefink v. State, 286 P.3d 599, 602, 128 Nev. Adv. Op. 49 (Nev. 2012).

Moreover, the Taxpayers' Bill of Rights states that each taxpayer has the right "[t]o have statutes imposing taxes and any regulations adopted pursuant thereto ***construed in favor of the taxpayer*** if those statutes or regulations are of doubtful validity or effect, unless there is a specific statutory provision that is applicable." NRS 360.291(1)(o) (emphasis added) (Addendum F). *See also* State v Pioneer Citizens Bank of Nevada, 85 Nev. 395, 398, 456 P.2d 422, 423-424 (1969) ("[S]tatutes imposing taxes are to be construed in favor of the taxpayer and most strongly against the government . . .").

## II. CONSTITUTIONAL CONSTRAINTS OF TAXES THAT IMPACT UPON FIRST AMENDMENT RIGHTS.

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 . . . . ***It 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, 63 S. Ct. 870, 872, 874 (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.
>
> * * *
>
> The danger from a scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from a content-based regulation: It will distort the market for ideas.

Leathers v. Medlock, 499 U.S. 439, 447-48, 111 S. Ct. 1438, 1443-44 (1991).

Third, a ***content-based tax*** is unconstitutional. Leathers, 499 U.S. at 447, 111 S. Ct. at 1444. ("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 v. Lerner, 120 Nev. 928, 936, 102 P.3d 91, 96 (2004).

That the LET is facially unconstitutional for all three reasons.

## III. DEFENDANTS HAD THE BURDEN BELOW 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, 107 S. Ct. 1722, 1729 (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, 103 S. Ct. 1365, 1375 (1983). In addition, a tax upon protected expression is "***presumptively unconstitutional***." Minneapolis Star, 460 U.S. at 585, 103 S. Ct. at 1372 (emphasis added). *See also* Seres, 120 Nev. at 936, 102 P.3d at 96 ("[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, 112 S. Ct. 501, 508 (1991)).

In order to pass muster under strict scrutiny[8], the Defendants were required to demonstrate that the law was narrowly tailored to serve a compelling governmental interest, which "it cannot achieve without differential taxation." Minneapolis Star, 460 U.S. at 585, 103 S. Ct. at 1372. The governmental interest of the "raising of revenue," "[s]tanding alone," cannot justify the discriminatory tax on First Amendment protected activities. Id. at 586, 103 S. Ct. 1372. 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.

## IV. THE DISTRICT COURT ERRED IN ADJUDICATING PLAINTIFFS' FACIAL CHALLENGE WITHOUT EXAMINING THE LEGISLATIVE HISTORY, CONTEXT, AND PRACTICAL EFFECT OF THE STATUTE.

[8] Irrespective of applying strict scrutiny, this Court can hold the LET unconstitutional simply for being a content-based restriction on speech. In Seres, this Court (save Justice 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 124-26, 112 S. Ct. at 512-14, wherein he stated 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. While this Court found such an approach "inviting" in Seres, it noted that the parties there had not raised claims under the Nevada Constitution. Id. Plaintiffs here have raised such state constitutional claims, and the content-based LET should be struck on that basis alone.

The District Court concluded that Plaintiffs' facial challenge required that Court to limit its examination to the text of the Statute. *See* App.Apx., Vol. 9, pp. 1883-1884 (Order of 12/19/2011); Vol. 9 p. 1874 (Trans., of 11/8/2011, p. 24). This conclusion was clearly erroneous.

A facial challenge 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, e.g.*, 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 Establishment Clause of

the First Amendment. Like a tax on a defined group of speakers, "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") (emphasis added) (*citing* Church of Lukumi Babalu Aye, Inc., v. Haileah, 508 U.S. 520, 535, 540, 113 S. Ct. 2217, 2228, 2230-31 (1993)).

In Lukumi the High Court recognized that the First Amendment prohibits "subtle departures from neutrality." 508 U.S. at 534, 113 S. Ct. at 2227 *citing* Gillette v United States, 401 U.S. 437, 452, 91 S. Ct. 828, 837 (1971). To determine whether "the object of the law is a neutral one," the Court instructed that judges may examine "both direct and circumstantial evidence."[9]

> 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 decision-making body.***

[9] The analysis in Lukumi was undertaken specifically under the Free Exercise Clause. 508 U.S. at 540, 113 S. Ct. at 2230. Still, the Court made clear that "[t]he principle underlying the generally applicability requirement has parallels in our First Amendment jurisprudence." Id. at 543, 113 S. Ct. at 2232 (*citing*, *inter alia*, Minneapolis Star, 460 U.S. at 585, 103 S. Ct. at 1371-72; other citations omitted).

Id. at 540 (emphasis added) (*citing* Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-68, 97 S. Ct. 555, 563-65 (1977)).

Like Lukumi, the structure and numerous exemptions demonstrate impermissible gerrymandering so that the 10% LET applies to gentlemen's clubs and "few if any" others. Lukumi, 508 at U.S. 536, 113 S. Ct. at 2228. Simply put, the Court in Lukumi recognized that "[i]t becomes evident that these ordinances target" the religious practices at issue there "***when the ordinances' operation is considered***. Apart from the text, the ***effect of a law*** in its real operation is ***strong evidence of its object***." Id. at 535, 113 S. Ct. 2228 (emphasis added). *See also* Id. at 547, 113 S. Ct. at 2234 (declaring the challenged laws "void" -- *i.e.*, *facially* invalid -- rather than unconstitutional "as applied" to the plaintiff).

Because the District Court declined to review the legislative history, context, and practical effect of the LET, it clearly erred in its legal analysis. Since, as will be discussed in Sections VI (B)(3) below, such matters clearly inform the unconstitutionality of Chapter 368A, the District Court erred in its grant of summary judgment to the State and its ruling should, respectfully, be reversed.

## V. THE DISTRICT COURT ERRED BY PRECLUDING PLAINTIFFS FROM BEING ABLE TO TAKE DEPOSITIONS IN THE ACTION BELOW.

As established in Section IV, *supra*, it is entirely appropriate in a facial challenge for the court to consider the context, legislative history and practical

effect of the challenged statute. The District Court improperly denied discovery aimed at uncovering this critical information.

In particular, Plaintiffs sought to depose Defendants' representatives, including Dino DiCianno and Michelle Jacobs. Mr. DiCianno was the Executive Director of the Nevada Department of Taxation during the period in which the LET was proposed, enacted and modified (2003-2005). Defendants identified DiCianno as the person most knowledgeable regarding, *inter alia*:

- the purposes for any and all legislative changes to the exceptions to the definition of "live entertainment" set forth in NRS § 368A.090;
- 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; and
- the steps by which the proposed "5% across the board" tax on live entertainment was modified to, instead, tax certain live entertainment at the rate of 10%, as provided by NRS § 368A.200(1);

App.Apx., Vol. 1, p. 214 (Nevada Department of Taxation's Responses to Plaintiff's First Set of Interrogatories).

Ms. Jacobs ("Tax Examiner II") was identified as the person most knowledgeable regarding:

- the purposes for each and every one of the exceptions to the definition of "live entertainment" set forth in NRS § 368A.090;
- the purposes for each and every one of the exceptions to the application of the Live Entertainment Tax set forth in NRS §

368A.200.

Id.

Mr. DiCianno was also the author or recipient of critical documents during the legislative process that shed further light on the drafting and amending of the LET, including:

- A memorandum specifically examining the seating capacities of gentlemen's clubs prior to the legislature amending the seating capacity threshold. App.Apx., Vol. 8, p. 1678.

- An email examining revenue impacts and stating: "Currently the vast majority of the revenue we collect comes from the gentlemen's clubs with a seating capacity greater than 300." App.Apx., Vol. 8, p. 1679.

- An email explaining that draft language was rejected because it might exempt dancers at gentlemen's club's. App.Apx., Vol. 8, p. 1680.

Plaintiffs' intended Rule 30(b)(6) depositions were also aimed at uncovering pertinent information regarding the LET's legislative history and practical effect. *See* App.Apx., Vol. 9, pp. 1810-1817 (2011 Deposition Notices).

These are all relevant matters to Plaintiffs' constitutional challenges and, Plaintiffs should have been permitted to undertake such discovery. Only the District Court's erroneous conclusion that a facial challenge was limited to review of the language of the statute itself lead to this discovery preclusion.

## VI. THE LIVE ENTERTAINMENT TAX IS UNCONSTITUTIONAL.

For the following reasons, the LET infringes both the Federal and State Constitutions, and the District Court's decision.

### A. THE LET IS A DIRECT TAX ON FIRST AMENDMENT ACTIVITIES.

The Supreme Court dealt with the unconstitutionality of directly taxing First Amendment rights in Murdock, where the Court analyzed 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, 63 S. Ct. at 871-72. 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 112, 63 S. Ct. at 874 *citing* Magnano Co., v Hamilton, 292 U.S. 40, 44-45, 54 S. Ct. 599, 601 (1934) (emphasis and clarification added).

The Court made clear that "[I]t could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax imposed by this ordinance is in substance just that." Id. at 108, 63 S. Ct. at 872. The LET, does not even present the pretext of a license (that may

require funds to administer), as it is merely a ***direct imposition of a tax on First Amendment freedoms***.

The Supreme Court noted that freedom of speech is "available to all, not merely to those who can pay their own way," and that "[t]hose 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, 63 S. Ct. at 874. 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 113, 63 S. Ct. at 875 (emphasis added). This is because "[t]he 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. *citing* Cantwell v. Connecticut, 310 U.S. 296, 306, 60 S. Ct. 900, 904 (1940) (other cites omitted).

In addition, the fact that entities subject to the LET present live entertainment for profit does not change the analysis. "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, 79 S. Ct. 524, 534 (1959).

Here, there is absolutely no doubt that "live entertainment" is a category of activity presumptively protected by the First Amendment. *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S. Ct. 2561, 2568 (1975); Schad v. Borough

of Mount Ephraim, 452 U.S. 61, 65, 101 S. Ct. 2176, 2181 (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") (and cases cited therein); Winters v. New York, 333 U.S. 507, 510, 68 S. Ct. 665, 667 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment).

Nevada cannot specifically tax live entertainment any more than it could ban it. Yet, the LET requires persons wishing to engage in "live entertainment" to pay the State 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, 63 S. Ct. at, 872. Nevada is "charg[ing] for the enjoyment of a right granted by the federal constitution." Id. at 113, 63 S. Ct. at 875 (clarification added). The LET is plainly and facially unconstitutional under Supreme Court precedent.

### B. THE LIVE ENTERTAINMENT TAX IS STATUTORILY GERRYMANDERED TO APPLY ONLY TO A "NARROWLY DEFINED GROUP OF SPEAKERS," AND IN DOING SO DISCRIMINATES BASED ON THE CONTENT OF THE ENTERTAINMENT.

While purportedly taxing "live entertainment," Chapter 368A does not impose a tax on all such entertainment and it does not tax that particular mode of

expression in a unified and even fashion. This is because a wide variety of "live entertainment," based upon its ***content,*** is statutorily ***exempted*** from the tax. In this regard, Plaintiffs' challenge to the LET involves two related but distinguishable lines of inquiry: Whether it taxes a narrow group of speakers and whether it 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 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.***
>
> *** * ***
>
> 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, 103 S. Ct. at 1371-72 (emphasis added) (citations omitted).

The reason for this is simple:

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

Leathers, 499 U.S. at 445 101 S. Ct. at 1443 *citing* Minneapolis Star, 460 U.S. at 585, 103 S. Ct. at 1371 (emphasis added).

An impermissible intent to discriminatorily tax based on content need not be established in order for the law to be found unconstitutional. And, of course, legislators may attempt to cloak their improper intentions by using seemingly benign gerrymandering. Such structuring *still* results in an unconstitutional tax.

> In Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 103 S. Ct. 1365 [ ] (1983), we noted that it was unclear whether the result in Grosjean [v. American Press Co., 297 U.S. 233, 56 S. Ct. 444 (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, 103 S. Ct. at 1369 (*citing* cases and commentary). Minneapolis Star resolved any 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, 103 S. Ct. at 1376.

Leathers, 499 U.S. at 445, 111 S. Ct. at 1442-43 (parallel citations omitted).

In addition to its ***explicit*** content-based discrimination (*see* subsection 2, *infra*), the LET uses the classic and well-worn mask of impermissible gerrymandering by discriminating based upon the "size" of the speaker and/or the volume of its activity. Grosjean was the first example of this, where the 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, 111 S. Ct. at 1442 (*citing* Grosjean, 297 U.S. at 246-51, 56 S. Ct. at 447-51).

Then, in Minneapolis Star, a special use tax was imposed on the cost of paper and ink consumed in the production of publications, but which 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 Plaintiff was responsible for roughly two-thirds of the total burden. Leathers, 499 U.S. at 445, 111 S. Ct. at 1443. The Court found no evidence of impermissible legislative motive in the case apart from the structure of the tax itself, yet invalidated the same. Id.

The same problems are found in the LET. It discriminates on the basis of the size of the facility by excluding facilities with a maximum occupancy of less than 200 persons, as well as entertainment provided at certain "licensed gaming establishment[s]." NRS 368A.200(5)(d) and (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. NRS 368A.200(1). Moreover, as explained in subsection 3 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"(*i.e.* nascar and baseball) and other preferred forms of live entertainment were then exempted from taxation.

### 1. 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 to lower their tax liability simply by reducing admission charges and raising the prices for food, drink, and merchandise. The functional result is that the Adult LET tax rate is effectively ***more than twice*** that of the Casino LET.

Thus, the structure of the LET, like the tax, Minneapolis Star, is sufficient to render the tax subject to strict scrutiny and void. For the LET to be held unconstitutional, it is not necessary for the Court to be convinced that the tax targets gentlemen's clubs or their expression. The relevant question is whether the tax may present a potential for abuse. 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 smaller enterprises."

Leathers, 449 U.S. at 446, 111 S. Ct. at 1443 (*citing* Minneapolis Star, 460 U.S. at 592, 103 S. Ct. at 1375) (emphasis added).

Moreover, the LET cannot be confused with the type of generally applicable tax ultimately upheld in Leathers (*see* 499 U.S. at 447, 111 S. Ct. at 1444 for a full list of services – far beyond First Amendment matters – subject to that tax). The LET is not such a generally applicable tax, but is, rather, only triggered by *the engagement of First Amendment activity* (and then further discriminates among expression based on the size of the taxpayer, the activity of the taxpayer.

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. Id. at 1116. Relying heavily on Arkansas Writers' Project and Leathers to conclude that the statute was an impermissible content-based tax, Id. at 1120-23, the court reasoned, in noting that even nude dancing constituted protected expression under the First Amendment, that:

> 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.

* * *

> 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, 112 S. Ct. at 508; Arkansas Writers' Project, 481 U.S. at 230, 107 S. Ct. at 1728. . . . 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.

Id. at 1120-21 (parallel citations omitted).

The reasoning in U.S. Satellite Broadcasting applies here. 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 solely 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 at 1120. The LET is no different. It applies only to First Amendment activity, and then only according to its size or the content of its speech. And, here, ironically, admissions to view boxing is ***exempted*** from the LET. NRS 368A.200(5)(c). This is obviously a content-based tax, which fails strict scrutiny.

**2. The Numerous Exemptions Demonstrate That The LET is Narrowly-Directed And Discriminates Based On Content.**

The definition of "live entertainment" itself contains, at NRS 368A.090(b), numerous ***exceptions***, which ***exclude*** from taxation the following activities:

> (1) "***Instrumental or vocal music*** . . . in a restaurant, lounge or similar area ***if such music does not routinely rise to the volume***

***that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen"***;

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

(3) Performances occurring in 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";

* * *

(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."

NRS 368A.090(b) (emphasis added).

Then, the ***exemptions*** to the tax contained in NRS 368A.200(5), include, among other things:

(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, 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.

* * *

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

* * *

(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.

* * *

(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.

Because whether a taxpayer is subject to these exceptions/exemptions is dependent upon the ***content*** of the live entertainment at issue (*e.g.*, boxing, baseball, NASCAR, food product demonstrations, and live entertainment which serves as "ambiance"), it is clear that the LET is a content-based tax. More specifically, these exceptions/exemptions have been gerrymandered in such a fashion to basically ensure that most of the 10% LET is paid by gentlemen's clubs.

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, 107 S. Ct. at 1728 (internal quotations and citations omitted, emphasis in original and added).

The Supreme Court has further observed 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 viewpoint 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, 114 S. Ct. 2039, 2044 (1994). There, the Court declared unconstitutional an ordinance banning outdoor signs (as content-based) because the law included a variety of exceptions of signs

that were nevertheless permitted.[10] That is exactly the situation 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 taxation). The LET is subject to strict scrutiny, and it is invalid.

### 3. The Legislative History Demonstrates the Impermissible Targeting and Content-Based Nature of the LET.

Plaintiffs propounded interrogatories upon the Department of Taxation directed at discovering the purposes and governmental interests to be served by the LET and, specifically, by the numerous exceptions and later changes. 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). App.Apx., Vol. 1, p. 213 (Nevada Department of Taxation's Responses to Plaintiffs First Set of Interrogatories to

[10] *See also* Lukumi, 508 U.S. at 535-40, 113 S. Ct. at 2228-30 (exemptions to 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 the "pattern of exemptions parallels the pattern of narrow prohibitions. ***Each contributes to the gerrymander***"); and U.S. v. Eichman, 496 U.S. 310, 317-19, 110 S. Ct. 2404, 2409-10 (1990) (facially neutral Flag Protection Act was content-based and therefore unconstitutional because although it prohibited burning of the flag, it exempted such burning for 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).

Defendants, Interrogatories 8, 9, 10, 11, 16, 17, 18, 21, and 22). 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.

In the "MINUTES OF THE MEETING OF THE ASSEMBLY COMMITTEE ON COMMERCE AND LABOR" recorded during the 73rd Congressional Session on May 16, 2005 (App.Apx., Vol. 8, p. 1661-1662),[11] legislators 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.

[11] Plaintiffs acknowledge that much of the legislative history referenced herein concerns how the 2003 legislation should be modified, rather than discussing the original enactment of the LET in 2003. First, the Plaintiffs challenged the 2005 version of the LET in the action below. 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***. Third, this is, the legislative history to which the Defendants referred the Plaintiffs when answering the governmental interest interrogatories.

> 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?

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***. The next one is race tracks at $1.5 million[12], but ***everything else pales***

[12] 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.

> ***in comparison to how much they're bringing in now, and I would hate to give them back their $6 million***.

Id. (emphasis added).

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 (NRS 368A.200(5)(d),(e)), even though adult entertainment was already paying four-times more in taxes that the next highest contributor – the racetrack. But racetrack revenues were then eliminated via the NASCAR

exception and the exception for "[l]ive entertainment that is provided to the public in the outdoor area. . . ." NRS 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 forgot to exempt "pale in comparison" to the amounts paid by adult entertainment establishments***. App.Apx., Vol. 8, p. 1662 (ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA 73d Sess., p. 19 (May 16, 2005),) (emphasis added).

Other documents disclosed in discovery from the period leading up to the 2005 changes likewise demonstrate that when amendments to the LET were proposed, the chief concern was how they would affect revenues from gentlemen's clubs. *See, e.g.*, App.Apx., Vol. 8, p. 1677 (Untitled Revenue Analysis 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); and App.Apx., Vol. 8, p. 1678 (Memorandum of November 4, 2004 to Chuck Chinnock, Executive Director of the Department, specifically identifying those gentlemen's clubs statewide that have seating capacities of less than 300). *See also* App.Apx., Vol. 8, p. 1679, where Dino Dicianno, then-Executive Director of the Department, in an April 24, 2005 email, 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 tend to 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.[13] (Emphasis added).

The documents preceding the 2003 tax are no different. In a November 18, 2003 email from Barbara Smith Campbell to Bill Bible (App.Apx., Vol. 8, p. 1680), 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***. (Emphasis added).

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

[13] This document was submitted as Exhibit E to the Assembly Committee/Ways & Means, on May 26, 2005.

**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.

App.Apx., Vol. 8, p. 1686 (SENATE COMMITTEE ON TAXATION, April 12, 2005, p. 24) (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 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.

App.Apx., Vol. 8, pp. 1696, 1698-1699, SENATE COMMITTEE ON TAXATION, June 5, 2005, pp. 4, 6-7 (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

tax. Consequently, this narrowly targeted ***and*** content-based tax cannot pass constitutional muster.

## VII. THE DISTRICT COURT SHOULD HAVE ENJOINED CHAPTER 368A.

"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)). Plaintiffs satisfied each of these elements.

Plaintiffs have demonstrated success on the merits for the reasons set forth above. In addition, the balance of equities clearly favored the Plaintiffs. The potential harm to Plaintiffs is the deprivation of their constitutional rights. More importantly, at issue here is not the infringement of just any right, but the fundamental liberties of freedom of speech and expression which, are the protections upon which all other constitutional rights depend. Palko v. Connecticut, 302 U.S. 319, 326-27, 58 S. Ct. 149, 152 (1937), *overruled on other grounds by* Benton v Maryland, 395 U.S. 784, 89 S. Ct. 2056 (1969). 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." Sammartano v First Judicial Dist., 303 F.3d 959, 974 (9th Cir. 2002), *citing* 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, 99 S. Ct. 2898, 2907 (1979); and Planned Parenthood Ass'n. v. City of Cincinnati, 822 F.2d 1390, 1400 (6th Cir. 1987)). Nevada has no countervailing interest of enforcing an unconstitutional law.

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

First, the government simply cannot condition the ability to engage in First Amendment expression upon the payment of a fee. If the Plaintiffs are unable to pay the tax imposed by Chapter 368A, they cannot then engage in the First Amendment. "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, 96 S. Ct. 2673, 2690 (1976) (plurality)).

Second, there is the suppression of the profits of the Plaintiffs. 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. Moreover, if the tax is just paid out of the general operating budgets of the Plaintiffs' establishments, that money could otherwise be used to purchase, among other things, additional advertising, 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.

On the other hand, even 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 then lead to additional costs to view such entertainment, which, from basic economic theory, will reduce the customer base (the customers themselves being imbued by First Amendment rights in order to be able to *view* such entertainment).

In light of another aspect of the District Court's ruling (dismissing out Plaintiffs' 42 U.S.C. § 1983 damage claims; *see* Order of 11/1/2011 App.Apx., Vol. 9, p. 1827), the Plaintiffs face the prospect of being unable to recover *any* of the consequent damages that they have sustained by paying the tax. Irreparable harm occurs, of course, 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*** obtain a damage award for any injuries sustained to their businesses.

Third, 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 Commission on July 9, 2007, the Department, through counsel, invoked the provisions of NAC 368A.170 to preclude the Plaintiffs' refund requests. App.Apx., Vol. 8, p. 1704 (Transcript, p. 30: 8-14).

NAC 368A.170 (Addendum C) concerns the "over-collection" of taxes, which is defined as "any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of NRS 368A.200." NAC 368A.170(1). The regulation states that any over-collection "must, if possible, be refunded by the taxpayer to the patron from whom it was collected." NAC 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." NAC 368A.170(3)(a) (emphasis added).

The regulations further dictate that if the taxpayer cannot "refund an over-collection," it must "***pay the over-collection to the department [of Taxation]***." NAC 368A.170(4) (emphasis and clarification added). Consequently, according to the regulation, ***if the State illegally collects a tax, the taxpayer is required upon the determination of such illegality to nevertheless pay the illegally collected tax over to the State.***

The initial Commission hearing was the first occasion that any of the Defendants raised the applicability of NAC 368A.170.[14] When the hearing continued on August 6, 2007, counsel for the taxpayers addressed NAC 368A.170 and stated that taxpayers did not maintain personal information for each customer who paid an admission charge, or for food, drink or merchandise, and that to require the same was absurd. App.Apx., Vol. 8, p. 1709 (Transcript of 8/16/2007 p. 10:14-21).

In addition to those arguments, the K-Kel Plaintiffs introduced affidavits from four of the Plaintiffs which established that they did not collect such information, and stated, through counsel, 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

[14] 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 Commission where, as stated above, the Department then took the position that the tax was not on the Plaintiffs, but rather on their customers. Plaintiffs then moved the Ninth Circuit to supplement the record to reflect this development, which was denied. *See* Addendum D. *See* also (App.Apx., Vol. 5, pp. 995-997 Defendants' "Answering Brief") before the Ninth Circuit, where they contended that so long as Plaintiffs have not passed the tax along to their customers -- which Plaintiffs verified they had not; *see* discussion, *infra* -- Plaintiffs would be entitled to a full refund of the LET tax paid) (pp. 14-15, 20); and App.Apx., Vol. 5, p. 945 (Order of the Ninth Circuit). Appellants request that the Court take judicial notice of the Ninth Circuit's decision to deny the request to supplement the record. *See* Occhiuto v. Occiuto, 97, Nev. 143, 145, 625 P.2d 568, 569 (Nev. 1981).

get back." App.Apx., Vol. 8, pp. 1709 (Transcript, page 10:22-11:1); and 1724 (Affidavits).

Irrespective of these arguments of the K-Kel Plaintiffs, defense counsel David Pope replied:

> 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.

App.Apx., Vol. 8, p. 1708 (Transcript of 8/16/2007 p. 9:5-13) (emphasis added).

Counsel for the Defendants expressed this same position before the District Court below. During a hearing on December 9, 2010, three of the attorneys for the Defendants articulated three different positions regarding the applicability of NAC 368A.170 to Plaintiffs' ability to even recover a refund.

First, Vivienne Rakowsky explained her interpretation:

> 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.

App.Apx., Vol. 8, p. 1737 (Transcript of 12/9/2010, p. 34) (clarification added).

Next, David Pope 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.

App.Apx., Vol. 8, p. 1738-1739 (Transcript, pp. 35-36) (emphasis added).

Then, Blake Doerr gave the District Court *his* interpretation:

> 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 - -

App.Apx., Vol. 8, p. 1741 (Transcript, 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. 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***.

App.Apx., Vol. 8, p. 1745 (Transcript, p. 42) (emphasis added).

Later, in support of their motion to compel discovery, the Defendants argued: "Pursuant to NAC 368A.170 it is necessary to determine whether the club owner or the patron paid the tax" (App.Apx. Vol. 7, p. 1329) and "[t]he Department must also determine whether the club collected the LET tax from its

customers or whether the club paid the LET tax without collecting from its customers" (id. at 1332) (*citing* NAC 368A.170).

While the Plaintiffs disagree with this position of the Defendants, (an issue not resolved by the District Court) Plaintiffs certainly are in fear of having an inadequate remedy at law.

Fourth, the regulation relied upon by the Defendants, itself, demonstrates irreparable injury. Under their interpretation of that 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 and engage in protected expression *anonymously*,[15] 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

[15] *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).

circumstances, the disclosure requirements of NAC 368A.170, justifying injunctive relief.

## VIII. THE "ANTI-INJUNCTION" PROVISION OF CHAPTER 368A IS UNCONSTITUTUIONAL.

Chapter 368A contains an anti-injunction section (NRS 368A.280(1)), which facially precludes any court from providing injunctive relief. However, this provision violates the separation of powers provision of the Nevada Constitution, and is therefore unenforceable.

The Supreme Court of Ohio faced a similar situation in City of Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006), where a statute "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, and recognized the authority to grant injunctive relief as a power that "resides exclusively in the judicial branch." Id. at 1148. In doing so, the Ohio Supreme Court relied upon the following statement of the Kentucky Supreme Court:

> 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).

The same constraints apply here under the separation of powers mandated by Article 3, § 1, of the Constitution of the State of 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. *See* Nev. Const., Article 6, § 6 (". . .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 in clear violation of the separation of powers set forth in Article 3, § 1, of the State Constitution, which provides for the allocation of powers among the three departments of government, and which explicitly states that ". . . 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. In Penrose v. Whitacre, 62 Nev. 239, 147 P.2d 887 (1944) ("Penrose II"), this Court stated that an injunction to prevent the collection of taxes would lie where, among other things, "enforcement of the tax would lead to a multiplicity of suits, or ***produce irreparable injury***. . . ." 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 (1942) ("Penrose I").

Here, Plaintiffs met 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 as explained above, and the District Court erred not to have granted an injunction.

## IX. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' "AS APPLIED" CONSTITUTIONAL CHALLENGE TO CHAPTER 368A.

Prior to granting summary judgement on Plaintiffs' facial challenge, the District Court dismissed Plaintiffs' "as applied" constitutional challenge (Order of App.Apx., Vol. 9, p. 1835), apparently believing that the action for refund (Case 2) would serve as the "as applied" aspect of Plaintiffs' claims. This was error.

First, constitutional issues, particularly those involving First Amendment protections, should be adjudicated by the courts, and not by administrative agencies. In Malecon Tobacco, LLC v. Department of Taxation, 118 Nev. 837, 840-841, 59 P.3d 474, 476 (2002), this Court noted that the "United States Supreme Court has recognized that under federal administrative procedures, the 'adjudication of the constitutionality of congressional enactments has generally been thought to be beyond the jurisdiction of administrative agencies.'" (*Citing* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215, 114 S. Ct. 771, 780. (1994) (other citations omitted)). Indeed, the Supreme Court has observed that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures, and therefore, access to the courts is essential to the decision of such questions." Califano v Sanders, 430 U.S. 99, 109, 97 S. Ct. 980, 986 (1977).

Second, the Supreme Court has observed that a person suffering a deprivation of their federal constitutional rights should not have to exhaust state administrative remedies as a condition to bringing suit to protect those liberties. The Court has "on numerous occasions ***rejected*** the argument that a § 1983 should be dismissed where the plaintiff has not exhausted state administrative remedies." Patsy v. Bd. Of Regents of State of Florida, 457 U.S. 496, 500, 102 S. Ct. 2557, 2559 (1979); Gibson v. Berryhill, 411 U.S. 564, 574, 93 S. Ct. 1689, 1695 (1973). Plaintiffs brought the action below, in part, pursuant to the Federal Civil Rights Statute found at 42 U.S.C. § 1983. App.Apx., Vol. 1, pp. 2-3, 14 (Complaint at ¶¶ 3, 65, 66).

Third, this Court has determined that because of the importance of constitutional rights, a taxpayer may in fact bypass administrative remedies and seek judicial redress ***directly in the state courts if the challenge related to the constitutionality of the taxing law.*** In Nevada Dep't of Taxation v. Scotsman Mfg. Co., Inc. 109 Nev. 252, 849 P.2d 317 (Nev. 1993), the Court stated that the "exhaustion doctrine will not deprive the court of jurisdiction 'where issues relate solely to the interpretation or constitutionality of a statute." Id. at 255, 849 P.2d at 319 *citing* State of Nevada v. Glusman, 98 Nev. 412, 419, 651 P.2d 639, 644 (Nev. 1992).

Fourth, where administrative redress would be futile, exhaustion is not a prerequisite to filing for legal redress. *See* Scotsman, 109 Nev. at 255 849 P.2d at 319. This exception applies here as well (and is particularly applicable to the Deja Vu Plaintiffs since all others have now undergone full administrative review).

## CONCLUSION

For the reasons as set forth above, Plaintiffs/Appellants respectfully request that this Honorable Court reverse the decision of the District Court below, declare Chapter 368A to be unconstitutional, enjoin its enforcement, and order a return by the State of all of the taxes paid by the Plaintiffs/Appellants to date; or in the alternative remand this matter with instructions for the District Court to: 1) permit the Plaintiffs to conclude their requested discovery; 2) consider the context, legislative history and practical effect of the LET before ruling on its facial validity; 3) permit the Plaintiffs to litigate their "as applied" challenge; and 4) ignore NRS 398A.280(1) in considering the relief available to the Plaintiffs.

Dated this 4th day of December, 2012

By: */s/ Bradley J. Shafer*

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Appellants' Opening Brief** was filed with the Clerk of the Court for the Supreme Court for the State of Nevada on December 4, 2012. 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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I hereby certify that on December 4, 2012 a copy of the foregoing **Appellants' Opening Brief** was mailed to the following with postage fully prepaid thereon:

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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 21(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 13,921 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 4th day of December, 2012 By: */s/ William H. Brown*

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**ADDENDUM A**

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

## 368A.010. Definitions

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.115, inclusive, have the meanings ascribed to them in those sections.

## 368A.020. "Admission charge" defined

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

## 368A.030. "Board" defined

"Board" means the State Gaming Control Board.

## 368A.040. "Business" defined

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

## 368A.050. "Business entity" defined

1. "Business entity" includes:

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

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

2. The term does not include a governmental entity.

### 368A.053. “Casual assemblage” defined

“Casual assemblage” includes, without limitation:

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

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

### 368A.055. “Commission” defined

“Commission” means the Nevada Gaming Commission.

### 368A.060. “Facility” defined

1. “Facility” means:

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

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

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

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

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

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

area or those premises; or

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

### 368A.070. "Game" defined

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

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

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

### 368A.090. "Live entertainment" defined

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

2. The term:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(I) Does not constitute a performance;

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

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

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

### 368A.097. "Shopping mall" defined

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

### 368A.100. "Slot machine" defined

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

### 368A.110. "Taxpayer" defined

"Taxpayer" means:

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

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

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

### ➡368A.115. “Trade show” defined

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

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

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

**Administration**

### ➡368A.130. Repealed

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

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

2. The Department shall:

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

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

3. For the purposes of:

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

(b) Subsection 2, the provisions of chapter 360 of NRS relating to the payment, collection, administration and enforcement of taxes, including, without limitation, any provisions relating to the imposition of penalties and

interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

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

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

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

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

1. If:

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

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

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

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

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

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

(b) Preserve those records for:

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

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

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

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

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

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

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

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

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

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

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

documents, plus any other actual expenses incurred by the employee while the employee is absent from his or her regular place of employment to examine those documents.

### ➡368A.180. Confidentiality of records and files of Board and Department

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

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

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

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

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

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

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

## Imposition and Collection

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

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

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

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

2. Amounts paid for:

(a) Admission charges collected and retained by a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or by a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS, are not taxable pursuant to this section.

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

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

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

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

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

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

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

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live

entertainment is provided has a maximum occupancy of less than 200 persons.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**➡368A.210. Repealed**

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

1. Except as otherwise provided in this section:

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

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

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

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

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

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

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

Upon written application made before the date on which payment must be made, the Board or the Department may, for good cause, extend by 30 days the time within which a taxpayer is required to pay the tax imposed by this chapter. If the tax is paid during the period of extension, no penalty or late charge may be imposed for failure to pay at the time required, but the taxpayer shall pay interest at the rate of 0.75 percent per month from the date on which the amount would have been due without the extension until the date of payment, unless otherwise provided in NRS 360.232 or 360.320.

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

1. If a taxpayer:

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

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

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

2. If the Internal Revenue Service disallows a deduction described in paragraph (b) of subsection 1 and the taxpayer claimed a credit on a return for a previous reporting period pursuant to subsection 1, the taxpayer

shall include the amount of that credit in the amount of taxes reported pursuant to this chapter in the first return filed with the Board or the Department after the deduction is disallowed.

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

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

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

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

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

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

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

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

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

**Overpayments and Refunds**

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

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

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

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

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

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

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

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

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

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

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

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

### ➡368A.270. Interest on overpayments; disallowance of interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) The Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring

an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

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

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

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

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

In any judgment, interest must be allowed at the rate of 3 percent per annum upon the amount found to have been illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment, or to a date preceding the date of the refund warrant by not more than 30 days. The date must be determined by the Board or the Department.

### 368A.320. Standing to recover

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

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

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

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

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

### 368A.340. Cancellation of illegal determination

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

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

**Miscellaneous Provisions**

### 368A.350. Prohibited acts; penalty

1. A person shall not:

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

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

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

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

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

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

### 368A.370. Remedies of State are cumulative

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

END OF DOCUMENT

**ADDENDUM B**

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.



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(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



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"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



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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.



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[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.



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(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



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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



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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



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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,



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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



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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.



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**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.



**ADDENDUM B**

**ADDENDUM C**

Westlaw.



NAC 368A.010

Nev. Admin. Code ch. 368A, s. 010

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION**

Current through November 2007, Supplement 2007-3

NAC 368A.010 Definitions. (NRS 360.090, 368A.140)

As used in NAC 368A.010 to 368A.170, inclusive, unless the context otherwise requires, the words and terms defined in NAC 368A.030 to 368A.090, inclusive, have the meanings ascribed to them in those sections.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003; A by R196-05, 2-23- 2006)

NAC 368A.010, NV ADC 368A.010

NV ADC 368A.010
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.030

Nev. Admin. Code ch. 368A, s. 030

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION**

Current through November 2007, Supplement 2007-3

NAC 368A.030 "Commission" defined. (NRS 360.090, 368A.140)

"Commission" means the Nevada Tax Commission.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.030, NV ADC 368A.030

NV ADC 368A.030
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.040

Nev. Admin. Code ch. 368A, s. 040

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION**

Current through November 2007, Supplement 2007-3

NAC 368A.040 "Department" defined. (NRS 360.090, 368A.140)

"Department" means the Department of Taxation.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.040, NV ADC 368A.040

NV ADC 368A.040
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.060

Nev. Admin. Code ch. 368A, s. 060

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION**

Current through November 2007, Supplement 2007-3

NAC 368A.060 "Live entertainment status" defined. (NRS 360.090, 368A.140)

"Live entertainment status" means that condition which renders the admission to a facility or the selling of food, refreshments or merchandise subject to the tax imposed by chapter 368A of NRS.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.060, NV ADC 368A.060

NV ADC 368A.060
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.070

Nev. Admin. Code ch. 368A, s. 070

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION**

Current through November 2007, Supplement 2007-3

NAC 368A.070 "Nonprofit organization" defined. (NRS 360.090, 368A.140)

"Nonprofit organization" means any organization described in paragraph (a) of subsection 2 of NRS 368A.200 or paragraph (b) of subsection 5 of that section.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003; A by R196-05, 2-23- 2006)

NAC 368A.070, NV ADC 368A.070

NV ADC 368A.070
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.080

Nev. Admin. Code ch. 368A, s. 080

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION**

Current through November 2007, Supplement 2007-3

NAC 368A.080 "Patron" defined. (NRS 360.090, 368A.140)

"Patron" means a person who gains access to a facility where live entertainment is provided and who neither solicits nor receives, from any source, any payment, reimbursement, remuneration or other form of consideration for providing live entertainment at the facility.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.080, NV ADC 368A.080

NV ADC 368A.080
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.090

Nev. Admin. Code ch. 368A, s. 090

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION**

Current through November 2007, Supplement 2007-3

NAC 368A.090 "Taxpayer" defined. (NRS 360.090, 368A.140)

"Taxpayer" means any person described in NRS 368A.110.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.090, NV ADC 368A.090

NV ADC 368A.090
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.100

Nev. Admin. Code ch. 368A, s. 100

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
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Current through November 2007, Supplement 2007-3

NAC 368A.100 Interpretation of certain statutory terms. (NRS 360.090, 368A.140)

For the purposes of chapter 368A of NRS, the Commission will interpret the term:

1. "Boxing contest or exhibition" to have the meaning ascribed in NRS 467.0107 to the term "unarmed combat."

2. "Facility" to encompass any area or premises where 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.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003; A by R196-05, 2-23- 2006)

NAC 368A.100, NV ADC 368A.100

NV ADC 368A.100
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.110

Nev. Admin. Code ch. 368A, s. 110

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION**

Current through November 2007, Supplement 2007-3

NAC 368A.110 Taxpayers: General requirements. (NRS 360.090, 368A.140)

1. If a taxpayer intends to provide live entertainment at a facility that is not a licensed gaming establishment, the taxpayer shall register with the Department to collect the tax. The taxpayer shall thereafter collect and remit the tax to the Department in accordance with the provisions of this chapter and chapter 368A of NRS.

2. If a taxpayer intends to provide live entertainment at a facility that is a licensed gaming establishment, the taxpayer shall act in accordance with such regulations as may be prescribed by the Nevada Gaming Commission.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003; A by R196-05, 2-23- 2006)

NAC 368A.110, NV ADC 368A.110

NV ADC 368A.110
END OF DOCUMENT



**ADDENDUM C**

Westlaw.

NV ADC 368A.120 Page 1

NAC 368A.120

Nev. Admin. Code ch. 368A, s. 120

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
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Current through November 2007, Supplement 2007-3

NAC 368A.120 Applicability of tax: Live entertainment status; sale of food, refreshments or merchandise. (NRS 360.090, 368A.140)

1. Live entertainment status commences when any patron is required to pay an admission charge before he is allowed to enter a facility, regardless of when the live entertainment actually commences.

2. Live entertainment status ceases at the later of:

(a) The conclusion of the live entertainment; or

(b) The time when a facility for which an admission charge was required is completely vacated by admitted patrons or is opened to the general public free of any admission charge.

3. The tax applies to the sale of food, refreshments or merchandise at a facility with a seating capacity of less than 7,500, even if patrons are unable to see, hear or enjoy live entertainment from the location within the facility where the food, refreshments or merchandise is sold.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.120, NV ADC 368A.120

NV ADC 368A.120
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.130

Nev. Admin. Code ch. 368A, s. 130

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION**

Current through November 2007, Supplement 2007-3

NAC 368A.130 Determination of tax rate when maximum occupancy has not been designated. (NRS 360.090, 368A.140)

For the purposes of paragraph (c) of subsection 7 of NRS 368A.200, if there is no governmental permit designating the maximum occupancy of a facility where live entertainment is provided, the Department shall compute the tax rate on the presumption that the actual seating capacity of the facility is at least 200 persons and less than 7,500 persons. To rebut this presumption, the taxpayer must establish, to the reasonable satisfaction of the Department, that the actual seating capacity of the facility is less than 200 persons or at least 7,500 persons. In determining whether the taxpayer has successfully rebutted the presumption, the Department shall consider all evidence provided by the taxpayer, including, without limitation, evidence of actual attendance, the number of tickets sold or offered for sale, the square footage of the facility, the physical needs or requirements of the patrons in relation to the nature of the live entertainment provided and any other evidence tending to establish the actual seating capacity of the facility.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003; A by R196-05, 2-23- 2006)

NAC 368A.130, NV ADC 368A.130

NV ADC 368A.130
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.140

Nev. Admin. Code ch. 368A, s. 140

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
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Current through November 2007, Supplement 2007-3

NAC 368A.140 Computation of tax; inclusion of tax in sales price of food, refreshments or merchandise. (NRS 360.090, 368A.140)

1. Pursuant to the provisions of subsection 4 of NRS 368A.200, the Department shall apply the tax rate to the total admission charge less the sum of any tax imposed by the United States upon or with respect to an admission charge to live entertainment, whether imposed upon the taxpayer or the patron.

2. The Department shall apply the tax rate to the gross receipts from the sale of food, refreshments or merchandise at a facility where live entertainment is provided. As used in this section, "gross receipts" has the meaning ascribed to it in NRS 372.025, except that "gross receipts" will not be construed to include the amount of any tax imposed by this State or a political subdivision upon or with respect to retail sales of tangible personal property.

3. If applicable, a taxpayer may include the excise tax in the sales price of food, refreshments or merchandise sold at a facility where live entertainment is provided, but if he does so, he shall notify the patrons of the facility by posting a sign which is visible to all purchasers of food, refreshments or merchandise which states that the excise tax is included in the sales price. In the absence of such a notification, the total amount charged to the patron shall be deemed to be the price of the item.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.140, NV ADC 368A.140

NV ADC 368A.140
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.150

Nev. Admin. Code ch. 368A, s. 150

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION**

Current through November 2007, Supplement 2007-3

NAC 368A.150 Scope of exemption for nonprofit organizations; assessment and computation of tax by Department. (NRS 360.090, 368A.140)

1. For the purposes of paragraph (b) of subsection 5 of NRS 368A.200, live entertainment is provided by or entirely for the benefit of a nonprofit organization if the proceeds of the admission charges to the facility where the live entertainment is provided become the property of the nonprofit organization. The proceeds of the admission charges do not become the property of a person other than a nonprofit organization as long as the person retains not more of the proceeds than is necessary to cover the direct, supportable costs of hosting, promoting or sponsoring the event at which the live entertainment is provided.

2. Subject to the provisions of subsection 1, a nonprofit organization providing live entertainment, or a person providing live entertainment entirely for the benefit of a nonprofit organization, incurs no liability for the excise tax on entertainment if the nonprofit organization or person contracts for goods or services with a person other than a nonprofit organization, even if the proceeds from the sale of food, refreshments or merchandise do not become the property of the nonprofit organization.

3. If live entertainment is provided by or entirely for the benefit of a nonprofit organization, there will be no tax on amounts paid for food, refreshments or merchandise sold within the facility where the live entertainment is provided, even if the proceeds from the sale of food, refreshments or merchandise do not become the property of the nonprofit organization.

4. Unless live entertainment is provided by or entirely for the benefit of a nonprofit organization, and except as otherwise provided in this chapter or chapter 368A of NRS, the Department shall assess and compute the excise tax in accordance with NAC 368A.140.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.150, NV ADC 368A.150

NV ADC 368A.150
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.160

Nev. Admin. Code ch. 368A, s. 160

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION**

Current through November 2007, Supplement 2007-3

NAC 368A.160 Documentation required for exemption of nonprofit organization. (NRS 360.090, 368A.140)

Any person who claims to be a nonprofit organization exempt from the provisions of NRS 368A.200, or any person who claims to provide live entertainment entirely for the benefit of such a nonprofit organization, shall, upon the request of the Department, provide to the Department such records as the Department deems necessary to demonstrate that the person who claims to be a nonprofit organization or the organization for whose benefit the person provided live entertainment:

1. Meets the criteria to qualify as a religious organization pursuant to 26 U.S.C. § 501(c) and any federal regulations relating thereto;

2. Has qualified as a tax-exempt organization pursuant to 26 U.S.C. § 501(c); or

3. Is organized or existing under the provisions of chapter 82 of NRS.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003; A by R196-05, 2-23- 2006)

NAC 368A.160, NV ADC 368A.160

NV ADC 368A.160
END OF DOCUMENT



**ADDENDUM C**

Westlaw.

NV ADC 368A.170 Page 1

NAC 368A.170

Nev. Admin. Code ch. 368A, s. 170

**NEVADA ADMINISTRATIVE CODE**
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**ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION**

Current through November 2007, Supplement 2007-3

NAC 368A.170 Over-collection of tax: Duties of taxpayer and Department. (NRS 360.090, 368A.140)

1. As used in this section, "over-collection" means any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of NRS 368A.200, or any amount in excess of the amount of the applicable tax as computed in accordance with subsections 1 to 4, inclusive, of NRS 368A.200.

2. Any over-collection must, if possible, be refunded by the taxpayer to the patron from whom it was collected.

3. A taxpayer shall:

(a) Use all practical methods to determine any amount to be refunded pursuant to subsection 2 and the name and address of the person to whom the refund is to be made.

(b) Within 60 days after reporting to the Department that a refund must be made, make an accounting to the Department of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.

4. If a taxpayer is unable for any reason to refund an over-collection, the taxpayer shall pay the over-collection to the Department.

5. If an audit of a taxpayer reveals the existence of an over-collection, the Department shall:

(a) Credit the over-collection toward any deficiency that results from the audit, if the taxpayer furnishes the Department with satisfactory evidence that the taxpayer has refunded the over-collection as required by subsection 2.

(b) Within 60 days after receiving notice from the Department that a refund must be made, seek an accounting of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)



**ADDENDUM C**

NAC 368A.170

Nev. Admin. Code ch. 368A, s. 170

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

NV ADC 368A.170
END OF DOCUMENT

Westlaw.



NAC 368A.300

Nev. Admin. Code ch. 368A, s. 300

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.300 Definitions. (NRS 368A.140)

As used in NAC 368A.300 to 368A.540, inclusive, unless the context otherwise requires, the words and terms defined in NAC 368A.310 to 368A.390, inclusive, have the meanings ascribed to them in those sections.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.300, NV ADC 368A.300

NV ADC 368A.300
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.310

Nev. Admin. Code ch. 368A, s. 310

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.310 "Board" defined. (NRS 368A.140)

"Board" means the State Gaming Control Board.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.310, NV ADC 368A.310

NV ADC 368A.310
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.320

Nev. Admin. Code ch. 368A, s. 320

**NEVADA ADMINISTRATIVE CODE**
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**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.320 "Chairman" defined. (NRS 368A.140)

"Chairman" means the Chairman of the Board or a person designated by him.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.320, NV ADC 368A.320

NV ADC 368A.320
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.330

Nev. Admin. Code ch. 368A, s. 330

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.330 "Live entertainment status" defined. (NRS 368A.140)

"Live entertainment status" means that condition which renders the selling of food, refreshments or merchandise subject to the tax imposed by chapter 368A of NRS.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.330, NV ADC 368A.330

NV ADC 368A.330
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.340

Nev. Admin. Code ch. 368A, s. 340

**NEVADA ADMINISTRATIVE CODE**
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Current through November 2007, Supplement 2007-3

NAC 368A.340 "Nonprofit organization" defined. (NRS 368A.140)

"Nonprofit organization" means any organization described in paragraph (b) of subsection 5 of NRS 368A.200.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.340, NV ADC 368A.340

NV ADC 368A.340
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.350

Nev. Admin. Code ch. 368A, s. 350

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.350 "Nonrestricted license" defined. (NRS 368A.140)

"Nonrestricted license" has the meaning ascribed to it in NRS 463.0177.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.350, NV ADC 368A.350

NV ADC 368A.350
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.360

Nev. Admin. Code ch. 368A, s. 360

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
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Current through November 2007, Supplement 2007-3

NAC 368A.360 "Package" defined. (NRS 368A.140)

"Package" means any aggregation of rights to rooms, food, refreshments, merchandise, entertainment, services or other items which is advertised to the public as a single unit and sold for a single price.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.360, NV ADC 368A.360

NV ADC 368A.360
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.370

Nev. Admin. Code ch. 368A, s. 370

**NEVADA ADMINISTRATIVE CODE**
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Current through November 2007, Supplement 2007-3

NAC 368A.370 "Patron" defined. (NRS 368A.140)

"Patron" means a person who gains access to a facility where live entertainment is provided and who neither solicits nor receives, from any source, any payment, reimbursement, remuneration or other form of consideration for providing live entertainment at the facility.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.370, NV ADC 368A.370

NV ADC 368A.370
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.380

Nev. Admin. Code ch. 368A, s. 380

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.380 "Restricted license" defined. (NRS 368A.140)

"Restricted license" has the meaning ascribed to it in NRS 463.0189.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.380, NV ADC 368A.380

NV ADC 368A.380
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.390

Nev. Admin. Code ch. 368A, s. 390

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Current through November 2007, Supplement 2007-3

NAC 368A.390 "Taxpayer" defined. (NRS 368A.140)

"Taxpayer" means any person described in subsection 1 of NRS 368A.110.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.390, NV ADC 368A.390

NV ADC 368A.390
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.400

Nev. Admin. Code ch. 368A, s. 400

**NEVADA ADMINISTRATIVE CODE**
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Current through November 2007, Supplement 2007-3

NAC 368A.400 Interpretation of certain statutory terms. (NRS 368A.140)

For the purposes of chapter 368A of NRS, the Board will interpret the term:

1. "Admission charge" to include, without limitation, an entertainment fee, a cover charge, a table reservation fee, or a required minimum purchase of food, refreshments or merchandise.

2. "Boxing contest or exhibition" to have the meaning ascribed in NRS 467.0107 to the term "unarmed combat."

3. "Casual assemblage" to include, without limitation:

(a) Participants in conventions, business meetings or tournaments governed by chapter 463 of NRS, 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.

4. "Facility" to encompass, 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.

5. "Live entertainment" in the same manner as that term is interpreted pursuant to subsection 5 of NAC 368A.100. For the purposes of that subsection, the Board will interpret the term "recorded music" to include, without limitation, music on a cassette tape, compact disc, phonograph album, or video tape or disc, or on live



**ADDENDUM C**

NAC 368A.400

Nev. Admin. Code ch. 368A, s. 400

television.

6. "Shopping mall" to include 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.

7. "Trade show" to mean 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.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.400, NV ADC 368A.400

NV ADC 368A.400
END OF DOCUMENT

Westlaw.

NV ADC 368A.410 Page 1

NAC 368A.410

Nev. Admin. Code ch. 368A, s. 410

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**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.410 Applicability of tax: Live entertainment status; dinner show. (NRS 368A.140)

1. Live entertainment status:

(a) Commences at the earlier of:

(1) The time when taxable live entertainment commences; or

(2) The time when any patron is required to pay an admission charge before the patron is allowed to enter a facility; and

(b) Ceases at the later of:

(1) The conclusion of the last performance of the taxable live entertainment; or

(2) The time when a facility for which an admission charge was required is completely vacated by admitted patrons or is opened to the general public free of any admission charge.

2. For the purposes of this section, there is no distinction between any period of dining and any period of entertainment at a restaurant of a licensed gaming establishment which is not open on a continual time schedule and where live entertainment is provided and advertised as a dinner show.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.410, NV ADC 368A.410

NV ADC 368A.410
END OF DOCUMENT



**ADDENDUM C**

Westlaw.

NV ADC 368A.420



NAC 368A.420

Nev. Admin. Code ch. 368A, s. 420

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.420 Applicability of tax: Particular circumstances. (NRS 368A.140)

1. Except as otherwise provided in NRS 368A.200, the tax imposed by that section:

(a) Applies to an admission charge for a patron regardless of whether the patron is present for any portion of the live entertainment.

(b) Applies to each sale of a ticket that affords a patron the right to be present for any taxable live entertainment, unless the taxpayer establishes that the patron has received a full refund of the amount paid for the ticket.

(c) Except as otherwise provided in paragraph (d), applies to the sale of food, refreshments and merchandise at a facility that operates under a continual time schedule with no admission charge, if the food, refreshments or merchandise are ordered while the facility is in live entertainment status.

(d) Applies to the sale of food, refreshments and merchandise at a facility which are ordered or purchased during an interval between performances of live entertainment at the facility, unless the taxpayer accounts separately for the volume of sales to persons who enter the facility during such an interval and leave the facility before the commencement of the next performance of live entertainment.

(e) Applies to the sale of food and refreshments at a facility which are ordered before the facility enters into live entertainment status if the sale is completed after the facility enters into live entertainment status, unless the taxpayer identifies through its recordkeeping system the amount paid for food and refreshments ordered before the facility enters into live entertainment status.

(f) Applies to the sale of food and refreshments at a location in close proximity to a facility if the primary purpose of the location is to provide food or refreshments to the patrons of that facility who view the live entertainment provided at that facility.

(g) Applies, if an admission charge:



**ADDENDUM C**

NAC 368A.420

Nev. Admin. Code ch. 368A, s. 420

(1) Is collected for access to a facility and payment of the admission charge entitles a patron to enter an area of the facility where live entertainment is provided, to the sale of food, refreshments and merchandise at any location within the facility to which the patron has access as a result of the payment of the admission charge, regardless of whether the patron can clearly hear or see the live entertainment from the location within the facility where the food, refreshments or merchandise is sold.

(2) Is not collected for access to a facility, to the sale of food, refreshments and merchandise at any location within the facility, unless the taxpayer identifies through its recordkeeping system the sales to patrons who are unable to see or hear the live entertainment from the location within the facility where the food, refreshments or merchandise is sold.

2. As used in this section, "facility" means a facility where live entertainment is provided which has a maximum seating capacity of less than 7,500.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.420, NV ADC 368A.420

NV ADC 368A.420
END OF DOCUMENT

Westlaw.



NAC 368A.430

Nev. Admin. Code ch. 368A, s. 430

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.430 Applicability of tax: When merchandise is deemed to be sold inside facility. (NRS 368A.140)

For the purposes of NRS 368A.200, merchandise shall be deemed to be sold inside a facility where live entertainment is provided if:

1. The purchase of a ticket or the payment of an admission fee, a cover charge, a minimum fee, or a similar charge or fee is required for a patron to gain access to the merchandise being sold; or

2. The merchandise is located in the area where the live entertainment is provided.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.430, NV ADC 368A.430

NV ADC 368A.430
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.440

Nev. Admin. Code ch. 368A, s. 440

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.440 Determination of tax rate when maximum occupancy has not been designated. (NRS 368A.140)

For the purposes of paragraph (c) of subsection 7 of NRS 368A.200, if there is no governmental permit designating the maximum occupancy of a facility where live entertainment is provided, the Board will compute the tax rate on the presumption that the actual seating capacity of the facility is at least 300 and less than 7,500. To rebut this presumption, the taxpayer must establish, to the reasonable satisfaction of the Board, that the actual seating capacity of the facility is less than 300 or 7,500 or more. In determining whether the taxpayer has successfully rebutted the presumption, the Board will consider all evidence provided by the taxpayer, including, without limitation, evidence of actual attendance, the number of tickets sold or offered for sale, the square footage of the facility, the physical needs or requirements of the patrons in relation to the nature of the live entertainment provided and any other evidence tending to establish the actual seating capacity of the facility.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.440, NV ADC 368A.440

NV ADC 368A.440
END OF DOCUMENT



**ADDENDUM C**

Westlaw.

NV ADC 368A.450 Page 1

NAC 368A.450

Nev. Admin. Code ch. 368A, s. 450

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.450 Computation of amount of tax due. (NRS 368A.140)

For purposes of computing the amount of the tax due pursuant to chapter 368A of NRS:

1. The tax rate must be applied to the total amounts paid for taxable admission charges and taxable sales of food, refreshments and merchandise, excluding the amount of any federal, state or local taxes included in those payments.

2. The tax must be paid on all taxable sales of food, refreshments and merchandise while a facility is in live entertainment status and on all taxable admission charges, regardless of whether the taxable amounts are paid in cash or through an extension of credit. Any required minimum purchases of food, refreshments or merchandise must be accounted for solely:

(a) As part of the total amount paid for taxable admission charges; or

(b) As part of the total amount paid for taxable sales of food, refreshments and merchandise.

3. The amount of any service charges imposed in connection with the use of credit cards or debit cards which is excluded from taxation pursuant to subsection 2 of NRS 368A.200, must be determined from the actual amount collected and retained by persons other than the taxpayer and not from an estimate of that amount.

4. If any taxable tickets for live entertainment are sold by a person who:

(a) Is not an affiliate of:

(1) The person licensed to conduct gaming at the facility where the live entertainment is provided; or

(2) The operator of the facility where the live entertainment is provided,

the tax must be paid on the portion of the proceeds of those sales which are remitted to the person licensed to conduct gaming at, or the operator of, the facility where the live entertainment is provided.



**ADDENDUM C**

NAC 368A.450

Nev. Admin. Code ch. 368A, s. 450

(b) Is an affiliate of:

(1) The person licensed to conduct gaming at the facility where the live entertainment is provided; or

(2) The operator of the facility where the live entertainment is provided,

the tax must be paid on all the proceeds of those sales.

5. Subject to the provisions of subsection 4 of NRS 368A.200, the tax on any taxable ticket for live entertainment or ticket redeemable for taxable food or refreshments sold as a component of a package must be computed in accordance with the following provisions:

(a) Except as otherwise provided in paragraphs (b) and (c):

(1) The average retail value of the ticket must be prorated against the average retail value of all the components of the package, and the tax must be paid on the sum obtained by multiplying the resulting prorated fraction by the actual price paid for the package.

(2) Any value advertised to the public as the retail value of a component of a package is rebuttably presumed to constitute the actual retail value of that component.

(3) If no average retail value can be established for a component of a package, the cost of the component to the taxpayer must be used to carry out subparagraph (1).

(b) The tax on any ticket redeemable for taxable food or refreshments with an average retail value of less than $5 must be computed on the full retail value of the ticket and not as a component of a package.

(c) This subsection does not prohibit a taxpayer from paying, at the option of the taxpayer, the tax on the full retail value of the taxable components of a package.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.450, NV ADC 368A.450

NV ADC 368A.450
END OF DOCUMENT

Westlaw



NAC 368A.460

Nev. Admin. Code ch. 368A, s. 460

**NEVADA ADMINISTRATIVE CODE**
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Current through November 2007, Supplement 2007-3

NAC 368A.460 Inclusion of tax in price of ticket: Form of required statement. (NRS 368A.140)

The statement required by subsection 4 of NRS 368A.200 must be substantially in one of the following forms:

1. Includes Entertainment Tax;

2. Inc. Ent. Tax;

3. Includes Live Ent. Tax; or

4. L.E.T. included.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.460, NV ADC 368A.460

NV ADC 368A.460
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.470

Nev. Admin. Code ch. 368A, s. 470

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
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Current through November 2007, Supplement 2007-3

NAC 368A.470 Scope of exemption for nonprofit organizations; assessment and computation of tax by Board. (NRS 368A.140)

1. For the purposes of paragraph (b) of subsection 5 of NRS 368A.200, live entertainment is provided by or entirely for the benefit of a nonprofit organization if the proceeds of the admission charges to the facility where the live entertainment is provided become the property of the nonprofit organization. The proceeds of the admission charges do not become the property of a person other than a nonprofit organization as long as the person retains not more of the proceeds than is necessary to cover the direct, supportable costs of hosting, promoting or sponsoring the event at which the live entertainment is provided.

2. Subject to the provisions of subsection 1, a nonprofit organization providing live entertainment, or a person providing live entertainment entirely for the benefit of a nonprofit organization, incurs no liability for the excise tax on live entertainment if the nonprofit organization or person contracts for goods or services with a person other than a nonprofit organization, even if the proceeds from the sale of food, refreshments or merchandise do not become the property of the nonprofit organization.

3. If live entertainment is provided by or entirely for the benefit of a nonprofit organization, there will be no tax on amounts paid for food, refreshments or merchandise sold within the facility where the live entertainment is provided, even if the proceeds from the sale of food, refreshments or merchandise do not become the property of the nonprofit organization.

4. Unless live entertainment is provided by or entirely for the benefit of a nonprofit organization, and except as otherwise provided in this chapter or chapter 368A of NRS, the Board will assess and compute the excise tax in accordance with NAC 368A.450.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.470, NV ADC 368A.470

NV ADC 368A.470
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.480

Nev. Admin. Code ch. 368A, s. 480

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**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.480 Documentation required for exemption of nonprofit organization. (NRS 368A.140)

Any person who claims to be a nonprofit organization exempt from the provisions of NRS 368A.200, or any person who claims to provide live entertainment entirely for the benefit of such a nonprofit organization, shall, upon the request of the Board:

1. If the person does not claim to be an exempt religious organization, provide to the Board documentation from the Internal Revenue Service deemed appropriate by the Board indicating that the person has qualified as a tax-exempt organization pursuant to 26 U.S.C. § 501(c); or

2. If the person claims to be an exempt religious organization, or claims to have provided live entertainment entirely for the benefit of an exempt religious organization, provide to the Board such records as the Board deems necessary to demonstrate that the person or the organization for whose benefit the person provided live entertainment meets the criteria to qualify as a religious organization pursuant to 26 U.S.C. § 501(c) and any federal regulations relating thereto.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.480, NV ADC 368A.480

NV ADC 368A.480
END OF DOCUMENT



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Westlaw.

NV ADC 368A.490 Page 1

NAC 368A.490

Nev. Admin. Code ch. 368A, s. 490

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.490 Responsibilities of persons licensed to conduct gaming: Payment of tax; records; reports. (NRS 368A.140, 368A.160)

1. If live entertainment that is taxable under chapter 368A of NRS is provided at a licensed gaming establishment, the person licensed to conduct gaming at that establishment is responsible for the payment of the tax, even if another person is affording that entertainment. In such a case, the person licensed to conduct gaming at that establishment is responsible for collecting the tax from the person affording that entertainment and for remitting the tax based upon the records of the person affording that entertainment.

2. If live entertainment that is taxable under chapter 368A of NRS is provided at a facility within a licensed gaming establishment in connection with any sale of food, refreshments or merchandise that is taxable under chapter 368A of NRS, and the facility is not operated by the person licensed to conduct gaming at that establishment, that person shall:

(a) Keep all pertinent records required by NRS 368A.160, chapter 463 of NRS and Regulation 6 of the Nevada Gaming Commission and State Gaming Control Board; and

(b) Obtain and keep, or require the person that operates that facility to obtain and keep, any other pertinent records required by NAC 368A.300 to 368A.540, inclusive.

3. If live entertainment that is taxable under chapter 368A of NRS is provided at a facility within a shopping mall on the premises of a licensed gaming establishment and the shopping mall is owned by the person licensed to conduct gaming at that establishment, or by an affiliate of that person, the person licensed to conduct gaming at that establishment is responsible for the payment of the tax and shall include all taxable amounts in the reports required by NRS 368A.220.

4. Each person that holds:

(a) A nonrestricted license shall file with the Board, on or before the 24th day of each month, a report pursuant to NRS 368A.220, showing the amount of all receipts for the preceding month which are taxable pursuant to chapter 368A of NRS.



**ADDENDUM C**

NAC 368A.490

Nev. Admin. Code ch. 368A, s. 490

(b) A restricted license shall file with the Board, on or before the 10th day of the month following each calendar quarter, a report pursuant to NRS 368A.220 , showing the amount of all receipts for the preceding calendar quarter which are taxable pursuant to chapter 368A of NRS.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.490, NV ADC 368A.490

NV ADC 368A.490
END OF DOCUMENT

Westlaw.



NAC 368A.500

Nev. Admin. Code ch. 368A, s. 500

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.500 Maintenance and availability of records of taxpayers. (NRS 368A.140, 368A.160)

A taxpayer shall:

1. Record all sales which are taxable pursuant to chapter 368A of NRS in a manner that reflects the amount of each taxable sale, unless the taxpayer uses an alternative accounting procedure approved by the Chairman.

2. Keep records evidencing any exemption from the tax imposed by chapter 368A of NRS of live entertainment provided at the licensed gaming establishment of the taxpayer.

3. Make its records available for audit by the Board at any reasonable time.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.500, NV ADC 368A.500

NV ADC 368A.500
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.510

Nev. Admin. Code ch. 368A, s. 510

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.510 Procedures for internal control. (NRS 368A.140)

1. Each:

(a) Group I licensee that provides live entertainment shall:

(1) Include in its system of internal control, submitted pursuant to Regulation 6.090 of the Nevada Gaming Commission and State Gaming Control Board, a description of the procedures adopted by the licensee to comply with NAC 368A.300 to 368A.540, inclusive; and

(2) Comply with that system of internal control and any minimum standards for internal control for entertainment adopted by the Chairman pursuant to Regulation 6.090 of the Nevada Gaming Commission and State Gaming Control Board.

(b) Group II licensee that provides live entertainment and each taxpayer that holds a restricted license shall comply with any procedures for internal control for entertainment adopted by the Chairman pursuant to Regulation 6.100 of the Nevada Gaming Commission and State Gaming Control Board.

Except as otherwise approved in writing by the Chairman, a taxpayer shall not carry out any procedures for internal control that deviate from any standards or procedures for internal control for entertainment adopted and published by the Chairman.

2. Each group I licensee that provides live entertainment shall direct its independent accountant to perform observations, examinations of documents and inquiries of employees, using any applicable guidelines, checklists and other criteria established by the Chairman, to determine compliance with the requirements for entertainment. The independent accountant shall report his findings as part of the report required by subsection 9 of Regulation 6.090 of the Nevada Gaming Commission and State Gaming Control Board.

3. The internal auditor of each group I licensee that provides live entertainment shall:

NAC 368A.510

Nev. Admin. Code ch. 368A, s. 510

(a) Using any applicable guidelines, checklists and other criteria established by the Chairman, perform observations, examinations of documents and inquiries of employees to determine compliance with the requirements for entertainment.

(b) Submit to the Board within 120 days after the last day of the first 6 months of the business year of the licensee two copies of a report by the internal auditor summarizing all instances of noncompliance with the requirements for entertainment during the first 6 months of the business year of the licensee and any applicable responses by the management of the licensee, including any work required to be performed during the reporting period and any additional procedures that were performed.

(c) Unless the instances of noncompliance are to be disclosed in the report submitted by the independent accountant for the licensee pursuant to subsection 9 of Regulation 6.090 of the Nevada Gaming Commission and State Gaming Control Board, submit to the Board within 120 days after the last day of the final 6 months of the business year of the licensee two copies of a report by the internal auditor summarizing all instances of noncompliance with the requirements for entertainment during the final 6 months of the business year of the licensee and any applicable responses by the management of the licensee, including any work required to be performed during the reporting period and any additional procedures that were performed.

4. As used in this section:

(a) "Group I licensee" and "group II licensee" have the meanings ascribed to those terms in Regulation 6.010 of the Nevada Gaming Commission and State Gaming Control Board.

(b) "Requirements for entertainment" means the provisions of NAC 368A.300 to 368A.540, inclusive, chapter 368A of NRS and any minimum standards for internal control for entertainment adopted by the Chairman.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.510, NV ADC 368A.510

NV ADC 368A.510
END OF DOCUMENT

Westlaw.



NAC 368A.520

Nev. Admin. Code ch. 368A, s. 520

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.520 Refund of overpayment of taxes. (NRS 368A.140)

The provisions of NRS 463.387 shall be deemed to apply to a claim pursuant to NRS 368A.260 by a taxpayer for the refund of any overpayment of taxes, except that:

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

2. No interest will be allowed on the overpayment if the Board determines that the overpayment was made intentionally or by reason of carelessness.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.520, NV ADC 368A.520

NV ADC 368A.520
END OF DOCUMENT



**ADDENDUM C**

Westlaw.

NV ADC 368A.530 Page 1

NAC 368A.530

Nev. Admin. Code ch. 368A, s. 530

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.530 Penalty for evasion or nonpayment of tax. (NRS 368A.140)

Any taxpayer liable for the payment of the tax imposed by chapter 368A of NRS who willfully fails to report, pay or truthfully account for the tax is liable for a penalty in the amount of the tax evaded or not paid, to be assessed and collected in the same manner as charges, taxes, licenses and penalties are assessed and collected pursuant to chapter 463 of NRS.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.530, NV ADC 368A.530

NV ADC 368A.530
END OF DOCUMENT



**ADDENDUM C**

Westlaw.



NAC 368A.540

Nev. Admin. Code ch. 368A, s. 540

**NEVADA ADMINISTRATIVE CODE**
**CHAPTER 368A. TAX ON LIVE ENTERTAINMENT**
**ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD**

Current through November 2007, Supplement 2007-3

NAC 368A.540 Violation constitutes unsuitable method of operation. (NRS 368A.140)

A violation of any of the provisions of NAC 368A.300 to 368A.540, inclusive, or chapter 368A of NRS constitutes an unsuitable method of operation subjecting a licensed gaming establishment to the suspension or revocation of its gaming license.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NV ADC 368A.540
END OF DOCUMENT



**ADDENDUM C**

**ADDENDUM D**

WUNITED 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
District of Nevada,
Las Vegas

ORDER

"Appellants' Motion for Leave to Supplement the Appellate Record" is denied.

FOR THE COURT:

MOLLY DWYER
CLERK OF THE COURT

By: Beverly Brown
Deputy Clerk

**ADDENDUM D**