MARK E. FERRARIO (1625)
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89136
Tel: (702) 792-3773
Fax: (702) 792-9002
Email: FerrarioM@gtlaw.com
Counsel for Appellant SHAC, LLC

WILLIAM H. BROWN (7623)
LAMBROSE | BROWN PLLC
300 S. Fourth St., Ste. 700
Las Vegas, Nevada 89101
Tel: (702) 816-2200
Fax: (702) 816-2300
Email: WBrown@LambroseBrown.com
Counsel for all Petitioners
except SHAC, LLC

Electronically Filed
Oct 27 2016 04:32 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT
OF THE STATE OF NEVADA

K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club, et al.,

Appellants,

vs.

NEVADA DEPARTMENT OF TAXATION, et al.,

Respondents.

Supreme Court Docket: 69886

District Court Case: A-11-648894-J
Consolidated with A-14-697515-J

Appellants' Appendix

APPELLANTS' APPENDIX
VOLUME 3, PAGES 498 – 741

INDEX TO APPELLANTS' APPENDIX

<table>
<tr><th>Filing Date</th><th>Description</th><th>Vol.</th><th>Page</th></tr>
<tr><td></td><td><table>
<tr><td>Waiver of Notice, dated 11/22/13</td><td>3637</td></tr>
<tr><td>Transcript of Nevada Tax Commission (only the portions of Nevada Tax Commission relevant to this matter), 12/09/13</td><td>3638-3642</td></tr>
<tr><td>Nevada Tax Commission’s Decision, 02/12/14</td><td>3643-3718</td></tr>
</table></td><td>18
18

18</td><td>3776
3777-3781

3782-3857</td></tr>
<tr><td>12/09/2011</td><td>Minutes</td><td>1</td><td>48-49</td></tr>
<tr><td>12/16/2011</td><td>Minutes</td><td>1</td><td>50-51</td></tr>
<tr><td>06/08/2012</td><td>Minutes</td><td>1</td><td>84-85</td></tr>
<tr><td>09/22/2015</td><td>Minutes</td><td>18</td><td>3867-3868</td></tr>
<tr><td>10/27/2015</td><td>Minutes</td><td>18</td><td>3877-3878</td></tr>
<tr><td>11/24/2015</td><td>Minutes</td><td>18</td><td>3907-3909</td></tr>
<tr><td>10/15/2013</td><td>Minutes – Status Check</td><td>1</td><td>95-96</td></tr>
<tr><td>02/26/2016</td><td>Notice of Appeal</td><td>18</td><td>3934-4006</td></tr>
<tr><td>06/24/2016</td><td>Notice of Entry of Amended Order Denying Judicial Review of Administrative Decision</td><td>19</td><td>4027-4035</td></tr>
<tr><td>10/26/2011</td><td>Notice of Entry of Order</td><td>1</td><td>19-23</td></tr>
<tr><td>11/21/2011</td><td>Notice of Entry of Order</td><td>1</td><td>28-33</td></tr>
<tr><td>02/02/2012</td><td>Notice of Entry of Order</td><td>1</td><td>54-59</td></tr>
<tr><td>06/22/2012</td><td>Notice of Entry of Order</td><td>1</td><td>88-93</td></tr>
<tr><td>3/28/2014</td><td>Notice of Entry of Order</td><td>1</td><td>119-126</td></tr>
</table>

Filing Date	Description	Vol.	Page
02/04/2016	Notice of Entry of Order Denying Judicial Review of Administrative Decision	18	3921-3933
10/13/2015	Notice of Entry of Order Granting Petitioner's Motion to File Supplemental Brief and Setting Hearing on Petition for Judicial Review	18	3872-3876
03/31/2015	Notice of Entry of Order Granting Stipulation and Order to Extend Time	18	3861-3866
03/26/2014	Notice of Entry of Stipulation and Order Consolidating Cases	1	111-118
01/22/2015	Notice of Entry of Stipulation and Order for Extension of Time	1	130-134
06/27/2016	Notice of Entry of Stipulation and Proposed Amended Order	19	4039-4055
01/15/2016	Order Denying Judicial Review of Administrative Decision	18	3911-3920
06/21/2012	Order Denying Stay	1	86-87
10/09/2015	Order Granting Petitioner's Motion to File Supplemental Brief and Setting Hearing on Petition for Judicial Review	18	3869-3871
02/01/2012	Order Granting Plaintiffs Application for Leave to Present Additional Evidence to the Nevada Tax Commission	1	52-53
09/09/2013	Order Scheduling Status Check	1	94
12/02/2015	Order to Statistically Close Case	18	3910
09/23/2011	Petition for Judicial Review	1	1-12

Filing Date	Description	Vol.	Page
03/11/2014	Petition for Judicial Review (District Court Case No. A-14-697515-J)	1	97-106
03/24/2014	Stipulation and Order Consolidating Cases (Consolidating A-14-697515-J with A-11-648894-J)	1	107-110
11/21/2011	Stipulation and Order for Continuance	1	25-27
10/25/2011	Stipulation and Order for Extension of Time	1	16-18
01/21/2015	Stipulation and Order for Extension of Time	1	127-129
03/30/2015	Stipulation and Order for Extension of Time	18	3858-3860
06/23/2016	Stipulation and Proposed Amended Order	19	4007-4020
01/26/2015	Supplement to the Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Entire Record - Index)	1	136-139
12/09/2011	Transcript (Entered on 10/30/2012 into District Court Case No. A-11-648894-J)	1	34-47
06/08/2012	Transcript (Entered on 10/30/2012 into District Court Case No. A-11-648894-J)	1	60-83
10/27/2015	Transcript of Proceedings Before the Honorable Jerry A. Wiese, II – October 27, 2015 (Re: Oral Argument on Petition for Judicial Review) (District Court Case No. A-11-648894-J) (Entered into District Court Case No. A-14-697515-J)	18	3879-3906
01/26/2015	Transmittal of Supplement to the Record on Appeal	1	135

BEFORE THE NEVADA TAX COMMISSION

IN RE:

Olympus Garden, Inc., D.I. Food & Beverage of Las Vegas, Shac, LLC, D. Westwood, Inc., K-Kel, Inc., The Power Co., Inc.,

Appellants.

NEVADA DEPARTMENT OF TAXATION'S BRIEF IN SUPPORT OF THE DEPARTMENT'S DENIAL OF APPELLANT'S REFUND REQUESTS

The Nevada Department of Taxation ("Department"), through its attorneys, Catherine Cortez Masto, Attorney General, and David J. Pope, Senior Deputy Attorney General, and Dennis Belcourt, Deputy Attorney General, hereby requests that the Nevada Tax Commission ("Commission") uphold the Department's denial of Appellants' Refund Requests. Appellants (hereinafter referred to as "Taxpayers,") are providers of live entertainment in the form of exotic dancing in Nevada.

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

POINTS AND AUTHORITIES

I. STANDARD OF REVIEW

At this time, it appears that the issue on appeal is whether Nevada's Live Entertainment Tax (hereinafter "LET") can withstand a facial constitutional challenge. Because such an issue is considered a matter of law, it is the Department's position that the Commission may review the Department's decision *de* novo. *Sheriff v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002) (indicating that a question as to whether a legislative enactment is constitutional presents a question of law to be reviewed *de novo*).

II. STATEMENT OF FACTS AND HISTORICAL BACKGROUND

The LET came into force in 2003, after the Nevada State Legislature, 20th Special Session, enacted Senate Bill No. 8 ("SB 8"), entitled in pertinent part as follows:

> AN ACT relating to state financial administration; providing for the imposition and administration of certain excise taxes on financial institutions; providing for the imposition and administration of an excise tax on employers based on wages paid to their employees; replacing the casino entertainment tax with a tax on all live entertainment; eliminating the tax imposed on the privilege of conducting business in this state; revising the taxes on liquor and cigarettes; imposing a state tax on the transfer of real property and revising the provisions governing the existing tax: revising the fees charged for certain gaming licenses; . . .
> and providing other matters properly relating thereto.

Act of July 22, 2003, ch. 5, 2003 Nev.Stat 133 (Emphasis added).

As the foregoing illustrates, the LET is a child of the casino entertainment tax, which was, in turn, a child of the Federal Cabaret Tax. See Nevada State Attorney General's Opinion No. 85-17, which reads in pertinent part as follows:

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

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

Legislative authorization for the former Casino Entertainment Tax was contained in NRS chapter 463. With certain exceptions, the Casino Entertainment Tax was imposed on "each licensed gaming establishment in this state where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment or merchandise." NRS 463.401 (1975) (repealed 2003 by S.B. 8, 20th Special Session); *see also Cashman*, 91 Nev. at 426, 538 P. 2d at 160, n.2,(quoting NRS 463.401 (1975)).

S.B. 8 expanded the Casino Entertainment Tax to include non-gaming establishments.

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

The tax thus created, the LET, is triggered when entertainment is being provided for an admissions charge. NRS 361.200. For the tax periods in question, live entertainment was statutorily defined as follows: "Live entertainment" means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present. NRS 368A.060.

Pursuant to NRS 368A.140(2), the Department administers the LET with regard to non-licensed gaming establishments. NRS 368A.200(1) provides,

> [T]here is hereby imposed an excise tax on admissions to any facility in this State where live entertainment is provided. 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.

Pursuant to NRS 368A.200(5), the LET does not apply to live entertainment that the Department "is prohibited from taxing under the Constitution, laws or treaties of the United States or of the Nevada Constitution." A taxpayer may request a refund pursuant to NRS 368A.260. In this case, Taxpayers requested refunds for January, February, March and April of 2004. The Department denied the refund requests and Taxpayers have appealed to the Commission.

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

III. AUTHORITIES AND ARGUMENT

In this case, the Department properly denied Taxpayers' refund requests. All acts passed by the Legislature are presumed to be valid until the contrary is clearly established, and courts will only interfere when the Constitution is clearly violated. *List v. Whisler*, 99 Nev. 133, 137, 660 P.2d. 104, 106 (1983). The burden of making a clear showing rebutting the presumption is on the party challenging the law's validity. *Id.* at 138, 660 P.2d. at 106. Where a statute is susceptible to both a constitutional and an unconstitutional interpretation, a

court is obliged to construe the statute so that it does not violate the constitution. *Whitehead v. Comm'n on Judicial Discipline*, 110 Nev. 874, 883, 878 P2d 913, 919 (1994). Whether a legislative enactment is constitutional presents a question of law to be reviewed *de novo*. *Sheriff v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002).

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

1. Nevada's LET Is Not Invalid As A Direct Tax On The Exercise of Constitutional Freedoms

Taxpayers take the position that because entertainment is protected as a form of speech, a tax just on entertainment is unconstitutional. They cite to the case of *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870 (1943) to support their position that the LET is an unconstitutional direct tax on the exercise of constitutional freedoms. *Murdock* involved a peddler's license fee that was imposed on religious proselytizers who were required to pay a fee as a *precondition* to their conducting their door-to-door religious activities, regardless of the revenue received. The holding in *Murdoch* has been limited by the U.S. Supreme Court, which has since held that the application of sales and use tax to sales of religious materials is not an unconstitutional burden on the free exercise of religion. *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 385, 110 S.Ct. 688, 693 (1990).

Unlike the license fee in *Murdock*, there is no requirement in the LET that a taxpayer obtain a license before engaging in the conduct, and the LET is expressly tied to revenue received.

Nor does the LET fall within the bar of *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365 (1983), also cited by Taxpayers. In *Minneapolis Star*, the State of Minnesota had set up a separate taxing scheme for newspaper print and ink, with

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

a rather large exemption that rendered only a handful of newspapers or other members of the press within the state actually subject to the tax.

There is ample indication from *Minneapolis Star* that its analysis only applies to the protections of the institution of the press, not to the more general protections of freedom of expression that Taxpayers are invoking in this matter. In *Minnesota Star*, the Supreme Court cited the Framers' concern about the role of the press in mobilizing sentiment in favor of independence. *Id.* at 583-585, 103 S.Ct. at 1370-1372. For example, *Minneapolis Star* cited to a speech by Potter Stewart in which he argues that the protection of the "Freedom of the Press" clause puts the protection of the Press on a different level than protection of expression by the rest of us. As Justice Stewart stated:

> It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are guaranteed* that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more that freedom of expression, it would be a constitutional redundancy. Between 1776 and the drafting of our Constitution, many of the state constitutions contained clauses protecting freedom of press while at the same time recognizing no general freedom of speech. By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.

26 Hastings L.J. 631, 633-4 (1975).

The Supreme Court was concerned about the coercive effects that a tax uniquely applicable to the press would have on that institution's independence as the "fourth branch of government." A differential tax on live entertainment does not carry with it the same level of concern.[1]

2. Nevada's LET Does Not Violate the Constitution By Taxing Differently Based on Content

The U.S. Supreme Court has articulated the following as a test for whether a regulation is content neutral:

---

[1] Other taxes solely on expressive activities have been upheld against First Amendment challenges. *See, e.g.,Adams Outdoor Advertising, Ltd., v. Borough of Stroudsburg, 667 A.2d 21(Cmwlth.Ct. Pa, 1995)(billboard tax upheld).*

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

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

Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754 (1989)(emphasis added).

There is no indication that the classifications set forth in NRS chapter 368A are for purposes other than optimizing tax revenues by a calculated expansion of the Casino Entertainment Tax. Pursuant to NRS 368A.200, the LET is imposed on admission to any facility in the State of Nevada where live entertainment is provided regardless of the content of that entertainment. The lower tax rate for larger capacities appears to be an expansion of the cabaret and casino entertainment taxes, which completely exempted facilities with larger capacities. See Exhibit A (*Lobbyist suggests taxing Celine Dion to Boost Revenues*, Las Vegas Review Journal, May 14, 2003, http://www.reviewjournal.com/lvrj_home/2003/May-14-Wed-2003/news/21318259.html) and AGO 85-179 (Casino Entertainment Tax, based on history of cabaret tax, not intended to cover large venues).

With regard to the exemptions, the Nevada Legislature has chosen simply to exclude or exempt certain live entertainment from the LET. See *Leathers v. Medlock*, 499 U.S. 439, 453, 111 S.Ct. 1438, 1447 (1991) ("[t]he Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax"). Nothing about the choice to exempt certain live entertainment from the tax suggests an interest in censoring the expressive activities of either nude dancing or clothed entertainment. *See id.* Rather, indications are that the minimum seating capacity of 300 in SB 8 was set so as not to do economic harm to smaller entertainment arenas, not to differentiate based on content. *See Minutes of Assembly Committee on Commerce and Labor*, 73rd Session, April 13, 2005, p. 4,

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

attached hereto as Exhibit B.

On the other hand, Taxpayers have offered nothing to indicate that the broad-based, content-neutral LET is likely to stifle the free exchange of ideas or is aimed at suppressing particular ideas. *See id.*(distinguishing *Minnesota Star*). What indication that Taxpayers do offer purportedly to be content-based is an incompletely cited reference quoting an unidentified person discussing an amendment that would have removed sporting events from the tax. We were unable to locate where that statement was transcribed in the committee minutes. Even if that amendment were reflective of a committee member's thinking, it did not carry the day, as the only amendment enacted in the 73rd (2005) session with regard to sporting events was that which dealt with the Nextel series of NASCAR. NRS 368A.200(5)(o).[2] With regard to NASCAR events, there is an obvious, non-content basis for the exemption—the prodigious economic activity generated by the race series. See Exhibit C, *Nascar weekend draws $198 million to area*, Las Vegas Review Journal, May 11, 2007. http://www.lvrj.com/sports/7458307.html.

Taxpayers have also noted that boxing is exempt under NRS 368A.200(5)(c). Taxpayers provide no inference to support a conclusion that this exemption is content-based, i.e., indicative of a disagreement that the Legislature has with entertainment that is not exempt. *See Rock Against Racism*, 491 U.S. at 793, 109 S.Ct. at 2755. Moreover, pursuant to NRS 467.107(1), promoters of boxing contests must pay a license fee equal to four percent of the total gross receipts from admission fees. In addition, the promoters must pay three percent of the first $1,000,000 and one percent of the next $2,000,000 of the total gross receipts from the sale, lease or other exploitation of broadcasting, television and motion picture rights for the particular contest. *Id.* Pursuant to NRS 467.108, the promoter must pay

---

[2] It should be noted that the NASCAR exemption was not even law during the time period in question. This rather narrow exemption therefore can hardly be evidence of an intent on the part of the Legislature in 2003 that the LET suppress the ideas being put forth by the taxpayers subject to the tax.

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

an additional $1.00 or $ .50, depending on the amount of the gross receipts from the admission fees. This is likely an example of the Legislature fitting the taxing scheme to the local needs and usages in order to achieve an equitable distribution of the tax burden. See *Madden v. Kentucky*, 309 U.S. 83, 87-88, 60 S.Ct. 406, 408 (1940).

3. Nevada's LET Classifications Are Not Unconstitutionally Overbroad

The United States Supreme Court has stated, "[i]nherent in the power to tax is the power to discriminate in taxation. *Leathers*, 499 U.S. at 451. "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." Id. (citations omitted). In *Madden*, 309 U.S. at 87-88, 60 S.Ct. at 408, the United States Supreme Court announced the following rule:

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

(citations omitted). There is a "strong presumption in favor of duly enacted taxation schemes." *Leathers*, 499 U.S. at 451. "[A] differential burden on speakers is insufficient by itself to raise First Amendment concerns." *Id.* at 452. The rule announced in *Leathers* is, "differential taxation of speakers . . . does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." *Id.* at 453. In the case at hand, Nevada's LET, on its face, is not directed at, nor does it present the danger of, suppressing particular ideas. Nevada's LET was enacted to raise revenues. It cannot be

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

argued that the LET limits the ability of exotic dancers, or for that matter any other entertainers, to express themselves. Clearly, Taxpayers cannot provide an explicit demonstration of a classification constituting a hostile and oppressive discrimination.

B. The Taxpayers are not Exempt from Taxation Pursuant to the Provisions of NRS 368A.200(5)

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

CONCLUSION

All indications are that the Live Entertainment Tax is intended to optimize revenue for the State of Nevada. The Federal and State Constitutions do not prohibit the taxation of expressive ideas. While the constitutions greatly restrict taxation based on content, there is certainly no indication that the LET violates this principle by suppressing or intending to suppress the expression of any ideas. The LET should therefore be upheld against Taxpayers' facial constitutional challenges.

Dated this 15th day of June, 2007.

CATHERINE CORTEZ MASTO
Attorney General

By: _____
Dennis Belcourt
Deputy Attorney General
State Bar No. 2658
David J. Pope
Sr. Deputy Attorney General
State Bar No. 8617
555 E. Washington Ave., #3900
Las Vegas, NV 89101
(702) 486-3426

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

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada Attorney General's Office and that on the 15th day of June, 2007, I served the foregoing Nevada Department of Taxation's Brief in Support of the Department's Denial of Refund Requests as indicated below:

Via U.S. Mail and Facsimile

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
3800 Capital City Blvd., Ste. #2
Lansing, MI 48906
Fax No.: (517) 886-6565

Via Electronic Mail

Erin Fierro, Executive Assistant
Nevada Department of Taxation
efierro@tax.state.nv.us

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
Shafer3800@aol.com

Andrea Adams, Esq.
Shafer & Associates, P.C.
aeadams@acd.net and
andreaeadams@hotmail.com

An employee of the Office of the
Attorney General

Exhibit A

reviewjournal.com

PRINT THIS

Wednesday, May 14, 2003

Lobbyist suggests taxing Celine Dion to boost revenues

By ED VOGEL
REVIEW-JOURNAL CAPITAL BUREAU

CARSON CITY -- In their quest to find things to tax, a longtime legislative lobbyist suggested Tuesday that legislators look to singer Celine Dion's shows at Caesars Palace.

Nevada Taxpayers Association President Carole Vilardo told the Assembly Taxation Committee that tickets purchased for Dion's shows are exempt from the 10 percent casino entertainment tax.

There are 4,000 seats in the $95 million Colosseum theater built especially for Dion. Under state law, the casino entertainment tax is collected only at shows with a seating capacity of fewer than 2,750 patrons.

"Celine Dion is not a taxable entity under the current casino entertainment base," Vilardo said. "So we could pick up that revenue base."

Park Place spokesman Robert Stewart, contacted in Las Vegas, declined comment.

Vilardo made the comment about Dion as she discussed Gov. Kenny Guinn's proposed 7.25 percent amusement tax, a tax originally projected to bring in $85 million a year.

But the tax proposal has come under fire from many sectors, particularly because initially it called for taxing bowling, video rentals and movie admissions, while exempting participatory activities such as golf and country and health club memberships.

Guinn since has proposed eliminating video rentals, while saying he could support adding golf. No amendments have been adopted.

Taxation Chairman David Parks, D-Las Vegas, did not take a vote on any tax proposal. Approval of tax bills probably will wait as legislative leaders work in private to try to hammer out a compromise that can win support of two-thirds of the members. The Legislature adjourns June 2.

Parks requested staff members give each legislator details on how the casino entertainment tax is levied.

Vilardo said if legislators have "angst about movies, bowling and pool halls," then it is within their power to exempt those activities.

Nonetheless, Vilardo called the tax "progressive" and worthy of consideration.

She suggested the committee consider taxing Dion's shows under the 7.25 percent amusement tax rate

proposal, rather than at the 10 percent casino entertainment tax rate.

"It would not look (so much) like we are trying to gouge the tourists," she said.

Assemblywoman Kathy McClain, D-Las Vegas, said she favors taxing participatory sporting activities.

"We can make a fortune taxing golf games," McClain said. "But some of these things I don't see as sporting or fun, such as aerobics or calisthenics."

Other members laughed.

Find this article at:
http://www.reviewjournal.com/lvrj_home/2003/May-14-Wed-2003/news/21318259.html

☐ Check the box to include the list of links referenced in the article.

Exhibit B

questions about how we would feel about this and what the tax might bring in. We talked about a bill draft request that would be similar to the one that is before you today. I felt that the Governor's tax package included us because of its broad definition of live entertainment. It did include us right up to the very end, when the 300-seat threshold was brought in to the bill at the request of Senator Neil to protect some of the small arenas in the North Las Vegas area. He felt they would be impacted by having to charge an admissions fee. That 300-seat threshold not only amended us out of the bill, but it amended out a big percentage of the other sexually related businesses, particularly in Clark County, which was not the intention.

[George Flint, continued.) Before you today is an amendment (Exhibit B), which is needed by my group. It changes the last two lines of page 1 of the bill and the first two lines from page 2. The old language had an industry-specific tax on what could be 30 percent of what the brothel operators receive, which would be devastating. This would be similar to raising the gross receipts tax on the casinos from 7 percent to almost 30 percent. It was not the language that we agreed to. It originally appeared in one of the special session bills in an attempt to bring in the out-call services in Las Vegas. Chairman Parks of Taxation worked with me to bring this language back in. I don't know how it landed in this bill. It was too late to change it before it was presented to you.

Were the bill to pass in its present form, it would be prohibitive, particularly in light of the fact that we already pay a tremendous amount of money to the local government. Brothels in Lyon County pay approximately $95,000 a year in business license taxes. It is similar in Nye County.

This bill would create around $1.6 million per year, or $3.2 million per biennium. Only a small portion of that is based on the admissions fee. Once a client decides to go to that area of the brothel where the live entertainment takes place, there would be an admissions fee in the $20 range, which would have a 10 percent tax on it. That is only a small part of the tax. A bigger part of the tax would be a 17 percent tax on alcohol or the bar tax. We have a new phenomenon in our industry—the sale of food and souvenirs. All food, alcohol, and souvenirs will be contributing up to 17 percent, as well as the 10 percent tax on admissions.

I hope that the Committee will give this bill serious consideration. I think that it is better to tax us and get some benefit from us, than to not. I think this tax will give us some added acceptability. It will probably become money that the state will be able to use and appreciate. I was told yesterday that there was $1.6 million need for a particular area of health care that has been left out of the Governor's budget. I am sure that you will find a place for this money.

Exhibit C

May 11, 2007

NASCAR weekend draws $198 million to area

REVIEW-JOURNAL

The economic impact of this year's annual NASCAR weekend at Las Vegas Motor Speedway inched closer to generating $200 million for Southern Nevada.

The March events produced $198 million, the Las Vegas Convention and Visitors Authority said. That's an increase of nearly $1 million over 2006 and marked the sixth consecutive annual increase for Nevada's largest sports event.

The report estimates weekend attendance to be more than 340,000, including the NASCAR races and two nights of racing at the LVMS dirt track.

• **BULLRING CORRECTIONS** -- The speedway earlier this week revised results from Saturday's NASCAR All-American Series event at the Bullring.

In Bandoleros, Dylan Kwasniewski won the Bandits division, and Kyle Spade was declared the winner in Young Guns after the car driven by Damon Blakeman failed a post-race technical inspection. ...

Scott Gafforini inadvertently was left off the initial Super Late Models results. He finished seventh.

• **DRAG RACING** -- Las Vegas resident Rod Fuller regained the Top Fuel points lead after advancing to the semifinal round of Sunday's NHRA Powerade Drag Racing Series event in Madison, Ill. He has a 23-point lead over Brandon Bernstein.

In Pro Stock Motorcycle, Minden's Karen Stoffer lost her first-place lead after Matt Smith's near-perfect weekend. He set a national elapsed time record of 6.901 seconds (191.78 mph) on his Buell.

• **BUSINESS** -- International Speedway Corp. will transform a 71-acre site next to its Daytona International Speedway into a $250 million entertainment complex with condominiums.

ISC also will put up for sale a 675-acre plot on New York's Staten Island after residents' resistance led it to scrap plans to build a NASCAR track.

Find this article at:
http://www.lvrj.com/sports/7458307.html

☐ Check the box to include the list of links referenced in the article.

BEFORE THE NEVADA TAX COMMISSION

IN RE:

OLYMPUS GARDEN, INC., D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, SHAC, L.L.C., , D. WESTWOOD, INC., K-KEL, INC., THE POWER COMPANY, INC.,

Appellants.

APPELLANTS' REPLY BRIEF IN OPPOSITION TO THE NEVADA DEPARTMENT OF TAXATION'S DENIAL OF APPELLANTS' REFUND REQUESTS

NOW COME Appellants, Olympus Garden, Inc., D.I. Food & Beverage of Las Vegas, LLC, SHAC, LLC, D. Westwood, Inc., K-Kel, Inc., and The Power Company, Inc. (also collectively referred to herein as the "Taxpayers"), by and through their attorneys, and hereby reply to the brief of the Nevada Department of Taxation (the "Department") requesting the Nevada Tax Commission (the "Commission") to uphold the Department's denial of Appellants' requests for refunds of the Live Entertainment Tax (simply the "LET") paid for the tax periods of January, February, March, and April of 2004.

I. STANDARD OF REVIEW

As there was no legal analysis set forth by the Department in its denial of the Taxpayers' requests for refunds, the Taxpayers agree that the Commission must review the Department's denial *de novo*.

II. STATEMENT OF FACTS AND HISTORICAL BACKGROUND

The Taxpayers have no major objections to the departments statement of facts and historical background other than to note that in the year 2005 the LET was modified to better capture and tax live adult entertainment and to exempt out any other significant payees under the 2003 version of the LET, other than providers of live adult entertainment. This is discussed more fully in Section III, B(3), *infra*.

III. ARGUMENT

A. THE LET IS A FACIALLY DISCRIMINATORY STATUTE THAT IS PRESUMED UNCONSTITUTIONAL

The Department contends that the LET is presumed valid until the contrary is clearly established. Dept.Br., p. 3. In response to this, the Taxpayers start by pointing out to the Commission that:

> "It is a fundamental precept of the First Amendment to the United States Constitution that all expression, whether it is written, pictorial or by way of performance, is presumptively protected against governmental interference and restraint."

Ellwest Stereo Theatre, Inc. v. Boner, 718 F. Supp. 1553,1560 (M.D.Tenn. 1989), citing Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Roaden v. Kentucky, 413 U.S. 496 (1973); and Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981).

Further, when considering the constitutionality of laws such as this, a number of important factors must be kept in mind. First, it has long been held that because of the recognized preferred position of First Amendment rights, there is no general presumption of constitutionality that would normally attach to other legislative enactments, contrary to the Department's assertion otherwise:

> "While state supreme court regulations and legislative and congressional acts are generally entitled to a presumption of constitutionality, [FN12] the preferred position of the first amendment greatly weakens such a presumption involving that amendment. See, e.g., Turchick v. United States, 561 F.2d 719, 724 (8th Cir. 1977); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973). See generally, Cahn, The Firstness of the First Amendment, 65 Yale L.J. 464 (1956). It is also inappropriate to apply such a presumption [of constitutionality] where the practical effect of doing so would be to greatly reduce the burden of proof on the part of the state in justifying its speech restrictions."
>
> FN12. However, the Supreme Court has recognized that enactments are subject to different presumptions of validity. Parham v. Hughes, 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed. 269, 274 (1979)"

Durham v. Brock, 498 F. Supp. 213, 221 (M.D. Tenn. 1980), *aff'd*, 698 F.2d 1218 (6th Cir. 1982).

Additionally, the State of Nevada has a Taxpayers Bill of Rights, which states that each taxpayer has the right "[t]o have statutes imposing taxes and any regulations adopted pursuant thereto ***construed in favor of the taxpayer*** if those statutes or regulations are of doubtful validity

or effect, unless there is a specific statutory provision that is applicable." N.R.S. § 360.291(1)(o) (emphasis added). The Taxpayers have established the invalidity of the LET, and there is no specific statutory provision that applies to First Amendment protected entertainment, since the interpretation of the exemption for "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitution," N.R.S. § 368A.200(5)(a), brings the Taxpayers' entertainment out of the realm of the LET.

Second, it is the government's ***general*** burden to substantiate the constitutionality of the infringement upon protected speech and expression rights, and not on the taxpayers as the Department contends. **Perry Education Ass'n. v. Perry Local Educator's Ass'n.**, 460 U.S. 37, 45 (1983) (direct infringement required strict scrutiny); and **Widmar v. Vincent**, 454 U.S. 263, 270 (1981) (incidental infringement required intermediate scrutiny).

Neither of the cases cited by the Department in arguing that LET enjoys a presumption of constitutionality - - unless the ***Taxpayers*** prove otherwise - - even involve First Amendment protected expression. It is clear that the implications on First Amendment speech modify the general burden threshold asserted by the Department, and the Department has not established otherwise.

B. THE LET IS CONTENT BASED, AND IS A FACIALLY UNCONSTITUTIONAL DIRECT TAX ON THE EXERCISE OF CONSTITUTIONAL FREEDOMS.

1. THE LET IS AN IMPERMISSIBLE TAX ON THE EXERCISE OF CONSTITUTIONAL FREEDOMS.

The Department attempts to distinguish the Taxpayers' reliance on **Murdock v. Commonwealth of Pennsylvania**, 319 U.S. 105 (1943), with reference to **Jimmy Swaggart Ministries v. Board of Equalization**, 493 U.S. 378, 385 (1990). Dept.Br., p. 3. First of all, it should be noted that in **Swaggart**, the taxpayer wanted an exemption from "a ***generally applicable*** sales and use tax" which "applies neutrally to ***all*** retail sales of tangible personal property made in California," for the religious materials distributed by his religious ministry. **Id.** at 389 (emphasis added). Here, the Taxpayers assert the unconstitutionality of a **limited** tax which is solely restricted to expression protected by the First Amendment. In addition, in the case before the Commission, the Taxpayers are arguing that they fall under a particular exemption to a law that is ***specifically***

directed at activity protected under the First Amendment.

In addition, while reaffirming its holding in **Murdock** that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment," **Swaggart**, at 386, the Supreme Court nevertheless upheld the California general sales and use tax, citing to its decision in **Follett v. Town of McCormick**, 321 U.S. 573 (1944):

> "We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities . . .a preacher is not 'free from all financial burdens of government, including taxes on income or property' and, 'like other citizens, may be subject to *general* taxation."

Swaggart, at 386-87, *citing* to **Murdock** and **Follett** (internal citations omitted) (emphasis in original). Here, the LET is most certainly ***not*** a generally applicable tax, is not a tax on income of an individual or a tax on property, nor is it a general tax applied to other citizens, as discussed by the Supreme Court. Taxpayers make no argument that they are exempt from general sales, property, and income tax. If that were the Taxpayers' argument, **Swaggart** would be applicable. Here, directly to the contrary, this Commission is asked to review a unique tax ***only*** applied to First Amendment protected activity.

The Department then attempts to discredit the Taxpayers' reliance upon **Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue**, 460 U.S. 575 (1983), by stating the case is inapplicable because it "only applies to the protections of the institution of the press, not to the more general protections of freedom of expression that Taxpayers are invoking in this matter." Dept.Br., p. 5. In support of this, the Department references a quote from Justice Potter Stewart in the **Minneapolis Star** opinion, which the Department contends demonstrates the Framers' preference towards protecting press over "general protections of freedom of expression." The Taxpayers aver in response that the Commission should hear from Thomas Jefferson himself regarding the importance of free speech ***and*** press to the Framers:

> "'(The First Amendment) thereby guard(s) in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. . . .' 8 The Works of Thomas Jefferson 464-465 (Ford ed. 1904)"

Gertz v. Robert Welch, Inc., 418 U.S. 323, 357 (1974) (clarification in original).

Moreover, at least one court has directly addressed and rejected the Department's argument that strict scrutiny only applies to selective taxation of the press. Vermont Society of Association Executives v. Milne, 779 A.2d 20, 23 (Vt. 2001) ("Because the State questions the general notion of applying heightened scrutiny to a tax directed at lobbyists, as opposed to the press, we first consider the status of lobbying as a protected First Amendment interest"). After determining that the act of lobbying was protected by the First Amendment speech guarantee, the court had no trouble concluding that the Supreme Court precedent clearly established that all taxes singling out First Amendment rights were subject to strict scrutiny:

> "The Court in Grosjean [297 U.S. 233 (1936)] emphasized, however, that a tax singling out interests protected by the First Amendment cannot stand. Id. at 244, 250, 56 S.Ct. 444 (it is settled law that freedoms of speech and press 'are rights of the same fundamental character' safeguarded against abridgment by state legislation). . . . Accordingly, the Court concluded that the abridgment clause prohibited not only laws that directly censored First Ament interests, but also laws that singled out those interests for special taxation. Id. at 248-250, 56 S.Ct. 444.
>
> * * *
>
> The United States Supreme Court has consistently adhered to this principle of disallowing special taxes that single out and burden First Amendment interests. For example, in Minneapolis Star [460 U.S. at 592], the Court Struck down, on two independent grounds, a special use tax imposed on paper and ink products consumed in the production of publications. The first ground, the one most relevant to the instant case, was that the tax singled out a First Amendment interest for special treatment. While acknowledging that the government can subject First Amendment interests to 'generally applicable' economic regulation without creating constitutional problems, the Court rejected the State's claim that the paper and ink tax was a substitute for the sales tax and thus part of a general scheme of taxation. Id. at 581, 103 S.Ct. 1365. The Court noted that its previous cases approving such economic regulation 'emphasized the *general applicability* of the challenged regulation *to all businesses*.' Id. at 583, 103 S.Ct. 1365 (emphasis added). The court reasoned that there is less concern that 'a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. Id. at 585, 103 S.Ct. 1365. When the tax singles out a select group, however, the political constraint is absent, and 'the threat of burdensome taxes becomes acute." Id.

779 A.2d at 25-26 (emphasis in original) (parentheticals in original) (clarification added).

Further, the United Supreme Court has identified that even adult entertainment - - and not simply free press as the Department contends - - is entitled to the same protection from financial

disincentives and economic hardship. In the Supreme Court's most recent foray into "adult" entertainment jurisprudence, Justice Kennedy, in his critical concurring opinion, observed that:

> "...a city may not regulate the secondary effects of speech by suppressing the speech itself. ***A city may not, for example, impose a content- based fee or tax.***"

City of Los Angeles v. Alameda Books, 535 U.S. 425, 445 (2002) (Kennedy, J., concurring) (emphasis added). *See also* **Acorn Invs. Inc. v. City of Seattle**, 887 F.2d 219, 222 (9th Cir. 1989) (invalidating a discriminatory licensing tax involving adult businesses where the tax was not proved to be related to the costs of regulating such businesses); **TK's Video, Inc. v. Denton County**, 24 F.3d 705, 710 (5th Cir. 1994) (***"Government cannot tax First Amendment rights***, but it can exact narrowly tailored fees to defray administrative cost of regulation.").

Justice Kennedy's concurrence in **Alameda Books** is critical because most courts have noted that opinion to be the constitutional "holding" of that plurality decision of the Court pursuant to **Marks v. United States**, 430 U.S. 188 (1977).[1]

As noted above, and in their notices of appeal, the Taxpayers' activities (and the activities of any other taxpayer who presents live entertainment) are forms of expression protected by the First Amendment. In regard to these protections, it makes absolutely no difference that N.R.A. §

---

[1]**Marks** is the case which describes how to discern the precedence of a plurality decision (the "holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds"). 430 U.S. at 193, *citing* **Gregg v. Georgia**, 428 U.S. 153, 169 n.15 (1976). Since the ruling in **Alameda Books**, courts have consistently held Justice Kennedy's concurring opinion to in fact be the holding of that decision. *See, e.g.*, **Ben's Bar v. Village of Somerset**, 316 F.3d 702, 721-22 (7th Cir. 2003)(challenging ordinance prohibiting the sale, use or consumption of alcohol on premises of "Sexually Oriented Businesses"); **SOB, Inc., v. County of Benton**, 317 F.3d 856, 861-62 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003)(challenging public indecency ordinance); **Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County**, 337 F.3d 1251, 1269 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004)(Justice Kennedy's concurrence applied to both zoning and public nudity ordinances); **G.M. Enterprises, Inc. v. Town of St. Joseph**, 350 F.3d. 631, 637-38 (7th Cir. 2003), *cert. denied*, 125 S.Ct. 49 (2004)(the Justice's concurring opinion applying to, among other things, a dancer/patron "buffer zone" such as the one found in Chapter 6.54); and **World Wide Video of Washington, Inc. v. City of Spokane**, 368 F.3d 1186, 1193 (9th Cir. 2004) (challenging a zoning ordinance). *Cf.*, **Center for Fair Public Policy v. Maricopa County**, 336 F.3d 1153, 1163-64 (9th Cir. 2003) *cert. denied*, 541 U.S. 973 (2004)(a divided Ninth Circuit concluding that Justice Kennedy's "proportionality" test was not relevant to an hours-of-operation restriction),*cert denied*, 541 U.S. 973 (2004).

368A.200(5) limits the tax's application to for-profit entertainment. "Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive." **Cammarano v. U.S.**, 358 U.S. 498, 514 (1959). In fact, protecting one's ability to turn a profit from First Amendment activity benefits free expression, as can be readily cognized in the publication realm. *See* **Pacific Gas and Elec. Co. v. Public Utilities Com'n of California**, 475 U.S. 1, 32 (1986) (". . .protection of an author's profit incentive furthers rather than inhibits expression. . ."), *citing* **Harper & Row Publishers, Inc. v. Nation Enterprises**, 471 U.S. 539, 555-59 (1985).

Further, as a basic legal premise, a state may not impose a charge upon the exercise of a constitutional right. **Murdock**, 319 U.S. at 113. Nevertheless, a licensing fee levied upon "adult entertainment establishments" does not excessively burden First Amendment rights "so long as it is imposed as a regulatory measure to ***defray the cost of investigating the license applicant***." **Broadway Books v. Roberts**, 642 F.Supp. 486, 493 (E.D. Tenn. 1986). The fee should be as minimal as necessary to meet the cost to the city. **Id.** The rationale for this rule is that "the power to impose a license tax on the exercise of . . . [First Amendment] freedoms is as potent as the power of censorship." **Murdock**, 319 U.S. at 113 (clarification added). "Speech cannot be ***financially burdened***, any more than it can be punished or banned, simply because it might" result in some problems to society. **Forsythe County v. Nationalists Movement**, 505 U.S. 123, 135 (1992) (emphasis added). And, "tax based on the content of speech does not become more constitutional because it is a small tax." **Id.** at 136.

The Department is certainly imposing more than a minimal fee on constitutionally protected live entertainment based on content, and has not set forth its rationale for laying that significant burden on protected expression. The burden of proving that the fees are necessary to cover the reasonable costs of the licensing scheme ***lies with the licensing authority***. *See, e.g.*, **Ellwest**, 718 F.Supp. at 1574 ; **Fly Fish, Inc. v. City of Cocoa Beach**, 337 F.3d 1301, 1315 (11th Cir. 2003) (". . . it is the City's burden to establish that its licensing fee is justified by the cost of processing the application"); and **Kentucky Restaurant Concepts, Inc. v. City of**

Louisville, 209 F.Supp.2d 672, 691-92 (W.D. Ky. 2002) (in striking down ordinance fees, the district court noted that the "principles governing whether a licensing fee is permissible are ***well-established*** . . ," and that the "municipality bears the burden of presenting evidence that its fee is necessary to defray the cost of administering the regulatory scheme") (emphasis added), *citing* **Bright Lights, Inc. v. City of Newport**, 830 F.Supp. 378, 385 (E.D. Ky. 1993), in turn *citing* **Ellwest Stereo Theatre**, 718 F.Supp. at 1574.

If the government does not fulfill this burden, the fee is void. *See, e.g.*, **Acorn Investments, Inc. v. City of Seattle**, 887 F.2d 219 (9th Cir. 1989) (Court of Appeals invalidated a $650.00 fee); **Sentinel Communications Co. v. Watts** , 936 F.2d 1189 (11th Cir. 1991) (evidence as to reasonableness of fee was insufficient); **AAK, Inc. v. City of Woonsocket**, 830 F. Supp. 99 (D.R.I. 1993) (fees for adult entertainment establishments struck down as unconstitutional). In addition, where protected speech is singled out for regulation, a heavy burden of justification is placed upon the licensing agency because "differential treatment. . . suggests that the goal of the regulation is not unrelated to suppression of expression and such a goal is presumptively unconstitutional." **Minneapolis Star**, 460 U.S. at 585.

This doctrine goes beyond the written word. As succinctly put by the United States Court of Appeals for the Fourth Circuit, "it is obvious that the First Amendment sets limit on the economic burdens that can be imposed upon the dissemination of protected materials," even against a store that "sold both books and films emphasizing sexual matters." **Hart Bookstores, Inc. v. Edminsten**, 612 F.2d 821, 827, 824 (4th Cir. 1979), ***cert. denied***, 447 U.S. 929 (1980).[2]

---

[2]*See also*, **United States v. National Treasury Employees Union**, 513 U.S. 454, 468-69 (1995) (Court noted that "because compensation provides a significant incentive toward more expression" by artists, "by denying respondents that incentive, the honoraria ban induces them to curtail their expression" and therefore "unquestionably imposes a significant burden on expressive activity"); **Turner Broadcasting System, Inc. v. F.C.C.**, 520 U.S. 180 (1997) (the Court underwent a detailed economic analysis in determining what the First Amendment benefits and detriments were in regard to the F.C.C. "must carry" provision for cable t.v. broadcasters, and found that -- in invalidating the regulation -- an 11% decline in advertising revenues posed a "***serious risk*** of financial difficulty" and that stations would suffer "financial harm and possible ruin") (emphasis added); and **Erznoznik v. City of Jacksonville**, 422 U.S. 205, 211 n.'s 7&8 (1975) (Court invalidated an ordinance that prohibited the showing of films containing nudity at drive-in theaters

The U.S. Supreme Court addressed the issue of economic impact on the First Amendment in **Simon & Schuster v. Crime Victims Board**, 502 U.S. 105 (1991), where it ruled unconstitutional the "Son of Sam" law which prohibited a criminal from earning a profit on books written about his or her criminal activity. The Supreme Court noted that such a regulation "imposes a financial disincentive," and that this "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." **Id.** at 611. Just as the state may not simply ban expression it dislikes, it cannot use financial disincentives and economic hardship to drive disfavored expression from the market.

More recently, the Supreme Court, in **United States v. Playboy Entertainment Group, Inc.**, 529 U.S. 803 (2000), considered the constitutionality of a law which restricted the availability of certain cable television stations to broadcast adult material prior to 10:00 p.m. In finding the regulations unconstitutional, the Court noted that "the result was a significant restriction of communication, ***with a corresponding reduction in Playboy's revenues***." **Id.** at 809. (emphasis added). Even the four-member dissent (while noting that the constitutional analysis may not be the same as an absolute ban) stated that "laws that burden speech, say, ***by making speech less profitable, may create serious First Amendment issues . . .***" **Id.** at 838 (emphasis added). This case obviously does not involve the press, yet flies directly in the face of the Department's argument.

Through Chapter 368A, the exercise of these constitutional rights is *conditioned upon* and burdened by the payment of a substantial fee in the form of a tax. If the Taxpayers are unable to pay the tax imposed by Chapter 368A, they cannot then engage in the First Amendment activities encompassed by the regulations. Even though the tax is not due before the speech can be presented (a classic prior restraint situation) if the tax is high enough, it will prevent taxpayers from engaging in speech because they will be unable to make money. In light of the above jurisprudence, even free

---

when the screen was visible from a public street or place, by concluding that the structural requirements necessary to comply with the ordinance would "increase the cost of showing films containing nudity;" that in certain circumstances theaters might avoid showing these movies rather than incur the additional costs; that this could result in individuals being unable to see such films; and that the ordinance was therefore unconstitutional in that it was a "restraint on free expression").

speech that is outside the realm of "free press" - - which the Department feels is the only type of "speech" that should be protected from such taxation - - is still not subject to impermissible taxation such as Chapter 368A.

2. THE LET DOES TAX DIFFERENTLY BASED UPON CONTENT

The Department's reliance on **Leathers v. Medlock**, 439 U.S. 439 (1991) is misplaced and must be rejected. The Department attempts to utilize **Leathers** to support the proposition that all tax legislation enjoys a presumption of validity and that legislatures have broad discretion to differential among speakers within those statutes however they may choose. **Leathers** does not support these propositions.

A proper understanding of **Leathers** begins with its context. **Leathers** is a continuation of **Arkansas Writers' Project**, 481 U.S. 221 (1987) ("**AWP**") and answers a very narrow question left open by **AWP**. Specifically, the **AWP** Court stated:

> "Because we hold today that the State's selective application of its sales tax to magazines is unconstitutional and therefore invalid, our ruling eliminates the differential treatment of newspapers and magazines. Accordingly, we need not decide whether a distinction between different types of periodicals presents ***an additional basis*** for invalidating the sales tax, as applied to the press."

481 U.S. **at 223** (emphasis added).

Leathers simply answers this question left open by **AWP**. To be sure, the **Leathers** Court began its analysis by distinguishing the case at hand from **Grojean v. American Press Co.**, 297 U.S. 233 (1936), **Minneapolis Star & Trubune Co. v. Minnesota Comm'r of Revenue**, 460 U.S. 575 (1983), and **AWP**, *supra*. 439 U.S. 444-449. In this regard, the Court explained, "This is not a tax structure that resembles a penalty for ***particular speakers*** or particular ideas." **Id**. at 449. Hence, the Court determined that the only possible basis to deem the ***generally applicable sales tax***[3] scheme unconstitutional would be via the "additional basis" left unexplored by **AWP**:

> "Because the Arkansas sales tax presents none of the First Amendment difficulties that have lead us to strike down differential taxation in the past, cable petitioners can prevail only if the Arkansas tax scheme presents '***an additional basis***' for concluding that the State has violated petitioner' First Amendment rights. See **Arkansas**

---

[3]This is why that case is not subject to the general doctrine that laws directed at First Amendment protected rights are ***presumed*** unconstitutional.

Writers', *supra*, 481 U.S. **at 233**...."

499 U.S. at 449 (emphasis added) (quotation in original).

In **Turner Broadcasting System, Inc. v. Federal Communications Commission**, 512 U.S. 622 (1994), the Court clarified that whether strict scrutiny applies to a tax targeting a certain medium of speech depends on the structure of the tax. **Id**. at 660. Taxes which are structured like those in **Minneapolis Star** and **AWP** to target a certain medium receive strict scrutiny, even where there is no evidence of illicit motive. **Id**. On the other hand, generally applicable taxes that incidentally burden speech receive rational basis review, unless there is evidence of an illicit motive. **Id**. In this regard the Court stated:

> "It would be error to conclude, however, that the First Amendment mandates strict scrutiny for any speech regulation that applied to one medium but not others. In **Leathers v. Medlock**, 499 U.S. 439 (1991) for example, we upheld against First Amendment challenge the application of a ***general state tax*** to cable television services, even though the print media and scrambled satellite broadcast television services were exempted from taxation. As **Leathers** illustrates, the fact a law singles out a certain medium, or even the press as a whole, 'is insufficient by itself to raise First Amendment concerns.' **Id**., at 444. Rather, laws of this nature are 'constitutionally suspect only in certain circumstances.' **Id**., at 444. The taxes invalidated in **Minneapolis Star** and **Arkansas Writers' Project**, for example targeted a small number of speakers, and thus threatened to 'distort the market for ideas." 499 U.S., at 448. Although there was no evidence that an illicit governmental motive was behind either of the taxes, both were ***structured in a manner that raised suspicions*** that their objective was, in fact, the suppression of certain ideas. See **Arkansas Writers' Project**, *supra*, 481 U.S., at 228-229; **Minneapolis Star**, 460 U.S., at 585."

Turner Broadcasting, 512 U.S. at 660 (emphasis added).

The decisive question is thus whether the LET is "differential ***or*** content based on [its] face, such that improper intent could be inferred" or whether "the tax is generally applicable ***and*** content neutral on its face" **Id**. There can be no doubt that the LET is differential on its face like the tax in **Minneapolis Star** and not a generally applicable tax, like the one in **Leathers**, that happens to extend to live entertainment, but not other mediums of speech.[4]

---

[4] It should be kept clear that the Taxpayers are facially challenging the tax as an unconstitutional differential tax on live entertainment generally and not erotic dancing specifically. The tax impermissibly singles out live entertainment for taxation, impermissibly taxes different forms of live entertainment differentially (via exemptions), and impermissibly treats venues of live entertainment differentially based on size.

A comparison of the LET to the taxes in **Minneapolis Star** and **Leathers** removes all doubt. **Leathers** involved a challenge to a an Arkansas sales "tax of general applicability." **Leathers**, 199 U.S. at 447. Specifically, "Arkansas' Gross Receipts Act imposes a 4% tax on receipts from the sale of all tangible personal property and specified services."[5] **Id**. at 441. Nevada has a similar sales and use tax, which is set forth in Chapters 360B and 372 of the Nevada Code. The taxpayers have not protested the payment of that sales and use tax and are not challenging it. Instead, the Taxpayers are challenging the LET which impermissibly ***singles out live entertainment for a special tax scheme***.

The LET is differential on its face. It singles out a single medium of speech for taxation like the tax in **Minneapolis Star**. The tax in **Minneapolis Star** was held "unconstitutional for two reasons." **Leathers**, 499 U.S. at 445. One of these reasons was that it singled out "a narrowly defined group to bear the full burden of the tax" – the press. **Id**. at 445-446 (*quoting*, **Minneapolis Star**, 460 U.S. at 592). The LET does the same, it singles out live entertainment for special taxation. This renders the tax constitutionally suspect and subjects it to strict scrutiny. There is no need to show even a scintilla of improper motive on the legislature's behalf. "**Minneapolis Star** resolved any doubts about whether direct evidence of improper censorial motive is required to invalidate a differential tax on First Amendment grounds: 'illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" **Id**. at 445 (*quoting*, **Minneapolis Star**, 460 U.S. at 592 (also stating, "We need not and do not impugn the motives of the Minnesota legislature....")). Therefore, since the structure of the LET renders it constitutionally suspect for singling out live entertainment, the LET is subject to strict scrutiny without any need for the Taxpayers to show discriminatory intent.

The LET is unconstitutional for two reasons. First, it is a specific tax - - not a general sales,

---

[5] "Among the services on which the tax is imposed are natural gas, electricity, water, ice, and team utility services; telephone, telecommunications, and telegraph service; the furnishing of rooms by hotels, apartment hotels, lodging houses, and tourist camps; alteration, addition, cleaning, refinishing replacement, and repair services; printing of all kinds; ticket for admission to places of amusement or athletic entertainment, or recreational events; and fees for the privilege of having access to, or use of, amusement, entertainment, athletic, or recreational facilities." **Leathers**, 499 U.S. at 447.

income, property, or usage tax - - directed particularly at First Amendment rights. Second, by exempting out the vast majority of live entertainment, the LET is basically only aimed at a particular group of First Amendment actors. The forms of live entertainment that are actually subject to the LET and not limited are very limited. Further, the Department has failed to attempt to justify or even address the numerous other exemptions to the LET besides boxing and NASCAR.

3. THE NUMEROUS EXCEPTIONS TO THE LET AND ITS LEGISLATIVE HISTORY FIRMLY ESTABLISH DISCRIMINATORY INTENT BEHIND THE CONTENT-BASED REGULATION

Assuming, *arguendo*, that it is necessary for the Taxpayers to show discriminatory intent, such intent is clear and overwhelming in light of the numerous types of live entertainment that are exempt from the tax, leaving adult entertainment as the primary and near only taxpayer. If any doubt could remain, it is eradicated by the legislative intent, which demonstrates that this was exactly what the legislature meant to accomplish.

The Supreme Court has stated that "[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risk of view point and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." **City of Ladue v. Gilleo**, 512 U.S. 43, 52 (1994). In this case, the numerous exemptions reveal that the LET is in fact targeted principally, if not only, at adult entertainment facilities, which are protected by the First Amendment. The LET is therefore content specific; it is subject to strict scrutiny; and it is unconstitutional.

There was a similar pattern of exceptions in the case of **Church of Lukumi v. Hialeah**, 508 U.S. 520 (1993). The Church of Lukumi was a church that practiced the Santeria religion, which has animal sacrifice as one of the principle tenets of its belief system. One of the city ordinances in question was, on its face, a broad prohibition against "[W]hoever . . .unnecessarily. . . kills any animal." **Id.** at 573. It was determined, however,with both textual and as applied exceptions, that the city deemed "hunting, slaughtering of animals for food, eradication of insects and pests, and euthanasia as necessary." **Id.** at 537. The city justified the exceptions because it believed that "animal sacrifice is 'different' from the animal killings that are permitted by law []. According to

the city, it is 'self-evident' that killing animals for food is 'important'; the eradication of insects and pests is 'obviously justified'; and that euthanasia of excess animals 'makes sense'." **Id.** at 544. The Supreme Court determined that the city, by this pattern of exceptions, devalued the reasons given for precluding the killing of animals in a First Amendment (religious) context. **Id.** at 537-538. Thus, the ordinances in question, the Court determined, had "every appearance of a prohibition that society is prepared to impose upon [Santeria worshipers] but not upon itself." **Id.** at 545 (internal cite omitted).

Just as in the **Lukumi** case, the Department exempts numerous forms of live entertainment from the LET, including but not limited to: live entertainment at trade shows, shopping malls, restaurants, and amusement rides; music performed by musicians who move constantly through the audience; outdoor concerts; many performances at casinos; and vocal and instrumental music in a restaurant or lounge if the music doesn't interfere with conversation or cause patrons to watch. Yet the adult entertainment establishments are still required to pay the tax. Thus, the LET has every appearance of a prohibition that society is prepared to impose upon people engaged in erotic expression, but not upon itself. The Supreme Court established in **Lukumi** that such distinctions rendered a regulation unconstitutional:

> "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is ***not compelling. It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.***"

Id. at 546-547 (emphasis added, citations omitted).

There is no First Amendment protection given to NASCAR racing or boxing. Nor do people generally oppose or take issue with the type of musical or live entertainment provided in shopping malls, amusement rides, casinos, restaurants, or concerts. Yet, the LET does not apply to these activities. Instead, the LET essentially only applies to live entertainment that is in fact fully protected by the First Amendment. As is the case in **Lukumi**, such a tax must fail to pass constitutional scrutiny. It is also the case that such a tax "simply cannot be defended on the ground that partial prohibitions may affect partial relief." **Florida Star v. B.J.F.**, 491 U.S. 524, 540 (1989).

Also, the Department only attempts to addresses two of the many exemptions set forth by the LET, boxing and NASCAR, without even discussing why the other forms of live entertainment are exempted. The Department cites the large amount of revenue brought in by the NASCAR races, however, no consideration is given to the amount of revenue and taxes live entertainment establishments are ***already*** paying in sales and income tax on top of the LET. The argument made by the Department is that the LET is simply a revenue generating measure, but even the legislative history of this tax demonstrates that the tax burden was simply shifted from the casinos (which are not protected activity under the Constitution) to the providers of live entertainment, which ***are*** protected by the First Amendment.

Furthermore, should any doubt remain, the legislative history unequivocally bears out the discriminatory intent of the legislature when it enacted the content-based LET. A salient example of this is the "Minutes of the Meeting of the Assembly Committee on Commerce and Labor" recorded during the 73rd Congressional Session on May 16, 2005, attached hereto as Exhibit A.[6] Since the Department was unable to located the document, the Taxpayers note that this was the committee meeting where it was debated whether to use the language "adult live entertainment" to better capture adult clubs in the amended versoin or whether that would make the target of the LET too obvious to the courts:

> **Chairwoman Buckley:**
> My biggest concern with the bill is its constitutionality. . . . I'm concerned that if we just put ["]live adult entertainment,["] that might be held unconstitutional. I wonder if a better approach might be to pick out a few more things like the racetrack and sporting events, but to delineate all those separate ones and leave it like that. We could fix and refine the language to make sure we're more careful and more able to describe things that might be caught up rather than put into our statute the phrase "adult entertainment." which puts a big red flag on it for the courts. What are your thoughts on that?
>
> **Senator Titus:**

---

[6] The Taxpayers duly recognize that this legislative history reflects debate on how the 2003 legislation should be modified rather than on the original enactment of the 2003 legislation. However, this does not detract from the fact the history unequivocally demonstrates that the 2003 legislation's tax burden befell live adult entertainment in a greatly disproportionate manner. Indeed, the discussion indicates that the tax failed to bring in the intended revenue because the 300-seat requirement, in action, excluded many of the adult clubs that were intended as a revenue source.

> At one time the brothels were included, so that would be broader. Your can make the argument that this is a special kind of business that poses special kinds of social problems and therefore you can attach them. It's worth doing, and if an elected court in the state wants to challenge it, that's fine. None of the parts of the Constitution are absolute and they're all subject to interpretation. They interpreted the property tax we recently passed as maybe constitutional, and we can see how flexible the Constitution is in Nevada. I think its worth the chance to put it in there.

ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess., p. 19 (May 16, 2005) (clarification added), Exhibit A.

The Minutes also elucidate that the intent behind the tax was to further ratchet up the tax burden on adult entertainment, even though adult entertainment was already paying the vast majority of the existing tax:

> **Senator Dina Titus, Clark County Senatorial District No. 7:**
> The tax package from the 2003 Legislative Session included the entertainment tax, which quickly proved a bookkeeping nightmare. It also failed to generate the revenue we had anticipated and it didn't adequately bring in a group some of us intended to be covered, which are the striptease clubs that have proliferated, primarily in southern Nevada.
>
> * * *
>
> It will do a better job of capturing adult live entertainment because it eliminates that 300 seating requirement.
>
> * * *
>
> Certainly the intent of the live entertainment tax was not to get nudist colonies, but ***to get striptease clubs***.
>
> * * *
>
> **Chairwoman Buckley:**
> I wonder if we could do it in a way that's a little broader but gets at the problems so we could avoid losing the revenue. We're getting the most revenue from adult entertainment clubs, which is $6 million dollars, the highest amount paid under the live entertainment tax. The next one is race tracks at $1.5 million, but everything else pales in comparison to how much they're bringing in now, and I would hate to give them back their $6 million.

Id. at 17-19 (names bolded in original) (emphasis added), Exhibit A.

This legislative history also explains that NASCAR racing and other sporting events were exempted from the bill because they were believed to be "family oriented" and not because of the "prodigious economic activity" that the Department has asserted as a pretext:

> **Senator Dina Titus, Clark County Senatorial District No. 7:**

> This eliminates seating requirements, which were problematic I the original bill. It eliminates sporting events, which are family oriented. We believe those are attended by local families, and eliminating this would help to get a second NASCAR race, an all-star basketball game, and a baseball team. . . .
>
> * * *
>
> **Senator Titus**:
> I agree with that. The 300-seat requirement has kept a lot of those clubs from paying. If you decide to amend this and do something with it, be sure to keep that in mind because that's where a lot of the revenue is. The fiscal Division in the Senate argued that if you eliminate some of the family-oriented businesses like NASCAR and you take out the 300-seat at the same time, that will more than make up for any lost revenue.

Id.

The 300-person seating requirement was, in fact, lowered to a 200-person seating requirement, even though adult entertainment was already paying four-times more in taxes that the next contributor under the LET. N.R.S. § 368A.200(5)(d),(e). The next largest contributor under the previous scheme was racetracks. Now racetracks are eliminated via the NASCAR exception and via the exception for all "[l]ive entertainment that is provided to the public in the outdoor area. . . ." N.R.S. § 368A.200(5)(o),(m). Now, in the Committee's own words, the taxes paid by any remaining providers of live entertainment that the legislature forgot to exempt "pale in comparison" to the amounts paid by adult entertainment establishments. ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess., p. 19 (May 16, 2005), Exhibit A.

Hence, the department cannot genuinely argue that this is not a content-based regulation that targets certain speech. Every path of analysis leads the LET directly to strict scrutiny.[7]

And, of course, the LET cannot survive strict scrutiny because the Department has failed to present a compelling governmental interest the tax promotes outside of raising revenues:

> "The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally. . . ."

---

[7] This section as a whole also further addresses the Department's quizzical argument that the "LET classifications are not unconstitutionally overbroad," which merits no further discussion.

Minneapolis Star, 460 U.S. at 586. Since the Department has not even attempted to assert a compelling interest in taxing constitutionally protected live entertainment differently from businesses generally, the LET fails strict scrutiny and must be declared unconstitutional under the First Amendment and the correlating provisions of the Nevada Constitution.

C. THE TAXPAYERS ARE EXEMPT FROM TAXATION.

The Taxpayers have demonstrated that federal law holds that states are not permitted to impermissibly tax First Amendment protected expression. The Department again (as in its initial denial of the refund claims) does not state specifically why the Taxpayers' entertainment, which is clearly protected by the United States and Nevada Constitutions, is not exempt under N.R.S. § 368A.200(5)(a).

IV. CONCLUSION

For the reasons set forth above as well as the reasons set forth in the Taxpayers' Notices of Appeal, the Taxpayers respectfully request that this Commission reverse the Nevada Department of Taxation's denial of their request for refund of any and all Live Entertainment Taxes paid for the reporting periods of January, February, March, and April 2004, and all months forward.

Respectfully Submitted:

Dated: June 22, 2007

BRADLEY J. SHAFER*, MI Bar No. P36604
Shafer & Associates, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906-2110
(517) 886-6560 - telephone
(517) 886-6565 - facsimile
shaferassociates@acd.net - email
*Pending Admission *Pro Hac Vice*

DIANA L. SULLIVAN, Bar No. 4701
Ghanem & Sullivan, LLP
8861 West Sahara Avenue, Suite 120
Las Vegas, Nevada 89117
(702) 862-4450 - telephone
(702) 862-4422 - facsimile
dsullivan@gs-lawyers.com - email

CERTIFICATE OF SERVICE

I certify that I am an employee of Shafer & Associates, P.C., and that on the 22nd day of June, 2007, I served the foregoing Appellants' Reply Brief in Opposition to the Nevada Department of Taxation's Denial of Appellants' Refund Requests as indicated below:

Via U.S. Mail , Facsimile and Electronic Mail

Mr. Dennis Belcourt
Deputy Attorney General
Mr. David J. Pope
Sr. Deputy Attorney General
555 East Washington Ave., #3900
Las Vegas, NV 89101

DJPOPE@ag.state.nv.us
DLBELCOU@ag.state.nv.us

Via Electronic Mail

Erin Fierro
Executive Assistant
Nevada Department of Taxation
efierro@tax.state.nv.us

Andrea E. Pritzlaff
Shafer & Associates, P.C.

EXHIBIT A

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON COMMERCE AND LABOR

Seventy-Third Session
May 16, 2005

The Committee on Commerce and Labor was called to order at 2:09 p.m., on Monday, May 16, 2005. Chairwoman Barbara Buckley presided in Room 4100 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4406 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Ms. Barbara Buckley, Chairwoman
Mr. John Oceguera, Vice Chairman
Ms. Francis Allen
Mr. Bernie Anderson
Mr. Morse Arberry Jr.
Mr. Marcus Conklin
Mrs. Heidi S. Gansert
Ms. Chris Giunchigliani
Mr. Lynn Hettrick
Ms. Kathy McClain
Mr. David Parks
Mr. Richard Perkins
Mr. Bob Seale
Mr. Rod Sherer

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Senator Michael Schneider, Clark County Senatorial District No. 11
Senator Dennis Nolan, Clark County Senatorial District No. 9
Senator Dean Rhoads, Northern Nevada Senatorial District
Senator Dina Titus, Clark County Senatorial District No. 7

STAFF MEMBERS PRESENT:

Brenda J. Erdoes, Legislative Counsel
Diane Thornton, Committee Policy Analyst
Russell Guindon, Deputy Fiscal Analyst
Vanessa Brown, Committee Attaché

OTHERS PRESENT:

Dino DiCianno, Deputy Director, Nevada Department of Taxation
Bobbette Bond, M.P.H., Government and Community Affairs Manager, Culinary Workers Health Fund
Jack Jeffrey, Legislative Advocate, representing Southern Nevada Building and Construction Trades Council
Bob Ostrovsky, Legislative Advocate, representing Employers Insurance Company of Nevada
Nancyann Leeder, Nevada Attorney for Injured Workers, Nevada Department of Business and Industry
Valerie Rosalin, Director, Consumer Health Assistance, Office of the Governor
Robin Drew, Private Citizen, Las Vegas, Nevada
Jim Nadeau, Legislative Advocate, representing the Nevada Association of Realtors
Charlie Mack, Owner and Broker, Mack Realty Commercial Specialists, Las Vegas, Nevada; and President, Nevada Real Estate Commission
Buffy Dreiling, Legal Counsel, Nevada Association of Realtors, Reno, Nevada
Gail Anderson, Administrator, Real Estate Division, Nevada Department of Business and Industry
Joseph Johnson, Legislative Advocate, representing Independent Power Corporation, Reno, Nevada; and representing the Toiyabe Chapter of the Sierra Club
Bill Bible, President, Nevada Resort Association, Las Vegas, Nevada
Denis Neilander, Chairman, Nevada State Gaming Control Board
Terry Graves, Legislative Advocate, representing The Beach Night Club, Las Vegas, Nevada
Don Logan, President and General Manager, Las Vegas 51s Baseball Club, Las Vegas, Nevada
Joe Brown, Legislative Advocate, representing Las Vegas Motor Speedway, Las Vegas, Nevada
Chris Powell, General Manager, Las Vegas Motor Speedway, Las Vegas, Nevada

Scott Sherer, Legislative Advocate, representing Paramount Parks, Las Vegas, Nevada
Taylor Dew, Magical Hula Girls, Las Vegas, Nevada
Billy Johnson, Vice President and Chief Operating Officer, Las Vegas Wranglers, Las Vegas, Nevada
Richard Clauser, Naturist Society and The Naturist Action Committee
Sabra Smith-Newby, Legislative Advocate, representing The City of Las Vegas, Las Vegas, Nevada
Allen Lichtenstein, General Counsel, American Civil Liberties Union, Nevada
Don Soderberg, Chairman, Public Utilities Commission of Nevada
Jon Wellinghoff, Legislative Advocate, representing MGM/Mirage, Power Light Corporation, and Freus Corporation, Las Vegas, Nevada
Michael Yackira, Executive Vice President and Chief National Officer, Sierra Pacific Resources, Nevada Power, and Sierra Pacific Power Company, Nevada
Adriana Escobar-Chanos, Consumer Advocate and Chief Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General, State of Nevada
Mark Russell, Chairman, Nevada Renewable Energy and Conservation Task Force
Tim Carlson, Member, Renewable Energy Task Force
Fred Schmidt, Legislative Advocate, representing ORMAT, Sparks, Nevada
Dan Schochet, Vice President, ORMAT, Sparks, Nevada; and Geothermal Member, Nevada Renewable Energy Task Force
Robert Tretiak, Business Development Officer, International Energy Conservation, Las Vegas, Nevada

Chairwoman Buckley:
[Called the meeting to order. Roll called.] I'll open the hearing on S.B. 483.

Senate Bill 483: Establishes joint and severable liability for payment of certain taxes, interest and penalties administered by Department of Taxation. (BDR 32-394)

Dino DiCianno, Deputy Director, Nevada Department of Taxation:
Senate Bill 483 is brought to you on behalf of the Department of Taxation. The bill moves the provisions with respect to responsible party determinations from the sales tax provisions found in S.B. 372 and S.B. 374, and includes them into NRS [*Nevada Revised Statutes*] 360, which are the general administrative

Assemblyman Seale:
Are there other states on the West Coast that have an exemption on this kind of equipment as well?

Senator Rhoads:
I'm sure there are, but LCB [Legislative Counsel Bureau] staff would have to tell you that.

Chairwoman Buckley:
Thanks for that. We'll close the public hearing on S.B. 398 and open the hearing on S.B. 247.

Senate Bill 247 (1st Reprint): Revises provisions governing tax on live entertainment. (BDR 32-680)

Senator Dina Titus, Clark County Senatorial District No. 7:
The tax package from the 2003 Legislative Session included the entertainment tax, which quickly proved a bookkeeping nightmare. It also failed to generate the revenue we had anticipated and it didn't adequately bring in a group some of us intended to be covered, which are the striptease clubs that have proliferated, primarily in southern Nevada. It did, however, introduce us to the touring hula girls who are constantly before us and were helpful in bringing some of the problems with the original bill to our attention. For those reasons, I've introduced S.B. 247 as a reform of the entertainment tax.

The amended bill sets up parallel entertainment taxes, a live entertainment tax, and an adult entertainment tax. The live entertainment tax applies only to non-restricted gaming facilities. It's administered by the Gaming Control Board and exempts sporting events that occur in non-restricted gaming facilities, keeping the same tax that was in place before, at 10 percent on admission, drinks, food, and souvenirs.

The adult entertainment tax in Section 11 provides a tax at 10 percent on everything in non-restricted gaming and non-gaming facilities that offer live adult entertainment, which is defined in Section 8 of the statute. It would be administered by the Department of Taxation and it does not include houses of prostitution.

This eliminates seating requirements, which were problematic in the original bill. It eliminates sporting events, which are family oriented. We believe those are attended by local families, and eliminating this would help to get a second

NASCAR race, an all-star basketball game, and a baseball team. It also eliminates taverns and restaurants that have occasional entertainment on weekends such as a piano player or a small band. It will do a better job of capturing adult live entertainment because it eliminates that 300 seating requirement. This is an industry that should pay its fair share because it does put additional burdens on society in terms of law enforcement and alcohol regulation. Because these people don't pay workers' comp or any benefits, their employees often become a burden on social services of the state, so it's only fair they should contribute.

[Senator Titus, continued.] An amendment (Exhibit D) is being brought forward by the Nevada Resort Association and others who would like us to put in statute the regulations that have worked over the last 18 months. The Tax Commission did a good job of working those out, so we don't want to start that process all over again. I support putting those regulations in the statute; it's a good amendment. There's also an amendment (Exhibit E) to clarify that mechanical rides like you find in the "*Star Trek* Experience" would not be considered live entertainment. I don't have any problem with that amendment, either.

There was some testimony on the Senate side by a group of naturists. I thought that meant people who hiked and picked flowers, but in the old days you called them nudist colonies. Certainly the intent of the live entertainment tax was not to get nudist colonies, but to get striptease clubs. If there's some way you can accommodate them, that is fine too.

If you are going to consider amendments to this bill, you might also consider amending the provision that's the severability clause. The clause says that if some part of this is found to be unconstitutional, it goes back to the old entertainment tax. We don't want that to happen, so it should be written to say if something is found unconstitutional the other part of the tax in this new bill would stand.

Chairwoman Buckley:
My biggest concern with the bill is its constitutionality. We already had an Assembly bill we passed that exempts the *Star Trek* ride. Now someone is claiming the free pens they give you at a convention should be taxed, so we put that in there. We clarified the strolling and the hula girls, and I don't think anyone opposes the Resort Association language (Exhibit D). We can clarify that wasn't the intent and everyone supports that. A lot of that was already in the Assembly bill that we sent to Ways and Means. I'm concerned that if we just put live adult entertainment, that might be held unconstitutional. I wonder if a better approach might be to pick out a few more things like the racetrack and

sporting events, but to delineate all those separate ones and leave it like that. We could fix and refine the language to make sure we're more careful and more able to describe things that might be caught up rather than to put into our statute the phrase "adult entertainment," which puts a big red flag on it for the courts. What are your thoughts on that?

Senator Titus:
At one time, the brothels were included, so that would be broader. You can make the argument that this is a special kind of business that poses special kinds of social problems and therefore you can attach them. It's worth doing, and if an elected court in the state wants to challenge it, that's fine. None of the parts of the *Constitution* are absolute and they're all subject to interpretation. They interpreted the property tax we recently passed as maybe constitutional, and we can see how flexible the *Constitution* is in Nevada. I think it's worth the chance to put it in there.

Chairwoman Buckley:
I wonder if we could do it in a way that's a little broader but gets at the problems so we would avoid losing the revenue. We're getting the most revenue from adult entertainment clubs, which is $6 million dollars, the highest amount paid under the live entertainment tax. The next one is race tracks at $1.5 million, but everything else pales in comparison to how much they're bringing in now, and I would hate to give them back their $6 million. Perhaps with the severability clause, but I hate to bring back anything we might want to fix now in terms of getting them excluded from the bill. It sounds like the goals are pretty much the same.

Senator Titus:
I agree with that. The 300-seat requirement has kept a lot of those clubs from paying. If you decide to amend this and do something with it, be sure to keep that in mind because that's where a lot of the revenue is. The Fiscal Division in the Senate argued that if you eliminate some of the family-oriented businesses like NASCAR and you take out the 300-seat at the same time, that will more than make up for any lost revenue.

Chairwoman Buckley:
Could staff obtain the fiscal information on the live entertainment tax for the Committee members? It can't be by business, but it can be by group and you can distribute that to the entire Committee. Senator Titus, we thank you for your testimony. We don't have a problem with the *Star Trek* amendment (Exhibit E); we already approved codifying the definitions.

Bill Bible, President, Nevada Resort Association [NRA], Las Vegas, Nevada:
You've seen the proposed amendment (Exhibit D) which codifies some of the existing regulations resolved in a lot of work between the Department of Taxation, the Tax Commission, the Gaming Control Board, and the Nevada Gaming Commission to resolve the less-than-perfect bill that emerged from the 2003 Legislative Session. We had a concern if S.B. 247 included or excluded it from taxation, and it doesn't exclude them, but we have a problem in outdoor venues in Laughlin and northern Nevada. Clearly in an outdoor venue, if you have some type of entertainment function that would be subject to the live entertainment tax and you pay a live admission fee, that becomes a taxable event. You also have a number of activities that take place with a band where there's no admission charge. Typically, those events have been excluded from taxation through some of the regulatory structure, but it would be helpful if we had a specific amendment that indicated that in an outdoor venue there would be no applicability of tax unless there's actually an admission charge. This created a two-part threshold which is an admission charge, and the other being live entertainment present.

Chairwoman Buckley:
That's current law?

Bill Bible:
That's current law through interpretation. This was a very complicated bill and we spent a lot of time debating and refining the various points of the various regulatory bodies, which is why we want to codify some of those existing regulations. That would at least provide additional clarity, principally in northern Nevada, but to some extent in Laughlin, where we have outdoor events on a seasonal basis.

Denis Neilander, Chairman, Nevada State Gaming Control Board:
There are a number of exemptions we've created through the rule-making process, and if the Committee chooses to codify those, that would be appropriate. Mr. Bible mentioned the situation with outdoor venues, and most of them have been excluded from the tax because they fit under one of these other exemptions in the amendment. There is no one particular provision that just addresses outdoor venues and there could be an open question about whether or not it's a taxable event even if you don't have an admission charge. The intent has been to focus on venues where there are no admission charges, and that would be an appropriate amendment. There are amendments that are currently in S.B. 392, which hasn't come over yet, but if you choose to process this legislation, the Board would be able to provide you with those amendments.

[Denis Neilander, continued.] The original legislation housed the regulation authority with the Board instead of the Nevada Gaming Commission, and that was an oversight. While the Board adopted the regulations, we did it together with the Commission and the Nevada Tax Commission, so that would go back to the way we do rulemaking, which is to say the Nevada Gaming Commission does it.

There is a provision in the existing law that requires you to place funds in a certain trust account and you'll hear from the Department of Taxation and us. That's not necessary, we've never required it before, and it would be a simple repeal of that provision.

You can read certain provisions that require the taxes be paid on a cash basis within the month they're collected, but it's probably more appropriate to give licensees the option of paying on either an accrual or cash basis. Right now, we do allow licensees to pay some of those taxes on an accrual basis, so we give them the option.

Assemblyman Anderson:
I can think of several events that take place outside in my community because of the redevelopment agency. Are you saying within an outdoor area you have one part of it with a separate entry which requires an admission fee, compared to something that is provided free of charge to everyone who's at the event? If it's part of Reno's ArtTown and if you had to come into Idylwild Park to see the entertainment show, you'd have to pay for it, but if you stand on the river, you don't have to pay for it? So if you can stand outside and see it, you don't have to pay for it, but if you enter into a special area where you have designated seating, you do have to pay for it, and therefore it's subject to the entertainment tax?

Bill Bible:
That's correct. In outdoor venues, mostly in northern Nevada or Laughlin, there has been some difficulty in the interpretation of the statute. If you conceptualize with the Rib Cook-Off, you have a "village" sponsored by the Sparks Nugget, and maybe two other licensees. In order to get into that village, you have to go through a gate to control access and pay an admission fee. There is live entertainment present, so that is subject to tax. In a different situation in the parking lot of the Hilton during Hot August Nights, there are vending stands, a bandstand, and sales of food and beverages. There was an argument that this would be subject to an entertainment tax because you could hear and see the live entertainment even though you did not pay an admission fee. Because of the way the existing regulations were interpreted by the Nevada State Gaming Control Board, they did not choose to apply the tax, but it was their legal

construction of some of the language that was adopted through the rule-making process, so we want to codify it to make it clear that in an outdoor venue, unless there's restricted access and someone is charged an admission price, there is no applicability of the tax.

Assemblyman Anderson:
If we were to take the Candy Dance in Genoa and it had music and there was an admission charge, then it would—

Bill Bible:
Under this proposal, the Candy Dance will no longer be a valid example because that's not a licensed gaming premise. If that was a licensed gaming premise, if you had to pay an admission fee and there was live entertainment, everything from the food, beverages, merchandise, and the admission fee would be subject to the entertainment tax.

Assemblyman Anderson:
The Rib Cook-Off, because it's put on by the Nugget, fits into the scenario, as does the Big Easy, which is put on by the Silver Club. But Hot August Nights doesn't because it's not put on by a casino?

Bill Bible:
It's not necessarily who sponsors, but who has control of the property and what are considered the premises of the establishment. With the Rib Cook-Off, part of that is done within the property controlled by the City of Sparks, but they've agreed to allow the Nugget and the sponsoring entities control over that particular property. It becomes a technical issue as to the applicability of the tax. If you think about them within the parking lot of the Hilton, or the parking lot of the Atlantis across Virginia Street, those are considered part of the premises of licensed gaming establishments, even though they're not within the confines of the buildings.

Assemblyman Anderson:
This bill doesn't change when we are taxing those entertainments and when we aren't?

Bill Bible:
This will clarify the existing tax and make it abundantly clear that those outdoor venues, unless there is an admission charge and live entertainment, don't have applicability with the tax.

Chairwoman Buckley:
I'm going to ask our staff to do a comprehensive document combining these proposed amendments, the ones we already approved, the clarifications on further exempting some of the folks from the live entertainment tax, and prepare it for our Ways and Means staff. We should not just say only the adult entertainment tax, but look at all the ones we want to exempt and pass it out that way. We really get into constitutional trouble. I don't have a problem with any of these amendments, including the one from the nudist colony (Exhibit D). I don't think the current term was intended to sweep into this. If we could list all the exemptions, we can re-refer this to Ways and Means, which has our other live entertainment bill. The Chairman of Ways and Means can identify fiscal impact. Most of these things we've identified are de minimus and can be passed. At some point with the larger ticket items, there might be a concern, but we should list and price them all and re-refer it to Ways and Means and have all the bills in one Committee. Is this exempted, Brenda?

Brenda Erdoes:
I don't believe it is exempted at this time. We might need to ask Mark [Stevens, Fiscal Division] if he's going to declare this eligible for exemption.

Chairwoman Buckley:
What about the other bill that Mr. Parks presented testimony on? That's definitely exempted, so maybe we can exempt this one, too, if Mark is willing to look at it. The same issues are with the Assembly committee bill, so we could combine them all after we price them all and figure out which way we're going to go. Why don't we refer without recommendation, get the complete list, and then we'll see those members in Ways and Means or on the Floor as we put them all together so we don't delay it.

Assemblywoman Giunchigliani:
I'll email Mark to see if this will qualify for an exemption at the same time.

Assemblyman Anderson:
I appreciate the fact that we want to move with some speed and dispatch, but if we don't have it exempt ahead of time, we'll have a problem, and we need at least a couple of the amendments for clarity.

Chairwoman Buckley:
We'll hold it to Wednesday or Friday, but in the meantime I'd ask staff to go ahead and work on that list.

Assemblyman Perkins:
If there's a problem with an exemption, you can always refer it back to Committee, and if you hold onto it until Wednesday or Friday and you can't get the exemption, then we'll have other issues. As Ways and Means looks at the bills collectively to see what we want to do with the live entertainment tax in the state, it's best to remove that without recommendation. If it's not exemptible, then we can refer it back to Commerce and Labor and we'll deal with it here.

ASSEMBLYWOMAN GIUNCHIGLIANI MOVED TO RE-REFER SENATE BILL 247 TO THE ASSEMBLY COMMITTEE ON WAYS AND MEANS.

ASSEMBLYMAN ANDERSON SECONDED THE MOTION.

Senator Titus:
There are a number of people who made a special trip up here to testify in favor of the bill. Would you let them come forward and put it on the record to make their trip worthwhile?

Chairwoman Buckley:
Of course.

Terry Graves, Legislative Advocate, representing The Beach Night Club, Las Vegas, Nevada:
We participated extensively during the interim hearings with the Tax Commission and the Gaming Commission on formulating the regulations. I did not have a chance to see what NRA [Nevada Resort Association] was proposing in that amendment (Exhibit D), but we certainly helped craft that. On the Senate side, we were supportive of Senator Titus's bill to try to clean up the live entertainment tax, and we appreciated her efforts.

Don Logan, President and General Manager, Las Vegas 51s Baseball Club, Las Vegas, Nevada:
We're the only professional team that's survived in Las Vegas for 23 years. We do provide the best fun, family-oriented entertainment in southern Nevada. The explosive growth and changes that have taken place down there make it more and more difficult each year, and the entertainment tax is one added burden that fell in our lap inadvertently last time. Unfortunately, we've had to pay the bill, and not having to do it would make it that much easier. Our margins

continue to shrink, and for us to provide entertainment with something real and wholesome in Las Vegas, it would help us.

Joe Brown, Legislative Advocate, representing Las Vegas Motor Speedway, Las Vegas, Nevada:
In my 40 years practicing law in Las Vegas, the term "entertainment capital" has been based on bringing tourists to Nevada and attracting them any way possible. We then get taxes from them by room taxes, sales taxes, gasoline taxes, gaming taxes, and every other way you can take money from their wallets. A few years ago, some people invested millions of dollars in a speedway and it's not the largest event in Nevada every year.

Chris Powell, General Manager, Las Vegas Motor Speedway, Las Vegas, Nevada:
I'm here in support of S.B. 247. The Las Vegas Motor Speedway provides an enormous contribution to Nevada's economy. The implementation of the live entertainment tax has proven to be unduly burdensome to our business. The passage of S.B. 247 not only will enhance our business, but it will put us back on an equal playing field with other speedways in an increasingly competitive environment. We've not yet received comparable numbers for the 2005 NASCAR Weekend; the 2004 Weekend put more than $142 million into Nevada's economy. That's a one-time expenditure that did not just affect Las Vegas Motor Speedway, but also gaming, hotels, restaurants, taxicabs, and retail shops. Furthermore, we employ roughly 2,500 people during the course of the weekend in March.

NASCAR's growth over the years has been astounding. These events routinely draw 100,000 to 175,000 people at various events across the country. Several members of the Legislature were in attendance at our March event. In the past year, speedways in the Los Angeles and Phoenix markets have been awarded with a second annual NASCAR event, an event that has put millions of dollars into their communities. A second date in Las Vegas, possibly in the fall, would be worth hundreds of millions of dollars to our state each year and would yield much more to our economy than the current live entertainment tax.

Occasionally we have issues where an event might get rained out, yet we've already paid the tax on it. As we sit here right now, there are ticket agents at the speedway who are putting numbers into computers, selling tickets, and entering in renewals for next year's event. If one day gets rained out and we have to refund money, the tax we are paying for next March's event is being paid at the end of this quarter, so it gets unwieldy. A lot of our tickets are tied to food, so the food is not taxed, but the ticket is. Another issue is a ticket may say $49, but because of our ticketing system, a $49 ticket has to be advertised

at the total price of $51.45, which is above that $50 threshold that any retailer wants to be below.

Chairwoman Buckley:
Could you tell us if the other states where other tracks are have any sort of tax?

Chris Powell:
The two markets that in the last 12 months have been awarded second NASCAR dates per year are in California in Arizona. They don't have an admissions tax.

Chairwoman Buckley:
What about ones with the first race? How does it compare to any one? Are there other places?

Chris Powell:
I'm just speaking to states whose speedways have recently been given second dates.

Chairwoman Buckley:
What other states have speedways with a tax?

Chris Powell:
Texas has some type of tax, but it's not just an admissions tax, it's everything involved in that category.

Chairwoman Buckley:
So it's more extensive than ours. The most convincing thing is last year it raised $1.5 million?

Chris Powell:
According to the Las Vegas Convention and Visitors Authority, which intercepts customers throughout the course of the event weekend, those three days in March pumped $142.5 million into the economy.

Chairwoman Buckley:
I'm saying that last year, the tax only rose. What you paid was relatively small, which means it doesn't affect the budget much; so I'm trying to make a point for you.

Scott Sherer, Legislative Advocate, representing Paramount Parks, Las Vegas, Nevada:
I appreciate your comments regarding the *Star Trek* amendment (Exhibit E). If this bill is processed in this fashion with regard to the effective date, it might make sense to make these exemptions that are being added effective upon passage and approval so they would be part of the chapter as it exists on June 30, 2005, if in fact there is any ruling on the unconstitutionality.

Chairwoman Buckley:
Let's move to Las Vegas.

Taylor Dew, Magical Hula Girls, Las Vegas, Nevada:
Lines 21 through 24 state "this bill provides that if the provisions of this bill concerning the tax on adult entertainment are held to be unconstitutional, the tax and all forms of live entertainment will be reinstated as currently set forth in provisions in NRS 368A." If this is removed, I'm in favor of this bill.

Billy Johnson, Vice President and Chief Operating Officer, Las Vegas Wranglers, Las Vegas, Nevada:
If you think the Speedway had a relatively small total in tax, wait until you hear about ours. Don Logan of the 51s was right when he said that they are the only franchise in Las Vegas to make it in 20 years. We're relatively new at two years old, going into our third season. That's a factor that we looked at when we decided to put a minor league hockey team in Las Vegas. That history in Las Vegas has been very difficult.

Our business in minor league sports tends to be fragile. In hockey, we only have 36 dates, which means we're effectively closed 11 months out of the season, so we have to capture our revenues in order to survive in a brief period of time. We only have 36 three-hour opportunities to do that. Most of our customers are families who want affordable entertainment. That's how we thrive and that's why we're fragile as a business. The tax last year meant we had to charge and pass that tax on to our customers. Oftentimes, families buy four to six season tickets at $144 for a family of four, and one season ticket holder told me last season when the tax was applied, "That's basically an electric bill for me for one month." We're here to represent our contingency of families in Las Vegas who are looking for something to do with quality time with their kids, friends, and families, to preserve that and increase our chances of surviving.

Chairwoman Buckley:
Thank you, and good luck with the Wranglers. For those of us with children who want more options, we do appreciate you, so thanks very much.

Richard Clauser, Naturist Society and The Naturist Action Committee:
We've changed the terms of what we call ourselves. "Colonies" doesn't fit anymore, so we call ourselves resorts and groups. We are not opposed to the adult entertainment tax. If you look at nudist people, probably 95 percent wouldn't go to an adult entertainment place. Our concern is that the definition of "adult entertainment" is so broad that it would encompass a lot of activities of a nudist group or resort. Our activities are family-oriented and are no different than if you went to a clothed resort; our patrons simply don't have clothes on. Our concern is that it's so broad that we need to better define what constitutes "adult entertainment." I realize there are constitutional issues if you narrow it down too much, but it's so broad it could be onerous on some of these small groups, and some are trying to help and doing good things. The Tahoe area naturists are always out there helping with causes around the Lake, and if they have a fundraiser this could conceivably apply, and that's what our concern is.

Sabra Smith-Newby, Legislative Advocate, representing the City of Las Vegas, Nevada:
I'm in support of this bill.

Allen Lichtenstein, General Counsel, American Civil Liberties Union, Nevada:
We're here to talk about the lack of constitutionality in this bill. This isn't a new issue for the courts. I dealt with an issue similar to this about 10 years ago as it related to a Clark County ordinance. The adult entertainment tax specifies a particular type of expressive content, and the courts have been very reluctant to allow that. It doesn't mean that adult entertainment venues are free from a general applicability tax, but taxing one particular type of content is not acceptable, and the courts have been clear about that. One possible exception in that is if taxes or fees can be specifically related to administrative costs for checking working cards, et cetera. This is not a revenue-neutral tax. It is not to relieve the state of certain burdens; the only exception might be to cover administrative costs. There is ample case law that proves this.

If this is passed in its current form, someone will challenge it. We at the ACLU [American Civil Liberties Union] don't involve ourselves in adult entertainment, but we would certainly lend our hand in opposing this. If it is dressed up differently, the impact is still to burden one particular type of business involving one type of content. That fact would weigh on the federal court, which would likely turn it down. The federal courts have dealt with these issues before, and we're sure this would fall as it has in other states.

Chairwoman Buckley:
I'll close the public hearing on S.B. 247. This bill is eligible for an exemption. I'd like to have the opportunity to work out the language of NRS 545, some more

exemptions, and have our Fiscal staff price it out. There are a lot of changes that will cost the state relatively little. Some changes will cost nothing at all, and that has to be part of the discussions of the money Committees.

ASSEMBLYMAN ANDERSON MOVED TO RE-REFER SENATE BILL 247 WITHOUT RECOMMENDATION TO THE ASSEMBLY COMMITTEE ON WAYS AND MEANS.

ASSEMBLYWOMAN GIUNCHIGLIANI SECONDED THE MOTION.

THE MOTION CARRIED. (Mr. Arberry and Mr. Perkins were not present for the vote.)

Chairwoman Buckley:
We'll open the hearing on S.B. 188.

Senate Bill 188 (1st Reprint): Makes various changes relating to energy. (BDR 58-364)

Don Soderberg, Chairman, Public Utilities Commission of Nevada (PUC):
Senate Bill 188 is a product of discussions that have gone on for 11 months, bringing together people involved in Nevada's energy business, energy regulation, and people with overall interest in how we are doing things. We weren't going to get together and talk about a number of regulatory issues, but we wanted to proactively address some of our bigger problems. One individual who participated in this group from the beginning was the late Richard Burdett, who was the Governor's Energy Advisor. Prior to that, he worked with us at the Commission. Mr. Burdett continually reminded us that we are spending about $3 billion a year in fossil fuels. This $3 billion for the most part is going out of the state. We kept asking ourselves what we can do about that, and we looked at the renewable portfolio standard, which was put together by the Legislature in past sessions, to reduce our dependence on fossil fuel to generate electricity. In Nevada, we're not doing a very good job of conservation.

We are called the Saudi Arabia of renewable energy in Nevada. Unfortunately, the Western United States, in which we are a leader when it comes to growth, is also the Saudi Arabia of energy waste, because over the last 25 years since the last oil crisis, we've lost the art of conserving. It's not something that is part of our daily lives and it's looked at from a dollar-and-cents point of view in

BEFORE THE

NEVADA TAX COMMISSION

IN RE:

Olympus Garden, Inc., D.I. Food & Beverage of Las Vegas, Shac, LLC, D. Westwood, Inc., K-Kel, Inc., The Power Co., Inc.,

Appellants.

NEVADA DEPARTMENT OF TAXATION'S SUPPLEMENTAL BRIEF IN SUPPORT OF THE DEPARTMENT'S DENIAL OF APPELLANT'S REFUND REQUESTS

The Nevada Department of Taxation ("Department"), through its attorneys, Catherine Cortez Masto, Attorney General, and David J. Pope, Senior Deputy Attorney General, and Dennis Belcourt, Deputy Attorney General, hereby file the Department's Supplemental Brief in Support of the Department's Denial of Appellant's Refund Requests.

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

POINTS AND AUTHORITIES

I. AUTHORITIES AND ARGUMENT

Taxing statutes are on a different footing than other statutes and are subject to the rational basis test. "[U]nlike a license fee, the purpose of which is to offset the costs of regulation, a tax is imposed for the purpose of raising revenue. *Adams Outdoor Advertising, Ltd.*, 667 A.2d 21, 24 (1995) (citation omitted). "[T]he primary purpose of taxes is always to raise money for the taxing authority." Id. (citation omitted). "[T]he government's purpose in enacting the legislation is the Court's controlling consideration, and if that purpose is unrelated to the content of the speech, then the [legislation] will be deemed to be content neutral." Id. at 27 (citation omitted). Because the primary purpose of the LET is to raise revenue, which is unrelated to the content of any of the entertainment, the LET is content neutral. See also *Forbes v. City of Seattle*, 113 Wash.2d 929, 935 (1990) (stating, "[t]he

admission tax is not 'imposed upon speech', rather, it is imposed upon an admission charge"). Unlike a statute that regulates speech, the LET allows the speech to occur and merely taxes the admission charge for the purpose of raising revenue. *Cf. City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728 (2002) (considering a statute "prohibiting 'the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof"); *Cf. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, et al.*, 502 U.S. 105, 112 S.Ct. 501 (1991) (considering a law requiring "that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account for victims"); See also *Forbes v. City of Seattle*, 113 Wash.2d 929, 935 (1990) (finding that the record did not contain any evidence that patrons had been deterred because of the admission tax). The constitutionality of a tax statute is reviewed under the rational basis test. See *Conley Motor Inns, Inc., et al.*, 728 A.2d 1012, 1014 (1999) (providing, "[c]hallenges to the constitutionality of a tax measure are reviewed under the rational basis standard . . ."). When a tax is imposed on a taxpayer who falls within a certain class, the legislative body must have a reasonable basis for singling out the particular category. *Adams Outdoor Advertising, Ltd.*, 667 A.2d 21, 25 (1995) (citation omitted). A "reasonable basis" means that the classification is not arbitrary and is "reasonable and just." Id. (citation omitted).

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

CONCLUSION

All indications are that the LET is intended to optimize revenue for the State of Nevada. The Federal and State Constitutions do not prohibit the taxation of expressive ideas. There is no indication that the LET suppresses or intends to suppress the expression

//

//

//

of any ideas. The LET should therefore be upheld against Taxpayers' facial constitutional challenges.

Dated this 23rd day of July, 2007.

CATHERINE CORTEZ MASTO
Attorney General

By: _____
Dennis Belcourt
Deputy Attorney General
State Bar No. 2658
David J. Pope
Sr. Deputy Attorney General
State Bar No. 8617
555 E. Washington Ave., #3900
Las Vegas, NV 89101
(702) 486-3426

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

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada Attorney General's Office and that on the 23rd day of July, 2007, I served the foregoing Nevada Department of Taxation's Supplemental Brief in Support of the Department's Denial of Refund Requests as indicated below:

Via U.S. Mail

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
3800 Capital City Blvd., Ste. #2
Lansing, MI 48906

Via Electronic Mail

Erin Fierro, Executive Assistant
Nevada Department of Taxation
efierro@tax.state.nv.us

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
Shafer3800@aol.com and
shaferassociates@acd.net

Andrea Adams, Esq.
Shafer & Associates, P.C.
aeadams@acd.net

Via fax

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
(517) 886-6565

Debbie Turman
An employee of the Office of the Attorney General

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

Analysis of Supreme Court Decisional Law

Excerpt from *Leathers v. Medlock*

[4][5][6][7] *447 These cases demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. Absent a compelling justification, the government may not exercise its taxing power to single out the press. See *Grosjean*, 297 U.S., at 244-249, 56 S.Ct., at 446-449; *Minneapolis Star*, 460 U.S., at 585, 103 S.Ct., at 1371. The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion. A tax is also suspect if it targets a small group of speakers. See **1444*id.*, at 575, 103 S.Ct., at 1365; *Arkansas Writers'*, 481 U.S., at 229, 107 S.Ct., at 1727. Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech. See *id.*, at 229-231, 107 S.Ct., at 1727-1729.

Applying *Leathers* criteria

For reasons of concerns about censorship, a tax receives heightened scrutiny if it:

- singles out the press
- targets a small group of speakers
- discriminates on the basis of the content of taxpayer speech

LET does not Single out the press

The LET is not applicable to the Press

Taxes on expressive activities (as opposed to taxes on press) have been upheld

- Admissions Tax (*e.g., Forbes v. City of Seattle*, 785 P. 431(1990) (movie theater challenge)
- Billboards (*Adams Outdoor Advertising, Ltd., v. Borough of Stroudsburg*, 667 A.2d 21(Cmwlth.Ct. Pa, 1995)

LET Does not Single out the Press (continued)

Contrast LET to tax at issue in *Vermt.Soc. v. Milne*, relied on by taxpayers in an effort to broaden the "single out the press" test.

In a 3-2 decision, Vermont Supreme Court found a tax on lobbying expenditures subject to strict scrutiny. In doing so, the Court stated:

- lobbying directly involves core political speech … at the very heart of what the First Amendment was designed to safeguard
- speech concerning public affairs is more than self-expression; it is the essence of self-government

LET Does not Single out the Press (continued)

In contrast, taxing entertainment is not singling out for taxation speech that is at the core of the First Amendment.

LET does not target a small group of speakers

- Taxpayers have failed to show a risk of "censorship of particular ideas or viewpoints." See *Leathers*.
- The LET is actually an enlargement of the earlier casino tax, taxing more entertainment venues than ever before
- The lion's share of the live entertainment tax still comes from gaming licensees, not from the Taxpayers challenging this tax. See next slide.

LET--Dept. Collections, FY 06	$8,688,864
LET—Dept. and GCB Collections, FY 06	$117,109,288
Percentage of total collections from non-gaming licensees, FY 06	7.41%

Sources: Governor's Budget, 2007-2009, Introduction, p. 5 and the Nevada Department of Taxation's Annual Report, 2005-2006

The Legislative Intent of the LET Does not support Taxpayers' targeting theory

- Taxpayers rely on statements by then Chairman Buckley and Senator Titus regarding S.B. 247. Such statements are not legislative history for the LET.
- Exemptions do not support Taxpayer's targeting theory

S.B. 247 of the 2005 Legislature Does not Prove Discriminatory Intent for the LET.

S.B. 247 would have narrowed the number of speakers to which the LET applied, by limiting application for non-gaming taxpayers to adult entertainment:

> **Sec. 10.** ***"Live adult entertainment" means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose which includes the exposure of one or more personal anatomical features by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present.***
>
> **Sec. 11.** ***"Personal anatomical feature" means any portion of the:***
>
> ***1. Genitals, pubic region, anus or perineum of any human person; or***
>
> ***2. Areola of any female human breast or of any male human breast which has been surgically altered to appear as a female human breast.***

SENATE BILL NO. 247–SENATOR TITUS

MARCH 21, 2005

Referred to Committee on Taxation

SUMMARY—Revises provisions governing tax on live entertainment. (BDR 32-680)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

~

EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets **[~~omitted material~~]** is material to be omitted.

AN ACT relating to taxation; revising the provisions governing the applicability, imposition, collection and administration of the tax on live entertainment; and providing other matters properly relating thereto.

SENATE BILL NO. 247–SENATOR TITUS

MARCH 21, 2005

Referred to Committee on T[illegible]a[illegible]on

SUMMARY—Revises p[illegible]visions g[illegible]ove[illegible]ni[illegible] tax on live entertainment[illegible]2-680[illegible]

FISCAL NOTE[illegible]ct[illegible]o[illegible]l[illegible]overn[illegible]t: No.
[illegible]Ef[illegible]ct[illegible]n[illegible]e[illegible]ta[illegible]o.

Rejected

EXPLANATION – Ma[illegible]n *[illegible]d italics* is [illegible] matter between brackets **[omitted material]** is material to be omitted.

AN ACT relating to taxation; revising the provisions governing the applicability, imposition, collection and administration of the tax on live entertainment; and providing other matters properly relating thereto.

Statements concerning the LET after it was enacted are irrelevent

- "Legislative history, of course, reflects the understanding of the Legislature as a whole at the time it enacts a statute. The views of an individual legislator or staffer concerning the interpretation of legislation may not properly be considered part of a statute's legislative history, particularly when the views are offered after the statute has already been enacted."
- *California Highway Patrol v. Superior Court*, 135 Cal.App.4th 488, 501, 38 Cal.Rptr.3d 16, 25 (2006)(emphasis added).

SB 247—Not Legislative History

- The fact of SB 247's rejection makes the minutes offered by Taxpayers from hearings on that bill legally irrelevant.

- Even considering the statements at the hearing, the rejection of SB 247 would in fact be proof that the Legislature did not want to target a small group of taxpayers.

Exemptions Do Not Prove Targeting

- Taxpayers fail to show exemptions prove targeting of a few taxpayers.
- The exemptions are in many cases minimal, intended to exempt taxation where the entertainment is not a major driver in purchases made. Examples:

  NRS 368A.200(5)(j), pertaining to "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."

  (p): pertaining to "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."

Exemptions, continued

- Size exemptions not like Minneapolis Star Case—More inclusive than exclusive
- Under 300 (now 200) occupancy exemption, clearly is intended to foster small venues, not to isolate big venues

Again, with emphasis: Taxpayers have not shown that a small group is being targeted.

The LET does not discriminate based on content

- Test for what is content-based discrimination:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . The government's purpose is the controlling consideration. **A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.**
>
> *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754 (1989)(emphasis added).

LET Does not Discriminate Based on the Message

- In other words, the question is whether the purpose of a tax classification is to discriminate against the message of the speaker. The Live Entertainment Tax is levied on a broad breadth of entertainment and does not single out any entertainment based on the message.

- Not only does the Live Entertainment Tax not single out the press, target a few speakers, or discriminate based on content, it does not burden expressive activities, according to the revenue collection experience.

Revenues from LET

General Fund Revenue by Fiscal Year - History and Forecast

	FY 2003 ACTUAL	FY 2004 ACTUAL	FY 2005 ACTUAL	FY 2006 ACTUAL	Economic Forum Forecast November 30, 2006 FY 2007	FY 2008	FY 2009
Taxes							
Mining	$ 10,641,100	$ 16,817,927	$ 16,449,304	$ 19,561,886	$ 23,619,000	$ 24,132,000	$ 24,648,000
Sales and Use	$ 693,528,823	$ 790,602,667	$ 913,895,384	$ 1,005,054,248	$ 1,042,630,000	$1,098,026,000	$ 1,172,748,000
Gaming	$ 595,260,210	$ 714,653,673	$ 749,655,622	$ 838,094,296	$ 856,378,000	$ 919,452,700	$ 992,125,200
Casino / Live Entertainment	$ 70,212,815	$ 89,201,827	$ 107,884,337	$ 117,108,286	$ 125,329,000	$ 133,261,000	$ 144,718,000
Insurance Premium	$ 174,133,841	$ 194,457,058	$ 215,948,970	$ 236,527,999	$ 252,536,600	$ 290,827,000	$ 320,346,100
Liquor	$ 16,531,358	$ 33,025,941	$ 35,490,874	$ 37,347,240	$ 39,215,000	$ 40,979,000	$ 42,209,000
Cigarette	$ 44,019,969	$ 106,770,729	$ 113,282,664	$ 114,593,245	$ 115,200,000	$ 115,700,000	$ 116,200,000
Business License	$ 79,765,693	$ 34,068,262	$ 15,783,698	$ 22,329,081	$ 23,250,000	$ 24,600,000	$ 26,000,000
Modified Business Tax		$ 161,649,489	$ 226,923,505	$ 255,251,922	$ 286,870,000	$ 320,430,000	$ 346,465,000
Real Property Transfer		$ 88,024,736	$ 148,730,974	$ 164,841,505	$ 123,735,000	$ 124,166,000	$ 134,880,000
Other	$ 10,916,301	$ 13,435,468	$ 15,642,063	$ 15,997,803	$ 16,697,000	$ 17,347,000	$ 18,041,000
Sub-Total Taxes	$1,696,810,111	$ 2,242,707,768	$ 2,559,687,394	$ 2,826,008,504	$ 2,925,462,600	$3,106,940,700	$ 3,338,380,300
Licenses	$ 70,323,528	$ 91,675,929	$ 101,463,939	$ 120,710,653	$ 125,163,000	$ 133,803,400	$ 143,057,200
Fees and Fines	$ 27,796,842	$ 31,991,086	$ 33,970,845	$ 36,396,214	$ 37,737,800	$ 37,394,600	$ 38,328,700
Interest Income	$ 5,990,047	$ 4,528,633	$ 13,685,859	$ 32,933,368	$ 48,529,800	$ 35,709,900	$ 29,054,900
Other Revenue	$ 25,231,525	$ 33,102,539	$ 33,856,974	$ 39,754,720	$ 31,751,579	$ 31,520,968	$ 29,994,239
Sub-Total	$ 129,341,935	$ 161,298,188	$ 182,977,627	$ 229,794,955	$ 243,182,279	$ 238,428,868	$ 240,465,139
Total Revenue	$1,825,352,046	$ 2,404,005,956	$ 2,742,665,021	$ 3,055,803,459	$ 3,168,644,779	$3,345,369,568	$ 3,578,845,439
Dollar change		$ 578,653,910	$ 338,659,065	$ 316,138,438	$ 109,841,320	$ 176,724,788	$ 233,475,872
Percent change		31.7%	14.1%	11.5%	3.6%	5.6%	7.0%
Biennium Total			$ 5,146,670,977		$ 6,227,448,228		$ 6,924,215,007
Dollar change					$ 1,080,777,252		$ 696,766,788
Percent change					21.0%		11.2%

INTRODUCTION - 5

Source: Governor's Budget, 2007-2009

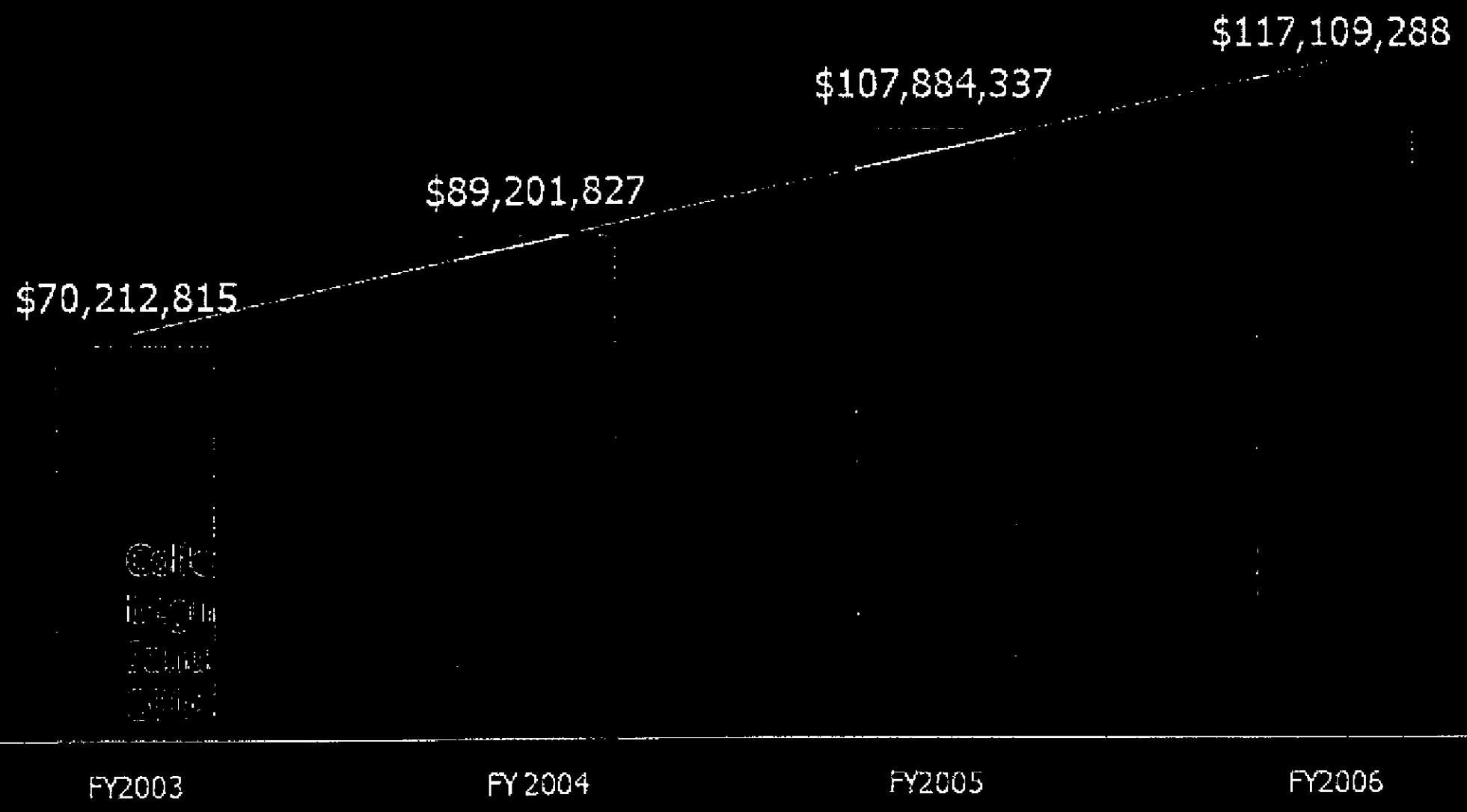
					Economic Foura Forecast November 30, 2006		
	FY 2003 ACTUAL	FY 2004 ACTUAL	FY 2005 ACTUAL	FY 2006 ACTUAL	FY 2007	FY 2008	FY 2009
Taxes							
Casino / Live Entertainment	$ 70,212,815	$ 89,201,827	$ 107,884,337	$ 117,109,268	$ 125,329,000	$ 133,261,000	$ 144,718,000

Note:

Collection of live entertainment tax began on January 1, 2004.

Before January 1, 2004, tax only applied to entertainment at casinos.

Live Entertainment Tax, Gaming and Non-gaming



Collections have gone up. Negative effect of live entertainment tax not apparent.

21

Non-casino Live Entertainment Tax Collections have done well.

"April 2007 collections for Live Entertainment Tax were $992,069; 4.30% above projections for fiscal year to date."

http://tax.state.nv.us/press_release.htm

FY 2007 to-date collections of LET through April 2007 were $9,234,645, compared with FY 2006 fiscal year to-date collections through April 2006 of $7,382,702

http://tax.state.nv.us/documents/Gross_Comp.xls

This Was So When Compared to Prior Years' non-Casino Live Entertainment Tax Collections.

Dear Governor Gibbons:

Pursuant to the provisions of NRS 360.100, the Department of Taxation submits herewith the Annual Report for the fiscal year ending June 30, 2006. During 2005-06, gross revenues and distributions changed in the following amounts.

Revenues	2004 - 2005	2005 - 2006		Increase/ (Decrease)	Percent Change
Live Entertainment Tax	8,516,031	8,688,864	$	172,832	2.03%

Source: Excerpt from Annual Report, 2005-2006,
http://tax.state.nv.us/pubs.htm#excise

Conclusion, non-casino live entertainment is not suffering under the live entertainment tax.

23

BEFORE THE

NEVADA TAX COMMISSION

IN RE:	)
Olympus Garden, Inc., D.I. Food & Beverage of Las Vegas, Shac, LLC, D. Westwood, Inc., K-Kel, Inc., The Power Co., Inc., Appellants.	)

APPENDIX OF CASES, STATUTES AND OTHER AUTHORITIES

Cases:

1. *Sheriff v. Burdg*, 118 Nev. 853, 59 P.3d 484 (2002).
2. *Cashman Photo Concessions and Labs, Inc. v. Nevada Gaming Commission*, 91 Nev. 424, 538 P.2d 158 (1975).
3. *List v. Whisler*, 99 Nev. 133, 660 P.2d 104 (1983).
4. *Whitehead v. Comm'n on Judicial Discipline*, 110 Nev. 874, 878 P.2d 913 (1994).
5. *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870 (1943).
6. *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 110 S.Ct. 688 (1990).
7. *Minneaopolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365 (1983).
8. *Adams Outdoor Advertising, Ltd. v. Borough of Stroudsburg*, 667 A.2d 21 (Cmwlth.Ct. Pa., 1995).
9. *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746 (1989).
10. *Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438 (1991).
11. *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406 (1940).
12. *Forbes v. City of Seattle*, 785 P.2d 431, 113 Wash.2d 929 (1990).
13. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 112 S.Ct. 501 (1991).
14. *City of Las Angeles v. Alemeda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728 (2002).
15. *California Highway Patrol v. Superior Court*, 135 Cal.App.4th 488, 38 Cal.Rptr.3d 16 (2006).
16. *Vermont Society of Assoc. Executives v. Milne*, 779 A.2d 20, 172 Vt. 375 (2001).

17. *Comptroller of the Treasury v. Clyde's of Chevy Chase, Inc., et al.*, 833 A.2d 1014, 377 Md. 471 (2003).

Statutes:

18. Chapter 368A of the Nevada Revised Statutes
19. Internal Revenue Code Sections 4231 through 4234, pp. 5480-5484 and p. 1782.

Attorney General Opinions:

20. Nevada State Attorney General's Opinion No. 85-17.

Legislative History:

21. Committee Notes regarding S.B. 497, June 6, 1995, pp. 1 through 12.

CATHERINE CORTEZ MASTO
Attorney General

By: _____

Dennis Belcourt
Deputy Attorney General
State Bar No. 2658
David J. Pope
Sr. Deputy Attorney General
State Bar No. 8617
555 E. Washington Ave., #3900
Las Vegas, NV 89101
(702) 486-3426

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada Attorney General's Office and that on the 23th day of July, 2007, I served the foregoing Appendix of Cases, Statutes and Other Authorities as indicated below:

Via U.S. Mail

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
3800 Capital City Blvd., Ste. #2
Lansing, MI 48906

Via Electronic Mail

Erin Fierro, Executive Assistant
Nevada Department of Taxation
efierro@tax.state.nv.us

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
Shafer3800@aol.com and
shaferassociates@acd.net

Andrea Adams, Esq.
Shafer & Associates, P.C.
aeadams@acd.net

Via fax

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
(517) 886-6565

An employee of the Office of the
Attorney General

APPENDIX 1

118 Nev. 853, 59 P.3d 484

Supreme Court of Nevada.
SHERIFF, WASHOE COUNTY, Appellant,
v.
Alice Mae BURDG and Kit Jerome Burdg, Respondents.
The State of Nevada, Appellant,
v.
Stephen Glenn Santillanez and Larry Shawn Early, Respondents.
Nos. 38105, 38264.
Dec. 20, 2002.

Defendants were charged, in separate cases, with felony possession of majority of ingredients required to manufacture a controlled substance. The Second Judicial District Court, Washoe County, James W. Hardesty and Brent T. Adams, JJ., granted defendants' petitions for pretrial writs of habeas corpus or their motions to dismiss. State appealed. The Supreme Court held that statute criminalizing possession of majority of ingredients required to manufacture a controlled substance was facially vague, in violation of due process.

Affirmed.

West Headnotes

[1] KeyCite Notes.

- 30 Appeal and Error
  - 30XVI Review
    - 30XVI(F) Trial De Novo
      - 30k892 Trial De Novo
        - 30k893 Cases Triable in Appellate Court
          - 30k893(1) k. In General. Most Cited Cases

- 110 Criminal Law KeyCite Notes
  - 110XXIV Review
    - 110XXIV(L) Scope of Review in General
      - 110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases

The constitutionality of a statute is a question of law that the appellate court reviews de novo.

[2] KeyCite Notes.

- 92 Constitutional Law
  - 92VI Enforcement of Constitutional Provisions
    - 92VI(C) Determination of Constitutional Questions
      - 92VI(C)3 Presumptions and Construction as to Constitutionality
        - 92k996 k. Clearly, Positively, or Unmistakably Unconstitutional. Most Cited Cases
          (Formerly 92k48(1))

To overcome the presumption of the constitutionality of a statute, there must be a clear showing of invalidity.

[3] KeyCite Notes

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited In General
92k3905 k. Certainty and Definiteness; Vagueness. Most Cited Cases
(Formerly 92k251.4)

The doctrine that a statute is void for vagueness is predicated upon its repugnancy to the Due Process Clause. West's NRSA Const. Art. 1, § 8.

[4] KeyCite Notes

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4506 k. Vagueness. Most Cited Cases
(Formerly 92k258(2))

A statute is void for vagueness, in violation of due process, if it fails to define the criminal offense with sufficient definiteness that a person of ordinary intelligence cannot understand what conduct is prohibited and if it lacks specific standards, encouraging arbitrary and discriminatory enforcement. West's NRSA Const. Art. 1, § 8.

[5] KeyCite Notes

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)10 Due Process
92k885 k. In General. Most Cited Cases
(Formerly 92k42.2(1))

A challenger who has engaged in conduct that is clearly proscribed by the statute cannot complain of the vagueness of the statute, for due process purposes, as applied to the conduct of others. West's NRSA Const. Art. 1, § 8.

[6] KeyCite Notes

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(9) k. Drugs; Controlled Substances. Most Cited Cases
(Formerly 92k258(3.1))

96H Controlled Substances KeyCite Notes
96HI In General
96Hk4 Statutes and Other Regulations
96Hk6 k. Validity. Most Cited Cases

Statute criminalizing possession of majority of ingredients required to manufacture a controlled substance was facially vague, in violation of due process; statute contained no intent element and therefore imposed criminal sanctions on non-criminal activity, and it failed to list items that might be described as ingredients required to manufacture or compound a controlled substance, so that the statute failed to provide fair notice of prohibited conduct and it allowed arbitrary and discriminatory enforcement. West's NRSA Const. Art. 1, § 8; West's NRSA 453.322, subd. 1(b).

West Codenotes

Held Unconstitutional

West's NRSA 453.322

***484 *853** Frankie Sue Del Papa, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Joseph R. Plater III, Deputy District Attorney, Washoe County, for Appellants.
Walter B. Fey, Reno, for Respondent Kit Jerome Burdg.
Marc P. Picker, Reno, for Respondent Alice Mae Burdg.
***485** M. Jerome Wright, Reno, for Respondent Stephen Glenn Santillanez.
Steven G. McGuire, Public Defender, James P. Logan, Chief Deputy Public Defender, and Paul C. Giese, Deputy Public Defender, Carson City, for Respondent Larry Shawn Early.

***854** Before the Court En Banc.

OPINION

PER CURIAM.
In these consolidated appeals we consider the constitutionality of NRS 453.322(1)(b), which criminalizes possession of a majority of the ingredients required to manufacture a controlled substance. The district court granted respondents Kit Jerome Burdg's and Alice Mae Burdg's petitions for writs of habeas corpus (No. 38105) and granted respondents Stephen Glenn Santillanez's and Larry Shawn Early's motions to dismiss (No. 38264). In both orders, the district court found NRS 453.322(1)(b) to be void for vagueness, and therefore, unconstitutional. We agree and affirm the district court's ruling.

FACTS

Kit and Alice Burdg

Detective Tim Kuzanek of the Washoe County Sheriff's Office, who was assigned to the Consolidated Narcotics Unit, received information in late 1998 and early 1999 about a methamphetamine manufacturing operation at 294 East Ninth Street in Sun Valley. Based on this information, on August 24, 2000, Detective Kuzanek examined the garbage from the property. This revealed several items that are commonly seen at methamphetamine operations, including a possible chemical bottle and ph

*855 papers, which are used to test acidic or base levels when manufacturing methamphetamine. Using this evidence, Detective Kuzanek obtained a search warrant for the property, which belonged to Kit Burdg.

That same day, law enforcement officers conducted a search of the property. During the search, law enforcement officers found several items in a shed that was located on the property, including flasks, funnels, scales, gloves, stained rags, ph papers, a hot plate, duct tape, coffee filters, aspirin, an electric fan, razor blades, plastic bottles, drug paraphernalia, jars, matches without striker plates, ephedrine tablets, a bottle of hydrogen peroxide, a butane torch, a can of Coleman fuel, bottles of Red Devil lye, a bottle suspected of containing iodine, a container suspected of containing acid, and a can suspected of containing acetone. Officers also found in the shed papers with Kit's name and a "pay and owe" sheet.[FN1] Notably, a presumptive chemical test conducted on some white powder obtained from the property was positive for the presence of pseudoephedrine, a chemical used to manufacture methamphetamine.

FN1. Officer Steve O'Farrell, who participated in the execution of the search warrant, testified at the preliminary hearing that a "pay and owe sheet" is "a list that people would make for monies owed or product [controlled substance] given out."

Kit Burdg voluntarily turned himself in following the search, and he was arrested. Alice Burdg, Kit's wife, was arrested soon thereafter.

Alice and Kit Burdg were charged with the crime of possession of a majority of the ingredients required to manufacture a controlled substance, a felony violation under NRS 453.322(1)(b). On September 25, 2000, a preliminary hearing was held. At the preliminary hearing there was conflicting testimony regarding the ingredients required to manufacture methamphetamine. Detective Kuzanek testified that he had made methamphetamine under laboratory conditions, using "red phosphorus, iodine, ephedrine or pseudoephedrine, Coleman fuel, muriatic acid, [and] Red Devil lye." Christopher Adduci, an agent for the Drug Enforcement Administration, testified that "two or three substances are adequate" to manufacture methamphetamine. Agent Adduci testified that the ingredients used to manufacture methamphetamine were not themselves controlled substances, but were "common substances," consisting of pseudoephedrine (an ingredient in many common household cold/flu medicines),**486 red phosphorus (which can be extracted from common household matches), and iodine. He also indicated that "there can be others," but he could not testify as to what other chemical substances were needed. After the preliminary hearing, Alice and Kit were bound over on the charged crime.

*856 On November 13, 2000, Kit filed a pretrial petition for writ of habeas corpus, arguing among other things that NRS 453.322(1)(b) is unconstitutionally overbroad and vague. Alice joined in Kit's petition, adopting his argument, but she added an additional argument-the State failed to present any evidence that Alice resided on the property when the raid occurred. On June 6, 2001, the district court granted the Burdgs' petitions for writs of habeas corpus, ruling that NRS 453.322(1)(b) is void for vagueness, and therefore is unconstitutional.

Stephen Santillanez and Larry Early

On September 28, 2000, the Washoe County Consolidated Narcotics Unit arrested Stephen Glenn Santillanez and Larry Shawn Early. They too were charged with possession of a majority of the ingredients required to manufacture a controlled substance in violation of NRS 453.322(1)(b). The specific controlled substance was methamphetamine.

On May 10, 2001, Santillanez and Early filed motions to dismiss, arguing that NRS 453.322(1)(b) is unconstitutionally vague and overbroad. In its opposition to the motions, the State made an offer of proof regarding the evidence it believed supported the charge. The State proffered that several bottles and other containers were recovered during the execution of a search warrant for the premises controlled by Santillanez and Early. Chemical samples were tested at the Washoe County Crime Lab,

and the test revealed the following chemicals: iodine, ephedrine, pseudoephedrine, red phosphorus, hydrochloric acid, and methamphetamine. On July 3, 2001, the district court granted Santillanez's and Early's motions to dismiss following its ruling in the Burdg case. The State appealed both rulings. We consolidated the two appeals.

DISCUSSION

NRS 453.322(1)(b) provides that it is unlawful for a person to "[p]ossess a majority of the ingredients required to manufacture or compound a controlled substance other than marijuana, unless he is at a laboratory that is licensed to store such ingredients." The district court held that the statute is void for vagueness because "[i]t is a criminal statute which contains no *mens rea* requirement, and infringes on an individual's liberty interest" and further, because "the statute does not provide sufficiently specific limits on the enforcement discretion of the police." The State challenges the district court's ruling on two grounds: the district court did not determine whether the statute is vague as applied to the defendants (in both cases), and the district court failed to address whether the statute is vague in all of its applications.

*857 [1] [2] Resolution of these appeals involves the constitutionality of a statute, which is a question of law that this court reviews de novo.[FN2] This court has stated, "[s]tatutes are presumed to be valid, and the burden is on the challenger to make a clear showing of their unconstitutionality." [FN3] To overcome this burden, there must be a " clear showing" of invalidity.[FN4]

FN2. *SIIS v. United Exposition Services Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

FN3. *Childs v. State*, 107 Nev. 584, 587, 816 P.2d 1079, 1081 (1991).

FN4. *Sheriff v. Martin*, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983).

[3] [4] [5] "The doctrine that a statute is void for vagueness is predicated upon its repugnancy to the due process clause of the Fourteenth Amendment to the United States Constitution." [FN5] A statute is void for vagueness if it fails to define the criminal offense with sufficient definiteness that a person of ordinary intelligence cannot understand what **487 conduct is prohibited and if it lacks specific standards, encouraging arbitrary and discriminatory enforcement.[FN6] The Supreme Court has also held that a facial-vagueness challenge is appropriate when the statute implicates constitutionally protected conduct or if the statute "is impermissibly vague in all of its applications." [FN7] But "[a] challenger who has engaged in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." [FN8]

FN5. *Woofter v. O'Donnell*, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975); *see also Cunningham v. State*, 109 Nev. 569, 570, 855 P.2d 125, 125 (1993) (stating that a statute that does not give fair notice of prohibited conduct, "is violative of the Due Process Clause, Article 1, Section 8 of the Nevada Constitution").

FN6. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

FN7. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *accord Martin*, 99 Nev. at 340, 662 P.2d at 637.

FN8. *Martin*, 99 Nev. at 340, 662 P.2d at 637.

[6] Under any of the tests noted above, we conclude that a facial-vagueness challenge is appropriate. More specifically, we conclude that NRS 453.322(1)(b) is facially vague because it infringes on constitutionally protected conduct, is incapable of any valid applications, fails to provide sufficient notice of the prohibited conduct, and encourages arbitrary and discriminatory enforcement. First, this criminal statute contains no intent element, and consequently the statute imposes criminal sanctions on what is otherwise non-criminal activity. We recognize that the "evil" that NRS 453.322(1)(b) addresses is clearly the manufacturing of controlled substances, and the statute is not meant to ***858** convict a person simply because that person possesses a combination of a few common household items. But without an intent element, the statute infringes on an individual's liberty interest. [FN9]

FN9. *Cf. Chicago v. Morales*, 527 U.S. 41, 55, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (Stevens, J., concurring) (applying a facial-vagueness analysis to a Chicago ordinance that required a police officer to give an order of dispersal upon observing a person whom he reasonably believed to be a street gang member loitering in a public place with one or more persons because the ordinance "is a criminal law that contains no *mens rea* requirement, and infringes on constitutionally protected rights" (citations omitted)).

During oral argument, the State asserted that it is common practice to build in a *mens rea* requirement when a statute is not explicit. However, we note that the general intent statute, NRS 193.190, does not alleviate the absence of an intent element in NRS 453.322(1)(b) because it is unclear where an intent element would be implied. For instance, the statute at issue is missing not only the intent to possess a majority of the ingredients required to manufacture, but more significantly, the intent to possess those ingredients for the purpose of manufacturing a controlled substance.

In addition to missing an intent element, the statute fails to provide a person of ordinary intelligence with fair notice of what conduct is prohibited. In particular, it fails to list the items that might be described as "ingredients" required to manufacture or compound a controlled substance. An "ingredient" is commonly defined as "something that enters into a compound or is a component part of any combination or mixture." [FN10] The legislative history of NRS 453.322(1)(b) indicates that the Legislature enacted the statute because of concerns regarding methamphetamine labs. The Assembly Committee on Judiciary was presented with an exhibit titled "Methamphetamine Lab Indicators," which, according to the committee's minutes, was a list of ingredients of methamphetamine.[FN11] However, that list includes items other than those that would fit the common definition of "ingredients," such as pots and pans, tubing, funnels, buckets, bottles, and coffee grinders and filters.[FN12] The list does not indicate what "ingredients" are required to manufacture a controlled substance such as methamphetamine.

FN10. *Webster's Collegiate Dictionary* 622 (9th ed.1985).

FN11. Hearing on A.B. 454 Before the Assembly Comm. on Judiciary, 70th Leg., 15 & ex. F (Nev., March 19, 1999).

FN12. *Id.* ex. F.

Moreover, we conclude that the absence of an intent element and the ambiguities regarding the required ingredients allow arbitrary and discriminatory enforcement. ****488** Thus, NRS 453.322(1)(b), as written, fails to provide law enforcement with adequate ***859** guidance concerning the precise scope of activities it aspires to proscribe.

Because we conclude that NRS 453.322(1)(b) is facially vague, we need not address the State's remaining arguments concerning overbreadth and an as-applied analysis. For the same reason, we need not address the Burdgs' sufficiency of the evidence argument.

CONCLUSION

We hold that NRS 453.322(1)(b) is void for vagueness on its face. Therefore, NRS 453.322(1)(b) violates the Fourteenth Amendment to the United States Constitution, and Article 1, Section 8 of the Nevada Constitution. Accordingly, we affirm the district court's order declaring NRS 453.322(1)(b) unconstitutional.

Nev.,2002.
Sheriff, Washoe County v. Burdg
118 Nev. 853, 59 P.3d 484

END OF DOCUMENT

APPENDIX 2

91 Nev. 424, 538 P.2d 158

Supreme Court of Nevada.
CASHMAN PHOTO CONCESSIONS AND LABS, INC., a Nevada Corporation, dba Cashman Photo Enterprises, Inc., Appellant,
v.
NEVADA GAMING COMMISSION, consisting of John W. Diehl, Chairman, et al., Respondents.
No. 7739.
July 9, 1975.

Photography concessionaire which had an exclusive photography concession with a number of entertainment establishments brought action against Nevada Gaming Commission, its members, and the owners of the entertainment establishments. The Eighth Judicial District Court, Clark County, Carl J. Christensen, J., upheld the validity of imposing casino entertainment tax on the concessionaire and concessionaire appealed. The Supreme Court, Zenoff, J., held that photographs which were taken of, and sold to, patrons in entertainment establishments constituted neither 'food,' nor 'refreshment,' nor 'merchandise,' within casino entertainment tax; and that regulation of the Gaming Commission which interpreted and implemented the tax so as to apply to photography concessionaires was invalid.
Reversed.

West Headnotes

[1] KeyCite Notes

188 Gaming
188I Gambling Contracts and Transactions
188I(A) Nature and Validity
188k4 k. Licenses and Taxes. Most Cited Cases

Photographs taken of, and sold to, customers in licensed gaming establishments do not constitute "food," "refreshment," or "merchandise," within casino entertainment tax. N.R.S. 463.401.

[2] KeyCite Notes

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak385 Power to Make
15Ak385.1 k. In General. Most Cited Cases
(Formerly 15Ak385)

Administrative body may, within prescribed limits, and when authorized by the law-making power, make rules and regulations calculated to carry into effect the express legislative intention.

[3] KeyCite Notes

188 Gaming
188I Gambling Contracts and Transactions
188I(A) Nature and Validity
188k4 k. Licenses and Taxes. Most Cited Cases

Nevada Gaming Commission may not, by rule, impose a tax under authority of the casino entertainment tax statute if the tax is not mentioned in the statute. N.R.S. 463.401-463.406.

[4] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k245 k. Revenue Laws. Most Cited Cases

Taxing statutes, when of doubtful validity or effect, must be construed in favor of the taxpayers.

[5] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k245 k. Revenue Laws. Most Cited Cases

A tax statute must say what it means; court will not extend a tax statute by implication.

[6] KeyCite Notes

188 Gaming
188I Gambling Contracts and Transactions
188I(A) Nature and Validity
188k4 k. Licenses and Taxes. Most Cited Cases

Regulation of the Nevada Gaming Commission which purported to apply the casino entertainment tax to photography concessionaires working in nightclubs was invalid since it was not authorized by the statute pursuant to which it was promulgated. N.R.S. 463.401-463.406.

***425 ****158** Richard H. Foster, San Francisco, Cal. and George Rudiak, Las Vegas, for appellant.
Lionel, Sawyer, Collins & Wartman, Galane, Tingey & Shearing, Las Vegas, Robert List, Atty. Gen. and David C. Polley, Deputy Atty. Gen., Carson City, for respondents.

OPINION

ZENOFF, Justice.
On April 10, 1973, the Gaming Control Board of Nevada by Bulletin No. 9 advised all gaming licensees in the State of Nevada that the Casino Entertainment Tax, NRS 463.401-463.406, applied to all photographs taken and sold to patrons of casino showrooms and required each licensee to keep accurate records thereon from May 1, 1973, forward.

***426** Appellant is a Nevada corporation which has contractual relationships with each of ****159** respondent licensees under which it is granted an exclusive photography concession. This entitles the appellant to take photographs of hotel guests in various areas of the hotels including casino entertainment areas, such as the main and lounge show rooms, and to sell the photographs to such guests. Appellant is also provided with space at the hotels of respondent licensees to operate a photographic darkroom and laboratory in connection with such photography concession.

Photographs in the main and lounge showrooms are in all cases taken by appellant before entertainment starts at which time the camera girl normally takes a small deposit from the customer. The photographs are processed in the darkroom and laboratory during the show and are delivered and the balance paid after the entertainment is ended, normally while the patron is still in the confines of the showroom or immediately upon his exit.[FN1]

FN1. The foregoing statements are excerpts from the agreed statement of facts executed by the parties.

The question is, does the Casino Entertainment Tax of NRS 463.401[FN2] apply to photographic services rendered by *427 photo concessionaires in the showrooms and lounges of gaming licensees? The trial court held that it does. We, however, do not agree and reverse.

FN2. NRS 463.401: Casino entertainment tax: levy; amount; exemptions.

1. In addition to any other license fees and taxes imposed by this chapter, a tax, to be known as the casino entertainment tax, is hereby levied upon each licensed gaming establishment in this state where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment or merchandise. A licensed gaming establishment is not subject to tax under this section if the establishment is licensed for not more than 50 slot machines, not more than three table games or any combination of slot machines and table games within such respective limits, or if:

(a) No distilled spirits, wine or beer is served or permitted to be consumed;

(b) Only light refreshment is served;

(c) Where space is provided for dancing, no charge is made for dancing; and

(d) Where music is provided or permitted, such music is:

(1) Instrumental or other music which is supplied without any charge to the owner, lessee or operator of such establishment or to any concessionaire; or

(2) Mechanical music.

2. The amount of the tax imposed upon each licensed gaming establishment by this section is 10 percent of all amounts paid for admission, merchandise, refreshment or service.

3. The tax imposed by this section shall be paid by the licensee of such establishment.

[1] The Nevada entertainment statute taxes licensed gaming establishments which offer live entertainment to patrons 'in connection with the serving or selling of food, refreshment or merchandise.' Photographs are neither food nor refreshment. The sale of photos under the Federal Cabaret Statute, from which our statute is derived, was construed to be a 'service,' not merchandise. IRS Rev.Rul. 57-263(2);[FN3] **160 see Lethert v. Culbertson's Cafe, Inc., 313 F.2d 506 (8th Cir. 1963).

FN3. IRS Rev.Rul. 57-263(2):

A carbaret owner or operator grants to another person rights to concessions in the cabaret. The concessions include the operation of food, refreshment and cigarette vending machines, the photographing of customers, and the maintenance of checking

facilities. Under the terms of the agreement between the parties, the concessionaire receives the proceeds from the concessions, pays the operating expenses, provides necessary maintenance and service and has control over the vending machines and the photographic and checking facilities. The concessionaire pays the cabaret owner a flat rate for the concessions for the concessions rights or an amount equal to a percentage of the gross receipts derived from the concessions.

* * *

. . ., it is held that under the circumstances described in (2) above the concessionaire is the person receiving the payments for the food, refreshment or merchandise, and he is liable for the return and payment of the tax on the total receipts from the machines. A photographic or checking concession is considered to provide a 'service' within the meaning of the statute and fixed amounts paid by patrons of the cabaret for such service are subject to the cabaret tax. Under these circumstances, the cabaret owner or operator is not liable for tax on amounts paid to him for the concessions rights regardless of the basis upon which payments are made (emphasis added).

See also IRS Rev.Rul. 63-154.

It is conceded by the parties that our statute is patterned from the Federal Cabaret Act and enacted in Nevada because of the repeal of the federal act. The federal statute applied to concessionaires because the tax in that statute was paid by the persons receiving the payments, namely the concessionaires. However, in borrowing the federal statute our legislature omitted reference to 'service.'

The Nevada tax law does not call for assessment on photographic service. We cannot tell whether the legislature did or did not intend the photographic concessions to be included as part of the casino operators' tax.

**428* [2] [3] An administrative body may within prescribed limits and when authorized by the law-making power make rules and regulations canculated to carry into effect the expressed legislative intention. But the commission cannot by such rule impose a tax that is not mentioned in the statute as taxable. Washington Printing & Binding Co. v. State, 192 Wash. 448, 73 P.2d 1326 (1937); cf. State Board of Barber Examiners v. Walker, 67 Ariz. 156, 192 P.2d 723, 728 (1948).

[4] [5] [6] Taxing statutes when of doubtful validity or effect must be construed in favor of the taxpayers. A tax statute particularly must say what it means. We will not extend a tax statute by implication. State v. Pioneer Citizens Bank, 85 Nev. 395, 456 P.2d 422 (1969). We declare Regulation No. 13 of the Nevada Gaming Commission which interprets and implements the Casino Entertainment Tax to apply to photo concessionaires to be invalid since it is not authorized by NRS 463.401 pursuant to which it was promulgated.

The foregoing being dispositive of this appeal, consideration of other issues and constitutional questions is unnecessary.

Reversed.

GUNDERSON, C.J., and BATJER, MOWBRAY and THOMPSON, JJ., concur.

Nev. 1975.

Cashman Photo Concessions & Labs, Inc. v. Nevada Gaming Commission,
91 Nev. 424, 538 P.2d 158

END OF DOCUMENT