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**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**  
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CLERK OF THE COURT

1 **SAO**

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

K-KEL, INC., d/b/a Spearmint Rhino  
Gentlemen's Club; OLYMPUS GARDEN,  
INC., d/b/a Olympic Garden; SHAC, L.L.C.,  
d/b/a Sapphire; THE POWER COMPANY,  
INC., d/b/a Crazy Horse Too Gentlemen's  
Club; D. WESTWOOD, INC., d/b/a  
Treasures; D.I. FOOD & BEVERAGE OF  
LAS VEGAS, LLC, d/b/a Scores, DÉJÀ VU  
SHOWGIRLS OF LAS VEGAS, LLC, d/b/a  
Déjà vu; and LITTLE DARLINGS OF LAS  
VEGAS, LLC, d/b/a Little Darlings,

Petitioners,

v.

STATE OF NEVADA, ex rel.  
DEPARTMENT OF TAXATION and TAX  
COMMISSION,

Respondents.

Case No.: A-11-648894-J

Dept. No.: XXX

FILED  
3/24/15  
3 AM chambers clerk

**STIPULATION AND ORDER FOR EXTENSION OF TIME**

WHEREAS, the Parties have agreed to extend the briefing schedule and set a new hearing date.

IT IS HEREBY STIPULATED AND AGREED by and between the Parties, through their  
Appellants' Appendix

Page 3858



1 respective undersigned counsel, that:

• Opening briefs are due before 4/14/15 —

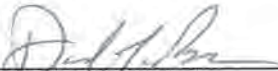
• Respondents' opposition memorandum of points and authorities shall be filed on or before April 30, 2015;

• Petitioners' reply memorandum of points and authorities shall be filed on or before June 4, 2015; and

• Oral argument shall occur on or after July 24, 2015.

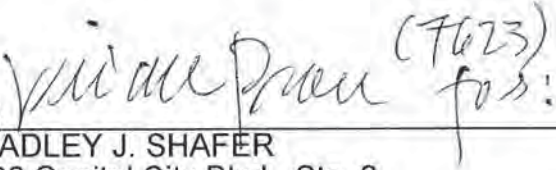
2  
3  
4  
5  
6  
7  
8  
9  
10 Dated: 3/24/15

11 ADAM PAUL LAXALT  
12 Attorney General

13 By:   
14 DAVID J. POPE  
15 Senior Deputy Attorney General  
16 Nevada Bar No. 008617  
17 555 E. Washington Ave., Ste. 3900  
18 Las Vegas, Nevada 89101  
19 Attorneys for Respondents


20 Dated: 3-24-15

21 SHAFER & ASSOCIATES, P.C.

22 By:  (7623) for:  
23 BRADLEY J. SHAFER  
24 3800 Capital City Blvd., Ste. 2  
25 Lansing, Michigan 48906  
26 Attorneys for Petitioners


Dated: 3-24-15

LAMBROSE BROWN

By:   
WILLIAM H. BROWN  
6029 S. Ft. Apache Rd., #100  
Las Vegas, Nevada  
Attorneys for Petitioners

Dated: 3-24-15

GREENBURG TRAURIG, LLP

By:  (7623) for:  
MARK E. FERRARIO  
3773 Howard Hughes Parkway, Ste. 400  
Las Vegas, NV 89169  
Attorneys for Petitioners

**ORDER**

*offering briefs are due on 4/14/15*

Based upon the foregoing Stipulation, Respondents' opposition memorandum of points and authorities shall be filed on or before April 30, 2015; Petitioners' reply memorandum of points and authorities shall be filed on or before June 4, 2015; and Oral argument shall occur on or after July 24, 2015 at a date and time set by the court.

IT IS SO ORDERED.

DATED this 27 day of March, 2015.




DISTRICT COURT JUDGE



Submitted by:

ADAM PAUL LAXALT  
Attorney General

By:

  
DAVID J. POPE  
Senior Deputy Attorney General  
Nevada Bar No. 008617  
555 E. Washington Ave., Ste. 3900  
Las Vegas, Nevada 89101  
Attorneys for Respondents





CLERK OF THE COURT

**NTSO**  
ADAM PAUL LAXALT  
Attorney General  
DAVID J. POPE  
Senior Deputy Attorney General  
Nevada Bar No. 008617  
VIVIENNE RAKOWSKY  
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VRakowsky@ag.nv.gov  
Attorneys for Respondents

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

K-KEL, INC., d/b/a Spearmint Rhino  
Gentlemen's Club; OLYMPUS GARDEN,  
INC., d/b/a Olympic Garden; SHAC, L.L.C.,  
d/b/a Sapphire; THE POWER COMPANY,  
INC., d/b/a Crazy Horse Too Gentlemen's  
Club; D. WESTWOOD, INC., d/b/a  
Treasures; D.I. FOOD & BEVERAGE OF  
LAS VEGAS, LLC, d/b/a Scores, DÉJÀ VU  
SHOWGIRLS OF LAS VEGAS, LLC, d/b/a  
Déjà vu; and LITTLE DARLINGS OF LAS  
VEGAS, LLC, d/b/a Little Darlings,

Petitioners,

v.

STATE OF NEVADA, ex rel.  
DEPARTMENT OF TAXATION and TAX  
COMMISSION,

Respondents.

Case No.: A-11-648894-J  
Dept. No.: XXX

*Consolidated with:*  
Case No.: A-14-697515-J

**NOTICE OF ENTRY OF ORDER**  
**GRANTING STIPULATION AND ORDER TO EXTEND TIME**

TO ALL INTERESTED PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF  
RECORD HEREIN:

1 PLEASE TAKE NOTICE that the *Stipulation and Order Granting the Parties'*  
2 *Agreement to Extend Time* was entered in the above-entitled action on the 30th of March,  
3 2015, a copy of which is attached hereto.

4 DATED this 31st day of March, 2015.

5 ADAM PAUL LAXALAT  
6 Attorney General

7  
8 By: /s/ VIVIENNE RAKOWSKY  
9 VIVIENNE RAKOWSKY  
10 Deputy Attorney General  
11 Nevada Bar No. 009160  
12 *Attorneys for Defendants,*  
13 *Nevada Department of Taxation*  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the **Notice of Entry of Order Granting the Parties' Request to Extend Time** with the Clerk of the Court by using the CM/ECF system on the 31st day of March, 2015. I also certify I e-mailed and mailed the foregoing document by First-Class Mail, postage prepaid as follows:

William H. Brown  
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Las Vegas, NV 89101  
WBrown@LambroseBrown.com

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Mark E. Ferrario, Esq.  
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Attorneys for Shac LLC, dba Sapphire (only)  
ferrariom@gtlaw.com

/s/ Michele Caro  
An employee of the  
OFFICE OF THE ATTORNEY GENERAL





CLERK OF THE COURT

**SAO**  
ADAM PAUL LAXALT  
Attorney General  
DAVID J. POPE  
Senior Deputy Attorney General  
Nevada Bar No. 008617  
VIVIENNE RAKOWSKY  
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VRakowsky@ag.nv.gov  
Attorneys for Respondents

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

K-KEL, INC., d/b/a Spearmint Rhino  
Gentlemen's Club; OLYMPUS GARDEN,  
INC., d/b/a Olympic Garden; SHAC, L.L.C.,  
d/b/a Sapphire; THE POWER COMPANY,  
INC., d/b/a Crazy Horse Too Gentlemen's  
Club; D. WESTWOOD, INC., d/b/a  
Treasures; D.I. FOOD & BEVERAGE OF  
LAS VEGAS, LLC, d/b/a Scores, DÉJÀ VU  
SHOWGIRLS OF LAS VEGAS, LLC, d/b/a  
Déjà vu; and LITTLE DARLINGS OF LAS  
VEGAS, LLC, d/b/a Little Darlings,

Petitioners,

v.

STATE OF NEVADA, ex rel.  
DEPARTMENT OF TAXATION and TAX  
COMMISSION,

Respondents.

Case No.: A-11-648894-J  
Dept. No.: XXX

FILED  
3/24/15  
3 AM  
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**STIPULATION AND ORDER FOR EXTENSION OF TIME**

WHEREAS, the Parties have agreed to extend the briefing schedule and set a new hearing date.

IT IS HEREBY STIPULATED AND AGREED by and between the Parties, through their

1 respective undersigned counsel, that:

• Opening briefs are due before 4/14/15 —

• Respondents' opposition memorandum of points and authorities shall be filed on or before April 30, 2015;

• Petitioners' reply memorandum of points and authorities shall be filed on or before June 4, 2015; and

• Oral argument shall occur on or after July 24, 2015.

10 Dated: 3/24/15

11 ADAM PAUL LAXALT  
Attorney General

13 By:

DAVID J. POPE  
Senior Deputy Attorney General  
Nevada Bar No. 008617  
555 E. Washington Ave., Ste. 3900  
Las Vegas, Nevada 89101  
Attorneys for Respondents

17 Dated:

3-24-15

18 SHAFER & ASSOCIATES, P.C.

21 By:

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3800 Capital City Blvd., Ste. 2  
Lansing, Michigan 48906  
Attorneys for Petitioners

Dated: 3-24-15

LAMBROSE BROWN

By:

WILLIAM H. BROWN  
6029 S. Ft. Apache Rd., #100  
Las Vegas, Nevada  
Attorneys for Petitioners

Dated:

3-24-15

GREENBURG TRAURIG, LLP

By:

MARK E. FERRARIO  
3773 Howard Hughes Parkway, Ste. 400  
Las Vegas, NV 89169  
Attorneys for Petitioners



**ORDER**

*opening briefs are due on 4/14/15*

Based upon the foregoing Stipulation, Respondents' opposition memorandum of points and authorities shall be filed on or before April 30, 2015; Petitioners' reply memorandum of points and authorities shall be filed on or before June 4, 2015; and Oral argument shall occur on or after July 24, 2015 at a date and time set by the court.

IT IS SO ORDERED.

DATED this 27 day of March, 2015.



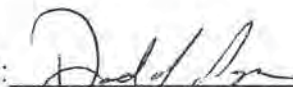
DISTRICT COURT JUDGE



Submitted by:

ADAM PAUL LAXALT  
Attorney General

By:



DAVID J. POPE  
Senior Deputy Attorney General  
Nevada Bar No. 008617  
555 E. Washington Ave., Ste. 3900  
Las Vegas, Nevada 89101  
Attorneys for Respondents

[Skip to Main Content](#) [Logout](#) [My Account](#) [Search Menu](#) [New District Civil/Criminal Search](#) [Refine Search](#) [Close](#)

Location : District Court Civil/Criminal [Help](#)**REGISTER OF ACTIONS**

CASE NO. A-11-648894-J

K-Kel, Inc., Plaintiff(s) vs. Nevada Department of Taxation,  
Defendant(s)§  
§  
§  
§  
§  
§  
§Case Type: Civil Petition for Judicial  
Review

Date Filed: 09/23/2011

Location: Department 30

Cross-Reference Case Number: A648894

Supreme Court No.: 69886

**RELATED CASE INFORMATION**

## Related Cases

A-14-697515-J (Consolidated)

**PARTY INFORMATION**

Defendant	Nevada Department of Taxation	Lead Attorneys David J. Pope Retained 7026568084(W)
Defendant	Nevada Tax Commission	David J. Pope Retained 7026568084(W)
Plaintiff	D I Food and Beverage of Las Vegas LLC Doing Business As Scores	William H. Brown Retained 702-816-2200(W)
Plaintiff	D Westwood Inc Doing Business As Treasures	William H. Brown Retained 702-816-2200(W)
Plaintiff	Deja Vu Showgirls of Las Vegas Doing Business As Deja Vu	William H. Brown Retained 702-816-2200(W)
Plaintiff	K-Kel, Inc. Doing Business As Spearmint Rhino Gentlemens Club	William H. Brown Retained 702-816-2200(W)
Plaintiff	Little Darlings of Las Vegas LLC Doing Business As Little Darlings	William H. Brown Retained 702-816-2200(W)
Plaintiff	Olympus Garden Inc Doing Business As Olympic Garden	William H. Brown Retained 702-816-2200(W)
Plaintiff	Power Company Inc Doing Business As Crazy Horse Too Gentlemens Club	William H. Brown Retained 702-816-2200(W)
Plaintiff	Shac LLC Doing Business As Sapphire	William H. Brown Retained 702-816-2200(W)

**EVENTS & ORDERS OF THE COURT**

09/22/2015 | Motion for Leave (9:00 AM) (Judicial Officer Wiese, Jerry A.)  
 Motion for Leave to File Supplemental Brief Regarding New U.S. Supreme Court Precedent  
 Appellants Appendix  
 Minutes

Page 3867

08/18/2015 9:00 AM

09/22/2015 9:00 AM

- Motion for Leave to File Supplemental Brief Regarding New U.S. Supreme Court Precedent There being no objection. COURT ORDERED, motion GRANTED. Briefing schedule set as followed: 10/6/15 Response 10/13/15 Reply 10/27/15 9:00 am Hearing: Petition for Judicial Review

[Parties Present](#)

[Return to Register of Actions](#)



**ORDR**

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16 *Co-Counsel for all Petitioners except SHAC, LLC*

17 **DISTRICT COURT**  
18 **CLARK COUNTY, NEVADA**

19 K-KEL, INC., d/b/a *Spearmint Rhino*  
20 *Gentlemen's Club*, OLYMPUS GARDEN,  
INC., d/b/a *Olympic Garden*, SHAC, L.L.C.  
21 d/b/a *Sapphire*, D. WESTWOOD, INC.,  
d/b/a *Treasures*, DEJA VU SHOWGIRLS  
22 OF LAS VEGAS, LLC, d/b/a/ *Déjà vu*  
and LITTLE DARLINGS OF LAS VEGAS,  
23 LLC, d/b/a *Little Darlings*,


24 **Petitioners,**

25 **vs.**

26 NEVADA DEPARTMENT OF TAXATION,  
27 and NEVADA TAX COMMISSION,

28 **Respondents**

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CLERK OF THE COURT

Case No. A-11-648894-J

Consolidated with: A-14-697515-J

Dept: 30

1 **ORDER GRANTING PETITIONERS' MOTION TO FILE SUPPLEMENTAL BREIF**  
2 **AND SETTING HEARING ON PETITION FOR JUDICIAL REVIEW**

3 This matter came on for hearing on September 22, 2015, at 9:00 a.m. before the Court  
4 was petitioners' motion for leave to file supplemental brief (the "motion"), respondents'  
5 opposition, and petitioners' reply. The parties were represented by and through their counsel of  
6 record. The Court, being fully advised on the premises, and good cause appearing, now  
7 therefore orders as follows:

- 8 1. Petitioners' motion is granted;  
9  
10 2. Respondents' may file an opposition to petitioners' supplemental brief no later than  
11 **October 6, 2015;**  
12  
13 3. Petitioners may file a reply no later than **October 13, 2015;** and  
14  
15 4. Pursuant to NRS 233B.133(4), the Court will hold a hearing in this matter on  
16 **October 27, 2015, at 9:00 a.m.**

17 Dated: 6 Oct, 2015.

18   
DISTRICT COURT JUDGE

19 Submitted by:

20 By: /s/ William H. Brown  
21 WILLIAM H. BROWN  
22 Nevada Bar No.: 7623  
23 LAMBROSE BROWN  
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25 Las Vegas, Nevada 89101  
26 Telephone: (702) 816-2200  
27 Facsimile: (702) 816-2300  
28 wbrown@lambrosebrown.com  
Counsel for Petitioner K-Kel, Inc.

[Signatures continued below]

Approved as to form and content:

By: /s/ David J. Pope  
DAVID J. POPE  
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Counsel for Respondents



1 By: /s/ Mark E. Ferrario

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13 Counsel for Petitioner SHAC, LLC

14 By: /s/ Bradley J. Shafer

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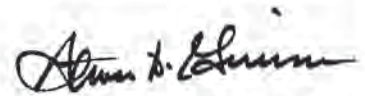
19 Lansing, Michigan 48906-2110

20 brad@bradshaferlaw.com

21 Co-Counsel for all Petitioners

22 except SHAC, LLC

23 \*Admitted Pro Hac Vice

  
CLERK OF THE COURT

**NEOJ**

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*Co-Counsel for all Petitioners except SHAC, LLC*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

K-KEL, INC., d/b/a *Spearmint Rhino  
Gentlemen's Club*, OLYMPUS GARDEN,  
INC., d/b/a *Olympic Garden*, SHAC, L.L.C.  
d/b/a *Sapphire*, D. WESTWOOD, INC.,  
d/b/a *Treasures*, DEJA VU SHOWGIRLS  
OF LAS VEGAS, LLC, d/b/a *Déjà vu*  
and LITTLE DARLINGS OF LAS VEGAS,  
LLC, d/b/a *Little Darlings*,

Petitioners,

vs.

NEVADA DEPARTMENT OF TAXATION,  
and NEVADA TAX COMMISSION,

Respondents

Case No. A-11-648894-J

Consolidated with: A-14-697515-J

Dept: 30

1                                   **NOTICE OF ENTRY OF ORDER GRANTING PETITIONERS'**  
2                                   **MOTION TO FILE SUPPLEMENTAL BRIEF AND SETTING**  
3                                   **HEARING ON PETITION FOR JUDICIAL REVIEW**

4           Please take notice that an order granting petitioners' motion to file supplemental brief and  
5           setting hearing on petition for judicial review was entered on October 9, 2015, a copy of which is  
6           attached hereto.

7           Dated: October 13, 2015

8           By: /s/ William H. Brown  
9               WILLIAM H. BROWN  
10              Nevada Bar No.: 7623  
11              LAMBROSE BROWN  
12              300 S. Fourth St. Ste. 700  
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16              wbrown@lambrosebrown.com  
17              Attorney for Petitioner K-Kel, Inc.

18                                   **CERTIFICATE OF SERVICE**

19           I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER GRANTING**  
20           **PETITIONERS' MOTION TO FILE SUPPLEMENTAL BRIEF AND SETTING**  
21           **HEARING ON PETITION FOR JUDICIAL REVIEW** was filed with the Clark County  
22           Nevada District Court by way of the Court's electronic filing system, the operation of which  
23           will cause service upon:

24           Adam Paul Laxalt  
25           Attorney General  
26           David J. Pope  
27           Senior Deputy Attorney General  
28           Vivienne Rakowsky  
29           Deputy Attorney General  
30           555 E. Washington Ave., Suite 3900  
31           Las Vegas, Nevada 89101  
32           Email: [dpope@ag.nv.gov](mailto:dpope@ag.nv.gov);  
33           [vrakowsky@ag.nv.gov](mailto:vrakowsky@ag.nv.gov)  
34           Attorneys for Respondents

35           Dated: October 13, 2015

36                                   /s/ Deidra Hufnagle  
37                                   An employee of LAMBROSE BROWN



**ORDR**

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6 MARK E. FERRARIO  
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11 *Counsel for Petitioner SHAC, LLC*

12 BRADLEY J. SHAFER  
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13 SHAFER & ASSOCIATES, P.C.  
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Email: [brad@bradshaferlaw.com](mailto:brad@bradshaferlaw.com)  
16 *Co-Counsel for all Petitioners except SHAC, LLC*

17 **DISTRICT COURT**  
18 **CLARK COUNTY, NEVADA**

19 K-KEL, INC., d/b/a *Spearmint Rhino*  
20 *Gentlemen's Club*, OLYMPUS GARDEN,  
INC., d/b/a *Olympic Garden*, SHAC, L.L.C.  
21 d/b/a *Sapphire*, D. WESTWOOD, INC.,  
d/b/a *Treasures*, DEJA VU SHOWGIRLS  
22 OF LAS VEGAS, LLC, d/b/a/ *Déjà vu*  
and LITTLE DARLINGS OF LAS VEGAS,  
23 LLC, d/b/a *Little Darlings*,

24 **Petitioners,**

25 **vs.**

26 NEVADA DEPARTMENT OF TAXATION,  
and NEVADA TAX COMMISSION,

27 **Respondents**  
28

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10/09/2015 03:29:41 PM



CLERK OF THE COURT

Case No. A-11-648894-J

Consolidated with: A-14-697515-J

Dept: 30

1                   **ORDER GRANTING PETITIONERS' MOTION TO FILE SUPPLEMENTAL BREIF**  
2                   **AND SETTING HEARING ON PETITION FOR JUDICIAL REVIEW**

3                   This matter came on for hearing on September 22, 2015, at 9:00 a.m. before the Court  
4                   was petitioners' motion for leave to file supplemental brief (the "motion"), respondents'  
5                   opposition, and petitioners' reply. The parties were represented by and through their counsel of  
6                   record. The Court, being fully advised on the premises, and good cause appearing, now  
7                   therefore orders as follows:

- 8                   1. Petitioners' motion is granted;
- 9                   2. Respondents' may file an opposition to petitioners' supplemental brief no later than
- 10                  **October 6, 2015;**
- 11                  3. Petitioners may file a reply no later than **October 13, 2015;** and
- 12                  4. Pursuant to NRS 233B.133(4), the Court will hold a hearing in this matter on

13                  **October 27, 2015, at 9:00 a.m.**

14                  Dated: 6 Oct, 2015.

15                  \_\_\_\_\_  
16                  DISTRICT COURT JUDGE

17                  Submitted by:

18                  Approved as to form and content:

19                  By: /s/ William H. Brown  
20                  WILLIAM H. BROWN  
21                  Nevada Bar No.: 7623  
22                  LAMBROSE BROWN  
23                  300 S. Fourth St. Ste. 700  
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27                  wbrown@lambrosebrown.com  
28                  Counsel for Petitioner K-Kel, Inc.

By: /s/ David J. Pope  
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Location : District Court Civil/Criminal [Help](#)**REGISTER OF ACTIONS**

CASE NO. A-11-648894-J

K-Kel, Inc., Plaintiff(s) vs. Nevada Department of Taxation,  
Defendant(s)§  
§  
§  
§  
§  
§  
§Case Type: Civil Petition for Judicial  
Review

Date Filed: 09/23/2011

Location: Department 30

Cross-Reference Case Number: A648894

Supreme Court No.: 69886

**RELATED CASE INFORMATION**

## Related Cases

A-14-697515-J (Consolidated)

**PARTY INFORMATION**

Defendant	Nevada Department of Taxation	Lead Attorneys David J. Pope Retained 7026568084(W)
Defendant	Nevada Tax Commission	David J. Pope Retained 7026568084(W)
Plaintiff	D I Food and Beverage of Las Vegas LLC Doing Business As Scores	William H. Brown Retained 702-816-2200(W)
Plaintiff	D Westwood Inc Doing Business As Treasures	William H. Brown Retained 702-816-2200(W)
Plaintiff	Deja Vu Showgirls of Las Vegas Doing Business As Deja Vu	William H. Brown Retained 702-816-2200(W)
Plaintiff	K-Kel, Inc. Doing Business As Spearmint Rhino Gentlemens Club	William H. Brown Retained 702-816-2200(W)
Plaintiff	Little Darlings of Las Vegas LLC Doing Business As Little Darlings	William H. Brown Retained 702-816-2200(W)
Plaintiff	Olympus Garden Inc Doing Business As Olympic Garden	William H. Brown Retained 702-816-2200(W)
Plaintiff	Power Company Inc Doing Business As Crazy Horse Too Gentlemens Club	William H. Brown Retained 702-816-2200(W)
Plaintiff	Shac LLC Doing Business As Sapphire	William H. Brown Retained 702-816-2200(W)

**EVENTS & ORDERS OF THE COURT**

10/27/2015 | Hearing (9:00 AM) (Judicial Officer Wiese, Jerry A.)  
PETITION FOR JUDICIAL REVIEW  
Minutes

**Appellants' Appendix****Page 3877**

10/27/2015 9:00 AM


- Following arguments by counsel regarding facial challenge of live entertainment tax and first amendment right. COURT ORDERED, matter UNDER ADVISEMENT and will issue a written order from Chambers.

[Parties Present](#)

[Return to Register of Actions](#)

1 CASE NO. A-14-697515  
2 DEPT. NO. 30  
3 DOCKET U  
4

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CLERK OF THE COURT

5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7 \* \* \* \* \*

8  
9 K-KEL, INC., d/b/a Spearmint )  
10 Rhino Gentlemen's Club, et )  
al., )  
11 Petitioner, )  
12 vs. )  
13 NEVADA DEPARTMENT OF TAXATION )  
and NEVADA TAX COMMISSION, )  
14 Respondents. )  
15 \_\_\_\_\_ )  
16

17 REPORTER'S TRANSCRIPT  
18 OF  
19 PROCEEDINGS  
20 BEFORE THE HONORABLE JERRY A. WIESE, II

21 DEPARTMENT XXX

22 DATED TUESDAY, OCTOBER 27, 2015  
23

24 REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708,  
25 CA CSR #13529

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25



1 LAS VEGAS, NEVADA, TUESDAY, OCTOBER 27, 2015;

2 9:42 A.M.

3  
4 P R O C E E D I N G S

5 \* \* \* \* \*

6  
7 THE COURT: All right. So this is A648894,  
8 K-Kel versus Nevada Department of Taxation. You guys  
9 want to state your appearances.

10 MS. RAKOWSKY: Good morning, Your Honor.  
11 Vivienne Rakowsky for the attorney general's office for  
12 the department of taxation.

13 MR. POPE: Good morning, Your Honor. David  
14 Pope also with the attorney general's office also on  
15 behalf of the department of taxation.

16 MR. SHAFER: Brad Shafer from the Michigan  
17 and Arizona bars on behalf of the petitioners, Your  
18 Honor.

19 MR. BROWN: William Brown, K-Kel, Inc., Your  
20 Honor.

21 MR. FERRARIO: Mark Ferrario for SHAC, Your  
22 Honor.

23 THE COURT: Good morning. All right. So  
24 it's on today for -- I don't know. I guess you guys  
25 did a petition for judicial review and wanted oral

1 arguments.

2 MR. SHAFER: Yes, Your Honor.

3 THE COURT: I got a stack of stuff here.

4 MR. SHAFER: Yes, you do. That's why I made  
5 the comment earlier on, I didn't want to drone on for,  
6 you know, 45 minutes on oral argument.

7 We've been here, I think this is now the  
8 third time before Your Honor. The first one was on  
9 discovery issues. The second one was on the  
10 supplemental brief because of the new U.S. Supreme  
11 Court case of Reid versus Tom Gilbert. Your Honor  
12 granted that motion. So the last proceedings were the  
13 Department had filed a response to our supplemental  
14 brief, and then we filed the reply.

15 And we've gone through in our memorandum of  
16 points and authorities, Your Honor, I think pretty  
17 exhaustively why we believe that the live entertainment  
18 tax violates the First Amendment to the United States  
19 constitution. And regrettably because I am not a  
20 resident of the State of Nevada, I cannot vote for you  
21 for reelection. If you uphold the First Amendment this  
22 morning --

23 THE COURT: Just so everybody understands,  
24 it's not a consideration.

25 MR. SHAFER: And because we put so much into



1 the briefing, Your Honor, I'll be more than happy to  
2 answer whatever questions you have, but I really want  
3 to address what I think -- if I was you, what would be  
4 my question, which is the Nevada Supreme Court has  
5 ruled on the facial constitutionality of this in the  
6 Deja Vu Showgirls case. Why is this any different?  
7 And shouldn't I just rule the same way that the Nevada  
8 Supreme Court ruled?

9           And, Your Honor, I'll give you four responses  
10 to that. The first is, Your Honor, we do not believe  
11 that we were provided all of the discovery that we were  
12 entitled to and that Your Honor ordered when we were  
13 here the first time in front of you. As you may  
14 recall, this case has a long, contorted history. This  
15 portion was actually filed as really an offensive  
16 action that was split by Judge Gonzalez because of the  
17 consolidated Edison case. And she felt that our,  
18 quote, as-applied challenge hadn't proceeded as a  
19 petition for judicial review. That's why we're in  
20 front of Your Honor right now.

21           And I was literally here in Nevada for the  
22 depositions that we were going to take on our original  
23 action when Judge Gonzalez either on a Monday or  
24 Tuesday morning ruled as she did that because of  
25 consolidated Edison, she was only going to hear the

1 facial challenge, and she did not believe that  
2 discovery was permitted in a facial challenge and she  
3 shut that down.

4           When we came back to Your Honor, or when we  
5 filed the petition for judicial review and we first  
6 came before Your Honor, we pointed out that there were  
7 legitimate reasons why we had not taken discovery then,  
8 which was the fact that the -- before consolidated  
9 Edison, the law was clear that we got de novo review,  
10 and you agreed with us and you sent it back to Nevada  
11 Department of Taxation. We were allowed to present  
12 some documentary evidence, but the Nevada Tax  
13 Commission did not allow us to take the depositions  
14 that we wanted.

15           So the first issue is, Your Honor, we believe  
16 we're entitled to those depositions, and we did not get  
17 those depositions. The second issue, Your Honor, is  
18 really what are as-applied challenges all about? And  
19 unlike the facial challenge, we take a look at what is  
20 the effect and impact of the tax? The Nevada Supreme  
21 Court looked at it and said, you know, facially, we  
22 don't see any specific intent here to pick on anyone.  
23 And we don't see any disparate action on behalf of --  
24 on the part of the tax.

25           Now, that should be contrasted with what Your



1 Honor already has in front of you in regard to the  
2 documentary evidence that we presented to the Nevada  
3 Tax Commission. And not only do we have e-mails, we  
4 have the legislative history, we have the fact that in  
5 our interrogatories and when we asked, you know, please  
6 present what the governmental interests are and why  
7 this thing was enacted, they specifically responded to  
8 the legislative history as their answer. So we've  
9 given Your Honor the legislative history. But more  
10 importantly, we've also given Your Honor the data in  
11 regard to the impact of this tax.

12           And before I go over that, I need to talk  
13 about what the United States Supreme Court did in the  
14 Minneapolis Star case where there was a tax not on  
15 newspapers but on ink and paper that was used in  
16 publications. And in that case, the United States  
17 Supreme Court invalidated -- in 1943, they invalidated  
18 that tax because it impacted approximately with what  
19 the U.S. Supreme Court said was two thirds of the big  
20 newspapers were affected by that tax.

21           Contrast that with the data that we have  
22 provided to Your Honor, and I'm not going to go through  
23 all of it, but you can take a look at the percentages.  
24 And in 2009, our clients paid 91 percent, 91 percent of  
25 the 10 percent LET. Whereas the U.S. Supreme Court in



1 Minneapolis Star struck it only because two thirds were  
2 paid by a particularized group.

3           We also have, Your Honor, the legislative  
4 history that shows beyond any doubt that the intent was  
5 to tax what they referred to as the strip clubs. They  
6 not only wanted to tax the strip clubs, they wanted to  
7 remove from taxation when the amendments came in in  
8 2005 what they referred to as, quote, "family-oriented  
9 entertainment" such as NASCAR and minor league baseball  
10 that was then exempted. We also have in the  
11 legislative record the fact that they felt that by  
12 decreasing the seating capacity of the strip clubs that  
13 would be subject to the tax because at that time under  
14 the original tax not all of them were. They reduced  
15 the seating capacity from 300 down to 200. They would  
16 then make up the revenues that were lost by then  
17 exempting the family-oriented establishments.

18           And most importantly, we have the legislative  
19 record. Again, they referred to that in their answers  
20 to interrogatories. The legislative record tells you  
21 what the governmental interests are. We have a  
22 legislative record saying that this may well be a way  
23 to control strip clubs by taxing them.

24           The third thing, Your Honor, the reason that  
25 this is different from the Deja Vu Showgirls case is of



1 course because of the case of Reid versus Town of  
2 Gilbert. And I just want to refresh the Court's  
3 recollection in regard to how the briefing went along  
4 these lines. First, what we did was we submitted  
5 our -- excuse me -- our motion for leave to file a  
6 supplemental brief talking about Reid. The Department  
7 responds by saying, Reid only applies to signed  
8 regulations. In our reply, we then pointed out to Your  
9 Honor the fact that two federal circuits, the Seventh,  
10 and I believe it was the Fourth, have noted that that  
11 is not the case and in fact expanded Reid to other  
12 regulations. In fact, we pointed out Judge Manion's  
13 concurring opinion in the Seventh Circuit opinion where  
14 he points out that Reid applies to all laws that  
15 potentially impact upon protected expression.

16           So now in their response to our supplemental  
17 brief after Your Honor granted leave, when we were here  
18 last time, what did they do in response to that? They  
19 literally cite a case from 1890, a U.S. Supreme Court  
20 case from 1890 that, No. 1, has nothing to do with the  
21 First Amendment. The First Amendment wasn't argued in  
22 there. And No. 2, precedes by a half a century when  
23 the United States Supreme Court first started  
24 developing their case law in 1943 in regard to the  
25 application of the First Amendment to tax laws starting



1 with Murdock and then Minneapolis Star Tribune.

2           There is nothing that they have shown Your  
3 Honor, again recalling that under the applicable case  
4 law, they have the burden to demonstrate the  
5 constitutionality of this law or this First Amendment.  
6 They haven't demonstrated any reason. It has to be a  
7 substantial governmental interest, and the regulation  
8 has to be necessary to it. They haven't demonstrated  
9 anything why these 26 exceptions, Your Honor, are  
10 necessary to further the governmental interests. And  
11 what did they say the governmental interest was?  
12 Raising tax revenues, which we pointed out to Your  
13 Honor, the U.S. Supreme Court said, that is not a  
14 sufficient governmental interest in and of itself under  
15 the First Amendment. They have given the Court  
16 nothing.

17           So then the final issue, the reason that this  
18 is distinguishable from the Deja Vu Showgirls case is  
19 who our clients are. Our clients are strip clubs.  
20 That isn't relevant in a facial challenge. The Court's  
21 just looking at what the law says on its face. But now  
22 what do we have by way of application of this law  
23 through the 26 exceptions? The family-oriented  
24 establishments are now exempt from tax, and all the  
25 taxes on live entertainment and what is left, the

1 legislative history refers to the vast majority of the  
2 taxes paid by the strip clubs. But we have also  
3 provided Your Honor again with the documentation and  
4 the data that shows that it's well beyond the two  
5 thirds that the United States Supreme Court found to be  
6 relevant in striking down the law in Minneapolis Star.

7           In one year, our clients paid as much as  
8 91 percent of the tax. The government cannot tax  
9 protected expression directly. They cannot pick out a  
10 limited group of taxpayers. And they cannot make  
11 distinctions of taxation based upon the content of  
12 speech. And this statute violates all three precepts.  
13 If you have any questions, Your Honor, I would be more  
14 than happy to answer them.

15           THE COURT: Nope.

16           MR. SHAFER: Thank you.

17           MS. RAKOWSKY: Thank you, Your Honor.

18 Vivienne Rakowsky. I'm just trying to think of where I  
19 should start to come back to that.

20           First, they were provided all of the  
21 discovery. This Court allowed the plaintiffs, the  
22 petitioners to include 1,510 pages of discovery that  
23 were -- that were taken years after the initial cases  
24 were filed. This Court remanded to look at the  
25 discovery and determine whether the case -- whether



1 they would overturn, amend, or -- or just say that the  
2 original 2007 tax commission case was upheld.

3           The ALJ, it went back to the Nevada Tax  
4 Commission, and that Nevada Tax Commission first looked  
5 at the -- whether they were allowed depositions. And  
6 they turned around and looked at what they did in 2007  
7 when they allowed these -- the petitioners at the time,  
8 they said, Do you want to take discovery? Do you want  
9 to do any of this? And they said, No, we have  
10 everything. And then they said, Well, why don't you  
11 take a month, determine what you need, and we'll come  
12 back again, hear the case. After a month, they came  
13 back. They had added additional 500 pages of  
14 discovery, and they never ever asked for depositions.  
15 Depositions were not asked for until years after the  
16 case was already in district court.

17           We're here on the 2007 decision of the tax  
18 commission. In -- so when we went back two years ago  
19 to the -- to the tax commission, they turned around and  
20 said, We'll accept these documents, because they were  
21 in existence in 2007, but in 2007, you were given the  
22 opportunity for additional discovery. You didn't want  
23 it. And to come now, we don't want anything after 2007  
24 because this is a PJ on our decision in 2007.

25           But what they did is they remanded the 1,500



1 documents to the ALJ. Told the ALJ to look at these  
2 documents and determine whether they would change the  
3 decision, abandon the decision, or upheld the decision,  
4 and that's what she did. And she looked at all 1,500  
5 documents and she came up with a written decision,  
6 which said that the 1,500 documents did not change  
7 anything. And she also -- and they also wrote a letter  
8 after she had the documents for almost a year asking  
9 again for depositions. And she denied it. Because it  
10 wasn't in existence in 2007. So they have had the  
11 discovery. The tax commission's looked at the  
12 additional discovery. They have remanded it, they  
13 upheld it, and now we're back here again.

14           With respect to the as-applied challenge,  
15 they have -- they have been arguing the legislative  
16 history of a bill that was never passed since 2006.  
17 They were before the tax commission who said, We're not  
18 looking for -- at the legislative history of a bill  
19 that was never passed. They were in front of the ALJ.  
20 We're not looking at it. In front of Judge Gonzalez.  
21 Not looking at it. We were in front of the Nevada  
22 Supreme Court, the Nevada Supreme Court said, The  
23 statute is clear on its face. We don't even need to go  
24 to the legislative history. And all they do is cite to  
25 some comments and legislatures that were made during



1 hearings that had no relevance to the actual tax that  
2 was eventually passed.

3           In fact, the United States Supreme Court and  
4 the Nevada Supreme Court in other decisions have turned  
5 around and said, We don't do that because why should we  
6 look at what one legislature said and then overturn a  
7 constitutional law which is just going to be brought  
8 again and nobody's going to make any comments about it?  
9 We're not going to overturn a law that's constitutional  
10 based on comments of legislatures, and that's what's  
11 happening here.

12           With regards to the impact of the tax, they  
13 talk about Minneapolis Star. Minneapolis Star only  
14 taxed, I think, 3 out of -- out of 16 different  
15 providers. That really is not relevant here. In fact,  
16 the Nevada Supreme Court, when they decided the Deja Vu  
17 case, they basically give a roadmap for this case.  
18 They knew the as-applied challenge was coming. They  
19 made a determination saying that Judge Gonzalez  
20 properly dismissed it and should proceed as an  
21 as-applied challenge. So they knew this case was  
22 coming. And in doing so, they could have gone directly  
23 to the facial challenge. They could have determined  
24 what right of way, there was no set of circumstances  
25 under which a statute would be valid, but instead they



1 made a number of findings that applied to this  
2 as-applied challenge. They said, quote, that "it's an  
3 excise tax on admission fees and certain products."  
4 It's not a First Amendment case. The live  
5 entertainment tax does not even implicate the -- the  
6 taxpayers' message, any of the 90 venues. None of them  
7 are the messages discussed. They -- they said that --  
8 they did away with their argument on intermediate  
9 scrutiny by finding that the live entertainment tax  
10 does not regulate live entertainment and it does not  
11 burden the expressive conduct of the facility. And  
12 this is very, very important these findings because  
13 these findings apply here. This is not a First  
14 Amendment tax. This is the -- this is a tax on -- on  
15 places where live entertainment is taking place and  
16 it's a tax on the admission. It does not tax or burden  
17 the people performing the -- the live entertainment and  
18 it does not look at their message.

19           They also did away with Murdock. And  
20 these -- the districts have been arguing Murdock for  
21 years. And under Murdock -- and Murdock was a prior  
22 restraint case. And, in fact, the -- the Nevada  
23 Supreme Court made some interesting findings when it  
24 came to Murdock and even reprimanded the -- and even  
25 reprimanded the petitioners by saying the Nevada



1 Supreme Court did the same in the subsequent Swaggert  
2 (phonetic) case limited Murdock to apply only where  
3 there's a flat license tax that operates a prior  
4 restraint on the free exercise of religious beliefs.  
5 So the Murdock case that they have argued in their  
6 briefs doesn't even apply here because this is not a  
7 prior restraint. Nobody has to pay the tax in order to  
8 take part in First Amendment activities. The dancers  
9 don't pay the tax. The patrons pay the tax.

10           The supreme court also stated that, Despite  
11 its misnomer, the live entertainment tax does not  
12 regulate live entertainment and does not regulate a  
13 First Amendment activity. Imposing an excise tax on  
14 business transactions would neither inhibit nor burden  
15 the expressive conduct taking place at the facility.  
16 They also said the Nevada -- the tax does not place a  
17 burden on any activities because it's a tax on  
18 admission paid by patrons.

19           As the ALJ noted in her decision that the --  
20 that the petitioner's liability to be -- for the tax  
21 has increased over the years only because their  
22 business has increased. It has not affected their  
23 business at all. And after reviewing the 1,500  
24 documents, the ALJ actually noted, she says, Frankly,  
25 it's difficult to imagine there might be facts to

1 support any of the petitioner's assertions. The  
2 petitioner's position that the Nevada legislature  
3 enacted that the live entertainment tax in an attempt  
4 to suppress entertainment in Nevada, which is the life  
5 blood of the tourism in our state, borders on the  
6 absurd. I mean, the very thought that they would  
7 try -- that our legislature would try to tax  
8 gentlemen's club who bring in so much income into our  
9 state is ridiculous. We have -- we have the same type  
10 of venues in the casinos that we do -- that these --  
11 that these gentlemen clubs have. There is adult  
12 entertainment in the casinos, and -- and that tax --  
13 the casinos are taxed the same way as the adult  
14 entertainment industry. In other words, this is one  
15 tax that's -- that is administered by two different  
16 agencies.

17           So if you have an adult entertainment venue  
18 that seats less than 7,500 people in a casino, they're  
19 going to pay the same 10 percent tax on admission, the  
20 same 10 percent tax on the merchandise and beverages as  
21 the gentleman's club, as petitioners here today. This  
22 is not two different taxes. It's one tax.

23           THE COURT: What kind of -- what kind of  
24 places do we have in our -- in our casinos that  
25 supplies --



1 MS. RAKOWSKY: We have all of the shows. We  
2 have Zumanity. We have the -- the men -- the men's  
3 strip shows. I mean, I provided an entire list of them  
4 plus -- plus -- since -- since conventions are --  
5 are -- are exempt, we have the AVN convention here  
6 which is the adult entertainment convention that they  
7 sell tickets to. And there's all types of live  
8 entertainment going on in there. And it's definitely  
9 adult entertainment. But that's also exempt because we  
10 exempt all of the conventions.

11 So -- so -- so the tax is treated equally  
12 across the lines. And if they talk about the -- okay.  
13 And -- and I just want to add one more thing about what  
14 goes on in the casinos. The casinos already pay tax.  
15 The casinos pay 6 3/4 percent. And not only do they  
16 pay the 6 3/4 percent, but when they have a venue that  
17 has live entertainment in it, they're also paying the  
18 10 percent that the -- that these gentleman's club  
19 that -- that the venues outside of the casinos are  
20 paying. And they're also -- if their venue is over  
21 7,500, they're also paying the 5 percent just like any  
22 other venue outside the casino.

23 So the tax is administered equally. Just  
24 that because -- because the casino has a special board  
25 that governs them, they're the ones who actually



1 administer the tax. And then the Department of  
2 Taxation administers the ones outside. In fact, we  
3 have -- we've had entertainment venues that have been  
4 in the malls that are attached to casinos like in the  
5 Venetian. If something is in the mall and they provide  
6 live entertainment, then the Department of Taxation is  
7 the one who administers the tax. But if it's inside  
8 the casino itself, then that's administered by Gaming  
9 Control.

10 Just going to skip ahead to the -- to the  
11 third fact that they argued which is Reid. Reid is --  
12 Reid is a First Amendment case. Reid affects behavior.  
13 It looks at a First Amendment issue. It looks at  
14 signs. It specifically looked at signs and said that  
15 they're content based. And that goes back to the -- to  
16 the case -- Reid goes -- Reid goes back and depends on  
17 our Arkansas Writers Project. Arkansas Writers Project  
18 years ago said that if something is content based, then  
19 it's subject to strict scrutiny.

20 Arkansas Writers Project has been around for  
21 years. They looked at that and they determined that  
22 the -- that -- that Reid was looking at the content of  
23 the signs. The political signs could only be a certain  
24 size. Certain size that advertises this type of thing  
25 could be a certain size. A directional sign could only



1 be a certain size. It could only be up to a certain  
2 amount. So they looked at the content of the sign, and  
3 that's how they determined it was subject to strict  
4 scrutiny. They also took certain -- on three different  
5 sign cases.

6 Now, as Mr. Shafer said, they have looked at  
7 our cases too. They looked at political robocalling  
8 and determined that political robocalling was content  
9 based so they overruled that. They looked at  
10 panhandling and panhandling with signs and realized  
11 that's a First Amendment issue. But what we have here  
12 is not a First Amendment issue. We have a tax that's  
13 on the admission. The supreme court has already said  
14 it's on the business transaction. It's not on the  
15 First Amendment activity. So we don't even bring the  
16 First Amendment into the determination of this tax.

17 So from the very beginning, the entire  
18 argument is misplaced. And then in addition,  
19 Mr. Shafer keeps saying that -- that the State has the  
20 burden. Well, this is a petition for judicial review  
21 which is governed by 233(B). And 233(B), 1352 has  
22 specifically said that the burden is on the petitioner  
23 to show -- to show that the decision of the  
24 administrative body was incorrect.

25 So we're here, as I said, on a petition for

1 judicial review. We're not here on the facial  
2 challenge because the facial challenge was never  
3 determined below. We're only here with what has been  
4 determined by the administrative agency. And that's  
5 all governed by 32(B).

6           So the petitioner has the burden. And the  
7 fourth issue that they mentioned was the -- the  
8 exemption. They -- they tried to say that there's a  
9 family tax, and there's -- there's a casino tax and  
10 there's an adult entertainment tax. And by them saying  
11 that they pay 90 percent of the tax, that's incorrect.  
12 When it comes to the overall live entertainment tax,  
13 they pay less than 6 percent. They pay the majority of  
14 what the state administers because the majority of the  
15 venues that are outside the casinos are gentlemen's  
16 clubs. But there are 90 different venues that are  
17 administered by the department of taxation. It's just  
18 that the gentlemen's club, as a group, there's more of  
19 them and they do more business. And that's the only  
20 reason that they pay more of the tax. But if you have  
21 any questions, I would be happy to answer them.

22           THE COURT: No.

23           MS. RAKOWSKY: Thank you.

24           MR. SHAFER: Thank you, Your Honor.

25           THE COURT: Should have given you guys a



1 separate day.

2 MS. RAKOWSKY: I didn't start it.

3 MR. SHAFER: I will try to be brief.

4 THE COURT: You guys lied to me when you said  
5 it was going to be ten minutes; right?

6 MR. SHAFER: How long was I in my initial  
7 comments?

8 THE COURT: It's been 45.

9 MR. SHAFER: Sorry. Sorry. Sorry,  
10 everybody. The very first thing is, after nine years  
11 of litigation, I'm glad that this state now  
12 acknowledges that Reid is dependent on RADLIN, Arkansas  
13 Writers Project, so that the Reid case is, in fact,  
14 dependent on a First Amendment tax case.

15 Now, this is what NRS 368(A).200 says, Point  
16 1, "Except as otherwise provided in this section, there  
17 is hereby imposed an excise tax on admission to any  
18 facility in the state where live entertainment is  
19 provided." And you may remember from law school, first  
20 day, First Amendment analysis, there's actually two  
21 components of the First Amendment. There's the ability  
22 to speak and there's also the ability to hear. Or in  
23 this case, the ability to perform and the ability to  
24 see. And she's absolutely right. The taxes on the  
25 customer as coming in, and that is, in fact, a tax and

1 that is a prior restraint tax because the only way that  
2 these people can come in and see the live entertainment  
3 that's performed in my client's establishments is by  
4 paying the tax.

5 That is what renders -- that's the first  
6 reason that it renders it unconstitutional. Your  
7 Honor, you can accept all of the statements that she  
8 just made if you do one thing, you -- you do that --  
9 you know that monkey poster we have all seen -- by  
10 putting hands over the ears, putting hands over the  
11 eyes, and putting hands over the mouth. Because the --  
12 the 26 exceptions, without question, make distinctions  
13 based on content of expression. It is not the tax  
14 itself that makes a distinction, the tax that I just  
15 read. It's the 26 exceptions where it leaves my  
16 clients in and it takes out virtually everybody else.  
17 She talks about the fact that because the customer --  
18 because our clients were doing better, they started  
19 paying more tax. That wasn't the data that I showed  
20 you. The data that we showed you were the percentages  
21 of what our clients paid over all of the tax, the  
22 nongaming tax.

23 And let me also correct something that she  
24 said, when Ms. Rakowsky made the statement that the  
25 casinos pay the same thing. No, they don't. We



1 pointed out, Your Honor, how there's two separate sets  
2 of tax here. There's a 5 percent tax on admissions and  
3 there's a 10 percent tax on our clients which is  
4 admissions, food, and beverages. That is a huge  
5 distinction. And in regard to that tax, which is the  
6 only thing we're challenging here, this is not our  
7 facial challenge. What we're challenging is the tax  
8 that was applied to our clients we paid in 19 -- in  
9 2009, 91 percent of that tax, way over the 66 percent  
10 that was at issue in Murdock.

11           Now, they talk about the comments of the  
12 legislatures. And she would be absolutely correct if I  
13 came before Your Honor and said, This is what this  
14 legislator said. Okay. And you need to take that as  
15 whole cloth because -- take that for the reason that  
16 the whole legislature acted. But that's not what  
17 happened here. Because what happened here is we  
18 specifically asked in the interrogatories, Articulate  
19 for us what the governmental interest is and how the  
20 tax furthers that governmental interest. And what they  
21 responded to us was the legislative history that we  
22 have quoted to Your Honor. Now she gets up and says,  
23 that's part of a statute that -- that -- a bill that  
24 was never even passed. That is untrue. Take a look at  
25 the bills that were at issue. And even if it was true,



1 even if it was true, that's what they have cited as the  
2 governmental interest in the way that the -- that the  
3 department is articulating that the governmental  
4 interest is furthered here.

5           There's a reason we asked those discovery  
6 requests. They're bound by those discovery requests,  
7 Your Honor. They can't get out of this at that late  
8 date. And those comments to the legislators are  
9 directly relevant because they said it is. They agreed  
10 to be bound by those statements in those interrogatory  
11 answers.

12           I think that's all I have got.

13           MR. FERRARIO: Your Honor, can we correct one  
14 thing? Any intimation that Judge Gonzalez went over  
15 the legislative history is incorrect. Judge Gonzalez  
16 refused to look at the legislative history. She made  
17 that comment. I don't know if she meant to intimate  
18 that or not. And the only thing I would add is that  
19 we're entitled to an objective review of the evidence,  
20 as Mr. Shafer has said. And it's always baffled me  
21 that the State has argued this and the tax  
22 commissioner. When we stand up, we're looking at a  
23 statute that's entitled Live Entertainment. And the  
24 state starts off and says, That's not what this is  
25 about. I think that should trigger in Your Honor's



1 head the need to look further. And I would encourage  
2 you to follow Mr. Shafer's lead. Look at the record  
3 here. The records speaks better than we can.

4           And that's what we've been trying to get the  
5 courts to do. Go beyond the defensive measures being  
6 articulated by the department. Look at the record.  
7 Look at what the legislature was trying to do. Look at  
8 the title of the statute. Then look at the law that  
9 Mr. Shafer articulated, we've articulated in our  
10 briefs, and particularly look at it in light of Reid.  
11 An objective analysis of this leads to one conclusion,  
12 and that is this tax needs to be struck down because it  
13 was visited, and I mean, primarily on our clients. And  
14 our clients were targeted and it's content based. Take  
15 a look at the legislative history.

16           MR. SHAFER: Your Honor, we had given you  
17 Judge Gonzalez's order. I apologize if I didn't talk  
18 about that. But we gave Your Honor Judge Gonzalez's  
19 order where she specifically said, because this is a  
20 facial challenge, I will not look at the legislative  
21 history. And that's the exact same argument that they  
22 made to the Nevada Supreme Court. And you will see,  
23 Your Honor, that in the decision, the Nevada Supreme  
24 Court did not look at it.

25           MR. FERRARIO: And you now have it. We want

1 you to look at it.

2 THE COURT: Great.

3 MR. FERRARIO: We would welcome that. It's  
4 actually entertainment, especially the part where it  
5 says, if we do this somebody is going to come and  
6 strike it down. Let's figure out a way to do it so it  
7 doesn't look like it, so ...

8 MS. RAKOWSKY: Can I briefly respond to some  
9 of the things that was said?

10 THE COURT: No. You guys just keep going on  
11 forever.

12 MS. RAKOWSKY: Just I really would like to  
13 because Judge Gonzalez said the statute was fair.

14 THE COURT: It was their petition; right?  
15 They go first, and then you go, and then they go last.

16 MS. RAKOWSKY: Okay.

17 MR. FERRARIO: Thank you, Your Honor.

18 THE COURT: Thanks, guys. Have a good day.  
19 I'll give you a written decision.

20 MR. SHAFER: Thank you.

21 (Thereupon, the proceedings  
22 concluded at 10:14 a.m.)  
23  
24  
25



**CERTIFICATE OF REPORTER**

STATE OF NEVADA )  
 ) ss:  
COUNTY OF CLARK )

I, Kristy L. Clark, a duly commissioned  
Notary Public, Clark County, State of Nevada, do hereby  
certify: That I reported the proceedings commencing on  
Tuesday, October 27, 2015, at 9:42 o'clock a.m.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes.

I further certify that I am not a relative or employee of counsel of any of the parties, nor a relative or employee of the parties involved in said action, nor a person financially interested in the action.

IN WITNESS WHEREOF, I have set my hand in my  
office in the County of Clark, State of Nevada, this  
21st day of March, 2016.

Kristy Clark

KRISTY L. CLARK, CCR #708



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Location : District Court Civil/Criminal [Help](#)**REGISTER OF ACTIONS**

CASE NO. A-11-648894-J

K-Kel, Inc., Plaintiff(s) vs. Nevada Department of Taxation,  
Defendant(s)§  
§  
§  
§  
§  
§  
§Case Type: Civil Petition for Judicial  
Review

Date Filed: 09/23/2011

Location: Department 30

Cross-Reference Case Number: A648894

Supreme Court No.: 69886

**RELATED CASE INFORMATION**

## Related Cases

A-14-697515-J (Consolidated)

**PARTY INFORMATION**

Defendant	Nevada Department of Taxation	Lead Attorneys David J. Pope Retained 7026568084(W)
Defendant	Nevada Tax Commission	David J. Pope Retained 7026568084(W)
Plaintiff	D I Food and Beverage of Las Vegas LLC Doing Business As Scores	William H. Brown Retained 702-816-2200(W)
Plaintiff	D Westwood Inc Doing Business As Treasures	William H. Brown Retained 702-816-2200(W)
Plaintiff	Deja Vu Showgirls of Las Vegas Doing Business As Deja Vu	William H. Brown Retained 702-816-2200(W)
Plaintiff	K-Kel, Inc. Doing Business As Spearmint Rhino Gentlemens Club	William H. Brown Retained 702-816-2200(W)
Plaintiff	Little Darlings of Las Vegas LLC Doing Business As Little Darlings	William H. Brown Retained 702-816-2200(W)
Plaintiff	Olympus Garden Inc Doing Business As Olympic Garden	William H. Brown Retained 702-816-2200(W)
Plaintiff	Power Company Inc Doing Business As Crazy Horse Too Gentlemens Club	William H. Brown Retained 702-816-2200(W)
Plaintiff	Shac LLC Doing Business As Sapphire	William H. Brown Retained 702-816-2200(W)

**EVENTS & ORDERS OF THE COURT**

11/24/2015 Minute Order (9:00 AM) (Judicial Officer Wiese, Jerry A.)  
PETITION FOR JUDICIAL REVIEW  
Minutes

**Appellants' Appendix****Page 3907**

11/24/2015 9:00 AM

- The above-referenced matter came before Judge Jerry Wiese with regard to a Petition for Judicial Review filed by Petitioners, K-KEL, INC., d/b/a Spearmint Rhino Gentlemen s Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, LLC d/b/a Sapphire, D. WESTWOOD, INC., d/b/a Treasures, D J VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a D j vu and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a Little Darlings. Briefs were filed in this matter, and the Court also heard oral argument. After supplemental briefing regarding the Reed case, and after oral argument, the Court took the matter under advisement. Based upon the pleadings and papers on file, after hearing oral argument, and good cause appearing, the Court now renders the following decision: This Court will not reiterate the procedural history or the factual background of this case, as the parties essentially agree to the underlying facts. Petitioners argue that the Commission should have permitted Petitioners to conduct the requested depositions in order to shed further light on the drafting and amending of the NLET and to identify the purpose for each and every one of the exceptions to the definition of live entertainment set forth in NRS 368A. Petitioners also argue that NLET is unconstitutional because it is a direct tax on First Amendment activities and is statutorily gerrymandered to apply only to a narrowly defined group of speakers, and in doing so discriminates based on the content of the entertainment. Lastly, Petitioners argue that in light of the recent ruling in *Reed v. Town of Gilbert, Arizona*, \_\_U.S.\_\_, 135 S. Ct. 2218 (2015), the NLET does not pass the constitutional muster of strict scrutiny that now applies, whereas in this case, there is a differentiation of the application of a law based upon the content of expression. The Department of Taxation ( Department ) argues that the Commission s decision on remand to deny depositions should be upheld because, while NRS 233B.131(2) provides for additional evidence under very specific conditions, it does not provide for additional evidence after receiving an adverse decision. This Court remanded the case to the Commission for review of evidence, not to allow additional evidence to be gathered. The Department also argues that NLET is a Constitutional revenue raising tax and not a tax on a First Amendment right, and it has not been applied to the Petitioners in an unconstitutional manner. Furthermore, the Department notes that the Nevada Supreme Court found that the NLET is constitutional on its face in *D j Vu Showgirls v. Department of Taxation*, 334 P.3d 392 (2014). In that case, the Nevada Supreme Court established that the standard of review for the NLET is a rational basis analysis, because it does not regulate live entertainment, it does not discriminate on the basis of the taxpayers' speech, and it does not target a small group of speakers or threaten to suppress viewpoints. *D j vu*, 334 P.3d at 401. Finally, the Department argues that the standard of review for a tax matter has been in place more than 125 years and has not changed on the basis of a sign ordinance case (*Reed*). The Department argues that the Court in *D j Vu* ruled that heightened scrutiny does not apply to tax classification unless the classification is hostile and oppressive discrimination against particular person and classes. NRS 233B.135 indicates that the Court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. (NRS 233B.135[3]). Pursuant to NRS 33B.135(3), the Court can remand, affirm, or set aside the Commission s decision if the substantial rights of the petitioner have been prejudiced because the agency s decision is in violation of statutory provisions, in excess of the statutory authority of the agency, made upon unlawful procedure, affected by other error of law, clearly erroneous, or an arbitrary or capricious abuse of discretion. The Commission did not find Petitioner s argument with respect to reopening discovery to allow depositions meritorious because all the information that Petitioners sought recently was available prior to 2007, and the information sought was consistently determined to be irrelevant. These are findings of fact by the Commission that may not be disturbed by this Court. The Court does not find that the Commission s determination violated the constitution or a statute, was in excess of its statutory authority, was made upon unlawful procedure, was affected by other error of law, was clearly erroneous, or was arbitrary, capricious, or an abuse of discretion. Consequently, the Commission s determination with regard to the request to take depositions, is hereby AFFIRMED. The construction of a statute is a question of law, and therefore, independent review is appropriate. However, this court will not readily disturb an administrative interpretation of statutory language. *City of Reno v. Reno Police Protective Ass n.*, 118 Nev. 889, 900 (2002). The Commission s determination that the NLET is constitutional as applied to the Petitioners is supported by the fact that the Nevada Supreme Court has determined that the NLET does not regulate live entertainment and is simply a tax on a business activity, specifically on the expressive activity taking place within the facility. Petitioners have failed to meet their burden to show that the NLET has attacked

the content of their message. In addition, this Court finds that the Commission did not exceed their authority by concluding that NLET, as applied to Petitioners, is not an impermissible differential tax, and does not place a burden on a narrowly defined group of speakers. This court agrees that Reed does not apply to tax classification unless the classification is hostile and oppressive discrimination against particular person and classes, which there is no evidence of here. Therefore, the Commission's decision that NLET is not a content-based tax on first amendment activity, but a legitimate tax scheme, evenly applied, and used to raise state revenue shall not be disturbed. Based upon the foregoing, this Court concludes that there was substantial evidence supporting the Commission's decisions that the Commission's decisions did not violate NRS 233B.135, and consequently, the Commission's decisions are hereby AFFIRMED. The Petition for Judicial Review is DENIED. Respondent's counsel is to prepare an Order consistent with this Minute Order within 10 days, have it approved as to form and content by Petitioner's counsel, and submit to this Court for signature.

[Return to Register of Actions](#)





CLERK OF THE COURT

OSCC

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

\*\*\*\*\*

K-KEL, INC., PLAINTIFF(S)  
VS.  
NEVADA DEPARTMENT OF  
TAXATION, DEFENDANT(S)

CASE NO.: A-11-648894-J  
A-14-697515-J  
DEPARTMENT 30

**CIVIL ORDER TO STATISTICALLY CLOSE CASE**

Upon review of this matter and good cause appearing,  
IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to  
statistically close this case for the following reason:

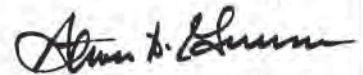
**DISPOSITIONS:**

- ☐ Default Judgment
- ☐ Judgment on Arbitration
- ☐ Stipulated Judgment
- ☒ Summary Judgment
- ☐ Involuntary Dismissal
- ☐ Motion to Dismiss by Defendant(s)
- ☐ Stipulated Dismissal
- ☐ Voluntary Dismissal
- ☐ Transferred (before trial)
- ☐ Non-Jury – Disposed After Trial Starts
- ☐ Non-Jury – Judgment Reached
- ☐ Jury – Disposed After Trial Starts
- ☐ Jury – Verdict Reached
- ☐ Other Manner of Disposition

DATED this 1st day of December, 2015.



JERRY A. WIESE  
DISTRICT COURT JUDGE



CLERK OF THE COURT

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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

K-KEL, INC., d/b/a Spearmint Rhino  
Gentlemen's Club; OLYMPUS GARDEN,  
INC., d/b/a Olympic Garden; SHAC, L.L.C.,  
d/b/a Sapphire; D. WESTWOOD, INC.,  
d/b/a Treasures; DÉJÀ VU SHOWGIRLS  
OF LAS VEGAS, LLC, d/b/a Déjà vu; and  
LITTLE DARLINGS OF LAS VEGAS, LLC,  
d/b/a Little Darlings,

Petitioners,

v.

STATE OF NEVADA, ex rel.  
DEPARTMENT OF TAXATION and TAX  
COMMISSION,

Respondents.

Case No.: A-11-648894-J  
Dept. No.: XXX

Consolidated with:  
Case No.: A-14-697515-J

<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Dismissal by Decision	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Dismissal by Withdrawal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Dismissal by Defendant	<input type="checkbox"/> Judgment of Arbitration

**ORDER DENYING JUDICIAL REVIEW OF ADMINISTRATIVE DECISION**

The above-referenced matter came before the Honorable Judge Jerry Wiese with regard to the Consolidated Petitions for Judicial Review of the decisions by the Nevada Tax Commission (hereinafter "Commission") filed by Petitioners, K-KEL, INC., d/b/a Spearmint Rhino Gentlemen s Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, LLC

Appellants' Appendix

Page 3911



d/b/a Sapphire, D. WESTWOOD, INC., d/b/a Treasures, DEJA VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a Deja vu and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a Little Darlings ("Petitioners"). Both sides filed briefs, and the Court heard oral argument. The Petitioners were represented by William Brown Esq., Mark Ferrario, Esq. and Bradley Shafer, Esq. (admitted Pro Hac Vice). The Nevada Tax Commission was represented by Vivienne Rakowsky, Deputy Attorney General and David Pope, Senior Deputy Attorney General.

After supplemental briefing regarding the Supreme Court decision in Reed v Town of Gilbert, Arizona, 135 U.S. 2218 (2015), and after oral argument, the Court took the matter under advisement and issued a Minute Order on November 24, 2015 which is attached hereto as Exhibit "A".

The procedural history of this matter dates back to a decision by the Nevada Tax Commission dated October 12, 2007 upholding the Live Entertainment Tax (PJR-11-648894-J), a remand in January 2012 to allow the Commission to review additional evidence and determine whether it would amend, affirm or reverse its 2007 decision and re-open discovery to allow depositions (PJR 14-697515-J), and supplemental briefing to determine whether the standard of review for the Live Entertainment Tax changed based on the U.S. Supreme Court decision in Reed v. Town of Gilbert, Arizona, 135 S. Ct. 2218 (2015).

Based upon the pleadings and papers on file, after hearing oral argument, and good cause appearing, the Court renders the following findings of fact:

1. The parties essentially agreed to the procedural history and underlying factual background of this case.
2. The three issues before this Court were:
  - a. Petition for Judicial Review of the Nevada Tax Commission October 12, 2007 decision denying Petitioners requests for refunds of Live Entertainment Tax ("NLET") paid, and finding that the NLET does not violate the U.S. Constitution or Nevada Constitution, is not targeted at gentlemen's clubs, and is not a tax based on the content of the taxpayer's message.



- b. Petition for Judicial Review of the Nevada Tax Commission's decision dated September 6, 2012 finding that discovery would not be reopened to allow depositions, and decision on February 12, 2014 upholding the Hearing Officers Hearing on Remand finding that the more than 1,500 pages of supplemental materials were insufficient to cause the Commission's October 12, 2007 decision to be reversed or amended.
    - c. Petitioner's supplemental briefing claiming that the U.S. Supreme Court decision in Reed v. Gilbert Arizona changed the standard of review for determining the constitutionality of the Live Entertainment Tax to strict scrutiny.
  3. The Petitioners made the following arguments:
    - a. That the NLET is unconstitutional because it is a direct tax on First Amendment activities and is statutorily gerrymandered to apply only to a narrowly defined group of speakers, and in doing so discriminates based on the content of the entertainment;
    - b. The Commission should have permitted Petitioners to conduct the requested depositions in order to shed further light on the drafting and amending of the NLET and to identify the purpose for each and every one of the exceptions to the definition of live entertainment set forth in NRS 368A; and
    - c. Based on the recent ruling in Reed v. Town of Gilbert, Arizona, U.S. , 135 S. Ct. 2218 (2015), strict scrutiny applies, and the NLET does not pass the constitutional muster because there is a differentiation of the application of a law based upon the content of the expression.
  4. The Department made the following arguments:
    - a. That the NLET is Constitutional revenue raising tax and not a tax on a First Amendment right, and the tax has not been applied to the Petitioners in an unconstitutional manner. The Nevada Supreme Court found that the NLET is



1 constitutional on its face in Deja Vu Showgirls v. Department of Taxation, 334  
2 P.3d 392 (2014). In that case, the Nevada Supreme Court established that  
3 the standard of review for the NLET is a rational basis analysis, because it  
4 does not regulate live entertainment, it does not discriminate on the basis of  
5 the taxpayers' speech, and it does not target a small group of speakers or  
6 threaten to suppress viewpoints. Deja vu, 334 P.3d at 401;

- 7 b. That the Commission's decision on remand to deny depositions should be  
8 upheld because, while NRS 233B.131(2) provides for additional evidence  
9 under very specific conditions, it does not provide for additional evidence  
10 after receiving an adverse decision. Moreover, the information that the  
11 Petitioners were seeking was available in 2007. On January 24, 2012, the  
12 Court remanded the case to the Commission for review of evidence, not to  
13 allow additional evidence to be gathered; and
- 14 c. The standard used by the court to review a tax matter has been in place  
15 more than 125 years and has not changed on the basis of a sign ordinance  
16 case (Reed). The Court in Deja Vu had previously ruled that heightened  
17 scrutiny does not apply to tax classification unless the classification is hostile  
18 and oppressive discrimination against particular person and classes.

19 The Court made the following conclusions of law:

- 20 5. NRS 233B.135 indicates that the Court shall not substitute its judgment for that of  
21 the agency as to the weight of evidence on a question of fact. NRS 233B.135(3).
- 22 6. Pursuant to NRS 233B.135(3), the Court can remand, affirm, or set aside the  
23 Commission's decision if the substantial rights of the petitioner have been  
24 prejudiced because the agency's decision is in violation of statutory provisions, in  
25 excess of the statutory authority of the agency, made upon unlawful procedure,  
26 affected by other error of law, clearly erroneous, or an arbitrary or capricious abuse  
27 of discretion.



- 1 7. The Commission did not find Petitioner's argument with respect to reopening  
2 discovery to allow depositions meritorious because all the information that  
3 Petitioners sought recently was available prior to 2007, and the information sought  
4 was consistently determined to be irrelevant. The Commission's decision did not  
5 violate the constitution or a statute, was not in excess of its statutory authority, was  
6 not made upon unlawful procedure, was not affected by other error of law, was not  
7 clearly erroneous, and was not arbitrary, capricious, or an abuse of discretion.  
8 These findings of fact by the Commission may not be disturbed by this Court. The  
9 Commission's determination with regard to the request to take depositions is hereby  
10 AFFIRMED.
- 11 8. The construction of a statute is a question of law, and therefore, independent review  
12 is appropriate. However, the court will not readily disturb an administrative  
13 interpretation of statutory language. City of Reno v. Reno Police Protective Ass'n.,  
14 118 Nev. 889, 900 (2002). The Commission's determination that the NLET is  
15 constitutional as applied to the Petitioners is supported by the fact that the Nevada  
16 Supreme Court has determined that the NLET does not regulate live entertainment  
17 and is simply a tax on a business transaction, and not a tax on the expressive  
18 activity taking place within the facility.
- 19 9. Petitioners have failed to meet their burden to show that the NLET has attacked the  
20 content of their message.
- 21 10. The Commission did not exceed their authority by concluding that NLET, as applied  
22 to Petitioners, is not an impermissible differential tax, and does not place a burden  
23 on a narrowly defined group of speakers.
- 24 11. Reed v Town of Gilbert, Arizona, 135 U.S. 2218 (2015), does not apply to tax  
25 classification unless the classification is hostile and oppressive discrimination  
26 against particular person and classes. This Court does not find any evidence here  
27 that NLET triggers the application of Reed.



12. The Commission's decision that NLET is not a content-based tax on first amendment activity, but a legitimate tax scheme, evenly applied, and used to raise state revenue shall not be disturbed.

**ORDER**

Based upon the foregoing, this Court Orders that there was substantial evidence supporting the Commission's decisions and that the Commission's decisions did not violate NRS 233B.135, and consequently, the Commission's decisions are hereby AFFIRMED. The Petition for Judicial Review is DENIED.

**IT IS SO ORDERED**

DATED this 13 day of May, 2016.

  
DISTRICT COURT JUDGE

Respectfully Submitted By:

  
VIVENNE RAKOWSKY  
Deputy Attorney General

# EXHIBIT A

# EXHIBIT A

**CASE NO. A-11-648894-J**

www.elsevier.com/locate/jmb

Case Type: Civil Petition for Judgment  
Date Filed: 09/23/2011  
Location: Department 30  
Reference Case Number: A648894

### Related Cases

A-14-697515-J (Consolidated)

<b>Defendant</b>	<b>Nevada Department of Taxation</b>	<b>Lead Attorneys</b> <b>David J. Pope</b> À À Retained 7026568084(W)
<b>Defendant</b>	<b>Nevada Tax Commission</b>	<b>David J. Pope</b> À À Retained 7026568084(W)
<b>Plaintiff</b>	<b>D I Food and Beverage of Las Vegas LLC</b>	<b>William H. Brown</b> À À Retained 702-816-2200(W)
<b>Plaintiff</b>	<b>D Westwood Inc</b>	<b>William H. Brown</b> À À Retained 702-816-2200(W)
<b>Plaintiff</b>	<b>Deja Vu Showgirls of Las Vegas</b>	<b>William H. Brown</b> À À Retained 702-816-2200(W)
<b>Plaintiff</b>	<b>K-Kel, Inc.</b>	<b>William H. Brown</b> À À Retained 702-816-2200(W)
<b>Plaintiff</b>	<b>Little Darlings of Las Vegas LLC</b>	<b>William H. Brown</b> À À Retained 702-816-2200(W)
<b>Plaintiff</b>	<b>Olympus Garden Inc</b>	<b>William H. Brown</b> À À Retained 702-816-2200(W)
<b>Plaintiff</b>	<b>Power Company Inc</b>	<b>William H. Brown</b> À À Retained 702-816-2200(W)
<b>Plaintiff</b>	<b>Shac LLC</b>	<b>William H. Brown</b> À À Retained 702-816-2200(W)



11/24/2015 Minute Order (9:00 AM) (Judicial Officer Wiese, Jerry A.)

## Minutes

11/24/2015 9:00 AM

The above-referenced matter came before Judge Jerry Wiese with regard to a Petition for Judicial Review filed by Petitioners, K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, LLC d/b/a Sapphire, D. WESTWOOD, INC., d/b/a Treasures, D J VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a D j vu and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a Little Darlings. Briefs were filed in this matter, and the Court also heard oral argument. After supplemental briefing regarding the Reed case, and after oral argument, the Court took the matter under advisement. Based upon the pleadings and papers on file, after hearing oral argument, and good cause appearing, the Court now renders the following decision: This Court will not reiterate the procedural history or the factual background of this case, as the parties essentially agree to the underlying facts. Petitioners argue that the Commission should have permitted Petitioners to conduct the requested depositions in order to shed further light on the drafting and amending of the NLET and to identify the purpose for each and every one of the exceptions to the definition of live entertainment set forth in NRS 368A. Petitioners also argue that NLET is unconstitutional because it is a direct tax on First Amendment activities and is statutorily gerrymandered to apply only to a narrowly defined group of speakers, and in doing so discriminates based on the content of the entertainment. Lastly, Petitioners argue that in light of the recent ruling in *Reed v. Town of Gilbert, Arizona*, \_\_U.S.\_\_, 135 S. Ct. 2218 (2015), the NLET does not pass the constitutional muster of strict scrutiny that now applies, whereas in this case, there is a differentiation of the application of a law based upon the content of expression. The Department of Taxation ( Department ) argues that the Commission's decision on remand to deny depositions should be upheld because, while NRS 233B.131(2) provides for additional evidence under very specific conditions, it does not provide for additional evidence after receiving an adverse decision. This Court remanded the case to the Commission for review of evidence, not to allow additional evidence to be gathered. The Department also argues that NLET is a Constitutional revenue raising tax and not a tax on a First Amendment right, and it has not been applied to the Petitioners in an unconstitutional manner. Furthermore, the Department notes that the Nevada Supreme Court found that the NLET is constitutional on its face in *D j Vu Showgirls v. Department of Taxation*, 334 P.3d 392 (2014). In that case, the Nevada Supreme Court established that the standard of review for the NLET is a rational basis analysis, because it does not regulate live entertainment, it does not discriminate on the basis of the taxpayers' speech, and it does not target a small group of speakers or threaten to suppress viewpoints. *D j vu*, 334 P.3d at 401. Finally, the Department argues that the standard of review for a tax matter has been in place more than 125 years and has not changed on the basis of a sign ordinance case (*Reed*). The Department argues that the Court in *D j Vu* ruled that heightened scrutiny does not apply to tax classification unless the classification is hostile and oppressive discrimination against particular person and classes. NRS 233B.135 indicates that the Court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. (NRS 233B.135[3]). Pursuant to NRS 33B.135(3), the Court can remand, affirm, or set aside the Commission's decision if the substantial rights of the petitioner have been prejudiced because the agency's decision is in violation of statutory provisions, in excess of the statutory authority of the agency, made upon unlawful procedure, affected by other error of law, clearly erroneous, or an arbitrary or capricious abuse of discretion. The Commission did not find Petitioner's argument with respect to reopening discovery to allow depositions meritorious because all the information that Petitioners sought recently was available prior to 2007, and the information sought was consistently determined to be irrelevant. These are findings of fact by the Commission that may not be disturbed by this Court. The Court does not find that the Commission's determination violated the constitution or a statute, was in excess of its statutory authority, was made upon unlawful procedure, was affected by other error of law, was clearly erroneous, or was arbitrary, capricious, or an abuse of discretion. Consequently, the Commission's determination with regard to the request to take depositions, is hereby AFFIRMED. The construction of a statute is a question of law, and therefore, independent review is appropriate. However, this court will not readily disturb an administrative interpretation of statutory language. *City of Reno v. Reno Police Protective Ass'n.*, 118 Nev. 889, 900 (2002). The Commission's determination that the NLET is constitutional as applied to the Petitioners is supported by the fact that the Nevada Supreme Court has determined that the NLET does not regulate live entertainment and is simply a tax on a business transaction, and not on the expressive activity taking place within the facility. Petitioners have failed to meet their burden to show that the NLET has attacked the content of their message. In addition, this Court finds that the Commission did not exceed their authority by concluding that NLET, as applied to Petitioners, is not an impermissible differential tax, and does not place a burden on a narrowly defined group of speakers. This court agrees that *Reed* does not apply to tax classification unless the classification is hostile and oppressive discrimination against particular person and classes, which there is no

evidence of here. Therefore, the Commission's decision that NLET is not a content-based tax on first amendment activity, but a legitimate tax scheme, evenly applied, and used to raise state revenue shall not be disturbed. Based upon the foregoing, this Court concludes that there was substantial evidence supporting the Commission's decisions that the Commission's decisions did not violate NRS 233B.135, and consequently, the Commission's decisions are hereby AFFIRMED. The Petition for Judicial Review is DENIED. Respondent's counsel is to prepare an Order consistent with this Minute Order within 10 days, have it approved as to form and content by Petitioner's counsel, and submit to this Court for signature.

[Return to Register of Actions](#)



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10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 K-KEL, INC., d/b/a Spearmint Rhino )  
13 Gentlemen's Club; OLYMPUS GARDEN, )  
14 INC., d/b/a Olympic Garden; SHAC, L.L.C., )  
15 d/b/a Sapphire; D. WESTWOOD, INC., )  
16 d/b/a Treasures; DÉJÀ VU SHOWGIRLS )  
17 OF LAS VEGAS, LLC, d/b/a Déjà vu; and )  
18 LITTLE DARLINGS OF LAS VEGAS, LLC, )  
19 d/b/a Little Darlings, )

20 Petitioners, )

21 v. )

22 STATE OF NEVADA, ex rel. )  
23 DEPARTMENT OF TAXATION and TAX )  
24 COMMISSION, )

25 Respondents. )

Case No.: A-11-648894-J

Dept. No.: XXX

Consolidated with:

Case No.: A-14-697585-J

**NOTICE OF ENTRY OF ORDER DENYING**  
**JUDICIAL REVIEW OF ADMINISTRATIVE**  
**DECISION**

26 PLEASE TAKE NOTICE that the ORDER DENYING JUDICIAL REVIEW OF  
27 ADMINISTRATIVE DECISION was entered on January 13, 2016, and electronically filed on  
28



1 January 15th, 2016, a copy of which is attached hereto.

2 DATED this 4th day of February, 2016.

3 Respectfully submitted:

4 ADAM PAUL LAXALT  
5 Attorney General

6 By: /S/ VIVIENNE RAKOWSKY  
7 DAVID J. POPE  
8 Senior Deputy Attorney General  
9 VIVIENNE RAKOWSKY  
10 Deputy Attorney General  
11 Attorneys for Respondents  
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**CERTIFICATE OF SERVICE**

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 4th day of February, 2016, I filed and served the foregoing **ORDER DENYING JUDICIAL REVIEW OF ADMINISTRATIVE DECISION** with the Clerk of the Court by using the electronic filing system and placing a true and accurate copy of the foregoing in U.S. Mail at Las Vegas, Nevada, first class, postage prepaid, and via e-mail, to the following:

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An employee of the Office of the Attorney General

  
CLERK OF THE COURT

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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

K-KEL, INC., d/b/a Spearmint Rhino  
Gentlemen's Club; OLYMPUS GARDEN,  
INC., d/b/a Olympic Garden; SHAC, L.L.C.,  
d/b/a Sapphire; D. WESTWOOD, INC.,  
d/b/a Treasures; DÉJÀ VU SHOWGIRLS  
OF LAS VEGAS, LLC, d/b/a Déjà vu; and  
LITTLE DARLINGS OF LAS VEGAS, LLC,  
d/b/a Little Darlings,

Petitioners,

v.

STATE OF NEVADA, ex rel.  
DEPARTMENT OF TAXATION and TAX  
COMMISSION,

Respondents.

Case No.: A-11-648894-J  
Dept. No.: XXX

Consolidated with:  
Case No.: A-14-697515-J

<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Dismissal by Defendant	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Dismissal by Plaintiff	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Dismissal by Court	<input type="checkbox"/> Judgment of Arbitration

**ORDER DENYING JUDICIAL REVIEW OF ADMINISTRATIVE DECISION**

The above-referenced matter came before the Honorable Judge Jerry Wiese with regard to the Consolidated Petitions for Judicial Review of the decisions by the Nevada Tax Commission (hereinafter "Commission") filed by Petitioners, K-KEL, INC., d/b/a Spearmint Rhino Gentlemen s Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, LLC



1 d/b/a Sapphire, D. WESTWOOD, INC., d/b/a Treasures, DEJA VU SHOWGIRLS OF LAS  
2 VEGAS, LLC, d/b/a Deja vu and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a Little  
3 Darlings ("Petitioners"). Both sides filed briefs, and the Court heard oral argument. The  
4 Petitioners were represented by William Brown Esq., Mark Ferrario, Esq. and Bradley Shafer,  
5 Esq. (admitted Pro Hac Vice). The Nevada Tax Commission was represented by Vivienne  
6 Rakowsky, Deputy Attorney General and David Pope, Senior Deputy Attorney General.

7 After supplemental briefing regarding the Supreme Court decision in Reed v Town of  
8 Gilbert, Arizona, 135 U.S. 2218 (2015), and after oral argument, the Court took the matter  
9 under advisement and issued a Minute Order on November 24, 2015 which is attached hereto  
10 as Exhibit "A".

11 The procedural history of this matter dates back to a decision by the Nevada Tax  
12 Commission dated October 12, 2007 upholding the Live Entertainment Tax  
13 (PJR-11-648894-J), a remand in January 2012 to allow the Commission to review additional  
14 evidence and determine whether it would amend, affirm or reverse its 2007 decision and re-  
15 open discovery to allow depositions (PJR 14-697515-J), and supplemental briefing to  
16 determine whether the standard of review for the Live Entertainment Tax changed based on  
17 the U.S. Supreme Court decision in Reed v. Town of Gilbert, Arizona, 135 S. Ct. 2218 (2015).

18 Based upon the pleadings and papers on file, after hearing oral argument, and good  
19 cause appearing, the Court renders the following findings of fact:

- 20 1. The parties essentially agreed to the procedural history and underlying factual  
21 background of this case.
- 22 2. The three issues before this Court were:
  - 23 a. Petition for Judicial Review of the Nevada Tax Commission October 12, 2007  
24 decision denying Petitioners requests for refunds of Live Entertainment Tax  
25 ("NLET") paid, and finding that the NLET does not violate the U.S.  
26 Constitution or Nevada Constitution, is not targeted at gentlemen's clubs,  
27 and is not a tax based on the content of the taxpayer's message.



- b. Petition for Judicial Review of the Nevada Tax Commission's decision dated September 6, 2012 finding that discovery would not be reopened to allow depositions, and decision on February 12, 2014 upholding the Hearing Officers Hearing on Remand finding that the more than 1,500 pages of supplemental materials were insufficient to cause the Commission's October 12, 2007 decision to be reversed or amended.
- c. Petitioner's supplemental briefing claiming that the U.S. Supreme Court decision in Reed v. Gilbert Arizona changed the standard of review for determining the constitutionality of the Live Entertainment Tax to strict scrutiny.

3. The Petitioners made the following arguments:

- a. That the NLET is unconstitutional because it is a direct tax on First Amendment activities and is statutorily gerrymandered to apply only to a narrowly defined group of speakers, and in doing so discriminates based on the content of the entertainment;
- b. The Commission should have permitted Petitioners to conduct the requested depositions in order to shed further light on the drafting and amending of the NLET and to identify the purpose for each and every one of the exceptions to the definition of live entertainment set forth in NRS 368A; and
- c. Based on the recent ruling in Reed v. Town of Gilbert, Arizona, U.S. , 135 S. Ct. 2218 (2015), strict scrutiny applies, and the NLET does not pass the constitutional muster because there is a differentiation of the application of a law based upon the content of the expression.

4. The Department made the following arguments:

- a. That the NLET is Constitutional revenue raising tax and not a tax on a First Amendment right, and the tax has not been applied to the Petitioners in an unconstitutional manner. The Nevada Supreme Court found that the NLET is



constitutional on its face in Deja Vu Showgirls v. Department of Taxation, 334 P.3d 392 (2014). In that case, the Nevada Supreme Court established that the standard of review for the NLET is a rational basis analysis, because it does not regulate live entertainment, it does not discriminate on the basis of the taxpayers' speech, and it does not target a small group of speakers or threaten to suppress viewpoints. Deja vu, 334 P.3d at 401;

- b. That the Commission's decision on remand to deny depositions should be upheld because, while NRS 233B.131(2) provides for additional evidence under very specific conditions, it does not provide for additional evidence after receiving an adverse decision. Moreover, the information that the Petitioners were seeking was available in 2007. On January 24, 2012, the Court remanded the case to the Commission for review of evidence, not to allow additional evidence to be gathered; and
- c. The standard used by the court to review a tax matter has been in place more than 125 years and has not changed on the basis of a sign ordinance case (Reed). The Court in Deja Vu had previously ruled that heightened scrutiny does not apply to tax classification unless the classification is hostile and oppressive discrimination against particular person and classes.

The Court made the following conclusions of law:

- 5. NRS 233B.135 indicates that the Court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. NRS 233B.135(3).
- 6. Pursuant to NRS 233B.135(3), the Court can remand, affirm, or set aside the Commission's decision if the substantial rights of the petitioner have been prejudiced because the agency's decision is in violation of statutory provisions, in excess of the statutory authority of the agency, made upon unlawful procedure, affected by other error of law, clearly erroneous, or an arbitrary or capricious abuse of discretion.



- 1 7. The Commission did not find Petitioner's argument with respect to reopening  
2 discovery to allow depositions meritorious because all the information that  
3 Petitioners sought recently was available prior to 2007, and the information sought  
4 was consistently determined to be irrelevant. The Commission's decision did not  
5 violate the constitution or a statute, was not in excess of its statutory authority, was  
6 not made upon unlawful procedure, was not affected by other error of law, was not  
7 clearly erroneous, and was not arbitrary, capricious, or an abuse of discretion.  
8 These findings of fact by the Commission may not be disturbed by this Court. The  
9 Commission's determination with regard to the request to take depositions is hereby  
10 AFFIRMED.
- 11 8. The construction of a statute is a question of law, and therefore, independent review  
12 is appropriate. However, the court will not readily disturb an administrative  
13 interpretation of statutory language. City of Reno v. Reno Police Protective Ass'n.,  
14 118 Nev. 889, 900 (2002). The Commission's determination that the NLET is  
15 constitutional as applied to the Petitioners is supported by the fact that the Nevada  
16 Supreme Court has determined that the NLET does not regulate live entertainment  
17 and is simply a tax on a business transaction, and not a tax on the expressive  
18 activity taking place within the facility.
- 19 9. Petitioners have failed to meet their burden to show that the NLET has attacked the  
20 content of their message.
- 21 10. The Commission did not exceed their authority by concluding that NLET, as applied  
22 to Petitioners, is not an impermissible differential tax, and does not place a burden  
23 on a narrowly defined group of speakers.
- 24 11. Reed v. Town of Gilbert, Arizona, 135 U.S. 2218 (2015), does not apply to tax  
25 classification unless the classification is hostile and oppressive discrimination  
26 against particular person and classes. This Court does not find any evidence here  
27 that NLET triggers the application of Reed.
- 28

12. The Commission's decision that NLET is not a content-based tax on first amendment activity, but a legitimate tax scheme, evenly applied, and used to raise state revenue shall not be disturbed.

**ORDER**

Based upon the foregoing, this Court Orders that there was substantial evidence supporting the Commission's decisions and that the Commission's decisions did not violate NRS 233B.135, and consequently, the Commission's decisions are hereby AFFIRMED. The Petition for Judicial Review is DENIED.

**IT IS SO ORDERED**

DATED this 13 day of January, 2016.

  
DISTRICT COURT JUDGE

Respectfully Submitted By:

  
VIVENNE RAKOWSKY  
Deputy Attorney General

# EXHIBIT A

# EXHIBIT A



## REGISTER OF ACTIONS

CASE NO. A-11-648894-J

K-Kel, Inc., Plaintiff(s) vs. Nevada Department of Taxation,  
Defendant(s)

Case No. A-11-648894-J

Case Type: Civil Petition for Judgment  
Date Filed: 09/23/2011  
Location: Department 30  
Cross-Reference Case Number: A648894

### RELATED CASE INFORMATION

#### Related Cases

A-14-697515-J (Consolidated)

### PARTY INFORMATION

<b>Defendant</b>	Nevada Department of Taxation	<b>Lead Attorneys</b> David J. Pope A A Retained 7026568084(W)
<b>Defendant</b>	Nevada Tax Commission	David J. Pope A A Retained 7026568084(W)
<b>Plaintiff</b>	D I Food and Beverage of Las Vegas LLC	William H. Brown A A Retained 702-816-2200(W)
<b>Plaintiff</b>	D Westwood Inc	William H. Brown A A Retained 702-816-2200(W)
<b>Plaintiff</b>	Deja Vu Showgirls of Las Vegas	William H. Brown A A Retained 702-816-2200(W)
<b>Plaintiff</b>	K-Kel, Inc.	William H. Brown A A Retained 702-816-2200(W)
<b>Plaintiff</b>	Little Darlings of Las Vegas LLC	William H. Brown A A Retained 702-816-2200(W)
<b>Plaintiff</b>	Olympus Garden Inc	William H. Brown A A Retained 702-816-2200(W)
<b>Plaintiff</b>	Power Company Inc	William H. Brown A A Retained 702-816-2200(W)
<b>Plaintiff</b>	Shac LLC	William H. Brown A A Retained 702-816-2200(W)

11/24/2015 Minute Order (9:00 AM) (Judicial Officer Wiese, Jerry A.)

**Minutes**

11/24/2015 9:00 AM

- The above-referenced matter came before Judge Jerry Wiese with regard to a Petition for Judicial Review filed by Petitioners, K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club, OLYMPUS GARDEN, INC., d/b/a Olympic Garden, SHAC, LLC d/b/a Sapphire, D. WESTWOOD, INC., d/b/a Treasures, D J VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a D j vu and LITTLE DARLINGS OF LAS VEGAS, LLC, d/b/a Little Darlings. Briefs were filed in this matter, and the Court also heard oral argument. After supplemental briefing regarding the Reed case, and after oral argument, the Court took the matter under advisement. Based upon the pleadings and papers on file, after hearing oral argument, and good cause appearing, the Court now renders the following decision: This Court will not reiterate the procedural history or the factual background of this case, as the parties essentially agree to the underlying facts. Petitioners argue that the Commission should have permitted Petitioners to conduct the requested depositions in order to shed further light on the drafting and amending of the NLET and to identify the purpose for each and every one of the exceptions to the definition of live entertainment set forth in NRS 368A. Petitioners also argue that NLET is unconstitutional because it is a direct tax on First Amendment activities and is statutorily gerrymandered to apply only to a narrowly defined group of speakers, and in doing so discriminates based on the content of the entertainment. Lastly, Petitioners argue that in light of the recent ruling in *Reed v. Town of Gilbert, Arizona*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2218 (2015), the NLET does not pass the constitutional muster of strict scrutiny that now applies, whereas in this case, there is a differentiation of the application of a law based upon the content of expression. The Department of Taxation ( Department ) argues that the Commission's decision on remand to deny depositions should be upheld because, while NRS 233B.131(2) provides for additional evidence under very specific conditions, it does not provide for additional evidence after receiving an adverse decision. This Court remanded the case to the Commission for review of evidence, not to allow additional evidence to be gathered. The Department also argues that NLET is a Constitutional revenue raising tax and not a tax on a First Amendment right, and it has not been applied to the Petitioners in an unconstitutional manner. Furthermore, the Department notes that the Nevada Supreme Court found that the NLET is constitutional on its face in *D j Vu Showgirls v. Department of Taxation*, 334 P.3d 392 (2014). In that case, the Nevada Supreme Court established that the standard of review for the NLET is a rational basis analysis, because it does not regulate live entertainment, it does not discriminate on the basis of the taxpayers' speech, and it does not target a small group of speakers or threaten to suppress viewpoints. *D j vu*, 334 P.3d at 401. Finally, the Department argues that the standard of review for a tax matter has been in place more than 125 years and has not changed on the basis of a sign ordinance case (*Reed*). The Department argues that the Court in *D j Vu* ruled that heightened scrutiny does not apply to tax classification unless the classification is hostile and oppressive discrimination against particular person and classes. NRS 233B.135 indicates that the Court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. (NRS 233B.135[3]). Pursuant to NRS 33B.135(3), the Court can remand, affirm, or set aside the Commission's decision if the substantial rights of the petitioner have been prejudiced because the agency's decision is in violation of statutory provisions, in excess of the statutory authority of the agency, made upon unlawful procedure, affected by other error of law, clearly erroneous, or an arbitrary or capricious abuse of discretion. The Commission did not find Petitioner's argument with respect to reopening discovery to allow depositions meritorious because all the information that Petitioners sought recently was available prior to 2007, and the information sought was consistently determined to be irrelevant. These are findings of fact by the Commission that may not be disturbed by this Court. The Court does not find that the Commission's determination violated the constitution or a statute, was in excess of its statutory authority, was made upon unlawful procedure, was affected by other error of law, was clearly erroneous, or was arbitrary, capricious, or an abuse of discretion. Consequently, the Commission's determination with regard to the request to take depositions, is hereby AFFIRMED. The construction of a statute is a question of law, and therefore, independent review is appropriate. However, this court will not readily disturb an administrative interpretation of statutory language. *City of Reno v. Reno Police Protective Ass'n.*, 118 Nev. 889, 900 (2002). The Commission's determination that the NLET is constitutional as applied to the Petitioners is supported by the fact that the Nevada Supreme Court has determined that the NLET does not regulate live entertainment and is simply a tax on a business transaction, and not on the expressive activity taking place within the facility. Petitioners have failed to meet their burden to show that the NLET has attacked the content of their message. In addition, this Court finds that the Commission did not exceed their authority by concluding that NLET, as applied to Petitioners, is not an impermissible differential tax, and does not place a burden on a narrowly defined group of speakers. This court agrees that *Reed* does not apply to tax classification unless the classification is hostile and oppressive discrimination against particular person and classes, which there is no



evidence of here. Therefore, the Commission's decision that NLET is not a content-based tax on first amendment activity, but a legitimate tax scheme, evenly applied, and used to raise state revenue shall not be disturbed. Based upon the foregoing, this Court concludes that there was substantial evidence supporting the Commission's decisions that the Commission's decisions did not violate NRS 233B.135, and consequently, the Commission's decisions are hereby AFFIRMED. The Petition for Judicial Review is DENIED. Respondent's counsel is to prepare an Order consistent with this Minute Order within 10 days, have it approved as to form and content by Petitioner's counsel, and submit to this Court for signature.

[Return to Register of Actions](#)