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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' Opening Brief

APPELLANTS' OPENING BRIEF

NRAP 26.1 DISCLOSURE OF

K-KEL, INC.

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

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

None.

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

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NRAP 26.1 DISCLOSURE OF OLYMPUS GARDEN, INC.

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

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

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

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NRAP 26.1 DISCLOSURE OF THE POWER COMPANY, INC.

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NRAP 26.1 DISCLOSURE OF D. WESTWOOD, INC.

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

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP § 3A(b)(1), and Nev. Const. Art. 6 § 4. This is an appeal originally from a final judgment dated January 15, 2016 and entered on February 4, 2016, with the notice of appeal filed on February 26, 2016. Following an order by this Court, an amended order was filed on June 23, 2016 and entered on June 24, 2016, with an Amended Notice of Appeal filed June 24, 2016.

ROUTING STATEMENT

This case is an administrative agency appeal involving a tax commission determination and thus under NRAP 17(a)(9) shall be heard and decided by this Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED IN RULING THAT CHAPTER 368A IS NOT UNCONSTITUTIONAL AND, THEREBY, IN DENYING THE PETITIONERS' PETITION FOR JUDICIAL REVIEW AND INCORPORATED CLAIMS FOR REFUND OF TAXES PAID.

II. THE DISTRICT COURT ERRED IN NOT REQUIRING THE NEVADA TAX COMISSION TO PERMIT PETITIONERS TO CONDUCT CERTAIN DEPOSITIONS BEFORE RULING.

STATEMENT OF THE CASE

Petitioners operate commercial entertainment establishments in the City of Las Vegas, which present on their business premises live performance dance entertainment to the consenting adult public. Respondents Nevada Department of

Taxation (the "Department") and the Nevada Tax Commission (the "Commission") have taken the position that the Petitioners' establishments are subject to a Live Entertainment Tax enacted by the Nevada Legislature IN 2003 as NRS Chapter 368A (the "LET," or the "Tax," or "Chapter 368A"; the current version as of 2007[1], is found as Addendum A).

Petitioners assert that the "10%" portion of the LET[2] is unconstitutional under the First and Fourteenth Amendments to the United States Constitution, as well as Art. I, §§ 9 and 10, of the Nevada Constitution. Petitioners have filed claims for the period January, February, March, and April of 2004, for amounts paid under the LET by them during that time. App.Apx., Vol.2, pp. 310-393; 406-448; and 455-497. The Department denied those claims for refund. App.Apx., Vol.2, pp. 394-405; 449-454; and App.Apx., Vol.3, pp. 498-503. Petitioners appealed to the Commission (App.Apx., Vol.3, pp. 504-582; and 596-642), which ultimately upheld the Department's denial of the refund requests (App.Apx., Vol.7, pp. 1642-1643).

---

[1] Additional amendments to the LET were enacted via SB 266 in 2015. The version ***cited throughout this brief*** and attached at Addendum A does not include these recent revisions.

[2] Petitioners' challenge is only to the 10% tax on admissions, food, refreshments, and merchandise imposed by NRS 368A.200(1)(A). This portion of the LET is not applicable to facilities with a maximum occupancy of 7,500 persons or more (NRS 368A.200(1)) or to licensed gaming establishments (NRS 368A.200(5)(e)). Those businesses are subject to a 5% tax, which Petitioners do not challenge here.

Petitioners have also filed and continue to file claims for refund for the periods of May of 2004 to present. The Department continues to deny those claims for refund and Petitioners then appeal to the Commission. The Commission is holding those appeals in abeyance pending the ultimate outcome of the present case.

When they were first before the Commission, the Petitioners did not undertake discovery because, among other things: 1) precedent established that administrative agencies were not the appropriate forum in which to litigate constitutional challenges, Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215, 114 S.Ct. 771, 780 (1994); 2) precedent at the time established that the Petitioners would be afforded de novo judicial review where discovery would be permitted (and, in fact, established that the filing of a limited petition for judicial review was procedurally improper and would be subject to dismissal), Saveway Super Serv. Stations, Inc. v. Cafferata, 104 Nev. 402, 405, 760 P.2d 127, 129 (1988); and 3) the judicial redress statute contained in Chapter 368A (that being NRS 368A.290) appeared to provide for the filing of an original action for refund following the denial by the Commission of appeals regarding administrative claims for refund, where de novo review would be provided and where discovery could be conducted.

On January 9, 2008, Petitioners filed a complaint for refund pursuant to NRS 368A.290(1)(b) and NRS 368A.300(3)(b), which was assigned Case No. A554970 in Division XI of the Eighth Judicial District Court for Clark County ("Case 2").

Previously in 2005, Petitioners and others had filed suit in federal court, after the Nevada Legislature enacted certain amendments to the LET expanding the scope of the Tax. That action was dismissed pursuant to a motion filed by the Respondents on the basis that, under the federal Tax Injunction Act (28 U.S.C. § 1341), a "plain, speedy, and efficient remedy" could be had in the courts of this state. Petitioners thereafter filed a complaint in the Clark County District Court seeking essentially the same relief, which was assigned Case No. A533273 ("Case 1"). Case 1 and Case 2 were coordinated and later partially consolidated in Department XI.

After substantial litigation, Respondents moved to dismiss Case 2 on the grounds that the matter should have been filed as a petition for judicial review pursuant to NRS Ch. 233B. Following the ruling of this Court in Southern California Edison v. First Judicial District, 127 Nev. 276, 255 P.3d 231 (2011), the District Court entered an order dismissing Case 2, and ordering the matter be re-filed as a petition for judicial review. In Case 1, the District Court found the LET to be facially constitutional.

Petitioners filed a petition for judicial review on September 23, 2011 (Case No. A-11-648894-J) seeking refunds of the taxes paid, and their Application for Leave to Present Additional Evidence to the Nevada Tax Commission (the "Application") was filed on September 28, 2011. App.Apx., Vol.1, pp. 140-169. The Application sought to permit the Petitioners to undertake discovery before the Commission and to

present such additional evidence thereto as the Petitioners deemed appropriate before further review was undertaken by the District Court. Id.

The Application was granted on January 24, 2012, remanding the matter to the Commission and instructing it to consider the additional evidence and either: "Amend the Findings of Fact, Conclusions of Law dated Oct. 12, 2007, Reverse the Decision, or Affirm the Decision." App.Apx., Vol.1, pp. 52-53, Order of 1/24/12.

Following the remand, Petitioners, pursuant to NAC 360.135, submitted a letter to the Commission to request the depositions of Dino Dicianno, Michelle Jacobs, and Tesa Wannamaker. App.Apx., Vol.15, pp. 3308-3312. Respondents opposed the request. App.Apx., Vol.15, pp. 3313-3318. The Commission denied the requested subpoenas not because the evidence would be immaterial, but instead because it concluded that Petitioners had waived their right to obtain subpoenas by not having requested them when the matter was originally before the Commission. App.Apx., Vol.17, pp. 3744-3749, Nevada Tax Commission Letter, 9/6/12.

The Commission also, pursuant to NRS 360.245 and NRS 233B.130 (1), remanded the matter to an administrative law judge ("ALJ") to review the entire record "and determine whether the findings of fact, conclusions of law, and final decision issued in 2007 should be amended, reversed, or affirmed." Id., App.Apx., Vol.17, pp. 3744-3749.

The ALJ denied Petitioners' request for a hearing on the matter and for further discovery, and affirmed the Commission's October 12, 2007 decision. App.Apx., Vol.17, pp. 3750-3757, Hearing Officer's Order on Remand, 8/27/13.

On February 12, 2014, the Commission affirmed the ALJ's September 6, 2012, decision. App.Apx. Vol.18, pp. 3782-3857. Petitioners filed an additional Petition for Judicial Review with the District Court, which was assigned case number A-14-697515-J. The parties stipulated to and the District Court ordered the consolidation of the two Petitions for Review (App.Apx., Vol.1, pp. 1007-110, Stipulation and Order signed 3/24/2014), which were temporarily stayed pending Petitioners' appeal of the District Court's decision to dismiss the "as applied" challenges to the LET and its appeal of the District Court's entry of summary judgment in favor of the Respondents on the facial challenge. This Court issued its opinions on those appeals on September 18, 2014.

In the appeal of Case 2, this Court upheld the District Court's order that Petitioners were required to seek review of the Commission's decision by way of a petition for judicial review – the action below here. Deja Vu Showgirls v. Nevada Dep't of Taxation ("Deja Vu 2"), 130 Nev. Adv. Op. 72, 334 P.3d 387, 390 (2014).

In Case 1, this Court held that the District Court correctly dismissed Petitioners' "as applied" challenges, which were subject to administrative exhaustion. Deja Vu Showgirls v. Nevada Dep't of Taxation ("Deja Vu 1"), 130 Nev. Adv. Op. 73, 334

P.3d 392, 397 (2014). The Court also found that the text of Chapter 368A did not render the LET unconstitutional on its face. Id. at 401-02.

Following that, the District Court ruled, on the Petition for Judicial Review, that the LET was fully constitutional and that the Commission had not erred in denying Petitioners' the ability to take depositions. App.Apx., Vol.19, pp. 4021-4026, Amended Order, 06/22/16.

This appeal follows.

STATEMENT OF FACTS

Petitioners operate licensed establishments that present a variety of female performance dance entertainment; some of which is clothed and some which is "topless." This entertainment constitutes speech and expression, as well as a form of assembly, protected by the First and Fourteenth Amendments to the United States Constitution, as well as by Art. I, §§ 9 and 10 of the Nevada Constitution.[3]

[3] Exotic dancing, in the form of clothed, "topless," and even fully nude entertainment, falls within the scope of the liberties, including the right to free expressive association, afforded by the First Amendment. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 2460 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap's A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 1391 (2000) (same); Schad ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation"); and Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, 274 F.3d 377, 396 (6th Cir. 2001), *cert denied*, 535 U.S. 1073 (2002), *citing* Roberts v. United States Jaycees, 468 U.S. 609, 622, 104 S.Ct. 3244,

On or about July 22, 2003, the legislature enacted Chapter 368A, which modified the previous "Casino Entertainment Tax" and imposed, for the first time and subject to numerous and various exceptions, a 10% excise tax on admission to non-gaming facilities with an occupancy of less than 7,500 which provide defined "live entertainment." NRS 368A.200. The original 2003 version of the Tax is found as Addendum B.

As originally enacted, the tax imposed by Chapter 368A was not applicable, under the terms of NRS 368A.200 (5)(d), to live entertainment that was not provided at a licensed gaming establishment if the facility had a maximum occupancy of less than 300 persons. 368A.200(5)(d). However, on June 17, 2005, Chapter 368A was amended by Assembly Bill No. 554.

Among other things, Assembly Bill No. 554 (App.Apx., Vol.7, pp. 1481-1488) reduced the exception as contained in NRS 368A.200(5)(d) from a maximum seating capacity of 300 to 200 persons. App.Apx., Vol.7, p. 1485. As discussed below, the purpose of this amendment was to specifically extend the tax obligation as contained in Chapter 368A to a number of adult entertainment establishments that were not then

---

3252 (1984) (court held that "the First Amendment protects the entertainers and audience members' right to free expressive association. They are certainly engaged in a 'collective effort on behalf of shared goals'"). Because the Federal Constitution represents the "floor" level of protections that can be afforded under the State Constitution (*see* S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414, 23 P.3d 243, 250 (2001)), this federal case law is applicable to Petitioners' state constitutional challenges as well.

subject to the LET. In 2007, via Assembly Bill No. 487 (App.Apx., Vol.7, pp. 1489-1491), the Tax was also modified to exempt "certain minor league baseball events . . . ."

While Petitioners contend the 10% tax imposed by Chapter 368A is both illegal and unconstitutional, and that even if it is not they are specifically exempted from paying the LET pursuant to the statutory exemptions as contained therein, they have nevertheless paid the LET mandated by Chapter 368A.

As reflected in Section VI (B) (3), *infra*, the legislative history and documents produced in discovery demonstrate that the purpose of enacting the LET was to *specifically tax adult nightclubs*. In addition, while purporting to apply to virtually all forms of live entertainment (see NRS 368A.090), because of the admittedly targeted focus on adult nightclubs, Chapter 368A is statutorily gerrymandered (some of which occurring after 2003) in such a fashion so that the non-gaming aspects of the Tax apply to adult nightclubs and little else. There are now no less than *Twenty-six* separate exemptions to the LET, which are discussed in Section VI (B) (2) below.

RELEVANT PROVISIONS OF CHAPTER 368A

Chapter 368A states, at NRS 368A.200 (1), that "[e]xcept as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided." If the live entertainment is provided at a facility with a maximum occupancy of less than 7,500, the rate of tax is 10% of

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

Chapter 368A defines an "[a]dmission charge" in NRS 368A.020 as:

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

The term "facility" is defined in NRS 368A.060 as follows:

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

"[L]ive entertainment" is generally defined in NRS 368A.090 as:

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

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

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

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

SUMMARY OF ARGUMENT

Chapter 368A, both facially and as applied to Petitioners, is unconstitutional under the First Amendment to the United States and Nevada Constitutions because it: 1) is a direct tax on First Amendment protected activities, and in particular on "live entertainment"; 2) it targets a small group of taxpayers, namely those presenting exotic dance entertainment; and 3) it differentiates between the expression that is or is not subject to the tax based upon the content of the entertainment involved. Even if the Court were to determine that intermediate scrutiny applies, the LET cannot survive even that level of scrutiny.

In addition, the District Court erred by not ordering the Nevada Tax Commission to permit Petitioners to take depositions on matters relevant to their "as applied" constitutional challenges.

STANDARD OF REVIEW

The standard of review of the District Court in regard to a petition for judicial review of an administrative decision is set forth in NRS 233B.135 (3). Petitioners contend that the LET violates the federal and state constitutional provisions identified above and/or that Petitioners are not subject to this Tax under NRS 368A.200 (5)(a), which exempts from taxation "[l]ive entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States . . . ." These issues of constitutionality and statutory interpretation are subject to *de novo* review. *See* Busefink v. State, 128 Nev. Adv. Op. 49, 286 P.3d 599, 602 (Nev. 2012).

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

Further, the decision of whether to grant leave to present additional evidence is within the discretion of the district court. NRS 233B.131(2) ("if . . . it is show to the satisfaction of the court . . .") Thus, the district courts determination on the

discretionary discovery matter is reviewed for an abuse of discretion. *See, e.g.*, Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 243, 249, 235 P.3d 592, 596 (2010) (discovery sanctions are discretionary and reviewed for an abuse of discretion).

ARGUMENT

I. CONSTITUTIONAL CONSTRAINTS OF TAXES THAT IMPACT UPON FIRST AMENDMENT RIGHTS.

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

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

Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 108, 111, 63 S. Ct. 870, 872, 874 (1943) (emphasis added).

Second, a tax that targets a narrowly defined group of speakers is unconstitutional.

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

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

Third, a ***content-based tax*** is unconstitutional. Leathers, 499 U.S. at 447, 111 S. Ct. at 1444 ("Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech"). *See also* Seres v. Lerner, 120 Nev. 928, 936, 102 P.3d 91, 96 (2004).

As discussed herein, the LET is unconstitutional for all three reasons.

II. RESPONDENTS HAVE THE BURDEN TO PROVE THE CONSTITUTIONALITY OF THE LET.

Taxes that raise First Amendment concerns are subject to strict constitutional scrutiny, and the ***State of Nevada*** has the burden to demonstrate the constitutionality of its taxing scheme of live entertainment. *See, e.g.*, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S. Ct. 1722, 1729 (1987) ("***Arkansas faces a heavy burden*** in attempting to defend its content-based approach to taxation of magazines. ***In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end***"), *citing* Minneapolis Star Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 591-92, 103 S. Ct. 1365, 1375 (1983) (emphasis added).

In addition, a tax upon protected expression is "***presumptively unconstitutional***." Minneapolis Star, 460 U.S. at 585, 103 S. Ct. at 1372 (emphasis added). *See also* Seres, 120 Nev. at 936, 102 P.3d at 96 ("[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers

because of the content of their speech") (*citing* Simon & Schuster v. Members of New York State Crime Victims Bd., 502 U.S. 105, 115, 112 S. Ct. 501, 508 (1991)).

In order to pass muster under strict scrutiny[4], the Respondents were required to demonstrate that the law was narrowly tailored to serve a compelling governmental interest, which "it cannot achieve without differential taxation." Minneapolis Star, 460 U.S. at 585, 103 S. Ct. at 1372. The governmental interest of the "raising of revenue," "[s]tanding alone," cannot justify the discriminatory tax on First Amendment protected activities. Id. at 586, 103 S. Ct. 1372. The Court has noted that the "state could raise the revenue by ***taxing businesses generally***, avoiding the censorial threat implicit in a tax that singles out" protected expression. Id.

[4] Irrespective of applying strict scrutiny, this Court can hold the LET unconstitutional simply for being a content-based restriction on speech. In Seres, this Court (save Justice Douglas; 120 Nev. at 292, 102 P.3d at 92) questioned the necessity of applying the strict scrutiny analysis to content-based restrictions on speech (120 Nev. at 942, 102 P.3d at 100). The Court favorably discussed Justice Kennedy's concurrence in Simon & Schuster, 502 U.S. at 124-26, 112 S. Ct. at 512-14, wherein he stated that when a content-based restriction on speech is present, there is no need to borrow the strict scrutiny analysis from equal protection jurisprudence. Seres, 120 Nev. at 292, 102 P.3d at 92. While this Court found such an approach "inviting" in Seres, it noted that the parties there had not raised claims under the Nevada Constitution. Id. Petitioners here have raised such state constitutional claims, and the content-based LET should be struck on that basis alone. *See*, in particular, Section IV, *infra* (discussing new U.S. Supreme Court precedent supporting this approach).

III. CRITICAL CHANGES TO FIRST AMENDMENT JURISPRUDENCE SINCE THIS COURT'S "FACIAL" RULING ON THE CONSTITUTIONALITY OF THE LET.

There can be little doubt that the outcome of Petitioners' constitutional challenge is dependent upon the level of constitutional scrutiny that is applied to the Tax. If strict scrutiny is utilized, the Tax is, of course, presumed to be unconstitutional.

In Petitioners' facial challenge, this Court concluded, in its September 18, 2014 ruling, that the LET was only subject to rational basis scrutiny. However, on June 18, 2015, the United States Supreme Court issued its decision in Reed v. Town of Gilbert, Arizona, --- U.S. ---, 135 S.Ct. 2218 (2015), which represents a radical departure from prior precedent in how courts are now to determine what level of scrutiny is to be applied to laws that impact upon protected expression.

Reed involved a municipal ordinance that banned all outdoor signs without a permit, but exempted 23 categories of signs (not unlike the LET, that purports to tax all live entertainment but then excludes 26 forms of live entertainment from taxation). The Ninth Circuit had held that the law was not subject to strict scrutiny (again, as this Court previously did here), and was indeed valid. *See* Reed v. Town of Gilbert, Arizona, 707 F.3d 1057, 1069-1076 (9th Cir. 2013).

The Majority opinion authored by Justice Thomas, on behalf of six Members of the Court, noted that three categories of the 23 exempt classes of signs were

particularly relevant to the Court's decision: Ideological signs, political signs, and "temporary directional signs" that related to a gathering by a religious, charitable, community service, educational, or other similar non-profit organization.[5] Id. at 2224-25. The Ninth Circuit had ruled that the ordinance was not subject to strict scrutiny because "even though an enforcement officer would have to read the sign to determine what provisions of the Sign Code applied to it[6], the 'kind of cursory examination' that would be necessary for an officer to classify it as a temporary directional sign was 'not akin to an officer synthesizing the expressive content of the sign.'" Id. at 2226 (*citing* 587 F.3d at 978). The Supreme Court utterly rejected this analysis.

The Court began its constitutional discussion by noting that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." 135 S.Ct. at 2227. Laws are also subject to strict scrutiny, the Court continued, if they define "regulated speech by its function or purpose," or if, although facially content neutral, they cannot be

---

[5] *Cf*. NRS 368A.200(5)(b) (exempting from taxation "live entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax exempt organization pursuant to 26 U.S.C. § 501(c), or a nonprofit corporation organization or existing under the provisions of chapter 82 of NRS").

[6] Not unlike what a tax official would have to do here in order to determine whether the live entertainment fit within one of the 26 categories of exceptions/exemptions from taxation.

justified without reference to the content of the regulated speech, or were adopted by the government because of the disagreement with the message the speech conveys. Id.

The Court concluded that because the sign ordinance there was content based (id.), *it was irrelevant if the distinctions could be justified without regard to the content of the speech*.

> ***A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or "lack of animus towards the ideas contained" in the regulated speech.***

Id. at 2228 (*citing* Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429, 113 S.Ct. 1505, 1516 (1993)) (emphasis added).

Succinctly put, the Court held that "an innocuous justification cannot transform a facially content-based law into one that is content neutral." 135 S.Ct. at 2228.

> Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification of the law are content based, a court must evaluate *each question* before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

Id. (emphasis added).

This is now the task of *this Court*.

The paradigm shift nature of the Reed ruling as to the constitutional analysis that is *now* to be used to differentiate "content neutral" from content specific laws is demonstrated in at least three ways.

First, the decision engendered three separate concurring opinions of Justices either attempting to delineate the limitations of the ruling or expressing concerns as to the problems that will be unleashed by this new, broad, constitutional jurisprudence.

Justice Alito (joined by Justices Kennedy and Sotomayor) filed a concurrence that enumerated the types of sign regulations that he believed could be enacted and which would not be found to run afoul of the Constitution. 135 S.Ct. at 2233-34. Justice Breyer concurred only in the judgment, and expressed his lone opinion that content discrimination should not always trigger the use of strict scrutiny and that the law at issue there should not be so analyzed (although he nevertheless found the sign ordinance to be unconstitutional). 135 S.Ct. at 2234-36. Justice Kagan (joined by Justices Ginsberg and Breyer) also concurred only in the judgment; lamented the broad nature of the Court's ruling invoking strict scrutiny ever time content discrimination appears in a law (id. at 2236-39); asserted that "there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across the country containing a subject matter exemption[7]; and opined that "I suspect this Court and others will regret the majority's insistence today on answering that question in the affirmative." Id. at 2239.

Second, not only did the Court reverse the Ninth Circuit's decision in Reed, but it also subsequently vacated similar decisions in three other circuits. Those appellate

[7] The LET, of course, contained *numerous* "subject matter exemptions."

decisions had uniformly declined -- predicated upon prior decisions of the Supreme Court that the lower courts felt to be settled law -- to impose strict scrutiny when analyzing the constitutionality of various sign ordinances. *See* Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014), *vacated and remanded* 135 S.Ct. 2887 (2015); Central Radio Co., Inc. v. City of Norfolk, Virginia, 776 F.3d 229 (4th Cir. 2015), *vacated and remanded* 135 S.Ct. 2893 (2015); and Wagner v. City of Garfield Heights, Ohio, 577 Fed. Appx. 488 (6th Cir. 2014), *vacated and remanded* 135 S.Ct. 2888 (2015). This well-illustrates that the widely-held jurisprudential belief that a content specific law could – in the right circumstances – be nevertheless constitutionally analyzed as being "content neutral," has been abrogated by this new ruling.

While Reed involves sign ordinances and this Court is confronted with a tax statute, the constitutional analysis in regard to the level of scrutiny to apply to a speech specific law remains, of course, the same. This is demonstrated no better than by the simple fact that Justice Kagan, in her concurrence in the Reed sign case, relied upon the First Amendment *tax* case of Arkansas Writer's Project, 481 U.S. 221, which the Petitioners extensively briefed and relied upon below. Reed, 135 S.Ct. at 2236-37 (Kagan, J., concurring in the judgment).

Third, and further making this point, is the fact that post-Reed decisions have quickly applied its holding to a variety of laws well beyond sign ordinances. For

example, the Fourth Circuit applied Reed to an anti-robocall statute in Cahaly v. Larosa, 796 F.3d 399 (4th Cir. 2015), wherein it observed that Reed conflicted with its prior circuit precedent holding that when a law could be justified without reference to the content of the regulated speech, it was deemed to be content neutral (and thus subject to lower scrutiny) even though the law facially differentiated between types of speech. Id. at 404-05.

Finding that the law applied to "calls with a consumer or political message but [did] not reach calls made for any other purpose," the appellate court held that the law was subject to strict scrutiny and was unconstitutional under such analysis. Id. at 405 (clarification added). As noted by the court, "Reed has made clear that, at the first step, the government's justification or purpose in enacting the law is *irrelevant*." Id. (emphasis added). Because the law at issue there made content distinctions on its face, it did not "reach the second step to consider the government's regulatory purpose." Id.

In addition, in writing the Majority opinion on reconsideration in Norton v. City of Springfield, Illinois, 612 Fed.Appx. 386 (7th Cir. 2015), the esteemed Judge Frank Easterbrook reversed the court's earlier ruling finding that a municipal anti-panhandling ordinance barring "oral requests for money now but not regulating requests for money later" (again, *not* the type of sign regulation at issue in Reed) was constitutional because it had "not drawn lines based upon the content of anyone's

speech." Id. at 386. While the court had upheld the law under then-established precedent as it did not "restrict speech because of the ideas it conveys" or "because the government disapproves of its message," it noted that "*Reed understands content discrimination differently*." Id. at 386-87 (emphasis added). Because the law at issue there made distinctions based upon the content of speech, it was *now* subject to strict scrutiny and, the court concluded, invalid thereunder. Id. at 387.

Summarizing this sea-change in the law, Judge Easterbrook wrote:

> The majority opinion in Reed effectively abolishes any distinction between content regulation and subject-matter regulation. ***Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification***.

Id. (emphasis added).

Judge Manion wrote separately in concurrence "***to underscore the significance of the Supreme Court's recent decision in Reed*** [], which held that a speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter." Id. (Manion, J., concurring) (emphasis added). He further observed that Reed "injected some much needed clarity into First Amendment jurisprudence" by eliminating "confusion" that resulted by the High Court's previous decision in Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746 (1989), which he pointed out, correctly, was "well-recognized as the Court's seminal time, place, and manner First Amendment case. . . . " 612 Fed. Appx. 387 (Manion, J. concurring). Succinctly put, Judge Manion noted

that "Reed saw what *Ward* missed – that topical censorship is still censorship." Id. at 388.

Still other decisions further demonstrate the broad reach of Reed's sweeping change of First Amendment constitutional jurisprudence.[8]

Respectfully, Reed demonstrates, for the reasons detailed below, that the LET does not pass constitutional muster under these new standards. In Reed, the Court rejected the argument that the government was not targeting any particular viewpoint by the sign regulations at issue there. Rather, the Court noted that "a speech regulation targeted at a specific *subject matter* is content based even if it does not discriminate *among* viewpoints within the subject matter." Id. at 2230 (emphasis added) (*citing* Consolidated Edison of N. Y. v. Public Serv. Comm'n of N. Y., 447 U.S. 530, 537, 100 S.Ct. 2326, 2333(1980)). Here the LET fails *both* precepts.

First, it taxes the "subject matter" only of live entertainment; a form of expression undeniably protected by the First Amendment. Second, it sets the rate of taxation based upon whether a specific form of entertainment – gambling – is present

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[8] *See, e.g*, Wagner v. Fed. Election Comm'n, No. 13-5162, 2015 WL 4079575, at *22 n. 33 (D.C. Cir. July 7, 2015) (citing Reed in a campaign contribution statute dispute when comparing other cases discussing the constitutionality of under-inclusive statutes); Ex parte Perry, No. 03-15-00063-CR, 2015 WL 4514696, at *37 n. 279 (Tex. App. July 24, 2015) (in a statutory infringement case, citing Reed for proposition that "content-based" laws "target speech based on its communicative content" and that "the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained ... cannot transform a facially content-based law into one that is content-neutral").

or not. Third, it exempts from taxation whole categories of live entertainment based upon the content of the entertainment (NASCAR, baseball, boxing, minimalistic background music, animal demonstrations, etc.). What is left for the non-gaming higher 10% tax is basically the type of facilities operated by the Petitioners, and little else.

Moreover, in Reed the Court noted that it has insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference . . . ." 135 S.Ct. at 2230 (*quoting* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 658, 114 S.Ct. 2445, 2467 (1994)). And, the Court concluded in Reed that "a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed." 135 S.Ct. at 2231.

The *evidence* of targeting submitted in the record below – and *not* reviewed as part of the Petitioners' previous *facial* challenge, Deja Vu 1, 334 P.3d at 397, 401 n.10 – leaves no room to doubt that those admonitions apply here. The obvious target of the LET was, indeed, these Petitioners, and the subject matter of their entertainment was clearly disfavored by the legislators (as opposed, for example, to the "family friendly" entertainment of NASCAR). For these reasons, as illuminated below, the Tax is unconstitutional.

But that is not the end to the change in Supreme Court First Amendment jurisprudence that occurred after Petitioners' facial challenge was argued to this Court. In McCullen v. Coakley, --- U.S. ---, 134 S.Ct. 2518 (2014), and McCutcheon v. FEC, --- U.S. ---, 134 S.Ct. 1434 (2014), the Court held that even using mere intermediate scrutiny, there is now an enhanced obligation upon the government to establish that provisions of a law are "narrowly tailored" when they *impact* protected expression.

In McCullen, the High Court considered the constitutionality of a 35-foot "buffer zone" for protestors around abortion clinics. 134 S.Ct. at 2526. While the regulations were found to be content neutral, the Court noted "[t]o meet the requirement of narrow tailoring, the *government must demonstrate* that alternative measures that burden substantially less speech would fail to achieve the government's interests…." Id. at 2540 (emphasis added). Because the buffer zone regulation was not narrowly tailored, the Supreme Court reversed the First Circuit's determination that the statute was constitutional. Id. at 2541.

In McCutcheon, the Court addressed a First Amendment challenge to aggregate limits on political campaign contributions. 134 S.Ct. at 1442. The Court stated that "[e]ven when the Court is not applying strict scrutiny, we still require 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' ... that

employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." Id. at 1456-57 (citations omitted).

McCullen and McCutcheon demonstrate that – even under *intermediate* scrutiny[9] – the current standard applied to First Amendment challenges places the burden firmly on the government to demonstrate that statutes are narrowly tailored, rather than to give deference to the government under the deferential standard of United States v. Albertini, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906 (1985) (narrow tailoring is satisfied "so long as the … regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation."). The Department cannot meet this standard because it can raise revenues through general taxes that do not impact speech and expression.

IV. STARE DECISIS DOES NOT PRECLUDE PETITIONERS FROM RE-ARGUING THE FACIAL UNCONSTITUTIONALITY OF THE LET.

Respectfully, this Court's prior decision on the facial constitutionality of Chapter 368A in Deja Vu 1, 334 P.3d at 399-401, does not control under the principles of the law of the case or stare decisis because the governing constitutional jurisprudence has since changed. As explained above, the more recent precedent of

[9] Intermediate scrutiny generally requires that a regulation (1) be justified without reference to the content of the regulated speech, (2) be narrowly tailored to serve a significant governmental interest, and (3) leave open able alternative channels for protected expression. Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753 (1989).

Reed demonstrates that the standards of facial neutrality used by this Court have been abrogated. Neither stare decisis nor the law of the case requires that error be carried forward in the present case, nor limits the Petitioners from challenging the facial constitutionality of the LET under *current* Supreme Court precedent.

The Supreme Court itself has recognized that stare decisis does not control when "the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." United States v. Gaudin, 515 U.S. 506, 521, 115 S. Ct. 2310, 2319 (1995) (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 480–481, 109 S.Ct. 1917, 1919–1920 (1989); Andrews v. Louisville & Nashville R. Co., 406 U.S. 320, 92 S.Ct. 1562 (1972)). Likewise, the Court has explained that the "doctrine of stare decisis is of course 'essential to the respect accorded to the judgments of the court and the stability of the law,' but it does not compel us to follow a past decision when its rationale no longer withstands 'careful analysis." Arizona v. Gant, 556 U.S. 332, 348, 129 S. Ct. 1710, 1722 (2009) (quoting Lawrence v. Texas, 539 U.S. 558, 577, 123 S.Ct. 2472 (2003)).

Similarly, given the unique procedural history of this case, even if the law of the case doctrine applied, that doctrine would, of course, give way to changes in controlling law. This Court expressly adopted the view that "the doctrine of the law of the case should not apply where, in the interval between two appeals of a case,

there has been a change in the law by ... a judicial ruling entitled to deference." Hsu v. Cty. of Clark, 123 Nev. 625, 632, 173 P.3d 724, 730 (2007) (quoting Brezinka v. Bystrom Bros., 403 N.W.2d 841, 843 (Minn. 1987)). There is absolutely an exception when a change in controlling law occurs. 123 Nev. at 632-33, 173 P.3d at 730 (and n. 26 thereto). Thus, the present case must be decided under present controlling United States Supreme Court precedent as articulated above.

V. CHAPTER 368A IS UNCONSTITUTIONAL.

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

The Supreme Court dealt with the unconstitutionality of directly taxing First Amendment rights in Murdock, where it analyzed a city ordinance that required those who wished to canvas or solicit to pay a license fee of $1.50 per day, or $7.00 per week. 319 U.S. at 106, 63 S. Ct. at 871-72. The Court explained:

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

Id. at 112, 63 S. Ct. at 874 (*citing* Magnano Co., v Hamilton, 292 U.S. 40, 44-45, 54 S. Ct. 599, 601 (1934) (emphasis and clarification added)).

The Court made clear that "[i]t could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the

license tax imposed by this ordinance is in substance just that." 319 U.S. at 108, 63 S. Ct. at 872. The LET does not even present the pretext of a licensing scheme (which may otherwise require funds to administer), as it is merely the ***direct imposition of a tax on First Amendment freedoms***.

The Court noted that freedom of speech is "available to all, not merely to those who can pay their own way," and that "[t]hose who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." Id. at 111-12, 63 S. Ct. at 874 (clarification added). The Court flatly stated that "[a] state ***may not impose a charge for the enjoyment of a right granted by the federal constitution***." Id. at 113, 63 S. Ct. at 875 (emphasis added). This is because "[t]he power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down." Id. (numerous citations omitted).

In addition, the fact that entities subject to the LET present live entertainment for profit does not change the analysis. "Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive." Cammarano v. U.S., 358 U.S. 498, 514, 79 S. Ct. 524, 534 (1959) (Douglas, J., concurring).

Here, there is absolutely no doubt that "live entertainment" is a category of activity presumptively protected by the First Amendment. *See, e.g.*, Doran v. Salem

Inn, Inc., 422 U.S. 922, 932, 95 S. Ct. 2561, 2568 (1975); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65, 101 S. Ct. 2176, 2181 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee") (and cases cited therein); Winters v. New York, 333 U.S. 507, 510, 68 S. Ct. 665, 667 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment).

This State cannot specifically tax live entertainment any more than it could ban it. Yet, the LET requires persons wishing to engage in "live entertainment" to pay the government for this ability to exercise their First Amendment rights. This is "a tax laid specifically on the exercise of those freedoms," within the meaning of Murdock. Because Nevada is "charg[ing] for the enjoyment of a right granted by the federal constitution," 319 U.S. at 113, 63 S. Ct. at 875 (clarification added), the LET is plainly and facially unconstitutional under Supreme Court precedence.

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

While purportedly taxing "live entertainment," Chapter 368A does not impose a tax on all such entertainment and it does not tax that particular mode of expression in a unified and even fashion. This is because a wide variety of "live entertainment,"

based upon its ***content,*** is statutorily ***exempted*** from the tax. In this regard, Petitioners' challenge to the Tax involves two related but distinguishable lines of inquiry: Whether it taxes a narrow group of speakers, and whether it discriminates based on content. If the LET does *either* (it actually does *both*), it is unconstitutional.

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. ***When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.***
>
> * * *
>
> Further, ***differential treatment***, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is ***presumptively unconstitutional***.

Minneapolis Star, 460 U.S. at 585, 103 S. Ct. at 1371-72 (emphasis added) (citations omitted).

The reason for this is simple:

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

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

As discussed in detail above concerning the recent Reed decision, an impermissible intent to discriminatorily tax based on content need not be established

in order for the law to be found unconstitutional. Indeed, legislators may attempt to cloak their improper intentions by using seemingly benign gerrymandering. Such structuring *still* results in an unconstitutional tax.

> In Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 103 S. Ct. 1365 [ ] (1983), we noted that it was unclear whether the result in Grosjean [v. American Press Co., 297 U.S. 233, 56 S. Ct. 444 (1936)] depended on our perception in that case that the State had imposed the tax with the intent to penalize a selected group of newspapers or whether the structure of the tax was sufficient to invalidate it. *See* 460 U.S., at 580, 103 S. Ct. at 1369 (*citing* cases and commentary). Minneapolis Star resolved any doubts about whether direct evidence of improper censorial motive is required in order to invalidate a differential tax on First Amendment grounds: "Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." Id. at 592, 103 S. Ct. at 1376.

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

In addition to its ***explicit*** content-based discrimination (*see* subsection VI(B)(2), *infra*), the LET uses the classic and well-worn mask of impermissible gerrymandering by discriminating based upon the "size" of the speaker and/or the volume of its activity. Grosjean was the first example of this, where the Court invalidated a "Louisiana law that singled out publications with weekly circulations above 20,000 for a 2% tax on gross receipts from advertising. The tax fell exclusively on 13 newspapers. Four other daily newspapers and 120 weekly newspapers with weekly circulations of less than 20,000 were not taxed." Leathers, 499 U.S. at 444, 111 S. Ct. at 1442 (*citing* Grosjean, 297 U.S. at 246-51, 56 S. Ct. at 447-51).

Then, in Minneapolis Star, a special use tax was imposed on the cost of paper and ink[10] consumed in the production of publications, but which annually exempted the first $100,000 worth of paper and ink. Eleven publishers, producing only 14 of the State's 388 paid circulation newspapers, incurred liability under the tax in its first year of operation. The plaintiff was responsible for roughly two-thirds of the total burden. Leathers, 499 U.S. at 445, 111 S. Ct. at 1443. The Court found no evidence of impermissible legislative motive in the case apart from the structure of the tax itself, yet invalidated the same. Id.

The same problems are found in the LET. It discriminates on the basis of the size of the establishment by excluding facilities with a maximum occupancy of less than 200 persons, as well as entertainment provided at certain "licensed gaming establishment[s]." NRS 368A.200(5)(d) and (e). Those not excluded on the basis of size are then taxed at ***different rates according to their size***, with the smaller venues paying the *higher* rate. NRS 368A.200 (1). Moreover, as explained in subsection VI(B)(3) below, the seating capacity was actually lowered from 300 to 200 ***specifically to increase the number of gentlemen's clubs that would be swept into the tax***. At the same time, "family-oriented" (*i.e.*, NASCAR and baseball) and other preferred forms of live entertainment were then exempted from taxation.

[10] *Compare* the LET's taxation on *admissions, drinks, etc.*

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

The rate of taxation under what has been gerrymandered to be basically the "adult" LET is 10%. NRS 368A.200(1)(a). The rate of taxation under the "casino" LET (establishments over 7,500 persons) is, however, only ***5%***. NRS 368A.200 (1)(b). Moreover, under the "adult" LET, the tax applies to an "admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise. . . ." NRS 368A.200(1)(a). However, under the "casino" LET, the tax ***only applies to admissions***. NRS 368A.200(1)(b). This allows the casinos to lower their tax liability simply by reducing admission charges and raising the prices for food, drink, and merchandise. The functional result is that the "adult" LET tax rate is effectively ***more than twice*** that of the "casino" LET.

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

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

> largest newspapers than an attempt to favor struggling smaller enterprises."

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

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

Such a discriminatory tax on "live entertainment" was struck down in U.S. Satellite Broadcasting Co. v. Lynch, 41 F.Supp.2d 1113 (E.D.Cal. 1999). In that case, the state had singled out telecasts of boxing contests for special taxation. Id. at 1116. Relying heavily on Arkansas Writers' Project and Leathers to conclude that the statute was an impermissible content-based tax, id. at 1120-23, the court reasoned, in noting that even nude dancing constituted protected expression under the First Amendment, that:

> As a threshold matter, defendants have not convinced the court that First Amendment protection does not attach to a live boxing match organized, held, and televised for the purpose of entertaining live and remote viewers.
>
> * * *
>
> Thus, it simply does not matter if the First Amendment protects or even applies to boxing. ***A tax on the dissemination of entertainment based***

> ***on the content must pass strict scrutiny, regardless of its subject matter***. Simon & Schuster, 502 U.S. at 115, 112 S. Ct. at 508; Arkansas Writers' Project, 481 U.S. at 230, 107 S. Ct. at 1728. . . . Defendants' argument, that telecasts of boxing do not enjoy First Amendment protection because boxing is somehow "less valuable" than other subjects, runs contrary to every principle of the Free Speech Clause itself.

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

The reasoning in U.S. Satellite Broadcasting applies here. The court identified that "the Boxing Act taxes some telecasts, and not others, based on the content of those telecasts. . . . The Boxing Act thus taxes some speech based solely on its content. Under Leathers, Arkansas Writers' Project, and the weight of First Amendment jurisprudence, the tax should be subject to strict scrutiny." 41 F.Supp.2d at 1120. The LET is no different. It applies only to First Amendment activities, and then taxes according to the size of the taxpayer's business and/or the content of the entertainment provided therein. And, here, ironically, admissions to view boxing contests are ***exempted*** from the LET. NRS 368A.200(5)(c). This is obviously a content-based tax, which fails strict scrutiny.

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

The definition of "live entertainment" itself contains, at NRS 368A.090 (b), numerous ***exceptions*** to that phrase, including:

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

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

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

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

* * *

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

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

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

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

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

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

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

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

* * *

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

* * *

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

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

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

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

* * *

(o) Beginning July 1, 2007, race events scheduled at a race track in this State as a part of the ***National Association for Stock Car***

Auto Racing Nextel Cup Series, or its successor racing series, and all races associated therewith.

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

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

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

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

> Indeed, this case involves a more disturbing use of selective taxation than Minneapolis Star, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: ***a magazine's tax status depends entirely on its content.*** . . . ***Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment***.

Arkansas Writers Project, 481 U.S. at 229, 107 S. Ct. at 1728 (internal quotations and citations omitted, emphasis in original and added).

The Supreme Court has further observed that "[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risk of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." City of Ladue v. Gilleo, 512 U.S. 43, 52, 114 S. Ct. 2039, 2044 (1994). There, the Court declared unconstitutional an ordinance banning outdoor signs (as content-based) because the law included a variety of exceptions of signs that were nevertheless permitted.[11] That is exactly the situation here – a law that is triggered by First Amendment activity, which then picks winners and losers within the medium of expression regulated (*i.e.*, those to be taxed and those to be exempted from taxation). The LET is subject to strict scrutiny, and it is invalid.

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[11] *See also* Lukumi, 508 U.S. at 535-40, 113 S. Ct. at 2228-30 (exemptions to ordinances banning the killing of animals rendered the laws to be content-based and therefore unconstitutional as being directed at those practicing the Santeria religion, and the "pattern of exemptions parallels the pattern of narrow prohibitions. ***Each contributes to the gerrymander***"); and U.S. v. Eichman, 496 U.S. 310, 317-19, 110 S. Ct. 2404, 2409-10 (1990) (facially neutral Flag Protection Act was content-based and therefore unconstitutional because although it prohibited burning of the flag, it exempted such burning for a "worn or soiled" flag as a means of disposal. The exception was an act "traditionally associated with patriotic respect for the flag," and demonstrated content targeting by preferring patriotic rather than disrespectful acts upon a flag) (emphasis added).

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

In their facial challenge, Petitioners propounded interrogatories upon the Department directed at discovering the purposes and governmental interests to be served by the LET and, specifically, by the numerous exceptions and statutory amendments. In response, the Department repeatedly directed Petitioners to the Nevada Legislature's legislative history of Senate Bill 4 of the 19th Special Session (2003), Senate Bill 5 of the 19th Special Session (2003), Senate Bill 247 of the 73rd Session (2005), and Assembly Bill 554 of the 73rd Session (2005)[12]. App.Apx., Vol.8, pp. 1717-1741, Department's Responses to Plaintiffs' First Set of Interrogatories, 08/04/09 (Answers 4-5, 7-11, and 16-18). An analysis of this legislative history, specifically identified as being relevant to the constitutional issues at bar by the Department, readily discloses that the LET was crafted to apply to a narrowly-defined group of speakers, and that it discriminates based on content.

In the "MINUTES OF THE MEETING OF THE ASSEMBLY COMMITTEE ON COMMERCE AND LABOR" recorded during the 73rd Congressional Session on May

[12] Consequently, this is not a circumstance where the Petitioners ask the Court to invalidate a law on the basis of illicit legislative motive predicated upon the comments of one or a handful of legislators. *See, e.g.,* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48, 106 S. Ct. 925 (1986).

16, 2005 (App.Apx., Vol.1, pp. 232-249),[13] legislators debated whether to use the language "adult live entertainment" to better capture adult clubs in the amended statute or whether that would make the target of the LET ***too obvious to the courts***:

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

App.Apx., Vol.1, pp. 233-234 (emphasis added).

The Minutes also illustrate that the ***intent*** behind the amendments was to further ratchet up the tax burden on adult entertainment venues, even though such facilities were already paying the ***vast majority*** of the existing non-casino tax:

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

[13] Petitioners acknowledge that much of the legislative history referenced herein concerns how the 2003 legislation should be modified, rather than discussing the original enactment of the LET in 2003. First, this does not detract from the fact that the legislative history unequivocally demonstrates that the 2003 legislation's tax burden befell live adult entertainment in a greatly disproportionate manner, and was ***meant to do so***. Indeed, the discussion in 2005 indicates that the tax failed to bring in the intended revenue because the 300-seat requirement, in action, excluded many of the adult clubs that were ***intended as revenue sources***. Second, this is the legislative history to which the Respondents referred the Petitioners when answering the governmental interest interrogatories.

> The tax package from the 2003 Legislative Session included the entertainment tax, which quickly proved a bookkeeping nightmare. It also failed to generate the revenue we had anticipated ***and it didn't adequately bring in a group some of us intended to be covered, which are the striptease clubs that have proliferated, primarily in southern Nevada***.
>
> * * *
>
> ***It will do a better job of capturing adult live entertainment because it eliminates that 300 seating requirement.***
>
> * * *
>
> ***Certainly the intent of the live entertainment tax was not to get nudist colonies, but to get striptease clubs.***
>
> * * *
>
> **Chairwoman Buckley**:
>
> I wonder if we could do it in a way that's a little broader but gets at the problems so we could avoid losing the revenue. ***We're getting the most revenue from adult entertainment clubs, which is $6 million dollars, the highest amount paid under the live entertainment tax***. The next one is race tracks at $1.5 million[14], but ***everything else pales in comparison to how much they're bringing in now, and I would hate to give them back their $6 million***.

App.Apx., Vol.1, pp. 232-234 (emphasis added).

This legislative history also explains that NASCAR racing and other sporting events were exempted from the bill because they were believed to be "family oriented":

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

[14] In a time of needed tax revenues, it is, therefore, noteworthy that the *second highest source of revenue*, the racetrack, was then eviscerated by the "NASCAR Exemption" discussed immediately below.

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

App.Apx., Vol.1, pp. 232-234 (emphasis added).

The 300-person seating requirement was, in fact, lowered to 200 (NRS 368A.200(5)(d),(e)), even though adult entertainment facilities were already paying four-times more in taxes that the next highest contributor – the racetrack. But racetrack revenues were then eliminated via the NASCAR amendment and the exception for "[l]ive entertainment that is provided to the public in the outdoor area. . . ." NRS 368A.200(5)(l) and (m). And, the legislative history further reflects that decreasing the seating capacity in NRS 368A.200(5)(d) in order to bring more adult cabarets into the Tax was to make up for revenues that would be lost by exempting out the race track. MINUTES OF THE MEETING OF THE ASSEMBLY COMMITTEE ON COMMERCE AND LABOR, 73rd Congressional Session, May 16, 2005, App.Apx., Vol.1, p. 234.

Simply put, in the Committee's own words the taxes paid under the 2003 statute by any remaining providers of live entertainment that the legislature forgot to exempt (until 2005 and later) "pales in comparison" to the amounts paid by adult entertainment establishments. App.Apx., Vol.1, p. 234 (Id.) (emphasis added).

Other documents disclosed in discovery likewise demonstrate that when amendments to the LET were proposed, the chief concern was how they would affect revenues from gentlemen's clubs. *See, e.g.*, App.Apx., Vol.2, p. 260 (Untitled Revenue Analysis analyzing the impact of the 300-seat requirement separately for "men's clubs" from other businesses, and specifically analyzing revenue to be generated from 200-seat "men's clubs" - - no other specific category of business being mentioned or identified); and App.Apx., Vol.2, p. 261 (Memorandum of November 9, 2004 to Chuck Chinnock, Executive Director of the Department, specifically identifying those gentlemen's clubs statewide that had seating capacities of less than 300). *See also* App.Apx., Vol.2, p. 262, where Mr. Dicianno, in an April 24, 2005 email, explained:

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

> ***remaining gentlemen [sic] clubs that are currently not paying***. ***There is no question that they are a cash cow for LET***. My best guess is that the fiscal impact of the revised SB 247 would be either a wash with a distinct possibility of a potential LET revenue gain.[15] (Emphasis added).[16]

The documents preceding the 2003 enactment of the LET are no different. In a November 18, 2003 email of Barbara Smith Campbell (App.Apx., Vol.2, p. 263), it was explained that:

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

Even the speakers before the Senate Committee in 2005 understood the purpose of the initial tax.

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

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[15] This document was submitted as Exhibit E to the Assembly Committee/Ways & Means, on May 26, 2005. App.Apx., Vol.2, p.250-251.

[16] Discovery also disclosed other internal memoranda that confirmed that the adult nightclubs were the target of the LET. *See, e.g.*, App.Apx, Vol.1, pp. 174-146, Vol.2, pp. 261, 262, 263-64, Vol.8, pp. 1802-04, and Vol.9, pp. 2002-06.

impersonators, jugglers, singers, bands and virtually every type of entertainer. ***Obviously, the wording will need to be changed***.

App.Apx., Vol.12, p. 2700 (SENATE COMMITTEE ON TAXATION, April 12, 2005, p. 24) (emphasis added).

Later legislative history confirms this:

Senator Coffin:

Where are the topless clubs in this bill?

George W. Treat Flint (Nevada Brother Owners Association):

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

Senator Coffin:

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

* * *

Senator Coffin:

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

Charles Chinnock (Executive Director, Department of Taxation):

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

Senator Coffin:

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

Mr. Chinnock:

Yes, it was in the interest of safety.

Senator Coffin:

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

Mr. Chinnock:

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

* * *

Senator Townsend:

With regard to the 300 seating and the budget, the lower we make it, the more revenue we would generate as opposed to having an effect on ***them***. There should be no fiscal note. My limited knowledge of this corresponds with Senator Coffin. This puts our Department of Taxation and the auditors in a tough situation. We have to remember, at the end

> of the day. We have those individuals who will be responsible for implementing this law. ***Senator Coffin's proposal meets the original intent of what this Committee and the Assembly debated***. Obviously, we do not want to create a problem for Mr. Flint's clients. That was never the issue.
>
> **Mr. Flint:**
>
> This is not official, but ***I spoke with someone in the Department of Taxation***, and I do not have Mr. Chinnock's permission to say this on the record. ***I was told if you brought this number down to 200, you may pick up those who are avoiding or evading this at the moment***. I have been in enough of ***these places*** to know there are very few with less than 200 seats. There is a wide area you would pick up at 200, and you will still keep me harmless at this number.

App.Apx., Vol.13, p. 2908-2914 (SENATE COMMITTEE ON TAXATION, June 5, 2005, pp. 4, 6-7) (emphasis added).

Finally, the legislative record even reflects a Senator observing that the Tax might be used as a method of limiting "this type of business." App.Apx., Vol.12, p. 2703.

The context, legislative history to the 2003 statute and the 2005 amendments to the LET, and documents disclosed in discovery, all make clear that gentlemen's clubs were the focus of Chapter 368A. Consequently, this narrowly targeted ***and*** content-based tax cannot pass constitutional muster under either strict or intermediate scrutiny.

VI. THE DISTRICT COURT ERRED BY AFFIRMING THE COMMISSION'S DECISION TO NOT ALLOW PETITIONERS TO CONDUCT REQUESTED DEPOSITIONS.

How the LET is administered and applied is directly relevant to Petitioners' as applied challenge. In Arkansas Writers' Project, 481 U.S. at 230, 107 S. Ct. at 1729, the High Court made clear that if enforcing officials are necessarily required to examine the content to determine whether the tax applies, the tax is deemed content-based. In Church of Lukumi Babalu Aye, Inc., v. Haileah, 508 U.S. 520, 535, 113 S. Ct. 2217, 2228 (1993) the Court explained "when the ordinances' operation is considered, "***apart from the text***, the ***effect of a law*** in its real operation is ***strong evidence of its object***." (Emphasis added). Hence, the evidence Petitioners sought to obtain through deposition is particularly relevant to Petitioners' as applied challenge. The Commission improperly denied discovery aimed at uncovering such critical information, and the District Court affirmed. App.Apx., Vol.19, p. 4025, Amended Order, ¶ 7.

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

- the purposes for any and all legislative changes to the exceptions to the definition of "live entertainment" set forth in NRS § 368A.090;

- the purposes for each and every one of the exceptions to the application of the Live Entertainment Tax or to the definition of "live entertainment" created by any regulation or policy of the Commission; and

- the steps by which the proposed "5% across the board" tax on live entertainment was modified to, instead, tax certain live entertainment at the rate of 10%, as provided by NRS § 368A.200(1).

App.Apx., Vol.8, pp. 1717-1741 (Department's Responses to Plaintiffs' First Set of Interrogatories (Answers 4-5, 7-11, and 16-18).

Ms. Jacobs was identified ***by the Respondents*** as the person most knowledgeable regarding:

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

- the purposes for each and every one of the exceptions to the application of the Live Entertainment Tax set forth in NRS § 368A.200.

Id. (Response Nos. 6, 8, and 10-11.)

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

- A memorandum specifically examining the seating capacities of gentlemen's clubs prior to the legislature amending the seating capacity threshold. App.Apx., Vol.2, p. 261.

- An email examining revenue impacts and stating: "Currently the vast majority of the revenue we collect comes from the gentlemen's clubs with a seating capacity greater than 300." App.Apx., Vol.2, p. 256.

- An email explaining that draft language was rejected because it might exempt dancers at gentlemen's clubs. App.Apx., Vol.2, p. 263.

Petitioners' intended depositions were also aimed at uncovering pertinent information regarding the LET's legislative history and practical effect. *See, e.g.*, App.Apx., Vol.15, pp. 3308-3312 (June 14, 2012, Letter to Commission requesting subpoenas and explaining the purpose of the subpoenas).

These were all relevant matters to Petitioners' as applied constitutional challenges, and Petitioners should have been permitted to undertake such discovery. Indeed, the District Court's January 24, 2012, Order (entered 2/2/2012) (App.Apx., Vol.15, p. 3317-3318) granted Petitioner's Application for Leave to Present Additional Evidence "so the administrative agency can look at additional evidence and do one of the following: Amend the Findings of Fact, Conclusions of Law dated Oct. 12, 2007, Reverse the Decision, or Affirm the Decision." However, the Commission denied the subpoenas for the reason that Petitioners did not request subpoenas when the matter was originally before the Commission in 2007 (App.Apx., Vol.17, p. 3747, ¶ 4) and because "[t]he Commission has no obligation to reinstate the right to request subpoenas and depositions" (id. at ¶ 6).

This reasoning appears to directly contradict the reasoning of the District Court in granting leave to present additional evidence. It explained from the Bench:

> There's a second case that was going on that ended up getting dismissed because of the – whatever the new case was, Edison case, ***I don't know that there was necessarily – necessarily an obligation to discovery under the – in the administrative portion of the case***. There is – I – I found some law that says that there's no state or federal constitutional right in the administrative proceeding to prehearing discovery. Nevada Rules of Civil Procedure do not apply to administrative proceedings, and the Nevada Administrative Procedure Act makes no provision for discovery. ***I think that there's probably a valid basis for the plaintiffs [Taxpayers] to have not discovered the things that they are now saying that they want to bring before the agency***.
>
> My inclination is that there is good cause and the evidence is material, and I would prefer that the tax commission review everything before I review it.

App.Apx., Vol.8, pp. 1786-87 (Transcript, December 9, 2011, pp. 5:8-6:1) (emphasis added).

> The thing is, as a judge, I want to try to do the right thing, and if the right thing requires me to only look at the record on a petition for judicial review, I'm limited to review of the record. If there's a question whether or not something is in the record that should be or something's missing from the record that maybe should be in the record, I'm inclined to allow the administrative agency an opportunity to review that so that when it comes up to me, and I'm sure this will come back up to me, *that I've got all the evidence*. So I'm not going to dismiss the case, but what I'm going to do is I'm going to remand it right now for purposes -- so the administrative agency can -- *can look at the evidence that's requested by the petitioners*. And I'm guessing that as soon as that happens, they'll either come up with an amended decision or a different decision or they'll just say that the same decision applies.

Id. at App.Apx., Vol.8, pp. 1792-1793 (emphasis added).

The District Court's affirmance was error since the court itself acknowledged that the then-existing precedent had not required the Petitioners to have requested

discovery when they were first before the Commission, and the depositions requested certainly sought relevant evidence. The decision below should therefore be reversed.

CONCLUSION

For the reasons as set forth above, Petitioners respectfully request that this Honorable Court reverse the decision of the District Court below, declare Chapter 368A to be unconstitutional, enjoin its enforcement, and order the return by the State of all of the taxes paid by the Petitioners to date; or in the alternative remand this matter with instructions for the District Court to: 1) permit the Petitioners their requested discovery; 2) then consider Petitioners' challenges in light of such discovery.

Dated this 26th day of October 2016

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Appellants' Opening Brief** was filed with the Clerk of the Court for the Supreme Court for the State of Nevada on October 27, 2016. I certify that the following are registered with the Electronic Filing System through the Supreme Court for the State of Nevada and that service will be accomplished through the Electronic Filing System:

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

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

I further certify that this brief complies with the page-type or type-volume imitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of size 14 or more, and contains 12,697 words, as counted by MS Word.

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

Dated this 26th day of October, 2016

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