IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

v.

State of Nevada, ex rel. Department of Taxation and Tax Commission,

Respondents.

Supreme Court Case No.: 69886

District Court Case No.: A-11-648894-J consolidated with A-14-697515-J

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

RESPONDENTS' ANSWERING BRIEF

ADAM PAUL LAXALT
Attorney General
Nevada Bar No. 12426
WILLIAM J. MCKEAN
Chief Deputy Attorney General
Nevada Bar No. 6740
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 8617
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 9160
555 E. Washington Ave.
Ste. 3900
Las Vegas, Nevada 89101
(702) 486-3420
(702) 486-3416 – Facsimile

wmckean@ag.nv.gov
dpope@ag.nv.gov
vrakowsky@ag.nv.gov
Attorneys for Respondents
STATE OF NEVADA,
EX REL. DEPARTMENT OF
TAXATION AND TAX
COMMISSION

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I. INTRODUCTION

This Court should not be surprised by a strange sense that it already has seen this case. This is, in Petitioners' words, a "continuation of an earlier case, but in a different form."[1] That "earlier case"—*Déjà Vu I*,[2] and its companion—*Déjà Vu II*,[3] raised the same underlying procedural and substantive issues as this appeal.

The *Déjà Vu I* decision "focuse[d] on the procedural processes" available to Petitioners in challenging an administrative decision denying a refund-of-taxes-paid under NRS Chapter 368A, Nevada's Live Entertainment Tax ("NLET").[4] This Court ruled that the "appellants were limited to a petition for judicial review, rather than a de novo action," and because "judicial estoppel" did not apply it was proper to dismiss the "underlying de novo action for lack of subject matter jurisdiction."[5] One would think this ruling dispositive. However, prior to the *Déjà Vu I* decision, Petitioners "re-filed" this matter as a petition for judicial review.[6] The petition, however, was filed long after the statutory time limits had run—thus

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[1] Third Amended Case Appeal Statement, Sup. Ct. Case No. 69886 (June 27, 2016) (Third Am. Case App. Stmt.), at 5, note 1.

[2] *Déjà Vu Showgirls v. Dept. of Taxation*, 130 Nev. __, 334 P.3d 387 (Adv. Op. No. 72, September 18, 2014) (hereinafter, "*Déjà Vu I*").

[3] *Déjà Vu Showgirls v. Dept. of Taxation*, 130 Nev. __, 334 P.3d 392 (Adv. Op. No. 73, September 18, 2014), *cert. denied* 135 S.Ct 1431 (Feb. 23, 2015) (hereinafter, "*Déjà Vu II*").

[4] *Déjà Vu II*, 130 Nev. at __, 334 P.3d at 388.

[5] *Déjà Vu II*, 130 Nev. at __, 334 P.3d at 391-92.

[6] Third Am. Case App. Stmt. at 7. *See also* Docketing Statement, Sup. Ct. Case No. 69886 (March 23, 2016) at Ex. 1 (Petition for Judicial Review).

divesting the district court of jurisdiction. As an appeal from the district court's decision in that matter, this appeal should be dismissed on jurisdictional grounds.

As to the substantive issues, the *Déjà Vu II* decision addresses whether the "NLET is facially unconstitutional for violating free speech rights (*i.e.*, dance) under Article 1, Section 9 of the Nevada Constitution or the First Amendment to the United States Constitution."[7] This Court ruled that the standard of review is rational basis, and that the NLET does not suppress or burden speech because of its content.[8] This Court also ruled that NLET did not facially violate the First Amendment because it is a content-neutral and generally applicable tax that does not target constitutionally-protected activity.

This Court's decisions in the foregoing two cases are dispositive here. Furthermore, Petitioners have no evidence the NLET has ever been enforced in a discriminatory matter. As a practical matter, this appeal is *déjà vu* all over again.

II. QUESTIONS PRESENTED

1) Should this appeal be dismissed on jurisdictional grounds?

2) Is the NLET constitutional?

3) Was the denial of administrative depositions appropriate?

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[7] 130 Nev. at __, 333 P.3d at 401.

[8] *Déjà Vu II*, 130 Nev. at __, 334 P.3d at 401 ("Because the NLET does not discriminate on the basis of the content of taxpayer speech, target a small group of speakers, or otherwise threaten to suppress ideas of viewpoints, we determine that heightened scrutiny does not apply. Instead, rational basis review applies . . .").

III. STATEMENT OF FACTS

Most of the material background and facts are summarized in this Court's prior decisions in the *Déjà Vu* cases. In 2003, the Nevada Legislature enacted the NLET as a general revenue raising measure to apply to all facilities that provide live entertainment and charge an admission fee.[9] The tax is imposed "***on admission*** to any facility" providing "live entertainment."[10] As such, the NLET is a tax on "business transactions which neither inhibits nor burdens the expressive conduct."[11] Because Petitioners' venues are located outside of a casino property, they all remitted their NLET payments to the Department of Taxation ("Department").[12] In addition, their facilities each seat fewer than 7,500, so they are subject to the 10% NLET on admission, food, refreshments and merchandise.[13]

Here, just as in *Déjà Vu I*, Petitioners seek to challenge the decision of the Nevada Tax Commission ("Commission") dated October 12, 2007.[14]

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[9] *Déjà Vu II*, 130 Nev. at __, 334 P.3d at 395.

[10] *Id.*, 334 P.3d at 395.

[11] *Id.*, 334 P.3d at 399. The NLET also contains certain exemptions which this Court has also held to be nondiscriminatory as to speech or expression. *Id.* at 400. For various reasons unrelated to the type or location of any given entertainment venue within a casino or otherwise, the Nevada Legislature exempted certain specific events/facilities from the NLET. This does not run afoul of the First Amendment given the broad latitude afforded the states in adopting classifications and distinctions in tax statutes. *See supra* Section 2.C.

[12] NRS 368A.140; Déjà Vu II, 130 Nev. at __, 334 P.3d at 395.

[13] *Déjà Vu II*, 130 Nev. at __, 334 P.3d at 395.

[14] *Déjà Vu I*, 130 Nev. at __, 334 P.3d at 388-9; Third Am. Case App. Stmt. at 5-6, notes 1 & 2.

Petitioners started by filing a de novo action in district court on January 9, 2008 (identified as "Case 2" in the *Déjà Vu I* decision).[15] Petitioners describe this procedural background as follows:

> After an unsuccessful administrative challenge [resulting in the Commission's October 12, 2007 decision], [Petitioners] filed a de novo action (as opposed to a petition for judicial review). The district court found that was error . . . so the court dismissed the de novo action and ordered that it "shall proceed [as] petition for judicial review"—which is this case.[16]

The district court, after oral argument on August 23, 2011, issued its written order dismissing the de novo action on October 27, 2011.[17] In *Déjà Vu I*, this Court concluded that the "district court did not err by determining that it lacked subject matter jurisdiction to consider the de novo challenge below . . . ."[18] Instead, this Court held that the "sole remedy for a taxpayer aggrieved by a final decision from the Commission concerning a tax refund request under NRS Chapter 368A is to file a petition for judicial review" in accordance with the Nevada Administrative Procedure Act ("APA") found in NRS Chapter 233B.[19]

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[15] *Id.*, 334 P.3d at 389; Respondents Appendix ("RA") at 93-113.
[16] Third Am. Case App. Stmt. at 5-6, notes 1 & 2.
[17] *Id.*, note 2, Ex. 2.
[18] *Déjà Vu I*, 130 Nev. at __, 334 P.3d at 390.
[19] *Id.*

Left unaddressed in *Déjà Vu I* was the jurisdictional status of Petitioners' petition for judicial review filed on September 23, 2011.[20] Petitioners made this filing on the basis of the district court's October 27, 2011, order, which purported to grant Petitioners "thirty (30) days from August 23, 2011, to file a petition for judicial review pursuant to NRS 233B.130 . . . ."[21] In 2011 (prior to the *Déjà Vu I* decision issued in September 2014), the district court docketed Petitioners' petition for judicial review (as Case No.11-648894). Respondents moved to dismiss on November 9, 2011, asserting that Petitioners' filing—nearly four years after the Commission's October 12, 2007 decision—was untimely. AA 50-51. However, the district court did not grant the motion, and Petitioners proceeded to seek discovery and reconsideration of the Commission's October 12, 2007 decision.[22] The Commission did not allow all of the requested discovery[23] and issued a letter decision to that effect on September 6, 2012. In a written decision dated February 14, 2014, the Commission affirmed the ALJ's Order on Remand, Petitioners then

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[20] Third Am. Case App. Stmt. at 5-6, notes 1 & 2.

[21] *Id.* at Ex. 2.

[22] In February 2012, the district court ordered the Commission to review additional evidence and to determine if it warranted any change to its October 12, 2007, decision. Respondents Appendix (RA) at 168 (Order 2/1/12). In June 2012, Petitioners requested the Commission permit depositions. AA 3476-3480. The Commission denied the request and directed the matter to an administrative law judge ("ALJ") to consider the additional documentary evidence. AA 3750-3757.

[23] In August 2013, Petitioners requested depositions, additional discovery, and a new hearing. AA 3750-3757. The ALJ issued a decision finding that the additional documents did not prove an unconstitutional application of the NLET. *Id.* Petitioners appealed to the Commission, which affirmed the ALJ decision.

filed a second petition for judicial review essentially challenging the Commission's denial of depositions and further discovery (which the district court docketed as case No. 14-69751). AA 97-106. The district court denied the consolidated petitions for judicial review by a written order dated June 22, 2016.[24]

IV. SUMMARY OF ARGUMENT

As a threshold matter, it is clear that the underlying substantive petition for judicial review (filed September 23, 2011) should be dismissed on jurisdictional grounds. Prior to the *Déjà Vu I* decision, the parties dutifully continued to comply with district court orders—including Petitioners "re-filing" of the matter as a petition for judicial review. The *Déjà Vu I* decision, however, affirmed the district court's lack of subject matter jurisdiction as to the de novo action.[25] In other words, the district court did not have jurisdiction on January 9, 2008—when Petitioners filed the de novo action, nor on October 27, 2011—when the district court ordered the de novo action dismissed, while also purporting to order the case "proceed as a petition for judicial review." Accordingly, when Petitioners filed their petition for judicial review on September 23, 2011—nearly four years after the Commission's October 12, 2007 decision—they had no excuse for failing to comply with the "mandatory and jurisdictional" time period under the APA.

If this Court does reach the merits, then it should conclude that Petitioners'

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[24] Third Am. Case App. Stmt. at Ex. 3.

[25] *Déjà Vu I*, 130 Nev. at __, 334 P.3d at 392.

arguments remain substantially the same as those advanced in *Déjà Vu II*. Furthermore, the relevant facts have not changed since the Court decided that case in 2014. Therefore, Petitioners cannot satisfy their additional burden of proving in this case that the tax has been applied or enforced in such a way as to abridge their rights under the First Amendment, and they have produced no evidence that the NLET was applied or enforced in a discriminatory fashion so as to silence or inhibit adult entertainment. The only new shine on the shoe is their assertion that *Reed v. Gilbert Arizona*, changes the applicable standard of review. However, unlike the ordinance at issue in *Reed* (which prohibited speech),[26] this Court has already concluded that the NLET is content neutral.[27]

Finally, Petitioners also challenge the 2012 Commission decision denying their request to reopen discovery. The request was denied because they made a strategic decision in 2007 to forego depositions despite the availability of the information that they now seek to obtain through depositions. At this point, it is difficult to imagine any set of facts that would bolster Petitioners' arguments in this case. Their attempt to reopen discovery is patently frivolous.

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[26] *Reed v. Town of Gilbert, Ariz.*, 135, S.Ct. 2218 (2105); s*ee infra* Section 2.B. Furthermore, only one of the more than 900 cites to *Reed* has addressed a tax matter. In that case, the court found that *Reed* did not apply because New York's cabaret tax and amusement tax are not imposed on a First Amendment activity. Similarly, in *Déjà Vu II*, this Court already has determined that the NLET is not a tax on First Amendment activity.

[27] *Déjà Vu II*, 130 Nev. at __, 334 P.3d at 395.

V. ARGUMENT

1. THIS APPEAL SHOULD BE DISMISSED ON JURISDICTIONAL GROUNDS.

In *Déjà Vu I*, this Court ruled that "absent explicit legislative direction to the contrary, the APA's procedures, including the requirement to file a petition for judicial review, apply to all final Commission decisions, including those addressing refund requests under NLET."[28] Generally, "[c]ourts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review."[29] Accordingly, the provisions of the APA require "strict compliance" as a "precondition to jurisdiction by the court of judicial review."[30] The "APA's procedures" specify that a petition for judicial review must "be filed within 30 days after service of the final decision of the agency." NRS 233B.130(2)(d). This Court has held that the "time period for filing a petition for judicial review of an administrative decision is mandatory and jurisdictional," and thus, it may not be excused.[31]

Here, Petitioners' petition for judicial review of the Commission's October 12, 2007 decision was not filed until September 23, 2011—nearly four years after

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[28] *Déjà Vu I*, 130 Nev. at __, 334 P.3d at 390.

[29] *Washoe Cnty. v. Otto*, 128 Nev. 424, __, 282 P.3d 719, 724 (2012) (internal citation omitted).

[30] *Id.*

[31] *Kame v. Employment Security Dep't*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989)(citation omitted).

the Commission's October 12, 2007 decision. That fails to comply with any applicable statutory time frame in NRS 233B.130 or NRS Chapter 368A. While the district court did proceed to docket the untimely petition for judicial review (as Case No.11-648894), it did not have jurisdiction to do so. "As the time limitation of NRS 233B.130(2)(c) [now codified at NRS 233B.130(2)(d)] is jurisdictional, a district court is divested of jurisdiction if the petition is not timely filed."[32] This jurisdictional defect was, and is, not capable of being cured.[33]

In continuing to proceed, moreover, Petitioners had no valid basis to rely on the district court's October 27, 2011 order. As an equitable matter, they were fully informed of their options when—in January 2008—they elected to file a de novo action instead of a petition for judicial review to challenge the Commission's October 12, 2007 decision.[34] As a legal matter, whether a court lacks subject matter jurisdiction "can be raised by the parties at any time, or sua sponte by a court of review, and cannot be conferred by the parties."[35] This Court specifically ruled, in *Déjà Vu I*, that the district court lacked subject matter jurisdiction as to the

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[32] *Mikohn Gaming v. Espinosa*, 122 Nev. 593, 598, 137 P.3d 1150, 1154 (2006).

[33] *Otto*, 128 Nev. at 282, P.3d at 725-727.

[34] *Déjà Vu I*, 130 Nev. at __, 334 P.3d at 391 (finding that "the record shows that as early as their federal district court case in 2006, [Respondents] identified that a petition for judicial review was the appropriate remedy, citing to the APA.").

[35] *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990)(citation omitted).

de novo action.[36] This ruling confirmed that the district court did not have jurisdiction on October 27, 2011—when it ordered the de novo action dismissed, while purporting to order the case "proceed as a petition for judicial review." Accordingly, the district court's October 27, 2011 order was "void,"[37] and not a valid basis for the late-filing of a petition for judicial review.

In summary, this appeal should be dismissed on jurisdictional grounds.

2. THE NLET IS NOT A TAX ON ANY FIRST AMENDMENT PROTECTED ACTIVITY

Should the Court entertain Petitioners' arguments on the merits, it bears repeating that their arguments are built on the false premise that the NLET is levied on First Amendment activity. This leads them to the false conclusion that the NLET is subject to strict scrutiny. Since the NLET is not a tax on First Amendment activity, it is subject to rational basis review. Under this standard, all of Petitioners' arguments fail. This Court's prior determination that the NLET is constitutional on its face is precedent.[38] Petitioners' argument, that the *Reed* decision changed the applicable standard of review, fails; indeed, they do not cite a single tax case negatively affected by *Reed*.

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[36] *Déjà Vu I*, 130 Nev. at __, 334 P.3d at 388-9.

[37] *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984).

[38] *Déjà Vu II*, 130 Nev. __, 334 P.3d at 402.

A. The Nevada Constitution Provides that "Taxes May Be Levied Upon The Income Or Revenue Of Any Business In Whatever Form It May Be Conducted For Profit In The State."[39]

There is a "strong presumption in favor of duly enacted tax schemes."[40] The "presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against a particular person and classes."[41] Despite this case law to the contrary, Petitioners persist in their argument that the different tax rates for large and small facilities constitute impermissible gerrymandering. Gerrymandering is beside the point because tax classifications are valid as long as they bear a rational relationship to a legitimate governmental purpose and do not interfere with the exercise of free speech.[42]

For more than 125 years, the Supreme Court has consistently upheld the rule that the government may:

> impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property

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[39] NEV. CONST. Art. 10 § 9.

[40] *Leathers v. Medlock*, 499 U.S. 439, 451 (1991); *see also Midcontinent Broad. Co. of Wis., Inc. v. Wis. Dep't. of Revenue*, 297 N.W. 2d 191, 203 (Wis. 1980) ("[W]here a tax measure is involved, the presumption of constitutionality is strongest. The courts have given recognition to the essentiality of taxation in preserving an ordered society.").

[41] *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983), *citing Madden v. Kentucky*, 309 U.S. 83, 88 (1940).

[42] *Regan*, 461 U.S. at 547.

> only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them.[43]

Additionally, a government may also, "if it chooses, exempt certain classes of property from any taxation at all."[44] The Court reaffirmed this rule half a century later in *Madden v. Commonwealth of Kentucky,* when the Court ruled that the "presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.[45] In 1983 the Court again affirmed that a legislature has the broad discretion to adopt classifications in the field of taxation.[46]

Along the same line, in *Leathers v. Medlock,* the U.S. Supreme Court had already reinforced earlier tax cases stating "discrimination among taxpayers, whether those taxpayers are speakers or non-speakers, is inherent and permissible in creating tax classifications that allow states the flexibility needed to fit tax programs to local needs."[47]

Relying on the rule from *Leathers,* this Court found that heightened scrutiny does not apply to tax classifications unless the classification is hostile and

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[43] *Bell's Gap v. Commonwealth of Pa.*, 134 U.S. 232 (1890).

[44] *Id.*

[45] 60 S.Ct. 406, 407-408 (1940)(citation omitted).

[46] *See Regan,* 461 U.S. at 547.

[47] *Déjà Vu* 11, 130 Nev. __, 334 P.3d at 400 (citing *Leathers*, 499 U.S. at 451).

oppressive discrimination against particular persons and classes.[48] Today, *Leathers, Regan, and Madden,* as well as the entire line of case law with respect to tax classifications, are still good law, and so is *Déjà Vu II.*

B. Petitioners Cannot Meet Their Burden to Show the NLET has been Applied to Them in an Unconstitutional Manner.

Rational basis is the correct standard of review of the NLET for both facial and as-applied challenges. A court must determine whether the NLET is rationally related to a legitimate governmental purpose.[49] Strict scrutiny review does not apply to a tax unless the tax is oppressive or is content based.[50]

Petitioners argue that the *Reed*[51] case changes the level of scrutiny. In response to this specious argument, the District Court concluded the facts of this case do not implicate *Reed.* AA 3969-3981. The court explained that *Reed* does not apply to a tax classification unless the classification amounts to hostile and oppressive discrimination against a particular person and class. AA 3969-3981.

Petitioners argue that *Reed* changed the analysis by applying strict scrutiny to a regulation that was viewpoint neutral but prohibited or regulated a specified

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[48] *Déjà Vu II*, 130 Nev. __, 334 P.3d at 401 ("a tax that discriminates between speakers on a basis other than ideas is not by itself constitutionally suspect."), *citing Leathers*, 499 U.S. at 450.

[49] *See Regan*, 461 U.S. at 547 ("Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. . . . Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes").

[50] *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221(1987).

[51] 135 S.Ct. at 2227.

topic.[52] Because Petitioners have failed to show that the NLET targets their "speech" based on its communicative content, *Reed* cannot apply, and the standard of review is rational basis.[53] Petitioners' argument concerning intermediate scrutiny is likewise misplaced.[54]

As this Court has already concluded, the NLET does not regulate speech and does not discriminate on the basis of content or a topic or the viewpoint

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[52] *See Norton v. City of Springfield Ill.*, 806 F.3d 411, 412 (7th Cir, 2015) (noting that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter"); *In re Tam*, 808 F.3d 1321, 1334 (D.C. Cir. 2015) ("content based restriction 'discriminates on the basis of content in the sense that it applies to particular speech because of the topic discussed.'")(citation omitted).

[53] *Reed*, 135 S.Ct. at 2227.

[54] According to Petitioners, intermediate scrutiny applies when provisions of law ***impact*** protected expression. App. Br. at 25-26 (emphasis in original). Petitioners have produced no evidence to date that the NLET impacts protected expression. Furthermore, the cited cases addressed facts that are not analogous to those at issue here. The *McCutcheon* case concerns the right to engage in political speech, and whether restrictions on aggregate limits were poorly tailored to the government interest in preventing circumvention of the base limits of contributions. While *McCutcheon* addressed legislation that was specifically designed to curtail political speech, the NLET has no such purpose. *McCutcheon v. FEC*, 134 S.Ct. 1442, 1446-1447 (2014). The *McCullen* case concerns restrictions on public ways and sidewalks. Because sidewalks are a site for public discussion and debate, the Court used intermediate scrutiny to evaluate legislative restrictions on the public's use of a traditional public forum for engaging in free speech. The NLET does not impact a public forum. *McCullen v. Coakley*, 134 S.Ct. 2518 (2014). Neither of these cases concern taxation nor mention *Reed.* In fact, *McCullen's* reference to *Ward* actually bolsters the Department's position in its recognition that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." To the contrary, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *McCullen*, 134 S.Ct at 2531.

discussed.[55] The NLET is simply a tax on a business transaction and not a tax on the entertainment.[56] The NLET does not contain guidelines for the messages conveyed in the live entertainment. The NLET does not impose subjective standards on any messages.[57] Most importantly, the NLET does not prohibit or regulate certain forms of entertainment, or regulate the time, place, or manner of any entertainment. This Court found that the NLET simply "imposes an excise tax on business transactions which neither inhibits nor burdens the expressive conduct occurring at live-entertainment facilities."[58] There are no objective indicators in the NLET statutory scheme showing a legislative intent to control content.

Of the hundreds of First Amendment challenges based on the *Reed* decision, only one concerns a tax.[59] In that case, *CMSG Restaurant Group LLC v. State*, which involved a cabaret tax and an amusement tax, the court found that rational

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[55] *Déjà Vu II*, 130 Nev. __, 334 P.3d at 399.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *See infra*, note 60 (discussing the *CMSG* case). The other cases cited by Petitioners concern regulating signs (*Central Radio, Inc v. City of Norfolk*, 227 F.3d 229 (4th Cir. 2015)), (*Wagner v. City of Garfield Heights*, 577 Fed. App. 488 (6th Cir. 2014)(unpublished)), panhandling (*Norton v. City of Springfield Ill.*, 806 F.3d 411 (7th Cir. 2015)), panhandling with signs (*Thayer v. City of Worcester,* 755 F.3d 60 (1st Cir. 2014)), and political robocalls (*Cahaly v. Larosa*, __F.3d__, 2015 WL 4646922 (4th Cir, Aug. 6, 2015)) , they do not concern a legislatively enacted tax which does not regulate speech.

basis review applied.[60] The *CMSG* court distinguished *Reed* in that it concerns a law that initially prohibits speech and then restricts different speech in different ways. The NLET, like the cabaret tax and amusement tax in *CMSG*, does not prohibit speech under any circumstances and only taxes business transactions. The *CSMG* court applied the rational basis test and found the taxes constitutional.[61]

According to *Reed,* strict scrutiny will apply to a "[g]overnment regulation of speech [that] is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[62] There is nothing new about laws that target speech based on its communicative content being subject to strict scrutiny.[63] The rationale behind the prohibition against content based regulations of speech is that "content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'"[64] "As a general rule, laws that by their terms distinguish favored speech from disfavored

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[60] *CMSG Restaurant Group LLC v. State*, 2016 WL 6496678, 2016 N.Y. Slip Op. 07280, __ N.Y.S.3d __ (2016).

[61] *Id.*

[62] *Reed*, 135 S.Ct. at 2227.

[63] *See Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987). Contrary to the assertion of Petitioners, Justice Kagan did not rely on *Arkansas Writers Project* for tax issues, but referenced it in one sentence for the longstanding rule that a content based distinction must serve a compelling state interest and be narrowly tailored to achieve that end. *Reed,* 135 S.Ct. at 2236.

[64] *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 188 (2007)(citation omitted).

speech on the basis of the ideas or views expressed are content based."[65]

The first analysis is to determine whether the regulation is content neutral on its face.[66] In *Ward,* after finding the regulation was content neutral, the Court then looked to see if there was a government motive to regulate speech because of a disagreement with the message. After determining that there was no disagreement with the message, the Court upheld the regulation.[67] *Ward* is still good law. Here, this Court has already found that the NLET is content neutral on its face, and also found that the NLET does not implicate any message.[68]

C. The Legislature has Extremely Broad Discretion in Creating Taxing Statutes and Exemptions.

Legislatures have especially broad latitude in fashioning classifications and distinctions in tax statutes.[69] "Tax exemptions are based on the accomplishment of public purpose and not the benefitting of private interests at the expense of

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[65] *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 643 (1994).

[66] *See Ward v. Rock Against Racism*, 491 U.S 781, 791 (1989) (concerning the regulation of sound amplification systems in a city owned music venue). The Court also stated that "[g]overnment regulation of "expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791. For example the justification for the sound amplification guidelines is the city's desire to control noise levels at the band shell as well as to make sure that all concert attendees can hear the music. *Ward*, 491 U.S. at 792, 799.

[67] *See Ward*, 491 U.S at 803.

[68] *Déjà Vu II*, 130 Nev. __, 334 P.3d at 400.

[69] *Madden*, 309 U.S. at 87-88.

taxpayers generally."[70] In *Madden*, the Court stated that "classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden" and that "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes."[71] Taxes can be imposed on specific businesses as long as it is equally applied to all those in the same business.[72]

Petitioners argue that the exemptions show that the NLET targets adult entertainment. Notwithstanding the exemptions, there are more than 25 different types of facilities responsible for paying the NLET. AA 3547-3548. Petitioners made the same arguments to the Commission in August 2007 and the Commission found that the NLET is a single tax on live entertainment.[73] Indeed, the NLET does not target speech, but rather raises revenue from a variety of sources for the general public benefit. While tax statutes commonly include exemptions, there

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[70] *Clark County Sports Enterprises, Inc. v. City of Las Vegas*, 96 Nev. 167, 174, 606 P.2d 171,176 (1980)(citation omitted).

[71] *Madden*, 309 U.S. at 88 (internal citations omitted).

[72] *Walters v. City of St. Louis*, Mo., 347 U.S. 231, 237 (1954).

[73] AA 1622 (Member Kelesis stating: "nobody objected or refuted the fact that approximately $117 million is collected under the LET Tax, the same tax that applies to every taxpayer that's taxed under that, nobody argued with me, yet you keep referring that the entertainment clubs pay the majority of the tax and that's not accurate based on the statistics I'm looking at. They paid approximately 7 million of 117million. That's less than ten percent. You're not paying the majority, Mr. Shafer.").

must be a rational relationship between an exemption and a legitimate governmental purpose.[74] Because exemptions are narrowly construed, they apply only to what is strictly within their terms.[75]

Exemptions were discussed in detail by the United States Supreme Court in *Leathers v. Medlock*, where the Court upheld the application of sales tax to cable television, while exempting printed media, because the state law did not single out a small group of speakers to fully bear the burden of the tax, and the Court noted the "strong presumption in favor of duly enacted taxation schemes."[76] The rule announced in *Leathers* is that the "differential taxation of speakers . . . does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas."[77] Here, the NLET is not directed at, nor does it present the danger of suppressing the Club's message. The exemptions to the NLET are narrow, and the objective and non-discriminatory reasoning behind each exemption is obvious.

The minimum seating capacity of 300 in SB 8 was set to prevent economic harm to smaller entertainment arenas, not to differentiate based on the content of the message. The change to an occupancy rate of 200 persons in 2005 applies in

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[74] *Armour v. City of Indianapolis*, 132 S.Ct 2073, 2080 (2012); *see also Madden*, 309 U.S. at 87-88.

[75] *Department of Taxation v. Daimler-Chrysler Services North America*, 121, Nev. 541, 545, 119 P.3d 135, 137 (2005).

[76] *Leathers*, 499 U.S. at 451.

[77] *Id.*, 499 U.S. at 453.

both gaming and non-gaming establishments and was enacted as part of AB 554 to capture more businesses and more revenue, both inside and outside of a casino property. AA 268 ("We should consider the possibility of reducing the seating capacity so these highly profitable, legitimate businesses could help pay their share of the budget.") The history of the legislation shows that the occupancy threshold was reduced to: (1) broaden the tax base; and, (2) capture taxpayers who were removing "chairs" in order to be exempt from tax. AA 268 (recognizing that "some of the topless clubs get out of being taxed by removing a few seats.").

Petitioners argue that targeting is evident because boxing events are exempt from the NLET. NRS 368A.200(5)(c). However, boxing events were excluded because those events already are subject to taxation pursuant to NRS 467.107(1)(a), which requires promoters of boxing contests to pay tax in an amount equal to six percent of the total gross receipts from admission fees. In addition, the promoters must pay three percent of the first $1,000,000 and one percent of the next $2,000,000 of the total gross receipts from the sale, lease, or other exploitation of broadcasting, television and motion picture rights for the particular contest. NRS 467.107(1)(b). Pursuant to NRS 467.108, the promoter must pay an additional $1.00 for larger events or $.50 for smaller events for each ticket sold to further amateur, unarmed combat.

Additionally, the Legislature recognized that boxing brings hundreds of

millions of dollars into the Nevada economy, and Nevada must compete for these types of events with other states. Since boxing already is heavily taxed under NRS 467.107, the additional imposition of the NLET might have caused Nevada to price itself out of the market and lose lucrative boxing events. Accordingly, it was a rational policy choice to exempt boxing events from the NLET.

Likewise, there is an obvious, non-content basis for the exemption for NASCAR events. The economic activity generated by the race series also brings hundreds of millions of dollars into the Nevada economy.[78] In fact, only NASCAR has received a legislative exemption; all other racing events at the racetrack are subject to NLET.[79] The Legislative history of the NASCAR exemption is clear; the exemption relates to the possibility of getting an additional race and remaining competitive in the market. AA 266-267. Similar economic considerations weighed into the decision to exempt minor league baseball.

The reasons for other legislatively enacted exemptions speak for themselves. In some cases, sales of food and merchandise may escape taxation because no admission is paid for access to areas where the items are sold. In other cases, at a trade show for example, the admission charge escapes taxation because people do

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[78] *See* "Nascar weekend draws $198 million to area," Las Vegas Review Journal, May 11, 2007, http://www.lvrj.com/sports/7458307.html; *see also* AA 266-267.

[79] Petitioners erroneously allege that the "racetrack" is exempt, it is not, only NASCAR races are exempt. App. Br. p. 43 n. 14.

not attend for the live entertainment—they attend for the trade show.[80]

In fact, the AVN Adult Entertainment Expo, the industry trade show for adult entertainment, takes place in Las Vegas every year. Recently, there were more than 500 adult entertainment personalities appearing at the trade show, and "fan ticket packages" were sold to the public in order to gain admission to attend the trade show. However, the AVN is not subject to NLET because it is an industry trade show. That the show is not subject to the NLET suggests that there is no hostility in Nevada toward adult entertainment.

Like the exemption for trade shows, other exemptions apply to venues where live entertainment is not the focal point of the patrons' attention, or where no admission is charged for access. For example, ambient music in restaurants does not qualify as live entertainment when it does not rise to a volume that interferes with conversation. Strolling musicians generally frequent areas where no admission is charged, or where they are not the focal point of patrons' attention. Similar venues include public areas, private meetings, the common areas of malls and supermarkets, and areas with amusement rides. With respect to amusement rides, the predominant element of the attraction is not taxed because the characters that perform in the vicinity of the rides are generally there for instructive or safety purposes and any entertainment value is incidental to the ride itself. RA 1

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[80] NRS 368A.200; *see also* Hearing on A.B. 516 Before the Senate Committee on Taxation, 72nd Leg. (Nev., May 19, 2003), p. 3.

(Assembly Committee on Commerce and Labor, April 13, 2005, p. 40).

Petitioners' allegation that the NLET favors family entertainment to the detriment of adult entertainment is a fiction.[81] Petitioners argue that the NLET targets nude and semi-nude dancing while exempting other forms of entertainment. That the NLET is imposed upon a variety of entertainment types, including nude and semi-nude dancing, does not suggest a design to suppress or burden adult entertainment. Petitioners are a source of tax revenue just as any other facility that is subject to the NLET. To suppress adult entertainment would be to undermine the very purpose of the tax. In fact, the more business they do, the more tax revenue goes to the State.

Since the NLET is imposed upon gaming and non-gaming venues alike,[82] the NLET applies equally to similarly situated taxpayers. As an example, there are a number of facilities within casinos that feature nude or semi-nude live entertainment and all remit NLET, including, but not limited to: Jubilee at Bally's, Zumanity at New York New York, X Burlesque at the Flamingo, Crazy Girls at the Riviera (now Planet Hollywood), X Rocks at the Rio, Chippendales at the Rio, Fantasy at Luxor, Thunder from Down Under at the Excalibur, Men of X at Hooters, et al.

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[81] As an example—brothels are exempt from LET, and brothels cannot be classified as family entertainment. AA 268.

[82] The activities within a gaming property, although not related to gaming itself, are enforced by the Gaming Control Board.

In short, there is no evidence that the NLET burdens Petitioners financially, much less their message. All of the exemptions from the NLET are narrowly drawn to apply to very specific situations. This Court has noted these exemptions, "no matter how meritorious, are of grace, and must be strictly construed. They embrace only what is strictly within their terms."[83] The exemptions to the NLET were enacted for a variety of reasons, none of which reflects a design to censor, burden, or regulate adult entertainment. This Court found in 2004 that more than 90 different live entertainment facilities, including raceways, nightclubs, performing arts centers, gentlemen's clubs, and facilities hosting sporting and one-time events paid the NLET.[84] Gentlemen's clubs pay less than six percent (6%) of the NLET. AA 170-173. Accordingly, there is no merit to, nor evidentiary support for, the argument that the NLET targets any given form of speech or expression.

D. Statements Made by Legislators During Hearings, are Irrelevant.

In *Minneapolis Star and Tribune,* the case most cited and argued by Petitioners, the U.S. Supreme Court stated, "We need not and do not impugn the motives of the Minnesota legislature in passing the ink and paper tax. Illicit

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[83] *Dep't of Taxation v. Daimler Chrysler Services of North America, LLC*, 121 Nev. 541, 545, 119 P. 3d 135, 138 (2005)(citation omitted).

[84] *Déjà Vu II*, 130 Nev. at __, 334 P.3d at 401.

legislative intent is not the *sine qua non* of a violation of the First Amendment."[85] The Court has "eschewed reliance on the passing comments of one [m]ember and casual statement from the floor debates."[86] Nonetheless, Petitioners emphasize that comments made during the legislative hearings illustrate a legislative intent to attack or stifle Petitioners' ability to provide a stage for entertainment and charge admission. To the contrary, the legislative record reveals the Legislature anticipated that the businesses would continue to flourish, thus providing a consistent stream of revenue. As this Court noted in *Déjà Vu II*, "delving into legislative intent in this context is neither required nor prudent."[87] At best, it shows that individual legislators perceived that the industry as a whole was not paying its fair share in taxes.

3. PETITIONERS WERE NOT IMPOPERLY DENIED ADMINISTRATIVE DEPOSITIONS

NRS 233B.123 allows for discovery along with a liberal evidentiary standard at the administrative level. NAC 360.145(6) allows for depositions, and unambiguously states that the "hearing officer or any party to any proceeding may cause the depositions of witnesses to be taken in the manner prescribed by law and the rules of the court for depositions in civil actions." Yet, in 2007, while the

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[85] *Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 592 (1963)(citation omitted).

[86] *Garcia v. U.S.*, 469 U.S. 70, 76 (1984)(internal cites omitted).

[87] *Déjà Vu II*, 130 Nev. at __, n.10 334 P.3d at 402, n.10 (*citing U.S. v O'Brien*, 391 U.S. 367, 383 (1968)).

matter was pending at the administrative level, Petitioners never asked for depositions. Although NRS 233B.131(2) provides for additional evidence under very specific conditions, it does not provide for reopening discovery after receiving an adverse decision. A party cannot wait for the results of the administrative hearing, change strategies and then seek to expand the record.[88]

The Court has provided guidance as to the standard for supplementing the record with additional evidence. The standard, as set forth at NRS 233B.131(2), precludes additional discovery or fact finding when evidence was available at the time of the administrative hearing but apparently not presented based on a tactical decision.[89]

In this case, over the last 10 years, Petitioners have pursued a deliberate, though unsuccessful, strategy of attacking the NLET on the basis of its structure, content, and legislative history. Petitioners never asked for depositions until years after the 2007 Commission hearing, nor have they provided any good reason for their failure to request depositions during the administrative process in 2007. Now they suggest that facts outside of the legislative record may support their arguments. This is a fishing expedition and will not yield any relevant information

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[88] *Garcia v. Scolari's Food and Drug*, 125 Nev. 48, 56, 200 P.3d 514, 519 (2009); *see also Northern Ill. Gas Co. v. Indus. Comm'n of Ill.*, 498 N.E. 2d 327, 332, (Ill. 1986) ("A party cannot choose one trial strategy and then, faced with an adverse decision, supply additional evidence on review, absent, for example, the need to prevent injustice . . .").

[89] *Garcia*, 125 Nev. at 56, 200 P.3d at 519.

about the NLET as it pertains to free speech or expression.

Because the NLET imposes no impermissible burdens upon speech or expression, the Commission properly denied the 2012 request by Petitioners for depositions.[90] Petitioners have not shown that the Commission's decision to deny depositions was arbitrary or capricious or unsupported by substantial evidence. To the contrary, the Commission's decision was a reasonable step toward bringing this matter to a conclusion. The depositions are unnecessary and untimely. The Administrative Record is more than sufficient to show that the purpose of the NLET was to raise revenue.

In fact, the Commission did afford Petitioners ample opportunity to develop factual support for their arguments. On July 9, 2007, the Commission stated that they wanted all issues to be addressed during the hearing because they wanted to consider everything while the parties were present so they could pose questions to the parties. AA 1538-1539. When Petitioners' counsel asked if the commissioners wanted the case law, the response was that "[they] want the whole thing." AA1542. Petitioners provided numerous documents considered by the Commission. AA 1056-1527; AA 1542 (Chairman Sheets stating, "We'll read whatever

[90] AA 3730 (In 2012, during the administrative hearing on this matter, Commissioner Turner stated "It seems to me like the taxpayers had a theory of how they were going to approach this case when they came before us in 2007. . . . They could have put this information in front of us back in 2007, they could have pursued it at that time. And they chose not to do so. And now we're being asked to give them another bite of the apple. I'm uncomfortable with that.").

you send to us.").

The record shows that Petitioners did not ask for depositions and that the Commission reviewed all of the documents, the briefs, and the voluminous case law submitted by both sides, and also gave the parties an additional opportunity to submit more evidence prior to the August 9, 2007 hearing. AA 1528-1544 ("Let's just continue it today and they can put together whatever they have to put together, like in the past, they have seven days before the hearing to get it to us, and if you don't have it here, don't submit anything supplement, you're done." AA 1539).

When the Commission continued the hearing for a month in order to allow the parties to supplement the record, the Commission requested that was to be considered during the administrative process. Both sides supplemented the record as they deemed appropriate. The Commission did not place any restrictions on the evidence to be presented and Petitioners did not attempt to take depositions. Notably, the information that Petitioners were seeking through depositions was available in 2007.

Petitioners argued that they only conducted a "limited constitutional challenge" before the Commission in an attempt to persuade the Commission to reopen discovery and allow depositions. AA 140-169, AA 1645-1694. Petitioners also argued that they believed that they would be entitled to a trial de novo after the Commission issued its final decision. As referenced previously, the trial de

novo issue was resolved by this Court when it found that the "appellants have failed to show that respondents made any statement during a judicial or quasi-judicial proceeding promising or providing for a reasonable probability that de novo review would be available to appellants."[91]

Furthermore, when the district court remanded the matter to the Tax Commission, it clearly said that the Commission should look at the evidence—the Order did not state that discovery should be ***reopened***. The order provided that the administrative agency should look at additional evidence and either amend, reverse, or affirm October 12, 2007 decision. AA 1800-1801. Moreover, although Petitioners asked for depositions and even submitted a draft of an order which would have allowed depositions, the district court did not direct the Commission to take or consider additional evidence.

The Commission found that the record could be supplemented with the evidence that was obtained through discovery and existing in January 2012. Although it stopped short of granting Petitioners' leave to conduct depositions, the Commission provided Petitioners with ample opportunity to develop facts in support of their arguments. The Commission determined that Petitioners failed to ask for depositions during the original administrative proceeding and, as a result, waived their right to request depositions. AA 3744-3749. This was neither

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[91] *Déjà Vu I*, 130 Nev. __, 334 P.3d at 391.

arbitrary nor capricious, but rather a reasonable exercise of control over the administrative proceedings.

VI. CONCLUSION

For the foregoing reasons, the appeal either should be dismissed on jurisdictional grounds, or the district court's denial of the petition for judicial review should be affirmed.

Respectfully submitted this 28th day of December 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ William J. McKean
WILLIAM J. MCKEAN
Chief Deputy Attorney General
Nevada Bar No. 6740
Attorneys for Respondents State of Nevada, *ex rel.* Department of Taxation and Tax Commission

CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page- or type-volume limitations 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 14 points or more and contains 7,706 words.

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 Appellate Procedure.

DATED this 28th day of December 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ William J. McKean
WILLIAM J. MCKEAN
Chief Deputy Attorney General
Nevada Bar No. 6740
Attorneys for Respondents State of Nevada, *ex rel.* Department of Taxation and Tax Commission

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on December 28, 2016.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

/s/ Anne Goldy
ANNE GOLDY
An Employee of the
Office of the Attorney General