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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' REPLY BRIEF

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INTRODUCTION

After litigating the present matter since it was originally filed in 2008 and since it had been refiled in 2011 as a petition for judicial review, the Department now asserts that the District Court lacked and this Court lacks jurisdiction to hear the matter. The Department's position is without merit. First, since the original action was filed within the specific controlling 90-day deadline for actions seeking refund under the Nevada Live Entertainment Tax ("NLET"), Petitioners secured jurisdiction before the District Court and this Court has appellate jurisdiction. Second, even if the Department were correct, it allowed the matter to be remanded to the Tax Commission, which rendered a *new* final decision in 2014. Immediately after that decision Petitioners filed a new petition for judicial review within 30 days and consolidated that action with the 2011 petition for judicial review below. Thus, Petitioner's dutifully secured subject matter jurisdiction twice over.

The Department erroneously argues that this Court's decision in Deja Vu Showgirls v. Nevada Dep't of Taxation ("Deja Vu 1"), 130 Nev. Adv. Op. 73, 334 P.3d 392 (2014) insulates the NLET and any other discriminatory tax the legislature could envision because the tax is levied the business transactions of collection admission, etc., and not immediately upon Petitioners' First Amendment Activity. However, this Court's analysis in Deja Vu 1 only distinguished the NLET from an impermissible "direct tax" on First Amendment activity, where a license fee or other

tax is paid as a precondition to engaging in speech. Binding precedent is clear that a tax triggered in a content-based or other impermissible fashion by First Amendment activity is still subject to constitutional scrutiny and invalidation.

Finally, the Departments Answering Brief completely misses the point of Reed v. Town of Gilbert, Arizona, --- U.S. ---, 135 S.Ct. 2218 (2015), which was decided after this Court's opinion in Deja Vu 1. Reed provides that a law that discriminates based upon speaker or topic is content-based, if absent an illicit motive. The 26 categories of exceptions and exemptions from the NLET are precisely the type of speaker- and topic-based, which are contrary to the First Amendment. Further, Reed's reliance upon Sorrell v. IMS Health, Inc., 564 U.S. ——, —— – ——, 131 S.Ct. 2653, 2663–2664, 180 L.Ed.2d 544 (2011) reaffirms that a review of legislative history and analysis of a laws effect are appropriate means of vetting improper motive. The history and operation of the NLET make clear that the legislature specifically targeted gentlemen's clubs for taxation and squarely hit its mark, resulting in gentlemen's clubs paying the most under the new taxation imposed by the NLET.

For all these reasons, the decision of the District Court should be reversed and the District Court should be instructed to declare the NLET to be contrary to the First Amendment and to refund the Petitioners all taxes paid under the NLET.

C. THE COURT HAS JURISDICTION TO HEAR THE APPEAL.

In light of the Department's inability to defend the NLET in the wake of Reed v. Town of Gilbert, Arizona, --- U.S. ---, 135 S.Ct. 2218 (2015) and after litigating the underlying petition for review for six years, the Department has asserted a subject matter jurisdiction defense in order to avoid a ruling that the NLET violates Petitioner's rights under the First Amendment of the United States Constitution and Article I, §§ 9 and 10 of the Nevada Constitution.

It must be noted that the Tax Commission is holding the refund requests of Petitioners and others in abeyance awaiting a final decision by this Court. The tax periods subject to those refund requests date back to 2004. Thus, the result of a jurisdictional dismissal, rather than an adjudication on the merits, would be that the parties would simply start the present "as-applied" litigation over again. Of course, if Petitioners appeal were dismissed on jurisdictional grounds, their and others first step would be to request discovery denied in the present action, and continue to pursue their appeals before the Tax Commission on the thirteen years of refund requests currently being held in abeyance.

However, there is no reason to start over. The Department's position is wrong for a number of reasons. First, because Petitioner's original "de novo" action was timely filed, any defect from it not being styled as a petition for judicial review is not a jurisdictional defect. Rather, under established precedent, the district court had the

discretion to permit Petitioners to cure any deficiency by refiling as a petition for judicial review. Second, because the Department waited so long to assert its jurisdictional defense, it allowed the matter to be remanded to the Tax Commission. This resulted in a subsequent order by the Tax Commission as to the refund years in question, followed by the timely filing of a petition for judicial review, which was consolidated with the case currently on appeal.

A. Petitioner's Timely Filed De Novo Action Satisfies the Jurisdictional Deadline.

Petitioner's *de novo* action was filed on January 9, 2008. Deja Vu Showgirls v. Nevada Dep't of Taxation ("Deja Vu 2"), 130 Nev. Adv. Op. 72, 334 P.3d 387, 388 (2014). This was within 90 days of the Tax Commission decision issued on October 12, 2007. Appellants Appendix ("App.Apx.") Vol.7, pp 1642-43. This meets the applicable 90-day deadline to file a petition for judicial review stated in the then applicable (Addendum A to Appellant's Opening Brief) and current version of NRS 368A.290. Per the District Court's instructions, Petitioners refiled the action as a petition for judicial review within 30 days. App.Apx. Vol.1, p. 4[1].

Oddly, the Department asserts that the general 30-day deadline to file a petition for judicial review, found in NRS 233B.130(2)(d), is the controlling deadline. It is

[1] Respondent's Answering Brief also recognizes the District Court's Order granting Petitioners 30 days to refile the action as a petition for judicial review. Answering Brief, p. 5.

not. As the Department asserted in its previous briefing (App.Apx. Vol.2, pp. 287)[2] in the federal matter – asserting a lack of subject matter jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1381 because there existed a plain, speedy, and efficient remedy under state law – the applicable deadline to file a petition for judicial review seeking refund of taxes paid under the NLET is the 90-day deadline set forth in NRS 368A.290.

Court's addressing this issue accepted the Department's original position in the federal case. The Department does not point to any authority that approves of the new position it asserts in its Answering Brief. Indeed, this Court rejected the Department's argument directly when the Department raised it in a prior case before this Court.

> Petitioner [the ***Department***] argues that, in the event the court agrees that the matter must be brought as a petition for judicial review, this case must be dismissed because it was untimely filed under NRS Chapter 233B more than 30 days after service of the final agency decision. But even though NRS Chapter 233B applies generally, NRS 372.680 operates to provide a 90–day filing period; thus NRS 233B.130(2)(c)'s

[2] In the federal matter, the Department argued in favor of jurisdiction before the state courts in order to successfully argue that the federal court lacked jurisdiction under the Tax Injunction Act. Specifically the Department argued:

> Within ***ninety days*** of denial by the Commission of a taxpayer's appeal of a claim for refund, the taxpayer may bring an action in court. NRS 368A.290. By default, jurisdiction for such actions lies in the District Court. Nev. Constit. Art. 6, § 6, NRS 4.370. Therefore, ***the Nevada Supreme Court has original appellate jurisdiction***. Nev. Constit., Art. 6, § 4. *See also*, NRS 233B.150.

(Emphasis added).

> 30–day deadline to file a petition for judicial review does not apply here. A specific statute that conflicts with a general statute will take precedence over the general statute. Andersen Family Assocs. v. State Engineer, 124 Nev. 182, 187, 179 P.3d 1201, 1204 (2008). Accordingly, because it specifically applies to tax refund claims while NRS Chapter 233B applies generally to judicial review proceedings, NRS 372.680's 90–day provision takes precedence over NRS 233B.130's 30–day provision. *See* NRS 233B.020(2) ("The provisions of this chapter are intended to supplement [not supplant] statutes applicable to specific agencies. This chapter does not abrogate or limit additional requirements imposed on such agencies by statute or otherwise recognized by law.").
>
> Consequently, we grant this petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to allow real party in interest to take any steps necessary to comply with the applicable provisions of NRS Chapter 233B and to thereafter proceed with its review of this matter under that chapter.[2] It is so ORDERED.

State, Dep't of Taxation v. Eighth Judicial Dist. of State ex rel. Cty. of Clark, 373 P.3d 963, 2011 WL 2671553, at *1 (Nev. 2011) (unpublished decision) (clarification added, footnote omitted).

In fact, the instruction ordered by this Court in State v. Eighth Judicial District, *supra*, is the same instruction the Department contends that the District Court lacked jurisdiction to provide. In that petition for a writ of mandamus, the District Court had ordered that use tax refund matter proceed as an independent action rather than a petition for judicial review. This Court granted the writ and confirmed that the matter must proceed as a petition for judicial review in accordance with its then recent decision in Southern California Edison v. First Judicial District, 127 Nev. 276, 255 P.3d 231 (2011). However, rather than dismiss the action, this court instructed that

"the district court to ***allow real party in interest to take any steps necessary to comply*** with the applicable provisions of NRS Chapter 233B and to thereafter ***proceed with its review of this matter under that chapter***." State v. Eighth Judicial District, 2011 WL 2671553, at *1.

The District Court in this matter did just that. It instructed the Petitioners to comply with NRS Chapter 233B, by refiling the matter as a petition for judicial review within 30 days. And, the Petitioner's did refile, identifying that the petition for judicial review as a refiling of Case 2, now styled as a petition for judicial review. App.Apx. Vol.1, p. 4.

The requirement that the matter be *refiled* as a petition for judicial review was likely a bit excessive, as the matter could have simply been converted to a petition for judicial review, as in State v. Eighth Judicial District, *supra*. At the time, the District Court did not have the benefit of that decision. Still, this Court has held that in order to invoke the jurisdiction of the District Court under the APA, a petition must (1) name the agency and all parties of record to the administrative proceeding, (2) be filed in the correct district court, and (3) be timely. Washoe County v. Otto, 128 Nev. Adv. Op. 40, 282 P.3d 719, 725 (2012) (citing NRS 233B.130(2)).

The Department does not contest, nor could it, whether the original complaint in Case 2 named the correct parties or was filed in the correct district court. *See, e.g.,* Deja Vu 2, *supra* (caption naming all parties in interest). And, the Department points

to no mandatory jurisdictional provision in NRS 233B.130 requiring the pleading to be styled as a petition for judicial review.

Therefore, the result in State v. Eighth Judicial District, *supra*, should be the same result here. Since the matter was originally timely filed in accordance with the mandatory provisions of the APA, the District Court had jurisdiction over the matter to have it restyled as a petition for judicial review via refiling.

B. Because The Petition for Review Consolidated With The Present Action Was Filed Within 30 Days Of The Tax Commission's Final Decision, The Court Unquestionably Has Jurisdiction To Hear This Appeal.

Even if jurisdiction was not already established for the reasons stated in the proceeding section, Jurisdiction is established for the District Court's review of the Tax Commission's February 12, 2014 Decision Letter (App.Apx. Vol.18, pp 3782-3857), by way of Petitioner's petition for judicial review filed March 11, 2014 (App.Apx. Vol.1, pp. 98-100). That petition for judicial review, bearing Case Number A-14-697515-J was consolidated with the petition below, bearing Case Number A-11-648894. App.Apx. Vol.1, pp. 111-18.

If the Department believed that the Court lacked jurisdiction to consider the 2011 petition for judicial review, it should have raised that argument before the District Court entered its order remanding the matter to the Tax Commission for consideration of additional evidence. *See* Order Granting Plaintiffs' Application for Leave to Present Additional Evidence to the Nevada Tax Commission, App.Apx.

Vol.8, pp. 1796-1801. Instead, it chose to sit on any rights it may have had and cannot now be heard to complaint.

The Tax Commission having reconsidered the matter and entered a final Decision Letter (App.Apx. Vol.18, pp. 3782-3857), there is no question that its Decision Letter is the final decision of the Tax Commission within the meaning of NRS 233B.130(1)(b) (stating that a party "[a]ggrieved by a final decision in contested case … is entitled to judicial review.") In fact, the February 12, 2014 is *the* final decision as to the tax periods at issue in this appeal.

Because the case on appeal includes Petitioners' timely filed petition for judicial review from the Tax Commission's February 12, 2014 Decision Letter, there is no question that the District Court had jurisdiction to hear the matter or that this Court has jurisdiction to hear this appeal.

D. BECAUSE FIRST AMENDMENT ACTIVITY TRIGGERS APPLICABILITY OF THE NLET, IT IS SUBJECT TO FIRST AMENDMENT SCRUTINY.

The Department argues for an interpretation of Deja Vu Showgirls v. Nevada Dep't of Taxation ("Deja Vu 1"), 130 Nev. Adv. Op. 73, 334 P.3d 392 (2014) and existing United States Supreme Court precedent, which cannot survived even casual review. According to the Department, so long as the government taxes the business activity of a First Amendment actor, its actions are insulated from First Amendment

scrutiny. The accurate question is whether regulatory provision or tax is triggered by First Amendment activity. If so, it is subject to First Amendment scrutiny.

The flaw in the Department's reasoning stems from its failure to recognize the context of this Court's statement. In Deja Vu I, the Petitioners challenged the NLET as a "direct tax" on First Amendment activity under Murdock v. Pennsylvania, 319 U.S. 105 (1943), since the tax must be collected from a patron upon paying admission to view First Amendment Activity. This Court differentiated Murdock and progeny as applying only to situations where a speaker must pay a flat tax or license fee for governmental permission to engage in First Amendment Activity. Deja Vu I, 334 P.3d at 399. Because the NLET is an "excise tax on business transactions," which "does not operate as a prior restraint on constitutionally protective activities," it rejected that challenge. Id. However, the Court did not end its analysis there, but continued on to analyze the tax under Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 103 S.Ct. 1365 (1983); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 107 S.Ct. 1722 (1987); and Leathers v. Medlock, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991). Deja Vu I, 334 P.3d at 399-402. Had this Court actually concluded that taxes on business transactions were insulated from First Amendment scrutiny, such further analysis would have been unnecessary and, indeed, inappropriate.

The ridiculousness of the Department's assertions can be exposed through both analogy and precedent. In Minneapolis Star, the tax at issue was upon the ink and paper used in printing a newspaper. 460 U.S. at 578. These are unquestionably business transactions ancillary to First Amendment activity. If the law were as the Department proposes, it would not have been possible for the Supreme Court to declare the tax to be unconstitutional, which it did. Id. at 592-93.

Likewise, under the Department's assertion, an additional excise, sales, or use tax on a business that was triggered by the business making political donations to a particular political party or by the business expressing support or opposition to a political party, candidate, or cause, would be not be subject to First Amendment scrutiny. Obviously, that is neither correct nor what this Court held in Deja Vu I.

E. THE NLET IS CONTRARY TO THE FIRST AMENDMENT JURISPRUDENCE ON TAXATION, ESPECIALLY IN LIGHT OF REED.

Under Reed, the 26 forms of live entertainment excluded from the LET are fatal. The Department's discussion of Reed focuses on what remained the same from prior Supreme Court precedent, rather than the additional guidance provided in Reed, which, as discussed in the Opening Brief, resulted in reversal not only in the Ninth Circuit's decision underlying Reed, but also other cases across the county on various topics. *See* Opening Brief, pp. 19-23. Specifically, the Department cites the language in Reed that a "[g]overnmental 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. Reed looked further into how to identify where topic, idea, or message is impermissibly targeted. The Court explained:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g.,* Sorrell v. IMS Health, Inc., 564 U.S. ——, ——–——, 131 S.Ct. 2653, 2663–2664, 180 L.Ed.2d 544 (2011); Carey v. Brown, 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); Mosley, *supra,* at 95, 92 S.Ct. 2286. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Sorrell, *supra,* at ——, 131 S.Ct., at 2664. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and ***others are more subtle, defining regulated speech by its function or purpose***. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.
>
> Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be " 'justified without reference to the content of the regulated speech,' " or that were adopted by the government "because of disagreement with the message [the speech] conveys," Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

Reed, 135 S. Ct. at 2227 (emphasis added). The LET is unconstitutional, inter alia, because it is speaker and topic based and because its distinctions can only be justified by references to the content of the speech.

A. The NLET Impermissibly Discriminates By the Function or Purpose of the Speech.

The numerous exceptions and exemptions from the NLET are found in both the definition of "live entertainment" itself in NRS 368A.090(b) and the exemption set forth in NRS 368A.200(5). *See* Opening Brief, pp. 36-38 (setting forth the exemptions and exclusions).

The exceptions in NRS 368A.200(1)-(4) exempt live entertainment that has the ***function*** of serving as ambiance or enhancing the theme of the establishment. NRS 368A.200(1) exempts a specific topic, animal behaviors when they can be characterized as educational. Other topics of live entertainment excluded are viewing of (admissions to) product advertising, boxing, strolling musicians, NASCAR and minor league baseball. NRS 368A.200(5). Clearly impermissible is the exemption for "***nonprofit religious, charitable, fraternal or other organization***" in NRS 368A.200(5)(b). Under Reed this speaker- and topic-based discrimination is flatly impermissible.

The Department offers up a number of "common-sense" justifications for the discriminatory levying of the NLET. For example, it explains that the State is attempting to attract the economic activity of minor league baseball and NASCAR. Quizzically, the Department does not seek to explain why it is not seeking to attract the economic activity of gentlemen's clubs. Regardless, a content-neutral justification cannot save a discriminatory law. That is, while a content-hostile motivation can render a law content-based, a content-neutral justification does not removed the

content-based character of improper distinctions among First Amendment Activity. The Court clearly explained:

> The Court of Appeals first determined that the Sign Code was content neutral because the Town "did not adopt its regulation of speech [based on] disagree [ment] with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." 707 F.3d, at 1071–1072. In its brief to this Court, the United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign's communicative content—if those distinctions can be " 'justified without reference to the content of the regulated speech.' " Brief for United States as *Amicus Curiae* 20, 24 (quoting Ward*, supra,* at 791, 109 S.Ct. 2746; emphasis deleted).
>
> But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. ***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 toward the ideas contained" in the regulated speec***h. Cincinnati v. Discovery Network, Inc.*,* 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). We have thus made clear that " '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,' " and a party opposing the government "need adduce 'no evidence of an improper censorial motive.' " Simon & Schuster*, supra,* at 117, 112 S.Ct. 501. Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." Turner Broadcasting System, Inc. v. FCC*,* 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

Reed, 135 S. Ct. at 2227–28. *See also* Id. at 2229 ("Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech").

Thus, the Department's attempt to justify the speakers and topics of speech favored in the NLET only serves to reinforce Petitioner's assertions that the NLET discriminates by speaker and topic, but does nothing to sustain the constitutionality of the NLET.

B. Reed Verifies That The Legislative History to the NLET, Showing A Targeting of Gentlemen's Clubs, Must Be Considered.

As quoted above, a "content-based purpose" can be sufficient to demonstrate that a law is content-based and invalid. Reed, 135 S.Ct. at 2228. The Court further cited to its recent decision striking a statute in Sorrell v. IMS Health, Inc., 564 U.S. 552, 131 S. Ct. 2653 (2011), noting that the case involved "evidence of an impermissible legislative motive." The NLET suffers from the same defect.

At issue in Sorrell was a Vermont law restricting the "sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors?" Id. at 557. The act prohibited using the information for marketing purposes. Id. The Court specifically found that prohibiting marketers from receiving the information amounted to a speaker-based restriction. Id. at 564. Conversely, but equally impermissible, live entertainment for marketing purposes is exempted from the NLET. NRS 368A.200(5)(k).

The Court's conclusion was, in part, based on the legislative findings accompanying the law. Sorrell v. IMS Health, Inc., 564 U.S. at 565. This amounts to confirmation of the view that the result in Grosjean v. American Press Co., 297 U.S.

233, 56 S.Ct. 444 (1936) (tax on newpapers with a circulation above 20,000 struck) was based on the legislature's improper motive. *See* Minneapolis Star, 460 U.S. at 580 ("Commentators have generally viewed Grosjean as dependent on the improper censorial goals of the legislature"). The evidence of improper motive in Grosjean were "the events leading up to the tax and the contemporary political climate," including a circular distributed by a state senator describing the large newspapers as " 'lying newspapers' as conducting 'a vicious campaign' and the tax as 'a tax on lying . . . .'" Minneapolis Star, 460 U.S. at 579-80.

Thus, this Court can and must consider the evidence Petitioners presented in the form of the legislative history and the practical effect of the NLET. The legislative history is clear that gentlemen's clubs were the target of both the original NLET and the amendments thereto. *See* Opening Brief, pp. 41-19. The practical effect of the NLET is equally instructive. Petitioners and other gentlemen's clubs are bearing the burden of the NLET.

The Court should also not be misled by the Departments contention that Petitioners and their ilk are paying a small portion of the overall NLET. There is no disagreement that the businesses like Petitioners are paying the vast majority of the non-casino portion of the NLET. *See, e.g.,* MINUTES OF THE MEETING OF THE ASSEMBLY COMMITTEE ON COMMERCE AND LABOR, 73rd Congressional Session (May 16, 2005), App.Apx., Vol.1, pp. 232-234 (We're getting the most

revenue from adult entertainment clubs . . .). The NLET was a modification to the pre-existing Casino Tax. Yet, the NLET still retains a division between the "casino" LET" and the "gentlemen's club" NLET.

The rate of taxation under the "gentlemen's club" NLET is 10%. NRS § 368A.200(1)(a). The rate of taxation under the "Casino NLET" is only 5%. NRS § 368A.200(1)(b). Moreover, under the "gentlemen's club" NLET, 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 NLET, the tax only applies to admissions. NRS § 368A.200(1)(b). This allows the casinos, but not Plaintiffs, to lower their tax liability simply by reducing admission charges and raising the prices for refreshments and merchandise. The functional result is obvious. The "gentlemen's club" NLET tax rate is effectively more than twice that of the Casino NLET.

The Casino NLET requires payment and the filing of the applicable tax returns to the State Gaming Control Board. NRS § 368A.220(1)(a). The "gentlemen's club" NLET requires payment and filing with the Nevada Department of Taxation. Likewise, the Casino NLET imposes the duty to collect on the Gaming Control Board, while the "gentlemen's club" NLET places the duty to collect on the Department of Taxation. NRS §§ 368A.140(1)(a) and (2)(a).

Although the old Casino Tax has been swept under the same moniker of new tax on gentlemen's clubs, including all taxes collected under the NLET to assess its burden is misleading. For example, the tax at issue in Minneapolis Star was an extension of the existing sales and use tax. 460 U.S. at 577. Still, the Court looked to the effect of the changes, and not to the overall sales and use tax, to note that the paper challenging the tax was paying "roughly two thirds of the total revenue raised by the tax." Id. at 578. Using existing Supreme Court precedent as a guide, the burden to the Petitioners is roughly the same under the NLET and the tax is likewise impermissible.

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 16th day of March 2016:

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Appellants' Reply Brief** was filed with the Clerk of the Court for the Supreme Court for the State of Nevada on March 16, 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 the NRAP 32(a)(4), the typeface requirements of the NRAP 32(a)(5) and the type style requirements of the NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2010 in Times New Roman 14.

I further certify that this brief complies with the page – or type-volume imitations of NRAP 21(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of size 14 or more, and contains 4,671 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 16th day of March, 2017

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