

No. 70475

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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DITECH FINANCIAL LLC F/K/A GREEN TREE SERVICES, LLC

*Appellant,*

vs.

SANFORD BUCKLES, ON BEHALF OF HIMSELF AND OTHERS  
SIMILARLY SITUATED,

*Respondent.*

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On certification from the United States District Court for the  
District of Nevada, No. 2:15-cv-01581-GMN-(CWH)

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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS' REPLY IN SUPPORT OF MOTION FOR  
LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN  
SUPPORT OF APPELLANT

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Respondent Buckles offers no valid reason for the Court to deny NACDL leave to file its *amicus curiae* brief in support of appellant. NACDL's brief appropriately focuses on the constitutional implications of the statutory interpretation that Buckles advocates, and explains how the Court's decision in this case may affect criminal as well as civil actions. NACDL has weighed in on issues of interest to the criminal defense bar in courts throughout the Nation, including this Court. *See In re William M.*, 124 Nev. 1150, 196 P.3d 456 (2008). It should be granted leave to do so here.

The Nevada statute at issue here provides both criminal sanctions and civil damages for the same conduct. Nothing in the statute suggests that the scope of the statute differs depending on whether a case is brought by a plaintiff seeking civil damages or a prosecutor seeking criminal sanctions. On the contrary, NRS 200.620 contains a single prohibition on conduct and NRS 200.690 provides both civil and criminal remedies for violations. The statute has only one text.<sup>1</sup>

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<sup>1</sup> By contrast, in *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006), the civil cause of action appeared in a separate statutory provision. In declining to rule explicitly on the criminal statute, the *Kearney* court nonetheless did address the constitutional issues raised here, although it resolved them erroneously.

Buckles asks to Court to deny NACDL's motion because he is only seeking civil damages and, he claims, NACDL's arguments relate only to the effect that this Court's ruling will have on criminal prosecutions under NRS 200.620. Buckles's tactical desire to limit consideration of the constitutional repercussions of his argument provides no basis to deny NACDL's motion. His opposition is mistaken for a number of reasons.

First, although NACDL's proposed brief focuses primarily on the effect that this Court's ruling would have on the criminal law—in line with NACDL's organizational focus—many of the constitutional infirmities discussed in NACDL's brief also would arise through the extraterritorial application of the statute in a civil case. That is why NACDL is seeking leave. The federal structure of the United States underlies both the criminal and civil spheres; just as there is only one statute, there is only one Nation. Both criminal and civil defendants are entitled to due process. And the Commerce Clause prohibits regulation of extraterritorial conduct, whether that regulation comes through a case seeking civil damages or a criminal prosecution.

Second, there is no pertinence to Buckles's puzzling observation

(Opp. 3-4) that this Court is more likely to accept a certified question from a federal court if there is a question of Nevada law that may be determinative of the federal case. This Court already has agreed to answer the certified question and determine the scope of NRS 200.620, precisely because this Court's determination of the scope of NRS 200.620 very well may determine the outcome of Buckles's claims. And because this is the Court of last resort in Nevada, its ruling will control both the civil and criminal application of the statute in future cases. That the criminal-law ramifications of the Court's ruling will not affect this particular plaintiff's claim is no reason for the Court to proceed without considering the broader effects of its decision.

For the same reason, Buckles's argument that the constitutional issues discussed in NACDL's brief supposedly are not "in controversy" under his particular allegations (Opp. 5-6) would be meaningless even if it were factually accurate. The issues NACDL raises are necessarily presented by the statutory interpretation this Court has undertaken to provide, and should be considered before the Court settles on its interpretation.<sup>2</sup>

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<sup>2</sup> Thus, *Resnick v. Nevada Gaming Commission*, 104 Nev. 60, 752 P.2d

Third, Buckles's contention that a discussion of the constitutional repercussions of its ruling will not "assist the Court" (Opp. 4-5) has no merit. Those constitutional issues are raised by Buckles's proposed interpretation of the statute whether or not they pertain to his individual case (and many of them do pertain to his case). Considering those issues will assist the Court in deciding the proper interpretation of the statute, whether or not its ruling explicitly addresses them.

Fourth, Buckles accuses NACDL of failing to comply with NRAP 44, which requires a party to give notice to the clerk of the Supreme Court if it "questions the constitutionality of an Act of the Legislature." Opp. 6-7. Of course, NACDL does not question the constitutionality of NRS 200.620, but advocates an interpretation of the Act that is perfectly consistent with the Constitution and the statutory text.

Fifth, Buckles says that the Court should reject NACDL's amicus brief because it is not "necessary" to resolve the constitutional issues discussed in the brief. Opp. 7-9. But those issues necessarily arise as a

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229 (1988), which stands only for the unremarkable proposition that the Court will not take up a controversy before it is ripe, is inapposite. Here, the Court *will* be answering the question; the only dispute is whether it should consider all of the question's repercussions in arriving at an answer.

result of Buckles's position on the certified question that the Court has agreed to answer. If the Court accepts Buckles's contention that NRS 200.620 prohibits conduct that occurs in other states, that would result in an extraterritorial projection of Nevada's regulatory and criminal authority that violates the Due Process Clause and Commerce Clause of the federal Constitution. Buckles does not dispute that statutes should be interpreted to avoid such constitutional violations.

Buckles's opposition disregards this Court's function as a court of last resort whose decisions necessarily reverberate throughout the Nevada justice system. This Court properly considers not just technicalities, but the broad implications of its decisions. It should do so here, with whatever assistance the NACDL brief may provide.

## CONCLUSION

The motion for leave should be granted under NRAP 29 and the proposed *amicus curiae* brief filed.

November 1, 2016

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing **NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on November 1, 2016.

I certify that the participants in the case are listed below and are registered electronic filing users and the service will be accomplished by the Court's Electronic Filing system.

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I further certify that the following participants in the case listed below are not registered electronic filing users and were served via U.S. Mail, postage pre-paid, on November 1, 2016, to the following:

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