IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

STATE OF NEVADA ex rel. THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEVADA, Petitioner, vs. THE JUSTICE COURT OF LAS VEGAS TOWNSHIP IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE JUSTICE OF THE PEACE DEBORAH J. LIPPIS, Respondents, and MARIA ESCALANTE; and RAMIRO FUNEZ, Real Parties in Interest.	Supreme Court Case No.: Case No. 16M-03289A-B

PETITIONER'S APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **PETITIONER'S APPENDIX** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on July 14, 2016.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case may not be registered CM/ECF users. I have emailed and mailed the foregoing document by First-Class Mail, postage prepaid, for delivery within three calendar days to the following non-CM/ECF participants:

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The Honorable Deborah J. Lippis
Las Vegas Justice Court, Dept. 1
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Las Vegas, NV 89155

/s/ Gina Long
An employee of the Attorney General

16M03289A

☐ In the Municipal Court of
☒ In the Justice Court of Clark County

Court Case #

☒ Adult ☐ Juvenile

State of Nevada
CLARK COUNTY
Las Vegas Metropolitan Police Department

TRAFFIC/MISDEMEANOR CITATION/COMPLAINT

COURT

Event #: LLV151215003573

ID #: VGW

☐ Traffic ☐ Accident
☒ Non-Traffic Meter #
☐ Parking

☐ School Zone ☐ Hazmat
☐ Construction Zone ☐ S.T.E.P.

☒ Urban ☐ Rural

☐ Injuries ☒ Crime Report
☐ Officer's Report

☐ Evidence Logged ☐ Arrest

☐ Aircraft Clock Number
☐ Radar ☐ Other
Explain:

Travel Direction: ☐ N ☐ S ☒ E ☐ W | Beat/Area: R1 | Mile Marker:

At Location: RED ROCK HOTEL 11011 W. CHARLESTON LV NV 89135

Violation Date: 12/15/15 **Time:** 1920 **Issue Date:** 12/15/15 **Time:** 2041

Day Code: S 1 M 2 T 3 W 4 T 5 F 6 S 7

Had Been Drinking: ☐ Yes ☒ No ☐ Unknown
Test Type: ☐ PBT ☐ Blood ☐ Breath ☐ UA
☐ Drugs Suspected Results: %

Defendant Type: ☐ Driver ☐ Passenger ☒ Pedestrian
☐ Other Explain:

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF NEVADA

NAME (Last, First, Middle):	Social Security #:
ESCALANTE, MARIA	

Address: ☒ Physical ☐ Mailing:	City:	State:	Zip:	Ctry:
1716 N 46TH PL	PHOENIX	AZ	85008	USA

DOB:	Race:	Sex:	Height:	Weight:	Hair:	Eyes:
10/24/1992	H	F	5'2	102	BRO	BRO

DLN / ID: ☐ CDL	State:	Class:	Expiration:	Restrictions:	Endorsements:
D07424359	AZ	D	10/24/17	A	NONE

Vehicle has current proof of insurance? ☐ Yes ☐ No | Expiration Date of Insurance Card:

DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE AT THE ABOVE LISTED LOCATION:

☐ Commercial Vehicle ☐ 16+ Pass Vehicle | US DOT #: | VIN #:

Vehicle License:	Lic. State:	Expiration:	Year:	Make:	Model:	Type:	Color:

Reg. Owner: ☐ Same | Address:

DID THEN AND THERE COMMIT THE FOLLOWING OFFENSE(S):

1 Violation: TRESPASS — 53075

Posted Speed:	Actual Speed:	Cited Speed:	☒ NRS ☐ CFR ☐ County Code ☐ Municipal Code

To Wit: DID RETURN TO PROPERTY | NRS/County/City #: 207.200

AFTER WARNING NOT TO TRESPASS BY A REPRESENTITIVE TO WIT: RED ROCK CASINO LAYERS DID WARN COLINARY UNION BY CERTIFIED LETTER TO NOT ALLOW REPRESENTATIVES

2 Violation: TO DISTRIBUTE OR BE ON THE PREMESIS — CODE

☐ NRS ☐ CFR ☐ County Code ☐ Municipal Code

NRS/County/City #

ADD Vagrancy

16M03289A
CRM
Criminal Complaint
6101594

Officer, that I have reasonable grounds/probable cause to believe person committed the above offense(s) contrary to law.

Officer: B. BURBRINK / MARSHALL | Complainant's Signature: | P#: 15222 | Bureau: EAST

Las Vegas Municipal Court	Las Vegas Justice Court	Juvenile Justice Services	Goodsprings Justice Court	North Las Vegas Municipal Court	Henderson Municipal Court	Boulder City Municipal Court
200 Lewis Ave. Las Vegas, NV 702-382-6878 1-800-654-6858	200 Lewis Ave. Las Vegas, NV 89155 702-671-3444 1-877-671-3183 X	601 N. Pecos Rd. Las Vegas, NV 89101 702-455-5380	Box 19155 Jean, NV 89019 702-874-1405	2332 Las Vegas Blvd. N. Suite 100 N. Las Vegas, NV 89030 702-633-1130	243 Water St. Henderson, NV 89015 702-267-3300	501 Avenue G Boulder City, NV 89005 702-293-9278

Township/Justice Court: ☐ Court Mandatory | Phone:

You are hereby ordered to appear on 15 day of FEBRUARY year 2016 at a.m. p.m. OR ☒ Regular Business Hours to answer the above charge(s).

WITHOUT ADMITTING HAVING COMMITTED THE ABOVE OFFENSE(S), I HEREBY PROMISE TO RESPOND AS DIRECTED ON THIS NOTICE AND WAIVE MY RIGHT TO BE TAKEN IMMEDIATELY BEFORE A MAGISTRATE (NRS 484.799 AND NRS 484.803).

Defendant's Signature X | Phone | ☐ Interpreter Needed? LANGUAGE

REV. 12-14 M1000 Failure to comply with this complaint or future dates relating to this complaint will constitute a separate offense.

1-054062812 A

APP 001

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

FILED
FEB 4 12 32 PM '16
JUSTICE COURT
LAS VEGAS NEVADA
BY _____ DEPUTY

THE STATE OF NEVADA,

Plaintiff,

-vs-

MARIA ESCALANTE #7043062,
RAMIRO FUNEZ #7043063,

Defendants.

CASE NO: 16M03289A-B

DEPT NO: 1

AMENDED

CRIMINAL COMPLAINT

The Defendants above named having committed the crimes of TRESPASS (Misdemeanor - NRS 207.200 - NOC 53166) and VAGRANCY (Misdemeanor - CCC 12.32.020 - NOC 56760), in the manner following, to-wit: That the said Defendants, on or about the 15th day of December, 2015, at and within the County of Clark, State of Nevada,

COUNT 1 - TRESPASS

Defendants MARIA ESCALANTE and RAMIRO FUNEZ, did then and there willfully and unlawfully go upon that certain property of the RED ROCK HOTEL & CASINO, 11011 West Charleston Boulevard, Las Vegas, Clark County, Nevada, with the intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act thereon.

COUNT 2 - VAGRANCY

Defendant MARIA ESCALANTE, did then and there willfully and unlawfully prowl upon the private property of another, without visible or lawful business with the owner, to wit: the RED ROCK HOTEL & CASINO, 11011 West Charleston Boulevard, Las Vegas, Clark County, Nevada.

All of which is contrary to the form, force and effect of Statutes in such cases made and provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.

K M. Carroll
02/03/16

16M03289A-B/cg
LVMPD EV# 151215003593
(TK1)

16M03289A
ACRM
Amended Criminal Complaint
6101595

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Attorneys for MARIA ESCALANTE and RAMIRO FUNEZ

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, STATE OF NEVADA

STATE OF NEVADA Plaintiff, v. MARIA ESCALANTE, RAMIRO FUNEZ Defendant,	Case No.: 16M03289A-B Dept. No.: 1 **MOTION TO DISMISS AMENDED CRIMINAL COMPLAINT**

COMES NOW, MARIA ESCALANTE AND RAMIRO FUNEZ, Defendants, by and through their attorneys of record **THOMAS F. PITARO, ESQ.**, of the law offices of **PITARO & FUMO, CHTD.**, and **RICHARD G. McCRACKEN** and **PAUL L. MORE**, of the law offices of **McCRACKEN, STEMERMAN & HOLSBERRY**, and respectfully moves this Honorable Court for an Order dismissing the amended criminal complaint.

16M03289A
MTD
Motion to Dismiss
6284679

This Motion is made and based upon all of the papers and pleadings on file herein, the attached Points and Authorities, and any oral argument allowed at the time of the hearing if deemed necessary.

DATED: March 18, 2016

PITARO & FUMO, CHTD.

By: _____
THOMAS F. PITARO, ESQ.
Nevada State Bar No. 1332

NOTICE OF MOTION

TO: **OFFICE OF THE DISTRICT ATTORNEY**

PLEASE TAKE NOTICE that the undersigned will bring the foregoing MOTION TO DISMISS AMENDED CRIMINAL COMPLAINT on the 23 day of MAR, 2016, at the hour of 8:30 a.m./p.m. in Department No. 1 of the above Court, or as soon as thereafter as counsel may be heard.

DATED: March 18, 2016

PITARO & FUMO, CHTD.

By: _____
THOMAS F. PITARO, ESQ.
Nevada State Bar No. 1332

MEMORANDUM OF POINTS AND AUTHORITIES

PROCEDURAL HISTORY

On December 15, 2015, defendant Maria Escalante (Escalante) was given a citation for Trespass in violation of NRS 207.200, at the Red Rock Hotel & Casino, located at 11011 W. Charleston Blvd. The citation states that Escalante, "Did return to property after warning not to trespass by a representative to wit: Red Rock Casino lawyers did warn culinary union by certified letter to not allow representatives to distribute or be on the premises."

On February 4, 2016, an Amended Criminal Complaint was filed against Escalante charging her with Count 1: Trespass, in violation of NRS 207.200 – NOC 53166, and Count 2: Vagrancy: in violation of CCC 12.32.020 – NOC 56760.

On December 15, 2015, defendant Ramiro Funez was given a citation for Trespass in violation of NRS 207.200, at the Red Rock Hotel & Casino, located at 11011 W. Charleston Blvd. The citation states that Funez, "Did return to property after warning not to trespass by a representative to wit: Red Rock Casino security did warn culinary union by letter, via attorney, to not allow representatives to distribute on the premises or be on the premises."

On February 4, 2016, an Amended Criminal Complaint was filed against Funez charging him with Count 1: Trespass, in violation of NRS 207.200 – NOC 53166.

INTRODUCTION

These citations arise from a labor dispute between Culinary Workers Union Local 226 (the "Union"), which is seeking to organize workers at the Red Rock Casino, and Station Casinos, Red Rock's owner. The Union has over 60,000 members in Nevada, and is the largest local union of UNITE HERE, which represents over 250,000 hospitality workers throughout the United States and Canada. Both Escalante and Funez are representatives of UNITE HERE. The Union, through the dedication and commitment of its members and staff, has strived to obtain the

best possible health, welfare, and economic benefits for its members. The members of the Union are as diverse as the Las Vegas Community, young and old, male and female, Black, White, Hispanic, Asian, Native American and everyone in between. Its members strive to make Las Vegas a better place to live, work, and raise their families.

This Amended Criminal Complaint, filed in the name of the State of Nevada, and being prosecuted by the Clark County District Attorney's Office, resurrects the Jim Crow vagrancy laws of a segregated and bigoted United States. The District Attorney's Office asks that the defendants be deemed trespassers and vagrants for seeking to improve the working conditions of Red Rock Casino employees. The Amended Criminal Complaint fails to allege with the requisite particularity what the defendants are accused of and, even if it did, is based clearly unconstitutional statutes. The Amended Criminal Complaint must be dismissed in its entirety.

ARGUMENT

I. COUNTS 1 AND 2 MUST BE DISMISSED BECAUSE THEY FAIL TO STATE A CRIMINAL CAUSE OF ACTION AND FURTHER FAIL TO ADVISE THE DEFENDANT OF THAT WHICH SHE SHOULD DEFEND AGAINST.

A. Count 1: Trespass

Escalante and Funez are charged in Count 1 with Trespass in violation of NRS 207.200(1)(a). The Amended Criminal Complaint alleges that both Escalante and Funez, "did then and there willfully and unlawfully go upon that certain property of the Red Rock Hotel & Casino, 11011 West Charleston Boulevard, Las Vegas, Clark County, Nevada, with the intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act thereon." NRS 207.200 provides:

> NRS 207.200 Unlawful trespass upon land; warning against trespassing.
>
> 1. Unless a greater penalty is provided pursuant to NRS 200.603, any person who, under circumstances not amounting to a burglary:

(a) Goes upon the land or into any building of another with intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act; or

(b) Willfully goes or remains upon any land or in any building after having been warned by the owner or occupant thereof not to trespass.

While the initial citation from December 15, 2015 alleged a violation of NRS 207.200(1)(b), the Amended Criminal Complaint alleges only a violation of NRS 207.200(1)(a). Thus, the District Attorney's office has completely changed the facts of its allegations from the time of the citation to the time of filing of the Amended Criminal Complaint.

The Amended Criminal Complaint violates due process and must be dismissed because it does not properly inform Escalante and Funez of what they are alleged to have done, making it impossible for them to properly defend their case.

A charging document must be a "plain, concise and definite written statement of the essential facts constituting the offense charged . . ." *See* NRS 173.075. The leading case dealing with the nature of a charging document and its sufficiency was *Simpson v. Eighth Judicial District Court*, 88 Nev. 654, 503 P.2d 1225 (1972). In *Simpson*, the defendant/petitioner had been charged with murder but argued that the charging document was not sufficient to state a crime nor to advise her of essential facts which would allow her to defend the case. In concurring with the petitioner, the Nevada Supreme Court started with the premise that a petitioner is entitled "'to be informed of the nature and cause of the accusation' against her." *Id.* at 656.

The *Simpson* Court then set forth the standard that must be met:

> Accordingly, we believe the following formulation of the law, by one of the leading authorities, correctly states the principle that must govern our decision:
>
> > "Whether at common law or under statute, the accusation must include a characterization of the crime and such description of *the particular act* alleged to have been committed by the accused as will enable him properly to defend against the accusation, and the description of the offense must be sufficiently *full and complete* to accord to the accused his constitutional right to due process of law."

See Simpson, 88 Nev. at 660 (internal citation omitted, emphasis added); *West v. State*, 119 Nev. 410, 419 (2003) ("The Legislature has also provided that an information must specify the means by which the charged offense was committed or allege that the means are unknown.").

In the Trespass charge, the Amended Criminal Complaint merely states that Escalante and Funez entered the property with the intent to "vex or annoy the owner or occupant thereof, or to commit any unlawful act thereon." The Amended Criminal Complaint merely recites the statutory language without describing what the defendants allegedly did to "vex or annoy" the owner, or what unlawful act they allegedly committed on the property. The Amended Criminal Complaint in Count 1 is extremely vague and does not properly characterize and describe the elements of the acts allegedly committed so that Escalante and Funez can properly defend their case, and therefore this count must be dismissed. It violates Due Process and is contrary to the Nevada Supreme Court's ruling in *Simpson*.

Count 2: Vagrancy

Escalante is charged in Count 2 with Vagrancy in violation of Clark County Code 12.32.020. It is alleged that Escalante "did then and there willfully and unlawfully prowl upon the private property of another, without visible or lawful business with the owner: to wit: the Red Rock Hotel & Casino, 11011 West Charleston Boulevard, Las Vegas, Clark County, Nevada."

This count must be dismissed for the same reason as Count 1: the charging document does not describe what Escalante allegedly did. It merely recites the language of the Clark County Code. The Amended Criminal Complaint violates Due Process and does not comply with the Nevada Supreme Court's ruling in *Simpson*. The Amended Criminal Complaint in Count 2 is extremely vague and does not properly characterize and describe the elements of the

acts allegedly committed so that Escalante can properly defend her case, and therefore this Count must be dismissed.

II. COUNT 1 MUST BE DISMISSED BECAUSE NRS 207.200(1)(a) IS UNCONSTITUTIONALLY VAGUE.

Even if the charging document had contained sufficient detail, the statutes under which Escalante and Funez are charged are void for vagueness. The statute that Escalante and Funez are alleged to have violated in Count 1—NRS 207.200(1)(a)—is unconstitutional. The U.S. and Nevada Supreme Courts have made clear that criminal statutes prohibiting conduct or speech that "annoys" or "vexes" are inherently subjective and unconstitutionally vague.

"'Vagueness may invalidate a criminal law for either of two independent reasons': (1) if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *State v. Castaneda*, 126 Nev. 478, 481-82, 245 P.3d 550, 553 (2010) (internal citations omitted), *opinion modified on denial of reh'g*, No. 52911, 2010 WL 5559401 (Nev. Dec. 22, 2010). NRS 207.200(1)(a) is facially unconstitutional (and unconstitutional as applied to the defendants) on both grounds. *See Pitmon v. State*, 131 Nev. Adv. Op. 16, 352 P.3d 655, 658 (Nev. App. 2015) ("A statute may be challenged as unconstitutional either because it is vague on its face, or because it is vague as applied only to the particular challenger." (citing *Flamingo Paradise Gaming LLC v. Chanos*, 125 Nev. 502, 509–10 (2009). When the statute involves criminal penalties, facial unconstitutionality is demonstrated when "vagueness permeates the text," regardless of whether there might be some contexts in which the statute unambiguously applies. *Flamingo Paradise*, 125 Nev. at 512.

In *Coates v. Cincinnati*, 402 U.S. 611, 615-16 (1971), the Supreme Court made clear that a criminal statute proscribing speech or conduct that "annoys" another person is unconstitutionally vague. The Court struck down a statute that made it criminal for "three or

more persons to assemble. . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by." *Id.* at 611-12. The statute was unconstitutionally vague "because it subjects the exercise of the right of assembly to an unascertainable standard":

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess as to its meaning.

Id. at 614. Following *Coates*, state and federal courts have regularly struck down statutes that prohibit "annoying" communication. *See, e.g., Vives v. City of New York*, 405 F.3d 115, 124 (2d Cir. 2005) ("By criminalizing speech that merely annoys or alarms, the statute is unconstitutionally overbroad."); *People v. Pierre-Louis*, 34 Misc. 3d 703, 708, 927 N.Y.S.2d 592, 596 (Dist. Ct. 2011) ("A criminal prohibition on communicating in an annoying or alarming way is facially unconstitutional."); *Thelen v. State*, 272 Ga. 81, 82, 526 S.E.2d 60, 62 (2000); *Nichols v. City of Gulfport*, 589 So. 2d 1280, 1283 (Miss. 1991); *Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983) *on reh'g* 723 F.2d 1164 (5th Cir. 1984); *May v. State*, 765 S.W.2d 438, 440 (Tex. Crim. App. 1989).

In the instant case, the defendants' activity that is alleged to be "annoying" or "vexing" to Station Casinos was clearly speech. The defendants were at Red Rock Casino peacefully distributing flyers about their Union's labor dispute with the Casino.

But NRS 207.200(1)(a) is unconstitutional regardless of whether it is applied to speech or conduct because the terms "annoy" and "vex" are inherently subjective and vague. "'Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause[s] of the Fifth' and Fourteenth Amendments to the United States Constitution." *State v. Castaneda*, 126 Nev. at 481 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). Courts have therefore held statutes that proscribe *conduct* that "annoys" to be unconstitutionally vague. *See*

Holder v. Humanitarian Law Project, 561 U.S. 1, 20, 130 S. Ct. 2705, 2720, 177 L. Ed. 2d 355 (2010) ("We have in the past 'struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.'") (quoting *Williams*, 553 U.S. at 306).

In *City of Las Vegas v. Eighth Judicial District Court*, 118 Nev. 859 (2002), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, for example, the Nevada Supreme Court struck down as unconstitutionally vague a statute providing that "a person who annoys or molests a minor is guilty of a misdemeanor." The Court concluded "that the standard of conduct proscribed by NRS 207.260, namely, conduct which is 'annoying,' does not provide fair notice because the citizens of Nevada must guess when conduct that bothers, disturbs, irritates or harasses a minor rises to the level of criminal conduct." *Id.* at 865.

The statute also invited discriminatory enforcement: "Because the statute fails to adequately set forth the conduct proscribed, it provides those charged with enforcement of its provisions unfettered and unguided discretion to decide what annoying activity falls within its parameters." *Id.; see also State v. Castaneda*, 126 Nev. at 482 ("A law that leaves the determination of whether conduct is criminal to a purely subjective determination, such as what might 'annoy' a minor or 'manifest' an illegal 'purpose,' is ' "vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."'") (internal citations omitted).

NRS 207.200(1)(a) is unconstitutional under *Coates* and *City of Las Vegas*. It makes it criminal to "[go] upon the land or into any building of another with intent to vex or annoy the owner or occupant thereof." What will "vex" or "annoy" a particular property owner is a purely

subjective standard, just as "conduct . . . annoying to persons passing by" is subjective and unconstitutionally vague. NRS 207.200(1)(a) gives unfettered enforcement discretion to the police and prosecutors, in violation of due process. See *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.") (internal citation and quotations omitted); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) ("Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'").

Because the range of conduct that might be "annoying" or "vexing" to a given property owner is so amorphous and broad, discrimination in who gets charged with a crime is virtually guaranteed. Inevitably, a criminal prosecution will be initiated on the mere say-so of the property owner, as almost certainly happened here.

No limiting construction of NRS 207.200(1)(a) is possible. "[T]his court cannot apply a limiting construction to a law where the terms employed are so vague that no standard of conduct is proscribed at all." *City of Las Vegas*, 118 Nev. at 866-67. Nor could some "reasonable person" standard be grafted onto NRS 207.200(1)(a). The statute is explicit that "annoyance" and "vexation" are judged by the sensitivities of the property owner, not by some objective standard.

Because NRS 207.200(1)(a)'s prohibition against entering onto property with the intent to "vex" or "annoy" the property owner is permeated by vagueness, *Flamingo Paradise*, 125 Nev. at 512, the statute is facially unconstitutional. Because the statute's text provides no fair

notice of what it makes criminal, NRS 207.200(1)(a)'s application to Escalante's and Funez's conduct in this case is also unconstitutional. Count 1 must be dismissed on this basis.

II. COUNT 2 MUST BE DISMISSED BECAUSE NEVADA'S VAGRANCY STATUTE HAS BEEN DECLARED UNCONSTITUTIONAL AND BECAUSE THE CLARK COUNTY CODE MUST BE IN CONFORMITY WITH STATE LAW.

A. The Clark County Vagrancy Law Is Unconstitutionally Vague.

In Count 2, Escalante is charged with Vagrancy in violation of Clark County Code 12.32.020. Count 2 alleges that Escalante "did then and there willfully and unlawfully prowl upon the private property of another, without visible or lawful business with the owner: to wit: the Red Rock Hotel & Casino, 11011 West Charleston Boulevard, Las Vegas, Clark County, Nevada." Clark County Code 12.32.020(j) makes it an unlawful act of vagrancy to "[p]rowl[] upon the private property of another, without visible or lawful business with the owner or occupant thereof."

The District Attorney's Office charged Escalante for vagrancy under the Clark County Code rather than the Nevada Revised Statute because the Nevada Supreme Court held the state vagrancy law to be unconstitutional. The Legislature later rewrote the state vagrancy law without the unconstitutional section that prohibited "prowling upon property of another without lawful business with the owner."

In *State v. Richard*, 108 Nev. 626 (1992), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 482, 245 P.3d 550, 553 (2010), the Nevada Supreme Court found state and municipal vagrancy laws containing identical language to that in Clark County Code 12.32.020(j) to be unconstitutional. At that time, NRS 207.030(*i*) designated as a "vagrant" anyone who "[l]oiters, prowls or wanders upon the private property of another, without visible or lawful business with the owner or occupant thereof." *Richard*, 108 Nev. at 628 n.1. Similarly, Las Vegas Municipal Code § 10.74.010 made it "unlawful for any person to loiter or prowl upon

the private property of another without lawful business with the owner or occupant thereof." *Ibid.*

The Nevada Supreme Court held the state statute and municipal ordinance to be unconstitutionally vague:

> Aside from its language prescribing punishment for being a vagrant, NRS 207.030 is unenforceable because it is unconstitutionally vague, as are Las Vegas Municipal Code sections 10.74.010 and 10.74.020. A vague law is one which fails to provide persons of ordinary intelligence with fair notice of what conduct is prohibited and also fails to provide law enforcement officials with adequate guidelines to prevent discriminatory enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Lanzetta v. New Jersey*, 306 U.S. 451 (1938); *Eaves v. Board of Clark Co. Comm'rs*, 96 Nev. 921, 620 P.2d 1248 (1980).
>
> In this case, the Nevada laws criminalize "loitering" on private property when an individual has no "lawful business with the owner or occupant thereof." We conclude that this language is inadequate to inform the public of what conduct is prohibited. References to "loitering" and "lawful business" fail to provide sufficient notice of when stepping onto private property will subject an individual to arrest. Under these laws, an individual must necessarily guess as to when an innocent stroll becomes a criminal "loitering."
>
> Because they lack articulable standards, these laws fail to provide law enforcement officials with proper guidelines to avoid arbitrary and discriminatory enforcement. We conclude that the challenged provisions of the Nevada vagrancy statute and the Las Vegas Municipal Codes are vague and therefore unconstitutional under the due process clauses of the federal and state constitutions."

Richard, 108 Nev. at 629; *see also Parker v. Mun. Judge of City of Las Vegas*, 83 Nev. 214, 215 (1967) (striking down City of Las Vegas 'disorderly persons' ordinance). The U.S. Supreme Court in *City of Chicago v. Morales*, 527 U.S. 41, 57-58 & n.26 (1999) cited *Richard* with approval, noting that "state courts have uniformly invalidated laws that do not join the term 'loitering' with a second specific element of the crime." In 1993, based on the *Richard* case, the Nevada Legislature rewrote NRS 207.030, leaving out section (*i*) (cited *supra*), which the Nevada Supreme Court had found unconstitutionally vague.

This is why the District Attorney's Office in the instant case did not file vagrancy charges under the Nevada Revised Statute. Instead, the District Attorney's Office filed charges under the Clark County Code 12.32.020(j), which has language identical to NRS 207.030's unconstitutional provision struck down in *Richard*. Clark County Code 12.32.020(j) is unconstitutional for the same reason the Nevada Supreme Court found NRS 207.030 unconstitutional in *Richard*. Because Clark County Code 12.32.020(j) is unconstitutionally vague on its face, Count 1 of the Amended Criminal Complaint must be dismissed.

Vagrancy and loitering laws like Clark County Code 12.32.020 and the former NRS 207.030(*i*) date back to the Jim Crow era,[1] and have long been recognized as unconstitutional, status-based tools for the control of "undesirables." *Papachristou, supra*, 405 U.S. 156 (recounting the history of vagrancy statutes, from early English law through the twentieth century, and striking down Jacksonville's vagrancy ordinance with the explanation that "[o]f course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables."); *Davis v. City of New York*, 902 F.Supp.2d 405, 420 (S.D.N.Y. 2012) ("Prohibitions on loitering have a long and ugly history in New York City and across the United States."); *State v. Richard*, 108 Nev. at 628 n.5; Michelle Alexander, THE NEW JIM CROW at 28–32 (2010) (documenting the use of vagrancy laws to reintroduce control over African-Americans during the Jim Crow era); *see, e.g.*, *Broughton v. Brewer*, 298 F. Supp. 260, 263 (S.D. Ala. 1969) (striking down as unconstitutionally vague an Alabama vagrancy law used to convict civil-rights demonstrators who were passing out leaflets advocating a boycott against white merchants). The District Attorney's Office seeks to resurrect this ugly history in the context of the Union's labor dispute with Station Casinos.

[1] NRS 207.030 was first enacted in 1911.

B. Clark County's Criminal Code Must Conform to State Law.

Even if it were not unconstitutionally vague under *Richard*, Clark County Code 12.32.020 would have to be stricken because it conflicts with the definition of vagrancy in the Nevada Revised Statutes. As a primary governing principle of constitutional law, all criminal laws must be uniform in application. In Nevada this constitutional principle is set forth in Article 4, § 21 of the State Constitution, which provides:

> In all cases enumerated in the proceeding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.

From the earliest days of statehood, this provision has been interpreted to prohibit special criminal laws. For example, the Nevada Attorney General issued an opinion in 1891 that stated that a criminal statute that applied to only certain counties based upon population was unconstitutional special legislation. Again in 1968 (AGO 481), the Attorney General stated that a city or county ordinance that materially altered or amended a state criminal statute would be inoperative and unenforceable. The Opinion, after citing Article 4, § 21 of the Constitution, states:

> It is therefore the opinion of this office that a city or county ordinance, which in any way alters, changes or amends the provisions of a general law enacted by the legislature, would be inoperative, and if enacted prior to the general law, would be preempted.

Nevada case law, and the law of other states, supports this fundamental principle. In *Ex parte Ah Pah*, 34 Nev. 283 (1911), the petitioner argued that a state statute was superseded by a local ordinance and that he was therefore wrongfully convicted. In dismissing this contention, the Supreme Court stated:

> After a careful review of the law and the authorities bearing upon this constitutional objection interposed by petitioner, we believe, contrary to petitioner's contention in this respect, that the doctrine is overwhelmingly maintained that the legislative department of our government can never divest the government itself of the inherent right at all times under the police power vested in it under the constitutions, both federal and state, of

enacting any legislation which it may deem wise and just for the betterment and preservation of the public health, safety, and morals.

Id. at 288.

In *Kelly v. Clark County*, 61 Nev. 293 (1942) the Supreme Court rejected the contention that a county ordinance for the enforcement of houses of prostitution superseded a state law on the same subject. The court explained that local governments may only pass and enforce criminal statutes that are consistent with the general laws of the State:

> The state, for the reasons given, cannot relinquish all authority in such matters. If the contention of plaintiffs that the state has abdicated all authority were allowed, it would, as stated in *State v. Linn*, 49 Okla. 526, 153 P. 826, 830, Ann. Cas. 1918B, 139, destroy "the uniformity and efficiency of the police power of the state, leave these matters subject to the sole management of the local authorities, and would permit a condition to exist in a city with such charter entirely different from and at variance with the conditions in other parts of the state; and if the officers of a city which has adopted a charter are not in sympathy with the enforcement of such laws, or other laws of like character, were the enforcement of said laws left entirely in their hands, it is easy to see that such laws, or indeed any law, might become a dead letter, and their enforcement a farce, and wholesale violations thereof might occur with the knowledge and consent of the city officials."
>
> In the above case it was held that the laws against gambling and prostitution are general and intended to operate throughout the entire state, and such statutes are public regulations necessary for the maintenance of the public peace and good order of society, and are matters in which every citizen of the state has an interest, and are not local and confined to the municipality, and to be regulated by its charter provisions and ordinances to the exclusion of the general laws of the state upon the subject. It was further held in that case that the city might enact ordinances not inconsistent with the state laws regulating such matters (gambling and prostitution) within its territorial limits. This is a well settled rule. *Ex Parte Ah Pah, supra*; *Ex Parte Sloan*, 47 Nev. 109, 217 P. 233; *State v. Lee*, 29 Minn. 445, 13 N.W. 913. In fact, it is from this source of concurrent jurisdiction between the state and municipalities in matters subject to the police power that the latter derive a delegated authority to deal with minor criminal infractions which are also punishable under state laws. The state, however, cannot surrender its sovereignty in these important duties of government.

Id. at 223-24; *Falcke v. County of Douglas*, 116 Nev. 583, 588 (2000) ("As a preliminary matter, it is clear that counties are legislative subdivisions of the state. See Nev. Const. art. 4, § 25. Because counties obtain their authority from the legislature, *county ordinances are subordinate*

to statutes if the two conflict." (emphasis added) (citing *Lamb v. Mirin*, 90 Nev. 329, 332-33 (1974)).

The Clark County Code must be in conformity with the criminal provisions in the Nevada Revised Statute, which Clark County Code 12.32.020 is not. For that reason, and because the County ordinance is unconstitutionally, as the Nevada Supreme Court recognized in *Richard*, Count 2 of the Amended Criminal Complaint must be dismissed.

CONCLUSION

Based on the foregoing, it is respectfully requested that this Honorable Court grant order to dismiss.

DATED: March 18, 2016

PITARO & FUMO, CHTD.

By: _____
THOMAS F. PITARO, ESQ.
Nevada State Bar No. 1332

RECEIPT OF COPY

RECEIPT OF A COPY of the foregoing **MOTION TO DISMISS AMENDED CRIMINAL COMPLAINT** is hereby acknowledged this 18 day of MARCH, 20 16.

OFFICE OF THE DISTRICT ATTORNEY

By: _____

ORIGINAL

FILED
APR 7 10 09 AM '16
JUSTICE COURT
LAS VEGAS NEVADA
BY DC DEPUTY

STEVEN B. WOLFSON
Clark County District Attorney
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JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MARIA ESCALANTE #7043062,
RAMIRO FUNEZ #7043063

Defendant.

CASE NO: 16M03289A-B

DEPT NO: 1

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AMENDED CRIMINAL COMPLAINT

DATE OF HEARING: MAY 6, 2016
TIME OF HEARING: 8:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through W. JAKE MERBACK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Dismiss Amended Criminal Complaint.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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Opposition
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POINTS AND AUTHORITIES

FACTS

On December 15, 2015 Security Officer Christian Takai was performing a security patrol on the 12th floor of the Red Rock Hotel and Casino here in Las Vegas, Clark County, Nevada. At approximately 7:15 PM, Officer Takai observed paper fliers under and near the guest room doors on the 12th floor. At about that same time Officer Takai observed MARIA ESCALANTE (Defendant Escalante) standing on the 12th floor holding a folder, in the same area as the flyers. Officer Takai then continued to clear the 12th floor of flyers, when he observed Defendant Escalante begin to move towards the nearby elevators. Officer Takai then informed security surveillance regarding what he had just observed on the 12th floor. Security surveillance was able locate security video which would suggest that Defendant Escalante had been distributing the same flyers that Officer Takai had located on the 12th floor. Additional security officers then made contact with Defendant Escalante in the lobby of the hotel. Defendant Escalante had in her possession multiple fliers consistent with those discovered by Officer Takai on the 12th floor of the Red Rock Hotel and Casino.

After Officer Takai had collected all of the flyers on the 12th floor he proceeded towards the elevator bank located on the 12th floor. As he was getting into one of the elevators, he observed RAMIRO FUNEZ (Defendant Funez) exit the 12th floor elevators. Officer Takai noticed that Defendant Funez was also carrying a folder. Security officer's later made contact with Defendant Funez in the lobby area of the Red Rock Hotel. The folder that Defendant Funez had in his possession contained the same flyers found in the folder that was in the possession of Defendant Escalante. They were also the same flyers discovered by Officer Takai on the 12th floor.

Security personnel then escorted both Defendant's to the security office, where metro later arrived and cited both Defendants. Neither Defendant was a guest at the Red Rock Casino and by their own admissions, as contained in their Motion to Dismiss, were functioning as "representatives" of the Culinary Union. The flyers, first located by Security Officer Takai, made various claims and suggestions regarding potential issues at the Red Rock Hotel and

other Station Casinos. Copies of those flyers have been attached to this motion and marked as exhibit #1. Security Officer Takai's security report has also been attached and marked as exhibit #2.

ARGUMENT

The Defendant's motion to dismiss makes three separate arguments regarding dismissal of the State's case. First, that the Amended Criminal Complaint is insufficiently plead and fails to state a cause of action against the Defendants. Second, that the Nevada Trespass statute, NRS 207.200(1)(a), is unconstitutionally vague. Third, that Clark County Code 12.32.020, criminalizing acts of vagrancy is unconstitutional.

I. THE CHARGE OF TRESPASS CONTAINED IN COUNT 1 SUFFICIENTLY STATES A CRIMINAL CAUSE OF ACTION AGAINST BOTH DEFENDANTS, HOWEVER, THE STATE MOVES TO FILE A SECOND AMENDED CRIMINAL COMPLAINT ADDING ADDITIONAL LANGUAGE TO THE CHARGE IN COUNT 1

The Defense argues that the Amended Criminal Complaint in this case is insufficiently plead and that it must be dismissed because it does not properly inform the Defendants of what they are alleged to have done. "The complaint is a written statement of the essential facts constituting the public offense charged." NRS 171.102. It is well established that Nevada is a notice-pleading jurisdiction and not a common law pleading jurisdiction, where factually detailed pleadings were required. *State v. McKiernan*, 17 Nev. 224 (1882).

In the instant case, the State would argue that the Amended Criminal Complaint is sufficiently plead and that it gives adequate notice to the Defendants of the charged crimes. The State has, however, prepared a Second Amended Criminal Complaint and respectfully moves for permission from this Court to file the Second Amended Criminal Complaint, which has been attached to this motion as exhibit #3. The Second Amended Criminal Complaint adds additional information regarding the specific actions of the Defendants and resolves the specificity concerns raised by the Defendant's Motion to Dismiss.

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II. THE CRIME OF TRESPASS, NRS 207.200(1)(A), AS CHARGED IN COUNT #1 IS NOT UNCONSTITUTIONALLY VAGUE

The Defense argues that Trespass statue, NRS 207.200(1)(a), under which both Defendants are charged, is unconstitutionally vague and that Count #1 should be dismissed. The "vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause(s) of the Fifth and Fourteenth Amendments to the United States Constitution." *United States v. Williams*, 553 U.S. 285, 304, (2008). The United States Supreme Court has held that "vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1998). That same test for vagueness was reiterated by the Nevada Supreme Court in *State v. Castaneda*, 126 Nev. 478, 481 (2010).

The Court in *Castaneda* also held that "we commence...under the presumption that statutes are constitutional; the party challenging a statute has the burden of making a clear showing of invalidity. Further, we adhere to the precedent that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (citing *Hooper v. California*, 155 U.S. 648, 657, (1895). *Castaneda*, 126 Nev. at 552. "Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

A. NRS 207.200 IS EASILY DISTINGUISHABLE FROM THE CASE LAW CITIED TO BY THE DEFENSE BECAUSE THE ENTRY REQUIREMENT CONTAINED IN THE STATUTE CREATES ADDITIONAL CLARITY AS TO WHAT SPECIFIC CONDUCT IS BEING PROHIBITED

The Defense in this case relies heavily on the United States Supreme Court case *Coates v. Cincinnati*, 402 US 611 (1971). In *Coates* a Cincinnati, Ohio ordinance made it a criminal offense for "three or more persons to assemble...on any sidewalks...and there conduct themselves in a manner annoying to persons passing by...". The Defendants were a student and four labor picketers. The Court in *Coates* held that the term "annoy" was vague as it was

used in the Cincinnati Ordinance. The Defense also relies heavily on the Nevada Supreme Court's holding in *City of Las Vegas v. Eighth Judicial Dist. Court*, 118 Nev. 859 (2002) in which the Court held NRS 207.260 unconstitutional. The Statute held that "a person who annoys or molests a minor is guilty of a misdemeanor". The Defendant in that case was charged after he followed the victim from one residence to another residence asking for her 10 or 15 times. The Court held that "conduct which is annoying does not provide fair notice.....and that it encourages arbitrary enforcement." *Id* at 865.

The Trespass statue charged in the instant case is easily distinguishable from the statutes held unconstitutional in *Coates* and *City of Las Vegas* and is not facially vague as argued by the Defendant. The statute in *Coates* criminalized annoying conduct on a public sidewalk. Thus, simply acting in an "annoying" manner while out in a completely public place, was held to be criminal. In *City of Las Vegas*, the statute at issue said simply that "a person who annoys or molests a minor is guilty of a misdemeanor." Once, again the statue contained no limitations regarding the location of the conduct. In the instant case NRS 207.200 holds that a trespass is committed when "any person who, under circumstances not amounting to a burglary, goes upon the land or into any building of another with intent to vex or annoy the owner or occupant thereof..." The act of entering the private land of another creates additional required conduct that more clearly defines what is prohibited than did the statutes at issue in *Coates* and *City of Las Vegas*.

In addition to the differences on the face of the statutes themselves, the conduct at issue in this case is also easily distinguishable from the conduct in *Coates* and *City of Las Vegas*. In *Coates* the annoying behavior occurred on the public sidewalk. In *City of Las Vegas* the Defendant followed the minor to a residence where he asked for her multiple times (there is nothing in the *City of Las Vegas* opinion to suggest that the defendant ever entered the private residence). In the instant case the conduct at issue occurred not only on private property, inside of a private building, it occurred deep inside that private property in an area not open to the general public. The 12th floor of the red Rock Casino is located in the hotel tower, which is only allowed to be accessed by guests staying in the hotel. In fact, in order to enter the

elevators to get to the 12th floor, one must have a key card which is placed in a slot before the elevator can be summoned. The Defendants in this case not only went onto the private property of the Red Rock Casino, they entered a restricted area where only hotel guests are allowed and proceeded to distribute fliers room to room within that area.

It is important to note that all of the cases and case law cited by the Defense relate to statutes created with the purpose of limiting certain types of conduct. *Coates v. Cincinnati*, 402 US 611 (1971) (criminalizing conduct which annoys someone from a public sidewalk); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1971) (creating criminal penalties for rouges and vagabonds, etc....."); *City of Las Vegas v. Eighth Judicial Dist. Court*, 118 Nev. 859 (2002) (criminalizing action that annoys or molests a minor); *Vives v. New York*, 405 F.3d 115 (2005) (criminalizing speech that merely annoys or alarms). Thus the focus of and purposes behind each of these statutes is the limitation or prohibition of conduct. NRS 207.200, however, is a trespass statute. The focus and purpose of the statute is prohibiting illegal entry onto private property. The prohibitions created by NRS 207.200 are at their very core different than the prohibitions created by all of the case law citied to by the Defense. Any reasonable person reading NRS 207.200 would understand the statute prohibits illegal entry onto private property. Any law enforcement officer seeking to enforce NRS 207.200 would have his enforcement ability limited by the requirement of illegal entry onto private property. As previously mentioned, the act of entry creates an additional element eliminating any potential void for vagueness issues. It also, however, at its very core completely distinguishes NRS 207.200 from any of the case law, statutes, or arguments made by or cited to by the Defense in this case.

Finally, in *Coates* the United States Supreme Court is particularly concerned with the First Amendment concerns raised by the Cincinnati Ordinance. "But the vice of the ordinance lies not alone in its violation of the due process standard of vagueness. The ordinance also violates the constitutional right of free assembly and association." *Id.* at 615. The Defense makes similar claims in its motion to dismiss, arguing that the activities of the Defendant's in this case constituted "speech". Obviously, however, none of those issues apply in this case as

the activity of the Defendant's was occurring on private property, where those same First Amendment concerns raised in *Coates* do not apply. This was private property and these Defendants are not being prosecuted for their speech, but rather for their illegal entry onto private property.

B. NRS 207.200 IS EASILY DISTINGUISHABLE FROM THE CASE LAW CITIED TO BY THE DEFENSE BECAUSE THE INTENT ELEMENT CONTAINED IN THE STATUTE CREATES ADDITIONAL CLARITY AS TO WHAT SPECIFIC CONDUCT IS BEING PROHIBITED

NRS 207.200 is also distinguishable in that the Statute requires a specific intent at the time the individual enters the private property at issue. It says "any person who, under circumstances not amounting to a burglary...goes upon the land or into any building of another with intent to vex or annoy the owner or occupant thereof". Neither the statue in *Coates* ("three or more persons to assemble...on any sidewalks...and there conduct themselves in a manner annoying to persons passing by..."), nor the Statue in *City of Las Vegas* ("a person who annoys or molests a minor is guilty of a misdemeanor") had a specific intent element similar to that contained in NRS 207.200. In *Screws v. United States*, 325 U.S. 91, 101, (1944), the U.S. Supreme Court stated:

> The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.

More recently, the United States Supreme Court determined that the presence of a "scienter" requirement in a statute "ameliorated" the concern that the statute was unconstitutionally vague because it ensured that people of ordinary intelligence have a

reasonable opportunity to understand what conduct the statute prohibits. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Even in *City of Las Vegas* the Court recognized the importance of intent in determining whether a statue is void for vagueness. "The language of the statute does not specify what type of annoying behavior is prohibited, nor does it define the term "molest." By its terms, the statute is not limited only to annoyances of a sexual nature, and it provides no indication of whether the perpetrator must subjectively intend to annoy the minor, or if mere unintentional, bothersome conduct, in and of itself, is sufficient to subject an individual to criminal sanctions." *Id.* at 865. That NRS 207.200 requires that the individual enter the property at issue with the specific intent to annoy or vex, creates a sufficiently specific warning as to what conduct is being prohibited. Clearly, the Defendants in this case, two culinary union representatives, entered the Red Rock Hotel with the intent to vex or annoy the owner by handing out inflammatory flyers.

C. NRS 207.200 IS EASILY DISTINGUISHABLE FROM THE CASE LAW CITIED TO BY THE DEFENSE BECAUSE THE WORD "VEX" IN THE STATUTE CREATES ADDITIONAL CLARITY TO WHAT SPECIFIC CONDUCT IS BEING PROHIBITED

All of the case law citied to by the Defense references the term "annoy" and prior decisions in which that word was found to be vague. NRS 207.200, however, also contains the word "vex". Merriam-Webster's Dictionary defines vex as "to bring trouble, distress, or agitation to". While the case law clearly calls into question the lack of specificity contained in the word "annoy", the word "vex" adds an additional level of clarity to the prohibited conduct that helps to resolve the void for vagueness issues cited to by the Defense in this case. The Defendants have provided no valid authority or specific argument indicating that the term "vex" is in anyway vague, beyond its simple proximity to the word "annoy" in NRS 207.200.

The entry requirement, the intent requirement and the use of the term "vex" all provide sufficient specificity to NRS 207.200 to overcome the Defendant's void for vagueness challenge. NRS 207.200 clearly provides "the kind of notice that will enable ordinary people to understand what conduct it prohibits" and does not "authorize and even encourage arbitrary and discriminatory enforcement". *City of Chicago*, 527 U.S. at 56.

III. THE STATE MAKES NO SPECIFIC ARGUMENTS, REPRESENTATIONS OR CONCESSIONS AS TO THE CHARGE OF VAGRANCY IN COUNT 2 AND MOVES TO DISMISS COUNT 2 FROM THE AMENDED CRIMINAL COMPLAINT.

The State moves to dismiss the charge of Vagrancy, as contained in count #2 of the Amended Criminal Complaint. Consequently, the Defendant's arguments as they are related to the charge of Vagrancy are moot. The State would note that the Vagrancy charge has been removed from the Second Amended Criminal Complaint that has been attached to this motion as exhibit #3.

CONCLUSIONS

Based upon the foregoing the State respectfully requests that the Defendant's Motion to Dismiss Amended Criminal Complaint be denied.

DATED this 6th day of April, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____
W. JAKE MERBACK
Chief Deputy District Attorney
Nevada Bar #009126

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 6th day of April, 2016, by electronic transmission to:

THOMAS PITARO, ESQ.
thomaspitaro@yahoo.com

BY _____
M. CRAWFORD
Secretary for the District Attorney's Office

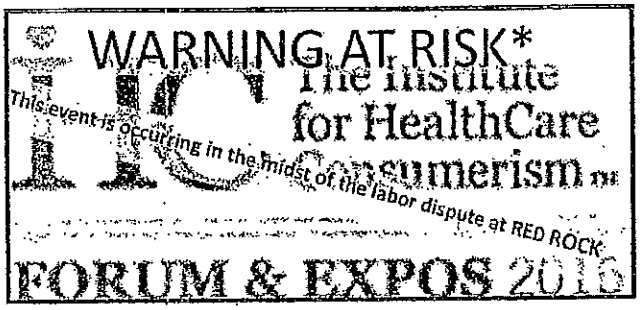
13F08177X/WJM/mc/L4

EXHIBIT "1"

LAS VEGAS TRAVEL ALERT/STATION CASINOS

PROTECT YOURSELF FROM THE BIGGEST LABOR DISPUTE IN LAS VEGAS

Sunshine Act and Labor Disputes



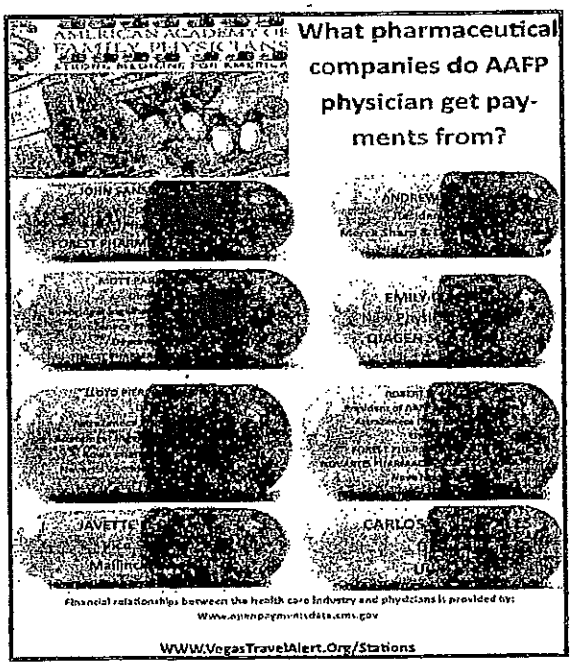
Many organizations, conference attendees, and other customers have decided to stay out of Station Casinos during their escalating labor dispute. One medical information technology convention customer stated:

"[W]e were not aware of the dispute at the time that we received the proposal from the [LVCVA] and prior to signing the contract with Green Valley Ranch. If we had known, we would have found an alternate venue. As soon as we were made aware of the dispute, we approached Green Valley Ranch in hopes that they would release us from our contract. They would not."

- Labor Disputes can compromise the guest experience. Many healthcare professionals do not wish to attend meetings where workers have been mistreated. Meeting planners may be surprised to learn that Station Casinos' meeting contracts do not protect the customer's interest in the event of strikes.

Meeting Magazines.com on April 1, 2013 stated that : "*Many physicians, it is feared, will not want to participate in clinical trials and other key meetings held by pharma companies once they learn that all the spend data related to them will be publicized, since they will see it as negative press suggesting they are being "bought" by pharma companies,*"

- Industry experts worry that doctors may avoid meetings that could produce records of gifts or transfers from pharmaceutical companies.



A leaflet containing financial relationship of a medical group and pharmaceutical companies found on VegasTraveAlert.Org/Medical

Red Rock Room Inspection

On October 22, 2015, the Southern Nevada Health District (SNHD) conducted a public accommodations inspection of Red Rock Hotel and Casino, an AAA Four Diamond resort. These were some of items deemed not in compliance by the SNHD inspector:

Items designated with an asterisk are violations that may result in room(s) closures and/or facility closures with fees.

In = In compliance **OUT** = Not In compliance **N/O** = Not observed **N/A** = Not applicable

16*	Mattress sanitary in good condition, free of vermin, free of blood or body fluid stains and damage.	☐ IN	☒ OUT	☐ N/O	☐ N/A
25	Furniture, cabinets, fixtures and environmental surfaces are properly installed, maintained, cleaned	☐ IN	☒ OUT	☐ N/O	☐ N/A
48	Ice machine - NSF or equivalent, properly installed with air gap, maintained and cleaned	☐ IN	☒ OUT	☐ N/O	☐ N/A
64	Solid waste properly contained & disposed; containers sufficient in number, size, covered & clean	☐ IN	☒ OUT	☐ N/O	☐ N/A

Here is one of the comments the health inspector wrote about one of the rooms and the corrective action:

UV positive stains on both mattresses in room	Discard and Replace. One sanitary mattress required in room → LOS.

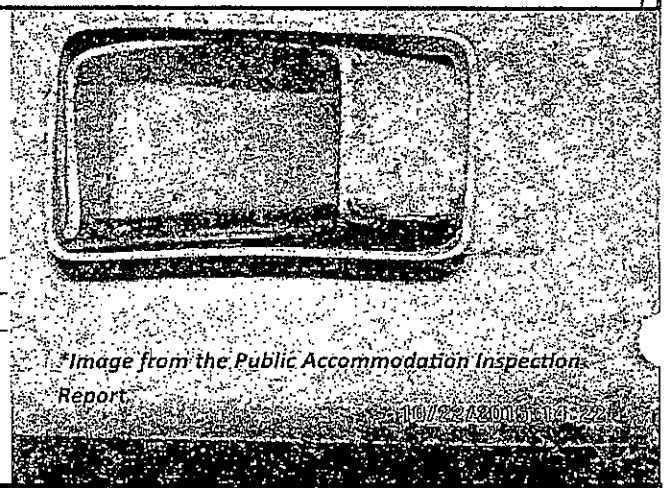


*Image from the Public Accommodation Inspections Report

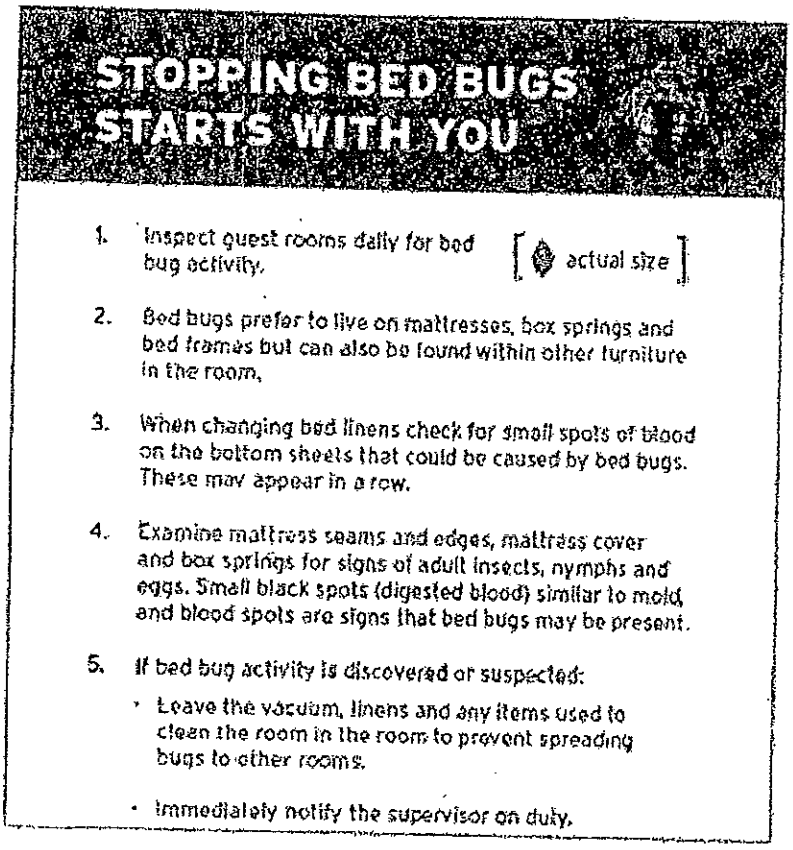
If you experience unsafe or unsanitary conditions at Red Rock Resort, please make a report to the Southern Nevada Health District citizen complaint hotline: (702) 759-0588 and to the Red Rock Resort General Manager at (702)-797-7777.

VegasTravelAlert.org/Stations

HAVE YOU SEEN BED BUGS?

From Station Casinos' *Housekeeping Best Practices Manual – March, 2015*:

Bed Bugs



• Any room suspected of having any bed bug or other pest activity should be reported to a Supervisor or Manager immediately upon finding.

Housekeeping Best Practices Manual– March 2015

If you are concerned, please call **(702) 495-3458**!

Thank you!

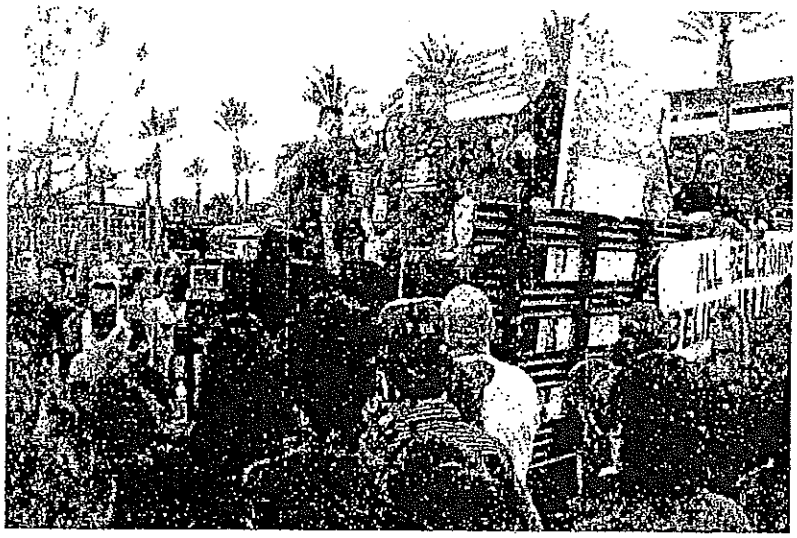
www.VegasTravelAlert.Org

WARNING AT RISK*

This event is occurring in the midst of the labor dispute at RED ROCK RESORT

Contract Packaging Association

Caught in the middle of a labor dispute?



Clergy, workers and community supporters delivering a petition for a fair process for workers to decide whether or not to unionize.

- Station Casinos, the owner of **Red Rock Resort,** is the worst labor law breaker in Nevada gaming.
- Since 2010, there have been large scale demonstrations and acts of civil disobedience.
- Workers at the company continue to seek a fair process to decide whether to unionize despite their employer's illegal anti-union behavior.
- Workers want the same opportunity to organize a union without employer interference that other workers in Las Vegas have had.

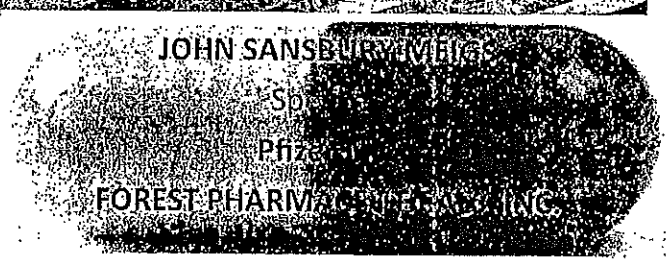
Don't let CPA

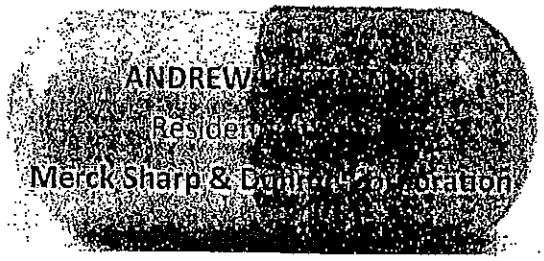
place you in the middle of it!

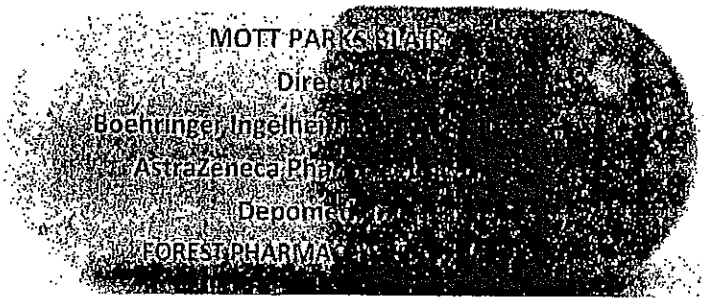
VegasTravelAlert.org/Stations

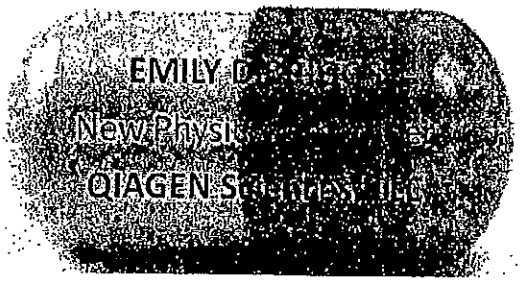
AMERICAN ACADEMY OF FAMILY PHYSICIANS
STRONG MEDICINE FOR AMERICA

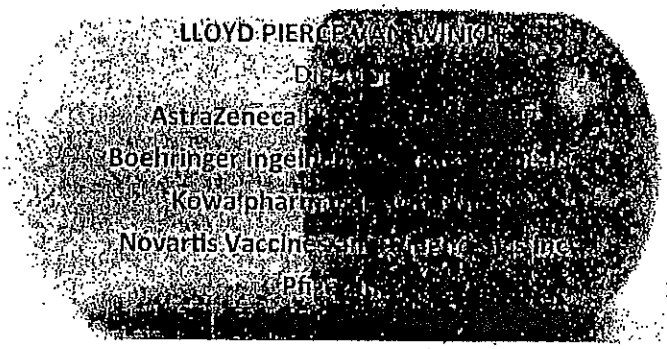
What pharmaceutical companies do AAFP physician get payments from?

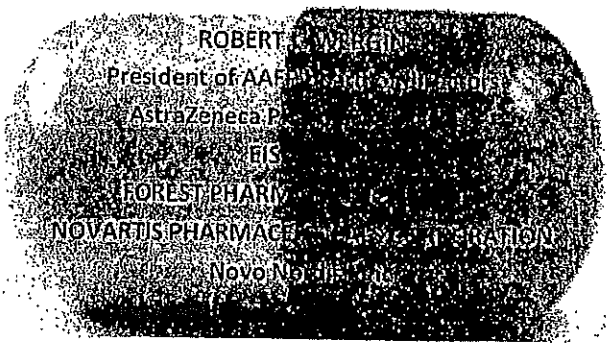


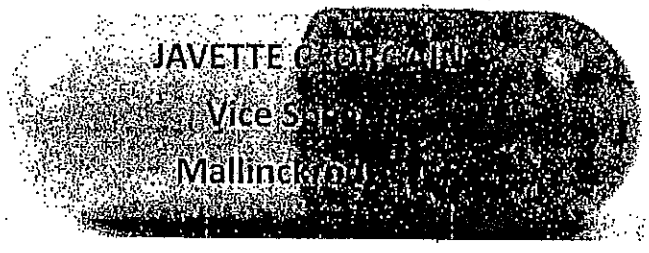


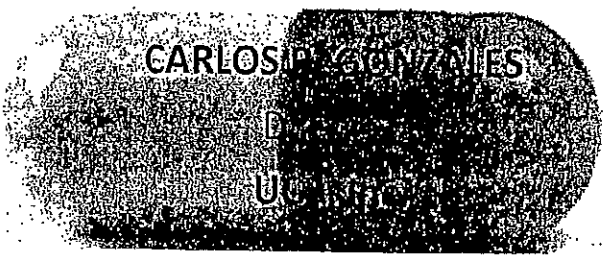












Financial relationships between the health care industry and physicians is provided by:
Www.openpaymentsdata.cms.gov

WWW.VegasTravelAlert.Org/Stations

EXHIBIT "2"

Incident File Full Report

dent File #IN20150012603

		Record Creation Details	
Date/Time Occurred:	15-Dec-2015 19:02	**Department:**	Security
Day of Week Occurred:	Tuesday	**Owner:**	ewoods
Date/Time Created:	15-Dec-2015 22:32	**Operator ID:**	ctakai
Date/Time Closed:	16-Dec-2015 18:43	**Operator Name:**	
Closed By:	mpaige	**Personnel ID:**	
		Card Number:	
		Job Position	
		Secondary Operator:	

Location of Incident:

Property:	Red Rock
Location:	Hotel
Sublocation:	

Details of Incident:

Daily Log #:	DL20151180711
Incident Type:	Trespass
Specific:	Undesireable
Category:	
Incident Status:	Closed
Synopsis:	U6-Reports taking 2 in custody and requesting Metro PD for individuals to be cited for placing unauthorized material on floors in the Hotel. Metro notified and en route. Event #3593 at Metro dispatch. A friend of the 2 in custody stopped by at the podium asking the where abouts of the 2 in custody. U6 and 283 responded to the podium, trespassed the individual and escorted him out the Feast Buffet doors. Guest departed in a silver in color, Ford Winstar, NV CP2137.
Checklist:	

Narrative:

Created On	Created By	Modified On	Modified By
15-Dec-2015 22:37	ctakai	16-Dec-2015 18:43	mpaige

On Tuesday, December 15, 2015 at approximately 7:15 PM, I, Security Officer Christian Takai, while on patrol of the Hotel, observed paper flyers on the 12th floor of the hotel. I notified Security Dispatch Officer Eric Woods, via radio of the incident, and conducted a check of the area.

During my inspection, I observed a Hispanic female adult, later identified as Maria Yesenia Hernandez Escalante, holding what appeared to be a folder and walking towards the casino side elevators (T1). I notified Surveillance and Security Supervisor Elijah Bougher of my findings and continued to clear the 12th floor of any flyers. Minutes later, I was notified by Surveillance that Escalante did place the flyers throughout the Hotel. Bougher along with Security Bike Officer Jeffrey Marchese and Security Officer Mike Curiel responded to the Hotel Lobby to speak with Escalante. During the interview with Escalante, she had in her possession several paper flyers that were distributed throughout the hotel. Bougher then asked her if she was a station casino team member and or a guest of the Hotel and she said no she was leaving and would not answer any more

Reporting Party:

Supervisor:

questions. Elijah contacted Security Director Mark Paige who gave the order to take Escalante into custody. Escalante was then placed in temporary mechanical restraints for trespassing and escorted to the Casino Security Office (CSO). Dispatch contacted LVMPD under event #151215-3593 to respond to the call. Maria was asked again by Security Director Mark Paige if she was a station casino team member and she stated no she is a student at Arizona State University.

I then responded to the CSO to drop off the flyers found in the hotel. As I was entering the T1 elevators on the 12th floor, a Hispanic male adult, later identified as Ramiro Funez, exited the elevator and was carrying what appeared to be a red folder. Moments later surveillance notified Bougher that Funez was also observed distributing flyers in the hotel. Myself, Bougher and Security Bike Officer Danny Juarez responded to the Gift Shop to make contact with Funez.who was asked if he was a station team meber and he refused to answer. Funez had in his possession flyers and was also placed in temporary mechanical restraints and escorted to the CSO. Once we arrive to the CSO Security Director Mark Paige asked Funez again if he was a station team member and he refused to answer stating he would not be answering any questions without his attorney present.

LVMPD Officers J. Park P#10011 and B. Burbrink P#15227 arrived on scene and cited both Escalante and Funez for trespassing. Escalante and Funez were then released by LVMPD to depart property.

Surveillance was notified.

Security has nothing further to report on this incident at this time.

Attachments:
(3) Photographs
(1) LVMPD statement
(1) LVMPD Victim's Information Guide

Executive brief:

Maria Yesenia Hernandez Escalante and Ramiro Funez were observed placing flyers on several floors of the hotel. Escalante and Funez were taken into custody and placed in mechanical restraints. LVMPD was notified, responded, and cited both Escalnate and Funez for trespassing. Surveillance was notified and has positive coverage.

Reporting Party:

Supervisor:

Participants Involved:

Personnel:	WOODS, ERIC R	Property:	Red Rock
Role:	Dispatch Officer, Team Member	Department:	SECURITY - 90416
Personnel:	BOUGHER, ELIJAH JEREMIAH	Property:	Red Rock
Role:	Dispatched Officer	Department:	SECURITY - 90416
Police Contacted:	Taken From Scene:	Police Contacted Result :	
Personnel:	JUAREZ, DANNY JOSHUA	Property:	Red Rock
Role:	Dispatched Officer, Team Member	Department:	SECURITY - 90416
Personnel:	CURIEL, MIKE	Property:	Red Rock
Role:	Dispatched Officer, Team Member	Department:	SECURITY - 90416
Personnel:	TAKAI, CHRISTIAN JOSEPH ELEAZAR	Property:	Red Rock
Role:	Dispatched Officer, Team Member	Department:	SECURITY - 90416
Personnel:	MARCHESE, JEFFREY SCOTT	Property:	Red Rock
Role:	Dispatched Officer, Team Member	Department:	SECURITY - 90416
Subject:	Funez, Ramiro	Company:	
Role:	Subject		
Address:	12715 102nd Ave, South Richmond, NY, 11419, USA		
Contact Info:			
Subject:	Hernandez Escalante, Maria Yesenia	Company:	
Role:	Subject		
Address:	1716 N. 46th Pl, Phoenix, AZ, 85008-4152, USA		
Contact Info:			

List of Attached Records:

Record Type:	Summary:	Attached By:	Date Attached:
iDispatch	Dispatch#: DS20150889196 - Daily Log#: DL20151180711 - Call Time: 12/15/2015 7:02:14 PM - Dispatch Code: Criminal Activity - Property: Red Rock - Location: Hotel - Dispatch Status: Cleared	ctakai	15-Dec-2015

Reporting Party:

Supervisor:

Reporting Party:	Supervisor:

EXHIBIT "3"

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MARIA ESCALANTE #7043062,
RAMIRO FUNEZ #7043063,

Defendants.

CASE NO: 16M03289A-B

DEPT NO: 1

SECOND AMENDED

CRIMINAL COMPLAINT

The Defendants above named having committed the crimes of TRESPASS (Misdemeanor - NRS 207.200 - NOC 53166), in the manner following, to-wit: That the said Defendants, on or about the 15th day of December, 2015, at and within the County of Clark, State of Nevada, did then and there willfully and unlawfully go upon that certain property of the RED ROCK HOTEL & CASINO, 11011 West Charleston Boulevard, Las Vegas, Clark County, Nevada, with the intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act thereon, to-wit: by distributing flyers regarding the Red Rock Hotel and Casino and its parent company Station Casinos, within the hotel room area of the Red Rock Hotel and Casino, said flyers containing inflammatory and/or damaging information about the Red Rock Hotel and Casino and its parent company Station Casinos; Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: (1) by directly committing this crime; and/or (2) by aiding or abetting one another in the commission of this crime with the intent to commit this crime, by providing counsel and/or encouragement, by the Defendants acting in concert; and/or (3) pursuant to a conspiracy to commit this crime.

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All of which is contrary to the form, force and effect of Statutes in such cases made and provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.

04/06/16

16M03289A-B/mc/L4
LVMPD EV# 151215003593
(TK1)

ORIGINAL

FILED
APR 13 3 49 PM '16
JUSTICE COURT
LAS VEGAS NEVADA
BY DC DEPUTY

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PITARO & FUMO, CHTD.
Nevada Bar No. 001332
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Las Vegas, NV 89101
(702) 382-9221

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(702) 386-5107

Attorneys for MARIA ESCALANTE and RAMIRO FUNEZ

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. **MARIA ESCALANTE AND RAMIRO FUNEZ,** Defendant	Case No.: 16M03289AB Dept: 1 **REPLY TO STATES OPPOSITION TO DEFENDANTS MOTION TO DISMISS**

COMES NOW, Defendants, **MARIA ESCALANTE AND RAMIRO FUNEZ** by and through their attorney of record, **THOMAS F. PITARO, ESQ.**, and hereby submits their reply to States Opposition to Defendants Motion to Dismiss.

This motion is made and based upon the following memorandum of points and authorities, and all motions previously filed.

DATED this April 13, 2016

THOMAS F. PITARO, ESQ.
PITARO & FUMO, CHTD.
Nevada Bar No. 001332
601 Las Vegas Blvd. S.
Las Vegas, NV 89101
(702) 382-9221
Attorney for Defendants
MARIA ESCALANTE AND
RAMIRO FUNEZ

INTRODUCTION

The District Attorney's Office concedes that its original and First Amended complaint in this matter relied on a plainly unconstitutional vagrancy ordinance. State's Opp. Br., at 9. It also concedes, effectively, that its original complaint in this matter lacked sufficient specificity to comply with due process. *Id.* at 3. But in its attempt to fix these errors, the DA's Office has laid bare what was previously unspoken: that it is pursuing this criminal action because it disagrees with what Union representatives were saying as part of the Union's labor dispute with Station Casinos. The Second Amended Complaint alleges that the Defendants violated NRS 207.200 because they distributed flyers within the Red Rock Casino "containing inflammatory and/or damaging information about the Red Rock Hotel and Casino and its parent company Station Casinos." State's Opp. Br., at Exh. 3. This Complaint bases criminal liability squarely on the *content of the Defendants' speech*, something that violates bedrock First Amendment principles. *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992). This alone requires dismissal.

The DA continues to rely on NRS 207.200(1)(a) in the Second Amended Complaint. But NRS 207.200(1)(a) is unconstitutionally vague because it bases criminal liability on whether the defendant "annoys" or "vexes." *Coates v. Cincinnati*, 402 U.S. 611, 615-16 (1971); *City of Las Vegas v. Eighth Judicial District Court*, 118 Nev. 859 (2002). The DA's attempts to defend this statute are all baseless. An intent requirement does not cure vagueness when the object of that requirement is itself vague. *Planned*

Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 933 (9th Cir. 2004) ("A scienter requirement of knowledge as applied to an unknowable element cannot save a provision from constitutional invalidity."). Nor does the addition of the term "vex" in the statute make it any less vague, because "vex" is simply a synonym for "annoy." Finally, the fact that NRS 207.200(1)(a) addresses trespass does not help the DA, because criminal liability for trespass is based on the defendant's intent to "annoy" or "vex"—which are unconstitutionally vague terms.

When visitors to the Red Rock Casino conduct themselves in ways that the Casino dislikes, it asks them to leave. If they return, they may be prosecuted for criminal trespass. Here, the DA's Office has interjected itself into a labor dispute between the Union and Station Casinos—and asked the Nevada courts to do the same—by basing a criminal trespass complaint on the content of Union representatives' speech and a patently unconstitutional statute that gives defendants no warning of the standard with which they must comply.

BACKGROUND

The State's opposition brief contains allegations of fact that are unsupported and improper on a motion to dismiss. Defendants, of course, dispute the facts that are alleged. But they also object to the DA's apparent contempt for procedure. None of the documents that the DA attaches to its brief is authenticated. The DA submits no affidavit supporting any of the factual allegations that are made, which go far beyond even what is set forth in the unauthenticated and hearsay "Incident File" appended to the DA's brief.

The Court should not countenance this transparent attempt to prejudice the Defendants and to distract the Court from the legal issues at hand.

The citations that Metro issued to the Defendants invoked the classic definition of criminal trespass: "entering or remaining upon on any land . . . by one who knows he is not authorized or privileged to do so; and (a) He enters or remains therein in defiance of an order not to enter or to leave such premises or property personally communicated to him by the owner thereof or other authorized person; or (b) Such premises or property are posted in a manner reasonably likely to come to the attention of intruders[.]" BLACK'S LAW DICTIONARY (Sixth Ed. 1990) at 1503. That traditional definition is reflected in NRS 207.200(1)(b) (trespass established where defendant "[w]illfully goes or remains upon any land or in any building after having been warned by the owner or occupant thereof not to trespass[.]") The citation alleges that the Defendants: "Did return to property after warning not to trespass by a representative to wit: Red Rock Casino security did warn culinary union by letter, via attorney, to not allow representatives to distribute on the premises or be on the premises."

The DA's Office apparently recognized that an alleged letter sent to the "culinary union" warning the union not to allow "representatives" on Casino premises was not a warning "personally communicated" to the Defendants within the meaning of NRS 207.200(1)(b) and did not provide the requisite notice. Therefore, the DA's Office changed course, alleging for the first time in the Amended Complaint that Defendants had violated NRS 207.200(1)(a) by going "upon the land or into any building of another

with intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act."

The DA's Office now alleges—in its Second Amended Complaint—that what made Defendants' actions "annoying" or "vexing" was the "inflammatory" and "damaging" content of their speech.

ARGUMENT

I. The Second Amended Complaint Is Based Squarely and Unconstitutionally on the Content of the Defendants' Speech.

The Second Amended Complaint demonstrates with clarity what was previously only implicit: that the DA's Office is prosecuting this case because of what the Defendants were saying in the course of the Union's labor dispute with the Casino. The Complaint now admits forthrightly that criminal trespass liability is predicated on the "inflammatory and/or damaging" words contained on the flyers that Defendants were distributing.

This is patently unconstitutional and requires dismissal of the Complaint. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S.Ct. at 2226. "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." *Ibid.* Regulation of speech can be content-based because the relevant statute distinguishes between different types of speech on its face, *see id.* at 2226-2227, or because the enforcement of an otherwise content-neutral statute is content-discriminatory, *Hoye v. City of Oakland*, 653 F.3d 835, 854 (9th Cir. 2011) ("Courts must be willing to entertain the possibility that content-neutral enactments are enforced in a content-discriminatory manner. If they were not, the First Amendment's guarantees would risk becoming an empty formality, as government could enact regulations on speech written in a content-neutral manner so as to withstand judicial scrutiny, but then proceed to ignore the regulations' content-neutral terms by adopting a content-discriminatory enforcement policy.").

Content-discrimination analysis is not limited to instances when the government regulates speech on public property. In *R.A.V. v. City of St. Paul*, *supra*, 505 U.S. at 380, the Supreme Court struck down a St. Paul, Minnesota ordinance stating:

> Whoever places on *public or private property* a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

(Emphasis added). The defendants in question had burned a cross on another person's private property. The Supreme Court held that the statute was unconstitutionally content-based because it distinguished between speech that one "knows or has reasonable grounds to know arouses anger, alarm, or resentment" based on the content of the speech. It did not matter that the statute's application was to speech that took place inside the

fenced property of the victims. *See also City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring) ("With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one."); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (striking down content-based regulation of private marketing, much of which took place at doctors' offices).

Here, the DA is basing his theory of criminal trespass liability on the content of the Defendants' speech. The DA's allegation is that the Defendants committed criminal trespass by distributing flyers within the Casino's hotel that contained "inflammatory and/or damaging information about the Red Rock Hotel and Casino and its parent company Station Casinos." This is content-based regulation of speech because in order to assess liability, "an official 'must necessarily examine the content of the message that is conveyed.'" *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 794 (9th Cir. 2006) (quoting *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 134 (1992)); *see ACLU of Nevada*, 466 F.3d at 794-95 (anti-solicitation ordinance that required officials to refer to the content of handbills was unconstitutional).

The First Amendment bans the government from regulating based on the content of speech because of the risk that "government officials may . . . wield such statutes to suppress disfavored speech." *Reed*, 135 S.Ct. at 2229. The DA's office is seeking to wield an unconstitutionally vague trespass statute to silence the Union's speech during a labor dispute.

II. NRS 207.200(1)(a) Is Unconstitutionally Vague.

As the Defendants demonstrated in their opening brief, the Nevada Supreme Court and other courts have consistently struck down criminal statutes that base liability on whether conduct or speech is "annoying." Mot. Dismiss, at 8; *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) ("We have in the past 'struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.'"); *City of Las Vegas v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 118 Nev. 859, 865 (2002) ("We conclude that the standard of conduct proscribed by NRS 207.260, namely, conduct which is 'annoying,' does not provide fair notice because the citizens of Nevada must guess when conduct that bothers, disturbs, irritates or harasses a minor rises to the level of criminal conduct.").

The DA's Office raises three arguments in an attempt to defend NRS 207.200(1)(a)'s constitutionality. But while the DA tries to present these arguments with bravado, none has any merit.

A. The fact that NRS 207.200(1)(a) contains a scienter requirement does not save it.

The DA argues that NRS 207.200(1)(a) survives constitutional scrutiny because it contains a scienter requirement—the defendant violates NRS 207.200(1)(a) if they "inten[d] to annoy or vex the owner or occupant." But the law is clear that a scienter requirement that applies to an inherently vague element—such as "annoy" or "vex"—does not save a vague statute from unconstitutionality. As the federal Ninth Circuit has

held: "A scienter requirement of knowledge as applied to an unknowable element cannot save a provision from constitutional invalidity." *Planned Parenthood of Idaho, Inc*, 376 F.3d at 933. The Supreme Court made this point prominently in *Screws v. United States*, a case on which the DA relies. *Screws v. United States*, 325 U.S. 91, 105 (1945) (stating that "willful conduct cannot make definite that which is undefined").

As the Court put it in *United States v. Reliant Energy Services, Inc.*, 420 F. Supp. 2d 1043, 1053 (N.D. Cal. 2006):

> a defendant may have the required *mens rea*, but the *actus reus* which is prohibited by the statute is undefined or unclear and cannot form the basis of a criminal conviction (i.e., the defendant commits the prohibited conduct with specific intent, yet a person of ordinary intelligence would not understand what physical acts are within the scope of the statute's *actus reus*).

In such case, "the indeterminacy of precisely what that fact is"—such as whether a person's entry will *annoy* a property owner or occupant—"renders a statute vague." *United States v. Williams*, 553 U.S. 285, 306 (2008); *see also Forbes v. Woods*, 71 F. Supp. 2d 1015, 1020 (D. Ariz. 1999), *aff'd sub nom. Forbes v. Napolitano*, 236 F.3d 1009 (9th Cir. 2000) ("However, a scienter requirement cannot save a statute such as A.R.S. § 36–2302 that has no core of meaning to begin with.").

In a well-reasoned decision, the federal Fifth Circuit found that an intent requirement did not save a Texas phone harassment statute that made it unlawful to make an obscene or vulgar phone call that "intentionally, knowingly, or recklessly annoys or alarms the recipient." *Kramer v. Price*, 712 F.2d 174, 176 (1983), *on reh'g en banc*, 723

F.2d 1164 (5th Cir. 1984).[1] The Fifth Circuit reasoned that "[s]pecifying an intent element does not save § 42.07 from vagueness because the conduct which must be motivated by intent, as well as the standard by which that conduct is to be assessed, remain vague." *Id.* at 178. Courts have struck down other statutes that append a scienter requirement to the vague term "annoy"—as does NRS 207.200(1)(a). *See, e.g., Langford v. City of Omaha*, 755 F. Supp. 1460 (D. Neb. 1989) (ordinance prohibiting "a person from purposefully or knowingly causing inconvenience, annoyance or alarm to others by making unreasonable noise" was void for vagueness); *People v. Norman*, 703 P.2d 1261, 1266 (Colo. 1985) (striking down as vague a statute providing that a person commits the crime of harassment if, "with intent to harass, annoy, or alarm another person," such person "[e]ngages in conduct or repeatedly commits acts that alarm or seriously annoy another person and that serve no legitimate purpose.").2

Notably, the DA does not cite any cases in which a court has upheld a statute proscribing "annoying" conduct merely because the statute requires that the defendant "intend" to annoy. In contrast to the line of cases rejecting his position, the DA cites only *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (plurality), in which a fractured plurality of the Supreme Court upheld a very different statute over vagueness challenge, in part because of its scienter requirement. The statute in question made it unlawful for a person to "'knowingly' approach[] within eight feet of another, without that person's consent, for

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1 The State of Texas repealed the statute at issue, rendering the case moot.
2 The Nevada Supreme Court cited both of these cases favorably in *City of Las Vegas v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 118 Nev. at 865 n. 26.

the purpose of engaging in oral protest, education, or counseling." *Ibid.* This statute was far more concrete than a statute making unlawful an intent to "annoy"—a term the Supreme Court has made clear is inherently vague. The plurality in *Hill v. Colorado* did not hold that the inclusion of a scienter requirement inoculates a statute against vagueness challenge, only that it may "ameliorate" the risk that defendants do not have adequate notice. Even this proposition in the context of the relatively concrete statute at issue was controversial and rejected by other Justices. *Id.* at 774 (Kennedy, J., dissenting) ("Scienter cannot save so vague a statute as this.").

The fact that NRS 207.200(1)(a) includes a requirement that the defendant have the "intent to annoy or vex the owner or occupant" does not make the statute constitutional, because the "intent" requirement is applied to an inherently vague element—"annoying" or "vexing" the property owner or occupant. Nevada citizens are left to guess as to whether their conduct will lead to criminal liability.

B. NRS 207.200(1)(a)'s use of the term "vex" does not make it constitutional.

Next, the DA's Office makes the absurd argument that because NRS 207.200(1)(a) uses the term "vex" in addition to the term "annoy" the statute is not unconstitutionally vague, relying on a dictionary definition. This argument fails because "annoy" and "vex" are synonyms; both are unconstitutionally vague. *See* Webster's Third New International Dictionary 87 ("annoy: **1:** to irritate with a nettling or exasperating effect esp. by being a continuous or repeatedly renewed source of vexation :

provoke, vex"); BLACK'S LAW DICTIONARY (Sixth Ed. 1990) at 1565 (Vex. To harass, disquiet, annoy").3

In *Coates v. Cincinnati*, the Supreme Court rejected a similar argument. The Ohio Supreme Court held that the statute was not vague, relying on a dictionary definition of "annoy" that made it synonymous with "to vex":

> The ordinance prohibits, inter alia, 'conduct ... annoying to persons passing by.' The word 'annoying' is a widely used and well understood word; it is not necessary to guess its meaning. 'Annoying' is the present participle of the transitive verb 'annoy' which means to trouble, to vex, to impede, to incommode, to provoke, to harass or to irritate.

City of Cincinnati v. Coates, 21 Ohio St.2d 66, 69, 255 N.E.2d 247, 249 (1970). The Supreme Court rejected the Ohio Supreme Court's simple reliance on a dictionary meaning, including its cross-reference to the word "vex." Instead, the Court recognized that vagueness inheres in the word annoy:

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.

Coates, 402 U.S. at 614.

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3 In contrast to NRS 207.200(1)(a), "vexatious litigant" statutes are upheld over void-for-vagueness challenges because they contain objective standards to measure "vexatious" conduct. *See, e.g., Wolfe v. George*, 486 F.3d 1120, 1124 (9th Cir. 2007) (upholding California statute that defines "vexatious litigant" as a "pro se litigant who has lost at least five pro se lawsuits in the preceding seven years, sued the same defendants for the same alleged wrongs after losing, repeatedly filed meritless papers or used frivolous tactical devices, or who has already been declared a vexatious litigant for similar reasons."). NRS 207.200(1)(a) provides no objective measure of what "vex" means.

Because the term vex is simply a synonym for the word "annoy", NRS 207.200(1)(a)'s use of both terms is no more constitutional than use of the term "annoy" alone.

C. The fact that NRS 207.200(1)(a) is a trespass statute does not make it constitutional.

Finally, the DA's Office argues that NRS 207.200(1)(a) is not unconstitutionally vague because it does not deal with conduct on public sidewalks, but is instead a trespass statute. State's Opp. Br., at 5-7. This is a total *non-sequitur*. The DA is correct that *Coates* involved a statute that regulated "annoying" conduct on public sidewalks, and that *City of Las Vegas v. Eighth Judicial District Court ex rel. Cty. of Clark* did not state whether the "annoying" and "molesting" conduct took place in a private residence. But so what? These cases did not turn on whether the conduct took place on public property or not. Void-for-vagueness is not a First Amendment doctrine to which public forum analysis applies. *See United States v. Williams*, 553 U.S. 285, 304 (2008) (void-for-vagueness is a due-process doctrine, not an outgrowth of the First Amendment). The problem in both *Coates* and *City of Las Vegas*—and in all of the other cases cited for the principle—is that the term "annoy" is inherently vague and does not provide notice of what conduct will be deemed criminal. The statute involved in *City of Las Vegas v. Eighth Judicial District Court* would have been no less vague if it only prohibited "annoying" a minor inside a private residence. Nor was the statute in *Coates* any less vague because it designated the "location of the conduct"—three or more individuals assembled on public sidewalks. *Coates*, 402 U.S. at 613-614; *cf.* State's Opp. Br., at 5

(arguing that because NRS 207.200 defines the "location of the conduct" it is less vague than the ordinance struck down in *Coates*).

The DA's Office confusion over the issue is reflected in the following passage: "Any reasonable person reading NRS 207.200 would understand the statute prohibits illegal entry onto private property. Any law enforcement officer seeking to enforce NRS 207.200 would have his enforcement ability limited by the requirement of illegal entry onto private property." States Opp. Br., at 6. But entry onto public property is only "illegal" if it is done with a purpose to "annoy" or "vex"—terms which are inherently vague. Pointing out that NRS 207.200(1)(a) is a trespass statute that makes entry onto private property illegal does not solve the statute's unconstitutionality because "illegal" entry is defined by inherently vague terms.

NRS 207.200(1)(a) is the quintessential example of a "vague law [which] impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). Unlike NRS 207.200(1)(b), which requires property owners to give notice by warning intruders either personally or through posting that they are not allowed on the property, NRS 207.200(1)(a) allows for criminal liability with no notice, subject only to an inherently vague and indeterminate standard. This inevitably leads to discriminatory application. *See City of Las Vegas v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 118 Nev. at 866 ("[T]he touchstone of the void for vagueness doctrine is to ensure that the legislature has provided guidelines for enforcement in order to prevent 'a

standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"). A drunk patron who wants to "raise the roof" at Red Rock Casino and irritate other patrons (*i.e.* "occupants" of the Casino under NRS 207.200(1)(a)) is told to leave by Casino security and only cited for trespass if he tries to return. But a labor organizer is prosecuted for criminal trespass, even as she willingly agrees to leave the property, based largely on the content of the flyers she is distributing.

NRS 207.200(1)(a) is unconstitutionally vague, and the Second Amended Complaint must be dismissed.

III. The DA's Office Should Not Be Granted Leave to Amend the Complaint.

The DA's Office has now made three attempts at drafting a constitutionally viable complaint against the Defendants, without success. Because NRS 207.200(1)(a) is unconstitutionally vague, the Second Amended Complaint must be dismissed. But even if the Court were to find NRS 207.200(1)(a) constitutional, the Second Amended Complaint makes clear that the DA's Office is prosecuting this action because of the content of the Defendants' speech. The DA should not be permitted to put that genie back in the bottle by attempting to allege yet another set of facts. Allowing the DA to do so would clearly prejudice the "substantial rights of the defendant" under NRS 173.095(1), as it is now clear that the DA is pursuing this prosecution for reasons that violate the First Amendment.

The amendment of the criminal complaint is also improper because it has changed the offense that it is alleging by changing the method by which the defendants allegedly committed the trespass.

NRS 173.095 Amendment

1. The court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

While a charging document may be amended pursuant to NRS 173.095, it cannot be done so to change the offense as charged and it cannot be done if the substantial rights of the defendant are prejudiced. The State cannot amend a charging document, if the amendment completely changes the method by which appellant allegedly committed the criminal act. See Green v. State, 94 Nev. 176 (1978).

Here, sections (a) and (b) of NRS 207.200 Trespass are two separate offenses. To violate the offense under section (a) a person must intentionally go onto the land to vex or annoy the occupant or to commit any unlawful act. While, to violate section (b) a person must go upon or remain on the land, after having been warned by the owner not to trespass.

Thus section (b) requires notice, and requires a person the opportunity to leave after being warned to leave, while section (a) is completely reliant on the person's intent for entering the property in the first place. These are wholly different offenses, with

distinct and separate types of persons aimed to criminalize. As the United States Supreme Court stated in United States v. Gaddis, 424 U.S. 544 (1976), when finding that a section of the federal bank robbery statute for possessing proceeds of a robbery is a separate offense than bank robbery, because it "reaches a different group of wrongdoers." Here, sections (a) and (b) of NRS 207.200 are distinct and separate offenses that seek to reach "different wrongdoers," that being those who have been given notice and refuse to leave vs. those who have no notice.

In the instant case, the State's attempted amendment to the complaint is improper. The State initially charged the defendants under section (b) for going onto Red Rock property after being warned to not to enter the property. The State abandoned that offense, and has now attempted to change the offense to section (a) for entering the Red Rock property with the intent to vex or annoy. These are different offenses, with completely different fact scenarios and types of persons the statute seeks to charge.

An amendment to a charging document cannot state a different offense and cannot change the method by which the defendant allegedly committed the criminal act. That is exactly what has happened here. The State went from charging the offense of entering property after being warned not to enter, to entering without notice but with the intent to vex or annoy. This proposed amendment is improper and thus must be stricken and the complaint must be dismissed.

CONCLUSION

For all of the foregoing reasons, the Amended Complaint should be dismissed. The DA should not be granted leave to further amend.

DATED this April 13, 2016

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RECEIPT OF COPY

RECEIPT OF A COPY of the foregoing **REPLY TO STATES OPPOSITION TO DEFENDANTS MOTION TO DISMISS** is hereby acknowledged this 13 day of APR 20 16

OFFICE OF THE DISTRICT ATTORNEY

By: _____

ORIGINAL

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. MARIA ESCALANTE #7043062, and RAMIRO FUNEZ #7043063, Defendants.	CASE NO.: 16M-03289A-B DEPT. NO.: 1 ORDER FILED IN OPEN COURT DATE: 5-6-16 CLERK:

This matter, having come before the Court on the State's "Motion to File Second Amended Complaint," and Defendants' "Motion to Dismiss," and the Court being fully advised of the premises herein, does hereby find the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 4, 2016, the State filed an Amended Criminal Complaint against Maria Escalante and Ramiro Funez (hereinafter collectively referred to as "Defendants"). The Amended Criminal Complaint includes one count of Trespass and one count of Vagrancy.

On March 18, 2016, Defendants filed a "Motion to Dismiss."

On April 7, 2016, the State filed an Opposition. Within the Opposition, the State included a "Motion to File Second Amended Complaint."

On April 13, 2016, Defendants filed a Reply.

DISCUSSION

I. The State's "Motion to File Second Amended Complaint"

The Second Amended Complaint is attached as Exhibit 3 to the State's Opposition. The Second Amended Complaint proposes to add more specific information regarding Count 1 and to remove Count 2 entirely.

Defendants argue that the Court should deny the State's Motion because of NRS 173.095(1) which states that "[t]he court may permit **an indictment or information** to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." [*Emphasis added*]. However, Defendants have offered no explanation as to why this Court should assume that NRS 173.095 applies to *complaints*, in addition to indictments and information.

In Salaiscooper v. Eighth Judicial Dist. Court, 117 Nev. 892 (2001), the Nevada Supreme Court recognized that "a district attorney is vested with immense discretion in deciding whether to prosecute a particular defendant that 'necessarily involves a degree of selectivity.'" Id. at 902-03. In exercising that discretion, "the district attorney is clothed with the presumption that he acted in good faith and properly discharged his duty to enforce the laws." Id. at 903. Additionally, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."). Id. at 903 n. 25 (citing U.S. v. Armstrong, 517 U.S. 456, 464 (1996)).

On December 24, 2015, Nevada's new Court of Appeals issued a decision which clearly supports the State's ability to amend a Criminal Complaint at the Justice-Court level. In Moultrie v. State, 131 Nev. Adv. Op. No. 93, 364 P.3d 606, 2015 Nev. App. LEXIS 15 (December 24, 2015), the Court of Appeals stated the following:

> Moultrie also contends the district court erred in finding the justice court committed egregious error by denying the State's motion to amend the complaint. We disagree.
>
> "The justice court's role at the preliminary hearing is to determine whether there is probable cause to find that an offense has been committed and that the defendant has committed it." *State v. Justice Court of Las Vegas, Twp.*, 112 Nev: 803, 806, 919 P.2d 401, 402 (1996). An "accused may be held to answer for a public offense other than that charged in the complaint." *Singleton v. Sheriff, Clark Cnty.*, 86 Nev. 590, 593, 471 P.2d 247, 249 (1970) (internal quotation omitted). **A justice court may permit the State to amend the complaint to conform to the evidence presented.** *See generally Viray v. State*, 121 Nev. 159, 163, 111 P.3d 1079, 1082 (2005) (concluding that the district court did not abuse its discretion by allowing the State to amend the information to conform to the victim's testimony); *Grant v. State*, 117 Nev. 427, 433-34, 24 P.3d 761, 765 (2001) (holding that the district court did not err by amending a grand larceny charge from a category B to a category C offense to conform to the evidence presented, where the State raised the alternative of amending the criminal information, and the defendant was not prejudiced because he had sufficient notice of the lesser charge); *see also* **NRS 178.610 (providing that a court may proceed in any lawful manner when procedure is not specifically prescribed).**
>
> In its rebuttal closing argument during the preliminary examination, the State moved to amend the complaint to charge Moultrie with a violation of NRS 453.337(2)(a), a category D felony, and not NRS 453.337(2)(b), a category C felony. The State never alleged a prior conviction in the complaint, nor tried to prove a prior conviction during the hearing. The error in the complaint referring to a category C felony (a second offense) compared to a category D felony (a first offense) was immaterial in the preliminary examination. *See* NRS 173.075(3) (stating that error in citation of statute is not a ground for dismissal unless error resulted in prejudice).
>
> Even if the complaint had alleged a prior offense, the State requested the prior conviction allegation be *removed*. The amendment to the complaint would have required Moultrie to defend the same underlying crime and because Moultrie had sufficient notice of the charge he was facing, granting the motion to amend would not have affected his substantial rights.
>
> At the preliminary examination, the State presented sufficient evidence to demonstrate that Moultrie had committed first offense possession of a controlled substance with the intent to sell, a category D felony under NRS 453.337(2)(a). Thus, the justice court

abused its discretion in denying the motion to amend the complaint. This error is plain from the record and resulted in Moultrie's discharge. Therefore, we conclude that the district court did not err in finding the justice court committed egregious error by denying the motion to amend the complaint and discharging Moultrie.

Because we conclude the district court did not err in finding the justice court committed egregious error, we conclude the district court did not abuse its discretion by granting the motion to file an information by affidavit pursuant to NRS 173.035(2).

Id. at ___, 364 P.3d at 612-614, 2015 Nev. App. LEXIS at 15-19 [*Emphasis added*].

The case cited above indicates that Criminal Complaints can be amended after a preliminary hearing, and there is no good reason why the State cannot amend a Criminal Complaint before a preliminary hearing.

The same logic applies to amendments made to a Criminal Complaint before trial. See NRS 178.610 (declaring that "[i]f no procedure is specifically prescribed by this title, the court may proceed in any lawful manner not inconsistent with this title or with any other applicable statute.").

Because NRS 173.095(1) does not impose restrictions on the ability of the Court to permit a Criminal Complaint to be amended, the Court finds that the State generally has the unfettered ability to amend its own Complaints prior to trial in a misdemeanor case.

In the instant case, the proposed Second Amended Criminal Complaint is designed to give Defendants notice, and an opportunity to be heard, regarding the charge that they may eventually face at trial. The proposed amendment will not prejudice Defendants in any way, and because the Court finds that such an amendment is authorized, the Court further finds that the State's "Motion to File Second Amended Criminal Complaint" should be granted.

II. Defendants' "Motion to Dismiss"

Defendants' Motion to Dismiss raised arguments about the two counts in the Amended Criminal Complaint. Because the Court is allowing the State to file a Second Amended Criminal Complaint, the Court will only consider Defendants' arguments that are relevant to the remaining charge.

The Second Amended Criminal Complaint includes one charge of misdemeanor **"Trespass"** based on the following factual allegations:

> That the said Defendants, on or about the 15th day of December, 2015, at and within the County of Clark, State of Nevada, did then and there willfully and unlawfully go upon that certain property of the RED ROCK HOTEL & CASINO, 11011 West Charleston Boulevard, Las Vegas, Clark County, Nevada, **with the intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act thereon**, to-wit: by distributing flyers regarding the Red Rock Hotel and Casino and its parent company Station Casinos, within the hotel room area of the Red Rock Hotel and Casino, said flyers containing inflammatory and/or damaging information about the Red Rock Hotel and Casino and its parent company Station Casinos; Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: (1) by directly committing this crime; and/or (2) by aiding or abetting one another in the commission of this crime with the intent to commit this crime, by providing counsel and/or encouragement, by the Defendants acting in concert; and/or (3) pursuant to a conspiracy to commit this crime. [*Emphasis added*].

The words emphasized above are taken from the language in NRS 207.200. That statute provides, in pertinent part, as follows:

> **NRS 207.200. Unlawful trespass upon land; warning against trespassing.**
> 1. Unless a greater penalty is provided pursuant to NRS 200.603, any person who, under circumstances not amounting to a burglary:
>
> (a) Goes upon the land or into any building of another **with intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act;** or
>
> (b) Willfully goes or remains upon any land or in any building after having been warned by the owner or occupant thereof not to trespass,
>
> is guilty of a misdemeanor. The meaning of this subsection is not limited by subsections 2 and 4. [*Emphasis added*].

The Second Amended Criminal Complaint does not allege any prior warning(s) as contemplated by NRS 207.200(1)(b).[1] Therefore, the Court must decide whether a Criminal Complaint which tracks the language in NRS 207.200(1)(a) is unconstitutionally void for vagueness.[2] The Court will conduct this analysis in two parts: (1) Discussion of the law relating to vagueness; and (2) consideration of the component parts of NRS 207.200(1)(a).

A. The Law Relating to Vagueness

In State v. Hughes, 127 Nev. Adv. Op. No. 56, 261 P.3d 1067 (2011), the Nevada Supreme Court stated the following:

> "The constitutionality of a statute is a question of law that we review de novo. Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. . . . [T]he challenger must make a clear showing of invalidity." Silvar v. Dist. Ct., 122 Nev. 289, 292, 129 P.3d 682, 684 (2006) (footnote omitted). "'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" State v. Castaneda, 126 Nev. , , 245 P.3d 550, 552 (2010) (quoting Hooper v. California, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L. Ed. 297 (1895)); accord Virginia and Truckee R.R. Co. v. Henry, 8 Nev. 165, 174 (1873) ("It requires neither argument nor reference to authorities to show that when the language of a statute admits of two constructions, one of which would render it constitutional and valid and the other unconstitutional and void, that construction should be adopted which will save the statute.").
>
> "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause[s] of the Fifth" and Fourteenth Amendments to the United States Constitution. United States v. Williams, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008);

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[1] The Court notes that the original citations which preceded the Amended Criminal Complaint and the Second Amended Criminal Complaint both utilized a theory under NRS 207.200(1)(b). The citations against Maria Escalante and Ramiro Funez each alleged that Defendants "did return to property after warning not to trespass by a representative." It is unclear why the State abandoned its arguments under NRS 207.200(1)(b) in favor of NRS 207.200(1)(a).

[2] Although Defendants' Motion to Dismiss includes arguments about the sufficiency of the language relating to the Trespass count in the Amended Criminal Complaint, the Court finds that the State eliminated such issues in the Second Amended Criminal Complaint when it amended the Trespass count to include additional clarifying information.

Silvar, 122 Nev. at 293, 129 P.3d at 684-85. "Vagueness may invalidate a criminal law for either of two independent reasons," Chicago v. Morales, 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999): (1) if it "`fails to provide a person of ordinary intelligence fair notice of what is prohibited'"; or (2) if it "'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" Holder v. Humanitarian Law Project, 561 U.S. , , 130 S. Ct. 2705, 2718, 177 L. Ed. 2d 355 (2010) (quoting Williams, 553 U.S. at 304).

Enough clarity to defeat a vagueness challenge "`may be supplied by judicial gloss on an otherwise uncertain statute,'" Skilling v. United States, 561 U.S. , , 130 S. Ct. 2896, 2933, 177 L. Ed. 2d 619 (2010) (quoting United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)), or by giving a statute's words their "`well-settled and ordinarily understood meaning.'" Castaneda, 126 Nev. at , 245 P.3d at 554 (quoting Berry v. State, 125 Nev. 265, 280, 212 P.3d 1085, 1095 (2009), abrogated on other grounds by Castaneda, 126 Nev. at n.1, 245 P.3d at 553 n.1).

Id. at 1069.

B. The Component Parts of NRS 207.200(1)(a)

1. "With Intent to Vex or Annoy"

a. "Vex"

The State argues the following:

Merriam-Webster's Dictionary defines vex as "to bring trouble, distress, or agitation to." While the case law clearly calls into question the lack of specificity contained in the word "annoy"[3], the word "vex" adds an additional level of clarity to the prohibited conduct that helps to resolve the void for vagueness issues cited to by the Defense in this case. The Defendants have provided no valid authority or specific argument indicating that the term "vex" is in any way vague, beyond its simple proximity to the word "annoy" in NRS 207.200.

State's Opposition, at 8:18-8:23.

[3] The Court will elaborate on this point in more detail infra.

The Court agrees with Defendant's argument that "vex" is simply a synonym for "annoy." See http://www.merriam-webster.com/dictionary/vex (last visited on May 4, 2016) (defining "vex" as "to annoy or worry (someone)"). Therefore, the Court will focus on whether the word "annoy" creates issues of vagueness.

b. "Annoy"

In City of Las Vegas v. Eighth Judicial Dist. Court, 118 Nev. 859 (2002), the Nevada Supreme Court ruled that former NRS 207.260 was unconstitutionally vague because of its reference to "annoying" a minor.[4] The Court stated the following:

> Notably, the criminal complaint in this case merely charged that Charles had willfully and unlawfully "annoyed" a minor; it did not allege that Charles had "molested" a minor. Thus, the State apparently read the statute to prohibit either the annoying or molesting of a minor.
>
> **The language of the statute does not specify what type of annoying behavior is prohibited,** nor does it define the term "molest." By its terms, the statute is not limited only to annoyances of a sexual nature, and it provides no indication of whether the perpetrator must subjectively intend to annoy the minor, or if mere unintentional, bothersome conduct, in and of itself, is sufficient to subject an individual to criminal sanctions.
>
> The plain meaning of the terms of NRS 207.260 provide little additional guidance. The term "annoy" is commonly defined as "to disturb or irritate [especially] by repeated acts." The term "molest" is a synonym for the term "annoy" and literally means "to annoy, disturb, or persecute [especially] with hostile intent or injurious effect."
>
> In *Coates v. City of Cincinnati*, [402 U.S. 611 (1971)], the Supreme Court considered the use of the word "annoy" in an ordinance that made it unlawful for three or more people to assemble on a sidewalk and "conduct themselves in a manner annoying to persons passing by." In holding that the ordinance was "unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard," the Court reasoned:

[4] At the time that the defendant was charged in the City of Las Vegas case, NRS 207.260 provided that "[a] person who annoys or molests a minor is guilty of a misdemeanor."

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning."

We conclude that **the standard of conduct proscribed by NRS 207.260, namely, conduct which is "annoying," does not provide fair notice because the citizens of Nevada must guess when conduct that bothers, disturbs, irritates or harasses a minor rises to the level of criminal conduct.**[5]

We also conclude that NRS 207.260 **authorizes and encourages arbitrary enforcement**. Because the statute fails to adequately set forth the conduct proscribed, it provides those charged with enforcement of its provisions unfettered and unguided discretion to decide what annoying activity falls within its parameters. A law that fails to provide fair notice and allows such unfettered discretion is unconstitutionally vague. Indeed, the touchstone of the void for vagueness doctrine is to ensure that the legislature has provided guidelines for enforcement in order to prevent "'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" Because NRS 207.260 provides insufficient notice of the conduct prohibited and contains no guidelines for law enforcement, we conclude that the statute is unconstitutionally void on its face under the United States and the Nevada Constitutions.

As an alternative to declaring the statute facially void, the City urges this court to apply a limiting construction to NRS 207.260. The City argues that this court can save the statute from invalidity by imposing a reasonable person standard, or by reading it in context with NRS 193.190 and NRS 194.010. We reject the City's invitation to construe the statute in a manner that renders it constitutional.

"In our system, . . . defining crimes and fixing penalties are legislative, not judicial, functions." Although a limiting construction is appropriate to clarify ambiguous statutory language, this court cannot apply a limiting construction to a law where the terms

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[5] At this point in the opinion, the Nevada Supreme Court recognized that there is disagreement on the use of the term "annoy" with reference to a standard of conduct. The Court stated the following:

> Some jurisdictions have held that statutes employing the term were void for vagueness. *See, e.g., Langford v. City of Omaha*, 755 F. Supp. 1460 (D. Neb. 1989); *Poole v. State*, 524 P.2d 286 (Alaska 1974); *People v. Norman*, 703 P.2d 1261 (Colo. 1985); *State v. Bryan*, 259 Kan. 143, 910 P.2d 212 (Kan. 1996); *City of Spokane v. Fischer*, 110 Wn.2d 541, 754 P.2d 1241 (Wash. 1988). Others, however, have concluded that statutes employing the terms "annoy" or "molest" were sufficiently definite. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 569-72, 86 L. Ed. 1031, 62 S. Ct. 766 (1942) (upholding statute that punished "offensive, derisive or annoying" words on basis of "fighting" words construction given by state courts); *Fernandez v. Klinger*, 346 F.2d 210 (9th Cir. 1965); *Matter of Maricopa County Juv. Action*, 172 Ariz. 604, 838 P.2d 1365 (Ariz. Ct. App. 1992); *People v. Thompson*, 206 Cal. App. 3d 459, 253 Cal.Rptr. 564 (Ct. App. 1988); *State v. King*, 303 S.W.2d 930 (Mo. 1957).

Id. at 865 n.26.

employed are so vague that no standard of conduct is proscribed at all. To construe NRS 207.260 in a manner that would render it constitutional, this court would have to engage in judicial legislation and rewrite the statute substantially. We prefer to leave such extensive statutory revisions to the legislature. As the United States Supreme Court has observed, the legislature may not "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

We conclude that the district court did not err in ruling that NRS 207.260, as it existed prior to the 2001 amendment, was facially void for vagueness. The statute is constitutionally inadequate under the United States and the Nevada Constitutions because: (1) it does not provide fair notice of the boundaries of unlawful conduct; and (2) it authorizes and encourages arbitrary enforcement.

Id. at 864-67 [*Emphasis added*].

More recently, in State v. Castaneda, 126 Nev. Adv. Op. No. 45, 245 P.3d 550 (2010), the Nevada Supreme Court revisited the concept of "annoying" and stated the following:

> "[M]athematical precision is not possible in drafting statutory language." *City of Las Vegas v. Dist. Ct.*, 118 Nev. at 864, 59 P.3d at 481. Nonetheless, "the law must, at a minimum, delineate the boundaries of unlawful conduct. Some specific conduct must be deemed unlawful so individuals will know what is permissible behavior and what is not." *Id.* A law that leaves the determination of whether conduct is criminal to a purely subjective determination, such as what might **"annoy"** a minor or "manifest" an illegal "purpose," is "'vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that **no standard of conduct is specified at all.'"** *Id.* at 865, 59 P.3d at 482 (quoting *Coates v. City of Cincinnati,* 402 U.S. 611, 614, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971)) (invalidating a law making it a misdemeanor to "annoy" a minor); *Silvar,* 122 Nev. at 294, 129 P.3d at 685 (invalidating law prohibiting loitering that "manifest[s] the purpose of inducing . . . prostitution"). *See Holder,* 561 U.S. at , 130 S. Ct. at 2720 ("We have in the past 'struck down statutes that tied criminal culpability to whether the defendant's conduct was **"annoying"** or "indecent"--**wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.**'" (quoting [*United States v.*] *Williams,* 553 U.S. [285,] 306)).

Id. at ___, 245 P.3d at 553-54 [*Emphasis added*]. See Carrigan v. Comm'n on Ethics of Nev., 129 Nev. Adv. Op. No. 95, 313 P.3d 880, 887 (2013) (finding that the terms "reasonable" and "substantially similar" are objective and do not require "the kind of 'untethered subjective

judgments'—such as whether a defendant's conduct was **'annoying'** or 'indecent'—that the [United States] Supreme Court has invalidated as unconstitutionally vague"). [*Emphasis added*].

The State argues that NRS 207.200(1)(a) is not vague because it is tied to an intent requirement and does not punish mere accidental or inadvertent conduct. According to the State, a person who trespasses with the "intent to annoy" can be subjected to criminal punishment. This Court disagrees.

In Kramer v. Price, 712 F.2d 174 (5th Cir. 1983), the Fifth Circuit addressed a harassment statute which provided that the crime was committed if the actor "communicate[d] by telephone or in writing in vulgar, profane, obscene, or indecent language or in a coarse and offensive manner and by this action intentionally, knowingly, or recklessly annoy[ed] or alarm[ed] the recipient." The Fifth Circuit held the following:

> The State maintains that the Texas Harassment Statute is restricted to individuals who act with an intent to annoy. An intent requirement, it contends, ensures that the actor will have fair notice that his contemplated conduct is forbidden. We disagree. Specifying an intent element does not save § 42.07 [the harassment statute] from vagueness because the conduct which must be motivated by intent, as well as the standard by which that conduct is to be assessed, remain vague. Whatever Kramer's intent may have been, if she was unable to determine the underlying conduct proscribed by the statute, then the statute fails on vagueness grounds.

Id. at 178. See State v. Blair, 601 P.2d 766, 767 (Ore. 1979) (analyzing a harassment statute which defined the crime as occurring when "[a] person . . . with intent to harass, annoy, or alarm another person . . . [c]ommunicates with a person, anonymously or otherwise, by telephone, mail or other form of written communication, in a manner likely to cause annoyance or alarm"); id. at 768 ("The state and the Court of Appeals rely on the requirement of a specific intent to 'harass, annoy or alarm another person' to save the statute from impermissible vagueness. But specification of the element of intent does nothing to define what someone who wishes to harass, annoy, or alarm another may not do in pursuit of that disagreeable aim.").

Based on the above, the Court finds that the reference in NRS 207.200(1)(a) to acting with intent "to vex or annoy the owner or occupant thereof" is unconstitutionally vague.

2. "With Intent . . . to Commit any Unlawful Act"

The Court finds that no vagueness issues are created by the portion of NRS 207.200(1)(a) which criminalizes a person who "[g]oes upon the land or into any building of another with intent . . . to commit any unlawful act." See NRS 193.190 ("In every crime or public offense there must exist a union, or joint operation of act and intention, or criminal negligence.").

Other Nevada statutes already use similar language. See, e.g., NRS 205.463 (declaring that a person commits a felony if that person knowingly "[o]btains any personal identifying information of another person" and "[w]ith the intent to commit an unlawful act," uses the personal identifying information for specified purposes); NRS 205.46513(1) ("A person shall not establish or possess a financial forgery laboratory with the intent to commit any unlawful act."); cf. NRS 205.060(1) (declaring that the crime of burglary occurs when a person enters various locations "with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses").

Thus, the Court finds that the language in NRS 207.200(1)(a) which refers to the "intent . . . to commit any unlawful act" is valid.

C. Severability

The Nevada Supreme Court has distinguished between "facial vagueness" and "vagueness as applied." See Pitmon v. State, 131 Nev. Adv. Op. No. 16, 352 P.3d 655, 658 (2015) (recognizing that "[a] statute may be challenged as unconstitutional either because it is vague on its face, or because it is vague as applied only to the particular challenger") (citing Flamingo Paradise Gaming, LLC v. Chanos, 125 Nev. 502, 509-10 (2009)). A statute containing a criminal penalty is facially vague when vagueness permeates the text of the statute. Flamingo Paradise Gaming, LLC v. Chanos, 125 Nev. 502, 507 (2009). Where a statute is not facially vague, it may still be vague as applied in a particular case. See, e.g., Smith v. State, 110 Nev. 1094, 1104 (1994) (holding that jury instructions regarding NRS 200.033(8) rendered the statute unconstitutionally vague as applied).

For the reasons explained below, this Court does not believe that NRS 207.200(1)(a) is facially unconstitutional. Instead, this Court believes that the statutory subsection is only unconstitutional as applied, and that the infirmity can be cured by the doctrine of "severability."

In Sierra Pac. Power Co. v. State Dep't of Taxation, 130 Nev. Adv. Op. No. 93, 338 P.3d 1244 (2014), the Nevada Supreme Court explained the following aspects of the "severability" doctrine:

> The severability doctrine obligates the judiciary "to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional provisions." *Rogers v. Heller*, 117 Nev. 169, 177, 18 P.3d 1034, 1039 (2001) (internal quotations omitted). This preference in favor of severability is set forth in NRS 0.020(1), which charges courts with preserving statutes to the extent they "can be given effect without the invalid provision or application."[6]

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[6] In full, NRS 0.020(1) provides as follows:

> **NRS 0.020. Severability.**
> 1. If any provision of the Nevada Revised Statutes, or the application thereof to any person, thing or circumstance is held invalid, such invalidity shall not affect the provisions or application of NRS which can be given effect without the invalid provision or application, and to this end the provisions of NRS are declared to be severable.

> But a preference is not a mandate, and not all statutory language is severable. Before language can be severed from a statute, a court must first determine whether the remainder of the statute, standing alone, can be given legal effect, and whether preserving the remaining portion of the statute accords with legislative intent. *Cnty. of Clark v. City of Las Vegas*, 92 Nev. 323, 336-37, 550 P.2d 779, 788-89 (1976).

Id. at 1247.

The Court finds that the unconstitutional language can be stricken from NRS 207.200(1)(a) in the following manner:

> **NRS 207.200. Unlawful trespass upon land; warning against trespassing.**
> 1. Unless a greater penalty is provided pursuant to NRS 200.603, any person who, under circumstances not amounting to a burglary:
> (a) Goes upon the land or into any building of another with intent [~~to vex or annoy the owner or occupant thereof, or~~] to commit any unlawful act; or
> (b) Willfully goes or remains upon any land or in any building after having been warned by the owner or occupant thereof not to trespass,
> is guilty of a misdemeanor. The meaning of this subsection is not limited by subsections 2 and 4. [*Language in strikethrough font used to signify stricken words*].

As to whether this construction of the statute accords with legislative intent, the Court notes that the language at issue was apparently codified at some point before 1968[7], at a time when legislative histories were neither routinely prepared nor extensive. Nevertheless, this Court is inclined to believe that the modern Nevada Legislature would be less inclined to use nebulous words like "vex" or "annoy" in penal statutes when such terms are riddled with constitutional problems. Thus, the Court finds that the phrase "to vex or annoy the owner or occupant thereof, or" can be severed from NRS 207.200(1)(a), and that the State can be allowed to proceed under the remaining theory of prosecution in that statutory subsection.

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[7] In 1968, the Nevada Supreme Court interpreted NRS 207.200 in the case of Scott v. Justice's Court of Tahoe Township, 84 Nev. 9 (1968). Although the Court's major focus was on the portion of the statute dealing with prior warning, the dissenting justice did quote the entire language of NRS 207.200 then in existence, and the statute provided, in pertinent part, as follows:

> "1. Every person who shall go upon the land of another with intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act, or shall willfully go or remain upon any land after having been warned by the owner or occupant thereof not to trespass thereon, shall be guilty of a misdemeanor."

ORDER

Pursuant to the statements of fact and the arguments of law submitted, it is hereby ordered, adjudged, and decreed that the State's "Motion to File Second Amended Complaint" is **granted**.

It is further ordered that Defendants' Motion to Dismiss is granted in part and denied in part.

Defendants' Motion to Dismiss is granted to the extent that the phrase "to vex or annoy the owner or occupant thereof, or" is unconstitutionally vague and must be stricken from the Second Amended Criminal Complaint.

Defendants' Motion to Dismiss is denied to the extent that the Court will allow the State an opportunity to cure the above defect, under the following conditions:

(1) The State shall have the opportunity to file a Third Amended Criminal Complaint no later than 5:00 PM on **Friday, May 13, 2016**. The Third Amended Criminal Complaint must contain no reference to "vexing" or "annoying" as part of the statutory elements of Trespass, and the Third Amended Criminal Complaint must also clearly define the "unlawful act" which forms the basis of the remaining theory under NRS 207.200(1)(a).

(2) If the State does not file a timely and proper Third Amended Criminal Complaint by the above deadline, then the Court will dismiss the Second Amended Criminal Complaint and halt further proceedings in this case.

It is further ordered that, pursuant to NRS 4.235[8], Defense Counsel shall provide a copy of this Court's Order to the Office of Attorney General within 10 judicial days.

Dated this 6th **day of** May, **20** 16.

JUDGE DEBORAH J. LIPPIS

[8] See NRS 4.235 ("If a justice court holds that a provision of . . . the Nevada Revised Statutes violates a provision of the Nevada Constitution or the United States Constitution, the prevailing party in the proceeding shall provide a copy of the ruling to the Office of the Attorney General.").

ORIGINAL

FILED IN OPEN COURT
DATE: 5616
CLERK: SD

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MARIA ESCALANTE #7043062,
RAMIRO FUNEZ #7043063,

Defendants.

CASE NO: 16M03289A-B

DEPT NO: 1

SECOND AMENDED

CRIMINAL COMPLAINT

The Defendants above named having committed the crimes of TRESPASS (Misdemeanor - NRS 207.200 - NOC 53166), in the manner following, to-wit: That the said Defendants, on or about the 15th day of December, 2015, at and within the County of Clark, State of Nevada, did then and there willfully and unlawfully go upon that certain property of the RED ROCK HOTEL & CASINO, 11011 West Charleston Boulevard, Las Vegas, Clark County, Nevada, with the intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act thereon, to-wit: by distributing flyers regarding the Red Rock Hotel and Casino and its parent company Station Casinos, within the hotel room area of the Red Rock Hotel and Casino, said flyers containing inflammatory and/or damaging information about the Red Rock Hotel and Casino and its parent company Station Casinos; Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: (1) by directly committing this crime; and/or (2) by aiding or abetting one another in the commission of this crime with the intent to commit this crime, by providing counsel and/or encouragement, by the Defendants acting in concert; and/or (3) pursuant to a conspiracy to commit this crime.

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All of which is contrary to the form, force and effect of Statutes in such cases made and provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.

04/06/16

16M03289A-B/mc/L4
LVMPD EV# 151215003593
(TK1)

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Lawrence VanDyke (NV Bar No. 13643C)
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JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

MARIA ESCALANTE #7043062, and
RAMIRO FUNEZ #7043063

Defendants.

Case No. 16M-03289A-B
Dept. No. I

NOTICE OF APPEARANCE

AND

MOTION TO PLACE ON CALENDAR

Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701

On May 6, 2016, the Court entered an Order "find[ing] that the reference in NRS 207.200(1)(a) to acting with intent 'to vex or annoy the owner or occupant thereof' is unconstitutionally vague." (Order 12:1-2, May 6, 2016, on file.) While the Office of the Attorney General was not given notice by the moving party that the constitutionality of the statute was at issue prior to the Court's decision and, consequently, did not have an opportunity to be heard before the Court's Order issued, *see* NRS 30.130,[1] the Court directed Defense Counsel to provide a copy of its ruling to the Attorney General within 10 judicial days pursuant to NRS 4.235. (*Id.* at 15:18-19 & n.8).

The Court's Order may have a wide-ranging impact on Nevada statutes. It not only invalidates a portion of NRS 207.200(1)(a), a statute that may be used to charge cases involving certain conduct related to domestic violence offenses, it also calls into question a number of other statutes that utilize the same or substantially similar language. *See, e.g.*, NRS 159.0486(1)(a); NRS 193.0175; NRS 203.100; NRS 266.275(4)(b); NRS 598.0918(2). Namely, the Court's ruling may have a particularly harsh impact on

[1] ("[I]f the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard.").

workers and victims of harassment or other domestic violence related crimes. *See, e.g.*, NRS 608.190 ("A person shall not willfully refuse or neglect to pay the wages due...with the intent to annoy...the person to whom such indebtedness is due."); NRS 201.255(2) ("Every person who makes a telephone call with the intent to annoy another is...guilty of a misdemeanor.").

Accordingly, ADAM PAUL LAXALT, Attorney General of the State of Nevada, by and through the undersigned counsel, hereby enters an appearance pursuant to NRS 4.235,[2] NRS 30.130,[3] and NRS 228.120(3),[4] and requests that the above-entitled matter be placed on calendar for the purpose of proposing a briefing schedule with the input of the other involved counsel.

DATED this 11th day of May, 2016.

ADAM PAUL LAXALT
Attorney General

By: _____
Lawrence VanDyke (NV Bar No. 13643C)
Solicitor General
Jordan T. Smith (NV Bar No. 12097)
Assistant Solicitor General
100 North Carson Street
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Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701

The above-entitled matter is to be placed on the arraignment calendar on: **5/13/2016** at **8:00 a.m.**

Dated: _____ By: _____
Deputy Clerk

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[2] ("If a justice court holds that a provision of the...Nevada Revised Statutes violates a provision of the Nevada Constitution or the United States Constitution, the prevailing party in the proceeding shall provide a copy of the ruling to the Office of the Attorney General.").

[3] *See supra* note 1.

[4] ("The Attorney General may ... [a]ppear in, take exclusive charge of and conduct any prosecution in any court of this State for a violation of any law of this State, when in his or her opinion it is necessary, or when requested to do so by the Governor.").

ADAM PAUL LAXALT
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IN THE JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, STATE OF NEVADA

THE STATE OF NEVADA, Plaintiff, v. MARIA ESCALANTE #7043062, and RAMIRO FUNEZ #7043063 Defendants.	Case No.: 16M-03289A-B Dept. No.: 1

Office of the Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101-1068

CERTIFICATE OF SERVICE

I hereby certify that, on the _11th___ day of May, 2016, service of the ***NOTICE OF APPEARANCE AND MOTION TO PLACE ON CALENDAR*** was made this date by sending a true and correct copy of the same via e-mail and fax, addressed as follows:

Thomas Pitaro
thomaspitaro@yahoo.com
Fax: 702-474-4210

William Merback
William.merback@clarkcountyda.com
Fax: 702-477-2962

/s/ Gina Long
An employee of the Office of the Attorney General

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Attorneys for MARIA ESCALANTE and RAMIRO FUNEZ

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. **MARIA ESCALANTE AND RAMIRO FUNEZ,** Defendant	Case No.: 16M03289AB Dept: 1 **DEFENDANTS' REPLY TO ATTORNEY GENERAL'S NOTICE OF APPEARANCE AND MOTION TO PLACE ON CALENDAR**

COMES NOW, Defendants, **MARIA ESCALANTE AND RAMIRO FUNEZ** by and through their attorney of record, **THOMAS F. PITARO, ESQ.**, and hereby respectfully submits the following reply to Attorney General's Notice of Appearance and Motion to Place on Calendar.

This motion is made and based upon the attached Points and Authorities, all pleadings and papers on file herein, and any oral argument this Court may deem necessary.

DATED: May 12, 2016

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MARIA ESCALANTE AND RAMIRO FUNEZ

INTRODUCTION

The Office of the Attorney General ("AG's Office") has filed a "Notice of Appearance" that reads like a motion for reconsideration of the Court's May 6 Order. The AG's Office complains that it was not given notice that Maria Escalante and Ramiro Funez were defending against their prosecution by arguing, successfully, that NRS 207.200(1)(a) is unconstitutionally vague. But NRS 30.130 did not require such notice. That statute only applies to declaratory judgment actions challenging a municipal franchise or ordinance, which this is not. *Moldon v. Cty. of Clark*, 124 Nev. 507, 516, n.23188 P.3d 76, 82 (2008); *Nationstar Mortgage, LLC v. Falls at Hidden Canyon*

Homeowners Ass'n, No. 215CV01287RCJVCF, 2015 WL 7069298, at *4 (D. Nev. Nov. 12, 2015). The AG's Office's parade of horribles about domestic-violence and wage-theft victims—which it improperly raises as part of a "Notice of Appearance"—is completely hollow. The statutes that the AG's Office cites are distinguishable and do not support NRS 207.200(1)(a)'s constitutionality.

Under Justice Court Rule 11(f), a motion that has been heard and decided may not be reheard except by leave of court. The AG's Office gives no legitimate reason for this Court's May 6 Order to be reheard.

1. No notice to the AG's Office was required under NRS 30.130.

The AG's Office complains that it was not given notice of Escalante and Funez's void-for-vagueness defense to prosecution under NRS 200.100(1)(a). It argues that such notice was required under NRS 30.130. Notice of Appearance, at p. 1. But this disregards both the plain language of that statute and Supreme Court precedent interpreting it.

NRS 30.130 is part of the "Uniform Declaratory Judgments Act." NRS 30.010. It provides:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard.

NRS 30.130 (emphasis added). The Nevada Supreme Court, reasonably, has interpreted this portion of the "Uniform Declaratory Judgment Act" to apply only in declaratory judgment actions.

In *Moldon v. Cty. of Clark*, 124 Nev. 507, the plaintiffs successfully argued that it was an unconstitutional taking to divert interest earned on eminent-domain condemnation funds to a local government's general fund for public benefit pursuant under NRS 355.210. The action was not one for declaratory judgment, but one in which homeowners who had their home condemned in an eminent domain proceeding sought compensation for the interest that had been diverted. The district court held that that the plaintiffs could not challenge NRS 355.210 because they had not given notice of such a challenge under NRS 30.130. The Supreme Court rejected this argument, pointing out that NRS 30.130 only applies to "declaratory judgment" actions. *Moldon*, 124 Nev. at 516 n.23 ("The Moldons were not seeking declaratory relief with their application; they were merely seeking to recover the interest earned on the condemnation deposit.").

The Defendants in this case have not brought a declaratory judgment action. They are defending themselves from prosecution under NRS 207.200(1)(a)'s "annoy or vex" provision. The relief that they seek is the dismissal of the criminal complaint. NRS 30.130 does not apply.

Even if this were a declaratory judgment action, NRS 30.130 only requires notice in a "proceeding which involves the validity of a municipal ordinance or franchise." The federal district court for Nevada rejected reliance on the statute to disqualify a

constitutional due-process challenge to the state quiet-title procedures, noting that NRS 30.130 only applies to challenges to municipal ordinances and franchises:

> [T]he HOA asks the Court to dismiss for Nationstar's failure to notify the Attorney General of its constitutional challenge under NRS 30.130. But that statute applies only to municipal ordinances and franchises. . . . The case the HOA cites in support of its argument involved a Reno city ordinance. *See City of Reno v. Saibini*, 429 P.2d 559, 560 (Nev. 1967). This case involves no municipal ordinance or franchise.

Nationstar Mortgage, No. 215CV01287RCJVCF, 2015 WL 7069298, at *4 (internal citation omitted).

The AG's Office may not use NRS 30.130 as a basis for seeking reconsideration of the Court's May 6 Order.

2. The statutes that the AG's Office cites in its "Notice of Appearance" do not make NRS 207.200(1)(a) constitutional.

It was improper for the AG's Office to try to brief the merits of its case as part of a "Notice of Appearance." Its claim that this Court's Order endangers domestic-violence and wage-theft victims is baseless and somewhat insulting.

First, the AG's Office claims that domestic-violence victims are threatened by the Court's Order because NRS 207.200(1)(a) is sometimes invoked to protect such victims. Notice of Appearance, at p. 1. But nothing in the Court's Order prevents prosecutors from invoking the *constitutional* parts of NRS 207.200. A domestic-violence perpetrator who stayed on private property after being asked to leave, or who entered private property with the intent to commit an independently unlawful act, *see* NRS 207.200(1)(b), could be prosecuted. All that the Court's May 6 Order does is prevent the

government from relying on the patently unconstitutional "annoy or vex" portion of NRS 207.200(1)(a).

The State may not rely on an unconstitutional statute to achieve laudable public goals. The same argument that the AG's Office raises here could have been raised in *City of Las Vegas v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 118 Nev. 859, 865, 59 P.3d 477, 482 (2002), which involved a vagueness challenge to a child molestation statute, NRS 207.260. The fact that the statute's prohibition against "conduct that bothers, disturbs, irritates or harasses a minor" was intended to protect victims of child molestation did not make the statute any more constitutional. It simply meant that prosecutors needed to rely on other, constitutional statutes and that the Legislature needed to draft anti-harassment laws with more precision.1

The other statutes that the AG's Office invokes as part of its parade of horribles do not support the constitutionality of NRS 207.200(1)(a) either.

NRS 608.190 provides:

> **Willful failure or refusal to pay wages due prohibited.** A person shall not willfully refuse or neglect to pay the wages due and payable when demanded as provided in this chapter, nor falsely deny the amount or validity thereof or that the amount is due with intent to secure for the person, the person's employer or any other person any discount upon such indebtedness, or with intent to annoy, harass, oppress, hinder, delay or defraud the person to whom such indebtedness is due.

1 The Legislature did so the year after the Supreme Court ruled NRS 207.260 unconstitutional. NRS 207.260(1) now reads: "A person who, without lawful authority, willfully and maliciously engages in a course of conduct with a child who is under 16 years of age and who is at least 5 years younger than the person which would cause a reasonable child of like age to feel terrorized, frightened, intimidated or harassed, and which actually causes the child to feel terrorized, frightened, intimidated or harassed, commits the crime of unlawful contact with a child."

The term "annoy" in this statute is one of a list of unlawful *mens rea* that a person who *falsely* denies the amount of wage due may have. Many of these are constitutionally permissible and clear, such as the prohibitions against falsely denying wages due in order to "hinder" or "delay" or "defraud" a person. Nothing in the Court' May 6 Order prevents the effective use of NRS 608.190, even if there were challenged at some point in the future.

NRS 201.225(2) provides:

> 1. Any person who willfully makes a telephone call and addresses any obscene language, representation or suggestion to or about any person receiving such call or addresses to such other person any threat to inflict injury to the person or property of the person addressed or any member of the person's family is guilty of a misdemeanor.
>
> 2. Every person who makes a telephone call with intent to annoy another is, whether or not conversation ensues from making the telephone call, guilty of a misdemeanor.

Like NRS 207.200 and NRS 608.190, NRS 201.225 contains a constitutional portion that provides clear guidance for prosecutors (Section 1) and one that may—at some point in the future—be challenged as unconstitutional. If such a constitutional challenge were brought, a court might conclude that criminalizing the act of making a *private telephone call* to an *individual* with the intent to "annoy" is far different from criminalizing going to a *casino* that is open to the public with the vague intent to "annoy" *any occupant* of that casino, and that the latter provides far less guidance about criminal behavior and far more prosecutorial discretion than does the former.

The grab-bag of other statutes that the AG's Office cites do not alter the equation. NRS 159.0486(2)—a vexatious litigant statute—is a civil law, not a criminal one, and is therefore not subject to the heightened standard that applies to NRS 207.200(1)(a). *Maldonado v. Morales*, 556 F.3d 1037, 1045 (9th Cir. 2009) ("Because of the nature of criminal sanctions, '[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily on civil sanction for enforcement.'" (quoting *Winters v. New York,* 333 U.S. 507, 515 (1948)). Moreover, NRS 159.0486 independently requires that a litigant have filed a "meritless" legal action.

NRS 193.0175 uses the term "annoy" in the context of a broader, general definition of the term "malice." But "malice" is not itself a criminal act to which due process applies, and statutes that incorporate the broad definition of "malice" contain additional *mens rea* and *actus reus* elements that save them from vagueness. *See, e.g.*, NRS 206.260 ("A person who fraudulently or maliciously tears, burns, effaces, cuts, or in any other way destroys, with the intent to defraud, prejudice or injure any person or body corporate . . .").

NRS 203.100 is statute enacted in 1911 that prohibits any person from "annoy[ing] any passenger" on a "public conveyance." There is no reported instance of this statute's "annoy" provision being invoked. The statute criminalizes conduct that "annoys" passersby, precisely the thing held unconstitutional in *Coates v. Cincinnati*, 402 U.S. 611, 615-16 (1971). If it were ever invoked and then challenged, a court would

likely hold it unconstitutional under *Coates* and *City of Las Vegas v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 118 Nev. 859.

NRS 266.275 is a 1907 statute that permits city councils to "[r]egulate and prevent in all public places . . . [a]ny practice tending to annoy persons passing in such public places." It is not an independent criminal statute; it merely permits city governments to enact a category of civil regulations. City governments may exercise this prerogative by enacting ordinances that are not unconstitutionally vague.

NRS 598.0918(2) states the one engages in a "deceptive trade practice" if during a sales presentation, he or she "[r]epeatedly or continuously conducts the solicitation or presentation in a manner that is considered by a reasonable person to be annoying, abusive or harassing." This statute contains a "reasonable person" standard for "annoyance"—which NRS 207.200(1)(a) does not. Such a "reasonable person" standard can save a statute from unconstitutionality. *See Grayned v. City of Rockford*, 408 U.S. 104 (1972).

The mere existence of other statutes—with far different structures, language, and contexts—that happen to contain the term "annoy" is not a basis for finding NRS 207.200(1)(a) constitutional.

CONCLUSION

The *complaint* portion of this misdemeanor proceeding has dragged on for more than six months. The AG's Office's apparent request that the Court reconsider its thoroughly briefed and well-reasoned May 6 Order should be denied.

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JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

MARIA ESCALANTE #7043062, and
RAMIRO FUNEZ #7043063

Defendants.

Case No. 16M-03289A-B
Dept. No. I

THE ATTORNEY GENERAL'S BRIEF ON HIS ABILITY TO APPEAR AND BE HEARD

I. INTRODUCTION

The reason Defendants do not want the Office of the Attorney General to participate in defense of the constitutionality of NRS 207.200(1)(a) is obvious: They obtained a favorable ruling by failing to disclose contradictory authority, mischaracterizing case law, and superficially interpreting Nevada Supreme Court precedent without regard for their pseudo-argument's impact on other Nevada statutes. By law, the Attorney General is required to receive notice—and be heard—in all constitutional challenges to Nevada's statutes for precisely this reason. Constitutional attacks often have wide ranging implications and, in such cases, the Attorney General's interests are broader than the District Attorney's prosecutorial objectives.[1] The Attorney General has a duty to defend duly enacted legislation.[2] Therefore, the Attorney General should be allowed to brief and present arguments in support of NRS 207.200(1)(a)'s constitutionality before the Court renders a final decision.

---

[1] The District Attorney's Opposition to Defendants' Motion to Dismiss Amended Criminal Complaint made many persuasive arguments. Nonetheless, there are additional arguments to be asserted that are specific to the Attorney General's interests.

[2] Defendants' Reply to Attorney General's Notice of Appearance misses the point. The Attorney General did not suggest that NRS 207.200(1)(a) is constitutional simply because other statutes use the same or substantially similar language. The Attorney General highlighted the other comparable statutes to demonstrate that the Court's ruling has ramifications beyond the parties to this case and, thus, the Attorney General has an interest in appearing.

II. ARGUMENT

A. Defendants Were Required to Notify the Attorney General of Their Motion to Dismiss the Amended Criminal Complaint.

As the State's highest law enforcement officer, the Attorney General "has all of the powers belonging to it at [English] common law, in addition to those conferred by statute...." *State v. Moore*, 46 Nev. 65, 207 P. 75, 76 (1922). At common law, the Attorney General has a number of powers and duties, including the duty to defend the constitutionality of statutes. *See id.; see also Trustees of Rutgers Coll. in N. J. v. Richman*, 41 N.J. Super. 259, 294, 125 A.2d 10, 29 (Ch. Div. 1956) ("The Attorney General, as part of the common-law duties of his office, participates in litigation to defend or attack the constitutionality of statutes."); *State v. Chastain*, 871 S.W.2d 661, 664 (Tenn. 1994) (discussing the common law duty to defend statutes and state constitutions).

To ensure that the Attorney General has the opportunity to exercise his duty to defend the constitutionality of statutes, the Legislature enacted NRS 30.130. It provides:

> [w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. *In any proceeding* which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, *and if the statute*, ordinance or franchise *is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard.*

NRS 30.130 (emphasis added). By its plain terms, NRS 30.130 mandates that the Attorney General be served and heard "[i]n any proceeding" where a statute "is alleged to be unconstitutional." *Id.* The second clause of the statute indisputably directs that "if the statute...is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard." The statute is clear. Notice to the Attorney General is not limited to declaratory judgment actions or actions involving a municipal ordinance or franchise. *See State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) ("We must attribute the plain meaning to a statute that is not ambiguous.").

The Nevada Supreme Court has agreed that the Attorney General must be provided notice in all cases challenging the constitutionality of a statute. In *City of Reno v. Saibini*, 83 Nev. 315, 321, 429 P.2d 559, 563 (1967), a case absent from Defendants' Reply to the Attorney General's Notice of Appearance,

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the High Court recognized that NRS 30.130 is clear and unambiguous. *Id.* ("The statute is clear and needs no construction."). And, accordingly, it held that "NRS 30.130 requires the attorney general to be served with a copy of the proceedings and to be given opportunity to be heard *in a constitutional attack on any statute*, ordinance or franchise *in any proceeding*." *Id.* (emphasis added).

Because the statute is unambiguous, the statutory chapter title under which it is found is immaterial. Courts only examine chapter titles if the meaning of a statute is ambiguous. *See Thompson v. First Judicial Dist. Court, Storey Cty.*, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984) ("In construing an ambiguous statute, evidence of the legislature's intent may be gleaned from the title of the act by which the statute was enacted."); *see also Coast Hotels & Casinos, Inc. v. Nevada State Labor Comm'n*, 117 Nev. 835, 841-42, 34 P.3d 546, 551 (2001) ("The title of a statute *may* considered in determining legislative intent.") (emphasis added). NRS 30.130 is not ambiguous or unclear. *Saibini*, 83 Nev. at 321, 429 P.2d at 563. Thus, the "Declaratory Judgments" chapter title is not dispositive and notice must be provided to the Attorney General in all cases where statutes are contested on constitutional grounds.

Defendants' authority is not to the contrary. *Moldon v. County of Clark*, 124 Nev. 507, 188 P.3d 76 (2008) did not directly involve a constitutional challenge to a statute. Instead, it addressed a question about whether a statute impermissibly condoned an unconstitutional taking of property in violation of the Fifth Amendment. *Id.* at 509-10, 188 P.3d at 78-79. The subject statute authorized the county clerk to retain the accrued interest on certain amounts deposited with the district court. *Id.* at 509-10, 188 P.3d at 78-79. The Supreme Court and the parties were primarily concerned with whether an unconstitutional taking occurred; they were not focused on the constitutionality of the statute *vel non*. *Id.* at 510, 188 P.3d at 79.

The issue of notice to the Attorney General was only briefly mentioned in the last footnote of the opinion. *Id.* at 516 n.23, 188 P.3d at 82 n.23. The district court had erroneously refused to award the accrued interest to the plaintiffs due, in part, to their failure to notify the Attorney General. *Id.* But the Supreme Court indicated that notice was not required because the proceeding did not, in actuality, involve a direct attack on the statute's constitutionality. *Id.* The plaintiffs "were merely seeking to recover the interest earned on the condemnation deposit." *Id.*

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If *Moldon* has any relevancy, it supports the Attorney General's position and refutes Defendants' contention that NRS 30.130 only requires notice in disputes concerning the validity of municipal ordinances or franchises. The Supreme Court was unequivocal in *Moldon* that NRS 30.130 applies, and notice is required, "when declaratory relief is sought as to the *validity of a statute*...." *Id.* (emphasis added).

The other unpublished decision that Defendants rely upon is incorrect for the same reason. In the last paragraph of the unpublished disposition of *Nationstar Mortgage, LLC v. Falls at Hidden Canyon Homeowners Association*, No. 215CV01287RCJVCF, 2015 WL 7069298 (D. Nev. Nov. 12, 2015), the court concluded, without analysis, that NRS 30.130 did not apply to that foreclosure dispute because it "only applies to municipal ordinances or franchises." *Id.* at *4. The court cited to *Saibini, id.*, but did not consider *Saibini*'s holding (discussed above) that "NRS 30.130 requires the attorney general to be served with a copy of the proceedings and to be given opportunity to be heard *in a constitutional attack on any statute*, ordinance or franchise *in any proceeding*." 83 Nev. at 321, 429 P.2d at 563 (emphasis added). Nor did *Nationstar* distinguish *Moldon*'s statement that the Attorney General should receive notice when statutes are constitutionally challenged. 124 Nev. at 516 n.23, 188 P.3d at 82 n.23. Most egregiously, *Nationstar* did not analyze the plain text of NRS 30.130 which articulates that "if the statute...is alleged to be unconstitutional, the Attorney General shall also be served...." Consequently, to the extent *Nationstar* can be interpreted as limiting the notice requirements of NRS 30.130 to municipal ordinances or franchises, it was wrongly decided and should not be followed.

In contrast to *Maldon* and *Nationstar*, the present matter falls squarely within the class of cases where NRS 30.130 requires notice to the Attorney General. Defendants' Motion to Dismiss Amended Complaint asserted a direct facial challenge to the constitutionality of a statute, NRS 207.200(1)(a). (Defs.' Mot. Dismiss 10:26-28, Mar. 18, 2016, on file.) Defendants explicitly alleged that NRS 207.200(1)(a) is void for vagueness. (*Id.* at 7:3-11:2.) The Motion to Dismiss is undoubtedly a "proceeding" contemplated by NRS 30.130. *See Iveson v. Second Judicial Dist. Court*, 66 Nev. 145, 153, 206 P.2d 755, 759 (1949) ("A motion is a proceeding directed to a court's authority to act on a given subject."). And the outcome of Defendants' Motion hinges upon the constitutionality of NRS 207.200(1)(a). As a result, Defendants were obligated to serve a copy of the pleading on the Attorney

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General's Office and allow him to be heard before the Court rendered a decision. Defendants neglected to do so. The Attorney General should not be deprived of his statutory opportunity to be heard on constitutional issues. Therefore, the Attorney General must be allowed to brief and argue the constitutionality of NRS 207.200(1)(a) before the Court makes a final ruling.

B. The Attorney General is Permitted to Appear Pursuant to NRS 228.120(3).

Regardless of whether the Attorney General should have received notice of Defendants' Motion to Dismiss, the Attorney General is allowed to appear and participate in this action pursuant to NRS 228.120(3).[3] That statute states, "[t]he Attorney General may…[a]ppear in, take exclusive charge of and conduct any prosecution in any court of this State for a violation of any law of this State, when in his or her opinion it is necessary…." If there is a pending prosecution, the Attorney General may make an appearance. *Ryan v. Eighth Judicial Dist. Court In & For Clark Cty.*, 88 Nev. 638, 641, 503 P.2d 842, 844 (1972).

This criminal proceeding was initiated on February 4, 2016. The Attorney General was not involved in the filing of the Complaint. *Cf. Ryan*, 88 Nev. at 641, 503 P.2d at 844. Indeed, the Attorney General was wholly unaware of this proceeding until the Court directed Defendants to provide notice under NRS 4.235 of the outcome of their Motion to Dismiss. Now that the Attorney General has been notified that this ongoing criminal proceeding involves a constitutional challenge to NRS 207.200(1)(a), he deems it necessary to appear and he is statutorily authorized to participate pursuant to NRS 228.120(3). As a matter of policy, because the relief sought by Defendants implicates the constitutionality of certain statutes and issues of statewide importance, the Office of Attorney General should be permitted to be heard.

…

…

…

[3] NRS 228.120(3) was also cited in the Attorney General's Notice of Appearance but was ignored by Defendants' Reply to Attorney General's Notice of Appearance.

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III. CONCLUSION

Based upon the foregoing, the Office of the Attorney General respectfully requests that it be allowed to appear, brief, and present arguments regarding Defendants' constitutional challenge to NRS 207.200(1)(a).

DATED this 27th day of May, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Jordan T. Smith
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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of May, 2016, service of **THE ATTORNEY GENERAL'S BRIEF ON HIS ABILITY TO APPEAR AND BE HEARD** was made this date by sending a true and correct copy of the same via email and fax addressed as follows:

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/s/ Gina Long

An employee of the Office of the Attorney General

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JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

FILED
2016 JUN 24 A 11:07
JUSTICE COURT
LAS VEGAS NEVADA
BY _____ DEPUTY

THE STATE OF NEVADA, Plaintiff, vs. MARIA ESCALANTE #7043062, and RAMIRO FUNEZ #7043063, Defendants.	CASE NO.: 16M-03289A DEPT. NO.: 1 **ORDER**

This matter, having come before the Court on a "Motion to Place on Calendar" from the Office of the Attorney General, and the Court being fully advised of the premises herein, does hereby find the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 6, 2016, this Court issued an Order which found that the reference in NRS 207.200(1)(a) to acting with intent "to vex or annoy the owner or occupant thereof" is unconstitutionally vague and must be stricken from the State's Second Amended Criminal Complaint. The Court gave the State the opportunity to file a Third Amended Criminal Complaint within a specific deadline. The Court also ordered Defense Counsel to provide a copy of the Court's Order to the Office of Attorney General within 10 judicial days.

On May 11, 2016, Assistant Solicitor General Jordan Smith (hereinafter ASG Smith) filed a "Notice of Appearance and Motion to Place on Calendar" on behalf of the Office of Attorney General.

On May 12, 2016, Defendants filed a "Reply."

On May 13, 2016, ASG Smith appeared before the Court for hearing. He argued that Defense Counsel should have given the Office of the Attorney General prior notice regarding

Defendants' constitutional challenge, and he argued that the Office of the Attorney General should be allowed to brief the relevant issues in this case. Defense Counsel objected to these arguments. At the conclusion of the hearing, the Court ordered that its ruling about the constitutionality of NRS 207.200(1)(a) would be stayed and that the Court would review the latest filings in this case in order to prepare the instant Order.

On May 27, 2016, fourteen days after the Court took this matter under advisement, ASG Smith filed "The Attorney General's Brief on His Ability to Appear and Be Heard." The Court suspended its research to see if either the office of the District Attorney or defense would reply. No further pleadings were filed as of 6/20/16, and the Court again took the matter under advisement.

DISCUSSION

I. The True Nature of Smith's Motion

ASG Smith's Motion was originally styled as a "Motion to Place on Calendar." Because the Court has already calendared Smith's Motion for a hearing, the Court will now construe Smith's Motion as a "Motion to Reconsider."

Moreover, the Court will apply the following legal standards by analogy from the Nevada Supreme Court:

> We will consider rehearing when we have overlooked or misapprehended material facts or questions of law or when we have overlooked, misapplied, or failed to consider legal authority directly controlling a dispositive issue in the appeal. NRAP 40(c)(2). In Gordon v. District Court, 114 Nev. 744, 745, 961 P.2d 142, 143 (1998), we discussed the proper purpose for petitions for rehearing: "'[u]nder our long established practice, rehearings are not granted to review matters that are of no practical consequence. Rather, a petition for rehearing will be entertained only when the court has overlooked or misapprehended some material matter, or when otherwise necessary to promote substantial justice.'" (quoting In re Herrmann, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984)).

Bahena v. Goodyear Tire & Rubber Co., 126 Nev. Adv. Op. No. 57, 245 P.3d 1182, 1184 (2010).

II. NRS 4.235

NRS 4.235 declares that "[i]f a justice court holds that a provision of the . . . Nevada Revised Statutes violates a provision of the Nevada Constitution or the United States Constitution, **the prevailing party in the proceeding** shall provide a copy of the ruling to the Office of the Attorney General." [*Emphasis added*].[1]

Notably, this statute only requires the Office of the Attorney General to be notified after a justice of the peace has already ruled upon a statute's constitutionality. The statute does not contain any notice requirement prior to such a ruling.[2]

Nevertheless, ASG Smith contends that the Office of the Attorney General was required to be notified because of a different statute which the Court will address separately.

---

[1] The Court notes that Section 8 of the introduced version of Senate Bill 60 (2015) proposed to amend NRS 4.235 so that the "clerk of the court" would be required to provide the required notice to the Office of the Attorney General. Because Section 8 was eventually stricken from Senate Bill 60 (2015), the duty of notification continues to remain with the prevailing party and not with the Court.

[2] NRS 4.235 is part of a group of three statutes which are all similar. The remaining two statutes provide as follows:

> **NRS 2.165. Ruling that provision of Nevada Constitution or Nevada Revised Statutes is unconstitutional: Prevailing party to provide copy of ruling to Attorney General.**
> If the **Supreme Court** holds that a provision of the Nevada Constitution or the Nevada Revised Statutes violates a provision of the Nevada Constitution or the United States Constitution, the prevailing party in the proceeding shall provide a copy of the ruling to the Office of the Attorney General. [*Emphasis added*].
>
> **NRS 3.241. Ruling that provision of Nevada Constitution or Nevada Revised Statutes is unconstitutional: Prevailing party to provide copy of ruling to Attorney General.**
> If a **district court** holds that a provision of the Nevada Constitution or the Nevada Revised Statutes violates a provision of the Nevada Constitution or the United States Constitution, the prevailing party in the proceeding shall provide a copy of the ruling to the Office of the Attorney General. [*Emphasis added*].

The Nevada Legislature treats NRS 2.165, NRS 3.241, and NRS 4.235 as part of the same conceptual package. See NRS 228.165 ("On or before September 1 of each even-numbered year, the Office of the Attorney General shall provide to the Legislative Counsel an index of all court rulings it has received pursuant to NRS 2.165, 3.241 and 4.235 during the immediately preceding 2-year period.").

The Court emphasizes that no notice is required before either the Nevada Supreme Court or a district court finds a statute unconstitutional under NRS 2.165 and NRS 3.241.

III. NRS 30.130

NRS Chapter 30 is the Uniform Declaratory Judgments Act. See NRS 30.010 ("NRS 30.010 to 30.160, inclusive, may be cited as the Uniform Declaratory Judgments Act.").

NRS 30.130 states the following:

> **NRS 30.130. Parties.**
> **When declaratory relief is sought,** all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. **In any proceeding which involves the validity of a municipal ordinance or franchise,** such municipality shall be made a party, and shall be entitled to be heard, and **if the statute[3], ordinance or franchise is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard.** [*Emphasis added*].

ASG Smith has cited to no criminal proceeding in which NRS 30.130 has been cited as applicable, and NRS Chapter 30 contains no references whatsoever to criminal cases.

Nevertheless, ASG Smith insists that, in a criminal proceeding, if a statute is alleged to be unconstitutional, the Attorney General must be served with a copy of the proceeding[4] and is entitled to be heard. The Court disagrees with Smith for two reasons.

A. The Nature of the Underlying Action

In Moldon v. County of Clark, 124 Nev. 507 (2008), the Nevada Supreme Court considered the applicability of NRS 30.130 to an eminent-domain proceeding. The Court stated the following:

> The record reveals that the district court's decision to deny the Moldons' application for interest earned on the condemnation deposit was based in part on the Moldons' failure to serve the Attorney General under NRS 30.130 with notice of their constitutional challenge to NRS 355.210. In pertinent part, NRS 30.130 provides that when declaratory

[3] It is unclear why NRS 30.130 refers to "municipal ordinance or franchise" in the first part of the second sentence and then to a "statute, ordinance, or franchise" in the latter part of the second sentence. Regardless of whether this distinction was intentional or inadvertent, the internal inconsistency in the second sentence of NRS 30.130 creates an ambiguity which renders the statute far from clear.

[4] The definition of a "copy of the proceeding" is also unclear. The reference could be to a copy of the court minutes where constitutionality was first discussed, or the reference could be to a copy of the motion where constitutionality was first raised as an issue.

> relief is sought as to the validity of a statute, the Attorney General must be served with a copy of the proceedings. We conclude that the district court's basis for denying the Moldons' application for interest under NRS 30.130 was improper. **The Moldons were not seeking declaratory relief with their application; they were merely seeking to recover the interest earned on the condemnation deposit.**

Id. at 516 n.23. [*Emphasis added*].

The present case is not an action for declaratory relief. Instead, this is a criminal action. Therefore, NRS 30.130 does not apply.

B. The Subject of the Constitutional Challenge

In 2015, the United States District Court for the District of Nevada considered NRS 30.130 and stated the following:

> Fourth, the HOA asks the Court to dismiss for Nationstar's failure to notify the Attorney General of its constitutional challenge under NRS 30.130. **But that statute applies only to municipal ordinances and franchises.** *See* Nev. Rev. Stat. § 30.130 ("In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard."). The case the HOA cites in support of its argument involved a Reno city ordinance. *See City of Reno v. Saibini*, 83 Nev. 315, 429 P.2d 559, 560 (Nev. 1967).[5] This case involves no municipal ordinance or franchise.

Nationstar Mortgage, LLC v. Falls at Hidden Canyon Homeowners Ass'n, 2015 U.S.Dist. LEXIS 153195 (November 12, 2015). [*Emphasis added*].[6]

ASG Smith argues that the Saibini case is helpful to his position. In Saibini, the Nevada Supreme Court stated the following:

> NRS 30.130 requires the attorney general to be served with a copy of the proceedings and to be given opportunity to be heard in a constitutional attack on any statute, ordinance or franchise in any proceeding. He was served in this case and chose not to appear and be heard. He need not be made a party to the action. The statute is clear and needs no construction.

City of Reno v. Saibini, 83 Nev. 315, 321 (1967).

[5] This Court believes that the Saibini case is distinguishable for two reasons: (1) The Saibini case actually involved a challenge to a Reno ordinance, rather than a statute; and (2) the reference to NRS 30.130 being "clear" was directed to the fact that the Attorney General need not be made a party to the action in conjunction with the statutory notification.

[6] ASG Smith contends that the Nationstar Mortgage case is unpublished. However, that case is not listed as such on Lexis.

The second sentence of NRS 30.130 states that the notification requirement only applies "[i]n any proceeding which involves the validity of a municipal ordinance or franchise." The instant criminal case clearly does not involve any municipal ordinance or franchise.

The Court recognizes that NRS 30.130 goes on to say that if a "statute" is alleged to be unconstitutional, the Attorney General must be notified. However, the United States District Court acknowledged the reference to "statute" in NRS 30.130 and nevertheless concluded that NRS 30.130 applies only to municipal ordinances and franchises.

Thus, this Court finds that NRS 30.130 does not apply to a challenge to the constitutionality of the statutory language in NRS 207.200(1)(a).[7]

IV. NRS 228.120(3)

NRS 228.120(3) provides as follows:

> **NRS 228.120. Appearance before grand jury; supervision of district attorneys; prosecution of criminal cases; subpoenas.**
> The Attorney General may:
>
> . . .
>
> 3. Appear in, take exclusive charge of and conduct any prosecution in any court of this State for a violation of any law of this State, when in his or her opinion it is necessary, or when requested to do so by the Governor. . . .

The Court agrees with ASG Smith's contention that the Office of the Attorney General may "[a]ppear in, take exclusive charge of, and conduct any prosecution" when necessary. However, that legal authority does not require this Court to overturn any judicial orders that were entered prior to the date of ASG Smith's appearance. If the Office of the Attorney General is so inclined, it may take exclusive charge of the pending criminal case and later pursue appellate

[7] Although ASG Smith has cited various statutes that could be implicated by the Court's ruling from May 6, 2016, the Court emphasizes that its specific ruling only applies to NRS 207.200(1)(a) and to no other statutes.

relief or writ relief at the District-Court level. At this time, however, the Court finds that its prior Order is valid and will remain in effect.

ORDER

Pursuant to the statements of fact and the arguments of law submitted, it is hereby ordered, adjudged, and decreed that the Court's prior Order from May 6, 2016, is hereby **affirmed** and that the Motion to Reconsider filed by the Office of Attorney General is hereby **denied.**

The Court repeats its prior conclusion that Defendants' Motion to Dismiss is granted to the extent that the phrase "to vex or annoy the owner or occupant thereof, or" is unconstitutionally vague and must be stricken from the Second Amended Criminal Complaint.

Defendants' Motion to Dismiss is again denied to the extent that the Court will allow the State an opportunity to cure the above defect, under the following conditions:

(1) The State shall have the opportunity to file a Third Amended Criminal Complaint. The Third Amended Criminal Complaint must contain no reference to "vexing" or "annoying" as part of the statutory elements of Trespass, and the Third Amended Criminal Complaint must also clearly define the "unlawful act" which forms the basis of the remaining theory under NRS 207.200(1)(a).

(2) If the State does not file a timely and proper Third Amended Criminal Complaint, then the Court will dismiss the Second Amended Criminal Complaint and halt further proceedings in this case.

(3) This matter is scheduled for Friday, July 8, 2016, at 8:30 a.m., Justice Court, Dept. 1. If a Third Amended Complaint is to be filed, filing shall take place on or before July 8, 2016.

(4) If the office of the Attorney General wishes to take charge of the prosecution of this case, ASG Smith shall so advise the Court and counsel on or before July 8, 2016.

Dated this 23rd **day of** June, **20** 16.

JUDGE DEBORAH J. LIPPIS

CERTIFICATE OF SERVICE

STATE VS. ESCALANTE & FUNEZ
16M03289AB

I hereby certify that on June 24th, 2016, a true and correct copy of an **ORDER** entered on 6/22/2016, regarding the above-referenced case was sent via email to:

William Merback, Esq.
Chief Deputy District Attorney
William.merbeck@clarkcountyda.com

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Attorney for defendants

I declare under penalty of perjury that the foregoing is true and correct.

Deborah A. Boyer
Judicial Executive Assistant to
Judge Deborah J. Lippis

Adam Paul Laxalt (NV Bar No. 12426)
Attorney General
Jordan T. Smith (NV Bar No. 12097)
Assistant Solicitor General
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
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JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

MARIA ESCALANTE #7043062, and
RAMIRO FUNEZ #7043063

Defendants.

Case No. 16M-03289A-B
Dept. No. I

MOTION TO STAY CASE PENDING WRIT PETITION TO NEVADA SUPREME COURT

Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701

I. INTRODUCTION

On June 24, 2016, this Court entered Findings of Fact and Conclusions of Law holding that NRS 30.130 does not apply to Defendants' challenge to the constitutionality of NRS 207.200(1)(a) and, therefore, the Office of the Attorney General was not required to receive notice of the challenge prior to the Court's ruling that the statute is unconstitutional. Respectfully, the Attorney General disagrees with the Court's interpretation of NRS 30.130 and intends to seek writ relief from the Nevada Supreme Court. Because the Attorney General's ability to seek redress may be hampered if this case proceeds prior to resolution of the writ by the Nevada Supreme Court, the Attorney General requests that this matter be stayed pending the outcome of the writ.

Staying further proceedings in this Court pending resolution of the State's writ will also further judicial economy. If the Nevada Supreme Court in the writ proceedings concludes that this Court was without jurisdiction to issue its May 6, 2016 ruling on the constitutionality of NRS 207.200(1)(a), any further proceedings in this case taken in the shadow of that ruling will need to be repeated. The Attorney General respectfully asks this Court to grant a stay to avoid that inefficiency and to ensure that the Nevada Supreme Court has the opportunity to clarify this important issue of law of statewide importance.

In the alternative, the Attorney General respectfully requests that this Court stay further proceedings in this case for enough time to allow the Attorney General to seek a stay from the Nevada Supreme Court.

This Motion is made and based upon all of the papers and pleadings on file herein, the attached Points and Authorities, and any oral argument allowed at the time of the hearing if deemed necessary.

DATED this 7th day of July, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Jordan T. Smith
Jordan T. Smith (NV Bar No. 12097)
Assistant Solicitor General
100 North Carson Street
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NOTICE OF MOTION

TO ALL PARTIES AND COUNSEL:

Please take notice that the undersigned will bring the foregoing **MOTION TO STAY CASE PENDING WRIT PETITION TO NEVADA SUPREME COURT** on the 8 day of July, 2016, at the hour of 8:30 a.m./p.m. in Department No. 1 of the above Court, or as soon thereafter as counsel may be heard.

DATED this 7th day of July, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Jordan T. Smith
Jordan T. Smith (NV Bar No. 12097)
Assistant Solicitor General
100 North Carson Street
Carson City, NV 89701-4717
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II. ARGUMENT

A. Standard for Granting a Stay Pending a Writ.

Nevada Rule of Appellate Procedure 8(a) generally requires a party seeking a stay to first move in the lower court before requesting relief from the Nevada Supreme Court. *See* NRAP 8(a). This rule applies to writ petitions. *Hansen v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). When considering a stay, courts weigh a number of factors: (1) whether the object of the writ petition will be defeated if the stay is denied; (2) whether petitioner will suffer irreparable injury if the stay is denied; (3) whether the real party in interest will suffer irreparable harm if a stay is granted; and (4) whether petitioner is likely to prevail on the merits of the writ petition. NRAP 8(c). No single factor is dispositive and, if one or two factors are especially strong, they may counterbalance other weak factors. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). These same factors apply in criminal proceedings. *State v. Robles-Nieves*, 129 Nev. Adv. Op. 55, 306 P.3d 399, 401 (2013).

B. The Attorney General is Likely to Prevail on the Merits of the Writ Petition.

The Attorney General believes that he is likely to prevail on the merits on the question of whether "NRS 30.130 requires the attorney general to be served with a copy of the proceedings and to be given opportunity to be heard in a constitutional attack on any statute, ordinance or franchise in any proceeding." *City of Reno v. Saibini*, 429 P.2d 559, 563 (1967); *see also Moldon v. Cty. of Clark*, 188 P.3d 76, 82 n.23 (2008) ("In pertinent part, NRS 30.130 provides that when declaratory relief is sought as to the validity of a statute, the Attorney General must be served with a copy of the proceedings."). Most other state supreme courts that have interpreted other state statutes like NRS 30.130 have reached the same conclusion.

Even if that was not so, "a movant does not always have to show a probability of success on the merits, the movant must 'present a *substantial case* on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.'" *See Hansen*, 116 Nev. at 659, 6 P.3d at 987 (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)) (emphasis added).

The Attorney General has clearly presented "a substantial case" on a "serious legal question" about whether his office is entitled to notice before a court declares a statute unconstitutional. Just as

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this Court looked to another unpublished, nonbinding decision as persuasive in issuing its ruling, this Court's decision may have implications on the Attorney General's statutory rights going forward in other cases. And even though this Court has disagreed with the Attorney General's interpretation of NRS 30.130 and Nevada case law, the Attorney General has made "a substantial case on the merits." This Court even acknowledged in its Order that certain aspects of NRS 30.130 are, at minimum, unclear. 6/24/16 Order at 4 n. 3 (stating "[i]t is unclear why NRS 30.130 refers to "municipal ordinance or franchise' in the first part of the sentence and then to [statute] .... in the later part of the sentence."); *id.* at 4 n.4 (stating definition of "a copy of the proceeding is unclear"). The Nevada Supreme Court should be given an opportunity to clarify these issues before this case continues.

C. The Object of the Writ Petition Will Be Defeated and the Attorney General Will Suffer Irreparable Harm if a Stay is Denied.

These two factors can be considered together. "Although irreparable or serious harm remains part of the stay analysis, this factor will not generally play a significant role in the decision whether to issue a stay." *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39.

The Attorney General considers the nature of the harm here to be of the first order: the notice-of-constitutional-attack provision is essential to the Attorney General's Office performing perhaps its most solemn and unique role in Nevada constitutional law. At a minimum, then, a stay would allow for the resolution of this single question of statewide importance.

The Attorney General believes that NRS 30.130 provides the Attorney General with a right to be heard *before* a court rules on the constitutionality of a state statute. If this case proceeds while the writ petition is pending, the Attorney General will be deprived of that opportunity. Even if the Nevada Supreme Court ultimately grants the writ and thereby effectively rewinds this case back to a point sometime before this Court's May 6 ruling, aside from the significant waste of this Court's and the litigants' resources, the Attorney General will be forced to participate in these proceedings for some period of time with the constitutional question already decided—and decided against the Attorney General. If, as the Attorney General believes, NRS 30.130 provides the Attorney General with the right to receive notice and participate in a case *before* a constitutional question is decided, the loss of this procedural right is irreparable harm.

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D. Real Parties in Interest Will Not Suffer Any Harm if a Stay is Granted.

This stay is sought solely to challenge this Court's interpretation of NRS 30.130 and does not bear on merits of the criminal proceeding. In contrast to the Attorney General, the Defendants will not suffer any harm if a stay is granted. During the pendency of the stay, the criminal prosecution of the defendants will be paused and no harm will be inflicted. This is confirmed by the Court's earlier stay while the parties briefed the issues related to the Attorney General's notice and ability to be heard. It should be emphasized that the Attorney General is not seeking this stay to hamper the defense, and the Defendants' rights to a speedy trial under the Sixth Amendment and NRS 178.556 are not implicated. *Robles-Nieves*, 129 Nev. Adv. Op. 55, 306 P.3d at 404-06. The Attorney General's interest in this important issue of statewide importance is much broader than just this particular case.[1]

III. CONCLUSION

Based upon the foregoing, the Office of the Attorney General respectfully requests that Court stay this proceeding pending resolution of his writ petition to the Nevada Supreme Court.

DATED this 7th day of July, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Jordan T. Smith
Jordan T. Smith (NV Bar No. 12097)
Assistant Solicitor General
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1100

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Carson City, NV 89701

[1] The Attorney General's Office attempted to contact opposing counsel regarding this Motion but was unable reach them before filing.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2016, service of **MOTION TO STAY CASE PENDING WRIT PETITION TO NEVADA SUPREME COURT** was made this date by sending a true and correct copy of the same via email and fax addressed as follows:

W. Jake Merbeck
Chief Deputy District Attorney
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/s/ Gina Long

An employee of the Office of the Attorney General

100 N. Carson Street
Carson City, NV 89701

REGISTER OF ACTIONS
CASE NO. 16M03289A

State of Nevada vs. ESCALANTE, MARIA

Case Type: **Citation**
Date Filed: **02/04/2016**
Location: **JC Department 1**

RELATED CASE INFORMATION

Related Cases
16M03289B (Multi-Defendant Case)

PARTY INFORMATION

Defendant **ESCALANTE, MARIA**

Lead Attorneys
Thomas F. Pitaro
Retained
7023829221(W)

State of Nevada **State of Nevada**

CHARGE INFORMATION

Charges: ESCALANTE, MARIA	Statute	Level	Date
1. Trespass, not amounting to burglary [53166]	207.200	Misdemeanor	12/15/2015
2. Vagrancy [56760]	12.32.030	Misdemeanor	12/15/2015

EVENTS & ORDERS OF THE COURT

DISPOSITIONS

05/06/2016 (Judicial Officer: Lippis, Deborah J.)
2. Vagrancy [56760]
Dismissed

OTHER EVENTS AND HEARINGS

02/04/2016 **Multi-Defendant Case**
02/04/2016 **CTRACK Track Assignment JC01**
02/04/2016 **CTRACK Case Modified**
Jurisdiction/DA; CaseType/C;
02/04/2016 **Criminal Complaint**
02/04/2016 **Amended Criminal Complaint**
02/04/2016 **Filed Under Seal**
02/05/2016 **Summons Issued In Lieu Of Arrest**
02/12/2016 **Comment**
Defendant was given a Holiday (2/15/16 to appear. Summons in lieu issued for 2/16/16.
02/16/2016 **Arraignment** (8:00 AM) (Judicial Officer Lippis, Deborah J.)
No Bail Posted
Result: Matter Heard
02/16/2016 **Counsel Confirms as Attorney of Record**
D. Marcello, Esq.
02/16/2016 **Arraignment Completed**
Defense Advised of Charges on Criminal Complaint, Waives Reading of Criminal Complaint
02/16/2016 **Court Continuance**
Status Check on Conflict Waiver
02/16/2016 **Minute Order - Department 01**
02/16/2016 **Discovery Given to Counsel in Open Court**
02/26/2016 **Status Check** (8:00 AM) (Judicial Officer Lippis, Deborah J.)
No bail posted
Result: Matter Heard
02/26/2016 **Waiver**
Waiver of Conflict of Interest filed in open court.
02/26/2016 **Future Court Date Stands**
4/11/16 9am Bench Trial
02/26/2016 **Minute Order - Department 01**
03/08/2016 **Notice**
of Witnesses
03/16/2016 **Notice**
Supplemental Notice of Witnesses
03/18/2016 **Motion to Dismiss**
motion to dismiss amended criminal complaint
03/18/2016 **Motion**
motion for discovery
03/23/2016 **Motion** (8:00 AM) (Judicial Officer Lippis, Deborah J.)

No Bail Posted
Result: Matter Heard
03/23/2016 **Motion to Dismiss**
Defense motion to dismiss amended complaint - motion continued
03/23/2016 **Comment**
Briefing Schedule: State's opposition due April 6, 2016 Defense's reply due April 15, 2016 Decision May 6, 2016
03/23/2016 **Future Court Date Vacated**
April 11, 2016
03/23/2016 **Minute Order - Department 01**
04/07/2016 **Opposition**
to defendant's motion to dismiss amended criminal complaint
04/11/2016 *CANCELED* **Bench Trial** (9:00 AM) (Judicial Officer Lippis, Deborah J.)
Vacated
No bail posted
04/13/2016 **Reply to Opposition**
to motion to dismiss filed by Thomas Pitaro
04/27/2016 **Opposition to Motion**
for discovery
05/06/2016 **Decision** (8:00 AM) (Judicial Officer Lippis, Deborah J.)
No Bail Posted
Result: Matter Heard
05/06/2016 **Notice of Entry Of Order**
05/06/2016 **Side Bar Conference Held**
05/06/2016 **Motion by State to File an Amended Criminal Complaint**
Granted
05/06/2016 **Amended Criminal Complaint**
Second Amended Complaint
05/06/2016 **Discovery Given to Counsel in Open Court**
05/06/2016 **Status Check**
State will decide if they will file a Third Amended Complaint.
05/06/2016 **Comment**
Court finds a portion of the Second Amended Complaint constitutionally vague.
05/06/2016 **Minute Order - Department 01**
05/06/2016 **Miscellaneous Filing**
Findings of Fact and Conclusions of Law filed in open court.
05/11/2016 **Motion to Place on Calendar**
to enter an appearance and for the purpose of proposing a briefing schedule with the input of the other involved counsel
05/12/2016 **Reply**
to Attorney General's notice of appearance
05/13/2016 **Status Check** (8:00 AM) (Judicial Officer Lippis, Deborah J.)
No bail posted
Result: Matter Heard
05/13/2016 **Comment**
Appearance by Assistant Attorney General Jordan Smith
05/13/2016 **Comment**
The Attorney General filed a Notice of Appearance and Motion to Place on Calendar. The Attorney General's office argues that it should have been notified of this constitutional challenge and allowed to brief issue. The Defense objected to this Notice. Assistant District Attorney Merback indicated his office will be filing a Third Amended Criminal Complaint based on the Court's previous ruling. Pursuant to the parties' request, the Court's Order finding a portion of the statute unconstitutional is stayed. The Court will review the District Attorney's pleading and the Defense's Opposition, and prepare the appropriate Orders. The Office of the District Attorney does need to file a Third Amended Criminal Complaint until the Court addresses these new issues.
05/13/2016 **Minute Order - Department 01**
05/13/2016 **Future Court Date Vacated**
05/20/2016 *CANCELED* **Status Check** (8:00 AM) (Judicial Officer Lippis, Deborah J.)
Vacated - per Judge
No bail posted
05/27/2016 **Brief**
the attorney general's brief on his ability to appear and be heard
06/24/2016 **Order**
FOF and Conclusions of Law emailed to parties. db
06/28/2016 **Further Proceeding - Not Calendared** (8:00 AM) (Judicial Officer Lippis, Deborah J.)
No bail posted
Result: Matter Heard
06/28/2016 **Future Court Date Vacated**
8/5/16
06/28/2016 **Minute Order - Department 01**
07/07/2016 **Motion**
motion to stay case pending writ petition to nevada supreme court
07/08/2016 **Status Check** (8:30 AM) (Judicial Officer Lippis, Deborah J.)
No Bail Posted
08/05/2016 *CANCELED* **Status Check** (8:00 AM) (Judicial Officer Lippis, Deborah J.)
Vacated
No Bail Posted