

INDECENCY SELLS. . . BUT IT COMES AT AN UNFORTUNATE PRICE: A LOOK AT WHETHER GAMING AUTHORITIES CAN REGULATE ADVERTISING

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I. INTRODUCTION

Tourists that come to Las Vegas to experience the lights, magnificent hotels, non-stop gambling, and amazing shows may find it hard to believe that not too long ago, some of these gaming establishments marketed their entertainment to families.¹

Tourists may also find it incredulous that Las Vegas once set its “market sights” on families because, even before arriving, most tourists have heard slogans like “Sin City” or “What Happens Here, Stays Here.” If it happens to be the tourist’s first visit, he only has to drive a few blocks from the airport or a few miles on Highway I-15 to be grateful that he did not bring the children along. Nobody can escape the indecent content that is displayed on billboards advertising burlesque shows, gentlemen’s clubs, and nightclubs in Las Vegas. Gaming establishments that previously marketed to families changed to this type of advertising because they quickly learned from others in the industry that it is not a family-oriented entertainment that sells in Las Vegas, but a sexual-oriented entertainment.

Some of the billboards at issue portray women wearing no or very minimal clothing. Others portray women in suggestive poses implying sexual activity. Many of these indecent billboards displayed around Las Vegas advertise nightclubs. The majority of nightclubs do not have gaming licenses. However, these nightclubs lease space from well-known gaming establishments and include the gaming establishment’s name on the billboard. Because of this relationship, viewers could correlate this type of advertising with the gaming industry.

However, sexual marketing contradicts the state’s gaming policy and the duties of the Nevada Gaming Commission (“Commission”) and the State Gaming Control Board (“Board”). The state’s gaming policy goal is to “protect the

* J.D Candidate, May 2013, William S. Boyd School of Law, University of Nevada, Las Vegas. I would like to thank Professor McAfee for his thoughtful insight. I would also like to thank my three boys, Easton, Caden, and Miles, for being my motivation to make this world a better place. Above all, I would like to thank my wife, Linsi, for her love and support. Having her by my side made this possible.

¹ Bonnie Neely & Bill Neely, *Las Vegas, The Entertainment Capital of the World for Travel Adventures*, REAL TRAVEL ADVENTURES WEB MAGAZINE, http://www.realtraveladventures.com/favoritefinds/entertainment_capital_of_the_world_for_travel_adventures.htm.

public health, safety, *morals*, good order and general welfare of the inhabitants of the State” (emphasis added).² Although nightclubs do not have gaming licenses and they claim that the material on the billboards is constitutionally protected, the Commission and the Board have the authority to regulate the nightclubs’ methods of operation as to the content on the billboards.

First, this note will explain why the gaming industry must maintain a good reputation with Nevada residents and how the Board and Commission are structured to accomplish that goal. Second, this note will show that the Commission and the Board not only have the authority to regulate the nightclub advertisements, but a duty to regulate the advertisements to attain the public policy goal of maintaining good standing with the public. Third, this note will propose that the offensive material on the billboards is not constitutionally protected under the First Amendment. Finally, this note will illustrate the harmful effect of the advertisements on the inhabitants of the State.

II. HISTORY OF NEVADA GAMING

Unquestionably, the gaming industry is vital to the State of Nevada,³ and because of this key role, the legislature has enacted laws in order to preserve it.⁴ The gaming industry, like other industries, requires the legislature and other regulatory agencies to walk a fine line.⁵ In order for the gaming industry to be successful, gaming establishments need some slack to run an effective business. On the other hand, the gaming industry requires strict regulation to maintain a good reputation with Nevada residents. As history shows, when the State was unable to regulate the gaming industry, Nevadans did not approve of gambling, and the gaming industry suffered.

The Nevada gaming industry experienced growing pains while learning how to walk this fine line.⁶ It all started in 1859, when silver and gold were discovered near Virginia City.⁷ During this time, the population expanded from 200 settlers to 20,000 in only two years.⁸ Because of this population explosion, gambling and prostitution went unchecked.⁹ Although Nevada was not yet a state, the territorial legislature enacted laws that prohibited gambling.¹⁰ These laws, however, had the opposite effect and gambling flourished.¹¹ Therefore, in 1869, having since achieved statehood, the state legislature passed laws that allowed gambling because the Nevada Assembly Committee thought that “the only effectual method of restricting gambling is to license it heavily.”¹²

² NEV. REV. STAT. § 463.0129(1)(d) (2011).

³ LIONEL SAWYER & COLLINS, NEVADA GAMING LAW 3 (3rd ed. 2000).

⁴ See NEV. REV. STAT. ch. 463 (2011) (providing the overall regulatory scheme for gaming in Nevada).

⁵ See LIONEL SAWYER & COLLINS, *supra* note 3, at 3.

⁶ *Id.* (stating that it took sixty years for Nevada to achieve the balance).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² *Id.*

In the beginning, one could argue that gambling was not restricted that “heavily.”¹³ The only regulation required establishments to obtain licensure to operate a game, but anyone could get a license.¹⁴ The legislature enacted more laws shortly thereafter: banning gambling on Sundays; raising the legal age of gambling to 21; and prohibiting cheating.¹⁵ Later laws reflected the public’s attitude that gambling was to be “tolerated and not encouraged.”¹⁶

These laws, however, were not enough for “The Anti-Gambling League of Reno,” a group consisting of religious leaders, civic leaders, educators, politicians, and women’s temperance organizations.¹⁷ The Anti-Gambling League convinced the legislature to outlaw gaming in addition to prostitution, which was always closely associated with gaming.¹⁸ As a result, in 1909, the legislature enacted a law that made owning a casino a felony and gave casinos twenty months to cease gambling operations.¹⁹

However, the legislature’s actions could not prevent gambling from continuing. Almost immediately after the twenty months had passed, illegal gambling sprouted up in different locations.²⁰ In 1915, legal gaming slowly started creeping back into the public view as a source of revenue when the legislature allowed the use of slot machines as long as the prize did not exceed \$2 in value.²¹ Although citizens and state officials knew many establishments allowed illegal gambling and state officials did nothing to prevent it, the legislature was unwilling to legalize it because of the anti-gambling attitude in Nevada at the time.²²

The anti-gambling view did not change until the Great Depression.²³ Like most states, Nevada suffered from declining state revenues during this period.²⁴ The public saw the potential in casino gaming and thought it could generate more business in the state and earn much needed tax revenues for Nevada.²⁵ The traumatic consequences of the Great Depression coupled with the declining support of anti-gambling groups gave hope that the gaming industry would rise again.²⁶

Phil Tobin, an Assemblyman from Humboldt County, was the daring lawmaker credited with introducing the bill to legalize gambling in 1931.²⁷ However, he was not the man who wrote the bill.²⁸ The bill’s author was from Elko, but he did not introduce the bill because of trepidation that the public

¹³ *Id.* at 6.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 8.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 9.

²¹ *Id.*

²² *Id.* at 10.

²³ *Id.* at 9.

²⁴ *Id.*

²⁵ *Id.* at 9.

²⁶ *Id.*

²⁷ *Id.* at 10.

²⁸ *Id.*

would vote out any lawmaker that supported gaming.²⁹ The bill was created because anti-gambling laws were hard to enforce and gaming was needed to help earn tax revenues.³⁰ Additionally, illegal gambling corrupted local officials and law enforcement.³¹ Despite major opposition, the bill passed in 1931.³² While the bill did not attempt to regulate the gaming industry itself, it mandated that local authorities regulate gaming.³³

This time around, the legislature and local authorities did a better job of maintaining control of the industry.³⁴ In the 1940s, Nevada experienced another population boom due to air conditioning, advancements in the automobile industry, and airline flights to Las Vegas.³⁵ During this period, the gaming industry substantially increased, and the modern era of Nevada gaming officially began.³⁶ In order to monitor the industry, the legislature deemed the Nevada Tax Commission to be the regulatory authority for the gaming industry and gave it broad power to regulate.³⁷

This potentially profitable market attracted the good and, unfortunately, the bad, as organized crime figures started to infiltrate the gaming industry.³⁸ Additionally, crooked smaller-scale gaming operations led the Tax Commission to impose stricter requirements to attain a gaming license.³⁹ However, the Tax Commission failed to keep organized crime members out of the industry.⁴⁰ Consequently, the gaming industry faced federal intervention and once again, a possible shutdown.⁴¹ Thus, the Legislature and other gaming officials initiated changes to stave off the federal government and save the industry.⁴²

In 1955, the Board was created, under the watchful eye of the Tax Commission, to investigate and enforce gaming regulations.⁴³ In 1958, the Nevada Gaming Commission ("Commission") was created as an independent agency to replace the Tax Commission.⁴⁴ This was a bold move as the industry was losing respect because newspaper and magazine articles claimed that organized crime members had permanently established themselves in the industry.⁴⁵ However, the combined efforts of the Commission and Board demonstrated that Nevada officials alone could regulate gaming.⁴⁶ The gaming industry was able to avoid potentially detrimental investigations from the Federal Govern-

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 10.

³³ *Id.* at 10-11.

³⁴ *See id.* at 11-12.

³⁵ *Id.* at 12.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 13.

³⁹ *See id.* at 15-17.

⁴⁰ *See id.* at 17.

⁴¹ *Id.* at 18.

⁴² *See generally id.* at 18-27.

⁴³ *Id.* at 18-19.

⁴⁴ *Id.* at 22-23.

⁴⁵ *Id.* at 23.

⁴⁶ *Id.* at 26.

ment that would create negative publicity for the industry.⁴⁷ Since then, the legislature, the Commission, and the Board have successfully regulated the gaming industry, as it has become an important part of Nevada's economy.⁴⁸

The history of the gaming industry in Nevada demonstrates the importance of maintaining the trust and confidence of the public.⁴⁹ When Nevada residents lost respect for the industry, it shut down and had the difficult challenge of re-establishing itself as beneficial to the State of Nevada.⁵⁰ Moving forward, the Commission and Board have the responsibility to regulate the industry to preserve the respect of the public and to allow the continued health and growth of the industry.⁵¹

III. VITAL ROLES OF THE GAMING BOARD AND GAMING COMMISSION

Nevada has a distinct system of regulating its gaming industry: a two-tiered system of authority.⁵² The Board does most of the legwork in investigating the qualifications of a potential gaming licensee or any potential complaint, but the Commission has the final say.⁵³

The Board acts as the police and the prosecutor.⁵⁴ It investigates any potential violation and defends its findings before the Commission.⁵⁵ The Commission acts as the judge and jury.⁵⁶ It has the authority to accept or reject the Board's recommendations.⁵⁷

The gaming industry in Nevada is essential to the State's economy and the general welfare of its residents.⁵⁸ Nevada has learned that the continued growth and success of the gaming industry depends on trust and confidence from the public, particularly because of its storied past.⁵⁹ As a result, the Nevada Legislature declared that gaming establishments shall "not unduly impact the quality of life enjoyed by residents of the surrounding neighborhoods."⁶⁰ Similarly, the Commission and the Board require that gaming establishments operate in a manner suitable to protect the "public health, safety, morals, good order and general welfare" of the public.⁶¹ Accordingly, the Board has the authority to observe a gaming licensee's conduct to ensure that it complies with all regulations⁶² and the Commission has the power to fine a gaming licensee whenever reasonable.⁶³

⁴⁷ *Id.* at 23-24.

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² LIONEL SAWYER & COLLINS, *supra* note 3, at 29 (3d ed. 2000).

⁵³ *Id.* at 29-30.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 30.

⁵⁷ *Id.*

⁵⁸ NEV. REV. STAT. § 463.0129(1)(a) (2011).

⁵⁹ *Id.* at § 463.0129(1)(b).

⁶⁰ *Id.*

⁶¹ Nev. Gaming Comm'n Reg. 5.010(1) (2011).

⁶² NEV. REV. STAT. § 463.220(3) (2011); Nev. Gaming Comm'n Reg. 5.040 (2011).

⁶³ NEV. REV. STAT. § 463.1405(4) (2011).

A licensee may be engaging in an unsuitable method of operation when it fails “to conduct advertising. . . in accordance with decency, dignity, good taste, honesty and inoffensiveness”⁶⁴ However, most of the indecent material on billboards stems from nightclubs, the majority of whom do not have gaming licenses. This forces the Commission and the Board to balance safeguarding the image of the gaming industry with protecting the nightclubs’ First Amendment right of freedom of speech.

IV. COMMISSION’S AUTHORITY TO REGULATE.

Traditionally, the Board’s power to investigate potential violations of gaming laws and the Commission’s power to sanction an establishment only encompassed establishments with gaming licenses.⁶⁵ Yet in 2004, the Commission disciplined a gaming licensee for the actions of an unlicensed entity merely leasing space from the gaming licensee.⁶⁶ This decision by the Commission shows that its power has expanded and that protecting the image of gaming is vitally important.⁶⁷

Opbiz, LLC, doing business as Planet Hollywood Resort & Casino (“Planet Hollywood”), holds a non-restricted gaming license.⁶⁸ On April 13, 2007, Planet Hollywood entered into an agreement with The Opium Group, LLC doing business as Privé.⁶⁹ Planet Hollywood agreed to lease to Privé three areas on its premises to operate a nightclub.⁷⁰ Privé opened its doors in 2007.⁷¹ However, Planet Hollywood’s relationship with Privé did not last long.⁷² Gaming regulators began investigating the nightclub’s operations after receiving a letter from a former Privé employee.⁷³ The letter complained about the use of marijuana and cocaine at the nightclub.⁷⁴ The complainant also claimed to have witnessed the management of Privé sneaking underage girls into the club and ordering club employees to serve them alcohol.⁷⁵ Ronald Lyons, former head of security for the club, stated that Privé had a different standard for patrons that were big spenders at the club. Specifically, big spenders were allowed to use drugs on the premise while others were forced to leave.⁷⁶ Other former

⁶⁴ Nev. Gaming Comm’n Reg. 5.011(4) (2011).

⁶⁵ See Liz Benston, *Is the Party Over for Prive?*, LAS VEGAS SUN, July, 29, 2009, <http://www.lasvegassun.com/news/2009/jul/29/party-over-prive>; see Memorandum from the State Gaming Control Bd. on Nightclub Activities and Entertainment Selection (Feb. 7, 2006), available at <http://online.liebertpub.com/doi/abs/10.1089/glre.2010.14103>.

⁶⁶ Benston, *supra* note 65.

⁶⁷ *Id.*

⁶⁸ Complaint for Disciplinary Action, State Gaming Control Bd. v. Opbiz, LLC., No. 08-18, at 5 (Nev. Gaming Comm’n July, 9, 2009), available at <http://gaming.nv.gov/modules/showdocument.aspx?documentid=3026>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Benston, *supra* note 65.

⁷² See Steve Green, *Privé Losing its Lease at Planet Hollywood*, LAS VEGAS SUN, Apr. 8, 2010, <http://www.lasvegassun.com/news/2010/apr/08/lease-problems-planet-hollywood/>.

⁷³ Benston, *supra* note 65.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

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employees claim that they saw prostitution, in addition to rampant drug use.⁷⁷ They also say that management allowed pimps and drug dealers into the club for patrons to use their services.⁷⁸ Additionally, Privé employees allegedly removed some inebriated patrons from the club and left them unattended.⁷⁹

After the Board discovered this evidence and made other findings, the Board filed a complaint against Planet Hollywood with the Commission.⁸⁰ The complaint included the following allegations: Privé removed inebriated patrons from the club and left them unattended; Privé patrons were using and/or under the influence of controlled substances; Privé employees physically and sexually assaulted patrons of Privé; and Privé allowed minors to enter the club and served them alcoholic beverages.⁸¹ The complaint also referenced an incident that occurred on May 14, 2008, when the Clark County Department of Business License issued Privé citations for allowing topless and lewd activity.⁸²

The type of conduct engaged in at Privé – a nightclub located on the property of a gaming licensee – is something Board members feared would bring a bad reputation to the gaming industry. Prior to the agreement between Planet Hollywood and Privé, the Board was concerned with recurring events at nightclubs that shared the same property as a licensee.⁸³ Specifically, the Board was worried about “excessive inebriation, drug distribution and abuse, the involvement of minors, and the handling of those individuals who become incapacitated while at the club.”⁸⁴ On February 7, 2006, the Board issued a letter to all non-restricted licensees advising them that “the [B]oard will hold the licensee accountable for any regulatory violations that occur within or outside a night club located on the property of the licensee.”⁸⁵ The letter also stated that the gaming licensee would be accountable for violations that the gaming licensee knew or should have known about.⁸⁶

Planet Hollywood could not argue ignorance as to the contents of the letter. Licensees are responsible for knowing all regulations and ignorance does not excuse violations.⁸⁷ Furthermore, the Commission had evidence that Planet Hollywood received the letter because representatives from Planet Hollywood attended classes conducted by the Enforcement Division of the Gaming Board.⁸⁸ In addition, the letter was unambiguous and clearly stated the responsibilities of a gaming licensee as to the conduct of a tenant nightclub. Therefore, the Commission held Planet Hollywood responsible for the violations of Privé.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Benston, *supra* note 65; Green, *supra* note 72.

⁸⁰ See Complaint for Opbiz, *supra* note 68.

⁸¹ *Id.* at 6-10.

⁸² *Id.* at 10.

⁸³ Memorandum from the State Gaming Control Bd., *supra* note 65.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Nev. Gaming Comm’n Reg. 5.030 (2011).

⁸⁸ Complaint for Opbiz, *supra* note 68, at 6.

The conduct by the management and employees of Privé⁸⁹ was not consistent with the “public health, safety, morals, good order and general welfare” of citizens of Nevada.⁹⁰ According to the complaint, Planet Hollywood’s

“failure to prevent [this conduct] reflects or tends to reflect poorly on the reputation of gaming in the State of Nevada and/or acts as a detriment to the development of the gaming industry and/or reflects or tends to reflect discredit upon the State of Nevada or the gaming industry.”⁹¹

In the end, Planet Hollywood agreed to pay \$500,000 to the Board for Privé’s actions and admitted to not taking action to prevent or correct them.⁹²

Thus, the Commission is willing to hold gaming licensees responsible for the acts of certain unlicensed entities, like Privé, because a good reputation is so vital to the gaming industry. As Dr. Tony Alamo, a Commissioner said, “there’s been a philosophical shift because we’re holding a landlord responsible for the actions of a tenant – something we hadn’t done before. I think the industry had received the message.”⁹³

This decision is monumental because the Commission’s power now reaches entities that do not have a gaming license. Moreover, the Board and the Commission have the authority to regulate the actions of a tenant to a gaming licensee. The question now is whether these regulatory agencies can regulate the content on billboards displayed by these nightclubs.

V. REGULATION OF ADVERTISING

The Commission together with the Board decided to regulate the operations of gaming licensees to ensure that the licensees would not act in a way that would give a bad reputation to the gaming industry.⁹⁴ One regulated operation is the method of advertising.⁹⁵ The relevant regulation states that advertising must be conducted in accordance with “decency, dignity, good taste. . .and inoffensiveness.”⁹⁶ Offensive advertising became an issue when the Hard Rock Hotel and the Palms Casino battled over market share of the younger generation of Las Vegas visitors.⁹⁷

A. *The Hard Rock Case*

In 2003, during the time of the National Finals Rodeo, the Hard Rock displayed a billboard depicting a female dropping her underwear and the caption: “GET READY TO BUCK ALL NIGHT.”⁹⁸ The same year, the Hard Rock produced another racy billboard depicting a naked female between the

⁸⁹ *See id.*

⁹⁰ NEV. REV. STAT. § 463.0129(1)(d) (2011).

⁹¹ Complaint for Opbiz, *supra* note 68, at 6.

⁹² Benston, *supra* note 65.

⁹³ *Id.*

⁹⁴ *See* Nev. Gaming Comm’n Reg. 5.011 (2011).

⁹⁵ *Id.* at 5.011(4).

⁹⁶ *Id.*

⁹⁷ Adrienne Packer, *Panel Hears Billboard Complaints*, LAS VEGAS REV.-J., Mar. 19, 2004, at 1B.

⁹⁸ Complaint for Disciplinary Action, State Gaming Control Bd. v. Hard Rock Hotel Inc., No. 04-01, at 6 (Nev. Gaming Comm’n Jan. 21, 2004).

mouth and chest.⁹⁹ The naked model was holding a pair of dice that strategically concealed only portions of her chest.¹⁰⁰ This billboard included the caption: “WE SELL USED DICE.” The billboards were featured in TV news programs causing the Clark County Licensing Bureau to take action against these ads.¹⁰¹

In the beginning of 2004, the Board also took action.¹⁰² Following an investigation, the Board filed a three-count complaint against the Hard Rock.¹⁰³ One count for the sexually suggestive billboards described above and two counts for other ads that allegedly implied cheating and promoted using prescription drugs.¹⁰⁴ This type of advertising, the Board argued, was not conducted in accordance with decency and inoffensiveness and, therefore, could damage the image of the gaming industry.¹⁰⁵

Additionally, the Hard Rock failed to comply with a previous order from the Commission in 2002.¹⁰⁶ As part of its punishment for a prior violation, the Commission required the Compliance Committee to review and approve the questionable elements in the Hard Rock’s advertisements.¹⁰⁷ The Hard Rock did not submit the above advertisements to the Compliance Committee and therefore violated the agreement.¹⁰⁸

The Board argued that the Hard Rock’s actions could negatively affect the repute of the gaming industry and could harm the industry’s development.¹⁰⁹ Therefore, the Board recommended that the Hard Rock receive a fine for each count.¹¹⁰ On April 22, 2004, the Board, the State Attorney’s Office, and the Hard Rock reached a stipulated settlement agreement requiring the Hard Rock to pay \$100,000 for each count.¹¹¹ Additionally, the Hard Rock agreed to be more diligent in involving the Compliance Committee when making decisions on advertising.¹¹² The Board then submitted the agreement to the Commission for approval.¹¹³

However, the Commission did not see eye-to-eye with the Board on this issue. In May of 2004, the Commission rejected the settlement that both parties previously agreed on.¹¹⁴ The Commission dismissed the first two counts and urged both parties to draft another agreement to settle the remaining issue.¹¹⁵

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 7.

¹⁰² David Thompson, *The Hard Casino: An In-Depth Observation*, NEV. OBSERVER, Vol. 1 No. 23, Oct. 1, 2004, available at <http://www.nevadaobserver.com/Archive/041001/Featurestory.htm>.

¹⁰³ *Id.*

¹⁰⁴ Complaint for Hard Rock Hotel, *supra* note 98, at 4-7.

¹⁰⁵ *See id.* at 7.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at Exhibit C.

¹⁰⁸ *Id.* at 7.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 8.

¹¹¹ Thompson, *supra* note 102.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

The Commission dismissed the first two counts because (1) it did not agree that the ads promoted cheating, and (2) it found that while the ads may have alluded to prescription drug use, using prescription drugs is not illegal.¹¹⁶ Furthermore, the Commission did not dismiss the third count because it thought the ads were indecent or offensive, but because the Hard Rock failed to involve the Compliance Committee in reviewing the ads.¹¹⁷ Both parties eventually reached an agreement that the Hard Rock would pay a \$100,000 fine, use the Compliance Committee for all types of advertising, and develop standards for the Compliance Committee to effectively review any questionable future ads.¹¹⁸ The Commission approved the settlement on November 19, 2004.¹¹⁹

The Commission usually does not overturn a decision by the Board,¹²⁰ but it has the difficult task of regulating the industry to maintain public confidence while still allowing a gaming licensee slack to run an effective business. In the Hard Rock case, the Board argued that these ads would bring disrepute to the gaming industry.¹²¹ However, what tipped the scale in this case was the fact that the licensee had a strong constitutional argument: the Hard Rock argued that censorship of the ads would violate its First Amendment right of freedom of speech.¹²²

In the end, Commission Chairman Peter Bernhard, defended the decision by arguing that the Commission needed to protect the agency's regulatory purposes.¹²³ He stated that while the main purpose of the Commission is to strictly regulate the industry in order to maintain the public's trust and confidence, strict regulation cannot violate gaming licensees' constitutional rights.¹²⁴ Thus, the Commission must walk a fine line between maintaining a good reputation with Nevada citizens and preserving the constitutional rights of the gaming licensees. The most difficult aspect of walking this line is determining where the line is.

B. *Walking the (Constitutional) Line*

The First Amendment of the Constitution reads, "Congress shall make no law. . . abridging the freedom of speech, or of the press."¹²⁵ Pursuant to the Fourteenth Amendment and applicable case law, the First Amendment also

¹¹⁶ *Id.*

¹¹⁷ Rod Smith, *Nevada Gaming Commission: Hard Rock Action Wins Praise*, CASINO CITY TIMES, Aug. 3, 2004, <http://www.casinocitytimes.com/article/nevada-gaming-commission-hard-rock-ad-issues-unresolved-54347>.

¹¹⁸ Stipulation For Settlement and Order, State Gaming Control Bd. v. Hard Rock Hotel, Inc, No. 04-01, at 2, Exhibit 1 (Nev. Gaming Comm'n Oct. 25, 2004), available at <http://gaming.nv.gov/modules/showdocument.aspx?documentid=3065>.

¹¹⁹ *See id.*

¹²⁰ Thompson, *supra* note 102.

¹²¹ Smith, *supra* note 117.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ U.S. CONST. amend. I.

prohibits state and local governments from restricting the freedom of speech.¹²⁶ Therefore, it is difficult for the Board and Commission to enforce Nevada Gaming Regulation 5.011(4), which prohibits indecent, disreputable, or offensive advertising. An alleged violator could argue that the law is unconstitutional because the law violates the freedom of speech or expression. However, the First Amendment does not protect all types of speech equally; some types of speech are less protected, and others are not protected at all.¹²⁷ The ads on the billboards at issue in the Hard Rock case can be analyzed under two separate categories of speech: commercial speech and sexually oriented speech.

i. Commercial Speech

When explaining why the Commission overturned the Board's recommendation to discipline the Hard Rock for indecent and offensive advertising, the Commission stated that censoring the ads would violate the Hard Rock's freedom of commercial speech.¹²⁸ To determine whether speech is protected as commercial speech, a court must decide if the speech can be considered commercial and if the government may regulate that particular type of commercial speech.¹²⁹ Originally, commercial speech was not protected under the First Amendment.¹³⁰ However, over time, commercial speech has become protected, but it is less protected than political speech.¹³¹

a. Nightclub Billboards are Classified as Commercial Speech

A court would almost certainly find that nightclub's billboards, like those in the Hard Rock case, would be classified as commercial speech. In order for material to be classified as commercial speech, the material must: (1) be an advertisement of some form; (2) refer to a specific product; and (3) the speaker must have an economic motivation for the speech.¹³² In *Bolgers v. Youngs Drug Products Corp.*, the Supreme Court held that the defendant's pamphlets that generally explained condoms and detailed its specific products were commercial speech.¹³³ The Court reasoned that because the pamphlets were a type of advertisement that referenced a specific product for the economic benefit of the company,¹³⁴ the pamphlets were properly classified as commercial speech.

The billboards advertising nightclubs are similar to the pamphlets advertising condoms in *Youngs*. Billboards, like pamphlets, are a form of advertisement. Moreover, the text and images on the nightclub billboards reference a specific product or service. Finally, the speaker (the nightclub) is economically motivated to attract potential customers to pay to enter and spend money inside

¹²⁶ U.S. CONST. amend. XIV, § 1; *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968) (showing the test to determine whether the right can be incorporated to apply to state governments under the 14th Amendment).

¹²⁷ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 1017 (4th ed. 2011).

¹²⁸ Smith, *supra* note 117.

¹²⁹ See CHERMERINSKY, *supra* note 127, at 1124.

¹³⁰ *Id.* at 1121.

¹³¹ *Id.* at 1122, 1128 (citing *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989)).

¹³² See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983).

¹³³ *Id.* at 66 n.13, 68.

¹³⁴ *Id.* at 66-67.

the club. Therefore, a court will most likely rule that the billboards are a type of commercial speech because a nightclub can prove that billboards are an economically motivated type of advertisement specifically referencing its product.

b. Government Agencies Can Regulate Billboards.

There are four types of commercial speech that the government may regulate: (1) advertisements that promote illegal activity; (2) advertisements that are false and deceptive; (3) true advertisements that inherently risk becoming false and deceptive; and (4) any other advertising to achieve their goals.¹³⁵ The Hard Rock billboards did not promote illegal activity, they were not false or deceptive and they did not carry a risk of becoming false or deceptive. However, a government agency, the Commission in this case, may have a legitimate interest in limiting or censoring the billboards.

In order for a government agency to constitutionally regulate commercial speech, the government agency has the burden of proving that its interest is substantial and is directly advanced by the regulation.¹³⁶ Additionally, the regulation must be narrowly tailored to achieve the desired objective.¹³⁷ For example, in *Central Hudson Gas*, the government agency prohibited an electrical utility from promoting the use of electricity.¹³⁸ The government had an interest in conserving energy and preventing inequities in the company's rates.¹³⁹ The Supreme Court analyzed whether the government's interest was substantial and directly advanced by the regulation.¹⁴⁰ The Court held that while these interests were substantial, the regulation was not narrowly tailored to the State's interests.¹⁴¹

Here, the Commission's interest – to assure that the gaming industry maintains a good image and reputation with Nevada citizens – is substantially similar to the government's interest in *Central Hudson Gas*. Furthermore, the Commission's regulation prohibiting indecent and offensive behavior in advertising is distinguishable from the regulation in *Central Hudson Gas* because the regulation of advertising has a direct link to maintaining a good reputation. When the gaming industry failed to maintain a good reputation with Nevada residents in the past, the industry was shut down.¹⁴² Therefore, the Commission and the Board determined it necessary to strictly regulate how gaming licensees advertise because indecent or offensive ads could adversely affect the industry.¹⁴³

Although the Nevada Resort Association does not think Hard Rock's billboards are damaging to the industry's reputation,¹⁴⁴ the potential disrepute of the gaming industry depends on one's perspective. The billboards more than

¹³⁵ CHEMERINSKY, *supra* note 127, at 1124.

¹³⁶ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 557, 564 (1980).

¹³⁷ *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

¹³⁸ *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 558.

¹³⁹ *Id.* at 568-69.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 571-72.

¹⁴² LIONEL SAWYER & COLLINS, *supra* note 3, at 8.

¹⁴³ See Complaint for Hard Rock Hotel, *supra* note 98.

¹⁴⁴ Smith, *supra* note 117.

likely did not damage the industry's reputation from a tourist's viewpoint because, chances are, the tourist left the children at home. However, the gaming industry should be concerned with maintaining a good reputation with Nevada residents. The voice of the citizens shut down the gaming industry in the past, and the controversial content on the billboards could cause the residents to lose confidence in the gaming industry again.

For example, on March 18, 2004, not long after the Hard Rock billboards started popping up around the valley, 300 concerned citizens packed themselves into the lobby of the Grant Sawyer Building to beg the Commission to take action against indecent billboards.¹⁴⁵ This meeting was organized by mothers and attended by representatives of the Nevada Concerned Citizens.¹⁴⁶ They feared that the inappropriate billboards were driving away potential business and, more importantly, threatening to pollute the minds of their children.¹⁴⁷ These fears were similar to those of the citizens in the early nineteenth century who voted to shut down the gaming industry. If enforcement of the regulation is challenged, a court will likely find that the Commission's interest is substantial and that the regulation is directly related to its purpose because the billboards can harm the gaming industry by bringing it into disrepute. Given that the residents have shown they have the power to shut down the industry and an interest in tasteful advertising, the Commission must carefully consider the effect of the advertising on Nevada residents.

In regulating commercial speech, a government agency no longer has to show that the regulation is the least restrictive means to achieve its desired objective.¹⁴⁸ The government agency need only show that the regulation is narrowly tailored to achieve its desired objective.¹⁴⁹ In *Board of Trustees of State University of New York v. Fox*, the State University of New York ("SUNY") enacted regulations that governed the use of school property.¹⁵⁰ Specifically, one of the regulations prohibited commercial enterprises from operating on the campus or in the facilities.¹⁵¹ American Future Systems, Inc. ("AFS"), is a company that sold housewares and marketed its products by hosting "Tupperware parties" in the homes of prospective buyers.¹⁵² While an AFS representative was conducting a demonstration in a student's dormitory room, the Campus police forced her to leave and eventually arrested her for violating this regulation.¹⁵³ The Supreme Court ruled that the lower court erred in using the least restrictive means test.¹⁵⁴ The Court held that if the regulation is narrowly tailored to achieve its desired objective, then the government agency could decide how the regulation may be employed.¹⁵⁵

¹⁴⁵ Packer, *supra* note 97, at 1B; Thompson, *supra* note 102.

¹⁴⁶ Packer, *supra* note 97, at 1B.

¹⁴⁷ *Id.*

¹⁴⁸ *See Fox*, 492 U.S. 469.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 471.

¹⁵¹ *Id.* at 471-72.

¹⁵² *Id.* at 472.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 485.

¹⁵⁵ *See id.* at 480.

Nevada Gaming Regulation 5.011(4) prohibits indecent advertising. This regulation helps the Commission achieve its desired objective: to maintain a good reputation with Nevada's citizens.¹⁵⁶ Although this may not be the least restrictive method of maintaining repute, this method is narrowly tailored because the regulation only restricts advertising. Therefore, a court will likely rule that this regulation is sufficiently narrowly tailored to achieve its desired objective of assuring that the gaming industry maintains repute with the citizens of Nevada.

Similarly, it is likely that the Commission may regulate the content of advertisements. The Commission has a substantial interest in assuring that the gaming industry maintains a good reputation, and regulating the content of billboards directly advances this objective. Additionally, the regulation is narrowly tailored because it only restricts advertising. Therefore, a court will likely rule that the Commission may regulate the content of billboards.

ii. Sexually Oriented Speech

Three hundred people attended a meeting before the Commission to express their distaste for the racy billboards displayed throughout the valley.¹⁵⁷ One concerned citizen explained that she had "a difficult time shaking the images from her head" despite the effort of trying to divert her eyes.¹⁵⁸ She stated, "We need to protect our minds from the pollution we see in our community."¹⁵⁹ Another citizen was concerned about the effects that the billboards would have on young children.¹⁶⁰

a. Obscenity

The Supreme Court has ruled that obscenity is not protected speech under the First Amendment because it carries no redeeming social value,¹⁶¹ yet the Court has had difficulty defining obscenity.¹⁶² In *Miller v. California*,¹⁶³ the Court formulated a conclusive test to define obscenity. A Court must determine:

"(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."¹⁶⁴

Nevada state law defines sexual display as "(1) [Depicting] in a patently offensive way ultimate sex acts, normal or perverted, actual or simulated. (2)

¹⁵⁶ Nev. Gaming Comm'n Reg. 5.011(4).

¹⁵⁷ Packer, *supra* note 97.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

¹⁶¹ *Roth v. United States*, 354 U.S. 476, 485 (1957).

¹⁶² *CHEMERINSKY supra* note 129, at 1052.

¹⁶³ *Miller v. California*, 413 U.S. 15, 15 (1973).

¹⁶⁴ *Id.*

[Depicting] in a patently offensive way masturbation, excretory functions, sadism or masochism. (3) Lewdly exhibits of the genitals.”¹⁶⁵

A court will likely find that the billboards appeal to the prurient interest. Prurient interest typically means material that excites lustful thoughts.¹⁶⁶ One of the billboards that the Hard Rock displayed featured a naked female model between the chest and chin holding a pair of dice that strategically concealed portions of her chest. The other billboard featured a female model standing next to a bed and dropping her underwear. Both of these billboards almost assuredly incite lustful thoughts, not only because of what they display, but also because of their intent. As such, a court will likely rule that the billboards appeal to the prurient interest. Further, a court will also likely rule that the billboards lack any literary, artistic, political or scientific value. The billboards were used for commercial purposes, not to render value to the literature, arts, political or science categories.

Although the billboards appealed to the prurient interest, the billboards did not depict offensive sexual conduct. Offensive sexual conduct includes sexual acts, such as, masturbation, excretory functions, sadism, masochism, or exhibiting genitals.¹⁶⁷ The billboards will just barely slide under the “obscenity fence” because although they show nudity and imply sexual conduct, they do not display patently offensive sexual conduct nor do they exhibit the genitals. As such, a court will likely find that the billboards do not depict offensive sexual conduct. Therefore, a court will probably hold that the billboards are not obscene and that the billboards’ speech is protected under the First Amendment.

VI. EXCEPTION TO FIRST AMENDMENT PROTECTION

The Supreme Court has held that the government can still regulate some types of sexual material that do not reach the standard of obscenity.¹⁶⁸ For instance, the Court has allowed the government to regulate child pornography.¹⁶⁹ It has also approved of zoning laws that prohibit adult stores from being near from any residential zone, church park or school.¹⁷⁰ Additionally, the Court has held that government agencies can regulate indecent or profane material over the broadcast media or in schools.¹⁷¹ The policy behind these holdings is to protect children from indecency.

A. Zoning Laws

The Supreme Court has indicated there can be sexually explicit material that fails the obscenity test but is low-value speech. In such circumstances, the government is given more deference to regulate low-value speech even though

¹⁶⁵ NEV. REV. STAT. § 201.235(c)(1)-(3) (2011).

¹⁶⁶ *Roth*, 354 U.S. at 487 n.20.

¹⁶⁷ NEV. REV. STAT. § 201.235(c)(1)-(3) (2011).

¹⁶⁸ CHEMERINSKY, *supra* note 127, at 1048.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1059.

¹⁷¹ *Id.* at 1049.

the First Amendment protects it.¹⁷² One method that the Court has allowed the government control this type of speech is through zoning ordinances.¹⁷³

For example in *Young v. American Mini-Theatres, Inc.* the Court upheld a local government's ordinance that, among other restrictions, prohibited adult theaters from being in residential areas.¹⁷⁴ The Court reasoned that the sexually explicit material had a lesser value and therefore, the local government had more leeway in determining how to regulate it.¹⁷⁵ Similar to the sexually explicit material of the adult theaters in *Young*, the Court would likely deem the content on the Hard Rock billboards to be sexually explicit. Thus, the Commission should have more latitude in regulating billboards, including the latitude to limit the locations of billboards to areas where children are less likely to be exposed to them.

B. Broadcast Media

Another area of speech that warrants less constitutional protection is broadcast media. In *F.C.C. v. Pacifica Foundation*, the Court had the innocence of children in mind when it held that broadcasting media warrants the most limited First Amendment protection.¹⁷⁶ In *Pacifica*, the Federal Communications Commission ("FCC") threatened to sanction a radio station for airing a "patently offensive" monologue that repeated a variety of indecent language.¹⁷⁷ The Court held that the FCC did not infringe upon the radio stations First Amendment right because broadcast media has a pervasive presence in the lives of Americans and it is uniquely accessible to children.¹⁷⁸

The Court held that since children can easily access broadcast media, special treatment for indecent broadcasting is justified.¹⁷⁹ The Court respected the government's interest in protecting the welfare of children and allowing parents to govern their own household.¹⁸⁰ Broadcast media is pervasive because citizens are exposed to it not only in public, but also in their own home where their privacy right outweighs any intruder's First Amendment right.¹⁸¹ The content on the Hard Rock billboards is more pervasive and intrusive to children than television or radio. Parents can control, to a degree, what a child sees or hears by preventing children from watching or listening to certain channels during certain times of the day. However, preventing exposure to indecent billboards is arguably more difficult for parents because they would have to avoid driving by these billboards. This task can be impossible because these types of billboards may be anywhere. Therefore, the indecent content on billboards should receive less protection from the First Amendment even though it is not classified as obscene.

¹⁷² *Id.* at 1058.

¹⁷³ *Id.*

¹⁷⁴ *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 72-73 (1976).

¹⁷⁵ *See id.* at 70-71.

¹⁷⁶ *See FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

¹⁷⁷ *Id.* at 726.

¹⁷⁸ *Id.* at 748-49.

¹⁷⁹ *Id.* at 750.

¹⁸⁰ *Id.* at 749.

¹⁸¹ *Id.* at 748.

VII. DAMAGING EFFECTS OF OBSCENE MATERIAL

According to Nevada Revised Statute § 463.0129, all gaming establishments must be licensed to “protect the public health, safety, morals, good order and general welfare of the inhabitants of the State.”¹⁸² The indecent content on billboards can affect employment in Nevada, but even more pressing is the negative effect that the obscene material can have on children.

A. *Negative Effect on Employment*

When the Hard Rock ran the ad campaign in 2003 featuring naked female models and implying sexual activity, many mothers and representatives from the Nevada Concerned Citizens voiced their disapproval.¹⁸³ One concerned mother protesting the ads argued that her husband has a difficult time recruiting employees for his company.¹⁸⁴ She explained that once the wives of the job candidates see the billboards when given a tour of the community, they are immediately turned off and do not want to move to Las Vegas.¹⁸⁵ However, these mothers and the Nevada Concerned Citizens were not the only groups that complained about the ad campaign that the Hard Rock ran in 2003. The Hard Rock’s own employees reported that the billboards negatively affected them.¹⁸⁶

Female blackjack dealers at the Hard Rock regularly suffered harassment from patrons at the tables.¹⁸⁷ However, these employees explained that the harassment escalated during the time that Hard Rock displayed these billboards.¹⁸⁸ While the Rodeo ad ran, the female employees were victims of comments like “ride em cowgirl!” “buck this bronco,” or “how about a ride?”¹⁸⁹

The Dice Ad was also a catalyst for harassing speech and conduct.¹⁹⁰ Male customers made comments like: “Come blow on my dice” or “I’d like to lick your dice” in the presence of female craps dealers or other female customers.¹⁹¹ Additionally, the ad was placed on room keys and one female employee said that she was propositioned on two different occasions while male customers prominently displayed their room keys.¹⁹²

These incidences show the negative effect that indecent billboards can have on employment. Consequently, because of the negative effect on employment, the health, morals and general welfare of the inhabitants of Nevada are affected also.

¹⁸² NEV. REV. STAT. § 463.0129(1)(d) (2011).

¹⁸³ Packer, *supra* note 97, at 1B.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Ann C. McGinley, *Harassing “Girls” at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229, 1246 (2007).

¹⁸⁷ *Id.* at 1234.

¹⁸⁸ *Id.* at 1246.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

B. *Negative Effect on Children*

As mentioned above, the task of preventing children from exposure to indecent billboards can be difficult to almost impossible. If a parent must drive by an indecent billboard, the parent is practically incapable of preventing the young passengers from exposure to the indecent material. The effects that indecent material has on children can be severe.¹⁹³

With so much sexual material readily accessible to children, they are becoming more “sexualized.”¹⁹⁴ Psychologists and researchers say that it affects young girls in particular because they are shaping how they view themselves and how others view them.¹⁹⁵ A study in 2007 by the Women’s Foundation of California showed that young women and girls have a hard time seeing value in themselves and thus look outward for validation.¹⁹⁶ Therefore, when girls are exposed to indecent material it affects their identity, behavior, and opportunity.¹⁹⁷ Experts also say that sexualization devalues children’s accomplishment, intelligence, and character.¹⁹⁸

Joan Campbell, a Family and Child Therapist, explained that children who are exposed to sexual material and become sexualized prematurely can exhibit symptoms of children who have been molested without ever being a victim.¹⁹⁹ Additionally, exposure to pornography hinders children’s ability to form healthy relationships later in life.²⁰⁰ This especially impacts young boys.²⁰¹ This type of material sends the message that self-gratification is more important than establishing relationships.²⁰² Boys also develop a decrease in respect for women and objectify them.²⁰³

Early exposure to sexual material has led to an increase of child-on-child sexual abuse.²⁰⁴ The Durban Childline Sexual Abuse Treatment Center reported that in 2001, 42% of sexual assaults against children were committed by adolescents and children younger than 13.²⁰⁵ The report claimed this increase of child-on-child abuse was repeated exposure to pornographic material.²⁰⁶ Similarly, adult child abusers frequently attribute their behavior to, among other factors, exposure to sexual material at an early age.²⁰⁷ Additionally, repeated exposure to pornography during childhood can lead to pornogra-

¹⁹³ Lois Collins & Sara Lenz, *The End of Innocence: The Cost of Sexualizing Kids*, DESERET NEWS, Sept. 18, 2011, <http://www.deseretnews.com/article/700180194/The-end-of-innocence-The-cost-of-sexualizing-kids.html>.

¹⁹⁴ *See id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ S.T.O.P., *The Harmful Effects of Pornography on Children*, <http://www.stop.org.za/articles/The%20effects%20of%20porn%20on%20children.htm> (last visited Feb. 9, 2013).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

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phy addictions as well as sex addictions later in life.²⁰⁸ Research has shown that the common denominator in most cases for these types of addictions is exposure to pornography during childhood.²⁰⁹

These facts show that indecent material displayed on billboards can affect the health, safety, morals, and overall general welfare of inhabitants of Nevada, particularly young children. Therefore, the Commission has a duty to regulate it.

VII. CONCLUSION

History has shown that the gaming industry must maintain the confidence of Nevada residents. The gaming industry has been shut down because Nevada residents voiced their disapproval and the Legislature passed laws to prohibit gaming. Accordingly, the Commission has the responsibility to ensure that the gaming licensees' actions do not bring disrepute to the industry.

Therefore, the Commission has the duty and the authority to regulate the indecent content displayed on billboards by gaming establishments or lessees of gaming establishments. Although the billboards may be protected under the First Amendment, the Commission's interest in protecting the gaming industry and Nevada residents outweighs the protection of the First Amendment. Therefore, the Commission should be allowed to regulate the indecent content displayed on billboards.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

