NEVADA'S CLEAN INDOOR AIR ACT – A COMPARISON AND A QUESTION: IS THE NCIAA CONSTITUTIONAL?

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I. INTRODUCTION

The anti-smoking movement has reached Nevada in the form of the Nevada Clean Indoor Air Act ("NCIAA" or "Act").[1] In 2005, Nevada voters placed an initiative on the ballot to outlaw smoking in certain public places for the stated purpose of "[p]rotecting children and families from secondhand smoke in most public places, excluding stand-alone bars and gaming areas of casinos."[2] Known as the NCIAA, the initiative contained both criminal sanctions and civil penalties for noncompliance.[3]

Since the Act's passage in the November 2006 general election, business owners have resisted compliance and challenged the new law. For example, in December 2006, a group of tavern owners requested an injunction against the Nevada Attorney General, Clark County District Attorney, and numerous law enforcement agencies to preclude enforcement of the Act on constitutional grounds.[4] As a result, in February 2007, Judge Douglas Herndon of the Eighth Judicial District Court of Clark County declared the criminal component of the NCIAA unconstitutionally vague, but upheld the civil provisions of the Act.[5] The tavern owners continue to challenge the remaining provisions of the NCIAA as a civil statute in their appeal to the Nevada Supreme Court, further discussed in section III of this Note.[6] The defendants also appealed the district court's injunction against the criminal component of the Act.[7] Some of the specific constitutional challenges to the NCIAA as a civil statute are claims that it violates the equal protection clauses of both the United States and Nevada

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[1] NEV. REV. STAT. § 202.2483 (2007).

[2] ASSEM. 2005-I.P. 1, 73d Sess., § 1 (Nev. 2005).

[3] NEV. REV. STAT. § 202.2483.

[4] *See* Plaintiffs' Complaint for Injunctive & Declaratory Relief, Fame Operating Co., Inc. v. Chanos, No. 06-A532434 (Nev. 8th Jud. Dist. Ct. Dec. 5, 2006) [hereinafter Tavern Owners' Complaint].

[5] Order Granting Summary Judgment in Part, Denying Summary Judgment in Part, *Fame Operating Co.*, No. 06-A532434 (Nev. 8th Jud. Dist. Ct. Feb. 27, 2007).

[6] Notice of Appeal, *Fame Operating Co.*, No. 06-A532434 (Nev. 8th Jud. Dist. Ct. Apr. 13, 2007) [hereinafter Notice of Appeal I]; Notice of Appeal, *Fame Operating Co.*, No. 06-A532434 (Nev. 8th Jud. Dist. Ct. Mar. 29, 2007) [hereinafter Notice of Appeal II].

[7] Defendant Chanos' Notice of Appeal, *Fame Operating Co.*, No. 06-A532434 (Nev. 8th Jud. Dist. Ct. Apr. 11, 2007) [hereinafter Notice of Appeal III].

Constitutions by relying on unfair distinctions between casinos, distinctions not reasonably related to accomplishing the purpose of the Act.[8] Using this argument, opponents to the NCIAA contend that the Act discriminates among similarly situated businesses by its definition of casinos, which are exempt from the Act's provisions.[9] Furthermore, opponents of the NCIAA argue that the Act violates the due process clauses of both the United States and Nevada Constitutions because its language is too vague to provide adequate notice of what actions the NCIAA prohibits.[10]

This Note will discuss the casino exemption and other constitutional challenges to the NCIAA, concluding that the Nevada Supreme Court should uphold the constitutionality of the civil components of the Act against the pending due process challenge for vagueness, and grant the constitutional challenge against civil enforcement of the Act on equal protection grounds. Section II gives a history of tobacco legislation and the NCIAA, including some comparisons between the NCIAA and similar legislation in other states. Section III provides an overview of pending litigation, focusing on several cases challenging the constitutionality of the NCIAA. Section IV offers two parts analyzing the NCIAA and its implications. The first part analyzes two main cases in depth. The second part discusses enforcement and the steps by business owners to allow smoking in their establishments while complying with the Act, and also offers some less invasive ways to encourage tavern owners to go smoke-free.

II. HISTORICAL DEVELOPMENT

Tobacco use has been a part of American culture since colonial times. However, it was not until the mid-1900s that people became aware of the health hazards associated with smoking tobacco.[11] In the 1990s, the focus on the health hazards associated with smoking broadened to include the hazard to others caused by secondhand smoke.[12] This section will give an overview of the country's history of tobacco use and the resulting legislation, followed by a discussion of the origins of the NCIAA and a brief comparison to other states' clean indoor air acts.

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[8] *See* Tavern Owners' Complaint, *supra* note 4, at 3, 7-8.

[9] *Id.* at 7. *See also* NEV. REV. STAT. § 202.2483(9)(a) (2007) (defining "casino" as "an entity that contains a building or large room devoted to gambling games or wagering on a variety of events. A casino must possess a nonrestricted gaming license as described in [Nevada Revised Statutes, section] 463.0177 [(2007)] and typically uses the word 'casino' as part of its proper name").

[10] *See* Application for Temporary Restraining Order & Motion for Preliminary Injunction at 11-12, *Fame Operating Co.*, No. 06-A532434 (Nev. 8th Jud. Dist. Ct. Dec. 5, 2006); Defendant, Bent Barrel, Inc. d.b.a. Bilbo's Bar & Grill Opposition to Plaintiff's Motion for Preliminary Injunction, Sands v. Bent Barrel, Inc., No. 07-A540305 (Nev. 8th Jud. Dist. Ct. May 7, 2007) [hereinafter Bilbo's Opposition].

[11] MARTHA A. DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS 9 (2d ed. 2005).

[12] Peter D. Jacobson & Lisa M. Zapawa, *Clean Indoor Air Restrictions: Progress and Promise*, *in* REGULATING TOBACCO 207, 208-11 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

A. America's History of Tobacco Use

Tobacco use in the United States dates back to before the arrival of the first Europeans in North America, as documented by Christopher Columbus.[13] He wrote in his journal during his voyages in the 1400s that the Indians of the New World were smoking tobacco and using snuff.[14] At the original Jamestown settlement in later colonial times, John Rolfe became the first European American to grow tobacco for commercial purposes.[15] During these early days, people mainly used tobacco either as snuff or in pipes, with cigarettes not becoming popular in the United States until after the Civil War.[16]

Moving forward in history to World War II, cigarettes became such an integral part of everyday life that President Franklin Delano Roosevelt designated tobacco as a protected crop, and American servicemen received cigarettes in their survival rations.[17] By the end of World War II, cigarette sales were at an all-time high, and a tobacco shortage developed.[18] Since then, Hollywood has encouraged Americans to smoke. For example, the movies *A Street Car Named Desire* and *West Side Story* glamorized smoking in the 1950s.[19]

The country's attitude toward smoking began to change, however, during the 1950s after *Reader's Digest* published research results linking smoking with lung cancer.[20] Initially, cigarette sales declined, but later rebounded when cigarette companies developed and advertised filtered cigarettes and low-tar formulas to make smoking "healthier."[21]

B. The Evolution of Anti-Smoking Legislation

Government regulation of both the production and consumption of tobacco has been in place since John Rolfe's early days of raising tobacco in

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[13] Gene Borio, Tobacco Timeline, http://www.tobacco.org/History/Tobacco_History.html (last visited June 19, 2009).

[14] *Id.* 'Snuff' is pulverized tobacco inhaled through the nose. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1648 (4th ed. 2006).

[15] CNN.com, A Brief History of Tobacco , http://www.cnn.com/US/9705/tobacco/history/index.html (last visited June 19, 2009).

[16] *Id.*

[17] Marot Williamson, Comment, *When One Person's Habit Becomes Everyone's Problem: The Battle Over Smoking Bans in Bars and Restaurants*, 14 VILL. SPORTS & ENT. L.J. 161, 164 (2007) (citing JOHN C. BURNHAM, BAD HABITS: DRINKING, SMOKING, TAKING DRUGS, GAMBLING, SEXUAL MISBEHAVIOR, AND SWEARING IN AMERICAN HISTORY 101 (1993)); Gene Borio, Tobacco Timeline: The Twentieth Century, 1900-1949—The Rise of the Cigarette, http://www.tobacco.org/resources/history/Tobacco_History20-1.html (last visited June 19, 2009).

[18] Borio, *supra* note 17.

[19] Lara Murphy, *Hollywood Keeps Smoking Glamorous: Actors Blamed for Influencing Youth to Smoke*, RANGER ONLINE, Sept. 9, 2004, http://media.www.theranger.org/media/storage/paper1010/news/2004/09/09/News/Hollywood.Keeps.Smoking.Glamorous-1999386.shtml. Other, more recent examples of Hollywood movies portraying the glamour of smoking include *Dr. No.*, showing "Bond, James Bond" smoking cigarettes, and *Chicago*, showing Catherine Zeta-Jones seductively smoking a cigarette on stage. *See id.*

[20] DERTHICK, *supra* note 11, at 9. *See also* Gene Borio, Tobacco Timeline: The Twentieth Century, 1950-1999—The Battle is Joined, http://www.tobacco.org/resources/history/Tobacco_History20-2.html (last visited Apr. 8, 2009); CNN.com, *supra* note 15.

[21] DERTHICK, *supra* note 11, at 9-10; Borio, *supra* note 20; CNN.com, *supra* note 15.

Virginia.[22] For example, as early as 1604, King James I of England placed a high tax on imported tobacco, and perceptively declared tobacco use "[a custom] loathsome to the eye, hateful to the nose, harmful to the brain" and "dangerous to the lungs."[23] However, the King relaxed this view in 1621 by granting a monopoly to tobacco companies in Virginia and Bermuda to produce tobacco to import into England.[24]

Regulation of the consumption of tobacco continued, and in the early twentieth century, forty-three out of forty-five states had anti-cigarette laws.[25] Regulations later included warning the public of the hazards of smoking, and beginning in the 1960s, the Surgeon General's warning appeared on all cigarette packs stating, "Caution: Cigarette Smoking May Be Hazardous to Your Health."[26] This labeling was the result of scientific evidence that suggested a causal relationship between smoking and cancer.[27] By 1965, Congress passed the Federal Cigarette Labeling and Advertising Act, which required the Surgeon General's warning to appear on every pack of cigarettes sold in America.[28] In 1971, the Marlboro Man, spokesman for Marlboro cigarettes, disappeared from television after Congress banned all broadcast tobacco advertising.[29] By 1990, Congress banned smoking on all interstate buses and domestic airline flights lasting two hours or less.[30]

One of the first lawsuits targeting big tobacco companies (collectively referred to as "Big Tobacco") began in 1983 when Rose Cipollone, a smoker dying from lung cancer, and her husband sued Liggett Group in New Jersey, alleging that the company failed to warn her about the dangers of its products.[31] Her surviving spouse won a $400,000 judgment, which the appellate court later overturned.[32] In 1993, a group of smokers sought certification of a nationwide class action against tobacco manufacturers on behalf of "all nicotine dependent persons in the United States," and their estates and relatives.[33] The plaintiffs claimed that cigarette manufacturers "failed to inform smokers that nicotine is

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[22] Nat'l Comm'n on Marihuana & Drug Abuse, History of Tobacco Regulation, http://www.druglibrary.org/schaffer/LIBRARY/studies/nc/nc2b.htm [hereinafter History of Tobacco Regulation].

[23] *Id. See also* Williamson, *supra* note 17, at 165 (quoting GEORGINA LOVELL, YOU ARE THE TARGET: BIG TOBACCO: LIES, SCAMS – NOW THE TRUTH 13 (2002)).

[24] History of Tobacco Regulation, *supra* note 22.

[25] Borio, *supra* note 17.

[26] DERTHICK, *supra* note 11, at 12.

[27] *Id.* at 10.

[28] *Id.* at 12.

[29] *Id*. at 14.

[30] *Id.* at 15.

[31] Cipollone v. Liggett Group, Inc., 789 F.2d 181, 183 (3d Cir. 1986). *See also* DERTHICK, *supra* note 11, at 31-32 (discussing the *Cipollone* case generally); Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, *in* REGULATING TOBACCO, *supra* note 12, at 176, 176-78.

[32] Cipollone v. Liggett Group, Inc., 893 F.2d 541, 546-547 (3d Cir. 1990). Note this decision was reversed in part by the United States Supreme Court and remanded for a new trial. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 508-09, 525-27, 530-31 (1992). *See also* Rabin, *supra* note 31, at 178.

[33] Castano v. Am. Tobacco Co., 160 F.R.D. 544, 548-49 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996). *See also* Rabin, *supra* note 31, at 179-85 (discussing the case generally).

addictive," denied the addictive nature of cigarettes, and manipulated nicotine levels.[34] Nationwide class certification was initially granted by the United States District Court for the Eastern District of Louisiana, but the Fifth Circuit Court of Appeals reversed.[35] This class action lawsuit began a wave of similar state lawsuits and kicked off a new era of tobacco litigation.[36]

Other state class action lawsuits followed until 1998 when the country's major cigarette manufacturers entered into Tobacco Settlement Agreements with forty-six states, five United States territories, and the District of Columbia.[37] The settlement agreements mandated changes in tobacco advertising and marketing and imposed restrictions on cigarette sales.[38] In addition, the settlement agreements required tobacco companies to pay damages to the states in the amount of ten billion dollars up front and two hundred billion dollars over a period of twenty-five years, with ongoing annual payments to states "in perpetuity."[39] Although the settlement agreements were purportedly for reimbursing the states for health care costs associated with smoking-induced illnesses,[40] whether state governments spent the settlement funds as intended is questionable.[41] Today, tobacco companies voluntarily advertise the health risks associated with smoking and sponsor anti-smoking campaigns aimed predominantly at discouraging youth from picking up the habit.[42] For example, Philip Morris goes so far as to offer seminars on its website to help smokers quit.[43]

With smoking now heavily regulated in terms of warnings and advertising to primary smokers, public health officials turned their focus to the ill effects on others from secondhand smoke, especially children.[44] By the 1990s, many states regulated smoking, and many implemented some type of clean indoor air act mandating no-smoking areas and/or smoke-free buildings and restaurants.[45]

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[34] *Castano*, 160 F.R.D. at 548.

[35] *See Castano*, 84 F.3d at 752.

[36] Rabin, *supra* note 31, at 184, 189.

[37] *Id.* at 190-91. *See also* PHILIP MORRIS USA, MASTER SETTLEMENT AGREEMENT 35 (2008), http://www.philipmorrisusa.com/en/cms/Responsibility/Government_Relations/Legislative_Issues/pdfs/msa.pdf.aspx [hereinafter MASTER SETTLEMENT AGREEMENT].

[38] DERTHICK, *supra* note 11, at 82-87; Rabin, *supra* note 31, at 190-91.

[39] MASTER SETTLEMENT AGREEMENT, *supra* note 37, at 35.

[40] Rabin, *supra* note 31, at 191.

[41] For example, in Nevada, a large portion of the proceeds from the tobacco settlements went to fund the state's Millennium Scholarship program, an attempt to boost lagging attendance at state colleges and universities, rather than reimbursement of health care costs. Memorandum from Carol Stonefield, Senior Research Analyst, to Chairman Raymond D. Rawson and Members of the Task Force for the Fund for a Healthy Nev. 3 (Oct. 8, 2003), *available at* http://www.leg.state.nv.us/72nd/Interim/StatCom/HealthyNV/exhibits/10126B.pdf. Although the appropriate spending of the tobacco settlement funds is an important topic, it is beyond the scope of this Note.

[42] Philip Morris USA, Helping Reduce Underage Tobacco Use, http://www.philipmorrisusa.com/en/cms/Responsibility/Helping_Reduce_Underage_Tobacco_Use/default.aspx?src=top_nav (last visited June 19, 2009).

[43] Philip Morris USA, Quitting and Staying Quit, http://www2.philipmorriusa.com/en/quitassist/quitting/index.asp?src=search (last visited June 19, 2009).

[44] PETER D. JACOBSON & JEFFREY WASSERMAN, TOBACCO CONTROL LAWS: IMPLEMENTATION AND ENFORCEMENT 5-6 (1997).

[45] *Id.* at 10-14.

Although Big Tobacco is willing to concede that smoking should be prohibited in some public places, tobacco companies and other conservative groups impose rigorous questioning to anti-smoking legislation and speak out against the complete bans contained in most state clean indoor air acts.[46] As Philip Morris points out, restaurant and bar owners are able to accommodate their patrons' needs and determine their own smoking policies.[47] Philip Morris' position on the matter is that "[t]he public can then choose whether or not to frequent places where smoking is permitted."[48] The focus of this Note is the NCIAA's civil provisions that ban smoking in casinos and stand-alone bars in an effort to protect patrons from secondhand smoke.

C. How Nevada's Clean Indoor Air Act Compares to Other State Clean Indoor Air Acts

The NCIAA began as a voter initiative in 2005 and became law following the Nevada general election on November 7, 2006.[49] The Act bans smoking in most public places, with some exceptions.[50] The NCIAA became effective on December 8, 2006, and is codified in the Nevada Revised Statutes, chapter 202, crimes against health and safety.[51] The stated purpose of the Act is "[p]rotecting children and families from secondhand smoke in most public places, excluding stand-alone bars and gaming areas of casinos."[52] Challenges to the initiative arose even before voters placed the measure on the ballot in 2006.[53] Since enactment of the NCIAA, numerous bar, tavern, and casino owners have challenged the constitutionality of the Act.[54]

Most states now have some type of clean indoor air act.[55] Similar to other states' legislation banning smoking in public places, the NCIAA prohibits smoking in schools, childcare facilities, theaters, malls, grocery stores, and restaurants.[56] Many exemptions contained in the NCIAA are also present in other states' clean indoor air acts. For example, private residences, hotel rooms, and in some states, American Indian cultural activities, are exempt from smoking restrictions.[57] However, some states' smoking legislation contains unique pro-

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[46] Jacobson & Zapawa, *supra* note 12, at 208.

[47] Philip Morris USA, Public Place Smoking Restrictions, http://www.philipmorrisusa.com/en/cms/Responsibility/Government_Relations/Public_Place_Smoking_Restrictions/default.aspx?src=search (last visited June 19, 2009).

[48] *Id.*

[49] *See* NEV. REV. STAT. § 202.2483 (2007); ASSEM. 2005-I.P. 1, 73d Sess. (Nev. 2005). *See also* Nevada Secretary of State, 2006 Official Statewide General Election Results, November 7, 2006, http://sos.state.nv.us/elections/results/2006StateWideGeneral/ElectionSummary.asp (last visited June 19, 2009).

[50] *See* NEV. REV. STAT. § 202.2483.

[51] *Id.*

[52] ASSEM. 2005-I.P. 1, § 1.

[53] *See* Herbst Gaming, Inc. v. Heller, 141 P.3d 1224, 1226 (Nev. 2006).

[54] *See, e.g.*, Tavern Owners' Complaint, *supra* note 4; Answer & Counterclaim, Sands v. Bent Barrel, Inc., No. 07-A540305 (Nev. 8th Jud. Dist. Ct. May 7, 2007) [hereinafter Bilbo's Answer & Counterclaim].

[55] *See, e.g.*, Jacobson & Zapawa, *supra* note 12, at 215.

[56] NEV. REV. STAT. § 202.2483.

[57] *See, e.g.*, MONT. CODE ANN. § 50-40-104 (2007); UTAH CODE ANN. §§ 26-38-3, -3.5 (West 2007).

visions. For instance, New York expressly permits smoking in cigar bars where ten percent or more of the bar's income derives from on-site tobacco sales, not including vending machines.[58] Many of the other states' clean indoor air acts include the same definition of "bar" as set forth in the NCIAA: "an establishment devoted primarily to the sale of alcoholic beverages . . . in which food service is incidental . . . ."[59] However, some states' smoking legislation provides bars with only a temporary exemption, putting bar owners on notice that at some particular future date, this exemption will expire, requiring the bar to become smoke-free.[60]

Nevada's Clean Indoor Air Act also contains some interesting provisions not included in other states' clean indoor air acts. For instance, the NCIAA is unique in two of its exemptions. First, brothels are exempt from the Act.[61] Second, the NCIAA's impact varies depending upon the type of gaming license an establishment holds.[62] The NCIAA allows smoking in casinos that prohibit the patronage of minors, and in stand-alone bars, strip clubs, retail tobacco stores, and private residences.[63] Although some states also exempt casinos from their clean indoor air acts,[64] these states do not define the term "casino" with reference to what type of gaming license an establishment holds. The NCIAA's definition of "casino" requires the casino to hold a *nonrestricted* (as opposed to *restricted*) gaming license, pursuant to Nevada Revised Statutes, section 463.0177.[65] Section 463.0177 allows an unrestricted gaming license for establishments with sixteen or more slot machines and slot machine routes.[66] The effect of this distinction means establishments with sixteen or more slot machines may allow smoking, while almost identical operations with only fifteen slot machines may not. This definition of "casino" is one of the most controversial provisions of the NCIAA and is one reason the Act has already faced several constitutional challenges.[67]

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[58] N.Y. PUB. HEALTH LAW § 1399-q (McKinney 2008).

[59] NEV. REV. STAT. § 202.2483(9)(m). *See also* MONT. CODE ANN. § 50-40-103 (defining "bar" as "an establishment . . . devoted to serving alcoholic beverages . . . and in which the serving of food is only incidental to the service of alcoholic beverages . . . ."); N.Y. PUB. HEALTH LAW § 1399-n (defining "bar" as "any area . . . devoted to the sale and service of alcoholic beverages . . . where the service of food is only incidental to the consumption of such beverages").

[60] For example, California's Indoor Clean Air Act exempted bars until January 1, 1998. *See* CAL. LAB. CODE § 6404.5(f)(1)(A) (West 2007). The Utah Indoor Clean Air Act exempted taverns until January 1, 2009 if the tavern was licensed on or before May 15, 2006, or licensed before May 15, 2006, and changed ownership after May 15, 2006. *See* UTAH CODE ANN. § 26-38-3(2)(c).

[61] NEV. REV. STAT. § 202.2483(3)(c).

[62] *Id.* § 202.2483(3)(a), (9)(a).

[63] *Id.* § 202.2483(3).

[64] *See, e.g.*, CAL. LAB. CODE § 6404.5(f)(1) (exempting "gaming clubs" from the provision of its clean indoor air act).

[65] NEV. REV. STAT. § 202.2483(9)(a).

[66] NEV. REV. STAT. § 463.0177 (2007) (stating the criteria for a nonrestricted gaming license).

[67] *See supra* note 54.

III. PRINCIPAL CASES

There is much litigation surrounding the NCIAA, with pivotal cases currently pending in both the state district court and the Nevada Supreme Court.[68] This section will give a broad overview of those cases, beginning with the initial challenge to placing the initiative on the ballot, followed by a number of constitutional challenges to the language of the NCIAA and its exemptions for a "stand alone bar" and "casino." Finally, this section will discuss several cases filed by the Southern Nevada Health District to enforce the NCIAA, and the various ways in which these cases were resolved.

A. Challenges to the NCIAA

The NCIAA was the subject of a lawsuit before it ever became law. In 2006, seven plaintiffs comprised of bar, tavern, and grocery store owners filed suit for an injunction to keep the initiative off the November general election ballot, claiming that the proposed Act would violate due process, equal protection, and the right to privacy.[69] The First Judicial District Court in Carson City, Nevada denied the injunction, and the Nevada Supreme Court affirmed.[70] The initiative remained on the ballot, and the voters passed it into law in the 2006 general election.[71]

Other constitutional challenges to the NCIAA soon followed. Shortly after the initiative passed, a group of tavern owners filed suit in the Eighth Judicial District Court in Clark County, Nevada seeking to restrain enforcement of the NCIAA and claiming the Act was impermissibly vague as a criminal statute in violation of due process.[72] In *Fame Operating Co. v. Chanos*,[73] otherwise known as the *Tavern Owners* lawsuit, the petitioners further claimed the NCIAA violated equal protection under both the United States and Nevada Constitutions by relying on arbitrary and irrational classifications for enforcement unrelated to any legitimate government interest.[74] The district court agreed, in part, and found that, when read as a criminal statute, the NCIAA was unconstitutional, its provisions impermissibly vague, and the Act encouraged arbitrary and discriminatory enforcement.[75] However, when read as a civil statute, the district court determined that the NCIAA was not impermissibly vague.[76] Therefore, the district court ordered the criminal portion of the

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[68] Fame Operating Co. v. Chanos, No. 06-A532434 (Nev. 8th Jud. Dist. Ct. filed Dec. 5, 2006), *argued*, Flamingo Paradise Gaming, LLC v. Chanos, No. 49223 (Nev. Apr. 6, 2009); Sands v. Bent Barrel, Inc., No. 07-A540305 (Nev. 8th Jud. Dist. Ct. filed Apr. 30, 2007).

[69] Herbst Gaming, Inc. v. Heller, 141 P.3d 1224, 1226-28 (Nev. 2006).

[70] *Id.* at 1226.

[71] *See* NEV. REV. STAT. § 202.2483 (2007).

[72] Application for Temporary Restraining Order & Motion for Preliminary Injunction, *supra* note 10, at 3, 10-24.

[73] Fame Operating Co. v. Chanos, No. 06-A532434 (Nev. 8th Jud. Dist. Ct. filed Dec. 5, 2006).

[74] Tavern Owners' Complaint, *supra* note 4, at 3.

[75] Order Granting Summary Judgment in Part, Denying Summary Judgment in Part, *supra* note 5, at 4.

[76] *Id.* at 5.

NCIAA severed from the text of the Act,[77] and both parties appealed.[78] The case is currently pending before the Nevada Supreme Court[79] and will be analyzed in depth in the next section.

Several other lawsuits followed the *Tavern Owners* suit. Most notably, in *Sands v. Bent Barrel, Inc.*,[80] the Southern Nevada Health District ("Health District") filed a motion for preliminary injunction against Bent Barrel, Inc., (d/b/a, Bilbo's Bar & Grill) ("Bilbo's").[81] The Health District charged Bilbo's with violating the NCIAA by allowing bar patrons to smoke and providing ashtrays and other smoking paraphernalia to customers.[82] Bilbo's responded that their ashtrays and matchbooks were advertising materials and therefore protected as commercial free speech.[83] Additionally, in its response, Bilbo's raised substantially similar constitutional claims to those raised in *Tavern Owners*.[84] Although the greater part of this case is still pending in the Eighth Judicial District Court, the court entered a preliminary injunction requiring Bilbo's to remove its ashtrays and matches from areas where the NCIAA prohibits smoking.[85]

B. Other Lawsuits filed by the Southern Nevada Health District

Other suits filed by the Health District were resolved without protracted litigation. For example, the Health District filed suit against Eminence Enterprise, Inc., (d/b/a as "Irene's") to enforce compliance with the NCIAA.[86] Similar to the complaint in the Bilbo's case, the Health District complained that Irene's violated the NCIAA by allowing patrons to smoke, in addition to failing to remove ashtrays and other smoking paraphernalia, and not posting the required "No Smoking" signs by its entrance.[87] The parties settled the dispute with a stipulation and order for temporary restraining order in which Irene's

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[77] *Id.* at 6.

[78] Notice of Appeal I, *supra* note 6; Notice of Appeal III, *supra* note 7; Notice of Appeal II, *supra* note 6.

[79] Fame Operating Co. v. Chanos, No. 06-A532434 (Nev. 8th Jud. Dist. Ct. filed Dec. 5, 2006), *argued*, Flamingo Paradise Gaming, LLC, No. 49223 (Nev. Apr. 6, 2007).

[80] Sands v. Bent Barrel, Inc., No. 07-A540305 (Nev. 8th Jud. Dist. Ct. filed Apr. 30, 2007). Note that the original named defendant was "Three B's," but was later corrected to reflect Bent Barrel, Inc. *See, e.g.*, Amended Complaint for Declaratory & Other Relief, *Sands*, No. 07-A540305 (Nev. 8th. Jud. Dist. Ct. May 7, 2007) [hereinafter Sands' Amended Compl.].

[81] Plaintiff's Motion for Preliminary Injunction at 1, Sands v. Three B s, Inc., No. 07-A540305 (Nev. 8th Jud. Dist. Ct. Apr. 30, 2007) [hereinafter Sands' Motion for Preliminary Injunction].

[82] *Id.* at 7, 10.

[83] Bilbo's Opposition, *supra* note 10, at 2.

[84] *See, e.g.*, Bilbo's Answer & Counterclaim, *supra* note 54, at 3-4.

[85] Order Granting Preliminary Injunction, *Sands*, No. 07-A540305 (Nev. 8th Jud. Dist. Ct. June 7, 2007).

[86] Complaint for Declaratory & Other Relief, Sands v. Eminence Enterprise, No. 07-A542639 (Nev. 8th Jud. Dist. Ct. June 8, 2007) [hereinafter Eminence Complaint]; Plaintiff's Motion for Preliminary Injunction, *Sands*, No. 07-A542639 (Nev. 8th Jud. Dist. Ct. June 8, 2007) [hereinafter Eminence Motion for Preliminary Injunction].

[87] Eminence Complaint, *supra* note 86, at 3; Eminence Motion for Preliminary Injunction, *supra* note 86, at 8.

promised to adhere to the NCIAA.[88] Additionally, the owner of Irene's completed construction of a wall separating its bar from the restaurant.[89] Once the wall was completed, Irene's became exempt from the Act's provisions as a "stand-alone bar."[90]

IV. Analysis

Depending on one's point of view, the NCIAA either goes too far, or does not go far enough. On the one hand, the NCIAA goes too far by enforcing the ban in bars and taverns where individuals under twenty-one years of age are not permitted.[91] The restriction on smoking in health care facilities, schools, and childcare centers,[92] by contrast, should remain in place because this provision reasonably accomplishes the state's goal of protecting children and families from secondhand smoke. However, establishments catering to adult patrons should be exempt, and the law should allow people to choose whether to frequent a smoke-free bar, casino, restaurant, or other establishment that permits smoking.

Alternatively, the NCIAA does not go far enough because it exempts many public buildings from compliance.[93] The stated purpose of the Act indicates a goal of improving air quality in public places frequented by children and families.[94] However, nowhere in the statute or in the arguments for or against the Act are appropriate air quality levels mentioned. Furthermore, if the Act protects children and families by banning smoking in bars that serve food and in casinos with fifteen or fewer slot machines, then it would further accomplish this purpose by banning smoking in all bars and casinos. The presence of sixteen or more slot machines does not magically transform a casino permitting smoking into a less hazardous environment. Banning smoking in all bars and casinos would bring the NCIAA much closer to its goal of protecting all people from the effects of secondhand smoke.

The following analysis will demonstrate that the NCIAA goes too far in attempting to impose a smoking ban on casinos and stand-alone bars. This Section will take an in-depth look at two lawsuits currently challenging the NCIAA's constitutionality, *Tavern Owners* and *Bilbo's*, with an analysis of the claims that the Act violates constitutional due process and equal protection. Following the analysis, this section explains how the NCIAA is enforced and ways in which businesses are working around the Act, followed by ideas for alternative ways to encourage smoke-free businesses without imposing a smoking ban.

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[88] Stipulation & Order for Temporary Restraining Order at 2-4, *Sands*, No. 07-A542639 (Nev. 8th Jud. Dist. Ct. Aug. 23, 2007).

[89] *Id.* at 2, 4.

[90] *Id.* at 2.

[91] *See* Nev. Rev. Stat. § 202.2483(1), (3)(b) (2007).

[92] *Id.* § 202.2483(1)-(2), (3)(e).

[93] *Id.* § 202.2483(3).

[94] *See* Assem. 2005-I.P. 1, 73d Sess., § 1 (Nev. 2005). *See also supra* text accompanying note 2.

A. Raising the Constitutional Challenge: A discussion of Tavern Owners *and* Bilbo's.

As briefly discussed in section III, the two principal cases currently challenging the NCIAA's constitutionality are the *Tavern Owners* and *Bilbo's* lawsuits.[95] Both cases raise similar constitutional issues regarding due process and equal protection. Clean indoor air acts in other states have survived similar constitutional challenges, including claims that the smoking bans violate a smoker's right to privacy or amounts to a regulatory taking.[96] However, these two Nevada cases challenge the NCIAA on somewhat different grounds. First, business owners in both *Tavern Owners* and *Bilbo's* claim the Act violates due process because its language is too vague to give notice of what action the statute prohibits.[97] Second, the owners in both cases allege the NCIAA violates equal protection because it treats similarly situated establishments differently based upon criteria not rationally related to accomplishing the Act's goal of protecting children and families from the harmful effects of secondhand smoke.[98] The vagueness claims are somewhat weak, and likely will not prevail in the Nevada Supreme Court. However, the claim that the NCIAA violates equal protection has merit, and the court should declare the casino exemption unconstitutional for treating similarly situated businesses differently.

1. The Tavern Owners *Case*

Three days before the NCIAA went into effect, a group of twenty-five bar and tavern owners filed an action to restrain enforcement of the Act.[99] The plaintiffs claimed the criminal aspect of the NCIAA violated the due process clause of the United States and Nevada Constitutions because its provisions were too vague to "provide notice sufficient to enable ordinary people to understand what conduct is prohibited."[100] Additionally, plaintiffs claimed the NCIAA is unconstitutional as a civil statute because it violates equal protection under both the United States and Nevada Constitutions by the Act's "wholly arbitrary treatment of similarly situated business."[101] Further, the plaintiffs claimed the Act violated due process because the "NCIAA confuses [both] business owners and individuals and leaves them to speculate as to how to comply[.]"[102] The Nevada Tavern Owners Association intervened in the suit,[103] and subsequently filed a joinder and supplement in support of the plaintiffs'

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[95] Fame Operating Co. v. Chanos, No. 06-A532434 (Nev. 8th Jud. Dist. Ct. filed Dec. 5, 2006), *argued*, Flamingo Paradise Gaming, LLC v. Chanos, No. 49223 (Nev. Apr. 6, 2009); Sands v. Bent Barrel, Inc., No. 07-A540305 (Nev. 8th Jud. Dist. Ct. filed Apr. 30, 2007).

[96] Jessica Niezgoda, Note, *Kicking Ash(Trays): Smoking Bans in Public Workplaces, Bars, and Restaurants Current Laws, Constitutional Challenges, and Proposed Federal Regulation*, 33 J. LEGIS. 99, 110-15 (2006).

[97] Bilbo's Answer & Counterclaim, *supra* note 54, at 3; Tavern Owners' Complaint, *supra* note 4, at 3.

[98] Bilbo's Answer & Counterclaim, *supra* note 54, at 4; Tavern Owners' Complaint, *supra* note 4, at 3;.

[99] Application for Temporary Restraining Order & Motion for Preliminary Injunction, *supra* note 10, at 3.

[100] *Id.* at 24.

[101] *Id.*

[102] *Id.* at 5.

motion for preliminary injunction.[104] This supplement claimed that the NCIAA affects a regulatory taking under the Fifth Amendment of the United States Constitution and article I, section 8 of the Nevada Constitution by seeking to control the air space of private property for a public purpose.[105]

The above claims of unconstitutionality arose from the combined claims of several different plaintiffs and the Nevada Tavern Owners' Association, which represents more than 200 taverns throughout Nevada.[106] The plaintiffs claimed violation of their equal protection rights.[107] For example, owners of the Three Angry Wives Pub, holders of a *restricted* gaming license, claimed their establishment operated in an "identical manner to other taverns which hold *nonrestricted* gaming licenses" and where smoking is permitted under the NCIAA.[108] Further, this plaintiff argued there was no rational basis for the NCIAA to treat taverns with nonrestricted gaming licenses more favorably by allowing smoking than the Act treated the Three Angry Wives Pub with its restricted gaming license, given that the two establishments were similar, except for the number of slot machines.[109]

Several plaintiffs in the case claimed the Act violated their due process rights based on its vague definition of "casino."[110] According to plaintiff Village Pub, such vagueness meant a casino owner could not determine how to conduct business in a way that lawfully allowed smoking.[111] An example of the confusion over the Act's language involved operators of slot routes holding nonrestricted gaming licenses and who had grocery store locations on their routes.[112] On the one hand, the NCIAA prohibits smoking in all areas of grocery stores, while on the other hand, the NCIAA allows smoking in casinos holding a nonrestricted gaming license.[113] Plaintiff Market Gaming, Inc. had two nonrestricted locations inside grocery stores on its slot route. Given the vague definition under the Nevada Revised Statutes of "casino" as an establishment holding a nonrestricted gaming license, Market Gaming claimed it could not determine how to conduct its business in a manner that allowed them to permit smoking within their nonrestricted gaming locations located within grocery stores.[114] Market Gaming further claimed it could not discern within the gaming areas where smoking may be permitted, and could not determine whether they needed to "change the name of their locations to include the term

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[103] Motion to Intervene Pursuant to NRCP 24, Fame Operating Co., Inc. v. Chanos, No. 06-A532434 (Nev. 8th Jud. Dist. Ct. Dec. 7, 2006) [hereinafter Motion to Intervene].

[104] Plaintiff Nevada Tavern Owners' Association's Joinder & Supplement to the Supplemental Brief in Support of Motion for Preliminary Injunction, *Fame Operating Co.*, No. 06-A532434 (Nev. 8th Jud. Dist. Ct. Dec. 11, 2006).

[105] *Id.* at 3.

[106] *See* Motion to Intervene, *supra* note 103, at 4.

[107] *See, e.g.*, Application for Temporary Restraining Order & Motion for Preliminary Injunction, *supra* note 10, at 4.

[108] *Id.* at 5 (emphasis added).

[109] *Id.*

[110] *See, e.g.*, *id.*

[111] *Id.* at 6.

[112] *Id.* at 7.

[113] *Id.*

[114] *Id.*

'casino' in order to permit smoking."[115] A similar slot route operation, E-T-T, Inc., claimed it could not determine which grocery store locations were exempt from the smoking ban, because grocery store casinos were subject "arbitrarily to different regulations under the NCIAA than its nonrestricted gaming locations."[116]

Plaintiff Flamingo Paradise Gaming, LLC, owners of Terrible's Hotel and Casino, also challenged the NCIAA for failing to clarify whether a hotel room is exempt from the NCIAA or is "considered an indoor place of employment where smoking is prohibited."[117] Their claim referenced *Herbst Gaming v. Heller*,[118] a case where petitioners challenged the Act before voters even passed it into law.[119] In *Herbst Gaming*, the First Judicial District Court in Carson City, Nevada found that hotel and motel rooms were included in the smoking ban.[120] However, the Nevada Supreme Court subsequently dismissed the constitutional challenge in *Herbst Gaming* and rendered the district court's interpretation void because the issue was not ripe for review, chastising the district court for rendering an "improper advisory opinion."[121] The owners of Terrible's Hotel and Casino raised the issue again in the *Tavern Owners* case.

Ultimately, both plaintiff tavern owners and defendant attorney general filed motions for summary judgment in the Eighth Judicial District Court in Las Vegas, Nevada, which were argued January 23, 2007.[122] The district court reviewed the NCIAA as both a criminal statute and as a civil statute before issuing its order granting in part and denying in part both parties' motions.[123] In his order, Judge Douglas Herndon found the NCIAA constitutional as a civil statute.[124] However, he ordered the criminal provisions severed from the NCIAA, finding them facially unconstitutional, stating, "vagueness permeates the whole statute, leading to arbitrary and discriminatory enforcement."[125] Specifically, the court found that the criminal enforcement standards were impermissibly vague and lacked a scienter clause, ultimately encouraging arbitrary and discriminatory enforcement.[126] Both parties appealed this ruling, and the case is currently pending in the Nevada Supreme Court.[127]

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115 *Id.*

116 *Id.*

117 *Id.* at 6.

118 Herbst Gaming, Inc. v. Heller, 141 P.3d 1224 (Nev. 2006).

119 *See id.* at 1227.

120 *Id.*

121 *Id.* at 1232, 1234.

122 *See, e.g.*, Order Granting Summary Judgment in Part, Denying Summary Judgment in Part, *supra* note 5, at 3.

123 *Id.* at 4-6.

124 *Id.* at 6.

125 *Id.* at 4.

126 *Id.*

127 *See* Notice of Appeal I, *supra* note 6; Notice of Appeal III, *supra* note 7; Notice of Appeal II, *supra* note 6. At the time research for this Note closed, oral arguments were scheduled for April 6, 2009, before the Nevada Supreme Court *en banc*. *See* Nevada Supreme Court Docket Sheet, Flamingo Paradise Gaming, LLC vs. Chanos, No. 49223 (Nev. filed Mar. 29, 2007) [hereinafter Docket Sheet].

2. The Bilbo's Case

In April 2007, the Southern Nevada Health District filed a motion for preliminary injunction against Bent Barrel, d/b/a Bilbo's Bar and Grill.[128] In its motion, the Health District claimed Bilbo's violated the NCIAA by allowing its customers to smoke in an area where Bilbo's also served food, and by providing ashtrays and matchbooks to its customers.[129] In its defiant opposition to the Health District's motion for preliminary injunction, Bilbo's claimed the NCIAA was unenforceable because it violated both the United States and Nevada Constitutions.[130] Bilbo's claimed the Act was unconstitutionally vague regarding several terms.[131] First, defendant Bilbo's asserted that the phrase "smoking tobacco in any form" was vague because it did not state that the "act of smoking" was prohibited and the Act failed to define the term "smoking paraphernalia."[132] Next, Bilbo's argued the novel claim that forcing it to remove its ashtrays and matchbooks would violate Bilbo's First Amendment right to commercial free speech, because the tavern provided these items to customers as advertising for its business.[133] Bilbo's answer also piggy-backed onto allegations contained in the *Tavern Owners* suit by claiming the NCIAA is unconstitutional as a criminal statute and violates the equal protection clause in both the United States and Nevada Constitutions.[134] Bilbo's further alleged the Act applied an unconstitutional classification between businesses based upon the type of gaming license a business holds.[135] Finally, Bilbo's asserted that a flawed electoral process led to the enactment of the NCIAA.[136]

The district court granted the preliminary injunction against Bilbo's and ordered it to remove the ashtrays and other smoking paraphernalia from its tavern.[137] The court stated that ordering Bilbo's to remove these items did not violate its constitutionally protected rights, because Bilbo's had "numerous other means of engaging in protected commercial speech."[138] The court further found the term "other smoking paraphernalia" was not unconstitutionally vague and the term provided Bilbo's with fair notice that providing matches at the bar violates the NCIAA.[139] This case is currently pending before the Eighth Judicial District Court with the Health District seeking declaratory and injunctive

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128 Sands' Motion for Preliminary Injunction, *supra* note 81. *See also supra* note 80.

129 *Id.* The NCIAA currently allows smoking in stand-alone bars, but prohibits smoking in taverns with more than "incidental" food service. *See* NEV. REV. STAT. § 202.2483(3)(b), (9)(m) (2007). The NCIAA further requires nonexempt establishments to remove all ashtrays and "smoking paraphernalia." *See id.* § 202.2483(6).

130 Bilbo's Opposition, *supra* note 10, at 1.

131 *Id.* at 2.

132 *Id.* at 2, 4.

133 *Id.* at 2.

134 *Id.* at 4-7.

135 *Id.* at 6-7.

136 *Id.* at 9-11.

137 *See* Order Granting Preliminary Injunction, *supra* note 85.

138 *Id.* ¶ 11.

139 *Id.* ¶ 8.

relief and civil penalties against Bilbo's.[140] Bilbo's has filed a counterclaim for declaratory and injunctive relief,[141] and trial is set for March 1, 2010.[142]

B. Parts of the NCIAA as a Civil Statute are Unconstitutional

As the following analysis will show, the Act contains vague terms. However, this vagueness is not extensive enough to render the NCIAA unconstitutional as a civil statute. On the other hand, it is much more likely that the Nevada Supreme Court will find a constitutional violation of equal protection based upon the Act's exemptions for certain casinos and stand-alone bars.

1. Due Process Challenges to the NCIAA for Vagueness

Most of the public places where the NCIAA bans smoking reasonably relate to accomplishing the stated purpose of the statute of protecting children and families from the harmful effects of secondhand smoke. The NCIAA prohibits smoking in childcare facilities, movie theaters, video arcades, retail and grocery stores, schools, government buildings, and indoor areas in restaurants.[143] These are places commonly frequented by children and families. However, the exemptions for stand-alone bars and casinos do not reasonably relate to accomplishing the Act's purpose. Furthermore, opponents to the NCIAA claim the NCIAA's vague terms leave them wondering how to comply with the Act, as discussed in section IV of this Note.[144]

Business owners in both the *Tavern Owners* and *Bilbo's* lawsuits claim terms contained within the NCIAA are so vague that the Act leaves individuals and business owners confused and required to speculate about how to comply with its provisions. Specifically at issue are the terms "stand-alone bars," "taverns," and "saloons."[145] The Health District responded that, given the liberal construction provided to legislation designed to protect public health, a challenge to these terms will probably fail to persuade the Nevada Supreme Court that the NCIAA is unconstitutionally vague.[146]

Judge Herndon struck down the criminal component of the NCIAA as impermissibly vague in the *Tavern Owners* suit, and issued a preliminary injunction against enforcement of the Act as a criminal statute; however, the judge did not enjoin enforcement of the Act as a civil statute.[147] The judge determined the Act lacked explicit standards for those individuals applying the

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[140] *See* Joint Case Conference Report, Sands v. Bent Barrel, Inc., No. 07-A540305 (Nev. 8th Jud. Dist. Ct. June 25, 2007).

[141] *Id.* at 1. *See also* Bilbo's Answer & Counterclaim, *supra* note 54, at 6-9.

[142] Order Setting Civil Non-Jury Trial, *Sands*, No. 07-A540305 (Nev. 8th Jud. Dist. Ct. Nov. 6, 2008).

[143] NEV. REV. STAT. § 202.2483 (1)-(2) (2007).

[144] *See supra* notes 97, 100, 102, 110-17, 131-32 and accompanying text.

[145] *See, e.g.*, Application for Temporary Restraining Order & Motion for Preliminary Injunction, *supra* note 10, at 5.

[146] *See* Plaintiff's Reply Point & Authorities in Support of Motion for Preliminary Injunction at 2-7, *Sands*, No. 07-A540305 (Nev. 8th Jud. Dist. Ct. May 14, 2007) [hereinafter Sands' Reply].

[147] Order Granting Summary Judgment in Part, Denying Summary Judgment in Part, *supra* note 5, at 4-6.

law, an omission that could lead to arbitrary enforcement.[148] Furthermore, Judge Herndon found the NCIAA lacked sufficient notice to the population regarding what activity is criminal and who will enforce the Act.[149]

The Nevada Supreme Court has discussed statutes containing unconstitutional vagueness in violation of due process as follows: "It is well established that a statute or ordinance which is so vague that men of common intelligence must guess at its meaning violates the due process guarantees found both in the Nevada and United States Constitutions because no fair notice or warning of the prohibited action is given."[150] When applying rules of statutory construction, a statute is read to avoid raising constitutional questions if such a construction is fairly possible.[151] The question now is whether the NCIAA, when read in its entirety as a civil statute, gives reasonable notice of what behavior is prohibited, by whom, and where.

The owners in *Bilbo's* argue that "other smoking paraphernalia" is not further defined in the Act, which leaves "men of common intelligence to guess at its meaning."[152] While it is true the authors of the NCIAA could have stated more clearly what activity the Act prohibits, it is reasonable to assume that men and women of common intelligence recognize "smoking paraphernalia" as those items associated with smoking cigarettes. Ashtrays and matches obviously fall into this category because these items facilitate the act of smoking. The NCIAA also states, in pertinent part, "smoking tobacco in any form is prohibited," rather than prohibiting the "act of smoking."[153] It seems unlikely that anyone truly is confused about what this statement means. Whether a cigarette, a cigar, or a pipe, the NCIAA clearly prohibits smoking it in nonexempt establishments. Chewing tobacco, for example, is not included within the Act's proscription. This is in line with the purpose of the Act, which is to protect people from secondhand smoke, which is not an issue when a person chews tobacco. With the heavy presumption of constitutionality afforded to social legislation,[154] it is doubtful that an argument that "smoking tobacco" or "smoking paraphernalia" are vague terms will be sufficient to convince the Nevada Supreme Court to render the Act as unconstitutionally vague.

2. The NCIAA Violates Equal Protection

As stated above, most of the public places where the NCIAA bans smoking reasonably relate to accomplishing the statute's purpose. Childcare facilities, movie theaters, video arcades, retail and grocery stores, schools, and

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148 *Id.* at 4.

149 *Id.*

150 Edwards v. City of Reno, 742 P.2d 486, 488 (Nev. 1987) (citations omitted), *cited in* Bilbo's Opposition, *supra* note 10, at 3-4.

151 Boos v. Barry, 485 U.S. 312, 332 (1988), *cited* in Sands' Reply, *supra* note 146, at 4. *See also* State v. Glusman, 651 P.2d 639, 644 (Nev. 1982) (noting that the Nevada Supreme Court has long recognized, as a general principle, "that statutes should be construed, if reasonably possible, so as to be in harmony with the [C]onstitution").

152 *See* Sands' Reply, *supra* note 146, at 3.

153 NEV. REV. STAT. § 202.2483(1) (2007).

154 *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (noting that states are given wide latitude under the Equal Protection Clause when social or economic legislation is at issue).

government buildings are places where one commonly finds children and families. However, the Act's exemption for stand-alone bars and casinos is problematic, particularly the casino exemption, which relies on the description of a casino found in Nevada Revised Statutes, section 463.0177.[155] As set forth earlier in this Note, a casino, for purposes of the NCIAA, is an establishment with a nonrestricted gaming license given to businesses operating sixteen or more gaming machines.[156] Therefore, a restricted gaming license allows up to fifteen slot machines,[157] which does not entitle such an establishment to the NCIAA exemption.[158] Furthermore, the NCIAA bases the description of a stand-alone bar on whether food service is "incidental" to the bar's business.[159] These distinctions between similarly situated establishments cause the provisions of the NCIAA to be unequally applied based upon criteria unrelated to the purpose of the Act. The result is an unconstitutional violation of equal protection.

If the classification scheme set forth in a statute is arbitrary and irrational and is too broad in its sweep, the statute violates the equal protection guarantees contained in both the United States and Nevada Constitutions.[160] The defendants in *Bilbo's* argue that exempting casinos, as defined in the Nevada gaming statutes, creates an arbitrary classification between smoking and nonsmoking taverns based on the number of slot machines.[161] Arguably, this classification does not meet equal protection standards. However, as expressed by the United States Supreme Court in *Romer v. Evans*,[162] a classification is constitutional if it "bears a rational relation to some legitimate end."[163] Furthermore, in *Romer*, the Court found the purpose of a statute may not be to discriminate against a politically unpopular group.[164] For a classification to be constitutional, it must be "rationally related to furthering a legitimate state interest."[165] Therefore, in order to show an equal protection violation, opponents to the NCIAA must demonstrate that the exempt establishment is substantially similar to the business operation of a nonexempt establishment.[166]

The equal protection argument presented in both the *Tavern Owners* and *Bilbo's* lawsuits is more persuasive than the vagueness due process argument. The casino exemption is applied unequally because it is based upon criteria which discriminate between substantially similar businesses, rather than criteria which promote the Act's purpose of improving the air quality in public buildings to protect children and families from secondhand smoke. Perhaps provid-

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155 *See* NEV. REV. STAT. § 202.2483(9)(a).
156 *See id.*; NEV. REV. STAT. 463.0177(1) (2007).
157 NEV. REV. STAT. § 463.0189 (2007) (providing the definition for a "restricted license").
158 *See* NEV. REV. STAT. § 202.2483(9)(a) (requiring a "casino" to have a nonrestricted, as opposed to restricted, gaming license for the purposes of the NCIAA).
159 *See id.* § 202.2483(9)(m).
160 Barnes v. Eighth Judicial Dist. Court, 748 P.2d 483, 487 (Nev. 1987) (citing Lindsey v. Normet, 405 U.S. 56, 79 (1972)), *cited in* Bilbo's Opposition, *supra* note 10, at 4-5.
161 Bilbo's Answer & Counterclaim, *supra* note 54, at 4.
162 Romer v. Evans, 517 U.S. 620 (1996).
163 *Id.* at 631.
164 *Id.* at 634-35 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
165 *Barnes*, 748 P.2d at 486.
166 *See* Sands' Reply, *supra* note 146, at 9.

ing a casino exemption was simply a ruse to encourage voters to pass the NCIAA. Most voters probably did not realize how the Act defined "casino," and reasonably assumed that smaller taverns with fifteen or fewer gaming machines were also exempt from the purview of the Act. People want the freedom to choose whether to smoke when they are out for a drink or playing video poker at their neighborhood casino. Moreover, a smoking ban is unnecessary. If a tavern or casino owner believes there is a market for a smoke-free establishment, he or she has always been free to run his or her business accordingly. Customers will either frequent or avoid the business if they are unhappy with the atmosphere. Furthermore, if the true purpose of the NCIAA is to improve indoor air quality, the Act would impose measurable air quality standards rather than discriminate between businesses based upon the number of slot machines.

The NCIAA's casino exemption includes all of the large casino-resorts across the state, while the smaller, neighborhood establishments are subject to the Act's smoking ban. This exemption indicates that those in favor of the NCIAA recognized that a ban on smoking in large casino-resorts would inconvenience visitors and tourists and possibly have a negative impact on the state's economy. The casino exemption acknowledges that when people gamble, they often like to smoke. If smoking in the major casinos were restricted, smokers may just decide to take their vacation somewhere that allows smoking. Allowing people to smoke in big casinos is an example of how the NCIAA does not go far enough to accomplish its purported goal. If voters were truly intent on protecting people from the harmful effects of secondhand smoke, the smoking ban would apply to all casinos, regardless of the type of gaming license held by the casino. This illustrates the irrational distinction in the NCIAA of exempting a casino based on what type of gaming license it holds and indicates a violation of equal protection.

Obtaining a nonrestricted gaming license is increasingly difficult for small casinos. There has been a shift in the Nevada Legislature to issue nonrestricted gaming licenses only to casino-resorts within gaming enterprise districts as outlined under Nevada Revised Statutes, sections 463.3072-463.3094.[167] The rational basis for this shift cited by the Health District is to promote tourism and gaming in casinos where gaming is the primary business, pursuant to public policy expressed under Nevada Revised Statutes, chapter 463.[168] It is interesting to note that neither the statutes limiting new nonrestricted gaming licenses to casinos in the gaming zones, nor the NCIAA, cite better air circulation systems in bigger casinos as the reason for exempting establishments with sixteen or more slot machines.[169] This indicates that the exemption for casinos found in the NCIAA is used to inhibit business at smaller casinos, while encouraging the growth of casinos in gaming zones, rather than the Act's stated purpose of protecting children and families from secondhand smoke. Between

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[167] *Id.* at 16. These statutes limit the growth of gaming in Clark County to gaming zones identified by the statutes. Nevada Revised Statutes, section 463.308 limits approval of a nonrestricted gaming license to new establishments or those wishing to expand which are located in a "gaming enterprise district" only. *See* NEV. REV. STAT. § 463.308(3) (2007).

[168] Sands' Reply, *supra* note 146, at 16.

[169] *See* NEV. REV. STAT. §§ 202.2483, 463.3072 to.3094 (2007).

the NCIAA's smoking ban and the hurdles facing a proprietor who wishes to obtain a nonrestricted gaming license, making a profit with a small casino will be more difficult.

C. Enforcing the NCIAA

The NCIAA states that its provisions are severable.[170] Therefore, the Health District continues to enforce the civil provisions remaining in effect after Judge Herndon enjoined enforcement of the criminal portion of the Act.[171] When taken together, the NCIAA, the lawsuits, and the affidavits of Mark Gillespie regarding his investigations for the Southern Nevada Health District, describe enforcement of the NCIAA as a civil statute. The Act requires health authorities to enforce the provisions and issue citations for violations.[172] The Act also requires business owners of nonexempt establishments to post "No Smoking" signs at their entrances and remove all ashtrays and other smoking paraphernalia.[173] To help restaurant and bar owners understand the requirements imposed by the NCIAA, the Southern Nevada Health District published *A Guide for Restaurants and Bars* available on their website, explaining the rules of the Act.[174] The Health District's guide also explains how business owners and managers should help enforce the Act.[175] The Health District suggests that owners, managers, or employees of nonexempt establishments enforce the Act by reminding patrons who are smoking that they are in violation of the law.[176] If a patron refuses to stop smoking, the Health District suggests the manager inform the patron that he could be subject to civil penalties for violating the Act.[177] If the patron continues to smoke, the manager or employee should ask him to leave.[178]

The citation process begins with an inspection of a nonexempt business by a Health District employee.[179] For example, in the case of *Sands v. Eminence Enterprise*,[180] a Health District investigator visited Irene's, a nonexempt establishment under the NCIAA, and observed patrons smoking, ashtrays at the bar and on the tables, and a cigarette machine.[181] The investigator identified him-

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[170] NEV. REV. STAT. § 202.2483(11).

[171] Order Granting Summary Judgment in Part, Denying Summary Judgment in Part, *supra* note 5, at 5-6. The appeal regarding this decision is currently pending before the Nevada Supreme Court. *See* Notice of Appeal I, *supra* note 6; Notice of Appeal III, *supra* note 7; Notice of Appeal II, *supra* note 6.

[172] NEV. REV. STAT. § 202.2483(7).

[173] *Id.* § 202.2483(6).

[174] S. NEV. HEALTH DIST., NEVADA CLEAN INDOOR AIR ACT: A GUIDE FOR RESTAURANTS AND BARS (2007), http://www.southernnevadahealthdistrict.org/download/disease_fact sheets/clean_air_act_rest&bars.pdf [hereinafter GUIDE].

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *See* Southern Nevada Health District, The Nevada Clean Indoor Air Act Current Enforcement Activities, http://www.southernnevadahealthdistrict.org/nciaatobacco/enforcement.htm (last visited June 19, 2009).

[180] Sands v. Eminence Enter., No. 07-A542639 (Nev. 8th Jud. Dist. Ct. filed June 8, 2007).

[181] Affidavit of Mark Gillespie, June 8, 2007 ¶ 2, *Sands*, No. 07-A542639 (Nev. 8th Jud. Dist. Ct. June 8, 2007) [hereinafter Gillespie Affidavit].

self to the manager as a Health District investigator and informed the manager of the observed violations.[182] Next, the investigator reported his findings in an affidavit to the Health District, which, in turn sent a warning letter to Irene's owner that he was in "willful disobedience" of the NCIAA.[183] Some weeks after a business receives the warning letter, the investigator conducts a follow-up visit to determine if the business has since complied with the Act.[184] If the owner has not complied, the Health District may file a civil suit seeking declaratory and injunctive relief to enforce the NCIAA, plus subject the owner to a $100 fine for each infraction.[185] Many times the Health District and the disobedient owner can resolve the issue informally by stipulating to a temporary restraining order.[186]

In *Sands v. Eminence Enterprise*, the Health District filed a complaint for declaratory relief against the owners of Irene's tavern for violations of the NCIAA.[187] In a stipulation and order to settle the matter, the owner agreed to stop delivering food from the restaurant to its bar area and the Health District approved a new wall separating the restaurant from the bar.[188] However, the order specifically allowed patrons to bring their own food into the bar, either from Irene's grill, or by ordering over the phone from a food delivery service.[189] The stipulation also allowed Irene's to complete an "internal door/window arrangement" to facilitate customers ordering or picking up food prepared by Irene's grill.[190] However, all the window does is effectively inconvenience the customer when ordering food from Irene's grill. The net effect is that people are still smoking in what is still a bar and grill. The only difference is that people on the restaurant side of Irene's are free from smoke wafting over from the bar—except, of course, when the pass-through window is opened to deliver food.

D. Circumventing the NCIAA

Irene's is one example of how some bar and grill establishments and their patrons have found creative ways to work within the constraints of the Act and still allow smoking. In order to comply with the NCIAA, many taverns with a restaurant attached to the bar have simply constructed walls to separate the two sides. This allows the bar to qualify as a stand-alone bar, while allowing the restaurant to continue serving food.[191] A recent Op-Ed piece in the *Las Vegas*

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[182] *Id.*

[183] Letter from Stephen R. Minagil, Esq., S. Nev. Health Dist., to Eminence Enter. (May 2, 2007) (attached to Eminence Motion for Preliminary Injunction, *supra* note 86).

[184] *See, e.g.*, Gillespie Affidavit, *supra* note 181, ¶ 3 (stating Gillespie again surveyed the establishment to determine compliance following an initial survey the month before).

[185] *See, e.g.*, Sands' Motion for Preliminary Injunction, *supra* note 81, at 8-9; Eminence Motion for Preliminary Injunction, *supra* note 86, at 11.

[186] *See* Stipulation & Order for Temporary Restraining Order, *supra* note 88.

[187] *See* Eminence Complaint, *supra* note 86.

[188] Stipulation & Order for Temporary Restraining Order, *supra* note 88, at 2.

[189] *Id.* at 3.

[190] *Id.* at 4.

[191] The NCIAA defines a stand-alone bar as "an establishment devoted primarily to the sale of alcoholic beverages to be consumed on the premises, in which food service is incidental to its operation, and provided that smoke from such establishments does not infiltrate into areas

Review-Journal described how other, nonexempt establishments work around the Act.[192] As the author points out, under the NCIAA, a bar waiter may not place food orders with a bar's adjoining restaurant.[193] However, bar waiters continue to bus the tables in the bar where customers consumed the food. As the opinion editorial piece points out, "Supporters of Question 5[[194]] argued their proposal was needed to protect children from secondhand smoke. To make up for the fact that kids can't sit at bars, they're now treating adults who wish to smoke while dining out as though they're children."[195] The stipulation between the Health District and Irene's demonstrates some of the problems created for business owners and the lengths they go to in order to comply with the NCIAA and still offer food service to their customers.

As another article in the *Las Vegas Review-Journal* points out, "you can enjoy a burger and onion rings while playing video poker and downing a cold brew at bars where smoking is allowed. You're just the one who has to take care of getting the food in front of you."[196] For example, PT's Pub went to great lengths to accommodate its customers while staying in compliance with the NCIAA.[197] The owners created PT's to Go in an attempt to stay within the law while still providing food to its patrons.[198] Hungry customers could order and pick up food from the PT's to Go next door and bring it back into PT's Pub.[199] According to the Health District, businesses that separate their kitchens from their bars or create a separate corporation for those kitchens and then serve food to customers inside the newly created stand-alone bar are not following the law.[200] "Food service is prohibited in stand-alone bars," stated Stephen Minagil, attorney for the Health District.[201]

Like any good government agency, the Health District is attempting to close these loopholes by developing regulations and creating uniform guidelines to enforce the smoking ban.[202] As noted earlier, the Health District posts *A Guide for Restaurants and Bars* on its website in an attempt to answer NCIAA compliance questions.[203] When a law is "difficult to enforce, you have to have regulations," said Joe Hardy, a Health District board member and Las Vegas physician.[204] Perhaps the law is difficult to enforce because it is simply bad law.

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where smoking is prohibited under the provisions of this section." NEV. REV. STAT. § 202.2483(9)(m) (2007).

192 Op-Ed., *If the Law Supposes that, the Law is a Ass*, LAS VEGAS REV.-J., Oct. 31, 2007, at 10B.

193 *Id.*

194 Question No. 5 was the voter initiative placing the NCIAA on the ballot. *See* ASSEM. 2005-I.P. 1, 73d Sess. (Nev. 2005).

195 Op-Ed., *supra* note 192.

196 Annette Wells, *You'll Still Have to BYO Food to the Local Tavern,* LAS VEGAS REV.-J., Oct. 26, 2007, at 1B.

197 *See id.*

198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.*

202 *See* Stipulation & Order for Temporary Restraining Order, *supra* note 88, at 2.

203 GUIDE, *supra* note 174.

204 Wells, *supra* note 196.

E. There Are Better Ways to Encourage Businesses to Go Smoke-Free.

The government should consider less invasive incentives for bar and casino owners to go smoke-free, without infringing on smokers' rights or impinging a business owner's freedom to run an establishment as the owner chooses. In an exhibit to its motion to intervene in *Tavern Owners*, the Nevada Tavern Owners' Association offered some interesting options on how to do it.[205] The Nevada Legislature would be wise to consider the Tavern Owners' suggestions, because they would narrow the focus of the NCIAA, while continuing to uphold the intent of the Act. For example, an amendment to the NCIAA could allow smoking "in enclosed rooms with separate ventilation systems," which would allow those "unwilling to enter an environment containing smoke an option" to avoid it.[206] In fact, creating a standard of compliance for ventilation systems makes more sense than a ban on smoking. This would create a standard for air quality without requiring a tavern to go smoke-free. The difference between walking through a large, modern casino with top-of-the line ventilation and that of an older casino with poor ventilation demonstrates how well this could work. The smell of tobacco smoke is virtually undetectable in establishments using adequate ventilation, and the risk associated with secondhand smoke would be lower in establishments using effective ventilation—whether or not the establishment holds a restricted or nonrestricted gaming license.

Additionally, the state could offer tax advantages that encourage establishments to create smoke-free environments voluntarily. As argued by the Tavern Owners' Association, offering a tax break to smoke-free establishments may increase the number of smoke-free bars and taverns without imposing economic loss in complying with a total smoking ban.[207] These solutions also return to business owners the freedom to choose how to run their establishments. Nevada and other state clean indoor air acts acknowledge this possibility in provisions stating that nothing contained in the Act shall prohibit a business owner from "voluntarily creating nonsmoking sections or designating the entire establishment as smoke free."[208]

Others believe that smoking is a matter of individual choice and that the free market should determine whether a business goes smoke-free, not the government.[209] This approach has merit because, as noted above, business owners have always had the power and freedom to go smoke-free if they wished. A statement made during the debate over Virginia's smoking ban in restaurants makes this point of view clear. In a discussion of the state's proposed smoking ban, Delegate David Albo asked, " 'Why do you need a law to protect people

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[205] *See* Motion to Intervene, *supra* note 103, Exhibit "1" ([Proposed] Joinder & Supplement to Application for Temporary Restraining Order & Motion for Preliminary Injunction) at 5.
[206] *Id.*
[207] *Id.*
[208] NEV. REV. STAT. § 202.2483(4) (2007). *See also* CAL. LAB. CODE § 6404.5(h) (West 2007) ("Nothing in this section shall prohibit an employer from prohibiting smoking in an enclosed place of employment for any reason."); N.Y. PUB. HEALTH LAW § 1399-r(1) (McKinney 2008) ("Nothing in this article shall be construed to deny the owner . . . the right to designate the entire place, or any part thereof, as a nonsmoking area.").
[209] Jacobson & Zapawa, *supra* note 12, at 212.

when people can protect themselves by not going in' restaurants that allow smoking[?]"[210] Mr. Albo's suggestion is the right approach because it affords both business owners and individuals maximum freedom. First, individuals decide whether to frequent only smoke-free establishments. Second, business owners decide whether the market determines they go smoke-free or continue to allow folks to light up.

Allowing the government to dictate matters of personal choice invites unwelcome invasion into our private lives. This is the beginning of a slippery slope, and we already see inklings of government intrusion into other areas of our personal lives. For example, consider New York City's recently passed ordinance banning all trans fats in any of the city's restaurants because it has been linked to blocked arteries and heart disease.[211] Another recent example is the attempt to ban obese people from eating in certain restaurants in the state of Mississippi. In Mississippi, three representatives introduced a bill during the 2008 regular legislative session to prohibit restaurants from "serving food to any person who is obese."[212] It is hard to imagine what could be more invasive. One can only imagine what comes next when the government begins to regulate our most personal decisions.

Although society cannot deny the negative health effects of secondhand smoke, smoking continues to be a legal activity. As demonstrated above, there are better ways to encourage business owners to run smoke-free establishments, while still allowing them the freedom to run their businesses as they choose. Furthermore, when we allow the government to determine who may smoke and where, we open the door to other invasive control of our personal health decisions.

V. CONCLUSION

When a state exercises its police power to regulate a legal activity, such as smoking tobacco, by imposing both criminal and civil fines and penalties, it must give careful consideration to balancing the state's legitimate interest in protecting the public health of its citizens against the means used to accomplish that goal. Legislation containing vague terms or unequal application of the law fails this balancing test and must be repealed or revised. The equal protection claims raised by opponents of the NCIAA have merit, and substantial changes are necessary to the NCIAA in order to retain constitutional protection for those impacted by the Act.

Although I believe the free market should determine whether an establishment goes smoke-free or not, the Nevada Clean Indoor Air Act is probably here to stay. The terms of the Act are not so vague as to render the NCIAA unconstitutional as a civil statute. However, if we are going to enforce criminal sanc-

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[210] Mike Gruss, *Proposed Ban on Smoking in Public Places Fails*, VIRGINIAN-PILOT (Norfolk, Va.), Feb. 24, 2006, *available at* http://hamptonroads.com/node/69811.

[211] Thomas J. Lueck & Kim Severson, *New York Bans Most Trans Fats in Restaurants*, N.Y. TIMES, Dec. 6, 2006, at A1.

[212] H.B. 282, 2008 Leg., Reg. Sess. (Miss. 2008). This bill died in committee on Feb. 19, 2008. Miss. Legislature, HB 282 – History of Actions/Background, http://billstatus.ls.state.ms.us/2008/pdf/history/HB/HB0282.xml (last visited June 19, 2009).

tions on violators, the Act must clearly set out what the prohibited activity is and who will be held responsible for infractions. Reasonable men and women understand what "smoking tobacco" means, and the statute adequately defines the term "stand-alone bars." However, using the number of gaming machines in defining a casino for the purposes of the Act and determining whether a tavern falls within the smoking ban's exemption is unconstitutional because it violates the equal protection clause of both the Nevada and the United States Constitutions. For these reasons, the Nevada Supreme Court should uphold the NCIAA against the pending due process challenge for vagueness, but find in favor of the constitutional challenge on equal protection grounds for the Act's unfair distinction between substantially similar business establishments based on what type of gaming license it holds.[213]

[213] At the time of publication, the appeal of the *Tavern Owners* case was pending before the Nevada Supreme Court following oral arguments held on April 6, 2009. *See* Docket Sheet, *supra* note 127.