

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-fifth Session
April 3, 2009**

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:43 a.m. on Friday, April 3, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Janet Sherwood, Committee Secretary

OTHERS PRESENT:

Michael G. Alonso, Herbst Gaming, Inc.; Terrible Herbst, Inc.
James L. Wadhams, Golden Gaming, Inc.
Sean T. Higgins, Executive Vice President, General Counsel, Herbst Gaming, Inc.; Terrible Herbst, Inc.
Steve Arcana, Chief Operating Officer, Golden Gaming, Inc.
Tom Clark, Nevada Tavern Owners Association
Joe Wilcock, Nevada Tavern Owners Association
Bob Peccole, Bilbo's Bars and Grills
Ron Drake, Treasurer, Nevada Tavern Owners Association
Terry Jicinsky, Las Vegas Convention and Visitors Authority

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Jim Avance, ETT Slots; Nevada Retail Gaming Association
Lenard Loper, Owner, Rainbow Market Convenience Stores; Chukars Sports
Casino & Restaurant
Ron Mestre, Bi-Rite Markets
Mary Guinan, M.D., State Health Officer, Health Division, Department of Health
and Human Services
Joe Pollock, Frontier and Rural Health Services Program, Health Division,
Department of Health and Human Services
Michael Hackett, American Cancer Society; Nevada State Medical Association
Robert Eisenberg, American Cancer Society
Joy Graber, American Cancer Society
Mary A. Anderson, M.D., M.P.H., District Health Officer, Washoe County Health
District
Richard P. Seher, M.D., Cardiologist, Reno Heart Physicians; President, Nevada
State Medical Association
Lawrence Sands, D.O., M.P.H., Chief Health Officer, Southern Nevada Health
District
Stephen R. Minagil, Southern Nevada Health District
EJ Maldonado, Tobacco Prevention Coordinator, Carson City Health and Human
Services
Josh Benke, Program Coordinator, American Lung Association of Nevada
Lee Radtke
Lawrence P. Matheis, Executive Director, Nevada State Medical Association
Christopher Roller, American Heart Association
Renny Ashleman, City of Henderson
Kyle Davis, Policy Director, Nevada Conservation League

CHAIR CARE:

The first item on the agenda is a work session on Senate Bill (S.B.) 221.
Senator Washington is not present so we will remove S.B. 221 from the
agenda.

SENATE BILL 221: Establishes a program of parole secured by a surety bond.
(BDR 16-926)

Let us open the hearing on S.B. 354. Where did Mr. Ashleman go?

SENATE BILL 354: Revises provisions governing land use decisions.
(BDR 22-235)

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CHAIR CARE:

I am not going to delay this any further. We will hear the testimony on S.B. 372 and then follow with testimony on S.B. 354.

[SENATE BILL 372](#): Revises the Nevada Clean Indoor Air Act. (BDR 15-1099)

CHAIR CARE:

Senate Bill 372 revises the Nevada Clean Indoor Air Act. I would like the proponents of the bill to come forward. We do not have floor today, so we will go to 11:30 a.m., but it will not be possible to allow everybody to testify.

MICHAEL G. ALONSO (Herbst Gaming, Inc.; Terrible Herbst, Inc.):

Before I go through the provisions of the bill, I want to provide some context on the Clean Indoor Air Act and what S.B. 372 proposes to do. The proponents of the Clean Indoor Air Act made the intent of protecting children from secondhand smoke clear while they gathered signatures and campaigned to get the initiative passed. The Clean Indoor Air Act initiative petition provides, and I quote, "This Act shall be known, cited and referred to as the Clean Indoor Air Act, the Nevada Clean Indoor Air Act protecting children and families from secondhand smoke." Contrary to what the opponents of this bill will tell you, S.B. 372 continues to protect children. The Clean Indoor Air Act was poorly written and is ambiguous. The problems with the Act have made enforcement difficult by the local governments and the State. James Wadhams will speak to the enforcement issues in more detail.

I would like to walk the Committee through the bill.

CHAIR CARE:

We have received e-mails from proponents and opponents, and the characterizations of what the bill does has been read in many different ways. Please provide us with your interpretation.

MR. ALONSO:

Section 1, subsection 3, paragraph (b) adds a new definition of adult stand-alone bar, tavern and saloon. Under paragraph (f), we modified the language of the Act. Subsection 1 reads, "Except as otherwise provided in subsection 3" That is where you can smoke as an exception to the Act. The bill provides for a public smoking area in an indoor place of employment if it is a completely enclosed area. The smoking area must contain a separate

method of ventilation from the other public areas of the indoor place of employment which substantially prevents smoke from infiltrating the other public areas. Persons under 21 years of age are prohibited at all times from entering into that area. In a grocery store, the gaming devices would be completely enclosed, there would be a separate ventilation system and nobody under the age of 21 could walk into that room. This is one example of what we are talking about. You have to look at all those parts; all of those things have to be there.

Section 1, subsection 3, paragraph (g), subparagraphs (1), (2) and (3) state, and I quote:

... the areas of convention facilities in which a meeting or trade show is being held, during the time the meeting or trade show is occurring, if the meeting or trade show: is not open to the public; in other words, it is a private show, is being produced or organized by a business relating to tobacco or a professional association of, for convenience stores; and involves the display of tobacco products.

We are talking about a limited exception. Terry Jicinsky is in Las Vegas and will provide testimony with respect to the economic impact the Act has had on trade shows in Las Vegas.

We deleted subsection 5, giving the control on smoking back to the State. The rest of the sections provide the State Health Officer with the enforcement powers.

The definition of adult stand-alone bar, tavern or saloon is implemented in subsection 8. The establishment must be licensed to sell alcoholic beverages, must hold a nonrestricted license or restricted gaming license and prohibit persons under 21 years of age from entering the premises at all times. Adults can smoke, and no children are allowed. We are protecting children, making enforcement easier, giving adults a choice and giving the owner the choice of making his or her business an over-21 establishment.

The rest of the bill is cleanup. The effective date of December 9 is set forth in section 2, three years after the Clean Indoor Air Act went into effect.

JAMES L. WADHAMS (Golden Gaming, Inc.):

It is important for the Committee members to understand what S.B. 372 proposes to do to the initiative petition. Parenthetically, sometimes initiative petitions that do not go through the vetting process of our legislative activity end up with ambiguities and contradictions. In southern Nevada, Douglas W. Herndon, District Judge, Department 3, Eighth Judicial District, reviewed the petition and said it was unconstitutional on its face as a criminal statute because of its inherent ambiguities. It is important to recognize it is not a smoking ban. The Act is designed to protect children and families from secondhand smoke in most public areas, excluding stand-alone bars and gaming areas of casinos. The Act is designed to say where smokers can and cannot smoke. It does not ban smoking; it deals with those locations permitted and not permitted for smoking.

Senate Bill 372 preserves and enhances the protection of children in section 1, subsection 3, paragraph (f), subparagraph (3) which reads, "Persons who are under 21 years of age are prohibited at all times from being present in the smoking area; "... They are isolated from secondhand smoke because they are prohibited from the area. A similar phrase appears in section 1, subsection 8, paragraph (a), subparagraph (3) which reads, "Prohibits at all times persons who are under 21 years of age from entering the premises." That was not in the Act. This prohibits those people going into smoking areas, adult-only locations, where people can make their own choices about smoking, gambling, eating and drinking. Family restaurants are still under the smoking ban.

Section 1, subsection 8, paragraph (m), subparagraph (1) suggests the drafters of this Act anticipated that completely enclosed areas in such places as restaurants, public places, indoor workplaces or strip malls would be permitted places for smoking. The language that Mr. Alonso identified in section 1, subsection 1, paragraph (f) is not a radical change. It recognizes that completely enclosed areas are places where smoking can occur. Some may argue that we have not added sufficient protection, but in the proposal that Mr. Alonso identified, it is required there be a separate method of ventilation. The drafters of the original Act said infiltration must be avoided. We have suggested it be completely separate. This enclosed area is not a radical, new concept. It was embodied in the original Act as passed by the people.

I have heard concerns about the preemption of local health authorities. This is not an accurate representation. I have been working with the Southern Nevada

Health District, which has been seeking direction from the State Health Officer and the Nevada State Health Division, to make statewide regulations. It is in that effort we thought it appropriate to add the language so that the State Health Officer or designee, which would be delegated to the Washoe County Health District and the Southern Nevada Health District, can create statewide regulations to allow some uniformity in this process.

The other area I want to identify is an important notion. My client will be up here to talk about his operation, comprised largely of smoking bars which are legal smoking locations under this Act. Does this mean he will have more smoking locations? I think not. It means those locations now legally qualified to be smoking establishments will be restricted to people over the age of 21, and they can serve a hamburger to the patrons. It adds a category making it clear that the establishment is an adult-only location. Once an adult chooses to enter, he or she is not precluded from ordering food in that location. In my discussions with the Southern Nevada Health District, it became clear that eating was not prohibited in a stand-alone bar; it was the service of food by the stand-alone bar. Eating and smoking were not the issue. I am not sure if that was the intent of the drafters, but this creation of an adult stand-alone bar makes it clear that those adults who choose to enter those locations will be able to eat.

What are the significant changes? Senate Bill 372 clarifies the exception in the enacting clause of the Act allowing stand-alone taverns that have gaming licenses to allow smoking as long as persons under the age of 21 are prohibited. People who choose to smoke and gamble can eat if they would like. It also allows for the construction of completely enclosed areas. I have identified that as already embedded in the Act, allowing smokers to smoke in a safe environment without endangering those who do not want to be exposed to secondhand smoke and prohibiting those persons under the age of 21 from entering the smoking area.

The significant change is the allowance of tobacco-related conventions. Reenergizing our tourism and convention activity is a critical component throughout the State. Under the Clean Indoor Air Act, those sorts of events cannot be allowed.

We are proposing S.B. 372 for many reasons. The first reason is choice. We are Nevadans, we are Americans and we should be able to exercise our choices. Secondly, local businesses suffered significant and dramatic job and revenue

loss from the enactment of the Clean Indoor Air Act. Thirdly, we think S.B. 372 will enhance business and tourism. Lastly, it will lend clarity to this clouded law in statewide uniformity of enforcement.

Once the Committee reads the Act and the amendments in the context of what they do, you will see that S.B. 372 does not repeal or dismantle the Clean Indoor Air Act. It refocuses the Act and leaves the basic principle of the Clean Indoor Air Act intact. There are places where you can smoke, and there are places where you cannot smoke. Most importantly, we are protecting those who choose to go where smoking is not permitted from secondhand smoke.

CHAIR CARE:

We have seen the implementation of the 2006 Clean Indoor Air Act. This would allow a stand-alone bar, tavern or saloon to convert if it wished to an adult stand-alone bar, tavern or saloon. Let me hone in on section 1, subsection 3, paragraph (f) where we talk about indoor places of employment. A grocery store is a place of employment; a movie theater is a place of employment. How broadly should this language of indoor place of employment read? Would grocery store employees be allowed to take a smoke break within a closed-off area in the grocery store?

MR. ALONSO:

If the workers within that enclosed area were over 21 years of age, they would be able to take a smoke break under the reading of this bill.

CHAIR CARE:

Okay. Paragraphs (a) through (g) of subsection 1, section 1 would be indoor places of employment. Would the language in paragraph (f), subsection 3 of section 1 permit a smoking place in an enclosed area in each one of those places of employment?

MR. ALONSO:

The answer to that question is yes. The language follows the way the Act was written, with the exceptions in subsection 3. We focused on certain types of businesses. We tried to make the language workable, so we used the language in the Act. Subsection 2 of section 1 states, "Without exception, smoking tobacco in any form is prohibited within school buildings and on school property." If it is the pleasure of the Committee to change that and include child care facilities or areas where you do not think smoking should be, even if you

put in the smoking capsule, subsection 2 would be the place to drop it. We tried to make it clear that smoking would be allowed if you have a ventilated smoking area and prohibit people under the age of 21. This is a policy decision for the Committee. I do not think any child care facility in this State would put in a smoking capsule.

CHAIR CARE:

What parent would want to send their child to that facility if they did?

MR. ALONSO:

Right. You are reading it correctly.

CHAIR CARE:

In section 1, subsection 3, paragraph (f), subparagraph (2), there is a line that reads, "... substantially prevents smoke from infiltrating the other public areas" You may want to have other people testify on this issue. It does not say prevent smoke, it says substantially prevent smoke. It sounds like a small difference, but I am sure this will be an issue you may want to address.

MR. ALONSO:

There are people who may answer this more clearly than I can. Prior to the Act, there was language in effect in the State law on smoking. You cannot prevent 100 percent of the smoke from coming out of the smoking area. The word substantially is used to allow compliance with the law.

SENATOR AMODEI:

Mr. Wadhams, you mentioned there has been a court case in Clark County on the criminal penalties.

MR. WADHAMS:

Yes, Senator Amodei, there was a case.

SENATOR AMODEI:

Who brought that case? Can you describe the circumstances and the outcome? I presume the Clark County District Attorney was the prosecutor?

MR. WADHAMS:

It was a challenge to the statute brought by several entities including the Herbst group, the Golden group and the Nevada Tavern Owners Association. The case

argued the law was unconstitutional. There were two bases of that challenge: it is unconstitutional on its face, and it is unconstitutional as applied. The judge ruled on the level of the standard applied for criminal enforcement, ruling it was unconstitutional on its face because of the ambiguities. It was an impressive discussion and heavily briefed. He did not rule it unconstitutional on its face as a civil enforcement statute, just as a criminal statute. He did indicate that depending on how the regulations were developed, it could be unconstitutional as applied.

We have not had regulations developed, and as I referenced in one of my earlier comments, the Southern Nevada Health District had solicited the State to have broader regulations. Senator Amodei, the simple answer to your question is District Judge Herndon ruled it unconstitutional on its face as a criminal statute but left open the opportunity in the interpretation as a civil enforcement statute.

SENATOR AMODEI:

I assume somebody was issued a misdemeanor citation, and that was the basis for the case going up, or was it a request for declaratory relief?

MR. WADHAMS:

It was for declaratory relief.

SENATOR AMODEI:

You said your clients appeared, saying the Act was unconstitutional. Who appeared on the other side?

MR. WADHAMS:

The Southern Nevada Health District.

SENATOR AMODEI:

How long ago was the case? Has it been appealed or has the appeal period expired for that ruling?

MR. WADHAMS:

There may be others who can correct me. I do not recall, but that case was decided in late 2006.

SENATOR AMODEI:

No appeal was taken by the Health District as to the ruling on the criminal?

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MR. WADHAMS:

That case was appealed and is pending in the Nevada Supreme Court. The oral argument is next Monday.

SENATOR AMODEI:

Mr. Chair, would it be possible to ask Bradley Wilkinson to get us the briefs for the comparative sides on that issue before the Supreme Court?

CHAIR CARE:

Sure, if you would, please.

SENATOR AMODEI:

Have you attempted to do anything in S.B. 372 regarding District Judge Herndon's decision on the constitutionality of the criminal provisions? Is there any proposed fix in your legislation regarding that judicial action?

MR. ALONSO:

We have not. It is primarily a drafting issue. I direct the Committee to section 1, subsection 6, which reads, "... this section pursuant to Nevada Revised Statute (NRS) 202.2492 and NRS 202.24925." The reference to NRS 202.2492 is the criminal piece. Senator Amodei, the fix would be to remove that statutory reference and the word "and."

SENATOR WASHINGTON:

Subsection 6 states the State Health Officer shall be the one to designate the regulatory process for the entire State. Is this the section that will add clarity to that court case in regard to the criminal provisions that may be contested as unconstitutional?

MR. WADHAMS:

It was our anticipation that the designee in the urban areas would be the Washoe County Health District and the Southern Nevada Health District. In the other counties that do not have health officers, the State would have the opportunity and clear authority to adopt statewide regulations. That was the intent of that change.

SENATOR WASHINGTON:

Under Clark County and Washoe County, you indicated the regulations to be adopted are ambiguous. Has there been any uniformity in those regulations in regard to the smoking ban?

MR. WADHAMS:

No regulations have been adopted. There have been several drafts proposed, but nothing has been adopted by the board of the Southern Nevada Health District. I do not believe anything has been adopted by Washoe County. We do not have a statewide standard.

SENATOR WASHINGTON:

If I am reading you correctly, it is vague as we speak.

MR. WADHAMS:

Yes, Senator Washington.

MR. ALONSO:

Senator Washington, the Clean Indoor Air Act makes a difference between a nonrestricted license and a restricted license. Many places throughout the State that do not have hotel rooms were issued nonrestricted gaming licenses prior to the passage of the Resort Hotel Act in 1991. There are grocery stores and bars that have nonrestricted gaming licenses. Under the Act, some grocery stores having those nonrestricted gaming licenses allow smoking. In Washoe County, there is a chain of grocery stores with three stores that have nonrestricted gaming licenses, and smoking is allowed. They made a deal with the District Attorney that as long as they enclose that area, people could smoke. In Clark County, grocery stores with nonrestricted gaming licenses were told they cannot allow smoking and that the Health Division would go after them because they were a grocery store. This is my understanding, and there are people who can provide clarification. This addresses your question about the interpretation and how the Act was written.

SENATOR WASHINGTON:

I remember those provisions several sessions back in regard to retail establishments. In particular, grocery store outlets were required to provide adequate ventilation in encapsulated areas for smoking. I understand where the provisions are and what you are talking about. My concern is having the State

Health Officer develop uniform or statewide regulations to enforce the no-smoking rule so there is continuity and consistency across the board.

MR. WADHAMS:

Because of the way the Clean Indoor Air Act is written, some stand-alone bars, smoking locations that have stopped serving food out of their kitchens and laid off those employees, may have prepackaged food appear in plastic containers. People can walk across the street, buy food at Wendy's and bring it back to the stand-alone bar. The ambiguity is there is no prohibition on eating food in a smoking stand-alone bar. It prohibits the stand-alone bar from serving food to its customers. That ambiguity has created confusion throughout the State as to what is and what is not allowed. The preamble of the Act was not intended to cover stand-alone bars. It has become a nightmare to figure who is in, who is out. If we declare adults-only, then let the adults make the choice. Let us protect the kids and move on.

SENATOR WIENER:

As a follow-up to the regulatory question, because the Health Division has jurisdiction over the remaining counties, have they adopted the regulations? We cannot enforce without regulations. What has the enforcement history been with the other counties?

MR. WADHAMS:

About one year ago, the State Board of Health held a hearing to begin discussing those regulations. None have been produced yet. We have had no workshops on regulations. That effort has stalled. There may have been ambiguity as to whether the authority was there to adopt the regulations. Whatever the administrative problem, it has not developed at the State level. We think this Act would clarify that authority.

SEAN T. HIGGINS (Executive Vice President, General Counsel, Herbst Gaming, Inc.; Terrible Herbst, Inc.):

Senate Bill 372 is an important step in clarifying the smoking laws in the State of Nevada as well as helping the State's economic recovery. It provides a clarification of the Clean Indoor Air Act passed by voter initiative in November 2006. Senate Bill 372 is not at odds with this piece of initiative; it strives to accomplish the stated goal of the Act to protect children and families from the effect of secondhand smoke. Senate Bill 372 does not expand the possibility of smoking to any area which would allow entry by children, anyone

under the age of 21, except as allowed under the Clean Indoor Air Act. Senate Bill 372 does take into consideration the free choice that adults can and do make on a regular basis with regard to smoking and other issues. The bill would allow smoking in completely enclosed, separately ventilated areas which are restricted to persons over the age of 21.

During the initiative process in 2006, many companies, mine included, made assertions that if this initiative was passed as written, there would be dire economic consequences to our businesses and the State of Nevada. We were rebuffed at every turn and told that by turning into a nonsmoking establishment, we would see new business from nonsmoking customers. I would like to review what happened to our company following the enactment of this initiative.

Herbst Gaming, Inc., is a public reporting company. Our documents are available on the Securities and Exchange Commission Website for verification. From January 2007 through June 30, 2007, immediately following the passage of the Nevada Clean Indoor Air Act, Herbst Gaming, Inc., suffered economic setbacks. We lost 18 percent of our revenues from our slot route operation and 62 percent of our earnings before interest, taxes, depreciation and amortization. That number totaled over \$50 million from our bottom line. The passage of the Clean Indoor Air Act was the cause for these losses. We have suffered, as have many other companies, additional economic setbacks distinguishable in time from the smoking ban. In the last year, we have suffered setbacks more to our casino businesses, much like the other casinos in the State have suffered.

Following the enactment of the Clean Indoor Air Act, Herbst Gaming had the ability to renegotiate our contractual rental payments with many of our grocery stores, drug stores and convenience store chains. Following our renegotiation of those leases and since then, we have had 15 grocery stores close specifically because their rental payment was reduced, making their stores unviable economically. Several other grocery stores have ceased 24-hour operations in an attempt to reduce costs and recover lost money by the lowered rent.

The entire chain of Rite Aid Drugstores closed following this enactment because we reduced their rental payment as allowed under our rent. On average, a grocery store in Nevada employs 65 people. Approximately 1,000 jobs were lost in those 15 locations. On average, a Rite Aid Drugstore employed 20 people; another 680 jobs were lost.

MR. HIGGINS:

We operate at several hundred tavern locations in the State. Over 75 percent of those taverns saw a dramatic drop in their gaming revenue in the six months immediately following the enactment of the Clean Indoor Air Act. Over 30 of those locations have closed because of the smoking ban. The number of closed locations is 11 percent of our route. This accounts for over 1,000 gaming devices on the street, which is in excess of 14 percent of our total route.

The loss of revenue for Herbst Gaming, Inc., dropped almost directly to our bottom line. We must provide service to locations regardless of their revenue. We send teams to collect the money, we have mechanics to repair the games and we must have change personnel available at all times games are offered for play to the public. Our labor costs do not drop commensurate with any drop in revenue.

Passing S.B. 372 will give businesses who cater to persons 21 years and older the choice of whether they want to make their establishment compliant with the requirements set forth in this bill. It is not an automatic. Each business will have to decide if the investment necessary to comply with S.B. 372 makes economic sense. Each of these business owners will have to gauge their respective clientele to decide whether a smoking establishment is appropriate.

Senate Bill 372 takes into account the health and well-being of the children of the State of Nevada. It does not expand any areas where children can go where smoking would be allowed. It takes into account the economic well-being of businesses in the State. It takes into account the employees who are citizens of Nevada and take pride in the opportunity to work and gain benefits these jobs offer. It takes into account the overall health of Nevada's economy and attempts to find ways to pull the State out of this recession.

This body is tasked with weighing all of these issues when making these types of decisions. This is not a task shared by the initiative process, where people can manipulate the question to suit their needs without vetting all the issues. It is in the best interest of the State of Nevada and its citizens to pass this legislation. It will continue to protect our children; it will provide jobs for our citizens; it will allow choices for people over the age of 21 and choices for business operators. It is an emotional issue for many people, but smoking is still legal in the United States. We are not eradicating smoking; we are limiting smoking to locations frequented by people 21 and over.

STEVE ARCANA (Chief Operating Officer, Golden Gaming, Inc.):

Golden Gaming is a diversified gaming company operating casinos in Nevada and Colorado. We participate in route accounts throughout the State, and we are the largest tavern operator in Nevada with over 45 locations. Southern Nevada holdings include our flagship Sierra Gold brand and PT's Gold, PT's Pubs and PT's Places. Golden Tavern Group also operates in northern Nevada, including brands of Sierra Gold, Sierra Junction, Sparky's Sports Bar and the Gold Bar in Fernley.

Since the acquisition of PT's Gaming LLC in May 2002, the company has grown into the Golden Tavern Group through a series of acquisitions as well as several ground-up developments. Our Sierra Gold brand is casually upscale and features refined décor and a comfortable atmosphere. Our PT's Gold brand has established itself as Las Vegas's tavern of choice, featuring a casual, upscale atmosphere and convenient locations. In addition to our quality tavern operations, we pride ourselves in employing excellent team members. We offer team member benefits and competitive wages, and many of our team members are tenure employees. Our employees play a part in the loyalty shown by our customers. Our operations are not restaurants. Our taverns cater to responsible adult activity, providing a clean environment, a variety of gaming selections, Golden Rewards Players Club, outstanding food selections, signature cocktails and friendly staff.

Recent statistics show that approximately 25 percent of Nevadans are smokers. That same 25 percent of our consumers represent a disproportionate amount of our potential revenue. In particular, the smoking populations are strong gamblers and drinkers. By eliminating smoking in January 2007, our taverns experienced a severe decline in revenue. Please refer to my handouts ([Exhibit C](#)). The charts on pages 2 through 7 show our percentage declines as of January 2007 and forward. Page 3, Monthly Beverage Revenue Based on Same Stores Open in 2006, shows those same stores experienced a 25-percent decline after the smoking ban was passed. As you can see, that trend has continued. It is the same story with food sales shown on the graph on page 4 of [Exhibit C](#). The trend graph on page 5 will show you we experienced a 28.2-percent decline within the first two months of the smoking ban. Those trends have continued to today. Page 7 of [Exhibit C](#) shows the trend on our same-store gaming revenues. Once again, you will see from December 2006 through January 2007, we experienced a 17.5-percent decline in taxable gaming revenues. That trend has continued.

As a result of the smoking ban and our economic downturn, Golden Gaming has had no other choice but to downsize its workforce. I want to emphasize that the graphs on pages 8 and 9 of [Exhibit C](#) are real. These graphs are lost jobs. In January 2007 we had a work reduction over that two-year period of 60 team members or 15.3 percent of our Golden Tavern workforce. Let me emphasize that this downsizing resulted in several millions of dollars of wages not going into the Nevada economy.

I want to respectfully pose some questions to the Committee. Is it fair to invest hundreds of millions of dollars into our taverns, our product and our team members, only to have 25 percent of our consumers eliminated through legislation? Is it fair that smoking legislation has forced us to eliminate a sizeable amount of our workers and prevent millions of dollars from entering the economy?

As an operator, I should see economic fluctuations to the business as a result of consumers' choices. Our taverns cater to adults, not children. Adults should have a choice as to whether they wish to be in a smoking environment. Let us put Nevadans back to work. We reported an unemployment rate last month of over 10 percent. By reopening these kitchens and getting our team members back to work, Golden Gaming can help meet some of the economic challenges we all face. Members of the Committee, please support S.B. 372.

TOM CLARK (Nevada Tavern Owners Association):

We have heard a number of different statistics, and my goal is to show this Committee the human side of this issue. Senate Bill 372 will put more people back to work. Prior to the ban, the Tavern Owners Association represented more than 300 taverns and bars in Nevada. Today, we represent 150 taverns and bars due to a decline in revenues and closings of bars altogether.

CHAIR CARE:

I have received a letter dated March 30 from Bob Peccole on behalf of his client, Bob Bozer.

JOE WILCOCK (Nevada Tavern Owners Association):

I own the Brewery Bar and Grill on Sunset Road in Las Vegas. I have been involved with the Nevada Tavern Owners Association for seven years. I want to look back on the history of the smoking ban. It is regretful that we could not work better for the good of the public in the stated goals. There are some

glaring flaws. State Question No. 5 did not include nonrestricted licenses but targeted restricted licenses. A translation of that is a small businessman did not have the money or resources to educate the public about what they were getting themselves in for. I still have patrons coming in every day asking the difference between State Question No. 4 and State Question No. 5. We wrote State Question No. 4 as a defensive response because we were getting stone-walled by the proponents of the original bill. By the time the vote was taken, the voters were so confused they did not know what they were voting for.

I would like to speak to the economic and human impact of the ban. Immediately after passage, a survey of our members showed the typical tavern game revenue declined 14 percent, food revenue declined 30 percent and bar revenue declined 15 percent from before the current economic downturn. On average, we lost 3.4 employees after passage of the Clean Indoor Air Act.

The typical owner tried to figure what course of action to take. I was one of them. We could choose between a train wreck and a plane crash. If we prohibited smoking, we lost patrons. If we stopped serving food in the bar, we lost patrons. After meeting with the cooperative Southern Nevada Health District, I isolated my restaurant by enclosing it in glass and providing a smoke-free hall to the bathroom area. After spending \$60,000, I was surprised all the nonsmokers, who were going to become my patrons, never made their appearance in my establishment. I was one of the lucky ones. Many of the tavern owners did not have the capital to remodel, or they had a kitchen location making it physically impossible to remodel, resulting in suspension of their food service altogether. Nevada is a 24-hour drinking state. As a tavern owner, I am concerned about my patrons being allowed to eat something after drinking before getting behind the wheel of a car.

Senate Bill 372 is a commonsense way to fix what is wrong with the smoking ban. It gives the owner an opportunity to provide a smoke-free environment for those patrons who wish to eat and enjoy that environment. Let the customer decide which place to patronize. This is free choice, and we like it. The customers tell us what they want. There are places I do not go because I do not like the environment. That is my free choice, and I make it. We tavern owners trust the intelligence of our customers. Before they enter our premises, they know what they are getting themselves into. If people do not like our

environments, they should stay away. Do not impose someone else's choice standards on us.

Since the passage of the smoking ban, I have laid off 4 out of 17 employees. I wish everyone beating this drum for the smoking ban on taverns could look in the eyes of a single mother with two kids and tell her she no longer has a job because some well-intentioned but poorly crafted piece of legislation missed the mark. This is a chance to correct what is wrong with our environment.

BOB PECCOLE (Bilbo's Bars and Grills):

I am an attorney representing the owners and employees of Bilbo's Bars and Grills; I am also a shareholder in Bilbo's Bars and Grills. I brought with me today a copy of the official sample ballot issued in Clark County for the general elections of November 7, 2006, when we had the initiative titled State Question No. 5. Consistent with what you have heard before you this morning, I would like to read portions of the ballot made available to each voter in the State. The part I want to read is the argument advocating the passage, which states, "Nevadans want change. In 2002, about 68 percent of voters in both Clark and Washoe Counties supported an advisory question whether smoking should be prohibited in public places where children are allowed." It also says, "Nevadans deserve the right to breathe clean indoor air. Voting 'YES' provides meaningful public benefit and best protects families and children from the health risks of secondhand smoke." Another passage states,

Most, if not all, bars, taverns and saloons that serve meals prepared on site, thereby requiring a food-handling license, such as Nevada's many sports bars, allow children and families in their establishments, so prohibiting smoking in these places is consistent with the measure's intent to protect children and all nonsmokers from the dangers of secondhand smoke.

The emphasis was on the protection of children. If this is the will of the people, then S.B. 372 is not inconsistent with that intent. The bill is saying we want to establish an adult atmosphere, and we are going to leave the children out. They will not be endangered by people who smoke frequenting bars and taverns.

This official ballot also states, "The above argument was submitted by the Ballot Question Committee composed of citizens in favor of this question as provided for in NRS 293.252." The nonsmoking coalition drafted this language.

They are the ones who are going to appear today and oppose everything we say. They are opposing their own views.

Another portion of Question No. 5 states,

Smoke-free laws do not harm businesses such as restaurants and bars. At worst, they've had no effect at all; at best, they produce positive trends. These types of businesses recognize these laws can mean a healthier bottom line. Restaurants in states that have enacted smoke-free laws, for example, have seen increases in sales, profits, tax receipts, patronage, employment and liquor license applications. Various chambers of commerce in other states support smoke-free laws. It has been found that smoke-free legislation has been easy to implement.

Question No. 5 states,

Smoke-free laws in other states have no adverse economic impact on the hospitality industry—restaurants and bars. Tourist destinations such as New York, California and Florida are smoke-free (Hawaii's laws take effect this November). Restaurants and bars there have increased sales, profits, tax receipts, employment and patronage.

These statements in this document provided to the voters of the State of Nevada for State Question No. 5 were not true at the time, and they are not true now. There is no question that when this law divided the smoking in bars from bars with no smoking, using the nonrestricted as opposed to restricted licensing as the demarcation line, it was a mistake. It should be corrected with the passage of S.B. 372. Whoever drafted this bill did not know what they were talking about with respect to restricted and nonrestricted gaming licenses in Nevada. They created a situation where some bars with 16 machines can allow smoking and other bars that have only 15 machines cannot allow smoking. That makes no sense; one machine is not going to make any difference with respect to smoking.

The states mentioned in State Question No. 5 have no gaming in their restaurants or bars. In Nevada, the hotels and casinos allowed smoking, and any bar having 16 or more machines with a nonrestricted license allowed smoking. How is that fair to the bars having only 15 machines that could not get 16 machines because that window was closed?

Since the passing of the smoking ban, Bilbo's Bars and Grills has lost 10 percent to 20 percent of our bottom line. We have reduced our workforce in each of the three locations by at least 15 percent through termination and reduction of time worked. In the last year and a half, 54 taverns and bars have gone under in Clark County. Not only has the State allowed income to go away, but there is a loss of sales tax, business fees and taxes. Gaming taxes have dropped; when you lose one slot machine, you are losing State revenue. Much State revenue was lost when the smoking ban went into effect. Bars and taverns not violating the intent of protecting children should not have been affected. In these hard times, the State of Nevada Legislature should consider looking out for the little guy because it will help the State's economy.

RON DRAKE (Treasurer, Nevada Tavern Owners Association):

I am a partner at the Point After Lounge in Las Vegas. The tavern industry is cognizant of our responsibility to protect children and minors. Being holders of privileged licenses, we are constantly on guard to prevent minors from participating in adult pastimes. The passage of the Clean Indoor Air Act has caused every tavern in the State to make a business decision that goes against a successful business model we have been operating under for many years. Do I allow food or do I allow smoking? When the purpose of the Clean Indoor Air Act is to protect children from secondhand smoke, it is pure folly to mandate that it is illegal to couple the act of eating with the pastime of smoking, particularly when this involves adults only.

Many of us have attempted to work with our local health departments to physically modify our facilities to conform to the Clean Indoor Air Act. It has been stated that every bar can be modified, but at what cost? In order to comply, many of our members would have to gut their entire building from wall to wall and start over. They have a kitchen on one side with seating on the other and a bar in the middle, making it impossible to follow the set guidelines. This solution would be prohibitive even in good economic times; now it is unacceptable. In many cases, the Clean Indoor Air Act has brought food service in small bars and taverns to an end, resulting in a loss of hundreds of jobs and costing the State in missed tax revenue.

The economic strength of Nevada stems from thinking outside the box. This is evidenced when the 1931 State Legislature legalized gaming. We have a long tradition of allowing individuals to choose what is right for them. We should not turn Nevada into a clone of California. Where adults are allowed to gather and

minors are prohibited, we feel that adults ought to make their own decision to patronize an establishment that allows food service and smoking. The marketplace should dictate whether a tavern allows the legal act of smoking. If there was a groundswell against patronizing a tavern as businessmen, we would be the first to make that change long ahead of any legislation. I strongly support the passage of S.B. 372.

TERRY JICINSKY (Las Vegas Convention and Visitors Authority):

I am here in support of S.B. 372, specifically section 1, subsection 3, paragraph (g) as it relates to convention centers and meeting venues throughout the State of Nevada, specifically the Las Vegas market. The meetings and conventions industry is our primary economic driver in southern Nevada. As we adjust to the economic downturn and challenges within the current market, we find ourselves in a position where we cannot afford to lose any more business from the conventions and meetings market.

Last year, this industry represented over \$8.5 million to our local economy and supported over 46,000 jobs in the southern Nevada market. The meeting and convention industry is competitive. Although Las Vegas has been ranked the No. 1 destination for the last 14 consecutive years in terms of citywide trade shows throughout North America, we are constantly competing with new conventions in other cities. Chicago, Orlando, New Orleans, Atlanta, New York, San Francisco are just some of the cities trying to take conventions scheduled for Las Vegas.

In 2009, Las Vegas lost two industry trade shows to New Orleans because of the Clean Indoor Air Act. The Retail Tobacco Dealers of America and the Tobacco Plus Expo were unable to market and sample their products in the Las Vegas Convention Center, the Sands Expo Convention Center or the Mandalay Bay Convention Center. Over the past three years, the total economic impact of these shows has been more than \$41 million to the local economy and represented over 17,000 visitors to our destination. The unintended consequence of the Clean Indoor Air Act as it applies to convention centers and meeting venues was to take \$41 million out of the Nevada economy and move it to the Louisiana economy.

Both shows have expressed an interest in returning to Las Vegas if and when the Clean Indoor Air Act is clarified, allowing them to exhibit and sample their products in convention facilities. These trade shows will be held in enclosed

convention halls, and no smoking would be permitted in the public areas of these facilities. These trade shows are not open to the public and are only involved with registered convention delegates who work in the tobacco industry. I would like to read a letter sent to us from the leadership of the Tobacco Expo, Ed O'Connor, President and Chief Executive Officer of Tobacco Plus Expo.

CHAIR CARE:

I have received both that letter and a letter from Joe Rowe, Executive Director of the International Premium Cigar & Pipe Retailers Association ([Exhibit D](#)).

MR. JICINSKY:

In closing, at a time when Nevada has been hard-hit by this recession, we cannot afford to lose any more business to our competitive cities. These two trade shows will generate additional visitors and revenue for southern Nevada and will support jobs in the meetings and conventions industry. The products would be exhibited in a closed convention hall, and no smoking would be permitted in the public areas of the facilities. These shows are not open to the general public, and attendees are only those from the industry specifically attributed to the tobacco industry.

JIM AVANCE (ETT Slots; Nevada Retail Gaming Association):

I will cut my testimony in half and concentrate primarily on the smoking area of slot machines, grocery stores and convenience stores. During the Legislative Session of 1987, Assemblyman Morse Arberry Jr., Assembly District No. 7, alerted me legislation was going through his Committee on Health and Human Services that would affect the gaming operation in the front of grocery stores. That legislation outlawed smoking in grocery stores. With his assistance, he and I crafted the language that said the smoking of tobacco in any form is prohibited if done in any public area of a store principally devoted to the sale of food for human consumption off premises—except those areas leased or operated by a person licensed pursuant to NRS 463.160, a slot route operator's standard.

Over the next several years, the grocery store industry went along, doing business as usual. The Gaming Control Board and the Legislature determined that children could not be around the machines. There would always be an attendant on duty, and we would be located near the front door by the dog food, rock salt and firewood. In the 1990s, we started getting pressure from

various groups regarding our patrons smoking while playing the slot machines. That pressure became legislation.

We hired a scientific research company to determine if the smoke was going away from the slot machine areas, and it was determined that it was not. Smoke goes up; it does not go sideways. It did not go out into the walking areas, and it did not go over to the cash registers. You did not see the studies because the legislation affecting the studies was stopped in the Assembly.

Between the 1997 and 1999 Sessions, talks were held between the slot route operators and the Retail Association of Nevada to see what both parties could do to keep the slot players and the store customers happy. The result of these talks was S.B. No. 421 of the 70th Session ([Exhibit E](#)), proposed by the Retail Association of Nevada, not a nonsmoking group. This language defined the smoking area, requiring us to build alcoves and/or glass-enclosed rooms.

I will lead you through the photos I have presented ([Exhibit F](#)). The area has to be segregated from the other public areas of the store by two or more walls and a combination thereof, and they have to contain a method of ventilation which substantially removes smoke from the area. The first two photos are of a Raley's Store in Carson City. The next two are of the Safeway Store in Carson City. The next one is Save Mart in Carson City and then a CVS drugstore. These pictures were taken between 3 p.m. and 4 p.m. last Monday. The last three pictures are standing in the doorway looking in at the slot machines. You will notice state-of-the-art equipment but no players. The lease on those machines in those areas still goes on. The employees are getting paid, but there are no players.

LENARD LOPER (Owner, Rainbow Market Convenience Stores; Chukars Sports Casino & Restaurant):

We own and operate four convenience stores in the Reno market and three in southern Nevada. I want to share with you the net effect of what has happened over the last two years with our slot machines and business in general. Since the passage of the smoking ban, our slot revenue income has dropped from \$2,047,000 in 2006 to \$1,312,000 in 2008 for a 36-percent decrease in revenues. At the same time, our gasoline sales increased 20 percent, our merchandise sales increased 2 percent and our gross profit dropped \$588,000 during that two-year period. We went from \$1,696,000 in gross profit in 2006 to \$770,000 in 2008, a difference of \$925,000. Our estimated cash surplus

dropped in 2006 from \$812,000 to \$164,000 on those operations, which means we cannot maintain our stores anymore. We are operating at a break-even level. If we cannot turn that around and improve, the stores will continue to deteriorate, equipment will age and we will lose ground on our business. We will eventually have to make some tough decisions.

Terrible Herbst, Inc., is the largest convenience store (C-store) operator in the State. As a result of the Clean Indoor Air Act, they went from being the largest, most prosperous company in the State in the C-store business to filing bankruptcy this year. They lost millions of dollars in their C-store business, their slot routes and their casino operations. There is no better example of the effect this law has had than to look at what has happened to Terrible Herbst, Inc. Many other C-store operations in this State may go the same way if we do not get some relief soon.

RON MESTRE (Bi-Rite Markets):

Bi-Rite Market is a 6,000-square-foot neighborhood grocery store with 100 square feet donated to slot machines. The day the smoking ban went into my store, we dropped 50 percent of our slot revenue. It does not sound like much, except we were taking in about \$205,000 a year in that particular store. We are now taking in \$120,000, a loss of \$105,000 a year. The loss of the slot players caused me a loss of \$38,000 in indoor sales. This is one little individual operator losing about \$150,000 a year. We laid off one full-time employee and two part-time employees, and two full-time employees are now part-time. The employees now pay 30 percent of their health insurance, which is \$150 per month for an employee. A \$15 an-hour employee is working about 14 hours just to pay their health insurance.

I spent 25 years as a member of the State Board for the American Lung Association of Nevada. I would like nothing better than to see no one smoke. If I thought no smoking in my slot area was doing some good, I would not be here, but it is not changing anything. I have a ventilation system, and kids are not at the slot machines. The people who smoke are going to smoke. They are adults. They go to the neighborhood casino and no longer come to Bi-Rite.

CHAIR CARE:

That will take care of the proponents of the bill.

I have the written testimony of Dr. Mary Guinan, State Health Officer ([Exhibit G](#)). If the bill passes as written or has amendments as to the enforcement provisions, the enforcement would be turned over to the State and no longer be local. You seem to discuss this in [Exhibit G](#). Could you give us some idea of how you think this would work? It might help Committee members to hear some testimony on this before we go to the opponents of the bill.

MARY GUINAN, M.D. (State Health Officer, Health Division, Department of Health and Human Services):

How we understand it to work is that only the State Health Officer could make the regulations. As stated in my prepared testimony, [Exhibit G](#), we have developed the process for drafting statewide regulations.

At the present time, the enforcement of the regulations is in the hands of the local health authorities, delegated from the State. Under the bill, only the Health Officer or his designees would enforce the law and receive and investigate complaints. That would change us. The State Health Officer's likely designee for enforcement of S.B. 372 would be the Health Division's Frontier and Rural Health Services Program. This unit would be tasked to respond to all complaints of violations of this bill, including complaints about establishments in Carson City, Washoe County and Clark County. It is likely, for reasons related to geography and limited resources, those complaint investigations may not be done in a timely manner, resulting in potential public health hazards.

Health Division staffing levels are insufficient to investigate all complaints of violations of the Act. The bill will have fiscal impact on the Frontier and Rural Health Services Program associated with hiring at least five additional environmental health specialists to enforce the Act for an estimated \$315,000 increase in annual budget. The State Health Officer will have to develop and implement a complaint system and adopt the necessary regulations to carry out the assigned provisions of the bill. This authorization is not addressed. Passage of the bill and subsequent regulation promulgations would cost approximately \$8,000, [Exhibit G](#).

Of great concern is no provision in this bill for noncompliance penalties, particularly for repeat offenders or for those who endanger the public's health as a result of noncompliance. In other words, there are no deterrents to encourage compliance, [Exhibit G](#).

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CHAIR CARE:

Is there anything you two want to add about the enforcement provisions if it goes statewide?

JOE POLLOCK (Frontier and Rural Health Services Program, Health Division, Department of Health and Human Services):

We would be that enforcement arm for the State Health Officer. We are here to support any questions you have for Dr. Guinan that we could answer from the enforcement side.

SENATOR WIENER:

Mr. Wadhams mentioned the language in the bill said "or designee." Does the designee part go to the Washoe or Clark County Health District, or does that mean it would have to stay within the State structure?

MR. POLLOCK:

It is our understanding that we would be the enforcement arm. We would not be able to designate Washoe County since they have their own board of health. We can clarify that with the Attorney General and get back to you.

SENATOR WIENER:

That is a critical piece for enforcement.

CHAIR CARE:

The deadline for bills coming out of the Committee house of origin is next Friday, so we would need that expeditiously.

Let us go to the opponents of the bill.

MICHAEL HACKETT (American Cancer Society; Nevada State Medical Association): Both the American Cancer Society and the Nevada State Medical Association are members of the Nevada Tobacco Prevention Coalition. I would like to introduce the original testimony and opposition of this bill. I served as the campaign manager for the Nevada Clean Indoor Air Act in 2006. That made me the de facto campaign manager for the effort to defeat the competing ballot measure at that time, responsibly protecting Nevadans from secondhand smoke. I want to address a comment made by Mr. Wilcock in Las Vegas when he claimed there was confusion over the Clean Indoor Air Act and that voters did

not know what they were voting for. I would like to put on the record that the confusion was generated by the competing measure of the other side.

CHAIR CARE:

I cannot speak for the other Committee members, but the law is what it is. Aside from the confusion the voters may or may not have had, the thrust of what I am hearing is the intent behind your initiative was to protect children, and what they seek to do here today does not harm children. In that sense, I thought the testimony was relevant.

SENATOR WIENER:

There has been an emphasis on children, but I also heard a reference to "nonsmokers" in part of the language read from the sample ballot. Was that part of the language as well?

MR. HACKETT:

Yes. I did not have anything to do with drafting the language for the Nevada Clean Indoor Air Act. I became involved during the campaign process. The purpose of the Clean Indoor Air Act is to protect those population segments most vulnerable to secondhand smoke. Children are the key component, but it also affects the elderly and people with preexisting medical conditions who are equally susceptible to the dangers of secondhand smoke. Does this protect adults? Of course it protects nonsmokers. We never made a secret about that; it is clear what we are trying to do with these clean indoor air laws.

I would like to clarify some of Dr. Guinan's comments. She indicated that at this point, enforcement rests solely with the local health districts. That is only true in Clark County. In Washoe County and elsewhere in the State, law enforcement has a role. There are two cases in Washoe County where the District Attorney's Office is litigating against repeat violators of the Clean Indoor Air Act. This issue of the local health authorities having sole enforcement is specific only to Clark County, based on District Judge Herndon's ruling.

We oppose S.B. 372. We are fully aware of the difficult economic times that everybody is experiencing. The organizations that I represent, such as the American Cancer Society, the American Heart Association, the American Lung Association and the March of Dimes, are all experiencing the same difficult economic times. As everybody on this Committee knows, the State has had to make some painful decisions during the interim and the two special sessions.

You are faced with making even more difficult decisions as we go forward through this Session.

We won this campaign in 2006; but I feel like I am here to fight this campaign all over again. We won this campaign twice in 2006 when voters not only voted to pass the Clean Indoor Air Act, they also voted to reject the competing measure responsibly protecting Nevadans from secondhand smoke.

One of the arguments made in 2006 that I want to make today is that it is bad policymaking to allow organizations, such as those in support of S.B. 372 and those behind the competing measure in 2006, to be put in a position of determining public health policy. They have no experience and credibility in any public health matter at all, and some have a vested interest in seeing, encouraging and promoting the sale and use of tobacco products. We are hoping this Committee will reject S.B. 372.

I have heard comments regarding the economic hardships of the bar and tavern owners and the slot route operators, but I have not heard any proof showing these economic hardships are tied directly and specifically to the Clean Indoor Air Act and not the result of some other economic factor. Because of rising energy costs and what that means to the delivery of goods and services in terms of food and alcohol products to bars and restaurants, is that not a consideration in economic hardships? It is irresponsible for the proponents of this bill to blame everything on the Clean Indoor Air Act. The Act is not responsible for the unemployment rate, the foreclosure rate or the jobless market. There are other economic factors to consider.

There was discussion earlier about the legal process that we are engaged in since the beginning of this initiative. This initiative of the Clean Indoor Air Act has been litigated since March 2005. Those same opponents tried to have us thrown off the ballot. It was taken to district court. They lost and appealed that decision to the State Supreme Court. They lost there, and we were allowed to stay on the ballot. One of the concerns we have is the impact of S.B. 372 on that legal process. The public is entitled to due process, seeing the legal process play its course out before this Legislature considers making any kind of amendments to this law. The attorneys at the table with me will speak more to the legal issues we are facing.

I have heard some of the incidences of how these businesses have been harmed, but I have difficulty with some of the measures and charts that have been put forward. Let me refer to Herbst Gaming specifically. In an article from the *Las Vegas Review Journal* dated March 11, addressing their pending bankruptcy and the separation of business, Troy Herbst states, "... even now our casinos and our routes are generating positive cash flow." They are making money. I would like to know what is so different now from earlier when this Clean Indoor Air Act was enacted that caused them to lose so much money on the front end but to the point where they are profitable right now.

MR. HACKETT:

Another issue impacting the full assessment of the Clean Indoor Air Act is the full settling out of the market. When we campaigned in 2006, we made no bones about the fact that in other states that have adopted clean indoor air laws, it is typically a two-month to two-year process before the market has a chance to fully settle out. Much of that is determined by the scope of the clean indoor air law as well as the intensity of the opposition in terms of their fight to prevent the laws from being implemented. What has complicated the process in Nevada has been alluded to already; we do not have any regulations adopted at the State or local level. We had one public hearing in June 2008 to discuss the draft regulations, but nothing has been done since then.

The other issue that has impeded the ability of the market to fully settle out and allow for an accurate assessment and full appreciation of the impact of the Clean Indoor Air Act is the fact that we are in litigation. There is uncertainty over the constitutionality of the Clean Indoor Air Act. As was put on the table earlier today, District Judge Herndon's ruling was in response to a request by the Office of the Attorney General, who was representing the Clean Indoor Air Act, and the attorneys from the opponents for summary judgment on the constitutionality of this Act. District Judge Herndon found the Act to be constitutional by civil enforcement standards but unconstitutional by criminal enforcement standards. To that end, the Nevada Clean Indoor Air Act did not bring that criminal enforcement provision to statute. That was already in statute when this Act was drafted. Our initiative was drafted to be in conformance with that particular standard.

When a ballot initiative is passed by the voters and enacted, it changes statute. There is a three-year moratorium, a three-year, hands-off period during which, and I will read directly from the Constitution on this, "... an initiative measure so

approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within three years from the date it takes effect." There is no precedent set that allows the Legislature to take action to amend, repeal, nullify and set aside a ballot measure before that three-year period has expired even though the effective date of that action would be after the three-year moratorium. This will set a bad precedent, compromising and undermining the ballot initiative process in terms of changes proposed to amend statute.

Why would anybody put into statute a change that they know could be acted upon in a few months of enactment even though the effective date could be two-and-a-half or three years down the road? The ultimate impact of something like that is initiatives put on the ballot, qualified and hopefully passed, but every one of those will be to address and amend the Constitution. You will find issues put into the Constitution that have no business there, and it will limit the ability of this Legislature and future Legislatures to craft policy because many things will be constitutionally mandated.

We oppose the provisions that take the control away from the local governments. Local control is an important part of the Clean Indoor Air Act. We agree with some of the comments of how this Act is to be enforced. We have concerns about the proposals in S.B. 372 that provide for the separated, ventilated areas. Nothing in the bill indicates what kind of standards these areas have to meet. We also have concerns that there is no definition for the word "substantially" when referring to the removal of carcinogens and smoke from these areas. If you are a business owner, and you want to put in a separated, ventilated area, what is the standard to which that area will comply? And further, who is charged with the inspection of those standards to make sure they are in compliance with whatever standard is ultimately agreed upon?

The groups I represent are sticking with a report submitted by the American Society of Heating, Refrigerating and Air-Conditioning Engineers. In their 2006 white paper, they included that no ventilation system provides a safe level of exposure to secondhand smoke. Even the most modern state-of-the-art air filtration systems still expose people to dangerous carcinogens. We do not feel air filtration systems are a proper remedy.

CHAIR CARE:

The three-year issue from the Nevada Constitution, Article 19, section 2, subsection 3 is the subject of the petition filed Tuesday. The court has not

instructed us as respondents to file an answering brief, so the hearing has gone forward. I do not know if the issue here is that you should not do it once the voters have said it is okay, or there should be some lag time before you attempt to do it, and this is just too early.

MR. HACKETT:
I defer to my legal counsel.

ROBERT L. EISENBERG (American Cancer Society):
My firm, Lemons Grundy & Eisenberg, has represented the American Cancer Society as amicus curiae, a friend of the court brief, in the case that is going on now. I have read the petition you talked about. We have done some extensive research on the three-year limitation, which I refer to as the three-year, hands-off provision.

The legislative history behind it is not very extensive. It was passed at the same time the initiative process was adopted. I see it as a fail-safe thing for the voters, giving the voters a constitutional right to know that if they passed a law through the initiative process, the Legislature would not tinker with it until it was given a fair opportunity to work. The fair opportunity the framers of the Constitution came up with was three years. If you support the constitutional proposition giving the voters the rights to rely on the three-year provision and you tinker with it prematurely, then you have taken away that three-year time period to see if it worked. Right now, we have eight months until the three-year time frame expires. There is still enough time until the three-year time period is over to see if it worked.

The proponents of this bill would take the position that you are okay doing what you are doing now because S.B. 372 will not take effect until the day after the three-year period expires. If you accept that logic, then you would accept the position that back in January 2007, when these laws went into effect, the Legislature could have said we are going to amend this, repeal that, but it will not take effect until three years from now. That would be contrary to the idea that a law passed by a majority of the voters should be given a fair opportunity to see if it works. After the three-year period, if it does not work, then the Legislature can tinker with it. It discourages people from using the initiative process, which should not be discouraged. I presume as Legislators you do not like the initiative process superseding your powers to enact legislation.

CHAIR CARE:

I have a bill this Session to give a broad interpretation of the single-subject rule. I do not know how my colleagues feel about that.

MR. EISENBERG:

If you support the idea of the initiative process and give voters that right, then the three-year rule is an important part of that idea. We suggest you do not do something to discourage that. With the Chair's permission, can I address some questions that Senator Amodei asked earlier?

CHAIR CARE:

If you would like, go ahead. I then want to go back to Mr. Hackett and talk about some substantive provisions in the bill, which I presume would be as vehemently opposed two years from now as today.

MR. EISENBERG:

District Judge Herndon did strike the criminal part of it, but said the civil part is constitutional. Monday is the oral argument. You also asked for the briefs in that case. I have them with me, and if you want copies, I could leave them with the staff. My only request is that I get them back right away.

CHAIR CARE:

You can leave the briefs ([Exhibit H](#), original is on file in the Research Library). Mr. Hackett, going back to the bill and the ballot question, let me give you a hypothetical situation. If the adult stand-alone bars created under this bill had existed when you assisted in putting the initiative on the ballot, would it have then been the intent to outlaw smoking in those bars as well? Had they been around, what would have been the approach? Catching you off guard might be unfair; I do not intend to do that.

You have heard all the testimony and what the proponents of S.B. 372 want. Part of me says the voters have spoken, but another part of me wonders what is wrong with adult stand-alone bars. If everybody going in these bars knows there is going to be heavy smoke, there will be nobody under the age of 21 and there will be no secondhand smoke wafting outside to harm an individual, what is wrong with that, realizing of course the voters have said what they said?

MR. HACKETT:

In the current Act, there is a provision allowing for a separation within bars to provide for smoking areas. In this regard, it is an expansion on that, encompassing the entire facility and not just this one particular area.

The main concern we have of this bill and its provisions is the lack of an enforcement mechanism of these provisions. Removing enforcement the way they have and placing it with an understaffed and under-resourced entity will make enforcement spotty at best and inconsistent in making sure smoke-free areas are smoke-free. The provisions in this bill are going to change the Nevada Clean Indoor Air Act to the Nevada Air and Filtration Act, compromising every area we feel should be a smoke-free area.

Before we put this question on the ballot, we tried to make concessions to certain businesses, not because of any philosophical argument, but because our polling and survey revealed what the voters wanted. They showed us in 2004 with the advisory questions on the Clark and Washoe County ballots, and they showed us again in 2006. We are trying to provide what the voters want in an equitable fashion.

CHAIR CARE:

I would like your comments on the provisions in the bill concerning trade shows.

MR. HACKETT:

Trade shows first came to my attention in the fall of 2008 when there was a big show coming to Las Vegas. It was brought to our attention that smoking would be allowed inside the convention facility for the purpose of sampling products. Some people did make inquiries of the local county commission to find out what they planned to do about it, but the trade show went on as planned. I know there is another trade show planned for this year.

I do not know of any position taken by the Southern Nevada Health District, the Clark County Commission or any other local authority to prohibit smoking in the trade show. As far as I know, that trade show is still to go forward. Did we look at this issue when this campaign was run? I have to be honest and say we did not. This type of issue was not on our radar. I am not keeping tabs on every tobacco trade show that comes into Las Vegas or northern Nevada, but as far as I know, many of these shows have gone on.

SENATOR WIENER:

You mentioned a study about the infiltration of smoke. Is there a summary of that study that we could review?

MR. HACKETT:

Yes, there is a study and I would be glad to provide that for you ([Exhibit I](#)).

SENATOR WIENER:

My concern is section 1, subsection 3, paragraph (f) which talks about carving out for places of employment that are protected. All the places where it is prohibited are places of employment. Maybe that study shows that there is not the protection for those who are not in the smoking area of those places that are prohibited. I would like to review that study. May we have that distributed to the entire Committee?

SENATOR WASHINGTON:

Who made the decision to exclude restricted gaming licenses as opposed to nonrestricted licenses?

MR. HACKETT:

I have followed the litigation on this Act throughout its process. The Nevada Supreme Court decision, *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 141 P.3d 1224 (2006), was challenged before the State Supreme Court, which ultimately allowed the Clean Indoor Air Act to stay on the ballot. That decision was approved by the Supreme Court on a 6-1 decision. The lone dissenting opinion at the time was from the Honorable Robert E. Rose, Chief Justice, Nevada Supreme Court. His only objection to the Act was he felt there needed to be a greater degree of clarification in what defined a stand-alone bar under the provision and the definition provided in the Act.

I believe that was alluded to by Mr. Peccole in Las Vegas who read the ballot question arguments. Mr. Peccole referred to the food handler's license, and that is how former Chief Justice Rose felt the differentiation should be made. If you are to be considered a stand-alone bar, you will not have a food handler's license. If you have a food handler's license, allowing you to prepare and serve full meals on site, then you are subject to the smoking ban. That is how we look at this issue. We do not look at it as specific to having a restricted or nonrestricted gaming license.

When District Judge Herndon was prefacing the ruling he was about to issue, he alluded to the fact that having a food handler's license is the defining criteria as opposed to whether you have a restricted or nonrestricted gaming license. To that end, I would like to address the fact that if you have a nonrestricted gaming license, that alone does not qualify you for the exemption allowed under the casino exemption in the Clean Indoor Air Act. The definition of casino provided in the Act was the first definition for a casino put into statute, and it is consistent with what existed in regulation at that time. If you have a nonrestricted gaming license, there are other licensing, regulation and zoning criteria an establishment must meet before it can become a casino. It also has to be paying taxes as a casino. This issue of nonrestricted and restricted gaming license is not a relevant issue to the Clean Indoor Air Act.

SENATOR WASHINGTON:

Let me dovetail off that and move forward to the questioning versus restricted or nonrestricted gaming licenses. Previous testimonies indicated a substantial loss of taxable income to the State as well as loss of jobs because of the loss of patronage to their businesses. Has your group done any statistical surveys to verify the information presented to us from the previous testimonies?

MR. HACKETT:

Comprehensive studies will provide an assessment of all the impacts of the Clean Indoor Air Act. I do not know at what stage these studies are in or when the data will be released.

SENATOR WASHINGTON:

I do not know when these studies will be available to this Committee in our processing this piece of legislation, but in reference to Golden Gaming, who indicated they lost 25 percent of their revenue due to decreased sales of beverages and food, as well as employee issues, I am wondering if your data is going to compare apples to apples.

MR. HACKETT:

Not having seen the methodology or questions in the surveys I referenced earlier, I cannot comment in terms of what information is going to be revealed as they near completion. In regard to Golden Gaming's assertions on the loss of revenues, these economic issues and the alleged economic harm caused by the Clean Indoor Air Act need to be prefaced within the context of the overall

economic environment. I have not seen or heard anything that can point to the Clean Indoor Air Act as the cause of the economic harm.

SENATOR WASHINGTON:

It will be interesting to see that study. Maybe we can run numbers through our own staff to get some comparisons.

In regard to the regulation process, subsection 6 of section 1 deals with the State officials, officers or designees who shall not only enforce but develop regulations that will be consistent and have continuity throughout this Clean Indoor Air Act. Your opposition is you want the local officials to adopt those regulations. Currently, there is no consistency, no continuity or unity in those regulations. Taverns, bars or anyone else affected by this petition are wondering which direction they should go.

MR. HACKETT:

Regulations have not been adopted by either the State or the local levels. In terms of any objections or concerns with the regulations, we have none because there are none.

SENATOR WASHINGTON:

This makes it difficult for a business to comply.

MR. HACKETT:

I agree with that. We all want regulations to come forward that provide specificity in terms of what is and what is not allowed and what the people on both sides of this can do to make this as effective as it can be.

SENATOR WASHINGTON:

I do not want to be argumentative, but we are awaiting a decision on a lawsuit that has come forth because of those regulations not being completed, and therefore, not being adhered to.

MR. HACKETT:

I do not want to speak for the Health Division or for the health districts on this. I imagine there is correlation with the pending litigation and the lack of regulations. That is speculation on my part.

JOY GRABER (American Cancer Society):

For brevity's sake, I defer to the testimony already offered by Mr. Hackett and Mr. Eisenberg.

SENATOR WASHINGTON:

Mr. Hackett, when you get that information regarding the loss of jobs and potential revenue, could you forward that to this Committee as quickly as possible?

MR. HACKETT:

I will let the health districts deal with the availability of the data and task them with getting it to the Committee as soon as possible.

MARY A. ANDERSON, M.D., M.P.H. (District Health Officer, Washoe County Health District):

I am here to oppose S.B. 372 because it negates our ability to protect the health of our community from secondhand smoke. It rolls back a significant public health advancement and opposes the will of the voters.

It is well-known that secondhand smoke is dangerous to our health. In 2006 when the Nevada Clean Indoor Air Act was passed, the Surgeon General released his report on secondhand smoke and its adverse effects on persons of all ages, particularly children, the elderly and the infirm.

One thing mentioned with isolating areas so secondhand smoke would not penetrate elsewhere was the issue about substantially preventing smoke from infiltrating to other areas. This is difficult, if not impossible, to do. Secondhand smoke does not know any boundaries; it seeps through cracks and doors and defies all ventilation systems. The only way to protect the young, the elderly and the infirm from secondhand smoke is to ban smoking in places where people eat and work and where children play.

Studies conducted in communities that have completely banned smoking have shown a decrease in the admissions to emergency rooms from myocardial infarctions. This takes awhile to actually show up as a long-term effect, but this has been shown and demonstrated in a number of studies published in the *American Journal of Preventive Medicine*.

Washoe County voters want our community to be smoke-free. This has been emphasized in Mr. Hackett's testimony; I will not belabor the point. The Nevada Clean Indoor Air Act thus far has been a success. We are pleased to report that 98 percent of the facilities in Washoe County are in compliance with the law. They have banned smoking, and they do not have any smoking paraphernalia in their establishments. Only three formal citations have been issued in Washoe County since the passage of the law. The other good thing to note is the prevalence of smoking in Washoe County has continued to fall. Overall, 80 percent of Nevadans are nonsmokers and 20 percent are smokers. This is reinforced in a recent issue of the *Morbidity and Mortality Weekly Report* from the Centers for Disease Control (CDC) outlining the smoking prevalence in all states.

Our mission in public health is to protect and enhance the quality of life for citizens of Washoe County through health promotion and disease prevention. Smoking regulation, educating people about the harmful effects of smoking and activities that restrict smoking to places where others do not want to be exposed are all important aspects of public health and public health practice.

It is for all the reasons I have mentioned that the Health District supports the Nevada Clean Indoor Air Act and opposes S.B. 372. I would like you to take note that not one mother or one member of the public came forward with formal testimony to support S.B. 372.

SENATOR WIENER:

We are on the regulatory process because we can enact something but unless you facilitate it through regulation, it does not get enforced. We have the two large counties with the health districts. You must have your regulation process in place if you have had three citations. Were they based on the regulations you promulgated from the statute?

DR. ANDERSON:

Yes. We have worked using the existing statute, and if you would like more particulars on the actual enforcement, I have members of the Washoe County District Health Department with me to explain some of the enforcement processes if you need more detail.

SENATOR WIENER:

I do not need that, but I do want to note the regulatory process is working through the local health authority for Washoe County.

DR. ANDERSON:

We have uniformity in the way we address these issues. When we do our regular restaurant inspections, we look to see if there is smoking paraphernalia available and if the restaurant has the appropriate signs posted. Those are now part of our regular inspections of restaurants and other establishments.

SENATOR WIENER:

The challenge to the criminal piece, which was statute before the initiative petition as cited in earlier testimony, these were not criminal actions brought before these three entities?

DR. ANDERSON:

Not being a lawyer, I have trouble with a few of these distinctions. I do believe three cases have been brought forward for citations.

CHAIR CARE:

Let us forget for a moment the discussion of smoking areas in an indoor place of employment, which would remove from the discussion the words "substantially prevents," and focus on this question for a moment. Should it be permissible for people who smoke—and do not care about the dangers of smoke, people who do not smoke and the dangers of secondhand smoke—to gather in a place where children are not permitted so they may eat, drink, gamble and smoke?

DR. ANDERSON:

That is more of civil liberty question than a medical or public health question.

CHAIR CARE:

Unfortunately, it has become a legal question.

DR. ANDERSON:

From my perspective, I do not approve of smoking.

CHAIR CARE:

Nor do I.

DR. ANDERSON:

There are those who approve and desire to indulge in that habit. Commenting from a civil liberty point of view, it would be a challenge for me to make a blanket statement that no one should be able to smoke anywhere.

CHAIR CARE:

Okay. Fair enough.

SENATOR WASHINGTON:

Section 1, subsection 3, paragraph (f), subparagraph (2) states, "... substantially prevents smoke from infiltrating the other public areas" Have you had an opportunity to read a handout given to us by the Legislative Counsel Bureau? The current statute as of October 1, 1999, gives the same language dealing with ventilation, substantially removing smoke from an area, and you just indicated that is not sufficient enough to comply with the current petition. Before you answer the question, this is a standard we apply to grocery stores that have slot machines.

DR. ANDERSON:

That standard perhaps predated the understanding that the ventilation systems are not equipped to totally remove all the carcinogens and the unfortunate side effects that result from smoke infiltrating into areas. There is no technology at this point. At the time it was written, the word substantially seemed appropriate and obviously effective for that particular understanding of the time. Recent studies from the ventilation industry, as alluded to by Mr. Hackett, say no current technology enables all carcinogens and adverse components of secondhand smoke to be removed.

RICHARD P. SEHER, M.D. (Cardiologist, Reno Heart Physicians; President, Nevada State Medical Association):

I have been practicing for almost 24 years. I am triple-boarded in internal medicine, cardiology and interventional cardiology. I am the President of the State Medical Association and Director of the Cardiac Cath Lab at St. Mary's Regional Medical Center of Reno.

I want to talk about the consequences of smoking. We are in the middle of an epidemic in this country. Take a look at the person sitting on either side of you. One of the three of you is destined to die from heart disease. There are 1.5 million heart attacks every year in this country. Each year, 500,000 people

die from heart attacks. This is largely preventable. In the entire history of acquired immunodeficiency syndrome (AIDS) in this country, we have not lost 500,000 people.

The No. 1 preventable risk factor is cigarette smoking. According to the Surgeon General's Report in 2006, secondhand smoke increases your risk of a heart attack by 27 percent. I am here today not to talk about the law but to talk about what is close to my heart. Two things happen with secondhand smokers. We are sitting here in this warm room, not doing much, with little stress on our hearts. Sitting here doing nothing, the arteries are narrowed with little flow to our hearts. If we all climb Mount Rose, the arteries expand like crazy with up to six times the flow down the arteries to your hearts. This is a dynamic system that works all day and all night without our knowledge. Cigarette smoking damages this system. Instead of the arteries expanding under stress, they constrict. Secondhand smoking has been noted to cause this problem called endothelial dysfunction. It happens if you are a smoker or if your spouse is a smoker.

Secondhand smoke also increases markers of inflammation. There has been much in the media about inflammation and heart disease and something called highly specific C-reactive protein or highly sensitive C-reactive protein. Half of all heart attacks occur in people who have normal cholesterol. They are not smokers, and we wonder what is going on. There can be inflammation in the arteries, and this is more common in smokers and people exposed to cigarette smoke. The measurement of this is something called highly sensitive C-reactive protein. This goes up in smokers and people exposed to secondhand smoke. It does not take years; it can happen quickly. Secondhand smoke has effects on the coronary tree that do not take years to develop.

I am on the front lines of heart disease. Last Thursday night, a 42-year-old family man was driving with his wife and their son. He smoked a pack and a half a day. He experienced a nasty chest pain, sweated, vomited and started breathing like a fish on the sidewalk. His wife took him to the emergency room in Truckee. He was having a heart attack. The best treatment for a heart attack in this day and age is to open the artery quickly with a stent. This procedure was not available in Truckee, so he was placed in an ambulance and brought to St. Mary's.

The man died en route, but our technicians shocked him back to life with defibrillators, and we took him up to the Cath Lab. His heart slowed down to a rate of five beats per minute; he was almost dead again. We gave him medication, put in a stent and he is fine. This is a man who almost died, something totally preventable if he did not smoke a pack and a half a day. I see this day in and day out. I take it personally. I hate this disease, and it is preventable.

The first hint of trouble concerning lung cancer was written in 1912 in an article suggesting that lung cancer may be caused by cigarette smoking. In 1950, the first article was written that definitely linked lung cancer to cigarette smoking. In 1964, the Surgeon General's Report stated, "Cigarette smoking is the major cause of lung cancer." If you are a nonsmoker, your lifetime risk of getting lung cancer is 1 percent. If you are a heavy smoker, your lifetime risk is 30 percent. If your spouse is a smoker, your risk of getting lung cancer goes up 30 percent. If you are a pipe or cigarette smoker, your risk of lung cancer increases fivefold.

In summary, there is no disputing cigarette smoking and secondhand smoke can lead to lung cancer and heart disease. There is no safe level of secondhand smoke. This epidemic is preventable, and we need to do everything possible to limit smoking and secondhand smoke exposure. Taxpayers bear the burden of any uninsured people who are smokers and victims of secondhand smoke.

CHAIR CARE:

This is not a legal question. Setting aside secondhand smoke, does the State have a duty to protect smokers from themselves?

DR. SEHER:

We have people driving at safe speed limits and wearing seatbelts. This falls into the same purview.

CHAIR CARE:

They are going to smoke in the houses. We cannot do anything about that.

DR. SEHER:

I wish I could.

CHAIR CARE:

You have answered my question.

LAWRENCE SANDS, D.O., M.P.H. (Chief Health Officer, Southern Nevada Health District):

I will read my prepared testimony ([Exhibit J](#)).

STEPHEN MINAGIL (Southern Nevada Health District):

Dr. Sands asked me to accompany him to the table to answer any questions regarding enforcement of the Act. The Southern Nevada Health District has taken a proactive approach to enforcing the Act. The first step in enforcement was education. The Health District targeted food and tavern businesses immediately after the Act came into effect. The Health District handouts and written guidelines indicated how compliance could be reached. Businesses having to make changes were encouraged to meet with the Health District to review and discuss physical plans of business models. Many businesses in Clark County took advantage of that opportunity. The Health District met with various business groups to hear and discuss concerns and compliance issues.

The second thing the Health District did was to reach out to individual businesses that were the subject of complaints. The Southern Nevada Health District set up a system to receive complaints from citizens. Letters under my signature were sent to businesses with the most complaints. The letters pointed out violations of failure to post signs and failure to pull ashtrays and smoking paraphernalia and invited them to the Health District to discuss compliance. We sent over 30 letters during a 6-month period, many to businesses, general taverns and restaurants with multiple locations whom you have heard from today.

We faced challenges. We would meet with business owners who would understand their obligations under the Act to post conspicuous no-smoking signs and pull ashtrays, only to have them call me a week or two weeks later to say they were not going to comply because the competitor across the street that is a bigger player in town with more locations will not comply. We also faced challenges from some business owners who said they would not comply. The Health District filed two lawsuits and secured compliance.

The third step in the enforcement process in Clark County is development of a citation process. Remember, District Judge Herndon struck the criminal aspect of the Act in Clark County and took away the assistance of law enforcement to write citations. The Health District has developed a civil citation complaint method. The statutory scheme calls for issuance of citations for violations with

a \$100 penalty. We developed the citation complaint, and we sold the local courts on the plan after some initial hesitancy about authority. We developed a process with each of the 11 justice courts in Clark County to accept our citations and place us on a calendar where we were heard if a recipient opposed paying the penalty. This \$100 penalty provided by law is not kept by the Health District. The law requires it be sent to the Office of the State Treasurer for deposit in a special State fund. No cost under the law is recovered or retained by the Health District. We recover \$100 and nothing else for our cost, and we send the \$100 to the State.

We are now ready to implement the citation process. We are in the process of training staff to write citations and learn to deal with situations in the field. We are now able to enforce the Act. Like Dr. Sands said, we have worked with our partners in the State to develop regulations to help make implementation and interpretation of the Act clearer, but those have to do with matters of food service and clarifying how food gets into stand-alone bars.

We are enforcing the Act in a step-by-step process which will culminate with the citation process. Do we have suggestions on increasing the effectiveness of the Act in addition to retaining local control? Sure we do. We would like the 2011 Legislature to improve protection of public health by revising the Act slightly so in addition to posting signs and pulling ashtrays, business owners have an affirmative obligation that smoking does not occur in their establishments.

We would like to see: penalties increased associated with noncompliance, especially for repeat offenders; the law include an administrative hearing process so a hearing officer instead of the courts can hear cases of noncompliance; the Health District given the opportunity to recover costs of investigating complaints; facilities prohibited from multipurpose uses, such as being a smoke-free restaurant during the day and a smoking nightclub at night; noncompliance with the Health District's issued permit and business licenses linked so that continued noncompliance could possibly jeopardize a permit or business license to operate.

CHAIR CARE:

If this bill as drafted were to become law, what happens to your evolving enforcement scheme? I am making reference to the enforcement duties that go to the State Health Officer.

MR. MINAGIL:

The State Health Officer could designate the local authority as the enforcement agent in a particular county.

CHAIR CARE:

This is in section 1, subsection 6. That is how you read that language, "... or his designee" That could be then in the case of the Southern Nevada Health District.

DR. SANDS:

There are questions about whether that would be able to take place. Control of the tobacco laws would come under the State, and it would be the State's decision about enforcement.

EJ MALDONADO (Tobacco Prevention Coordinator, Carson City Health and Human Services):

I will read from my prepared testimony ([Exhibit K](#)).

In reference to the tobacco trade shows held in convention centers, it is important to note that secondhand smoke stays in an enclosed area for up to two weeks before the air becomes clean. This will impact children and families if the room of the convention center will be used later.

SENATOR WASHINGTON:

This is not so much a question but more an observation. Have any of the health districts prepared any reports as to the substantial loss of economic viability, employment, loss of wages, businesses closed, lost revenue to the State outside of those entities that have already done their own surveys? Has the health department engaged, started or decided to do anything to report back about the causes and effects of the initiative petition?

DR. ANDERSON:

These studies have not been done by the health districts. Those sorts of studies would be extremely manpower intensive, requiring funding and personnel that we do not have. The University of Nevada, Reno, and the University of Nevada, Las Vegas, have been conducting studies on the impact of the Nevada Clean Indoor Air Act on businesses. It is my understanding that those studies are in the analysis phase. That is the extent of the information I can provide you on where those studies are now situated.

SENATOR WASHINGTON:

Your enforcement process is one thing, but I want to know about your regulatory process. Are those posted, and can businesses, taverns and casinos obtain those by the Internet or print?

MR. MALDONADO:

In Carson City, they can receive those through our health department.

DR. ANDERSON:

We have provided businesses with resources on the Washoe County Health District Website, where they can get their questions answered. They can even print out the no-smoking signage for their establishments.

JOSH BENKE: (Program Coordinator, American Lung Association of Nevada):

I am with the Reno office but speak on behalf of both northern and southern Nevada. For brevity's sake, our mission is to promote lung health and eradicate lung disease in Nevada. The Clean Indoor Air Act is the biggest step taken toward helping us accomplish that goal. I urge the Committee to keep the existing law. The American Lung Association stands in strong opposition to S.B. 372.

LEE RADTKE:

My name is Lee Radtke. I live in Carson City. I lost my voicebox because of cancer from secondhand smoking. I now breathe through a hole in my neck. I speak using this modified handheld computer and my artificial larynx. I can speak no other way. The biggest mistake I ever made was allowing people around me to smoke. I had a sore throat for about three months, and the doctor found I had cancer in my throat. I had six surgeries on my throat. In June 2006, doctors removed my voice box. My medical treatment cost over \$250,000. I never smoked, but I got cancer from secondhand smoke.

I am lucky to be alive. One out of three people who get throat cancer die from it. I cannot go boating or swimming, and I have to be careful in the shower because I could drown if water gets down my windpipe. I cannot smell and have very little taste. I cannot drink Coke because it goes up my nose. There are no fixes for my condition. I will have to live with a hole in my throat for the rest of my life.

I have created a presentation for children to educate them about the danger from secondhand smoke and smoking. The kids can see the hole in my throat. We have given a talk to over 3,400 students, mostly fourth- and fifth-grade classes, and have received over 500 thank-you letters from the kids. It is very important to protect nonsmokers from smoke.

As an adult, you have the right to smoke, which can destroy your life or kill you. Over 450,000 die per year. You do not have the right to destroy a nonsmoker. Over 53,000 die per year because of secondhand smoke.

After reviewing S.B. 372, I have the following comments. Eliminating local authorities' ability to adopt and enforce local and State tobacco control that meets or exceeds State laws is wrong. If the State cannot provide enough State health officers to cover Nevada, local areas need the right to create local laws to protect their residents, as State laws do not always cover all needs. Section 1, subsection 3, paragraph (g), which addresses using convention centers for tobacco meetings, should also include "have to remove tobacco residue from the facility ventilation system before using it for the public again." You should vote no as written. What is a law without enforcement?

I do not envy you people your job. I never smoked, but I was around people who smoked, and this is what happened to me. I just want to share with you what I share with the kids. I do not want anybody to have to go through what I did. We need laws. If there is anything wrong with the laws, we need to correct them. You have to keep the local enforcement because there is no way the State Health Officer can cover all of Nevada. You have a lot of rural areas. Who is going to cover them?

DR. GUINAN:

I want to clarify information about the regulations. In my prepared testimony, I state that the State Health Division was tasked with developing regulations for the enforcement of the Clean Indoor Air Act, [Exhibit G](#). Local health authorities sought an opinion from the Health Division regarding the State's authority to adopt these regulations. On March 5, 2008, the Nevada State Legislative Counsel Bureau rendered an opinion stating that the Health Division has the authority to draft Nevada Clean Indoor Air Act regulations.

Draft regulations were developed, and on March 8, 2008, a public workshop addressing the proposed regulations was conducted in Carson City and

videoconferenced to Las Vegas and Elko. Based on the comments from the workshop, where industry representatives voiced strong opposition to the draft regulations, and from further input from local health authorities who had different concerns, the Health Division realized that changes in the proposed regulations were necessary before conducting further workshops. Over the next several months, local health authorities and the Health Division had ongoing discussions to determine changes in the language of the regulations.

On January 15, the Health Division held a conference call with local health authorities to discuss the new language for the regulations. All local health authorities agreed to have the State Health Division simplify the regulations. On February 18, draft regulations with the agreed-upon language were sent to each health authority. The Health Division is continuing to work with local health authorities to refine the draft regulations. When the language changes are agreed upon, public workshops will be resumed with help from the local health authorities. The workshops are expected to be conducted within the next few months in Las Vegas, Reno and Elko.

CHAIR CARE:

Michelle Gorelow, I know you have signed in from Las Vegas to testify. We have your statement if you want to submit that to the record ([Exhibit L](#)).

LAWRENCE P. MATHEIS (Executive Director, Nevada State Medical Association):

I am here representing the Nevada Tobacco Prevention Coalition, Nevada State Medical Association, the American Cancer Society, the American Lung Association, the American Heart Association, the March of Dimes, the Nevada Cancer Institute, the health authorities and a number of other organizations committed to reducing the adverse consequences of tobacco on the health of Nevadans. We are instrumental in the passage of the Clean Indoor Air Act.

To the degree this matters, next week is National Public Health Week. It is ironic that you are considering legislation which would roll back what is arguably the most successful public health measure adopted in Nevada in two generations. You have heard numbers on the growing success rate in terms of the implementation of this and are beginning to see the numbers change. For 25 years, Nevada has been No. 1 or No. 2 in the country in prevalence of smoking. That has changed. The CDC published in the *Morbidity and Mortality Weekly Report* that Nevada dropped to No. 16. That is a huge step forward.

The compliance with the law has been noticeable. If the proponents mean what they say they do, there would be no purpose in having section 1, subsection 3, paragraph (f) included. There is no ambiguity; there is no doubt or confusion about what the public wanted. The public wanted to ban smoking in child care facilities, movie theaters, video arcades, government buildings, public places, malls, grocery stores and all indoor areas of restaurants. They wanted to do that, and they did. They wanted smoking banned in all areas of schools, and they did it. Why now would we want to roll back and allow smoking areas in these places where there is clearly no ambiguity as to the intent, what the law says, and what should be done?

As to the issue about substantially preventing smoke, the Surgeon General issued a comprehensive report in 2004 on every issue related to tobacco. The report looked at all the scientific studies and repudiated that there is any such thing as a system within buildings that removes all the carcinogens in smoking. I will provide that report.

If the proponents actually meant what they said, there would be no reason to remove section 1, subsection 5 of the current law. That removes all local authority. Why would they want to do that if, as they said, they really just want the State Health Division to adopt regulations, but they want the local authorities to enforce it? If you want them to enforce it, you do not remove the authority to enforce it. Clearly, it is because they do not want it enforced. That is an important matter. The preemption of local authorities by removing section 5 and section 7 makes this toothless. This is not a good idea.

The law is working and needs a chance to work further. It needs to be worked out over time. Overwhelmingly, all the facilities listed in sections 1 and 2 are complying with the law. As to where people who want to smoke can go, that is referred to in section 1, subsection 3. You can go to the floor of a gaming casino, stand-alone bars, where the kids are not allowed, strip clubs or brothels, retail tobacco stores, private residences, including private residences which may serve as an office workplace, except if used as a child care, an adult day care or a health care facility. This strikes a balance between public health and private rights. Let us not embarrass ourselves during National Public Health Week.

CHRISTOPHER ROLLER (American Heart Association):

I did want to reiterate what Dr. Seher mentioned. Clinical studies have shown that exposing nonsmokers to 20 minutes of concentrated secondhand smoke

can have the same effect as smoking one cigarette. This is significant if we look at the health effects. There is also the economic impact that comes from health effects. There was a lot of mention about the economic situation that many of these business owners find themselves in, but I would like to point out the long view that protecting our employees and patrons from secondhand smoke will be very beneficial in terms of those health costs that might come from the exposure to secondhand smoke.

CHAIR CARE:

I have an e-mail from Robert P. Bilbray, President, RB Properties, Inc., Laughlin, that will be entered into the record ([Exhibit M](#)).

We are going to close the hearing on S.B. 372. I apologize to those of you who did not have an opportunity to speak. I tried to be fair and divide the time equally.

We will open the hearing on S.B. 354. This bill was requested by the City of Henderson.

RENNY ASHLEMAN (City of Henderson):

I am willing to speak from the proposed amendment, which is a mock-up that should completely cover the matters ([Exhibit N](#)). I will try to do this in an economical fashion. The City of Henderson recently had four lawsuits in which the issues I am discussing and one of the others was raised. They are all resolved. This is not an effort to try to solve any of our existing legal problems.

A few things became apparent. One, people are filing and claiming if there is declaratory judgment involved in land use planning. There is a specific statute in Nevada to limit land use planning decisions to the actual land use problems. This is addressed in this amendment by saying this is the method of appeal from those. Secondly, it became apparent that you could actually appeal a land use planning decision even though you had never appeared, or if you had appeared, you had not stated any objections. We had one man who signed in, did not actually say on the record that he had any opposition to what we were doing, and the next thing we knew, we had a lawsuit.

When we began analyzing this legally, it became apparent that people who should have a right to make protests and appeals were deprived of them. For example, what is done by the planning commission is a recommendation, not a

decision. Things that can be appealed to the council can go from the council off to have parts of a plan redone and come back, and at that point, there is not an appealable decision.

In section 1, subsection 1 of the bill, we have adopted the language "appeared at." We will discuss what "appeared at" means rather than who "is aggrieved by a decision of," because sometimes they are not decisions, although they are matters the public might want to take to court.

In section 1, subsection 1, paragraph (d) of [Exhibit N](#), the new language has a population cap, counties of 400,000 or more. We have used the "have appeared" language. You can appear in person through an authorized representative or in writing before any of the individuals described, which are the kinds of public officials who might be involved.

We have changed "aggrieved person" to "appellant" in section 1, subsection 3, paragraph (b). In section 1, subsection 4, paragraph (a), we have used, "... is aggrieved by the decision of the governing body; or" This is to go to court. We required to define aggrieve a little further in paragraph (b), " ... aggrieved by a decision of a governing body in which the governing body considered a recommendation of a person or entity described in paragraphs (a) to (d)" That would be the planning commission. Paragraph (c) reads, "Is aggrieved by a decision made by a governing body which decision, pursuant to the procedures contained in the applicable local ordinance, was made without the necessity of a decision or recommendation ... ," which I previously discussed. Also in that subsection is, "The appeal to the district court must be confined to the issues considered by the governing body. The remedy provided in this subsection is the exclusive remedy for a person described in paragraphs (a) and (b)." That is to try and limit declaratory judgment on appeals from land decisions.

MR. ASHLEMAN:

For the purpose of judicial review, in counties over 400,000, you are aggrieved if the person appeared in writing, fully set forth his position and grounds to support thereof—or by course by representative or in person, and if the matter was considered before the applicable body, and if the injury claimed will have a substantial adverse effect on his property rights or other legal interests—and is not deemed aggrieved on the basis of the decision he is appealing, he may increase or decrease competition he claims may be detrimental.

The reason for that language is we have had more than one example of a place where we granted zoning to competitor A in many cases in an area where we limit competitor A to a location. For example, we have places where you can conduct a used or new car business, and someone who wanted to have a used or new car business outside of our restricted area—in some cases, quite some distance from it—appealed the decision granting the first person the right to use their property instead of appealing the decision denying their rights and tied those folks up and tied our staff up. That has happened to us more than once in more than one kind of business. We are trying to make sure you actually appeal something that concerns you.

We had language that said “is not suffered by the public as a whole.” We have taken that out. We do not intend to restrict someone whose neighborhoods are appealing on environmental grounds or otherwise, and we do not believe this language does that.

CHAIR CARE:

You and I have talked about this. I cannot remember the words, but if you are in a situation where you are not sure of your contractual or other rights, you seek determination from the court, but it has to be right for adjudication. The case that always gets cited is the fire in Hawthorne, I think it is the El Capitan, where it was not clear as to what insurance policies covered whom. In this situation, you have people getting an adverse recommendation, not a decision, from the planning commission, which is not binding on the city council, but nonetheless, would be used by the party to stall the matter in district court using declaratory relief.

MR. ASHLEMAN:

That is one of the examples. The vice there is that declaratory judgment, unlike this kind of a statute, allows discovery, so it is hard to get summary disposition even though there should be a record. There should be no reason why you could not have summary disposition. These things end up being tied up for two or three years with consequent harm to whoever originally got the approval and is primarily used by people who are foreign to the matter. They were not involved in the original decision.

SENATOR MCGINNESS:

I am not thinking about businesses but just an individual who has a problem with a decision. You said the decision of the planning commission is not really a

decision but a recommendation. If citizen A did not go to the planning commission and is precluded from going to the city council or the county commission, may he go to the board that has the ability to make the decision rather than just the recommendation?

MR. ASHLEMAN:

The problem is now they cannot appeal that at all. It is just a recommendation. We are trying to remedy that. We are trying to give them more rights by allowing them to participate at that level. You have two kinds of appeals. One is the appeal to the board. The other is the appeal to the district courts. You can come into the board and talk about your disagreements with the overall board decision. You can take that to court. We are not preventing that.

SENATOR MCGINNESS:

Take a decision on whether to give somebody a building permit for a car dealership. If I have a house next door and do not go to the planning commission, I cannot go to the city council or whoever is making the decisions. Is that correct?

MR. ASHLEMAN:

The way I am reading the bill, that is not the consequence. The appellate material to the court is governed by different regulations. The problem a person has now is they cannot appeal at all. If you do not go to the planning commission, the people are deemed to have appeared if they are in person through a representative or in writing.

SENATOR MCGINNESS:

So if I did not do any of that, then I missed the whole thing and I am precluded from appealing to whatever the next step. I am looking at my county to be the county commission.

MR. ASHLEMAN:

It does not apply to your county, Senator McGinness.

SENATOR MCGINNESS:

If I was in Henderson, would it be the city council?

MR. ASHLEMAN:

Correct.

SENATOR MCGINNESS:

If I had not gone to the planning commission meeting, which is only a recommendation, I have no standing for an appeal to the city council.

MR. ASHLEMAN:

That would be true, Senator. On the other hand, we may need some language to coordinate that; you could still appear in front of the city council and object to the council's decision taken as a whole.

KYLE DAVIS (Policy Director, Nevada Conservation League):

I did communicate our concerns with this bill to a member of the City of Henderson's lobbying team. I knew there was going to be an amendment, but this morning was the first time I could look at it. We still have some concerns with the amendment. The citizens may have a problem with a decision based on an environmental purpose, or they feel there will be environmental harm from that decision.

I share Senator McGinness's concern that this may be a case, and I know not if it was said that you could go to the city council and voice your opposition. My next question is if the city council takes that action, do you then have standing to appeal that to judicial review? The amendment, [Exhibit N](#), on page 3, says the person who can have access to judicial review has to have a personal impact with regard to their property or other legal interests. You would not be able to define doing something for environmental benefit as having a specific impact on property or other legal interests. If I were to appeal a decision on the basis the land use decision is to increase the amount of, say, greenhouse gasses that go into the atmosphere, that is not specifically something that has an impact on my property, but it is a concern that we have access to what is provided for under the law.

CHAIR CARE:

I do not know. It seems there is a place for that. It gets expensive in litigation to challenge the ordinance or the underlying act. We will close the hearing on S.B. 354. Mr. Davis, please continue talking to Mr. Ashleman.

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We were not able to have a work session on S.B. 221 this morning. I will meet with staff to see if we can come up with a revised agenda to work with some bills early next week. We are adjourned at 12:04 p.m.

RESPECTFULLY SUBMITTED:

Janet Sherwood,
Committee Secretary

APPROVED BY:

Senator Terry Care, Chair

DATE: _____