IN THE
SUPREME COURT OF ACADIA

STATE ex rel. GAMING CONTROL BOARD OF ACADIA and Gaming Commission, administrative agencies of the State of Acadia,	)
Petitioner,	)
vs.	)
THE ROXBURY, LLC, an Acadia Limited Liability Company,	)
Respondent.	)

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WRIT OF CERTORARI GRANTED

The petition for writ of certiorari is hereby GRANTED, limited to the following two questions:

1. Whether the Gaming Control Board's new club venue regulations exceeded the authority granted to the Gaming Control Board of Acadia under the Acadia Revised Statutes?
2. Whether the Gaming Control Board of Acadia, can prohibit Boogie Nights Nightclub from advertising under the First Amendment?

IN THE APPELLATE COURT OF THE STATE OF ACADIA

THE ROXBURY, LLC, an Acadia Limited Liability Company, Appellant, vs. STATE ex rel. GAMING CONTROL BOARD OF ACADIA and Gaming Commission, administrative agencies of the State of Acadia Respondent.	No. 99066

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This is an appeal from the Thirteenth Judicial District Court denying the Roxbury's Motion for Summary Judgment. We now reverse.

BACKGROUND

The Roxbury, LLC ("Roxbury") is the new up and coming casino in Nirvana, Acadia. Millions of people every year travel to Nirvana from all over the world to visit for conventions, business, and pleasure. Inside the Roxbury are multiple restaurants, shops, and attractions, including a 70s themed nightclub called Boogie Nights Nightclub ("Boogie Nights") that is owned and operated by the brothers Doug and Steve Butabi who lease the space from the Roxbury (a licensed gaming establishment) and are the designated club venue operators. As gaming has become less popular with the younger generation, it is the nightclub scene that is brining in millennials who spend an exorbitant amount of money at the Roxbury.

Boogie Nights is a two-story nightclub, with a pool day club on the top deck. It is at maximum capacity every weekend and most weeknights, bringing in top dollar to Nirvana through the major tourist attraction, even though there is no gaming inside the nightclub. Boogie Nights has contracts with the top 20 DJs in the world for their weekly headliners, which attracts these big crowds. The main entrance is inside the casino, but the main exit leads out to Nirvana Boulevard (there is a separate exit for club goers who are also staying at the Roxbury to return to their hotel room). Boogie Nights has the

policy of escorting disorderly people only through exits that lead to Nirvana Boulevard to prevent them from being dumped onto the casino floor. This 70s themed nightclub brings in celebrities from around the world and has become the big attraction to Nirvana. However, with the popularity and celebrity presence comes the illegal activities. Boogie Nights has begun to have a reputation of soliciting drugs, patron dumping, prostitution, and underage drinking, although Boogie Nights and the Roxbury have a zero-tolerance policy for any illegal activities.

In order to set itself apart from the other nightclubs, Boogie Nights launched a new advertising campaign. The nightclub's most prevalent advertisement, which is the subject of this dispute, is a billboard located in the area visited the most by tourists to Nirvana—the Nirvana strip. The Nirvana Strip contains the majority of Nirvana's casinos, nightclubs, and shows. Nirvana is known to host a variety of shows, a majority of which contain women in risqué clothing, including a plethora of live burlesque shows. The Nirvana strip is a host to all types of people and ideas, and is considered to be a place where "anything goes" for tourists.

Boogie Nights' billboard, located in this heavily trafficked area by tourists, displays the slogan, "Losing at the tables? Come get funked up!" This slogan overlays a woman, wearing lingerie, with fuzzy handcuffs on her wrists. Boogie Nights reasoned that sex sells so why not push the envelope. However, the Gaming Control Board of Arcadia (hereinafter the "GCBA") felt that this billboard, which was visible to any person (including families and children) visiting Nirvana, was improper and reflected poorly on Nirvana's gaming industry. The GCBA fails to note, however, that the lingerie worn by the women on the billboard is actually the uniform of the cocktail waitresses inside Boogie Nights.

The GCBA is the Acadia state agency in charge of regulating the gaming industry and has been given extreme power by the Acadia legislature to ensure that the gaming industry maintains the highest public image possible, as demonstrated by ARS 463.0129. The GCBA passes regulations in accordance with the legislature's wishes and has passed a regulation prohibiting casinos from advertising in a way that may harm Acadia's gaming industry image. It is under this regulation that the GCBA imposed a $2 million fine against the Roxbury because its tenant, Boogie Nights, put up this scandalous advertisement. The GCBA has expressly stated that the advertisement reflects poorly on the gaming industry and makes tourists think that Nirvana is a place that lacks moral values. The GCBA also argued

that the billboard gives tourists the idea that "anything goes" in Nirvana and this attitude by tourists will eventually spill over and affect the individuals that live in Nirvana.

More than 2 million people live in Nirvana as full-time residents and have careers, families, and strong communities, but tourists seldom notice because they typically do not leave the Nirvana strip. Approximately thirty individuals have come forward to express their displeasure over Boogie Nights' new billboard, many of which state that the billboard has hurt their businesses and has affected their lives negatively. A primary concern is that the billboard is visible to children and displays images that are too risqué for all individuals in the community.

Moreover, due to the reputation the nightclubs are beginning to have in Nirvana, the Nirvana legislature adopted a statute, Acad. Rev. Stat. 463.15999 ("ARS"), requiring the GCBA and the Acadia Gaming Commission ("AGC") to adopt regulations requiring club venue employees to register with the GCBA. This way the GCBA would be able to determine if certain employees were suitable to work inside club venues that were located inside gaming establishments. Amendments to Regulation 5 of the Regulations of the Acadia Gaming Commission and Gaming Control Board of Acadia followed.

Although it is undisputed that Boogie Nights has complied with all registration requirements with the GCBA, Boogies Nights still came under scrutiny by the GCBA. Due to Boogie Nights' reputation, the GCBA, who has the power to audit internal casino operations, commenced investigation against Boogie Nights. Although, the investigation did not reveal any evidence of soliciting drugs, prostitution, underage drinking, they became aware of numerous violations of the amendments to Regulation 5, which regulates club venues. The GCBA found the following violations of Regulation 5:

1. Did not have security posted outside the restroom door at all times; (5.360)(2)(p)
2. Did not have an ambulance onsite; (5.335)(3)
3. Bartenders notified security instead of management regarding individuals showing significant signs of intoxication who in turned escorted individuals out the premises, instead of medical staff; and (5.360)(2)(l)
4. Failed to have procedures in place for confiscation and disposal of illegal controlled substances (5.360)(2)(m).

On June 16, 2016, Gaming Board undercover auditors witnessed Charlie Sheen enter the Roxbury and club employees confiscate cocaine, but instead of disposing of it per Roxbury's own procedures, the employee put it with his personal property. Mr. Sheen had a VIP table and was seen to be increasingly inebriated throughout the night. As Charlie was seen existing the restroom, another club patron bumped into him and fight broke out that was unmanageable due to lack of security. The said individual was thrown out of the club onto the street without medical attention and there was not an emergency medical technician or ambulance on site to provide services. Mr. Sheen was able to continue his night, where he was seen engaging in an illegal backroom poker game in an empty room inside the club and left the club to go to his room inside the Roxbury.

PROCEDURAL HISTORY

As a result of the investigation, the Board brought suit against the Roxbury for the casino's failure to prevent such activities from occurring on its premises, which tends to reflect on the reputation of the State of Acadia and acts as a detriment to or the development of the gaming industry in violation of GCBA Regulations 5.010, 5.011(1), and 5.011(10), and thus constitutes an unsuitable method of operation and as such provides grounds for disciplinary action by the board. The GCBA is seeking punitive damages in the amount of $2 million for the club venue violations and $2 million for improper advertisements against the Roxbury.

Under the lease agreement between Boogie Nights and the Roxbury, Boogie Nights was required to cooperate and comply with all gaming regulations and matters. If Boogie Nights did not comply with gaming requirements, then they would be in breach of their lease. Due to the allegations brought by the GCBA, the Roxbury indemnified the Nightclub under its lease provisions, however both parties agreed to stay the binding arbitration until the determination of the present case; this is not an issue on appeal.

The Roxbury has challenged the fines, stating that the GCBA has exceeded its authority under the attached statutes and violated First Amendment principles of free speech. The Roxbury argued that the Gaming Control Board and Gaming Commission only have the authority to regulate gaming activities and operations. As Boogie Nights is not a gaming establishment, and has no gaming inside its venue, the GCBA and Commission cannot regulate its operations. Acadia statues only allow the GCBA and Commission to require club venue employees to register with GCBA. Furthermore, the prohibitions

on Boogie Nights' advertisements are a violation of the State and Federal First Amendment. The GCBA argued that since Boogie Nights is located inside a gaming establishment, the Roxbury, what occurs inside its venue affects the reputation of the gaming industry. After going through the administrative process and exhausting all administrative remedies, the Roxbury sought judicial review. In the district court, the Roxbury filed a Motion for Summary Judgment on the basis that the GCBA exceeded its authority when it passed Gaming Regulations 5.330, 5.335 and 5.360, and violated first amendment rights, which the district court denied. This appeal followed, and we now reverse on both issues.

CONCLUSIONS OF LAW

A. STANDARD OF REVIEW

We review a district court order granting summary judgment de novo, with no deference to the findings of the district court. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). Viewing the evidence in the light most favorable to the nonmoving party, we must decide whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *Id.* Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Acadia courts apply the federal approach outlined in *Celotex Corp v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986), with respect to burdens of proof and persuasion in the summary judgment context. Under that approach, the moving party bears the initial burden of production to show **the absence** of a genuine issue of material fact. *Celotex*, U.S. 317 at 323 (emphasis added). Only after the moving party makes this showing does the burden shift to the party opposing summary judgment to show **the existence** of a genuine issue of material fact. *Id.* at 331 (emphasis added).

B. Validity of Regulation 5

The Roxbury is challenging the validity of the amendments of Acadia Gaming Commission's Regulation 5, specifically the regulations relating to the operations of club venues (5.330, 5.335 and 5.360). When determining the validity of an administrative regulation, courts generally give "great deference" to an agency's interpretation of a statute that the agency is charged with enforcing. *Division of Ins. V. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293 (2000); *see also Clark Co. Sch. Dist. V.*

Local Gov't, 90 Nev. 442, 446 (1974). However, if the regulation violates the constitution, exceeds the statutory authority of the agency, or is arbitrary or capricious a court will not hesitate to declare it invalid. Acad. Rev. Stat. 233B.110[1]; *see also Division of Ins.*, 116 Nev. at 293. A party attacking the validity of an administrative rule must show compelling reasons why the rule conflicts with the legislations intent and purpose. *Pierce v. State*, 144 Wash. App. 78, 836 (2008). A court may strike even a reasonable agency interpretation of a statute if the interpretation conflicts with legislative intent. *See Hotel Employees v. State, Gaming Control Bd.*, 103 Nev. 588, 591 (1987).

Nightclubs are unique in that, they maintain autonomy from the casinos and tend to lack gaming within the venues that would directly subject them to the Gaming Control Board's control. Robert Loftus, Note, *Blowing the Whistle on Nightclub Illegality to the Nevada Gaming Control Board and Nevada's Common Law Protection*, 6 UNLV Gaming L.J. 248, 250 (2015). However, legislatures have endowed the Gaming Control Boards with broad reaching powers to protect the general welfare through oversight of casinos and operations conducted on casino property, such as the Nevada Legislature which Acadia has adopted its gaming laws. *Id.* Acadia's gaming laws and regulations were adopted from Nevada, as they lead the industry in gaming. Acadia's Gaming Regulation 5 and ARS 462.15999 are identical to that of Nevada's and were adopted as a precaution against the incidents that were happening inside of Las Vegas nightclubs located in casinos and the reputation the Nirvana nightclubs were beginning to have.

Regulation 5 was promulgated to implement ARS 463.15999,[2] which requires the AGC and GCBA to "provide by regulation for the registration of club venue employees and matters associated therewith." The Roxbury contends Regulation 5 exceeds the authority of the Gaming Commission because ARS. 463.15999 was not intended to regulate club venue operations. We agree.

Under the statutory scheme of ARS 463.15999, the regulations may include (a) requiring a club venue employee to register in the same way as a gaming employee; (b) establishing fees associated with registration; (c) requiring club venue operator to have a written agreement with third party contractors; (d) requiring registration of certain third party contractors. Acad. Rev. Stat. 463.15999.

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[1] Adopted from Nev. Rev. Stat. 233B.110.

[2] This statute was adopted from Nevada gaming statutes. Nev. Rev. Stat. 463.15999.

The Roxbury argues that Regulation 5 exceeds the scope of ARS 463.15999 because the statue only grants the Gaming Commission and Control Board authority to require the registration of club venues employees and third party contractors with the Gaming Control Board, not the authority to begin regulating the activities and operations of the club venue. The GCBA and AGC argue that the regulations relating to club venue operations and activities fall under "maters associated therewith, " which they were granted the authority to regulate.

The intent was "simply require the registration of certain employees so that the Board can fulfill its duties of preventing persons who are potentially unsuitable to the employer to continue employment at these types of locations that are within gaming establishments." Minutes of the Meeting *of the Assemb. Comm. On the Judiciary*, 78th Sess. 8 (2015). Due to a history of employees engaging in and promoting drugs, prostitution, and the like, this statue was created to determine if certain employees are suitable to work in a nightclub that has a gaming lessor, in an effort to prevent such activities from occurring inside of the nightclubs that are on gaming properties. *Id* at 11-12.

Nowhere in the statute nor in the legislative history is there any suggestion that the GCBA and AGC can now begin to regulate club venue operations. Therefore, the parts of Regulation 5 that do not have to do with registration of employees and third party vendors are invalid, specifically (5.330, 5.335 and 5.360), as the GCBA and AGC exceeded its authority granted by statute.

C. GCBA Regulation of Boogie Nights' Advertisements

The second issue on appeal is whether a state regulatory agency, specifically the GCBA can prohibit Boogie Nights from advertising its '70s-themed club on a billboard that features a woman in risqué lingerie wearing fuzzy handcuffs, with the phrase, "Losing at the tables? Come get funked up!" emblazoned across it. As an initial matter, no particular regulation in Acadia directly mentions club venues and advertising. Therefore, looking to the advertising regulations on casinos and applying the regulation to club venues, we find that the application of the regulation is not narrowly tailored to protect Acadia's gaming industry. Lastly, Boogie Nights' advertisement does not classify as obscenity under the state laws of Acadia. Thus, GCBA's action in limiting speech is unconstitutional.

1. No Explicit Power to Target Club Venue Advertisements

As an initial matter, the only regulations in Acadia that seem to directly apply to club venues on casino properties (such as Boogie Nights) are Acadia Gaming Commission Regulations 5.300 – 5.380 (2015), under the heading "Club Venues." However, conspicuously absent from the entirety of these club venue regulations is any mention of advertisement regulations. Thus, to find GCBA's authority to regulate advertisements of those businesses on gaming establishment premises, we must look elsewhere.

It is the public policy of Acadia to regulate the gaming industry and its participants in a strict manner. *See* Acad. Rev. Stat. 463.0129 ("The gaming industry is vitally important to the economy of Acadia and the general welfare of the inhabitants...public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations, and ***activities related to the operation of licensed gaming establishments***.") (emphasis supplied). It is under ARS 463.0129 that courts applying Acadia state law have given great deference to the GCBA.

Moreover, the GCBA has the authority to regulate the advertisements of gaming establishments, including casinos, under Acadia Gaming Commission Regulation 5.011(4). Specifically, "[f]ailure to conduct advertising and public relations activities in accordance with decency, dignity, good taste, honesty, and inoffensiveness, including, but not limited to, advertising that is false or materially misleading." Acadia Gaming Comm'n Reg. 5.011(4). Thus, we accept that the deference afforded to the GCBA, coupled with the language that the legislature has given the GCBA power to strictly regulate "all...locations...and activities related to the operation of licensed gaming establishments," we find that the GCBA has the authority to oversee advertisements of club venues on casino premises. However, this authority does not allow GCBA to fine The Roxbury for the specific advertisements of its tenant, Boogie Nights, currently at issue.

2. First Amendment

The First Amendment of the United States Constitution reads, "Congress shall make no law...abridging the freedom of speech, or of the press." The First Amendment applies to individual states, including Acadia, through the Fourteenth Amendment. *See, e.g.*, *Duncan v. State of Louisiana*, 391 U.S. 145, 148-49 (1968). Moreover, Acadia's State Constitution also mirrors the language from the First

Amendment. Thus, Acadia and its state agencies must take into account an individual's constitutional rights, including Boogie Nights' right to free speech.

a. Not narrowly tailored to achieve GCBA's objective to maintain public confidence in the gaming industry

Although the Supreme Court of the United States originally found that the First Amendment did not protect commercial speech, *see Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), the Court overruled that decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*. 447 U.S. 557 (1980). Moreover, the policies behind protecting purely commercial speech were emphasized in 1993 by the Supreme Court:

> The commercial market place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

Edenfield v. Fane, 507 U.S. 761 (1993). It is now undisputed that the First Amendment protects even purely commercial speech, albeit "lesser protection...than to other constitutionally guaranteed expression." *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993).

To classify as commercial speech, the material must be: (1) some form of advertisement; (2) referring to a specific product; and (3) the speaker must have an economic motivation behind making the speech. *See, e.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-7 (1983). In *Bolger*, the Supreme Court found a company's pamphlets discussing condoms and detailing the company's varying products to be commercial speech due to the fact that the pamphlets were distributed by the company in order to produce an economic benefit for the company, i.e. an uptick in sales. *Id.*

Here, Boogie Nights' billboards are commercial speech, similar to the pamphlets in *Bolger*. The billboards here were advertisements for a business and, although the pamphlets in *Bolger* were advertising an actual product, a service such as entertainment has been deemed to be analogous to an actual product. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (finding that a lawyer advertising his services was speech of a commercial nature). Moreover, Boogie Nights is making speech through its billboards for one reason—to bring more patrons into its nightclub to obtain more entry fees and sales in alcoholic beverages.

Thus, the billboard space leased by Boogie Nights is commercial speech and we must use this lens to continue the First Amendment analysis.

Government and its agencies have been allowed to regulate the following four types of commercial speech: (1) advertisements that promote illegal activity; (2) false or deceptive advertisements; (3) advertisements, which although true, are inherently at risk of becoming false and deceptive; and (4) any advertisements that may be impeding the government's objectives. *See* Chemerinsky, Erwin, *Constitutional Law Principles and Policies*, 1024 (4th ed. 2011). However, Boogie Nights advertisements are not promoting an illegal activity as they are not encouraging underage drinking. Additionally, the billboard does not mention any falsehoods— as it is likely that one can get "funked up" at a '70s-theme nightclub in Nirvana. Therefore, the only way in which the GCBA can regulate Boogie Nights' advertisements is through the catchall allotment—i.e. any advertisements that may impede government objectives. Moreover, as the GCBA is concerned about how this advertisement will affect the public view of the Acadia gaming industry, this is the category most applicable to the facts at hand.

b. GCBA Exceeded its Ability

Having found that the GCBA has the ability to regulate advertisements in Acadia's gaming industry, we must analyze whether or not the GCBA has exceeded its ability in regulating Boogie Nights' advertisements. Regulations of commercial speech are evaluated under a four-part test outline in *Central Hudson.* To determine if commercial speech receives First Amendment protection we look at (1) if it concerns lawful activity and is not misleading; (2) whether the government has a substantial interest; (3) if the regulation directly advances the governmental interest asserted;" and (4) whether or not the regulation "is...more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

Here, Boogie Nights' advertisement is for a lawful activity. It could hardly be suggested that Boogie Nights, where tourists go to drink and dance to 70s music is unlawful. The advertisement displays a woman dressed in the Boogie Nights' cocktail waitress uniform, and a pair of fuzzy handcuffs symbolizing the 70s theme, nothing in the billboard suggests unlawful activities. Moreover, it would be hard to argue that Acadia does not have a substantial interest in regulating its gaming industry. In fact, the legislature for Acadia specifically passed ARS 463.0129 and stated that the gaming industry is of vital importance to the state—this importance is the exact reason the GCBA has been given deference in handling gaming issues.

Acadia's concerns regarding its gaming industry is a factor this Court does not easily diminish; rather, we remain sympathetic to Acadia's need to regulate all aspects of one of its most important industries. However, although the GCBA has an extreme need to regulate its industry to ensure the welfare and safety of the inhabitants of Acadia, we must not forget that the First Amendment is a constitutional right that cannot be easily swept aside. The right to free speech promotes tolerance within our society and advances the ever-important principal of self-expression. Thus, keeping the importance of the GCBA's ability to regulate the industry in the forefront of our analysis and the necessity for the free flow of ideas in our society, we look to the third and fourth prongs of the analysis.

Showing that Regulation 5.011(4) directly advances Acadia's interest to uphold the integrity of its gaming industry is a burden placed upon the governmental organization—the GCBA. *See Edenfield*, 507 U.S. at 766. In *Greater New Orleans*, the Supreme Court tackled a FCC regulation that prohibited radio and television advertisement regarding privately operated casino gambling. *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 176 (1999). The substantial governmental interests put forth as the reasoning behind this commercial speech prohibition was that preventing this type of casino advertising would reduce social costs associated with gambling and would assist states in keeping gambling out of their borders. *Id.* at 179. However, the Court struck down this restrictive federal law on commercial speech stating that the law "may not [survive] if it provides only remote support for the government's purpose." *Id.* at 188. With this in mind, the court did not look to a lack of evidence in the record, but rather stated that the government had already endorsed gambling and it would be contradictory to allow the government to restrict advertisement of gambling that it had previously endorsed. *Id.* at 189.

We hold that the GCBA cannot meet its burden to show that application of Regulation 5.011 here directly advances its interest in protecting the integrity of its gaming industry and thus, as applied, the fine against The Roxbury under this regulation for Boogie Nights' advertisement is improper. Similar to the reasoning from *Greater New Orleans*, the state of Acadia has already endorsed gaming and to allow the GCBA to implement broad advertising regulations to promote censorship to be the exact type of "mere [governmental] speculation or conjecture" typically disfavored in the commercial speech realm. 527 U.S. at 188. Further, there has been no evidence provided by the GCBA to show that prohibiting the exact type of

suggestive advertisement done by Boogie Nights would directly prevent a loss of public confidence in the gaming industry.

Regulation 5.011 uses words such as "decency" and "dignity" and thus does not easily allow this court to examine whether or not Boogie Nights' advertisements actually fall within the category that the GCBA is trying to prevent. What is decent to one person may be indecent to another. Thus, because there has been no evidence showing that Boogie Nights' advertisement has been deemed "indecent," it is unclear that the GCBA is directly achieving its substantial governmental goals by fining The Roxbury based on Boogie Nights' actions.

Moreover, even if we were to find that the GCBA could meet its burden under the third prong of the *Central Hudson* test, applying Regulation 5.011 in this manner restricts more speech than is necessary to achieve Acadia's substantial governmental goal—thus, the regulation would fail under the fourth prong of the *Central Hudson* test. We can fathom other, less restrictive ways, in which the state of Acadia, through the GCBA, could prevent risqué or indecent advertisements from harming the public view of Acadia's gaming industry. In relation to billboard advertisements, similar to Boogie Nights' advertisement, the GCBA could simply limit the location of billboards advertising gaming or gaming-related activities. Further, the state of Acadia could put forth its own advertisements containing statistics about all of the good the gaming industry does for the state, thus promoting public confidence in the gaming industry. All of these would be less restrictive alternatives to the censorship of the commercial speech that the GCBA is proposing here.

Regulation 5.011 does not provide a legitimate basis for a fine against The Roxbury based on Boogie Nights' commercial speech because the GCBA cannot prove that the application of Regulation 5.011 to Boogie Nights is directly related to its substantial governmental objective of maintain public confidence in the gaming industry. Further, alternatives exist to prevent a loss of public confidence in the gaming industry that are less restrictive on commercial speech. Thus, the GCBA's argument that it can regulate Boogie Nights' advertisement under the commercial speech doctrine fails.

A. Boogie Nights' billboards do not qualify as obscenity.

The GCBA also argues that it is constitutional to regulate Boogie Nights' advertisement under Regulation 5.011 because the advertisement contains obscenity, which is not protected speech under the

First Amendment. *Roth v. United States*, 354 U.S. 476, 485 (1957). However, the advertisement at issue here would not offend many of the contemporary community standards of Nirvana and thus does cannot be defined as "obscenity" per *Miller v. California*, 413 U.S. 15, (1973), and its progeny.

In *Miller*, the Supreme Court set forth the applicable test for defining whether speech is deemed obscene:

> 1) whether the ***average person***, applying ***contemporary community standards*** would find that the work, taken as a whole, appeals to the prurient interest, 2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and 3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 15. Because there is no evidence that the billboard offends contemporary community standards within Nirvana, the speech is not "obscene" and thus the court will not analyze the following factors under *Miller*.

From a review of the record, Nirvana is a community known for letting loose and being a place where anything goes. People flock from all over the country to see the scandalous shows in the main tourist attractions of Nirvana—where women are regularly dressed in risqué clothing and performing live burlesque shows. It is with these factors in mind that we turn to viewing Boogie Nights' billboard, showing a woman in risqué lingerie and fuzzy handcuffs, through the contemporary community standards lens.

In *Miller*, Chief Justice Burger argued that community standards should be defined locally, rather than nationally, in order to avoid imposing on "New York City" the standards of the people of "Maine or Mississippi." It is hard for this court to imagine a more liberal community standard than the one present in Nirvana. Moreover, because the nation as a whole is becoming more and more accepting of—or numb to—sexual content becoming prevalent in society, it is hard to imagine that Nirvana, an incredibly open-minded community in America, would find a billboard such as Boogie Nights' offensive and "obscene." The billboard is modest in comparison to much of the sexual content in the live shows that tourists come to Nirvana to see. Thus, despite the dissent's arguments regarding the contemporary community standard analysis, we find that there does not exist sufficient evidence to support any finding that this billboard would offend the average person within the community of Nirvana. Therefore, the GCBA has failed to carry its burden to prove that this billboard is "obscene."

Thus, the billboard at issue is not "obscene" and is protected under the First Amendment. Moreover, even though Boogie Nights' advertisement is commercial speech and typically less deserving of First Amendment protection, application of Regulation 5.011 does not directly achieve Acadia's legitimate interest of protecting its gaming community and cannot serve as a constitutionally sound basis for imposing any fines.

For the foregoing reasons, we reverse the decision of the district court on both issues and reverse the fines the GCBA imposed on The Roxbury.

Honorable S. Corpodian, dissenting:

Validity of Regulation 5

The State legislature requested that the GCBA and AGC adopt regulations regarding club venues due to the reputation that the nightclubs were giving the gaming industry; thus, it is not our place to now step in and invalidate them. Therefore, I respectfully dissent. The State of Acadia shows great deference to the GCBA decision on appeal, which the majority failed to do. An order of the Gaming Control Board of Acadia will not be disturbed unless it is arbitrary, capricious, or contrary to the Law. *See Redmer v. Barbary Coast Hotel & Casino*, 110 Nev. 374, 378 (1994) (citing *Nevada Gaming v. Consolidated,* 94 Nev. 139 (1978)). Other states, specifically Nevada who sets precedent for gaming matters, have found that even if a statute contains the phrase "associated with a gaming enterprise," the statute should be construed to accommodate the statutory purpose and applies to businesses inside casinos, even if not directly tied to gaming. *State v. Glusman*, 98 Nev. 412, 648 (1982) (involving GCB calling a clothing shop owner, inside a casino, forward for suitability determination). The purpose of the Gaming Control Board, in fulfillment of its statutory duties to preserve public confidence and trust in licensed gaming, is empowered to investigate the qualifications of applicants for gaming licenses and observe the conduct of licensees and other persons involved in licensed gaming operations. Acad. Rev. Stat. 463.1405.[3]

ARS 463. 15999, requires the AGC, with the advice and assistance of the GCBA, to provide regulations "for the registration of club venue employees and matters associated therewith." The regulations may include: requiring a club venue employee to register in the same manner as a gaming

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[3] This statute was adopted from Nevada gaming statutes. NRS 463.1405(1).

employee; establish fees associated with registration; requiring written agreements with third-party vendors; and registration of third-party vendors. Acad. Rev. Stat. 463.1599. The State Gaming Control Board is charged with the duty of investigating the qualifications of applicants seeking gaming licenses and with the duty of continued surveillance over the conduct of those applicants who receive licenses. George v. Nevada Gaming Commission, 86 Nev. 374, 375 (1970).

The purpose of the gaming control board allows it to adopt regulations for the welfare of the public and gaming industry. Here, the GCBA found that the reputation of these nightclubs inside of casinos for soliciting drugs and prostitution and other illegal activities called for the GCBA to step in and protect the reputation of the gaming industry. Regulating security and medical staff, as well as drug disposal procedures, are "matters associated therewith" that accommodate the statutory purpose of preventing unsuitable employees from operating inside a casino venue in an unsuitable manner. As Boogie Nights is a venue inside a licensed gaming establishment, the GCBA has an interest in the activities that go on inside the club and how it will affect the gaming industry. Accordingly, I find that the GCBA regulations were in compliance with the authority granted to the GCBA under Acadia law.

First Amendment

Based on the fact that the billboard at hand qualifies as "obscenity" and thus is not protected by the First Amendment, I also respectfully dissent from the majority's ruling to overturn the fine against The Roxbury for Boogie Nights' advertisement as the regulation, upon which the fine was based, does not violate any constitutional rights or provisions.

Miller v. California, decided in 1973, set forth the following inquiry regarding obscenity: 1) does the speech offend the average person within the community where the speech occurs; 2) does the speech violate an applicable state law statute; and 3) does the work lack serious literary, artistic, political, or scientific value? If the answer to all three of these elements is in the affirmative, then the speech is "obscene" and thus not protected by the First Amendment. *See Miller*, 413 U.S. at 15-16.

The majority dismisses, without mention, evidence that shows that average members within the Nirvana community have found this billboard to be offensive. Many women of Nirvana have come forward to complain about Boogie Nights' so-called non-obscene advertisement. In fact, approximately twenty women have come forward and explicitly stated that this billboard is offensive. Some of the dealers within

the gaming industry of Nirvana have mentioned that this billboard has made them feel insecure at work and has led to an uptick in harassing comments by patrons to Nirvana's casinos. One woman, an employee at Boogie Nights, stated that a patron at the club asked her if she wanted to "get funked." This led to her quitting her job at the nightclub. Another woman, a real estate agent in Nirvana, has found that it is harder to sell houses ever since this advertisement went up because it "makes our town look sleazy and no one wants to live in a sleazy town." Even men in the community have called for the Boogie Nights advertisements to be taken down, saying the billboard objectifies women and upsets the women in these men's families. With all of these people speaking out and objecting to the display of this billboard, it is hard to see how the majority simply dismisses Nirvana as "an incredibly open-minded community in America."

Moreover, courts have acknowledged that the "average person in the community" standard is no longer feasible in today's society and instead courts have applied a nationwide standard in defining obscenity. *See United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009). In *Kilbride*, the defendants were convicted for transporting obscene material—a violation of federal law. *Id.* at 1245 (The defendants used email to send unsolicited advertisements of adult websites). The Ninth Circuit thoroughly analyzed Supreme Court Justices' opinions and concluded that Justices O'Connor and Breyer were correct that a national community standard should be applied in regulating obscene speech over the Internet. *Id.* at 1254. Here, although the billboard is not being transmitted electronically, many people from all over the country come to Nirvana, and this billboard is essentially being viewed on a national level due to the varying home bases of all the visitors to Acadia. Thus, here, the nationwide community standard from *Kilbride* must be applied. Without the liberal standards supposedly adopted by the incredibly "open-minded community" in America, the majority's argument falls flat, as this billboard would likely offend the average person within the United States, satisfying the first prong of *Miller*.

Looking to the second and third prong of the *Miller* test, the speech here directly violates Acadia's state law defining "obscenity." Acadia state law defines explicitly gives examples of what is "obscenity." ARS 201.235 states:

> "Obscene" means any item, material, or performance that does one of the following:
>
> 1) depicts or describes in a patently offensive way ultimate sexual acts, normal or perverted, actual or simulated; 2) depicts or describes in a patently offensive way

> sadism, masochism, or ***bondage***; or 3) lewdly exhibits the genitals and lacks serious literary, artistic, political, or scientific value. (emphasis added).

Here, the picture of the woman in fuzzy handcuffs depicts an act of bondage. Moreover, the fact that she is in lingerie pushes the image even further toward obscenity because the picture is clearly directed to sexual interests. No one could argue that sex is not being directly used to promote Boogie Nights. Lastly, this billboard does not have any literary, artistic, political, or scientific value. It is simply a billboard being used as commercial speech to advertise a nightclub in an offensive way—it is not a novel, a short story, or a painting. Therefore, this billboard should be deemed "obscene" and should not receive any First Amendment protection.

Even if the billboard could not be classified as obscene, the Supreme Court has held that the government can still regulate indecent speech that does not reach the standard of obscenity, especially when that speech involves or is directed at children. *See Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding that a school district could impose sanctions on a student who gave a speech in front of other students at school because the speech was "offensively lewd and indecent" and should not be protected by the First Amendment); *Ferber v. New York*, 458 U.S. 747 (1982) (finding that the First Amendment does not prohibit government actors from banning the sale of material depicting children in sexual activity). Further, the Court has also upheld governmental restrictions on sexually explicit material. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, (1976) (affirming a government ordinance that prohibited adult theatres from being in residential areas because the ordinance did not offend First Amendment rights). Here, Boogie Nights' billboard is visible at all times during the day and is not shielded from the eyes of today's youth.

Acadia has decided on strict regulation over the gaming industry, and has established the GCBA to implement these strict regulations. Because the GCBA has the duty and authority under Regulation 5.011 and ARS 201.235 to regulate indecent or obscene content displayed in advertisements of members of Acadia's gaming industry, the GCBA fine against the Roxbury was constitutional and must be upheld.

APPENDIX A (ACADIA'S STATUTES AND REGULATIONS)

ARS 201.235

"Obscene" means any item, material, or performance that does one of the following:

1) depicts or describes in a patently offensive way ultimate sexual acts, normal or perverted, actual or simulated; 2) depicts or describes in a patently offensive way sadism, masochism, or ***bondage***; or 3) lewdly exhibits the genitals; and lacks serious literary, artistic, political, or scientific value.

ARS 233B.110 Declaratory judgment to determine validity or applicability of regulation.

1. The validity or applicability of any regulation may be determined in a proceeding for a declaratory judgment in the district court in and for Carson City, or in and for the county where the plaintiff resides, when it is alleged that the regulation, or its proposed application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. A declaratory judgment may be rendered after the plaintiff has first requested the agency to pass upon the validity of the regulation in question. The court shall declare the regulation invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency. The agency whose regulation is made the subject of the declaratory action shall be made a party to the action.

2. An agency may institute an action for declaratory judgment to establish the validity of any one or more of its own regulations.

ARS 463.0129: Public policy of state concerning gaming; license or approval revocable privilege.

1. The Legislature hereby finds, and declares to be the public policy of this state, that:

(a) The gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants.

(b) The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming and the manufacture, sale and distribution of gaming devices and associated equipment are conducted honestly and competitively, that establishments which hold restricted and nonrestricted licenses where gaming is conducted and where gambling devices are operated do not unduly impact the quality of life enjoyed by residents of the surrounding neighborhoods, that the rights of the creditors of licensees are protected and that gaming is free from criminal and corruptive elements.

(c) Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments, the manufacture, sale or distribution of gaming devices and associated equipment and the operation of inter-casino linked systems.

(d) All establishments where gaming is conducted and where gaming devices are operated, and manufacturers, sellers and distributors of certain gaming devices and equipment, and operators of inter-casino linked systems must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State, to foster the stability and success of gaming and to preserve the competitive economy and policies of free competition of the State of Acadia.

(e) To ensure that gaming is conducted honestly, competitively and free of criminal and corruptive elements, all gaming establishments in this state must remain open to the general public and the access of the general public to gaming activities must not be restricted in any manner except as provided by the Legislature.

2. No applicant for a license or other affirmative commission approval has any right to a license or the granting of the approval sought. Any license issued or other commission approval granted is a revocable privilege, and no holder acquires any vested right therein or thereunder.

3. This section does not:

(a) Abrogate or abridge any common-law right of a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason; or

(b) Prohibit a licensee from establishing minimum wagers for any gambling game or slot machine.

ARS 463.0144 "Club venue" defined. [Effective on the date on which the Acadia Gaming Commission adopts the regulations described in ARS 463.15999.] "Club venue" means a venue, including, without limitation, a pool venue, that:

1. Is located on the premises of a nonrestricted gaming establishment;
2. Prohibits patrons under 21 years of age from entering the premises;
3. Is licensed to serve alcohol;
4. Allows dancing; and
5. Offers live music, a disc jockey or an emcee.

(Added to ARS by 2015, 1484, effective on the date on which the Acadia Gaming Commission adopts the regulations described in ARS 463.15999)

ARS 463.01443 "Club venue employee" defined. [Effective on the date on which the Acadia Gaming Commission adopts the regulations described in ARS 463.15999.] "Club venue employee" means a natural person or third-party contractor who is required to register under the regulations adopted by the Commission pursuant to ARS 463.15999. The term includes:

1. Any person who provides hosting and VIP services; and
2. Any other person who the Commission determines must register because such registration is necessary to promote the public policy set forth in ARS 463.0129.

(Added to ARS by 2015, 1484, effective on the date on which the Acadia Gaming Commission adopts the regulations described in ARS 463.15999)

ARS 463.01447 "Club venue operator" defined. [Effective on the date on which the Acadia Gaming Commission adopts the regulations described in ARS 463.15999.] "Club venue operator" means a person who:

1. Operates a club venue as a tenant of, or pursuant to a management or similar type of agreement with, a nonrestricted licensee; and
2. Does not, or whose controlled affiliate does not, hold a nonrestricted gaming license.

(Added to ARS by 2015, 1484, effective on the date on which the Acadia Gaming Commission adopts the regulations described in ARS 463.15999)

ARS 463.15999 Regulations requiring registration of club venue employees.

1. The Commission shall, with the advice and assistance of the Board, provide by regulation for the registration of club venue employees and matters associated therewith. Such regulations may include, without limitation, the following:

(a) Requiring a club venue employee to register with the Board in the same manner as a gaming employee.

(b) Establishing the fees associated with registration pursuant to paragraph (a), which may not exceed the fees for registration as a gaming employee.

(c) Requiring a club venue operator to have a written agreement with:

(1) Any third-party contractor who provides hosting or VIP services to the club venue; and

(2) Any other third-party contractor who provides services to the club venue on the premises of a licensed gaming establishment and who the Commission determines must comply with the provisions of this paragraph because such compliance is necessary to promote the public policy set forth in ARS 463.0129.

(d) Requiring the registration of certain third-party contractors in the manner established for independent agents, including the authority to require the application of such persons for a determination of suitability pursuant to paragraph (b) of subsection 2 of ARS 463.167.

(e) Establishing the fees associated with registration pursuant to paragraph (d), which may not exceed the fees for registration as an independent agent.

2. Except as otherwise provided by specific statute or by the regulations adopted pursuant to this section, a club venue employee shall be deemed to be a gaming employee for the purposes of all provisions of this chapter and the regulations adopted pursuant thereto that apply to a gaming employee.

ARS 463.1405 Investigation of qualifications of applicants and observation of conduct of licensees and other persons by Board; absolute powers of Board and Commission.

1. The Board shall investigate the qualifications of each applicant under this chapter before any license is issued or any registration, finding of suitability or approval of acts or transactions for which Commission approval is required or permission is granted, and shall continue to observe the conduct of all licensees and other persons having a material involvement directly or indirectly with a licensed gaming operation or registered holding company to ensure that licenses are not issued or held by, nor is there any material involvement directly or indirectly with a licensed gaming operation or registered holding company by unqualified, disqualified or unsuitable persons, or persons whose operations are conducted in an unsuitable manner or in unsuitable or prohibited places or locations.

Regulations of Acadia Gaming Commission and Acadia Gaming Control Board
Regulation 5: Operation of Gaming Establishments

5.010 Methods of operation.

1. It is the policy of the commission and the board to require that all establishments wherein gaming is conducted in this state be operated in a manner suitable to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Acadia.

2. Responsibility for the employment and maintenance of suitable methods of operation rests with the licensee, and willful or persistent use or toleration of methods of operation deemed unsuitable will constitute grounds for license revocation or other disciplinary action.

Regulation 5.011 Grounds for Disciplinary action. The GCBA deems any activity on the part of any gaming licensee, his agents or employees, that is inimical to the public health, safety, morals, good order and general welfare of the people of the State of Acadia, or that would reflect or tend to reflect discredit upon the State of Acadia or the gaming industry, to be an unsuitable method of operation and shall be grounds for disciplinary action by the GCBA. Without limiting the generality of the foregoing, the following acts or omissions may be determined to be unsuitable methods of operations:

1. failure to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the State of Acadia and act as a detriment to the development of the industry.

2. Permitting persons who are visibly intoxicated to participate in gaming activity.

3. Complimentary service of intoxicating beverages in the casino area to persons who are visibly intoxicated

4. Failure to conduct advertising and public relations activities in accordance with decency, good taste, honesty, and inoffensiveness, including, but not limited to, advertising that is false or materially misleading.

5. Catering to, assisting, employing or associating with, either socially or in business affairs, persons of notorious or unsavory reputation or who have extensive police records, or persons who have defied congressional investigative committees, or other officially constituted bodies acting on behalf of the United States, or any state, or persons who are associated with or support subversive movements, or the employing either directly or through a contract, or any other means, of any firm or individual in any capacity where the repute of the State of Acadia or the gaming industry is liable to be damaged because of the unsuitability of the firm or individual or because of the unethical methods of operation of the firm or individual.

6. Employing in any gaming operation any person whom the commission or any court has found guilty of cheating or using any improper device in connection with any game, whether as a licensee, dealer, or player at a licensed game or device; as well as any person whose conduct of a licensed game as a dealer or other employee of a licensee resulted in revocation or suspension of the license of such licensee.

7. Employing in any gaming operation any person whom the commission or any court has found guilty of cheating or using any improper device in connection with any game, whether as a licensee, dealer, or player at a licensed game or device; as well as any person whose conduct of a licensed game as a dealer or other employee of a licensee resulted in revocation or suspension of the license of such licensee

8. Failure to comply with or make provision for compliance with all federal, state, and local laws and regulations and with all commission approved conditions and limitations pertaining to the operations of a licensed establishment including, without limiting the generality of the foregoing, payment of all license fees, withholding any payroll taxes, liquor and entertainment taxes and antitrust and monopoly statutes.

The GCBA in exercise of its sound discretion can make its own determination of whether or not the licensee asfailed to comply with the aforementioned, but any such determination shall make use of established precedents in interpreting the language of the applicable statutes and regulations. Nothing in this section shall be deemed to affect any right to judicial review.

9. (a) Possessing or permitting to remain in or upon any licensed premises any cards, dice, mechanical device or any other cheating device whatever, the use of which is prohibited by statute or ordinance, or

(b) Conducting, carrying on, operating or dealing any cheating or thieving game or device on the premises, either knowingly or unknowingly, which may have in any manner been marked, tampered with or otherwise placed in a condition, or operated in a manner, which tends to deceive the public or which might make the game more liable to win or lose, or which tends to alter the normal random selection of criteria which determine the results of the game.

10. Failure to conduct gaming operations in accordance with proper standards of custom, decorum and decency, or permit any type of conduct in the gaming establishment which reflects or tends to reflect on the repute of the State of Acadia and act as a detriment to the gaming industry.

Club Venues

5.300 Applicability.

1. Sections 5.300 through 5.380 shall only apply to club venues which:
   (a) Serve alcohol from at least one bar which is not portable;
   (b) Have at least one designated area where patrons are permitted to dance; and
   (c) Charge an admission fee or cover charge.
2. The chairman, or his designee, may, in his sole and absolute discretion, designate additional club venues to which sections 5.300 through 5.380 shall apply.
3. The chairman, or his designee, may, in his sole and absolute discretion, limit the application of sections 5.300 through 5.380 with regard to club venues:
   (a) Operating primarily as showrooms, theaters, concert venues, or interactive entertainment centers or
   (b) Hosting short-term events conducted by a licensee or club venue operator in conjunction with a convention, corporate, or charitable event.

[Effective May 1, 2016]
(Adopted: 11/15.)

5.305 Definitions.

As used for sections 5.300 through 5.380:

1. “Chairman” means the chairman of the board or the chairman’s designee.
2. “Hosting or VIP services” means arranging access to or table service at a club venue, reserving tables at a club venue, or providing patrons to a club venue. This subsection does not include the conduct of convention, corporate, or charitable events at a club venue organized by an employee or contractor of the club venue operator or licensee.
3. “Independent host or promoter”
   (a) means:
      (1) a person and the employees or contractors of such person, if any, who are not directly employed by a licensee or club venue operator who provide hosting or VIP services for a club venue for any form of consideration and

(2) Third-party contractors not directly employed by a licensee or club venue operator who arrange for short-term use of a club venue to conduct an event at which there will be an admission fee or cover charge. This subsection does not include third-party contractors retained by licensees or club venue operators to conduct convention, corporate, or charitable events.

(b) does not mean:

(1) persons and the employees or contractors of such persons, if any, who provide hosting or VIP services but only have contact with the patrons of a club venue through an internet website and

(2) Licensed ticket brokers.

[Effective May 1, 2016]
(Adopted: 11/15.)

5.310 Employees designated to monitor club venues.

A licensee shall designate at least one of its employees to monitor club venues at its establishment.
[Effective May 1, 2016]
(Adopted: 11/15.)

5.320 Registration of club venue employees.

1. When not in conflict with this section, the gaming employee provisions of ARS 463.335 through 463.337, inclusive, and Regulations 5.100 through 5.109, inclusive, shall apply to persons required to register in the same manner as gaming employees pursuant to this section.

2. All supervisors, managers, security and surveillance personnel, servers, server assistants, bussers, restroom attendants, and any person who provides hosting or VIP services employed or contracted to work at a club venue by a licensee or club venue operator shall register in the same manner as gaming employees and shall be considered gaming employees because such registration is necessary to promote the public policy set forth in Acadia Revised Statute 463.0129.

3. Employees of a club venue operator who have access to the board's system of records for the purpose of processing the registrations required by this section shall register in the same manner as gaming employees and shall be considered gaming employees because such registration is necessary to promote the public policy set forth in Acadia Revised Statute 463.0129.

4. The licensee or club venue operator which operates a club venue shall be responsible for compliance with the registered gaming employee requirements for persons employed or contracted to work at the club venue.

5. This section shall have the following effective dates:

(a) April 1, 2016, for employees who have access to the board's system of records;

(b) May 1, 2016, for supervisors and managers;

(c) May 1, 2016, for any person who provides hosting or VIP services;

(d) July 1, 2016, for security and surveillance personnel;

(e) October 1, 2016, for servers, server assistants, and bussers; and

(f) November 1, 2016, for restroom attendants.

→ Applications for registrations required pursuant to this section shall not be submitted to the board more than 60 days prior to the effective date applicable to the applications for registrations.
(Adopted: 11/15.)

5.330 Security and surveillance.
1. A licensee or club venue operator, as applicable, shall regularly assess entertainment and events occurring within the club venue or which may impact attendance at the club venue to determine and engage appropriate security personnel.
2. To the extent applicable, the procedures, rights, remedies, and requirements set out in section 5.160 and applicable surveillance standards shall apply to the club venue surveillance systems.
[Effective May 1, 2016]
(Adopted: 11/15.)

5.335 Medical staffing requirements
1. As used in this section, the terms "emergency medical technician" and "advanced emergency medical technician" shall have the meanings ascribed by ARS chapter 450B.
2. A club venue operator or licensee which anticipates attendance of between 1,000 and 2,000 patrons within a club venue and waiting for entrance into the club venue shall have or contract to have at least one emergency medical technician onsite during club venue operation to perform initial emergency or non-emergency assessment and care and to make proper transport decisions. An emergency medical technician may concurrently perform security functions for the club venue.
3. A club venue operator or licensee which anticipates a total of 2,000 or more patrons to be present within the club venue and awaiting entrance into the club venue shall have or contract to have at least one advanced emergency medical technician ambulance on site during club venue operation to perform initial emergency or non-emergency assessment and care and to make proper transport decisions.
4. Security personnel employed or contracted to work at a club venue shall receive annual awareness training on regarding how the employees can best interact with onsite or responding emergency medical service providers. Such training shall be performed by an instructor who has a current endorsement as an instructor in emergency medical services from the State of Acadia, Department of Health and Human Services, Division of Public and Behavioral Health or from the Southern Acadia Health District. It will be the responsibility of the licensee and club venue operators to document the completion of said training for each employee on an annual basis.
[Effective May 1, 2016]
(Adopted: 11/15.)

5.340 Independent host or promoter written agreements.
A licensee or club venue operator shall have a written agreement with an independent host or promoter for the club venues owned or operated by the licensee or club venue operator at which the independent host or promoter provides hosting or VIP services.
[Effective May 1, 2016]
(Adopted: 11/15.)

5.345 Registration of Independent Hosts or Promoters.
1. An independent host or promoter must register with the board pursuant to this section for each club venue where the person will act as an independent host or promoter. The registration must be renewed every five years.
2. A licensee or club venue operator shall not provide any consideration to an independent host or promoter who must register pursuant to this section for services rendered for a club venue until the chairman notifies the licensee or club venue operator in writing that the board has registered the independent host or promoter at the club venue.

3. A filing for registration or renewal pursuant to this section must include the following:
(a) A fee set by the chairman not to exceed the fee charged for registering as an independent agent.
(b) The name and address of the club venue(s) with which the person will be affiliated;
(c) The name and address of the person registering;
(d) A list of all felony, drug-related, or prostitution related arrests and convictions;
(e) A signed statement from the person registering in which the person agrees the person is governed and bound by the laws of the State of Acadia and the regulations of the commission;
(f) A copy of the written agreement between the club venue(s) and the independent host or promoter;
(g) One complete set of fingerprints (if a natural person);
(h) The results of a drug test performed by a facility licensed as a medical laboratory in the State of Acadia (if a natural person); and
(i) Such additional information as the chairman may require.

→ The Chairman or designee may authorize a person who is registered as an independent host or promoter for at least one club venue to register as an independent host or promoter for additional club venues for such fees and requirements as he determines are appropriate.

4. The independent host or promoter shall provide its filing to the licensee or club venue operator for transmittal to the board. The board may reject filings made directly by an independent host or promoter.

5. A person registered pursuant to this section shall report changes to the information required pursuant to subsection 3 to the board within 30 days of such change.

6. The chairman may require a person registered pursuant to this section to file an application for a finding of suitability at any time in the chairman's sole and absolute discretion by sending notice to the person through the United States Postal Service to the person's address on file with the board. A person called forward pursuant to this subsection shall apply for a finding of suitability as required by the chairman within 30 days of the person's receipt of notice. The notice shall be deemed to have been received by the person 5 days after such notice is deposited with the United States Postal Service with the postage thereon prepaid.

7. If a person registered pursuant to this section does not file an application for a finding of suitability within 30 days following receipt of notice that the chairman is requiring a person registered pursuant to this section to file an application for a finding of suitability, the board shall notify all licensees and club venue operators which operate a club venue where such person is registered pursuant to this section. Upon such notice, a licensee or club venue operator shall provide documentary evidence that the person no longer acts as an independent host or promoter for the club venue. Failure of the licensee or club venue operator to respond as required by this section shall constitute grounds for disciplinary action.

8. If the commission finds a registered independent host or promoter to be unsuitable, the registration of such registered independent host or promoter is thereupon cancelled. A licensee, club venue operator, or independent host or promoter shall, upon written notification of a finding of unsuitability, immediately terminate all relationship, direct or indirect, with such independent host or promoter. Failure to terminate such relationship may be deemed to be an unsuitable method of operation. No determination of suitability of an independent host or promoter shall preclude a later determination by the commission of unsuitability.

9. Upon the chairman requiring a person who is required to be registered by this section to apply for a finding of suitability, the person does not have any right to the granting of the application. Any finding of suitability hereunder is a revocable privilege, and no holder acquires any vested right therein or thereunder. Judicial review is not available for decisions of the board and commission made or entered under the provisions of this section.

10. A licensee or club venue operator shall provide a monthly report to the board listing all independent hosts or promoters with which the licensee or club venue operator has terminated its business relationship during the time period covered by such report. Such reports shall include truthful statements of the reason(s) for each termination of business relationship and any additional information regarding the terminations requested by the chairman.
[Effective May 1, 2016]
(Adopted: 11/15.)

5.350 Reserved.
(Adopted: 11/15.)

5.360 Required policies and procedures.
1.Licensees and club venue operators shall have written policies and procedures for club venues that seek to foster the public health, safety, morals, good order, and general welfare of the patrons.
2. In order to determine whether a licensee or club venue operator has established appropriate policies and procedures to monitor, control and regulate club venues, the board and commission may consider some or all of the following factors:

(a) What procedures are in place to demonstrate compliance with these regulations;
(b) The extent of background investigations conducted by the licensee or club venue operator prior to hiring club venue security, employees, independent hosts and promoters, vendors and entertainers;
(c) The extent to which the licensee or club venue operator provides every club venue employee, or independent host or promoter with a written policy detailing the standard of conduct for club venue operations, and the extent to which the licensee or club venue operator informs the club venue employees, and independent hosts or promoters of the club venue policy and receives their agreement to follow it;
(d) The extent to which the licensee or club venue operator conducts regular meetings with club venue employees, independent hosts or promoters, on-site and relevant vendors, and entertainment talent and their staff to discuss club venue policies and daily operating, security and safety concerns;
(e) The extent of the training and work experience of security management and staff responsible for enforcing the licensee's or club venue operator's club venue policy;
(f) The extent to which a program is in place to conduct undercover "shop" operations at the club venue to determine if employees are engaging in, or otherwise permitting, illegal or inappropriate behavior, the type of background or training the individuals involved in the undercover "shop" program have, and records detailing the results of the undercover "shop" program;
(g) The extent to which the licensee's or club venue operator's management is actively involved in the oversight of club venue policies and procedures including management's participation in initial and continued training of club venue security and employees and management's active participation in monitoring club venue activities;
(h) The extent to which the licensee's or club venue operator's management interacts with law enforcement agencies and other licensees to develop and implement best practices regarding club venue operations and the extent to which management solicits the assistance of, and training by, law enforcement agencies or reputable private industry firms to reduce incidents of illegal or inappropriate behavior by employees, independent hosts or promoters, and patrons;
(i) The extent to which the licensee or club venue operator engages in pro-active and cooperative support of law enforcement agencies in their efforts to help regulate, monitor and protect the licensee, the club venue operator, if applicable, and the club venue operations;

(j) The extent to which the licensee conducts meetings with the club venue operator, as necessary, to discuss issues related to club venue operations;
(k) The extent to which club venue management, employees and security staff are trained to detect the use of false or misused identification. Such training should include similar detection techniques for foreign identifications and passports and other forms of identification not readily encountered in the U.S.;
(l) The extent to which the club venue will deter excessive consumption of alcohol by patrons, will require employees to notify club venue management of individuals showing significant signs of intoxication or drug impairment, and will regularly assess the need for medical response services, so that patrons exhibiting signs of excessive inebriation or drug impairment can be treated or transported to a medical facility, as determined by trained emergency medical personnel;
(m) The extent to which club venues maintain procedures for confiscation and disposal of suspected illegal controlled substances or other suspected illegal contraband;
(n) The criteria for trespassing patrons or referring patrons to law enforcement because of suspected illegal conduct;
(o) The extent to which club venues maintain procedures for termination of employees and exclusion of independent hosts or promoters who are involved in illegal or inappropriate conduct and the extent to which the licensee or club venue operator maintains records detailing terminations and exclusions;
(p) How the licensee or club venue operator will control its restrooms. Such policy shall address, but not be limited to, security and restroom attendants;
(q) The extent to which the licensee or club venue operator maintains records showing the number of individuals trespassed from club venues or referred to law enforcement because of illegal or inappropriate behavior;
(r) The extent to which drug testing of club venue employees occurs; and
(s) The extent to which any other policies or procedures implemented by the licensee or club venue operator exhibit commitment to promoting the public health, safety, morals, good order and general welfare of patrons and employees at club venues.

3. Licensees and club venue operators shall submit such policies and procedures to the chairman or his designee for approval at least annually and shall submit material changes to such policies and procedures within 60 days of such changes. If the chairman does not disapprove the submitted policies and procedures within 60 working days of receipt of them, the policies and procedures will be deemed approved. From time to time, the board or commission may publish topics believed to impact the public health, safety, morals, good order and general welfare of patrons and employees of club venues and request that the club venue policies and procedures be updated to address such topics.

4. Whether licensees and club venue operators are operating in accordance with the policies and procedures approved by the chairman shall be considered by the board in deciding whether or not to file any disciplinary action related to a club venue and by the commission in determining whether discipline is appropriate.

[Effective May 1, 2016]
(Adopted: 11/15.)

5.370 Access to club venue and production of records.

1. Upon request, a licensee or club venue operator shall produce to the board all records regarding the operation of a club venue that the board deems relevant to a board investigation or inquiry.

2. Upon display of a badge issued by the board and an identification card signed by a board member, a licensee or club venue operator shall ensure all board members and agents have immediate access to all areas of a club venue owned or operated by the licensee or club venue operator. In addition to areas accessible by the club venue's patrons, this shall include areas not accessible to the club venue's patrons including but not limited to offices, kitchens, storage rooms, record rooms, computer rooms, and surveillance rooms. Similar access shall be granted to any commission member who displays an identification card signed by the governor.

3. A licensee with one or more club venues at its establishment on or after January 1, 2016, shall establish a revolving account with the board in the amount of $10,000 unless a lower amount is approved by the chairman, which shall be used to pay the expenses of agents of the board and commission conducting undercover observations and operations at club venues.

4. A licensee with a club venue at its establishment operated by a club venue operator shall be responsible for the club venue operator's compliance with this section.

5. All records, reports and information provided to the board or commission pursuant to this section, and any communications related thereto with the board or the commission or any of their agents or employees, will be subject in all cases to ARS 463.120 and 463.3407.

[Effective May 1, 2016]

(Adopted: 11/15.)

5.380 Unsuitable methods of operation.

1. It may be deemed an unsuitable method of operation where a licensee fails to take immediate appropriate action if it knew or should have known an employee of the licensee, an employee of a club venue operator, or an independent host or promoter was engaging in or facilitating illegal activity at the licensee's establishment.

2. The requirements herein set a minimum threshold if a licensee allows a club venue at its establishment.

3. It may be deemed an unsuitable method of operation where the licensee meets the requirements concerning club venues in this regulation but fails to cause club venues to operate in a manner suitable to protect the public health, safety, morals, good order, and general welfare of the inhabitants of the State of Acadia or to prevent club venues from allowing incidents which might reflect on the repute of the State of Acadia and act as a detriment to the development of the industry. Compliance with the requirements concerning club venues in this regulation may be considered by the board in deciding whether or not to pursue discipline related to a club venue.

4. The primary responsibility to protect the reputation of gaming in Acadia, to foster the development of the gaming industry, and to protect the reputation of the State of Acadia is on the licensee which allows a club venue on its premises. Primary responsibility for protecting the health, safety, morals, good order, and general welfare of the patrons and employees of a club venue is on the licensee which allows a club venue on its premises.

Appendix B: Applicable Legislative History for Regulation 5 Amendments (SB 38)
Minutes of the Meeting *of the Assemb. Comm. On the Judiciary*, 78th Sess. 8 (2015).
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Senate Bill 38 (1st Reprint): Revises provisions governing the regulation of gaming. (BDR 41 350)

A.G. Burnett, Chairman, State Gaming Control Board:
Seated to my left is Buffy Brown, senior research analyst for the State Gaming Control Board (GCBA). This was originally a Gaming Control Board bill, and we have allowed several amendments to it; all of them have been friendly. The initial piece of Senate Bill 38 (1st Reprint) was to increase regulation in certain types of associated equipment manufacturers and also to eliminate the regulation of certain types of service providers and manufacturers of equipment associated with interactive gaming. Again, as the session progressed, several industry stakeholders came to us with friendly amendments, all of which we permitted.

Sections 1, 1.1, and 1.2 were proposed by the University of Nevada, Las Vegas William S. Boyd School of Law. They relate to charitable lotteries in the state of Acadia. It has been a tradition for the law school students to introduce a bill related to gaming, and this year there were no available bill draft requests except for S.B. 38 (R1), so we allowed them to tack this on as a friendly amendment. I am not sure if anyone from the law school is present. Would you like me to yield to them at this point, or just go through the bill?

Chairman Hansen: Go through the bill quickly first.

A.G. Burnett: Sections 1.3 through 1.8 address regulation of club venues that are located at gaming properties such as nightclubs, day clubs, and pool clubs. The Board has worked with a number of gaming licensees and club venue operators regarding this bill. The intent is to simply require the registration of certain employees so that the Board can fulfill its duties of preventing persons who are potentially unsuitable to the employer to continue employment at these types of locations that are within gaming establishments.

Sections 3.3 and 3.7 address the club venue operators. If a club venue is owned by a licensee, these provisions already apply. The additions address club venues that are operated by a nonlicensee on a gaming property. The GCBA always has the authority to require a club venue operator to apply for a finding of suitability for licensure if there are concerns about the persons involved;

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however, the Board is responsible for all the costs associated with those investigations. Section 3.3 would, therefore, authorize the Board to charge the club venue operator within the establishment for the cost of that investigation. The Board does not intend to require all club venue operators to apply for licensing. This would be done on a risk analysis basis. Section 3.7 would—as with current licensees—

allow for any information provided to the GCBA by a club venue to be deemed confidential and privileged under the statutes.

Sections 1.9, 2, and 5.5 authorize increased regulation of manufacturers and distributors of associated equipment and their employees, all pursuant to the main governing statute for the GCBA and the Acadia Gaming Commission. The bill provides for the Acadia Gaming Commission (AGC) to adopt regulations regarding registration of manufacturers and distributors of associated equipment if the equipment can affect the integrity of gaming, such as equipment that affects the operation of a game can add or subtract wagering credits to a game, et cetera. The intent is that the greater the risk and the more connectivity the associated equipment has to the actual core components of the game, the more in-depth the review of that entity or person providing that equipment. In adopting the regulations after the statute is enacted, the industry will have several opportunities to provide input.

Section 6 removes requirements for licensure of two types of service providers, as the Board has determined that those service providers pose little or no risk to gaming: those who provide intellectual property such as trade names related to interactive gaming and those who provide customer lists in regards to interactive gaming.

Sections 7, 8, and 9 of the bill all remove licensing requirements for manufacturers of associated equipment in regards to interactive gaming. The category was added in anticipation of the launch of interactive gaming; however, since that time, we have found that such equipment does not really exist and is not captured by other categories.

Last but not least, at the request of the Acadia Resort Association, there re a series of deletions at the end of S.B. 38 (R1), and those are all regarding limited liability partnerships and limited liability companies. The requirement is—to use a phrase, ancient and no longer needed—a cleanup of those two pieces of our statutes.

Chairman Hansen:
Ms. Brown, do you have anything to add to the testimony at this time?

Buffy Brown, Senior Research Specialist, Administration Division, State Gaming Control Board:
I will only provide answers to questions if there are any. I will need to offer one amendment that I can submit in writing. It is actually a technical issue. The amendment had already been adopted in the Senate, but did not get captured when the redraft was done, so I will offer that at the end and provide it in writing afterwards.

A.G. Burnett:
There is just one typo in section 1.7. We need to add the letter "a" in paragraph (c) so that it reads "Requiring a club venue operator."

Assemblyman Ohrenschall:
Will the club venues be separate licensees or will they work under an existing licensee? Can they just register with the GCBA?

A.G. Burnett:
The club venues would not be licensees. They are located within the confines of the statutorily defined premises or establishment of a gaming licensee. The potential for the club venue operator would exist for them to be called forward for what we call a "finding of suitability." That would essentially be if we think there are issues with a person or entity who is operating that club venue as a tenant for the gaming licensee. If we find issues or have sufficient cause for concern, we could do a call forward, which would require them to file an application for a finding of suitability, in which case they would either be found suitable or denied.

Assemblyman Ohrenschall:
Under current law and regulation, does the club venue operator need to appear before the GCBA at all, and if there are problems with the club venue operator, what power does the GCBA or AGC have currently?

A.G. Burnett:
Right now we would have power under a different statute to require the tenant of the licensee to come forward; however, the thought was that this would be cleaner and in conjunction with what we are trying to accomplish with the registered employees of certain establishments. We felt it was more appropriate to have it out front and clean in this fashion. We could call them forward; however, we would not have the power to bill for that activity. This just makes it cleaner and more straightforward; it is out in the open and addressed in the statute.

Assemblyman Elliot T. Anderson:
I would like to direct your attention to page 4, lines 29 through 33. It speaks to basically deeming a club employee to be a gaming employee for the purposes of all of our existing gaming laws and regulations. I am wondering about the breadth of it. I did a quick skim through Acadia Revised Statutes (ARS) Chapter 463 yesterday, and in those chapters, we contemplate the morals, and we talk about reputation. I am wondering if we should be treating clubs, such as on Fremont Street, different from clubs on Nirvana Boulevard.

Specifically, one of the sections in ARS Chapter 463 says that if you are convicted of something that could be punished as a gross misdemeanor or a felony in the state, you cannot get a license. Is that specific provision necessary? I do not want to take away from the problems that we have had with those club entities, but could we hire a club employee? I think a lot of those people have run into problems with drugs specifically, and you would think that at least it would be more than a misdemeanor under our laws. Would you comment on how that would affect those club operators being able to hire employees?

A.G. Burnett:
The intent behind section 1.7 in the lines you pointed out is to simply put those types of employees on the same footing as what we would deem a gaming employee under Regulation 3.100 and under the statutory definition of a gaming employee. Those persons are required to register for a work cards, and, in some cases, they might also have to register for a sheriff's card, depending on the jurisdiction in which they work. If the GCBA finds in their record something thatleads them to object pursuant to the statute, it can do so. Much like the patron dispute scenario that I pointed out earlier, the key employees have the same rights of recourse upon an objection as a patron does upon a patron dispute—appellate rights, sometimes three or four attempts at appeals all the way up from hearing examiner to the GCBA to the AGC. I think the intent is to provide some visibility and perhaps coverage for the employers, be it casino operators in Nirvana, but have nightclubs themselves, or the nightclub operators who are tenants in the licensed establishment. At the end of the day, the licensed gaming establishment's license is at risk, and if improper activities occur, even in a nightclub when it is located on the premises of the gaming establishment, that puts the gaming operator's license in jeopardy.

The idea here is to provide a mechanism whereby a key employee, gaming employee or nightclub employee, can be objected to and essentially kicked out of the system to where they cannot operate in any nightclub that has a gaming lessor. We have heard many instances of companies who have let bad

nightclub employees go because of drugs, prostitution, and things of that nature, but those employees just pop up somewhere else. This is an attempt to make sure those people do not pop up somewhere else. Again, all we can regulate are the gaming licenses, but that is what we are trying to accomplish here.

Russell Rowe, representing Hakkasan:
This is a ditto plus. Hakkasan is the leading nightlife and nightclub operator in Las Vegas and Nirvana and employs over 3,000 in this industry in the city with over 20 venues currently operating. This has become an important entertainment option to tourists nationally and internationally. It is a very critical piece to the resort experience in Nrivana. Seven of the top ten nightclubs worldwide are located in the city. Ensuring operations are free from unwanted elements is an important piece to this, and I think this is the ultimate intent of this legislation. It is important, not only to the gaming industry, but obviously it is very important to the nightlife industry. Hakkasan is a leader in this industry in Las Vegas and Nirvana and has been working to establish best practices in the industry for the past few years in cooperation with law enforcement and the GCBA. We would like to thank Chairman Burnett and Buffy Brown for their efforts in working with us and crafting this legislation. Hakkasan supports S.B. 38 (R1)with respect to the registration of certain nightclub employees.

Mark A. Clayton, representing Hakkasan:
As Mr. Rowe indicated, we are in support of sections 1.3 to 1.7 of S.B. 38 (R1) on behalf of Hakkasan. Hakkasan also supports the Board's efforts to target certain employees that pose a threat to the safe operation of the gaming industry. We understand and agree that the Board's focus is on those individuals and companies whose activities are physically present within the club venue and is not designed to address all individuals or companies who provide services to the nightclub, be it either from within or

outside the state of Acadia. Again, we applaud and support the Board's efforts to make sure that this element of potential regulation can be addressed through the regulatory process with the GCBA and the AGC.

Todd Mason, Director of Public Affairs, Wynn Resorts:
I am speaking today as our global compliance officer, Kevin Tourek, sends his regrets that he cannot join us today. I want to echo the comments of Mr. Rowe and Mr. Clayton in extending our thanks to the GCBA, Chairman Burnett, and Ms. Brown for their efforts in crafting these amendments and allowing us to work with them. I want to add that in addition to what Mr. Rowe said, obviously we recognize as well the need for club operators to take an active role

in policing illegal activities and monitoring our own nightclubs, which have become more a part of our business model. We have seen, to Assemblyman Anderson's question, numerous examples of both illegal activity and settlements among various operators over the past six years.
For Wynn Resorts, we have spent more than $1 million to independent shopper nightclubs to monitor their activity and perform integrity checks. We feel that we continue, along with industry partners, to be a leader in monitoring this activity, but believe that this legislation is important in allowing for the GCBA to promulgate regulations that will allow for certain nightclub employees to register.

Chairman Hansen:
Are there any questions at this time? [There were none.]