IN THE SUPREME COURT OF THE STATE OF NEVADA

BENT BARREL, INC. D/B/A BILBO'S BAR & GRILL,
Appellant,
vs.
LAWRENCE SANDS, D.O., M.P.H., AS DISTRICT HEALTH OFFICER FOR CLARK COUNTY, NEVADA,
Respondent.

No. 56100

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a permanent injunction in an action to enforce the Nevada Clean Indoor Air Act (NCIAA). Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

In this appeal, we consider the constitutionality of the NCIAA as applied to Bent Barrel, Inc., a Nevada corporation doing business as Bilbo's Bar & Grill in Las Vegas. Bilbo's is a restaurant, bar, and gaming establishment with a tavern liquor license and state and city restricted gaming licenses. When the Southern Nevada Health District inspected Bilbo's for compliance with the NCIAA on April 12, 2007, it observed overt smoking by customers, with Bilbo's providing ashtrays and matches to its customers for their use. During the inspection, Bilbo's staff indicated that they were instructed by the owner not to enforce the smoking prohibition.[1]

[1]While Bilbo's correctly points out that the Health District has never enforced the NCIAA against individuals, the Health District provided evidence that it is working to establish a process to cite individual smokers pursuant to the requirements of NRS 202.2483(7), NRS 202.2492, and NRS 202.24925.

In reaction to a letter from the Health District that concerned these compliance violations, the owner of Bilbo's advised the Health District that Bilbo's would not be complying with the provisions of the NCIAA requiring the removal of all ashtrays and other smoking paraphernalia. The Health District then filed a civil complaint for declaratory, injunctive, and other relief against Bilbo's for violating the NCIAA. Bilbo's responded by challenging the constitutionality of the NCIAA.

The district court ultimately held a hearing and granted a preliminary injunction, as it found that the NCIAA is constitutional, that Bilbo's violated the NCIAA, and that Bilbo's was required to remove its ashtrays and matchbooks from areas where smoking is prohibited. Bilbo's then removed its ashtrays and matchbooks from the premises but started handing out extra shot glasses, mugs, and Styrofoam cups to smokers to be used as ashtrays. When the Health District conducted a follow-up inspection, its health officials found five people smoking inside at the bar, using cups and shot glasses provided by Bilbo's as ashtrays, and the owner smoking a cigar on the premises. Upon being informed by a health official that smoking was not permitted, the owner extinguished the cigar but then announced that he wanted to be the first person sued civilly by the Health District for smoking. He also demanded to see a list of other establishments being surveyed and threatened to follow the health officials to their next destination.

The Health District then sent a letter to Bilbo's stating that Bilbo's was in willful disobedience of the NCIAA and that immediate compliance with the NCIAA was required or a civil action would be filed seeking injunctive relief plus civil penalties for each violation. Subsequently, the Health District filed a motion to hold Bilbo's in contempt for willful disobedience of the law by not removing all ashtrays.

The Health District asked for additional sanctions, including that all of Bilbo's officers, agents, and employees be enjoined from smoking in areas where smoking was unlawful and be ordered to advise patrons that they could not smoke in its establishment. Bilbo's countermoved for contempt against the Health District and requested sanctions on the basis of disobedience of the court's instructions and harassment of Bilbo's employees and its patrons. After an evidentiary hearing, the district court denied the contempt charges and declined to impose sanctions against either party.

The case proceeded to a bench trial and the district court ultimately ruled that the NCIAA was constitutional and issued a permanent injunction that required Bilbo's to remove all ashtrays and matches from the areas where smoking is prohibited; to stop providing ceramic cups, shot glasses, and other items to patrons to be used as ash receptacles; and to inform[2] those customers who start smoking inside the premises that smoking is prohibited.[3]

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[2]Bilbo's also argues that the district court lacked legal authority to transfer the enforcement duties to Bilbo's. Bilbo's contends that the NCIAA does not contain language that imposes the obligation upon an employer, agent of the employer, or an employee to tell a smoking patron to stop smoking or that smoking is not permitted. However, requiring Bilbo's to tell customers not to smoke is included within NRS 202.2483, as it is a minimal requirement connected to having a nonsmoking facility. As we stated in Flamingo Paradise Gaming v. Attorney General, "[w]hile there may be uncertainty as to what affirmative actions, if any, a business owner must take if someone smokes within his or her business in violation of the statute, there is no question that the business owner is required to make his or her establishment nonsmoking." 125 Nev. 502, 519, 217 P.3d 546, 558 (2009).

[3]The parties are familiar with the facts and we do not recount them further except as is necessary for our disposition.

This appeal from the district court's decision involves two constitutional challenges.[4] Bilbo's asks this court to consider whether the term "smoking paraphernalia," as used in the NCIAA, is unconstitutionally vague as applied to Bilbo's; and whether the NCIAA and the district court's injunction are unconstitutional as applied to Bilbo's because, by prohibiting it from advertising through matchbooks and ashtrays, they violate its right to commercial free speech. We agree with the district court that the statute and the injunction are constitutional for civil enforcement against Bilbo's, and we affirm the district court on all issues.[5]

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[4]Bilbo's also attempts to rehash the equal protection argument that was presented to and decided by this court in Flamingo, 125 Nev. 502, 217 P.3d 546. In Flamingo, the appellants argued that "the NCIAA violates equal protection because the NCIAA applies to businesses that hold a restricted gaming license but does not apply to gaming areas in those businesses that hold a nonrestricted gaming license." Id. at 521, 217 P.3d at 559. Bilbo's contends that Flamingo does not control here because it did not specifically address the issue of whether a bar with a nonrestricted 16-or-more-slot-machine license can allow smoking while a bar with a restricted 15-or-less-slot-machine license cannot allow smoking. We conclude that this distinction is nonexistent, as the statutes at issue here are the same as discussed in Flamingo—NRS 463.0177 and NRS 463.0189. In Flamingo, we determined that the distinction between these statutes does not violate equal protection under the rational basis test. 125 Nev. at 522, 217 P.3d at 560. Because Bilbo's has given us no reason to second-guess Flamingo, we reiterate that the NCIAA does not run afoul of the constitutional right to equal protection.

[5]In this appeal, the American Cancer Society filed an amicus brief supporting the Health District's position.

The Nevada Clean Indoor Air Act

The NCIAA, codified in NRS 202.2483, was enacted by initiative in 2006 with the intention of protecting families and children from the harmful effects of secondhand smoke. NRS 202.2483 (Reviser's note). The NCIAA generally prohibits smoking tobacco within indoor places of employment, such as restaurants. It also specifically requires the removal of smoking-related materials from these indoor places of employment: under NRS 202.2483(6), "[a]ll ashtrays and other smoking paraphernalia shall be removed from any area where smoking is prohibited." A person who violates NRS 202.2483 is liable for a civil penalty. NRS 202.2483(7); NRS 202.2492. Primary enforcement responsibility under the NCIAA rests with health authorities, including the Health District, within their respective jurisdictions. NRS 202.2483(7).

The term "smoking paraphernalia" as applied to Bilbo's is not unconstitutionally vague

We first discuss Bilbo's as-applied constitutional vagueness challenge. Bilbo's argues that the NCIAA is unconstitutional as applied to it because the ambiguous term "smoking paraphernalia" is so vague that Bilbo's was unable to ascertain that it meant the removal of its matchbooks, cups, and shot glasses.

A statute is presumed constitutional; the challenger bears the burden of showing that the statute is unconstitutional. Flamingo Paradise Gaming v. Att'y General, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009). When reviewing the constitutionality of a statute, we conduct a de novo review. Id. An act is unconstitutionally vague "(1) if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" State v. Castaneda, 126 Nev. ___, ___, 245

P.3d 550, 553 (2010) (quoting Holder v. Humanitarian Law Project, 561 U.S. ___, ___, 130 S. Ct. 2705, 2718 (2010)); see also Flamingo, 125 Nev. at 510, 217 P.3d at 551-52. In determining whether the statute is unconstitutionally vague in an as-applied challenge, the court must apply these tests in light of the specific facts of the case at issue. See Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 289 (1921) ("A statute may be invalid as applied to one state of facts and yet valid as applied to another.").

Here, the district court determined that the use of "other smoking paraphernalia" in NRS 202.2483(6) is not unconstitutionally vague because a person of common intelligence would know that the term included matchbooks and the use of other items as replacement ashtrays under the circumstances presented by this case. We agree with the district court that Bilbo's as-applied vagueness challenge to the term "smoking paraphernalia" fails.[6]

As noted, NRS 202.2483(6) states that "[a]ll ashtrays and other smoking paraphernalia shall be removed from any area where smoking is prohibited." While the term "smoking paraphernalia" is not

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[6]We emphasize that our determination in this case is based on the circumstances in this as-applied challenge. We note that the conclusion regarding matches and matchbooks might be different if we were presented with an establishment that was actively prohibiting smoking and was nonsmoking compliant. Courts have the discretion to apply the term "other smoking paraphernalia" flexibly to the differing circumstances inherent in each case. See Air France v. Saks, 470 U.S. 392, 405 (1985) (flexibly applying a definition after assessing the circumstances of the case). Under different circumstances, the handing out of matchbooks for souvenir and collecting purposes may not have fallen within the boundaries of "smoking paraphernalia." See Dahnke-Walker Co., 257 U.S. at 289.

defined by the NCIAA, the failure to define every term in a statute does not necessarily make the statute unconstitutionally vague; the undefined terms can be given their ordinary meaning. See Woofter v. O'Donnell, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975). An ashtray is generally defined as "a receptacle for tobacco ashes and for cigar and cigarette butts." Merriam-Webster's Collegiate Dictionary 72 (11th ed. 2007). The word "paraphernalia" is defined, in relevant part, as "personal belongings," "articles of equipment," and "accessory items." Id. at 899. We conclude that these terms, as applied to the items that Bilbo's was actively using to facilitate smoking, are not unconstitutionally vague. We conclude that, under the circumstances presented by this case, it is reasonable to read the phrase "smoking paraphernalia" within the NCIAA as including items such as matches, and ceramic cups and shot glasses used as ash receptacles. See Flamingo, 125 Nev. at 509, 217 P.3d at 551 ("words of [a] statute should be construed in light of the policy and spirit of law, and the interpretation made should avoid absurd results" (quotation omitted)). Matches and ash receptacles indisputably constitute "smoking paraphernalia" under the NCIAA when handed out for smoking purposes.

The NCIAA satisfies both tests for unconstitutional vagueness in this as-applied challenge. See id. at 510, 217 P.3d at 551-52. First, the NCIAA's use of the term "smoking paraphernalia" provides sufficient notice to "enable persons of ordinary intelligence to understand what conduct is prohibited." Id. at 510, 217 P.3d at 552 (quotation omitted). A person of ordinary intelligence would know that the term "smoking paraphernalia" included matches and the distribution of other items—ceramic cups, shot glasses, or Styrofoam cups—to be used as ashtrays when used by a noncompliant business to actively facilitate smoking. Bilbo's unwaveringly thwarted the NCIAA's anti-smoking provisions in its

establishment—it handed out shot glasses and mugs to be used as ash receptacles; handed out matchbooks to smoking patrons; and its owner smoked cigars inside the premises, setting a precedent that smoking was permitted. Because of this active encouragement of smoking inside Bilbo's, it is reasonable to read "other smoking paraphernalia" to include items that, although arguably may have purposes other than to facilitate smoking, were ultimately used to assist patrons to smoke indoors illegally. We conclude that use of the term "smoking paraphernalia" provided sufficient notice to Bilbo's.

Second, when viewed in light of the facts of this case, the NCIAA's use of the term "smoking paraphernalia" does not lack specific standards that result in the encouragement, authorization, or failure to prevent arbitrary and discriminatory enforcement. Id. The statute was applied by the Health Department and the district court in a limited manner to address Bilbo's refusal to comply with the statute's no-smoking requirements. There is nothing arbitrary about requiring Bilbo's to remove ashtrays and matchbooks and cease using other items as replacement ashtrays pursuant to the statute's requirement to remove ashtrays and other smoking paraphernalia when it is clear that these items were being used to facilitate smoking in a statutorily designated nonsmoking area.[7] Accordingly, the term "smoking paraphernalia" is not unconstitutionally vague as applied to Bilbo's.[8]

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[7]Bilbo's also takes issue with the district court's use of the term "other items" in its order, where it concluded that the NCIAA "is not unconstitutionally vague as applied to the distribution of other items, such as ceramic cups, shot glasses, or Styrofoam cups to be used as ashtrays." (Emphasis added). Bilbo's argues that this ambiguous language could mean almost everything in Bilbo's establishment. We conclude that, just

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The NCIAA is constitutional as applied to Bilbo's right to commercial free speech

We next discuss Bilbo's second as-applied challenge, that the NCIAA and the district court's injunction are unconstitutional because they violate its commercial free speech right to advertise its business locations and phone numbers on its ashtrays and matchbooks. We

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as with the language of the NCIAA, the order is not unconstitutionally vague with respect to Bilbo's as-applied challenge. See Evans v. Evans, 76 Cal. Rptr. 3d 859, 867 (Ct. App. 2008) ("An injunction is unconstitutionally vague if it does not clearly define the persons protected and the conduct prohibited.").

[8]Bilbo's also argues that the Health District has failed to enforce the NCIAA except against Bilbo's in an arbitrary and discriminatory fashion that violates Bilbo's constitutional rights. We agree with the district court that Bilbo's flagrant refusal to comply with the NCIAA or work with the Health District directly resulted in the Health District's decision to seek injunctive relief pursuant to the broad delegation of authority afforded to it by the people of this state. See NRS 202.2483. Bilbo's contention that it was singled out is undermined by the fact that the Health District sent identical violation letters and filed similar lawsuits against other businesses. The difference is that Bilbo's chose to continue its violations of the NCIAA while other businesses complied with the law. Moreover, while the Health District decided to halt further enforcement pending our decision in this matter, this decision was reasonable and permissible, as there was no indication of malicious or discriminatory intent or that the Health District does not intend to follow up this decision with general enforcement. See Snowden v. Hughes, 321 U.S. 1, 8 (1944) (stating that "a discriminatory purpose is not presumed"); Cook v. City of Price, Carbon Cty., Utah, 566 F.2d 699, 701 (10th Cir. 1977) ("Selective enforcement without malicious intent may be justified when a test case is needed to clarify a doubtful law, or when officials seek to prosecute a particularly egregious violation and thereby deter other violators." (internal citation omitted)).

disagree and conclude that the district court correctly found that there were no free speech violations.

The First Amendment, which applies to the states through the Fourteenth Amendment, generally prohibits Congress from imposing burdens on "freedom of speech." U.S. Const. amend. I; Deutsch v. Jordan, 618 F.3d 1093, 1096 (10th Cir. 2010). Generally, "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). The Supreme Court has "recognized 'the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'" Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 562 (1980) (quoting Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-56 (1978)). While commercial speech is also protected from "unwarranted governmental regulation," the Court has recognized that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." Id. at 561-63.

In resolving these issues, we must first determine the proper test under which to analyze this claim. The threshold issue is whether the restriction is content-neutral, or is content-based in that it regulates certain speech as opposed to all speech. Naser Jewelers, Inc. v. City of Concord, N.H., 513 F.3d 27, 32 (1st Cir. 2008); see Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642 (1994). While the district court here used the Central Hudson test developed by the Supreme Court for cases involving restraints on commercial speech, we conclude that this test was inappropriately applied because the limitations under the NCIAA and

the district court's order are content-neutral time, place, and manner regulations.

A provision is content-neutral if it does not regulate speech but instead only regulates the places where speech may occur, if it was adopted without reference to a specific message or viewpoint, or if it serves to advance the government's interests unrelated to expressive conduct. Hill v. Colorado, 530 U.S. 703, 719-20 (2000). The "'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" Turner Broadcasting, 512 U.S. at 642 (alterations in original) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward, 491 U.S. at 791 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986)).

The NCIAA's provision requiring the removal of ashtrays and other smoking paraphernalia is not triggered by any commercial content, but rather by the utilitarian nature of the objects themselves to facilitate smoking. The ban on ashtrays and other smoking paraphernalia applies regardless of whether those items are being used for advertising and is based on their functional use for smoking purposes. Accordingly, the provision is a content-neutral time, place, and manner restriction on speech, not a regulation of commercial speech. See General Auto Service Station v. City of Chicago, 526 F.3d 991, 1007-08 (7th Cir. 2008) (concluding that because the provision at issue applied to all manner of signs, regardless of whether they were for advertising, it was content-neutral); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1269 n.15 (11th Cir. 2005) ("Because the sign code does not regulate commercial

speech as such, but rather applies without distinction to signs bearing commercial and noncommercial messages, the Central Hudson test has no application here.").

This same reasoning applies to the district court's order granting the injunction that prohibits Bilbo's from placing ashtrays and matchbooks within their nonsmoking restaurant, gaming, and bar area. While ashtrays and matchbooks can be used to disseminate information for commercial purposes, this is not always the case and is not the focus of the order granting the injunction. These objects were actively being used to facilitate smoking in a nonsmoking area, and the district court specifically tailored the order to halt this noncompliance issue. "Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'" Ward, 491 U.S. at 791 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (emphasis added)). Accordingly, the time, place, and manner analysis governs the case at hand, not the Central Hudson test for commercial speech.

In this instance, Bilbo's challenges both the NCIAA's provision banning ashtrays in smoking areas and the injunction's order to remove matchbooks. These are reviewed separately under slightly different tests as a means to afford extra protection to the challenger of an injunction because of its greater risk of discriminatory application.

The NCIAA's prohibition against ashtrays and other smoking paraphernalia

The United States Supreme Court has held that government may impose reasonable restrictions on the time, place, or manner of engaging in protected speech. Ward, 491 U.S. at 791. A content-neutral law is permissible "provided that [the restrictions] are justified without reference to the content of the regulated speech, that they are narrowly

tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 293; see also Thomas v. Chicago Park Dist., 534 U.S. 316, 323 n.3 (2002).

The NCIAA meets these requirements. First, as indicated above, the requirement for the removal of ashtrays is not based upon the content of the advertising message on the ashtrays, rather, it regulates the location of the ashtrays pursuant to a smoking ban.

Second, there is no dispute that there is a significant governmental interest in the public health and safety of the people in this state. Moreover, the NCIAA is "narrowly tailored to serve the government's legitimate, content-neutral interests" in protecting the health of the public, as it requires the removal only of smoking-specific items in nonsmoking areas. Ward, 491 U.S. at 798. As "the means chosen are not substantially broader than necessary to achieve the government's interest," we conclude that the NCIAA satisfies the narrow tailoring requirement. Id. at 800.

Finally, the NCIAA provides abundant alternative means of communication because it only applies to ashtrays and other smoking paraphernalia. Ample channels of communication are left open, as Bilbo's still has numerous advertising methods at its disposal, such as shirts, hats, napkins, swizzle sticks, coasters, and glasses, to name a few. Thus, we conclude that the NCIAA, as a content-neutral law, permissibly imposes reasonable restrictions on the engagement of protected speech.

The district court's order prohibiting matchbooks

In Madsen v. Women's Health Center, Inc., the United States Supreme Court articulated the appropriate test to be used when analyzing content-neutral injunctions. 512 U.S. 753, 765 (1994). In deviating from

the test used for content-neutral, generally applicable statutes, the Madsen Court appreciated the differences between an injunction and a generally applicable ordinance. Id. at 764. "Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances." Id. (internal citation omitted). The Madsen Court then recognized that "[i]njunctions, of course, have some advantages over generally applicable statutes in that they can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred." Id. at 765 (citing United States v. Paradise, 480 U.S. 149 (1987)). The Madsen Court determined that those differences required a "somewhat more stringent application of general First Amendment principles" and held that the appropriate test for content-neutral injunctions was "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." Id.

Under this slightly modified test, we conclude that the injunction's requirement that Bilbo's remove all ashtrays and matchbooks from nonsmoking areas is narrowly tailored such that it burdens as little speech as necessary while still serving the significant government interest in protecting the public from secondhand smoke, a legitimate health concern. The State's interest in the health and safety of its citizens is undoubtedly significant. The injunction only bars Bilbo's from engaging in conduct that directly promotes smoking in a nonsmoking area—an act

that is itself illegal. See NRS 475.050 (making it illegal for a person to smoke in any building that has posted no-smoking signs).[9] While other circumstances may have required narrower tailoring, such as only prohibiting ashtrays and not matchbooks, the scope of the injunction was necessitated by Bilbo's repeated flagrant violations of the NCIAA, its active promotion of smoking inside, and its declarations that it would not comply with the smoking prohibition. In this instance, the district court was justified in prohibiting items that were used to support smoking, as these restrictions were necessary to protect public health. Accordingly, we conclude that Bilbo's free speech argument fails.[10]

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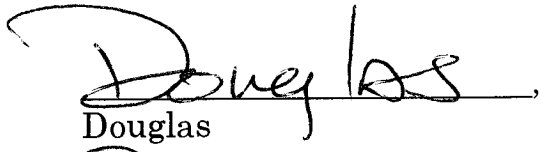
[9]Bilbo's displays no-smoking signs inside its establishment.

[10]To the extent that Bilbo's argues that the alleged due process violation for vagueness in the NCIAA's use of the term "smoking paraphernalia" infringed upon its constitutional rights to commercial free speech, we conclude that that argument also lacks merit.

Based on the foregoing, we affirm the district court's order that determined that the NCIAA was constitutional as applied to Bilbo's and its issuance of a permanent injunction against Bilbo's.[11]

It is so ORDERED.

_____, C.J.
Saitta



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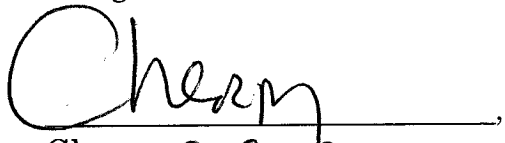
Douglas



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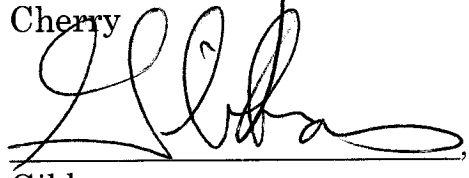

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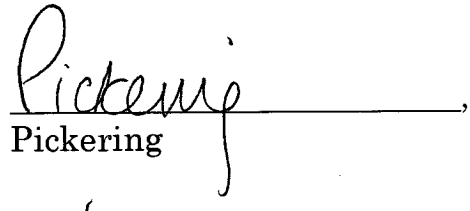

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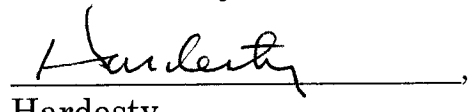

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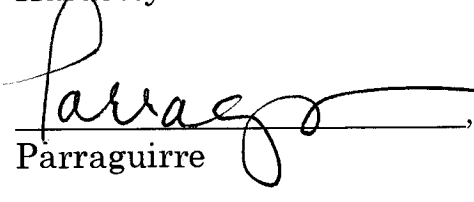

_____, J.
Parraguirre

[11]We further conclude that all other arguments raised on appeal lack merit.

cc: Hon. Valerie Adair, District Judge
Catherine Cortez Masto, Attorney General
Peccole & Peccole
Marquis Aurbach Coffing
Lemons, Grundy & Eisenberg
Eighth District Court Clerk