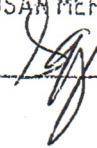


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SUSAN MERRYWETHER
CLERK

BY  DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

NEVADA SOCIETY OF ENROLLED
AGENTS, a Nevada nonprofit cooperative
association; A.J. DECARIA, an individual;
and CARRIE CORCORAN, an individual,

Plaintiffs,

vs.

STATE OF NEVADA, ex. rel. the
SECRETARY OF STATE of the STATE OF
NEVADA, and DOES 1-10, inclusive,

Defendants.

Case No. 17OC 00224 1B

Dept. No. II

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER GRANTING
PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

On November 2, 2017, a Temporary Restraining Order was entered by this Court pursuant to a stipulation of the parties. The order provides that Defendants are enjoined from taking any action to enforce Chapter 240A of the Nevada Revised Statutes against any person who is an approved Enrolled Agent under Treasury Department Circular No. 230, (Rev. 6-2014) entitled *Regulations Governing Practice before the Internal Revenue Service* ("Circular 230"). The parties further stipulated that they would each file dispositive motions on the merits of the action and the propriety of injunctive relief.

1 Pursuant to said stipulation, Plaintiffs filed their Motion for Summary Judgment on January
2 29, 2018. Plaintiffs' motion was supported by the affidavit of Janet Vick, President of the Nevada
3 Society of Enrolled Agents, and A.J. Decaria and Carrie Corcoran, both of whom are Enrolled Agents
4 practicing as such in Washoe County. The Defendants filed an Opposition to Plaintiffs' motion and a
5 Counter-Motion for Summary Judgment on or about March 13, 2018. The Plaintiffs filed a Reply to
6 Defendants' Opposition to Motion for Summary Judgment and Opposition to Counter-Motion for
7 Summary Judgment on April 9, 2018 and the Defendants filed a Reply in Support of their Counter-
8 Motion for Summary Judgment on or about April 23, 2018. The Court heard oral arguments on the
9 competing motions on July 6, 2018. Plaintiff's submitted a proposed Findings of Fact and
10 Conclusions of Law and, as permitted by the Court, defendants submitted proposed changes. The
11 Court declined to make the changes proposed by defendants.

12 Having considered the competing motions, the affidavits, the parties' opposition and reply
13 briefs, and all of the papers and pleadings on file herein, the Court now renders its Findings of Facts,
14 Conclusions of Law and Judgment as follows.

15 FINDINGS OF FACT

16 1. This is an action for declaratory relief pursuant to Nevada's Uniform Declaratory
17 Judgments Act, NRS 30.010, *et. seq.* Plaintiffs seek a declaration of their rights, status or other legal
18 relations arising under various provisions of Chapter 240A of the Nevada Revised Statutes, as
19 amended by Assembly Bill No. 324 (hereinafter "AB 324") generally described as "An Act relating to
20 document preparation services; revising the definition of a 'document preparation service';
21 prohibiting a person providing a document preparation service from advertising or representing
22 himself or herself as a paralegal or legal assistant; requiring certain fees to register or renew
23 registration as a document preparation service; revising the period of time in which an application for
24 registration as a document preparation service must be completed; and providing other matters
25 properly related thereto." AB 324 was enacted into law during the 79th Session of the Nevada
26 Legislature (2017). The new law became effective on July 1, 2017.

1 2. In 2013 the Nevada Legislature enacted and the Governor signed into law Chapter
2 240A of the Nevada Revised Statutes entitled "Document Preparation Services." The law defined
3 "document preparation service" as a person who, for compensation and at the direction of a client,
4 provides assistance to the client in a legal matter including, without limitation (1) preparing or
5 completing any pleading, application or other document for the client; (2) translating an answer to a
6 question posed in such a document; (3) securing any supporting document, such as a birth certificate,
7 required in connection with the legal matter; or (4) submitting a completed document on behalf of the
8 client to a court or administrative agency. At that time the law specifically excluded attorneys, law
9 students, governmental employees acting in the course and scope of their employment, legal aid or
10 lawyer referral services and "a person licensed by or registered with an agency or entity of the United
11 States Government acting within the scope of his or her license or registration, including, without
12 limitation, an accredited immigration representative and an **enrolled agent** authorized to practice
13 before the Internal Revenue Service, ..." (emphasis added).

14 3. Chapter 240A requires persons who wish to engage in the business of a document
15 preparation service to be registered by the Nevada Secretary of State. The registration is valid for one
16 year after the date of issuance of the certificate of registration unless the registration is suspended or
17 revoked. The law prohibits registration of persons who have been disbarred from the practice of law
18 in any jurisdiction, whose registration as a document preparation service in Nevada or another state
19 has previously been revoked for cause, who has previously been convicted of or entered a plea of
20 guilty, guilty but mentally ill, or nolo contendere to a gross misdemeanor or been convicted of certain
21 other enumerated crimes during the immediately preceding 10 years. An application for registration
22 as a document preparation service must be made under penalty of perjury and the Secretary of State's
23 office is authorized to investigate the background and history of the applicant, including fingerprints.

24 4. Chapter 240A requires a registrant to file with the Secretary a cash bond or surety bond
25 in the penal sum of \$50,000 which is approved as to form by the attorney general. The law also
26 regulates the payment of child support payments by registrants, advertisements for services of
27 registrants, display of business registrations and licenses and certain other enumerated requirements.
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1 5. NRS 240A.240 prohibits certain acts by a document preparation service registrant
2 including, without limitation (1) negotiating with another person concerning the rights or
3 responsibilities of a client, communicating the position of a client to another person or conveying the
4 position of another person to a client, (2) appearing on behalf of a client in a court proceeding or other
5 formal adjudicative proceeding, (3) providing any advice, explanation, opinion or recommendation to
6 a client about possible legal rights, remedies, defenses or options, or (4) selecting documents or
7 strategies to assist a client. The Secretary is empowered to perform investigations and Chapter 240A
8 of the Nevada Revised Statutes provides certain civil and criminal penalties for violation of the law
9 including, but not limited to: (1) a civil penalty of not less than \$100 or more than \$5000; (2) a
10 misdemeanor, if the violation was a first offense within the immediately preceding 5 years; (3) a gross
11 misdemeanor, if the violation is a second or subsequent offense within the immediately preceding 5
12 years, punishable by imprisonment in the county jail for not more than one year, or by a fine of not
13 more than \$10,000, or by both fine and imprisonment; (4) court ordered restitution to any person
14 suffering a pecuniary loss as a result of the violation; (5) private action for the recovery of the sum of
15 \$500 or twice the amount of the pecuniary loss sustained; and (6) denial, suspension or revocation of
16 the person's registration and right to engage in the business.

17 6. During the 2017 Nevada Legislative Session, AB 324 was introduced which amends
18 Chapter 240A of the Nevada Revised Statutes in several important respects. Among other things, the
19 amendment expands the definition of "document preparation service" to include (a) a person who, for
20 compensation, assists a client in preparing all or substantially all of a federal or state tax return or a
21 claim for a tax refund, (b) certain paralegals and (c) **enrolled agents** who are authorized to practice
22 before the Internal Revenue Service. The bill also requires all persons who register as a document
23 preparation service to pay a non-refundable application fee of \$50 and an annual renewal fee of \$25.
24 AB 324 was passed by both houses of the Nevada Legislature and signed into law by the Governor.
25 By its terms the amendment went into effect on July 1, 2017.

26 7. According to Circular 230, an "Enrolled Agent" is a person who has earned the
27 privilege of representing taxpayers before the Internal Revenue Service by either passing a three part
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1 comprehensive IRS test covering individual or business tax returns, or through experience as a former
2 IRS employee. Individuals who obtain this status must adhere to ethical standards and complete 72
3 hours of continuing education courses every three years. Enrolled Agents, like attorneys and certified
4 public accountants, have unlimited practice rights, meaning they are unrestricted as to which
5 taxpayers they can represent, what types of tax matters they can handle and which IRS offices they
6 can represent clients before.

7 8. Enrolled Agents and other professionals who practice before the IRS must comply
8 with the provisions of Circular 230. These regulations are codified as part of Title 31 of the Code of
9 Federal Regulations, Subtitle A, Part 10, published June 12, 2014. Pursuant to 31 CFR § 10.2(4),
10 "practice before the Internal Revenue Service" is defined as:

11 [A]ll matters connected with the presentation to the Internal Revenue Service or
12 any of its officers or employees relating to taxpayer's rights, privileges, or
13 liabilities under laws or regulations administered by the Internal Revenue
14 Service. **Such presentations include, but are not limited to, preparing**
15 **documents; filing documents; corresponding and communicating with the**
16 **Internal Revenue Service; rendering written advice with respect to any**
17 **entity, transaction, plan or arrangement, or other plan or arrangement**
18 **having a potential for tax avoidance or evasion; and representing a client at**
19 **conferences, hearings, and meetings. [Emphasis added].**

20 9. The Court finds that, as a result of the amendments made to Chapter 240A by AB 324,
21 Nevada Enrolled Agents cannot comply with both federal law and state law. Under federal
22 regulations, Nevada Enrolled Agents must provide competent tax advice, must assist clients in
23 preparing accurate tax returns and other forms, must collect documentation which supports a client's
24 position and must competently and diligently represent taxpayer clients in proceedings before the
25 IRS. Under Chapter 240A as amended, Enrolled Agents in Nevada are prohibited from performing
26 these duties and face civil and criminal liability for violations of the state law.

27 10. Plaintiffs contend that Chapter 240A of the Nevada Revised Statutes, as amended by
28 AB 324, is unconstitutional as applied to Enrolled Agents and must therefore be declared invalid.
Specifically, Plaintiffs claim the amended law (1) is unconstitutional pursuant to the Supremacy
Clause of the United States Constitution (Article VI, Clause 2) in that the state law is in direct conflict

1 with federal law; (2) is unconstitutional pursuant to the Supremacy Clause of the United States
2 Constitution (Article VI, Clause 2) in that federal law has preempted the field of regulating Enrolled
3 Agents who practice before the Internal Revenue Service; (3) is unconstitutional pursuant to the
4 Commerce Clause of the United States Constitution (Article I, Section 8, Clause 2) in that the state
5 law interferes with interstate commerce and the state lacks a sufficient basis for applying the law to
6 Enrolled Agents in Nevada; (4) is unconstitutional pursuant to the Due Process Clause contained
7 within the Fifth Amendment to the United States Constitution and the Due Process Clause of the
8 Nevada Constitution, Article I, Section 8, Subsection 5, in that the state law amendments
9 unreasonably restrict or eliminate Plaintiffs' right to practice their professions, and that the State of
10 Nevada lacks a sufficient basis for the restrictions. Plaintiffs seek a permanent injunction prohibiting
11 Defendants, and each of them, from enforcing Chapter 240A, as amended by AB 324, against
12 Enrolled Agents in Nevada.

13 CONCLUSIONS OF LAW

14 1. Summary judgment is appropriate and "shall be rendered forthwith" when the
15 pleadings and other evidence on file demonstrate that no genuine issue as to any material fact remains
16 and that the moving party is entitled to a judgment as a matter of law. *NRCP 56(c); Tucker v. Action*
17 *Equipment & Scaffold Co.*, 113 Nev. 1349, 1353 (1997); *Wood v. Safeway, Inc.*, 121 Nev. 724, 121
18 P.3d 1026 (2005), citing, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty*
19 *Lobby, Inc.*, 477 U.S. 242 (1986).

20 2. The determination of whether a statute is facially constitutional is a question of law.
21 *Flamingo Paradise Gaming, LLC v. Attorney General*, 125 Nev. 502, 509, 217 P.3d 546 (2009).
22 Statutes are presumed to be constitutional and the challenger has the burden of showing that a statute
23 is unconstitutional. *Id.* The court must interpret a statute in a reasonable manner and construe the
24 words of the statute in light of the policy and spirit of the law and in such a way as to avoid absurd
25 results. *Desert Valley Water Co. v. State, Engineer*, 104 Nev. 718, 720, 766 P.2d 886, 886-87 (1988).
26 The court must resolve any doubt as to legislative intent in favor of what is reasonable, and against
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1 what is unreasonable. *Cragun v. Nevada Pub. Employees' Ret. Bd.*, 92 Nev. 202, 547 P.2d 1356
2 (1976).

3 3. Injunctive relief is normally available upon the showing that the moving party enjoys a
4 reasonable probability of success on the merits and that the opposing party's conduct, if allowed to
5 continue, will result in irreparable harm for which monetary damages are an inadequate remedy. *NRS*
6 *33.010*; *Number One Rent-A-Car v. Ramada Inns, Inc.*, 94 Nev. 779, 780, 587 P.2d 1329 (1978),
7 *Hamm v. Arrowcreek Homeowners' Assoc.*, 124 Nev. 290, 297, 183 P.3d 895 (2008).

8 4. Article VI of the United States Constitution makes the Constitution and all federal law
9 the "supreme law of the land." Where Congress intends, expressly or implicitly, to occupy a field of
10 law, federal law will preempt state regulation of that field. *Cipollone v. Liggett Grp, Inc.*, 505 U.S.
11 504, 516 (1992). "State law is pre-empted if that law actually conflicts with federal law or if federal
12 law so thoroughly occupies a legislative field as to make reasonable inference that Congress left no
13 room for the States to supplement it." *Id.* (citations omitted). The Supreme Court has found implied
14 conflict pre-emption where it is impossible for a private party to comply with both state and federal
15 requirements or where state law "stands as an obstacle to the accomplishment and execution of the
16 full purpose and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

17 5. It is well settled that "'the law of the state, though enacted in the exercise of powers
18 not controverted, must yield' when incompatible with federal legislation." *Sperry v. State of Florida,*
19 *ex. rel. Florida Bar*, 373 U.S. 379, 384 (1963) (quoting, *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1
20 (1824)). To determine whether there is a direct conflict between state law or regulation and federal
21 law, the Supreme Court will read the two laws as if they were enacted by the same legislature and the
22 federal law was enacted later than the state law. If "the state law does not function consistently and
23 harmoniously with the overriding federal scheme, then it is replaced by the federal statute." *Gonzalez*
24 *v. Arizona*, 624 F3d 1162, 1181 (9th Cir. 2010).

25 6. In *Sperry*, the United States Supreme Court considered whether the state of Florida
26 could prohibit a person who was federally licensed to practice before the Patent Office from
27 practicing patent law in Florida without first being licensed by the state bar as an attorney. Under
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1 federal law, Sperry could be and was licensed to practice before the Patent Office without being
2 licensed as an attorney. Under Florida law, however, Sperry could not lawfully practice before the
3 Patent Office without first being licensed as a Florida attorney. The Supreme Court held that a state
4 “may not enforce licensing requirements which, though valid in the absence of federal regulation,
5 give the State’s licensing board a virtual power of review over the federal determination that a person
6 or agency is qualified and entitled to perform certain functions.” *Sperry*, 373 U.S. at 384. Neither can
7 a state “impose upon the performance of an activity sanctioned by federal license additional
8 conditions not contemplated by Congress.” *Id.* The Court held that “no State law can hinder or
9 obstruct the free use of a license granted under an act of Congress.” *Id.* (quoting *Pennsylvania v.*
10 *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How) 518, 566 (1852)).

11 7. In *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), the Ninth Circuit
12 held that the Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-263, preempted a county zoning
13 ordinance that prohibited oil exploration and extraction activities on federal land unless a county
14 permit was first obtained. *Id.* at 1084. The court determined that there was an actual conflict between
15 local and federal law because “the Ventura authorities wish[ed] to regulate conduct which Congress
16 has authorized.” *Id.* The court reasoned that the Departments of Interior and Agriculture had already
17 issued federal permits, and thus “Ventura cannot prohibit that use, either temporarily or permanently,
18 in an attempt to substitute its judgment for that of Congress.” *Id.*

19 8. This Court finds that Chapter 240A, as amended by A.B. 324 hinders and obstructs the
20 free use of the Enrolled Agents’ license to practice before the IRS. *See Sperry*, 373 U.S. at 384;
21 *Ventura County*, 601 F.2d 1080. Pursuant to NRS 240A.240(5), Enrolled Agents are no longer able
22 to “negotiate with another person concerning the rights or responsibilities of a client, communicate
23 the position of a client to another person or convey the position of another person to a client.” This
24 contradicts Section 10.2(4) of Circular 230, which allows agents to “correspond[] and communicat[e]
25 with the Internal Revenue Service” and engage in “matters connected with a presentation to the
26 Internal Revenue Service or any of its officers or employees relating to a taxpayer’s rights, privileges,
27 or liabilities.” The amended law also prohibits an Enrolled Agent from “appear[ing] on behalf of a
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1 client in a court proceeding or other formal adjudicative proceeding” *NRS 240A.240(6)*. This
2 provision conflicts with Section 10.2 of Circular 230, which allows agents to “represent[] a client at
3 conferences, hearings, and meetings.” The amended law prohibits Enrolled Agents from providing
4 “advice, explanation, opinion or recommendation to a client about possible legal rights, remedies,
5 defenses, options or the selection of documents or strategies” *NRS 240A.240(7)*. This
6 contradicts Circular 230, which states that Enrolled Agents may give written advice regarding tax
7 matters. *31 C.F.R. §§ 10.2, 10.33, 10.37*. Finally, the amended statute contradicts Circular 230
8 because it requires an Enrolled Agent to provide a copy of a client’s file to government entities. *NRS*
9 *240A.220(1)*. Yet, pursuant to IRC §§ 7525, 7216, 6713, Enrolled Agents must keep client
10 information confidential and only share client files when ordered to do so by a court.

11 9. Defendants rely on *Loving v. Internal Revenue Service*, 724 F.3d 1013 (D.C. Cir.,
12 2014), and *Ridgely v. Lew*, 55 F. Supp. 3d 89 (D.D.C. 2014) to argue that tax return preparers
13 (including persons who prepare refund claims) are beyond the statutory authority of the IRS to
14 regulate. Defendants reason that the act of preparing a tax return or claim for refund is thus properly
15 regulated by the State even when such services are performed by Enrolled Agents. The Court finds
16 these cases inapposite. The *Loving* case concerned a challenge by a paid tax preparer, not an Enrolled
17 Agent, attorney or C.P.A., each of whom “represent” taxpayers and “practice” before the IRS.
18 Similarly, the *Ridgely* case followed the holding of *Loving*, applying it to persons assisting taxpayers
19 in the preparation and filing of refund claims. In each of these cases the courts held that the Plaintiffs
20 were not subject to IRS regulation because they were not “representing” taxpayers and “practicing”
21 before the IRS. Here, this Court finds that Enrolled Agents do in fact represent taxpayers and practice
22 before the IRS and are thus subject to federal regulations.

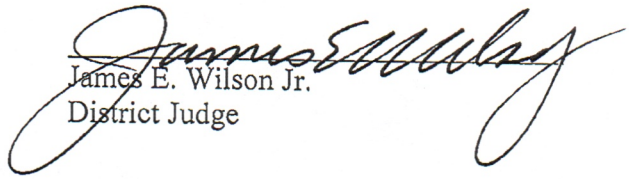
23 10. Accordingly, the Court finds that Chapter 240A of the Nevada Revised Statutes, as
24 amended by A.B. 324, conflicts with federal law to the extent it seeks to regulate Enrolled Agents
25 who are authorized to practice before the Internal Revenue Service. The law is therefore
26 unconstitutional pursuant to the Supremacy Clause of the United States Constitution, Article VI,
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1 Clause 2. Because of this finding, it is unnecessary to consider Plaintiffs' remaining constitutional
2 arguments.

3 **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Plaintiffs' Motion
4 for Summary Judgment is hereby granted. Defendants' Cross-Motion for Summary Judgment is
5 denied.

6 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the State of Nevada, its
7 officers, including the Secretary of State, agents, servants, employees and attorneys, and those
8 persons in active concert or participation with Defendants who receive actual notice of this order by
9 personal service or otherwise, are permanently enjoined from taking any action to enforce NRS 240A
10 against any person or entity that is an approved Enrolled Agent under Circular 230.

11 August 15, 2018.

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15 James E. Wilson Jr.
16 District Judge
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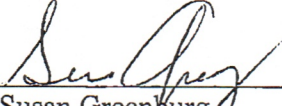
CERTIFICATE OF SERVICE

I certify that I am an employee of the First Judicial District Court of Nevada; that on August 16, 2018, I served a copy of this document by placing a true copy in an envelope addressed to:

Rick Oshinski, Esq.
504 E. Musser Street, Suite 302
Carson City, NV 89701

William J. McKean, Esq.
100 North Carson St.
Carson City, NV 89701-4717

the envelope sealed and then deposited in the Court's central mailing basket in the Court Clerk's Office for delivery to the United States Post Office at 1111 South Roop Street, Carson City, Nevada for mailing.


Susan Greenburg
Judicial Assistant