SUPREME COURT OF LOUISIANA

DOCKET NUMBER: 2021-OC-0552

CALCASIEU PARISH SCHOOL BOARD
SALES & USE DEPARTMENT, et al.

Plaintiffs-Petitioners

VERSUS

NELSON INDUSTRIAL STEAM COMPANY

Defendant-Respondent

A CIVIL PROCEEDING

AMICUS-CURIAE BRIEF ON THE MERITS SEEKING REVERSAL OF THE JUDGMENT
RENDERED ON APRIL 7, 2021

BY THE HONORABLE SYLVIA R. COOKS, CHIEF JUDGE
LOUISIANA THIRD CIRCUIT COURT OF APPEAL
(CASE NO. 2019-CA-0315)
REVERSING
THE FOURTEENTH JUDICIAL DISTRICT COURT
FOR THE PARISH OF CALCASIEU, DIVISION H
THE HONORABLE RONALD F. WARE, PRESIDING
(CASE NO. 2017-01373)

ORIGINAL AMICUS CURIAE BRIEF ON BEHALF OF
ST. CHARLES PARISH SCHOOL BOARD, AS EX-OFFICIO TAX COLLECTOR
FOR ST. CHARLES PARISH

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Dated: June 26, 2021

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MAY IT PLEASE THE COURT:

St. Charles Parish School Board, in its capacity as the ex-officio tax collector for the Parish of St. Charles ("St. Charles Parish"), hereby submits this amicus curiae brief on the merits in support of Calcasieu Parish School Board Sales & Use Department, *et al.* ("Calcasieu Parish"), and in opposition to Nelson Industrial Steam Company ("NISCO"), regarding the recent decision of the Louisiana Third Circuit Court of Appeal. St. Charles Parish requests that this Honorable Court reverse the judgment of the Third Circuit. St. Charles Parish, as the tax collector for the Parish, is an interested party to this litigation.

STATEMENT OF THE CASE

The current language of the further-processing exclusion from Louisiana sales and use tax is set forth in Louisiana Revised Statute 47:301(10)(c)(i)(aa). Enacted in 2016, the statute sets forth a three-pronged test for determining whether the exclusion applies to particular purchases of tangible personal property. 2016 La. Sess. Law Serv. 2nd Ex. Sess. Act 3 (H.B. 27) ("Act 3"). Prior to Act 3, the statutory language of the further processing exclusion stated as follows: "The term 'sale at retail' does not include sale of materials for further processing into articles of tangible personal property for sale at retail." Louisiana courts have spent 40 years interpreting the legislative intent behind that prior statutory language of the exclusion.[1]

The Louisiana legislature enacted Act 3 for the expressly stated purpose "to clarify and be interpretative of the original intent and application of R.S. 47:301(10)(c)(i)(aa)." The language of further processing exclusion under Act 3 clarifies the previous language as follows:

> (c)(i)(aa) The term "sale at retail" does not include sale of materials for further processing into articles of tangible personal property for sale at retail when all of the criteria in Subsubitem (I) of this Subitem are met.
>
>> (I)(aaa) The raw materials become a recognizable and identifiable component of the end product.
>>
>> (bbb) The raw materials are beneficial to the end product.
>>
>> (ccc) The raw materials are material for further processing, and as such, are purchased for the purpose of inclusion into the end product.. . . .
>>
>> (III)(aaa) If the materials are further processed into a byproduct for sale, such purchases of materials shall not be deemed to be sales for further processing and shall be taxable. For purposes of this Subitem, the term "byproduct" shall mean any incidental product that is sold for a sales price less than the cost of the materials.

[1] *Bridges v. Nelson Indus. Steam Co.*, 2015-1439, pp. 5-6 (La. 5/3/16), 190 So.3d 276, 279-80 (herein referred to as "NISCO I").

> (bbb) In the event a byproduct is sold at retail in this state for which a sales and use tax has been paid by the seller on the cost of the materials, which materials are used partially or fully in the manufacturing of the byproduct, a credit against the tax paid by the seller shall be allowed in an amount equal to the sales tax collected and remitted by the seller on the taxable retail sale of the byproduct.

Based on Act 3, Calcasieu Parish assessed NISCO with sales tax on limestone purchased by NISCO and used both (i) in its electricity manufacturing process, and (ii) in its ash byproduct sold to third parties. Calcasieu Parish filed suit against NISCO to collect the tax. Seeking to avoid the tax, NISCO claims that Act 3 is unconstitutional because it was not passed by a two-thirds (2/3) supermajority vote of the Louisiana legislature.

Under Louisiana Constitution Article VII, § 2, "[t]he levy of a new tax, an increase in an existing tax, or a repeal of an existing tax exemption shall require the enactment of a law by two-thirds of the elected members of each house of the legislature." Thus, for Act 3 to be unconstitutional, it must have been enacted under the Louisiana legislature's power to tax, and then only if Act 3 is additionally considered (1) the levy of a new tax, (2) an increase in an existing tax, (3) or a repeal of an existing tax exemption.

The 14th Judicial District Court for the Parish of Calcasieu, State of Louisiana (the "Trial Court") ruled in favor of Calcasieu Parish on the issue, finding that Act 3 is not a levy of a new tax, is not an increase in an existing tax, and did not a repeal an existing tax exemption.[2] NISCO appealed the Trial Court's judgment to the Louisiana Third Circuit Court of Appeal. The Third Circuit reversed the Trial Court based on the Third Circuit's finding that an "incidental" byproduct under Act 3 only includes products that were unintentional or unplanned. *NISCO 3 Cir. 2020*, at 796. Under that interpretation, the Third Circuit concluded that Act 3 "does not impose a new tax or increase a tax but merely codifies the prior jurisprudence . . . ." *Id.* Thus, while reversing the Trial Court on grounds of the statutory definition, the Third Circuit found that Act 3 was constitutional.

Calcasieu Parish appealed the Third Circuit's interpretation of the term "incidental" to the Louisiana Supreme Court, and this Court found that the Third Circuit's interpretation of

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[2] *Calcasieu Par. Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, 2019-315, p. 3 (La. App. 3 Cir. 3/18/20), 297 So.3d 790, 792, *writ granted, cause remanded*, 2020-00724 (La. 10/20/20), 303 So.3d 292, *and writ not considered sub nom. Calcasieu Par. Sch. Bd. Sales & Tax Use Dep't v. Nelson Indus. Steam Co.*, 2020-00866 (La. 10/20/20), 303 So.3d 311, *on reconsideration*, 2020-00866 (La. 1/12/21), 308 So.3d 287. The two Louisiana Supreme Court *NISCO* decisions referenced herein have commonly been referred to as *NISCO I* and *NISCO II*, and will be defined as such herein. For ease of reference and avoidance of confusion, the Third Circuit's *NISCO* decisions will be defined by date. Thus, the Third Circuit decision referenced in the beginning of this footnote shall be referred to herein as "NISCO 3 Cir. 2020."

"incidental" was erroneous as being too narrow, and accordingly reversed and remanded the case back to the Third Circuit for consideration of the remaining issues on appeal.[3]

On remand, the Third Circuit then changed course on its 2020 holding that Act 3 was not a "new tax," and found that Act 3 is now unconstitutional as a "new tax."[4] The Third Circuit held that:

> The supreme court in its Per Curiam opinion in *NISCO II*, held that which was excluded from taxation before Act 3 amended La.R.S. 47:301(10)(c)(i)(aa) are now subject to taxation. Thus, Act 3 imposes a new tax.

NISCO 3 Cir. 2021, at *4. Determining that Act 3 was a "new tax," the Third Circuit found Louisiana Constitution Article VII, § 2 applicable. *Id.* at *3. Because it found that Act 3 was not passed in accordance with La. Constitution Article VII, § 2, the Third Circuit again reversed the Trial Court, this time holding that Act 3 is unconstitutional. *Id.* It is from this holding that Calcasieu Parish now seeks relief from this Court.

LAW & ARGUMENT

I. The Judicial Statutory Interpretation in Effect at the Time an Act is Passed Should Not Be a Deciding Factor Regarding Whether Such Act is Considered a "New Tax"

The Third Circuit's holding that Act 3 is a "new tax" is based on the premise that before Act 3, the ash produced by NISCO was not an incidental byproduct under the further processing exclusion, and after Act 3, the ash produced by NISCO is an incidental byproduct under the further processing exclusion. *NISCO 3 Cir. 2021*, at *6. The Third Circuit grounds these findings on its misinterpretation of this Court's prior *NISCO* decisions. *See id.* (reasoning that in *NISCO I*, the Louisiana Supreme Court found NISCO's production of ash to be a non-incidental byproduct, while Louisiana Supreme Court in *NISCO II* found NISCO's production of ash to be an "incidental" byproduct).

As this Court noted in its *NISCO I* decision reversing the Third Circuit, the Third Circuit gave "particular emphasis to the nature of the ash as an incidental by-product" and "was distracted by its characterization as a by-product." *NISCO I*, 190 So.3d at 278, 282.[5] Similarly,

[3] *Calcasieu Par. Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, 2020-00724, p. 4 (La. 10/20/20), 303 So.3d 292, 293 (herein referred to as "NISCO II").
[4] *Calcasieu Par. Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, 2019-315, p. 4 (La. App. 3 Cir. 4/7/21), *writ granted*, 2021-00552 (La. 5/25/21) (herein referred to as "NISCO 3 Cir. 2021").
[5] Note that, the Third Circuit in 2015 held that "NISCO's purchases of sand and limestone are subject to sales and use tax, and not exempt or excluded under the further processing statute." *Bridges v. Nelson Indus. Steam Co.*, 2014-1250, p. 21 (La. App. 3 Cir. 6/24/15), 169 So.3d 711, 723, *writ granted*, 2015-1439 (La. 10/30/15), 179 So.3d 610, *and rev'd*, 2015-1439 (La. 5/3/16), 190 So.3d 276 (herein referred to as "NISCO 3 Cir. 2015"). This decision was reversed and remanded by the Louisiana Supreme Court in *NISCO I*. Thus, prior to the *NISCO I* decision, the Third Circuit would have held that Act 3 did not conflict with the interpretation of prior language of the further processing exclusion.

in *NISCO II*, this Court again found that the Third Circuit was too narrowly focused on the definitions of "incidental" and "byproduct." *NISCO II*, 303 So.3d at 292-93. It appears that the Third Circuit in its most recent holding was again erroneously focused on these terms.

Prior to Act 3, the language of the further processing exclusion did not address primary versus incidental products or byproducts at all. Rather, the language of the exclusion only read as follows:

> The term "sale at retail" does not include sale of materials for further processing into articles of tangible personal property for sale at retail.

NISCO 3 Cir. 2021, at *6. Recognizing the "inherent ambiguity" in the (pre-Act 3) statutory language of the further processing exclusion, this Court, along with numerous lower courts, over a 40-year period continued to attempt to construe and determine the intent of the legislature behind the language of the exclusion. *NISCO I*, 190 So.3d at 279-80. This Court recognized in its 1976 examination of the further processing exclusion that the "ultimate aim" of the Court's interpretation was to find the legislative intent. *Traigle v. PPG Industries, Inc.*, 332 So.2d 777, 782 (La. 1976). In *NISCO I*, this Court reiterated this same ultimate goal some 40 years later. *NISCO I*, 190 So.3d at 280.

The fact that Louisiana courts have been attempting to interpret the further processing exclusion for 40 years prior to Act 3 demonstrates that, before Act 3, the further processing exclusion remained unclear. This Court's decision in *NISCO I* was the most recent interpretation of the further processing exclusion, but the Honorable Justices of this Court in *NISCO I* even then did not agree on the true meaning and intent of the exclusion. Four Justices dissented (three in part) in the majority's opinion in *NISCO I.* Thus, the state of the further processing exclusion immediately prior to the enactment of Act 3 was anything but settled.

The Louisiana legislature enacted Act 3 to provide the legislative intent the courts had been seeking for the previous 40 years. The legislative history of Act 3 expressly states that the Louisiana legislature's intent was to clarify and interpret the original intent of the further processing exclusion. The intent of Act 3 was not to change or modify the further processing exclusion, but to express the true original intent behind the language of the exclusion. *See* Act 3 (stating "[t]his Act is intended to clarify and be interpretative of the original intent and application of R.S. 47:301(10)(c)(i)(aa)").

The Third Circuit claims that Act 3 levies a "new tax" because ash produced by NISCO was not an incidental byproduct under the language of the pre-Act 3 further processing

exclusion. This position assumes that the meaning of the exclusion was settled, and ignores the ongoing efforts of Louisiana courts to find the true intention behind and meaning of the further processing exclusion.

Since the "ultimate aim" of the courts is to find the true intent of the legislature, the legislature's own express statements of its intent should be controlling. A finding that Act 3 is a "new tax" is a finding that the courts' interpretation of the legislative intent is controlling over the legislatures own expressly stated intent. The Third Circuit's 2021 holding does just that. It pits the language of Act 3 against a judicial interpretation of the prior statutory language. The Third Circuit's holding means that a court's interpretation of the statutory language is, as a matter of fact and law, the true intent behind the statute and controls over the legislature's stated content. If that is true, then the Third Circuit's holding also begs the question of which judicial interpretation of the prior language of the exclusion is the law of the land for purposes of comparison against the language of Act 3. Under the Third Circuit's logic, Act 3's constitutionality depends entirely on which judicial interpretation of the prior language was in effect at the time Act 3 was passed. Thus, it becomes nothing more than a timing issue, rather than the language and stated intent of the Act.

As stated, the Third Circuit found Act 3 to be a "new tax" based on the *NISCO I* interpretation of the (pre-Act 3) further processing exclusion. By that standard, if Act 3 was first in time before *NISCO I*, the Third Circuit would have found that Act 3 was not a "new tax." Act 3 was passed on June 23, 2016. *NISCO I* was decided on May 3, 2016. Under the Third Circuit's view then, the Louisiana legislature needed to pass Act 3 by majority vote on May 2, 2016, but needed a 2/3 supermajority vote on May 3, 2016. Certainly, this cannot be the test of what is or is not a "new tax." Rather, the measure is what the Act at issue states and the legislative intent behind the passage of the Act.

Moreover, even under the Third Circuit's timing requirement, Act 3 would not be a "new tax" because Act 3's effective date was prior to the effective date of *NISCO I*. Upon issuance of this Court's *NISCO I* decision, Calcasieu Parish sought a rehearing, which was ultimately denied by this Court on September 7, 2016.[6] *See Auto-Lec Stores v. Ouachita Valley Camp No. 10, W. O. W.*, 185 La. 876, 879, 171 So. 62, 63 (1936) (stating that "[t]he motion for rehearing being timely filed, the judgment rendered in this case, though signed, is considered as not becoming

[6] *Bridges v. Nelson Indus. Steam Co.*, 2015-1439 (La. 9/7/16), 206 So.3d 195.

legally effective unless and until the motion is overruled"). Since Act 3 was passed on May 2, 2016, and thus prior in time to the September 7, 2016, effective date of *NISCO I*, under the Third Circuit's view, the jurisprudential interpretation of the further processing exclusion would not be "in conflict" with Act 3 if the pre-*NISCO I* interpretation of record did conflict with Act 3. In the Third Circuit's 2015 *NISCO* decision (which was reversed by this Court in *NISCO I*), the Third Circuit in 2015 held that "NISCO's purchases of sand and limestone are subject to sales and use tax, and not exempt or excluded under the further processing statute." *NISCO 3 Cir. 2015*, 169 So.3d at 723. Thus, because the Third Circuit's 2015 *NISCO* decision was the most recent interpretation in effect at the time Act 3 was passed, under the Third Circuit's theory, Act 3 did not conflict with the prior language or interpretation of the exclusion, and accordingly did not constitute a "new tax."

To further illustrate that the judicial interpretation of record at the time of passage of Act 3 should not be part of the "new tax" test under Article VII, § 2 of the Louisiana Constitution, the outcome of whether Act 3 was considered a "new tax" under the Third Circuit's test would solely depend on whether Calcasieu Parish filed a motion for rehearing. As set forth above, if no motion for rehearing was filed, *NISCO I* would have been effective on May 2, 2016, making it first in time ahead of Act 3, thus rendering Act 3 a "new tax" according to the Third Circuit. However, simply because a motion for rehearing was filed and denied by the Court in *NISCO I*, Act 3 would not be considered a "new tax" according to the Third Circuit. This arbitrary distinction has no place in the determination of what constitutes a "new tax" under the Louisiana Constitution.

II. The Third Circuit Gave Erroneous Deference to NISCO; It Should Not Have Given Deference in Interpreting the Louisiana Constitution, and Should Have Given Deference to the Legislature in Considering a Constitutional Challenge

The Third Circuit's 2021 opinion pays lip service to the cannons of statutory interpretation and the plaintiff's burden in challenging the constitutionality of a statute. *NISCO 3 Cir. 2021*, at *4-5. However, the Third Circuit does not actually apply any of these principles. Rather, it concluded that the further processing exclusion is an "exclusion," as opposed to an exemption, and determined that because Act 3 is an exclusion, it must be interpreted favorably to the taxpayer. *Id.* Based on that taxpayer deference, the Third Circuit concluded Act 3 was unconstitutional.

While taxpayer deference does apply in general to tax exclusions, such deference is limited to an interpretation of the language of statutory exclusion (here, the further processing exclusion). The Third Circuit's most recent decision does not involve an interpretation of the language of Act 3. The language of Act 3 was made clear by this Court's decision in *NISCO II*, and thus further interpretation was not an issue in the Third Circuit's 2021 decision.

Rather, the interpretation before the Third Circuit in its 2021 decision was the interpretation of "the levy of a new tax" under Louisiana Constitution Art. VII, § 2. The Third Circuit interpreted the Louisiana Constitution, not Act 3, to determine the definition of a "new tax," and that Act 3 fit within such definition. The Court does not owe NISCO deference in an interpretation of the Louisiana Constitution. *In re Off. of Chief Just., La. Supreme Ct.*, 2012-1342, pp. 9-10 (La. 10/16/12), 101 So.3d 9, 15.

Moreover, courts do not owe taxpayers deference in interpreting the constitutionality of a statute. Just the opposite, in an interpretation of a statute subject to a constitutional challenge, deference is given to the legislature. *See Carver v. La. Dep't of Pub. Safety*, 2017-1340, p. 5 (La. 1/30/18), 239 So.3d 226, 230 (stating that "[t]he legislature is given great deference in the judicial determination of a statute's constitutionality"). In interpreting the constitutionality of a statute, there is a "presumption of constitutionality." *Brown v. State, Dep't of Public Safety & Corrections*, 96-2204, p. 2 (La. 10/15/96), 680 So.2d 1179, 1180. In view of this presumption, judicial self-restraint is appropriate when statutes are under constitutional attack. *Sherman v. Cabildo Construction Co.*, 490 So.2d 1386, 1390 (La. 1986).

"All statutory enactments are presumed constitutional, and every presumption of law and fact must be indulged in favor of legality." *Carver*, 239 So.3d at 230. "The legislature is given great deference in the judicial determination of a statute's constitutionality, and legislators are presumed to have weighed the relevant constitutional considerations in enacting legislation." *Id.* "Because a state statute is presumed constitutional, the party challenging the statute bears the burden of proving it is unconstitutional." *Id.* "The burden plaintiffs carry in challenging the constitutionality of a statute is a heavy burden." *Id.* "It is not enough for a person challenging a statute to show that its constitutionality is fairly debatable; it must be shown clearly and convincingly that it was the constitutional aim to deny the legislature the power to enact the statute." *Id.*

Importantly, "[b]ecause of the presumption of constitutionality, in determining the validity of a constitutional challenge, a Court 'must construe a statute so as to preserve its constitutionality when it is reasonable to do so.'" *Id*. (quoting *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 07-2371, p. 22 (La. 7/1/08), 998 So.2d 16, 31). That was not done in this case by the Third Circuit.

In this case, the Third Circuit failed to interpret the Louisiana Constitution without deference, failed to presume Act 3 was constitutional, and failed to give deference to the legislature in considering NISCO's constitutional challenge to the further processing exclusion. Instead, the Third Circuit erroneously gave deference to NISCO, and accordingly proceeded to construe both Act 3 and Louisiana Constitution Article VII, § 2 in NISCO's favor. Had the Third Circuit not erroneously given NISCO such deference, it is clear that it would not have found Act 3 unconstitutional under Article VII, § 2 of the Louisiana Constitution as a "levy of a new tax." Clear and convincing evidence of unconstitutionality of Act 3 simply was not presented and does not exist.

III. **Recent Louisiana Case Law Supports the Position that Act 3 is Not a "New Tax"**

Calcasieu Parish has fully briefed the Louisiana Supreme Court's prior decisions regarding what is and what is not a "new tax." Rather than repeat what Calcasieu Parish has already said, St. Charles Parish offers one additional case that has recently passed through this Court, and which adds to the discussion of what constitutes a "new tax" under Louisiana Constitution Article VII, § 2.

In *Jazz Casino Co., L.L.C. v. Bridges*, the Louisiana legislature amended a statute that, prior to such amendment, prohibited casinos from entering into contracts with hotels to provide discounted rooms. 2019-1530, p. 12 (La. App. 1 Cir. 7/29/20), 309 So.3d 741, 749, *reh'g denied* (Sept. 2, 2020), *writ granted in part, judgment rev'd in part*, 2020-01145 (La. 2/9/21), 309 So.3d 729. The Act at issue in *Jazz Casino* amended the statute by removing the prohibition against hotel contracts, and by adding a requirement for casino operators to pay room taxes based on average seasonal rates. *Id*. The plaintiff (Harrah's) argued that the amendment was unconstitutional. First, Harrah's claimed that because the amendment had the effect of increasing the Harrah's tax liability, the Act was revenue raising. *Id.* at 750. Second, Harrah's claimed that the amendment was either a new tax obligation or increased an existing tax obligation in violation of La. Const. Art. VII, § 2. *Id*.

In rejecting Harrah's arguments, the First Circuit affirmed the trial court's findings, which were as follows:

> [L]ong before the [amendment at issue], the statutory scheme and authority for the imposition of taxes for the furnishings of sleeping rooms was in place. It's pretty clear. Anybody that operated a hotel knew what taxes applied and knew what they had to collect. . . . [The amendment] **didn't create or impose a new tax obligation. It simply extended that existing obligation**, the same statutory obligation that applied to all paying customers, now applied to complimentary rooms and discounted rooms. It's imposing and **clarifying the obligation** stating look, Harrah's, not only do you have to collect and remit the taxes on rooms paid for by the customer as established by the existing Louisiana statutory tax scheme, but also you have to do it on any rooms discounted or furnished complimentarily.

Id. at 750 (emphasis added). This Court granted Harrah's writ application in part, and reversed the First Circuit's ruling in part, which is not relevant in this case. *Jazz Casino Co., L.L.C. v. Bridges*, 2020-01145 (La. 2/9/21), 309 So.3d 729. This Court reversed the First Circuit's decision only as it related to room taxes on third-party hotel rooms that Harrah's did not own or operate. *Id.* Thus, in all material respects herein, the First Circuit's judgment was left intact.

The same logic that applied in *Jazz Casino* also applies in this case. Here, the sales tax scheme and authority to impose a sales or use tax on purchases of tangible personal property was already in place, and has been in place for 80 years. Act 3 did not create a new sales or use tax obligation, but rather explains that the legislative intent and meaning of the original further processing exclusion language was to extend to purchasers like NISCO the same sales and use tax obligations applicable to all other purchasers of tangible personal property in Louisiana. In other words, the further processing exclusion was never intended by the legislature to exclude from sales and use tax materials present in byproducts sold for less than cost. Like in *Jazz Casino*, Act 3 merely clarified the existing sales and use tax obligations of taxpayers such as NISCO.

The court in *Jazz Casino* further determined that the amendment at issue therein, while having a revenue raising effect, was not enacted under the legislature's power to tax. "It is well settled generally, and specifically in Louisiana, that not every imposition of a charge or fee by the government constitutes a demand for money under its power to tax." *Jazz Casino*, 309 So.3d at 750. "If the imposition has not for its principal object the raising of revenue, but is merely incidental to the making of rules and regulations to promote public order, individual liberty, and general welfare, it is an exercise of the police power." *Id.* The *Jazz Casino* court concluded that the addition of the casino room tax at issue "was merely incidental to the making of rules and regulations to promote public order, individual liberty, and general welfare." *Id.* at 751.

"Therefore, it is an exercise of the police power by the State to Harrah's of benefits not shared by other members of society, rather than a revenue-raising or money-appropriating measure." *Id.*

This Court has further expanded on the distinction between the imposition of a tax and the exercise of the police power. "If the imposition has not for its principal object the raising of revenue, . . . it is an exercise of the police power." *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072, 1074 (La. 1983). "But, if revenue is the primary purpose for an assessment and regulation is merely incidental, or if the imposition clearly and materially exceeds the cost of regulation or conferring special benefits upon those assessed, the imposition is a tax." *Id.*

In this case, revenue raising was not the primary purpose or any purpose of Act 3. The primary purpose of Act 3 was only to clarify the legislative intent of the existing further processing exclusion to sale and use tax. Act 3 expressly notes that "[t]his Act is intended to clarify and be interpretative of the original intent and application of R.S. 47:301(10)(c)(i)(aa)." 2016 La. Sess. Law Serv. 2nd Ex. Sess. Act 3 (H.B. 27). The fiscal note to Act 3 confirms that there was no revenue raising motivation in enacting Act 3. The Legislative Fiscal Office determined that Act 3 would have no direct material effect on governmental expenditures and would have no effect on revenue collection.

Act 3 was merely to clarify the original intent of the further processing exclusion. After 40 years of evolving interpretation of the exclusion, Act 3 was enacted to promote public order, individual liberty, and general welfare of Louisiana residents and non-residents who rightfully remained uncertain as to which items of tangible personal property should be taxable or excluded from tax under the further processing exclusion.

CONCLUSION

In summary, Act 3 is not constitute the levy of a "new tax." The Third Circuit Court of Appeal improperly compared a judicial interpretation of the former language to the language of Act 3, when the intent of the former language as stated by the legislature should be controlling. The Third Circuit's decision inherently mandates the courts to determine which judicial interpretation was in effect at the time of the new Act. This leads to untenable results as exemplified in this case, where seeking a rehearing versus not seeking a rehearing would decide whether an Act is constitutional or unconstitutional as a new tax. Even if the Third Circuit's judicial-interpretation-of-record approach was supportable, the judicial interpretation of the further processing exclusion in effect at the time Act 3 was passed was the Third Circuit's own

interpretation from 2015 in *NISCO 3 Cir. 2015*, which would uphold Act 3 as being consistent with the Third Circuit's 2015 interpretation of the prior language.

Further, the Third Circuit in its 2021 decision (now at issue before this Court) improperly gave deference to NISCO in interpretating the Louisiana Constitution, and in NISCO's constitutional challenge to a Louisiana statute. No such deference should have been given to NISCO. Without said deference to NISCO, the Third Circuit could not have found Act 3 unconstitutional because the high bar required by NISCO was not met. Finally, recent case law supports that Act 3 is not a new tax, but rather a clarification of an existing tax obligation that was always intended to be applicable to taxpayers such as NISCO.

Respectfully, St. Charles Parish prays that this Honorable Court reverses the decision of the Louisiana Third Circuit Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2021, that I am the attorney for amicus curiae St. Charles Parish, and I verify that this brief has been conditionally filed with the Louisiana Supreme Court on this date and that a copy of this brief has been mailed by U.S. Mail, properly addressed and posted pre-paid, to the following:

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