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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MARGARITA CABRAL, et al.,

Plaintiffs,

v.

CAESARS ENTERTAINMENT  
CORPORATION, et al.,

Defendants.

Case No. 2:17-cv-02841-APG-VCF

**ORDER GRANTING MOTION TO  
DISMISS AND DENYING MOTION TO  
CONSOLIDATE AS MOOT**

(ECF Nos. 6, 22)

The plaintiffs bring this proposed class action lawsuit against several resort hotels in Las Vegas. They allege the hotels charge overnight guests a mandatory per-night resort fee that includes payment for Internet access. The plaintiffs allege that the defendants applied the Clark County Combined Transient Lodging Tax to the entire amount of the resort fee, including that portion that covers Internet access. The plaintiffs assert this violates the Internet Tax Freedom Act (ITFA), a federal statute that precludes States and their political subdivisions from taxing Internet access.

The defendants move to dismiss for lack of jurisdiction, arguing the Tax Injunction Act (TIA) bars the plaintiffs' claims in federal court. Alternatively, the defendants request I dismiss the case based on principles of comity or abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The plaintiffs respond that the TIA does not apply because they are not challenging the Lodging Tax itself. Rather, they contend they are challenging the defendants' unilateral, non-mandatory decision to bundle Internet access charges with other services into a single resort fee and then applying the Lodging Tax to the total amount of the resort fee. Alternatively, the plaintiffs argue that Congress exempted ITFA suits from the TIA's scope. For similar reasons, the plaintiffs argue neither comity nor *Burford* abstention is appropriate. I grant the motion to dismiss for lack of jurisdiction under the TIA and based on comity principles.

1     **I. BACKGROUND**

2             **A. The Lodging Tax**

3             Clark County Code Chapter 4.08 sets forth the Lodging Tax, which is a tax on revenue  
4     derived from short-term room rentals for dwelling, lodging, or sleeping purposes, such as hotel  
5     rooms. The tax applies to “rent,” which “[m]eans the amount charged for a sleeping room/space  
6     in a transient lodging establishment, valued in money, whether received in money or otherwise,”  
7     including “[c]harges that would normally be part of an all inclusive room rate,” such as late  
8     check-out fees, cancellation fees, and the like. Clark County Code 4.08.005(17)(a). The term rent  
9     also includes a catchall provision for “[a]ny charges for services, amenities, accommodations, or  
10    use, not otherwise specified above, that are mandatory in nature and charged in connection with  
11    rental of a sleeping/room space.” *Id.* at 4.08.005(17)(a)(viii).<sup>1</sup>

12            The tax is collected from “every operator in Clark County.” *Id.* at 4.08.010(a). An  
13    operator means “the proprietor of a transient lodging establishment.” *Id.* at 4.08.005(12). “The  
14    tax, when due, constitutes a debt owed by the operator to the county which is extinguished only  
15    by payment thereof to the Clark County department of business license.” *Id.* at 4.08.010(b). The  
16    operator may collect the tax “from the paying transient guests,” but the “operator is liable to Clark  
17    County for the tax whether or not it is actually collected from the paying transient guest.” *Id.* at  
18    4.08.010(c). “Combined transient lodging taxes collected by the operator are public monies from  
19    the moment of their collection and shall be held in trust by the operator collecting such taxes for  
20    the use and benefit of the agencies for whom such revenues are collected.” *Id.* at 4.08.055(b).

21            The operator owes the tax “on the first day of each month for the preceding month,” and it  
22    is “payable to the Clark County Department of Business License.” *Id.* at 4.08.055(a). However,  
23    the Code allows for a “discount” for operators in the amount of two percent of the Lodging Tax  
24    collected by the operator if the operator pays the Lodging Tax “on or before the fifteenth day of  
25    the month following the month for which the tax is due.” *Id.* at 4.08.040.

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27            <sup>1</sup> This is the provision under which the defendants have applied the Lodging Tax to the  
28    entire resort fee.

1 The operator must refund any “over-collection” of the Lodging Tax “to the occupant from  
2 whom it was incorrectly collected.” *Id.* at 4.08.055(c). If the over-collection is not refunded to  
3 the occupant for any reason within a certain period of time, it must be remitted to the Clark  
4 County Department of Business License. *Id.* at 4.08.055(d).

5 The Code allows for refund requests. “Refunds of transient lodging tax collected by  
6 operators pursuant to Section 4.08.015 of this code must be requested from the department in  
7 writing” within two or three years, depending on the type of tax collected. *Id.* at 4.08.075(a), (b).  
8 “No transient lodging tax may be refunded to an operator who collected it unless the operator has  
9 refunded the transient lodging tax to the occupant who paid it.” *Id.* at 4.08.075(c).

10 The Clark County Department of Business License has issued a General Information  
11 Guide for Transient Lodging Establishments to assist operators in complying with their  
12 obligations related to the Lodging Tax.<sup>2</sup> That Guide contains a chart listing “revenues that  
13 transient lodging establishments commonly collect from their guests,” and identifies the different  
14 types of revenues as either (1) rent that is subject to the Lodging Tax or (2) non-rent or non-  
15 revenue that is not subject to the Lodging Tax. Guide at 6. The chart contains an entry for  
16 “Internet Access Fee (not mandatory with room rental)” and identifies it as non-rent that is not  
17 subject to the Lodging Tax. *Id.* at 7. The Guide notes that “[a]s a rule of thumb, any charges that  
18 are mandatory in nature and collected in connection with rental of a sleeping room/space/unit,  
19 will be considered rental revenue by the Department and therefore subject to the combined  
20 transient lodging tax.” *Id.* at 6. The Guide states that “[f]ailure to segregate taxable rental revenue  
21 from exempt rental revenue . . . could result in the entire amount being subject to the combined  
22 transient lodging tax. Transient lodging operators are cautioned, therefore, against recording  
23 various types of rent in single G/L accounts without making a distinction between taxable and  
24 exempt revenue entries.” *Id.* at 8 n.1.

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27 <sup>2</sup> See [http://www.clarkcountynv.gov/business-](http://www.clarkcountynv.gov/business-license/Pages/TransientLodgingGuidance.aspx)  
28 [license/Pages/TransientLodgingGuidance.aspx](http://www.clarkcountynv.gov/business-license/Pages/TransientLodgingGuidance.aspx).

1           **B. The Allegations**

2           The defendants are resort hotels in Las Vegas that charge overnight guests a mandatory  
3 per-night resort fee that includes various services such as Internet access, local phone calls, and  
4 access to the fitness center. ECF No. 1 at 3. According to the complaint, the primary service of  
5 value included in the resort fee is the Internet access. *Id.* The defendants applied the Lodging Tax  
6 to the entire amount of the resort fee, even though the ITFA precludes state and local taxation of  
7 Internet access. *Id.* The plaintiffs were overnight guests at the resorts who were charged the  
8 Lodging Tax on the entire resort fee. *Id.* at 5-11.

9           The plaintiffs allege that the defendants previously did not bundle Internet access into a  
10 resort fee and did not apply the Lodging Tax to unbundled Internet access fees before they began  
11 imposing the mandatory resort fee in March 2013. *Id.* at 4, 22, 25. According to the complaint,  
12 the defendants do not apply the Lodging Tax to add-on Internet services, such as guests who pay  
13 additional Internet access fees for more devices or faster service. *Id.* at 40. The plaintiffs allege  
14 the defendants bundle Internet access into the mandatory resort fee so they can apply the Lodging  
15 Tax to the entire amount because the defendants receive two percent of the Lodging Tax funds  
16 they collect. *Id.* at 4.

17           Based on these allegations, the plaintiffs bring a class action complaint and assert claims  
18 for (1) violation of ITFA, (2) violation of Clark County Code § 4.08.005 for failing to refund  
19 over-collection of the Lodging Tax, (3) violation of the Nevada Deceptive Trade Practices Act,  
20 (4) breach of the covenant of good faith and fair dealing, (5) money had and received, (6)  
21 conversion, (7) unjust enrichment, and (8) declaratory judgment. The plaintiffs seek injunctive  
22 relief, declaratory relief, and damages.

23           **II. ANALYSIS**

24           **A. TIA**

25           The TIA provides that a federal district court “shall not enjoin, suspend or restrain the  
26 assessment, levy or collection of any tax under State law where a plain, speedy and efficient  
27 remedy may be had in the courts of such State.” 28 U.S.C. § 1341. The statute “was designed  
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1 expressly to restrict the jurisdiction of the district courts of the United States over suits relating to  
2 the collection of State taxes.” *Hibbs v. Winn*, 542 U.S. 88, 104 (2004) (quotation omitted).  
3 Consequently, if the TIA applies, I must dismiss for lack of subject matter jurisdiction. *May*  
4 *Trucking Co. v. Oregon Dep’t of Transp.*, 388 F.3d 1261, 1275 (9th Cir. 2004).

5 1. The Lodging Tax is a Tax under the TIA

6 “Federal law determines whether an assessment qualifies as a ‘tax’ for purposes of the  
7 TIA.” *Wright v. Riveland*, 219 F.3d 905, 911 (9th Cir. 2000). To determine whether an  
8 assessment is a tax, I consider: “(1) the entity that imposes the assessment; (2) the parties upon  
9 whom the assessment is imposed; and (3) whether the assessment is expended for general public  
10 purposes, or used for the regulation or benefit of the parties upon whom the assessment is  
11 imposed.” *Bidart Bros. v. Cal. Apple Comm’n*, 73 F.3d 925, 931 (9th Cir. 1996). As to the first  
12 factor, an assessment imposed by a legislature “is more likely to be a tax than an assessment  
13 imposed by an administrative agency,” but the fact that it is imposed by “a non-legislative body is  
14 not dispositive in determining that it is not a tax.” *Id.* As to the second factor, an assessment  
15 “imposed upon a broad class of parties is more likely to be a tax than an assessment imposed  
16 upon a narrow class,” but “an assessment upon a narrow class of parties can still be characterized  
17 as a tax under the TIA.” *Id.* Finally, assessments that are “general revenues and paid into the  
18 state’s general fund are taxes,” whereas an assessment “placed in a special fund and used only for  
19 special purposes is less likely to be a tax.” *Id.* at 932. “However, even assessments that are  
20 segregated from general revenues are ‘taxes’ under the TIA if expended to provide a general  
21 benefit to the public.” *Id.* (quotation omitted).

22 The Lodging Tax is a tax within the TIA’s meaning. The tax is imposed through a Clark  
23 County ordinance passed by the Clark County board of commissioners acting in a capacity  
24 comparable to a legislature. *See Nev. Rev. Stat., Ch. 244.* The tax is imposed on only certain  
25 types of businesses, and thus is narrow in that respect. But it is broad in that it applies to any  
26 operator of a transient lodging establishment in the county. Most importantly, the funds are  
27 public money from the moment of collection and the proceeds are used for general public  
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1 purposes such as school funding, transportation, and tourism. *See* Clark County Code 4.08.015  
2 through 4.08.031 and statutes cited therein.

3 The plaintiffs argue the monies at issue in this case are not “taxes” but are actually “over-  
4 collected” funds under the Clark County Code. ECF No. 25 at 8. Putting aside the potentially  
5 fatal consequences this argument would have for the merits of the plaintiffs’ underlying claim,<sup>3</sup>  
6 the plaintiffs are incorrect. As the Ninth and Seventh Circuits have explained in addressing  
7 similar arguments in relation to a federal tax on air travel, a plaintiff cannot characterize a tax as  
8 improperly collected and thus not a tax at all. Although this argument has “superficial appeal[  
9 . . .] it nevertheless misses the mark.” *Brennan v. Sw. Airlines Co.*, 134 F.3d 1405, 1409 (9th  
10 Cir.), *amended sub nom. Brennan v. Sw. Airlines*, 140 F.3d 849 (9th Cir. 1998); *see also Kaucky*  
11 *v. Southwest Airlines Co.*, 109 F.3d 349 (7th Cir. 1997).

12 In both *Brennan* and *Kaucky*, the plaintiffs sued airlines based on the airlines’ alleged  
13 improper collection of a federal excise tax on air travel. A section of the Internal Revenue Code  
14 “required airline passengers to pay a ten percent excise tax on domestic air transportation  
15 commenced prior to 1996.” *Brennan*, 140 F.3d at 1408; *Kaucky*, 109 F.3d at 350. The airlines  
16 were required to collect the tax from their customers and remit the funds to the Internal Revenue  
17 Service. *Brennan*, 140 F.3d at 1408; *Kaucky*, 109 F.3d at 350. The defendant airlines imposed  
18 the excise tax on flights purchased in 1995 for travel in 1996 because they anticipated the tax  
19 would be renewed for 1996. *Brennan*, 140 F.3d at 1408; *Kaucky*, 109 F.3d at 352. The excise tax  
20 was not renewed for 1996 as expected, however, so the plaintiffs sued the airlines for return of the  
21 imposed tax. *Brennan*, 140 F.3d at 1408; *Kaucky*, 109 F.3d at 350. The airlines removed the  
22 cases to federal court, arguing that the lawsuits were federal tax refund suits and thus arose under  
23 federal law. *Brennan*, 140 F.3d at 1409; *Kaucky*, 109 F.3d at 350.

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26 <sup>3</sup> If the plaintiffs are correct that the funds in dispute are not “taxes,” then it is unclear how  
27 the defendants have violated the ITFA, which suspends the collection of taxes on Internet  
28 services. I need not (and do not) address this issue, however, because I dismiss for lack of subject  
matter jurisdiction and based on comity concerns.



1 Both courts held the suits were properly removed because they were effectively federal  
2 tax refund suits. *Brennan*, 140 F.3d at 1409-10; *Kaucky*, 109 F.3d at 351. In doing so, the courts  
3 rejected the plaintiffs' argument that because the tax had expired and was wrongly imposed, it  
4 was not a tax at all.

5 *Brennan* relied primarily on the language of 26 U.S.C. § 7422<sup>4</sup> to reach this conclusion,  
6 but the court stated the "correctness of [its] holding becomes apparent when one considers the  
7 consequences of accepting Plaintiffs' argument instead." 140 F.3d at 1410. As that court  
8 explained:

9 Accepting Plaintiffs' argument would permit a taxpayer to evade the strictures of  
10 § 7422 every time an IRS collection agent collected a tax without authority. This  
11 would render § 7422 virtually a dead letter because almost every citizen who seeks  
a tax refund alleges that the tax was collected without authority.

12 *Id.* (emphasis omitted). Thus, the court held that "based on the express language of § 7422 and  
13 the policy considerations that underlie it, . . . where a plaintiff sues to recover a sum that was  
14 collected as a tax, the plaintiff has sued for a tax refund, even if the sum does not literally  
15 constitute an internal revenue tax." *Id.* at 1412.

16 The Seventh Circuit reached a similar conclusion in *Kaucky*. *Id.* at 350, 352. That court  
17 stated that "[i]n a literal sense this is not a suit for a refund of taxes, because the plaintiff and the  
18 members of his class never paid the air transportation excise tax," as the tax was no longer in  
19 effect. *Id.* at 351. But the court stated it did "not think the literal sense is the right sense. If it  
20 were, then anytime a taxpayer thought he could prove that his employer had erroneously withheld  
21 a portion of his salary for federal income tax he would have an action in state court against the  
22 employer." *Id.*

23 Neither *Brennan* nor *Kaucky* addressed the scope of the TIA, but their reasoning supports  
24 rejecting the plaintiffs' position here. An over-collected tax is still a tax for purposes of the TIA.

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26 <sup>4</sup> Section § 7422(a) described a tax refund suit as a "suit or proceeding . . . in any court for  
27 the recovery of any revenue tax alleged to have been erroneously or illegally assessed or  
28 collected, . . . or of any sum alleged to have been . . . in any manner wrongfully collected . . . ."  
*Brennan*, 140 F.3d at 1409 (quoting 26 U.S.C. § 7422(a) (emphasis omitted)).

1 Otherwise, the TIA would be eviscerated because, like the plaintiffs here, virtually every plaintiff  
2 challenging a state or local tax will claim it was wrongly assessed or collected and thus not a tax  
3 subject to the TIA's reach. That cannot be what Congress intended when it enacted the TIA.

4 Finally, the plaintiffs contend that the portion of the Lodging Tax the defendants retain as  
5 a discount for timely payment is not a tax. However, the Clark County Code provides that the  
6 taxes collected are public money from the moment of collection, and the operators are eligible for  
7 the discount only if they make timely payment. Thus, the portion the defendants may retain if  
8 they make timely payment is a tax, which Clark County has chosen to use as an incentive to  
9 procure prompt remittance of the balance of the tax.

10 2. This Suit Seeks to Enjoin, Restrain, or Suspend the Assessment, Levy, or  
11 Collection of the Lodging Tax

12 The TIA may apply to a claim regardless of whether the requested relief is for injunctive  
13 or declaratory relief, or for damages. *See California v. Grace Brethren Church*, 457 U.S. 393, 411  
14 (1982); *Dillon v. State of Montana*, 634 F.2d 463, 464-65 (9th Cir. 1980). The critical inquiry is  
15 whether the practical effect of those remedies would be to stop the collection of state or local  
16 taxes.<sup>5</sup> *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1133 (2015); *Winn v. Killian*, 307 F.3d 1011,  
17 1017 (9th Cir. 2002). To make this determination, I consider whether the lawsuit, if successful,  
18 would reduce "the flow of state tax revenue." *May Trucking Co.*, 388 F.3d at 1267 (quotation  
19 omitted).

20 Each of the three types of relief requested by the plaintiffs would stop the collection of the  
21 Lodging Tax. An injunction against collecting the Lodging Tax on the resort fee (or a portion  
22 thereof) would obviously stop the collection of that tax. A declaration that the defendant could  
23 not apply the Lodging Tax to the entire resort fee would have the same result. Practically  
24 speaking, the plaintiffs' damages claim also would have the same effect. If successful, the  
25 defendants no doubt would cease collecting the tax in the future to avoid being sued again.

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<sup>5</sup> A state tax under § 1341 "includes local taxation," such as Clark County's Lodging Tax. *Hibbs*,  
542 U.S. at 100 n.1.



1           The plaintiffs contend their suit does not stop collection of the Lodging Tax because they  
2 do not challenge that tax or any state or local rule. Rather, they contend, they are challenging the  
3 defendants' unilateral decision to bundle the Internet access into the resort fee and to then apply  
4 the tax to the entire resort fee.

5           However, the Ninth Circuit ruled the TIA applied in a similar circumstance in *Fredrickson*  
6 *v. Starbucks Corporation*. There, three Starbucks baristas brought a class action challenging "the  
7 legality of Starbucks' practice of withholding state and federal taxes from baristas' paychecks  
8 based on the cash tips they receive." 840 F.3d 1119, 1120 (9th Cir. 2016). The baristas pooled  
9 their customers' tips and divided them up at the end of each week without reporting to Starbucks  
10 how much they each made in tips. *Id.* For tax withholding purposes, Starbucks "impute[d] 50  
11 cents per hour in estimated tip income to each barista and [withheld] state and federal taxes from  
12 the baristas' paychecks based on that amount." *Id.* at 1121. The plaintiffs did not seek actual  
13 damages, but instead sought statutory damages, as well as declaratory and injunctive relief. *Id.*

14           The Ninth Circuit held the plaintiffs' claims for declaratory and injunctive relief were  
15 barred in federal court by the TIA because granting the declaratory and injunctive relief would  
16 stop collection of the taxes, as "Starbucks would no longer collect the state taxes in question and  
17 would no longer remit those funds to Oregon's treasury." *Id.* at 1122-23. The court held the  
18 claim for statutory damages was barred by the comity doctrine. *Id.* at 1124. In doing so, however,  
19 the court noted that "[a]ny award of statutory damages here would have the same disruptive effect  
20 as entry of a declaratory judgment or issuance of an injunction, thereby undermining the state-  
21 revenue-protective objectives of the Tax Injunction Act," because "Starbucks would of course  
22 cease [withholding taxes] to avoid future liability." *Id.* "The impermissible end result, as with  
23 declaratory or injunctive relief, would be to stop the flow of tax revenue into Oregon's coffers."  
24 *Id.*

25           There is no indication in *Fredrickson* that Starbucks was required by state or federal law  
26 to withhold taxes based on an imputed estimation of 50 cents per hour in tips. Rather, Starbucks  
27 unilaterally adopted this policy, much like the plaintiffs here allege the defendants unilaterally  
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1 adopted the mandatory resort fee policy and applied the Lodging Tax to the entire amount of that  
2 fee. *See Fredrickson v. Starbucks Corp.*, 980 F. Supp. 2d 1227, 1233 (D. Or. 2013) (stating the  
3 plaintiffs’ suit “claims that Starbucks improperly withheld the taxes based on its policy of  
4 ‘imputing’ or ‘estimating’ tips, and seeks to recover the taxes withheld pursuant to that policy  
5 along with statutory penalties, interest, and attorney’s fees” (emphasis omitted)); *Fredrickson v.*  
6 *Starbucks Corp.*, No. 03:13-CV-00029-HU, 2013 WL 12314742, at \*11 (D. Or. Aug. 28, 2013)  
7 (stating that “Starbucks’s estimation of employees’ tip income was done pursuant to the  
8 company’s understanding (whether mistaken or not—a question not decided here) of the Tax  
9 Code and applicable regulations . . .”). Indeed, in *Fredrickson*, the plaintiffs argued neither  
10 federal nor Oregon law authorized Starbucks’ conduct, much less required it. *Fredrickson*, 840  
11 F.3d at 1121-22. But the Ninth Circuit nevertheless concluded that the plaintiffs’ lawsuit was  
12 barred in federal court by the TIA. Thus, as in *Fredrickson*, the fact that the plaintiffs are  
13 challenging the defendants’ decisions to impose the mandatory resort fee and apply the Lodging  
14 Tax to the entire amount of that fee does not take their claims outside the TIA’s scope.

15 Finally, the plaintiffs argue that their suit is consistent with Clark County’s interpretation  
16 of the Lodging Tax, as Clark County identifies non-mandatory Internet access fees as non-taxable  
17 and has advised operators not to comingle taxable and non-taxable revenues in the same account.  
18 However, that involves disputes on the merits of whether the defendants are properly applying the  
19 Lodging Tax and whether their conduct violates the ITFA. Those are questions for the state court  
20 to resolve.

### 21 3. Plaintiffs Have a Plain, Speedy, and Efficient State Law Remedy

22 The TIA bars federal jurisdiction only if there is a “plain, speedy and efficient remedy” in  
23 the state courts. 28 U.S.C. § 1341. This exception to the TIA requires “a state-court remedy that  
24 meets certain minimal *procedural* criteria.” *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 512  
25 (1981) (emphasis in original). That requirement generally is satisfied if the state court remedy  
26 provides a “full hearing and judicial determination at which [the plaintiff] may raise any and all  
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1 constitutional objections to the tax,” and appeal through the state court system, with a final review  
2 in the Supreme Court of the United States. *Id.* at 514 (quotation omitted).

3 A state remedy is not plain “if there is uncertainty regarding its availability or effect.”  
4 *Ashton v. Cory*, 780 F.2d 816, 819 (9th Cir. 1986); *see also Franchise Tax Bd. of Cal. v. Alcan*  
5 *Aluminium Ltd.*, 493 U.S. 331, 340 (1990) (stating “a remedy that is uncertain or speculative is  
6 not adequate to bar federal jurisdiction”). Whether a state remedy is speedy “is a relative  
7 concept, intended to be evaluated against the time normally required for similar litigation.”  
8 *Ashton*, 780 F.2d at 821. The state remedy need not be “the most expeditious.” *Id.* To be  
9 efficient, the state court remedy must not impose “unusual hardship” or require “ineffectual  
10 activity or unnecessary expenditure of time and energy.” *Id.* Merely having to travel across state  
11 lines to challenge the tax does not make the state remedy inefficient. *Rosewell*, 450 U.S. at 517-  
12 18. Rather, there must be a showing that resort to the state remedy would, for example, “require a  
13 multiplicity of suits,” or “would allow a challenge against only one of many taxing authorities.”  
14 *Id.*

15 I must narrowly construe this exception to the TIA. *Grace Brethren Church*, 457 U.S. at  
16 413. The party seeking to avoid the TIA’s jurisdictional bar bears the burden of showing no  
17 plain, speedy, and efficient remedy exists in the state courts. *Franchise Tax Bd. of State of Cal. v.*  
18 *Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 20 n.21 (1983).

19 The defendants identify two potential state law remedies. First, the defendants suggest the  
20 plaintiffs could request a refund under the Clark County Code’s refund procedures. Alternatively,  
21 the defendants argue the plaintiffs could bring these same claims in state court. The plaintiffs  
22 assert they could not bring a refund claim because under the Code, only operators, who are the  
23 taxpayers, may assert a refund claim. They also appear to assert their claims would be rejected in  
24 state court because they are not the taxpayers, the operators are.

25 I need not address whether a guest could request a refund under the Clark County Code  
26 because the plaintiffs have a plain, speedy, and efficient remedy in Nevada’s state courts. The  
27 plaintiffs do not explain why they could not bring the exact same complaint against the  
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1 defendants in Nevada state court. Nor do they assert that the Nevada courts could not or would  
2 not hear and decide their federal claim. The Nevada courts provide a forum for a full judicial  
3 determination on the merits with appeal to the Supreme Court of Nevada, and review in the  
4 Supreme Court of the United States.

5 That remedy is plain, particularly given that all but one of the plaintiffs' claims in the  
6 complaint arise under Nevada state law. Although the plaintiffs suggest Nevada may not allow  
7 them to pursue their claims because they are not the taxpayer, they cite no law in support of that  
8 argument except for an unpublished decision from another state. The plaintiffs have not cited a  
9 case in which the Nevada courts refused to hear a claim similar to the plaintiffs' claims. They  
10 thus "have not given [me] any convincing reason to doubt that the [Nevada] courts will entertain"  
11 their claims, including the federal issue of whether the defendants' conduct violates the ITFA.  
12 *Alcan Aluminium Ltd.*, 493 U.S. at 341 (quotation omitted). The plaintiffs therefore have not met  
13 their burden of showing there is no plain remedy in state court. *See id.*

14 There is no indication that litigation in the Nevada state courts is substantially more  
15 protracted than in federal court, so that remedy is speedy. Finally, the remedy is efficient. The  
16 plaintiffs could file the same lawsuit in state court that they have filed in this court. Because the  
17 Lodging Tax is collected by operators in Clark County, there is only one taxing authority at issue  
18 and nothing about state law would require a multiplicity of suits. There have been multiple suits  
19 filed in this court raising the same issue but asserted against various resort hotels. But that is not  
20 because of some feature of the state court system that would render that remedy inefficient. The  
21 plaintiffs therefore have a plain, speedy, and efficient remedy in the Nevada state courts.

#### 22 4. Summary

23 The plaintiffs' suit is barred by the TIA because the plaintiffs' claims seek to restrain,  
24 enjoin, or suspend the assessment, levy, or collection of a local tax, and the plaintiffs have a plain,  
25 speedy, and efficient remedy in the Nevada state courts. I therefore must dismiss this case for  
26 lack of subject matter jurisdiction unless the ITFA is exempt from the TIA's reach.

27 ////

1                    5. ITFA is Not Exempted from TIA's Reach

2            Courts have found federal statutes are not exempt from the TIA's reach unless there is  
3    express language demonstrating Congress's intent to make an exception to the TIA. *See*  
4    *Blangeres v. Burlington N., Inc.*, 872 F.2d 327, 328 (9th Cir. 1989) (stating the court "will not  
5    carve out exceptions to the Tax Injunction Act unless Congress clearly expresses an intent to  
6    create an exception"); *Ashton*, 780 F.2d at 821-22 (declining to find that Employee Retirement  
7    Income Security Act was an implied exception to the TIA). Congress has demonstrated it knows  
8    how to create an exception to the TIA when it wants that result. *See* 49 U.S.C. § 11501(c)  
9    ("Notwithstanding section 1341 of title 28 . . . , a district court of the United States has  
10   jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to  
11   prevent a violation of subsection (b) of this section." (emphasis added)).

12           The plaintiffs contend that because Congress contemplated the effect a moratorium on  
13    taxing Internet access would have on state and local budgets when it enacted the ITFA, Congress  
14    intended ITFA to be an exception to the TIA. But Congress did not expressly exempt ITFA from  
15    the TIA.<sup>6</sup> The fact that Congress chose to exempt Internet access from state and local taxes does  
16    not mean it also intended that any challenges to a state or local tax under ITFA could be heard in  
17    federal court where a plain, speedy, and efficient remedy exists in the state courts.

18           Congress did not clearly exempt ITFA from the TIA. I therefore dismiss the plaintiffs'  
19    complaint for lack of subject matter jurisdiction.

20    *////*

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22           <sup>6</sup> The ITFA was enacted in 1998 on a temporary basis and set to expire after three years.  
23    Internet Tax Freedom Act § 1101(a), Pub. L. 105-277, div. C, tit. XI, 112 Stat. 2681-719 (1998).  
24    The ITFA was extended multiple times and then made permanent in 2016. Internet Tax  
25    Nondiscrimination Act, Pub. L. 107-75, § 2, 115 Stat. 703 (2001); Internet Tax  
26    Nondiscrimination Act, Pub. L. 108-435, 118 Stat. 2615 (2004); Internet Tax Freedom Act  
27    Amendments Act of 2007, Pub. L. 110-108, 121 Stat. 1024; Consolidated and Further Continuing  
28    Appropriations Act, 2015, Pub. L. 113-235, div. E, tit. VI, § 624, 128 Stat. 2377 (2014);  
Consolidated Appropriations Act, 2016, Pub. L. 114-113, div. E, tit. VI, § 633, 129 Stat. 2471  
(2015); Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. 114-125, tit. IX, § 922  
(2016). *See also* 47 U.S.C. § 151, note. None of these laws contains language exempting the  
ITFA from the TIA.

1           **B. Comity**

2           Even if I am incorrect about the TIA's application, I nevertheless would dismiss this case  
3 based on comity concerns. "The comity doctrine counsels lower federal courts to resist  
4 engagement in certain cases falling within their jurisdiction." *Levin v. Commerce Energy, Inc.*,  
5 560 U.S. 413, 421 (2010). "The doctrine reflects a proper respect for state functions, a  
6 recognition of the fact that the entire country is made up of a Union of separate state  
7 governments, and a continuance of the belief that the National Government will fare best if the  
8 States and their institutions are left free to perform their separate functions in separate ways." *Id.*  
9 (quotation omitted). The doctrine has "particular force" when a suit challenging a state tax is  
10 brought in federal court because "[i]t is upon taxation that the several States chiefly rely to obtain  
11 the means to carry on their respective governments, and it is of the utmost importance to all of  
12 them that the modes adopted to enforce the taxes levied should be interfered with as little as  
13 possible." *Id.* (quotation omitted). Thus, similar to the concerns that animate the TIA, comity  
14 dictates that federal court should be reluctant to adjudicate a suit that would stop the collection of  
15 state taxes where the challenging party's federal rights can be preserved through resort to a state  
16 remedy. *Id.*; *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 115-16 (1981).

17           For all of the reasons discussed with respect to the TIA, comity principles support  
18 declining to exercise jurisdiction in this case. Thus, even if the TIA did not bar the plaintiffs'  
19 claims in this court, comity and federalism concerns do. I therefore dismiss this case.

20           **III. CONCLUSION**

21           IT IS THEREFORE ORDERED that the defendants' motion to dismiss (**ECF No. 22**) is  
22 **GRANTED**. This case is dismissed for lack of subject matter jurisdiction and based on comity  
23 principles.

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IT IS FURTHER ORDERED that the motion to consolidate (ECF No. 6) is **DENIED** as  
**moot.**

DATED this 11th day of June, 2018.



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ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE