**IN THE SUPREME COURT**

**STATE OF ARIZONA**

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| S.W.A.T. TRAINING FACILITIES LLC, an Arizona limited liability company,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>ARIZONA DEPARTMENT OF REVENUE, an agency of the State of Arizona,<br><br>Defendant/Appellee. | Supreme Court<br>No. CV-21-0128-PR<br><br>Court of Appeals Division One<br>Case No. 1 CA-TX 20-0002<br><br>Maricopa County Superior Court<br>No. TX2018-000324 |

# BRIEF AMICUS CURIAE OF THE GOLDWATER INSTITUTE IN SUPPORT OF PETITION FOR REVIEW FILED WITH CONSENT OF ALL PARTIES

**Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE**
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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Constitutional Provisions



### Statutes

**Regulations**



**Other Authorities**

## INTEREST AND IDENTITY OF AMICUS

The Goldwater Institute is a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty and limited government. Among the Institute's priorities is a responsible, principled, and limited tax policy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute represents parties and participates as amicus curiae in this and other courts in cases involving those values. *See, e.g.*, *Fann, et al., v. State, et al.*, No. CV-21-0058-T/AP, Ariz. Sup. Ct. (filed Mar. 4, 2021) (pending); *Vangilder, et al. v. Dep't of Revenue, et al.*, No. CV-20-0040-PR, Ariz. Sup. Ct. (filed Feb. 13, 2020) (pending). Goldwater believes its policy expertise and experience will aid this Court in considering this petition.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly emphasized that tax laws should be strictly construed, and that courts should not "gather new objects of taxation" by "implication." *Wilderness World, Inc. v. Dep't of Revenue*, 182 Ariz. 196, 199 (1995); *accord*, *Ebasco Servs. Inc. v. Tax Comm'n*, 105 Ariz. 94, 97 (1969); *Ariz. Tax Comm'n v. Staggs Realty Corp.*, 85 Ariz. 294, 297 (1959). The court below did just the opposite, and—in an opinion strikingly short on analysis—concluded that Petitioner's shooting range is a place of "amusement" under A.R.S. Section 42-5073(A) because it "offers the same type or nature of activity as those provided

by" menageries, pool halls, boxing matches, tennis courts, etc. AA024 ¶ 14. But this interpretation of the statute crosses the line into the sort of reasoning–by–inference that this Court has warned against. It also ignores A.R.S. § 42-5073(A), which *expressly excludes* from taxation "private or group instructional activities" including, but not limited to, martial arts and aerobic instruction.

Indeed, the Court of Appeals never explained its understanding of the phrase "exhibition, amusement or entertainment" at all, and made no effort to distinguish between "entertainment" and "instructional activities." AA.022 ¶ 7. Instead of discerning the "common thread or purpose" that connects the examples in the Section 42-5073(A) list—which this Court said in *White v. Moore*, 46 Ariz. 48, 56 (1935), is the proper way to proceed in cases such as this—the lower court here proceeded as follows: it concluded that shooting at a range is a participatory activity and that people pay for admission, and therefore that shooting ranges are distinguishable from the services provided in *Wilderness World*. But even granting that, it does not show that shooting ranges are places of amusement. The same can be said for martial arts instruction or exercise classes. The court's logic is fallacious.

In fact, the record shows that Petitioners provide *instruction* instead—and as explained below (Section I), the Legislature expressly *removed* "instruction" from the taxable items in the statute almost 25 years ago, drawing a line between mere

entertainment (taxable) and establishments where people practice, train, or receive instruction (exempt). But the Court of Appeals failed to respect that line.

While many people no doubt enjoy going to the shooting range, it is not ordinarily seen as a place one resorts to for mere pleasure. Rather, the ordinary person regards shooting ranges as places to practice an important skill—just as they do for martial arts training. A firing range is therefore not only *not* a place of amusement under Section 42-5073(A), but is a place of for "private or group instructional activities," and thus exempt under Section 42-5073(A)(2). Indeed, a shooting range has far more in common with a martial arts dojo or a gymnasium, which the Legislature chose not to tax because they provide "instruction," than with any form of amusement or entertainment.

By failing to strictly construe a taxing statute, as this Court's precedents require, the decision below threatens the predictability of state tax law generally and contradicts the important state policy that taxes should be imposed only upon those things specifically and expressly contemplated by the people's representatives. The Court should grant review and reverse.

## ARGUMENT

### I. Petitioner's shooting range is a place of instruction and practice, not mere amusement.

The tax in Section 42-5073(A)(3) is designed to impose a levy on the business of providing "exhibition, amusement or entertainment." None of these

words encompass the type of supervised training and practice involved in the use of firearms at Petitioner's range. Except perhaps in special circumstances such as shooting competitions, a gun range is not a place of *exhibition*; indeed, the public is not normally allowed merely to observe at a shooting range. *Amusement* generally means "[t]he state or experience of finding something funny" or "[t]he provision or enjoyment of entertainment," or "[s]omething that causes laughter or provides entertainment," (*Amusement*, Oxford English Dictionary, Lexico) and *Black's Law Dictionary* 84 (6th ed. 1990) defines amusement as "[a] pleasurable occupation of the senses." While no doubt many Arizonans enjoy shooting at ranges, they would not typically regard it as falling within these definitions: on the contrary, they would consider the shooting range a serious place, where careful attention to rules and decorum are of the utmost importance.

As for *entertainment*, this has been defined synonymously with "amusement," as a place people resort to for "a pleasurable occupation of the senses," which again would not ordinarily include shooting ranges. *Young v. Bd. of Trustees of Broadwater Cnty. High Sch.*, 4 P.2d 725, 726 (Mont. 1931); *see also Stiska v. City of Chicago*, 90 N.E.2d 742, 745-46 (Ill. 1950) ("as 'amusement' is synonymous with diversion, entertainment, recreation, pastime and sport," whether it be "participative" or "exhibitive."); *In re City of Enid*, 158 P.2d 348, 352 (Okla. 1945) ("Although the words 'amusement' and 'recreation' are not identical in

meaning, they are synonymous when related to the passing of time in pleasant or agreeable occupations.").

Instead, a gun range is typically a place to practice and to maintain proficiency in a difficult, potentially dangerous skill. It is the responsibility of all gun owners to maintain their skill with, and knowledge of, firearms, and this requires regular exercise. *See* John Cashin, *Handguns: Safety, Selection, and Use* 14 (2014) ("you can't just purchase the weapon and keep it in a drawer by your bed until you need it. You have a responsibility to practice..."); *cf.* *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (citizens have "the right to maintain proficiency in firearm use, [which is] an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.").

Police departments in Arizona require officers to demonstrate their proficiency with firearms every year, *see* Ariz. Admin. Code R13-4-111(C), and members of the military must also maintain proficiency with firearms. *See* Department of Defense Directive 4210.56 § 3.2 (2020). Petitioners serve federal agencies and police departments for this purpose. AA030 ¶ 4. Also, the Arizona Constitution provides that all capable citizens of the state between the ages of 18 and 45 are considered members of the state militia. *See* Ariz. Const. art. XVI § 1. It is arguable, therefore, that *all* such citizens who own firearms have an *obligation* to practice thier safe use. *See, e.g.*, Saul Cornell & Nathan DeDino, *A Well*

*Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 508–10 (2004) (describing colonial-era laws that required able-bodied citizens to possess firearms and regularly drill with them).

Far from being places of entertainment, gun ranges are places of *instruction*. "Instruct" means the conveyance of information, the imparting of knowledge, and the furnishing of authoritative directives. *Pontiac Sch. Dist. v. Pontiac Educ. Ass'n*, 811 N.W.2d 64, 69 (Mich. App. 2012). There is no dispute that Petitioner provides this service to the great majority of its customers. AA032 ¶ 30, AA033–34 ¶¶41-50.

The distinction between entertainment and instruction is not only relevant, but should have been dispositive in this case, because the Legislature has distinguished between places of amusement and places of instruction, for purposes of tax law.[1]

[1] In its briefing before the Court of Appeals, the Department of Revenue attempted to distinguish between amusement and "education," arguing that only part of Petitioner's business qualifies as educational, and that only that portion could claim exemption. Whatever the merits of this more nuanced argument, nothing like it appears in the Court of Appeals' opinion, which makes no reference to either instruction or education. The Department's argument, however, is unpersuasive, given that instruction is inextricable from all of Petitioner's services. The Department's effort to distinguish "classes" which provide education from range time which does not, finds no foundation in the statute, which contemplates "instruction" as including things such as martial arts or aerobics businesses—where, indeed, customers are allowed to use the facilities *either* independently under supervision, *or* in a traditional "classroom" manner.

At one time, the statute at issue here taxed both "amusement" and "instruction." That was the situation when the *Wilderness World* lawsuit was initiated; Section 42-1310.13 (1993)[2] taxed "any … business charging admission or user fees for exhibition, amusement, *or instruction*." (emphasis added). That had been the statute's wording since the Transaction Privilege Tax was first adopted in 1935. *See* 1935 Arizona Session Laws Ch. 77, § 2(f)(1), p. 319. But in March 1994, only months after the Court of Appeals concluded in *Wilderness World* that rafting trips led by a guide did not fall within the statute, 180 Ariz. 155, 157–58 (App. 1993), the Legislature adopted HB 2273 (1994),[3] which amended the statute by striking out the word "instruction," and substituting the word "entertainment." It also added an exemption for "private or group instructional activities," which was defined to include "performing arts, gymnastics, and aerobic instruction." That remains the text of the statute today, except that the Legislature later added "martial arts" to its list of examples of exempt places of instruction. *See* A.R.S. § 42-5073(A).

The Legislative Fact Sheet for HB 2273 (1994) makes the Legislature's intention clear. It informed lawmakers that "[t]his legislation excludes instructional activities and health and fitness establishment and private recreational

[2] Originally A.R.S. § 42-1314(A)(1), the statute had been renumbered as A.R.S. § 42–1310.13, and was later again renumbered as A.R.S. § 42-5073.
[3] 1994 Arizona Session Laws, Ch. 312, § 1, p. 1789.

facility membership fees from transaction privilege taxation under the amusement classification."[4]

In other words, the Legislature in 1994 acknowledged the distinction between instruction and amusement that the Court of Appeals drew in *Wilderness World*—and which this Court affirmed in its *Wilderness World* opinion[5]—and expressly chose to *eliminate* taxes on places of "instruction," which it defined as including places of personal training such as gyms. This choice to replace the word "instruction" with "entertainment" makes clear that the current version of Section 42-5073(A) contemplates a qualitative distinction between "instruction" and "entertainment"—one the Court of Appeals failed to heed in this case.

That is significant because firing ranges like Shooter's World are closely analogous to aerobics classes or martial arts dojos. These are all places people go to practice skills—including self-defense skills—under the supervision of trained experts, although they can also use the facilities for private practice in accordance with safety guidelines promulgated by the owners. Customers can and often do bring their own equipment to these places. Notwithstanding the fact that many

[4] Arizona State Senate Fact Sheet, HB 2273 (Apr. 27, 1994), attached as Appendix A.

[5] This Court did not rely on the amended version of the statute when it rendered its *Wilderness World* opinion, of course, since that case was governed by the earlier version of the statute. *See* 182 Ariz. at 198 (quoting the pre-1994 version of the statute with the word "instruction" still in it).

people find martial arts practice or aerobics classes enjoyable, such businesses are places of "instruction," not "amusement." The same is true of firing ranges.

But the decision below never examined what "instruction" means, or addressed the exemption for places of instruction. On the contrary, its reasoning would appear to sweep these gyms, martial arts studios, as well as yoga or dance studios, *into* the amusement classification, since they, too, charge fees for the use of their facilities, and they, too, provide the kinds of "supervision and safety measures" that the Court of Appeals found insufficient to escape the amusement classification. AA024 ¶ 14. This was plainly erroneous.

## II. The Court of Appeals erred in failing to apply a strict construction.

This Court has said repeatedly that tax laws must be construed narrowly, and that courts should not expand their reach by implication. *Staggs Realty Corp.*, 85 Ariz. at 297 (citing cases). The decision below did just the opposite, and concluded based on inference that Petitioner's shooting range is a place of amusement even though it does not fall within either the ordinary meaning of the word "amusement" or the list of examples included in the statute.

The Court of Appeals' explanation of its reasoning was remarkably cursory. At no time did it define the word "amusement," and it cited no dictionary definition, despite acknowledging that courts should "give words their plain and ordinary meaning." AA022 ¶ 8. It did not even acknowledge that, after

*Wilderness World*, the Legislature expressly chose to narrow the scope of the tax even further. It spent several paragraphs concluding that the shooting range is unlike the river-rafting excursion at issue in *Wilderness World*, AA023-AA024 ¶¶ 9-13, and then concluded without further elaboration that a shooting range is therefore of "the same type or nature of activity as those provided by the businesses specifically enumerated" in the statute. *Id.* ¶ 14.

This is fallacious reasoning. Specifically, it commits the fallacy of negative premises, which takes the form "X is not Y, Y is not Z, therefore X is Z." *Cf.* *United States v. Turrieta*, 875 F.3d 1340, 1344 (10th Cir. 2017) (explaining the fallacy); *see also* Ruggero Aldisert, *Logic for Lawyers* 156–57 (1989). Here, the Court of Appeals reasoned that (a) the rafting excursion in *Wilderness World* was not an "amusement," and (b) Shooter's World is not like the rafting excursion in *Wilderness World*, so (c) therefore Shooter's World is an "amusement." But that draws an affirmative conclusion from two negative premises, which is logically invalid, and without more, such reasoning fails to prove that shooting ranges are places of amusement.

Laying aside the Court of Appeals' rejection of the argument that Shooter's World is like *Wilderness World*, the entirety of the panel's reasoning is contained in paragraphs 13 and 14—which assert that Petitioner's safety and instruction policies are comparable to the supervision and safety measures undertaken at an

amusement park, and that Shooter's World is therefore of "the same type or nature of activity" as theaters, carnivals, dance halls, etc. AA024. But, even aside from ignoring the instruction/amusement distinction noted above, this analysis stretches the reach of the statute by implication, which courts are not supposed to do.

The reason this Court has repeatedly emphasized the need for strict construction of tax statutes is that taxation is a coercive power which, although constitutionally legitimate, is potentially dangerous to the livelihoods and financial well-being of the people, and should therefore be kept carefully within the bounds of legislative authorization. That is why this Court said in *Alvord v. State Tax Comm'n*, 69 Ariz. 287, 291 (1950), that "[t]axing statutes are not and should not be extended to embrace objects bearing the burden of taxation by a strained construction or implication. Matters or persons upon whom these burdens are placed should be pointed out with reasonable clarity and not left to the realm of speculation." (Citation omitted). People should be able to know beforehand what their tax liabilities will be and why, so that they can plan their finances and behaviors accordingly.

*Alvord*, in fact, is highly instructive here. The question in that case was whether owners of agricultural lands and dwelling houses who rented out these properties were subject to a tax that applied to businesses "charging storage fees or rents," such as hotels, resorts, apartment houses, and parking lots. *Id.* at 289.

Fifteen years previously, the *Moore* Court had ruled that this did not authorize a tax on renting property for retail or office use, reasoning that "the Legislature had in mind occupations through which runs a common thread or purpose," namely, "furnishing accommodations for tourists, either living quarters for themselves or storage for their cars." 46 Ariz. at 56–57. This, *Moore* said, does not include retail or office space which are not intended for transient use.

Then, after *Moore* was decided, the Legislature added office buildings to the list of taxable items, so that the *Alvord* Court was asked to determine whether "the [legislature's] destruction of [the] 'thread of common purpose'" that *Moore* had identified meant that the statute now authorized a tax on the rentals of "farms, dwelling houses, store rooms and so forth." 69 Ariz. at 291. The Department of Revenue argued yes, relying on the *ejusdem generis* principle. But this Court said no.

Adding office buildings to the statute after *Moore* had no further legal consequence than to authorize the taxation specifically of office buildings; it left the rest of the *Moore* decision intact. "The courts will not strain, stretch and struggle to uncover hidden taxable items," the Court said. "It is for the Legislature to expose them so the administrators of the law can proceed to gather the revenue without confusion and with reasonable certainty. … The designation of taxable objects must be accomplished in some more substantial manner than the mere

severance of a thread of common purpose. Such is not the proper way to impose the burden of taxation." *Id.* at 292.

Here, shooting ranges do not fall within the "thread of common purpose" described in the statute. That thread consists of places of *amusement or entertainment*—that is, places to which people resort not for purposes of training, practice, industry, or self-improvement, but for relaxation, socializing, diversion, and the pleasurable occupation of the senses. This primarily includes spectator events and participatory games—and it does not include places of study, learning, training, or drill. Thus under the reasoning of *Moore* and *Alvord*, Petitioners should have prevailed.

Yet the Court of Appeals never attempted to discern the "thread of common purpose" between the examples in Section 42-5073(A), which all fall into the categories of *spectacles for amusement* (theaters, movies, operas, exhibitions, wrestling matches etc.), *participatory socializing* (dance halls, public dances), *carnivals* (fairs, amusement parks, circuses), or *games* (races, contests, tennis courts, bowling alleys).[6] The common purpose of these items is *amusement or entertainment*, in contrast to *instruction*, which is the acquisition or maintenance of skill, ability, or knowledge. Instead of applying the reasoning endorsed in *Moore*,

[6] A game is a goal-directed activity in which the rules require the attaining of that goal by inefficient means. *See* Bernard Suits, *The Grasshopper: Games, Life, and Utopia* 34 (1978). Shooting at a shooting range is not a game.

the Court of Appeals inferred from the statute and expanded its reach to encompass matters not plainly included within its ambit—in violation of basic principles of legal reasoning. That was reversible error.

## CONCLUSION

The Petition should be *granted*.

**Respectfully submitted this 15th day of July 2021 by**:

/s/ *Timothy Sandefur*
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**GOLDWATER INSTITUTE**

# APPENDIX

[ ] For Committee on FIN

For Caucus & Floor Action [ ]

As passed by the Senate [XX]

# *ARIZONA STATE SENATE*

*Phoenix, Arizona*

## *FINAL REVISED*

FACT SHEET FOR H.B. 2273

amusement sales tax classification; instruction

Purpose

Excludes private or group instructional activities and health and fitness establishment and private recreational facility membership fees from transaction privilege taxation under the amusement classification. Also, authorizes refunds for transaction privilege and use taxes paid on tangible personal property installed in a health care facility and retroactively extends from 1986 to 1982 the commercial lease exemption for leases and subleases of real property used by licensed nursing care institutions.

Background

The amusement classification includes businesses such as theaters, concerts, amusement parks, tennis courts, sports events or any other business charging admission or user fees for exhibition, amusement, entertainment or instruction.

According to the Department of Revenue (DOR), instructional activities such as aerobics, martial arts, performing arts and gymnastics are also currently subject to transaction privilege tax under the amusement classification. When DOR undertook a recent audit program on health and fitness and instructional facilities and other related businesses, it found that compliance was not universal; some businesses had paid the taxes, while many had not. As a result of the audits, DOR began assessing penalties and interest on those businesses that were found to be in noncompliance.

This legislation excludes instructional activities and health and fitness establishment and private recreational facility membership fees from transaction privilege taxation under the amusement classification, and provides for the refund of instructional activity taxes, penalties and interest paid since December 31, 1987. JLBC staff estimates general fund losses of $800,000 in FY 1994-1995 and $840,000 in FY 1995-1996 as a result of exempting instructional facilities and health and fitness establishment and private recreational facility membership fees from transaction privilege taxation.

This legislation also authorizes refunds for transaction privilege and use taxes paid on tangible personal property installed in a health care facility by a prime contractor.

Community health centers are non-profit, community-based, primary care health clinics. Community health centers are generally either the sole provider of primary care in a community or are located in medically underserved areas. These centers are governed by a community-based board of directors.

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1993 legislation, exempted from transaction privilege and use taxation, tangible personal property sold to qualifying community health centers. The legislation was retroactive to 1/1/91 to include five building projects already in progress.

Under Department of Revenue administrative rules, a qualifying community center must designate a contractor as a 'purchasing agent' to qualify for the transaction privilege and use tax exemption. The 1993 exemption was retroactive to include building projects already in progress, however those projects were initiated prior to the designated 'purchasing agent' requirement. As a result, the building projects for which the act was made retroactive, were unable to receive a refund of transaction privilege and use taxes paid.

This legislation exempts from transaction privilege and use taxation prime contractors entering into contracts with community health centers prior to the purchasing agent rule, adopted by the Department of Revenue. In 1993, the Association of Community Health Centers estimated that the transaction privilege and use tax refunds due to three of the five building projects already in progress amounted to $175,000. The amount of refunds for the other two projects could not be determined.

Finally, 1993 legislation exempted leases and subleases of real property used by licensed nursing care institutions from commercial lease taxation. The 1993 legislation was made retroactive to January 1, 1986. Some leases, however, dated further back than 1986. This legislation therefore extends the retroactivity of the 1993 legislation back to 1982 in order to include those older leases in the exemption. The industry estimates there will be no additional fiscal impact as a result of extending the exemption back to 1982.

Provisions

- Retroactive to taxable periods beginning January 1, 1988, exempts private or group instructional activities from transaction privilege taxation under the amusement classification.
- Requires persons engaged in both taxable amusement activities and instructional activities to keep separate accounting records for each type of activity, to receive the exemption for instructional activities.
- Provides for refunds of any tax, penalty and interest paid between January 1, 1988, and July 17, 1994 on income from private or group instructional activities.
- Exempts, from transaction privilege taxation under the amusement classification, gross income of health and fitness establishments and private recreational facilities derived from memberships and initiation fees to use the establishment or facility. Specifies income from sources other than memberships and initiation fees is not exempt from transaction privilege taxation.

- Retroactive to 1982, exempts from the commercial lease classification of the state transaction privilege tax, leases and subleases of real property used by licensed nursing care institutions and prohibits refunds of taxes, penalties and interest paid unless the taxpayer requesting the refund provides proof that the taxes paid will be returned to the residents of the nursing care institution.

- Provides a transaction privilege and use tax exemption for tangible personal property installed in a health care facility between 12/31/90 and 12/31/93, irrespective of whether the contracting community health center had designated the contractor as a purchasing agent.

- Requires a prime contractor to submit a claim on or before June 30, 1995, in order to receive a refund of transaction privilege and use taxes paid, on property installed in a health care facility, between 12/31/90 and 12/31/93.

- Requires a prime contractor to prove that refunds will be remitted to the contracting community health center in order for the contractor to receive the refund.

- Specifies that refunds associated with property installed in a health care facility will be paid by the Department of Revenue from and after June 30, 1995.

- Defines terms.

- Makes technical and conforming changes.

Amendments Adopted by Committee

- Exempts, from transaction privilege taxation under the amusement classification, admissions to an amusement park or entertainment facility located on property owned by a political subdivision which requires payment of a percentage of the park's gross receipts.

Amendments Adopted by Committee of the Whole

- Limits the amusement park or entertainment facility transaction privilege tax exemption to nonathletic facilities located on county-owned property.

Amendments Adopted by Conference Committee

- Exempts health and fitness establishment and private recreational facility membership fees from transaction privilege taxation under the amusement classification.

- Extends, from 1986 to 1982, the retroactive application of 1993 legislation exempting leases and subleases of real property used by licensed nursing care institutions from commercial lease taxation.

- O V E R -

- Authorizes refunds for transaction privilege and use taxes paid on tangible personal property installed in a health care facility by a prime contractor between 12/31/90 and 12/31/93.

- Eliminates the Finance Committee amendment authorizing an exemption from transaction privilege taxation under the amusement classification for an amusement park or entertainment facility, located on county-owned property, that is required to remit a percentage of gross receipts to the county.

House Action

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| WAYS AND MEANS | DPA | 10-0-0-1-0 |
| THIRD READ | DPA | 59-0-1-0 |
| FINAL READ | DPA | 54-0-4-2 |

Senate Action

| | | |
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| FIN | DPA | 9-0-0 |
| 3RD READ | DPA | 30-0-0-0 |
| FINAL READ | DPA | 27-1-2-0 |

CHAPTER 312

Prepared by Senate Staff
April 27, 1994