



100 Westminster Street, Suite 1500
Providence, RI 02903

p: 401-274-2000 f: 401-277-9600
hinckleyallen.com

TO: Senator Louis P. DiPalma, Chair, Senate Finance Committee
Members of the Senate Finance Committee

Representative Marvin L. Abney, Chair, House Finance Committee
Members of the House Finance Committee

FROM: Gerald J. Petros, Esq., Christine E. Dieter, Esq., Hinckley Allen

RE: Proposed Legislation: H 8132 and S 3022

DATE: May 8, 2024

Introduction

The Preservation Society of Newport County asked Hinckley Allen to analyze the constitutionality of recently introduced legislation, H 8132 and S 3022 (together the Ticket Tax Bill). The Ticket Tax Bill would amend General Laws Chapter 45-2 by adding a new section entitled "45-2-68. City of Newport – Amusement excise tax." The Ticket Tax Bill would permit the City of Newport to enact a nine percent "amusement excise tax" on any entity that sold over 100,000 tickets in the year prior to the imposition of the amusement tax. Because of certain express exclusions and the steep threshold for ticket sales, the Ticket Tax Bill will tax only the Preservation Society of Newport County.

By selectively taxing the Preservation Society and its patrons in an arbitrary manner, the Ticket Tax Bill violates the Equal Protection Clauses of both the Rhode Island and the United States Constitutions. In singling out the Preservation Society and its patrons for selective tax assessment, the bill also constitutes an unlawful bill of attainder in violation of Article I, § 10 of the United States Constitution. Finally, the bill violates the Privileges and Immunities Clause of the United States Constitution by discriminating against out-of-state residents.

Overview of H 8132 and S 3022

Representatives Lauren Carson (Newport) and Marvin Abney (Newport and Middletown) introduced H 8132 in the House of Representatives on April 3, 2024. Senators Dawn Euer (Newport, Jamestown) and Louis DiPalma (Little Compton, Middletown, Newport, Tiverton) introduced an identical, companion bill S 3022 to the Senate on May 2, 2024. The Ticket Tax Bill would add a new Section 68 to Chapter 45-2 of the General Laws entitled "City of Newport – Amusement excise tax."

I. The Ticket Tax Bill Excludes All “Amusement Events” that Occur in Newport Except for Events Sponsored by the Preservation Society.

The Ticket Tax Bill purports to authorize the City of Newport to enact a nine percent “amusement excise tax” on the purchase of “any ticket or admission fee by the patrons of any amusement event held by any entity in the city with ticket sales of over one hundred thousand (100,000) tickets in the year prior to the imposition of the amusement tax.” The Ticket Tax Bill would require the City of Newport to allocate the resulting funds “for public infrastructure and public safety improvements only.”

The Ticket Tax Bill defines “amusement event” broadly to include “[a]ny activity where a ticket or admission fee is charged for an activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose including, but not limited to, any concert, game, ride, or sporting event.” Despite this broad definition, the Ticket Tax Bill expressly excludes theater ticket sales, movie theater ticket sales, and any entity that sold less than 100,000 tickets in the year prior to the imposition of the tax.

Because of these exclusions and the 100,000 ticket-sales threshold, the tax applies only to the Preservation Society. The amusement excise tax will not apply to the following events that clearly meet the definition of “amusement event”:

- Theater and movie theater tickets (expressly excluded);
- Newport Folk Festival (approximately 10,000 tickets per day over a 3-day weekend);
- Newport Jazz Festival (approximately 10,000 tickets per day over a 3-day weekend);
- Newport International Boat Show (approximately 40,000 tickets over four days);
- New York Yacht Club Transatlantic Race 2025;
- International Tennis Hall of Fame; and
- Golf Tournaments held in Newport, including the U.S. Senior Open Championship, scheduled in June 2024.

II. The City Resolution Unfairly and Improperly Targets the Preservation Society.

Newport City Council member Mark Aramli introduced a city resolution requesting the Rhode Island General Assembly to enact the Ticket Tax Bill. The City Council discussed the resolution at its regular February 28, 2024 meeting. (video of the meeting is available at [Newport City Council Regular Meeting \(granicus.com\)](https://www.granicus.com/publicPage.asp?id=1000000)). According to the Councilor:

- the intent of the Ticket Tax Bill is “to tax the visitors, and not the locals,” “folks that don’t live here, and that visit us”;
- the Ticket Tax Bill targets “high-impact tourism entities”; and
- the Ticket Tax Bill was “surgically oriented towards visitors and not locals.”

This logic obviously applies to many of the amusement events identified above and many others not identified, and yet the Council exempted those events from the tax by imposing a 100,000-ticket threshold. The Council could identify only the Preservation Society as “clearly qualifying” under the Ticket Tax Bill because only the Preservation Society sells more than 100,000 tickets

per year.¹ The Council acknowledged that the Ticket Tax Bill would not apply to Newport entertainment events selling tens of thousands of tickets, including the International Boat Show, the Tennis Hall of Fame and the United States Senior Open Golf Championship at the Newport Country Club. Thus, the Council meeting demonstrates that the Ticket Tax Bill targets and applies only to the Preservation Society. At least two Council members voted against the resolution because they found the proposed law unfair in targeting a single entity.

Legal Analysis

The enactment of the Ticket Tax Bill would constitute an unconstitutional application of the Rhode Island General Assembly's taxation authority under both the Rhode Island and United States Constitutions. First, the Ticket Tax Bill violates the Equal Protection Clauses of both constitutions by singling out the Preservation Society and its patrons for selective tax treatment in an arbitrary and capricious manner untethered from a legitimate state purpose. Second, the Ticket Tax Bill constitutes an unlawful bill of attainder in violation of the United States Constitution by singling out the Preservation Society and its patrons for negative burdens based on the Preservation Society's historical level of ticket sales. Finally, the Ticket Tax Bill's history, as evidenced in the Council meeting and the Ticket Tax Bill's express exclusions, reveal an impermissible bias against out-of-state residents based solely on their out-of-state status. Such bias violates the Privileges and Immunities Clause and the dormant Commerce Clause of the United States Constitution. For these reasons, Rhode Island Courts would sustain a constitutional challenge to the Ticket Tax Bill if enacted by the General Assembly.

I. The Ticket Tax Bill Violates the Equal Protection Clause of the Rhode Island Constitution and the Fourteenth Amendment of the United States Constitution.

The Rhode Island Constitution states that, "All laws . . . should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens." R.I. Const. Art. 1, § 2. It further provides that no person shall be denied equal protection of the laws. *Id.* The U.S. Constitution likewise provides that "No State" shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. Our Supreme Court has stated that the Fourteenth Amendment of the U.S. Constitution and Article I, § 2 of the Rhode Island Constitution provide for similar protections and therefore may be analyzed together. *See R.I. Insurers' Insolvency Fund v. Leviton Mfg. Co., Inc.* 716 A.2d 730, 734 (R.I. 1998); *R.I. Depositors Economic Protection Corp. v. Brown*, 659 A.2d 95, 100 (R.I. 1995).

Classification for taxation purposes must have "a reasonable relation to a legitimate end of governmental action." *Opinion to the Governor*, 170 A.2d 908, 911 (R.I. 1961). The legislature's power "to classify persons and property for the purpose of taxation, and to impose different burdens upon different classes" applies only so long as "such classification is not unreasonable nor arbitrary, but is based upon differences indicating a reasonable and just relation to the act in

¹ The Council also exempted movie theatres that also (1) include many out-of-towners and (2) sell more than 100,000 tickets per year.

respect to which the classification is proposed.” *Manufacturers’ Mut. Ins. Co. v. Clarke*, 103 A. 931, 933 (R.I. 1918).

“[S]elective assessments are generally held unlawful as discriminatory against the complaining taxpayer.” *Capital Props. v. State*, 749 A.2d 1069, 1084 (R.I. 1999). For example, in *Capital Properties v. State*, 749 A.2d 1069 (R.I. 1999), our Supreme Court rejected the City of Providence’s attempt to reassess only Capital Properties’ parcels as “selective, arbitrary, and illegal” and not “part of a definite and logical plan for all properties in the City.” *Id.* at 1085-86 (internal citations and quotation marks omitted) (emphasis added); see also *Picerne v. DiPrete*, 428 A.2d 1074, 1078 (R.I. 1981) (holding that tax authorities “act[ed] out of improper or discriminatory motives” by selectively revaluing a handful of properties to meet city revenue targets); *Picerne v. DiPrete*, 542 A.2d 1101, 1105 (R.I. 1988) (“Reevaluations must be carried out in an acceptable and orderly manner, and selective assessments are generally held to be unlawful as discriminatory.”).

Similarly, in *Rhode Island Depositors Economic Protection Corp. v. Brown*, 659 A.2d 95 (R.I. 1995), the Rhode Island Supreme Court required that the Depositors Economic Protection Corporation Act have “a rational relationship” to “legitimate state purposes,” or that “the Legislature could rationally conclude that [the Act] would effectuate a resolution to a legitimate problem.” *Id.* at 101 (emphasis and internal quotation marks omitted). The court applied a similar standard in *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983), which invalidated a statute relating to medical malpractice litigation on equal protection grounds. *Id.* at 93 (“In the absence of an identifiable legitimate governmental interest, these class distinctions [between medical malpractice plaintiffs and nonmedical tort plaintiffs] constitute a patent violation of one of the most fundamental tenets of equal protection, namely, that persons similarly situated shall be treated in a like manner.”).

The Ticket Tax Bill does not pass constitutional muster for many reasons.

A. The Ticket Tax Bill’s Selective Targeting of the Preservation Society Constitutes Per Se Evidence of a Constitutional Violation.

First, the Ticket Tax Bill is selective on its face. The Ticket Tax Bill might just as well authorize Newport to assess an excise tax on the Preservation Society and only the Preservation Society, because that is the practical impact of the Ticket Tax Bill. Indeed, the chief drafter and sponsor of the Ticket Tax Bill could not identify any other entity required to pay the excise tax, not one. Our Supreme Court’s rulings in *Capital Properties* and *Picerne* hold that “selective assessments are generally held unlawful.” *Capital Props.*, 749 A.2d at 1084. The facts demonstrate that the Ticket Tax Bill is not merely selective, but targets a single taxpayer for disparate treatment. That the Preservation Society is the only entity subject to the amusement excise tax is per se evidence that the Ticket Tax Bill is selective, arbitrary, and capricious. No rational person crafting a tax designed to target out-of-town visitors purchasing entertainment tickets in Newport would logically exclude *every other* business or entity selling entertainment tickets except for the Preservation Society. This is particularly so where Newport has so many events yielding tens of thousands of ticket sales each year.

B. Specifically Targeting the Preservation Society Bears No Rational Relationship to the Ticket Tax Bill's Stated Purpose or Intended Function.

Second, the Ticket Tax Bill provides no justification for targeting the Preservation Society, a single taxpayer. The Ticket Tax Bill taxes "amusement events," defined as "*any activity where a ticket or admission fee is charged for an activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose including, but not limited to, any concert, game, ride, or sporting event.*" (emphasis added) The Ticket Tax Bill provides no justification for taxing only one of many thousands of amusement events that occur in Newport each year. The City Council declared its intent to tax amusement events to generate revenue from out-of-towners to fund infrastructure needs. This purpose is evident not only in the explicit comments during the Newport City Council meeting, but also in the exclusion of theaters and movie theaters from the tax because, as one Councilor said, "that's where locals go." The rationale for the amusement excise tax is that these visitors do not pay property taxes or other local taxes, but they do use and degrade the roads, bridges, and other local infrastructure, and they benefit from public services including police and fire.

Nevertheless, this stated goal or purpose is not rationally related to the Ticket Tax Bill's impact in targeting the Preservation Society. Out-of-towners attend thousands of entertainment events in Newport each year. In addition to the larger events noted earlier, every concert or event in Newport that sells tickets or imposes a cover charge is an amusement event, and virtually all of these events include out-of-towners. Neither the Ticket Tax Bill nor the stated purpose justify targeting only the Preservation Society to support infrastructure projects. Out-of-towners dominate ticket sales for the Newport Folk Festival, Newport Jazz Festival, Newport International Boat Show and the International Tennis Hall of Fame. Further, many of these events place an even greater strain – or "high impact" – on Newport's public infrastructure and safety services, as they bring tens of thousands of tourists to Newport in a single weekend. By contrast, the Preservation Society's ticket sales to visit the museums they manage are spread more evenly over the entire year. Far from "surgically" targeting visitors to Newport, the Ticket Tax Bill is demonstrably irrational and "surgically" targets only the Preservation Society. Targeting the Preservation Society is arbitrary, capricious, and unreasonable.

C. The Ticket Tax Bill's Express Exclusions Have No Rational Relationship to its Stated Purpose and Provide Additional Evidence of Unequal Treatment.

Third, the exclusions further support the conclusion that the Ticket Tax Bill unreasonably targets the Preservation Society. The 100,000-ticket threshold is inherently unreasonable – why not tax an entity that sells 50,000 tickets? Or 20,000 tickets? The nine percent tax applies to each ticket, so each patron bears the same burden. There is no reason not to spread the burden out more evenly among visitors. The 100,000-ticket threshold has no rational justification. The *only* purpose it serves is to exclude every amusement event except those hosted by the Preservation Society. The City Council also excluded movie or theater tickets because it "assumed" that only locals go there. That assumption is plainly wrong. Further, if the Council wanted to exclude any entity that sold tickets to both Newport residents and out-of-towners, the Preservation Society can defeat the tax by setting at least a nominal ticket price for Newport residents.

In sum, the Ticket Tax Bill is “selective, arbitrary, and illegal” as established by Rhode Island Supreme Court precedent. It applies to and targets only one taxpayer – it could not be more selective. Targeting the Preservation Society is not rationally related to the Ticket Tax Bill’s purpose. And its express restrictions and exclusions on the application of the amusement excise tax conflict with the Ticket Tax Bill’s stated purpose. The Ticket Tax Bill’s differential treatment of taxpayers is manifest and entirely unjustified.

For these reasons, the Ticket Tax Bill does not bear a rational relation to a legitimate state goal. It therefore violates the Equal Protection Clauses of the Rhode Island Constitution and United States Constitution.

II. The Ticket Tax Constitutes an Unlawful Bill of Attainder.

Article I, Section 10 of the United States Constitution prohibits states from “pass[ing] any Bill of Attainder.” U.S. Const. Art. I, § 10. To constitute a bill of attainder, legislation must single out an individual or identifiable group and impose a punitive burden based on the entity’s past conduct. *Ernst & Young v. Depositors Economic Protection Corp.*, 862 F. Supp. 709, 716, (D.R.I. 1994).

The punitive burden imposed by a bill need not fall within the historical definition of “legislative punishment.” *Ernst & Young*, 862 F. Supp. at 716. A bill may impose a punitive burden where the nature of the burden cannot “reasonably” “be said to further nonpunitive legislative purposes.” *Id.* (quoting *Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984)). Likewise, “whether the legislative record evinces a congressional intent to punish” also affects the assessment of the punitive burden imposed. *Id.* For example, following the home mortgage crisis of 2008, the U.S. Congress considered passing legislation that would have taxed bonuses paid to executives of financial institutions that received funds under the Troubled Asset Relief Program of the Emergency Economic Stabilization Act of 2008. One such bill would have taxed these bonuses at a rate of 90 percent, while another would have created an excise tax equal to 35 percent of the bonus on both the employee and the institution. These bills raised concerns that they constituted unlawful bills of attainder. *See also Consolidated Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 353-54 (2d Cir. 2002) (invalidating as unlawful bill of attainder law that prevented Con Edison from passing through to ratepayers costs related to a power outage that the legislature determined resulted from Con Edison’s failure to exercise reasonable care).

The Ticket Tax Bill meets the criteria for a bill of attainder. First, the Ticket Tax Bill specifically singles out the Preservation Society. The drafters admitted as much. The criteria in the Ticket Tax Bill target the Preservation Society and purposefully exclude all other potential taxpayers. This specific targeting satisfies the first element of a bill of attainder. *See, e.g., United States v. Lovett*, 328 U.S. 303, 317 (1946) (invalidating as bill of attainder appropriation bill that cut off federal salaries of three named individuals thought to be associated with the Communist Party); *In re Advisory Opinion (Chief Justice)*, 507 A.2d 1316, 1327 (R.I. 1986) (“[T]he limitation of the attainder clause would, in our judgment, completely preclude the passage of any resolution purporting to remove the Chief Justice or any justice of this court in a context in which such removal would be construed as punishment for past misconduct.”).

Second, the Ticket Tax Bill imposes a special burden on the Preservation Society based on its historical levels of ticket sales. The Preservation Society has no opportunity to change its conduct (i.e., sell fewer tickets) to avoid falling within the amusement excise tax – nor would this be at all logical given the Preservation Society’s mission to promote appreciation of historical preservation through its house museums and landscapes, and the City of Newport’s reliance on tourism to bolster the local economy. Because the Ticket Tax Bill proposes to implement the amusement excise tax in such an arbitrary manner it fails to evidence a nonpunative legislative purpose. Instead, it imposes a punitive burden on the Preservation Society. The constitutional prohibition on bills of attainder exists to prevent this type of legislative motive. For these reasons, the Ticket Tax Bill constitutes an unlawful bill of attainder.

III. The Ticket Tax Bill Violates the Privileges and Immunities Clause and the Dormant Commerce Clause of the United States Constitution.

The Privileges and Immunities Clause provides that, “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. Art. IV, § 2. The “fundamental purpose” of this clause is “to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.” *Seibert v. Clark*, 619 A.2d 1108, 1117 (R.I. 1993) (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)). Accordingly, a state “must have a substantial reason for discriminating against a nonresident *beyond the mere fact of citizenship*.” *Id.* (citing *Toomer*, 334 U.S. at 396) (emphasis added). The United States Supreme Court has stated in stark terms the risks of placing “special burdens” on nonresidents:

The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual’s right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism. Since nonresidents are not represented in the taxing State’s legislative halls, judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but to prevent (retaliation) was one of the chief ends sought to be accomplished by the adoption of the Constitution. Our prior cases, therefore, reflect an appropriately heightened concern for the integrity of the Privileges and Immunities Clause by erecting a standard of review substantially more rigorous than that applied to state tax distinctions among, say forms of business organizations or different trades and professions.

Austin v. New Hampshire, 420 U.S. 656, 662-63 (1975) (internal citations and quotation marks omitted) (invalidating New Hampshire commuters income tax that resulted in only nonresidents paying income tax in the state). When a law distinguishes between residents and nonresidents, “a State may defend its position by demonstrating that (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State’s objective.” *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (internal quotation marks omitted).

Similarly, the dormant Commerce Clause “prevents the States from adopting protectionist measures and thus preserves a national market for goods and services.” *Am. Trucking Ass’ns, Inc. v. Alviti*, 630 F. Supp. 3d 357, 379 (D.R.I. 2022) (quoting *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (appeal pending)). It prevents “economic discrimination” by the states that unduly restrict interstate commerce. *Id.*

The Ticket Tax Bill violates both the Privileges and Immunities Clause and the dormant Commerce Clause. The General Assembly may adopt only “justified and reasonable distinctions between residents and nonresidents in the provision of tax benefits.” *Lunding*, 522 U.S. at 311 (invalidating New York law disallowing nonresidents a deduction for alimony paid). As discussed above, the Ticket Tax Bill is arbitrary and irrational in its classifications. The classifications do not “bear a substantial relationship” to the express purpose. *Id.* at 298; *see also Brusznicki v. Prince George’s Cnty.*, 42 F. 4th 413, 424 (4th Cir. 2022) (invalidating Maryland statute directing county to offer tax-delinquent properties to county residents and government employees before listing them for regular public auction); *Am. Trucking Ass’ns, Inc.*, 630 F. Supp. 3d at 398 (invalidating under dormant Commerce Clause truck toll law that exempted from the toll truck classes more likely to have Rhode Island-registered plates); *Utility Contractors Ass’n of New Eng., Inc. v. City of Worcester*, 236 F. Supp. 2d 113, 120 (D. Mass. 2002) (granting preliminary injunction to enjoin municipal ordinance requiring private contractors to allocate 50 percent of employee work hours on public works projects to Worcester residents as unjustified by Worcester’s poor economic conditions). It singles out the Preservation Society for differential treatment in its attempt to target Newport tourists. The classifications made by the Ticket Tax Bill cannot be considered “justified and reasonable” under the Equal Protection Clause, dormant Commerce Clause, or the Privileges and Immunities Clause. *Lunding*, 522 U.S. at 298.

Further, the fundamental impulse behind the Ticket Tax Bill – targeting nonresidents – cannot pass constitutional muster. The Ticket Tax Bill undermines the “structural balance essential to the concept of federalism” by imposing greater tax burdens on out-of-towners. *Austin*, 420 U.S. 661-62; *Ward v. State*, 79 U.S. 418, 430 (1870); *Am. Trucking Ass’ns, Inc.*, 630 F. Supp. 3d at 398. In addition to these out-of-town visitors contributing to infrastructure and public safety payments in their home communities, they also pay direct taxes and fees while in Rhode Island, including hotel taxes, restaurant taxes, cruise fees, and sales tax on items purchased while in Newport. They contribute indirectly as well, such as through the real estate taxes paid by local hotels to the City. Subjecting them to further taxation would interfere with the free travel between states that was fundamental to constituting the country as a single nation. *See Toomer*, 334 U.S. at 395. It also would risk the sort of “retaliatory” taxation that the Court warned about in *Austin*. 420 U.S. at 662-63.

The Ticket Tax Bill therefore violates the Privileges and Immunities Clause and dormant Commerce Clause of the United States Constitution.

Conclusion

The Ticket Tax Bill proposes a selective, arbitrary, and irrational taxation scheme. It singles out only the Preservation Society of Newport County for differential and burdensome treatment. Further, the history of the Ticket Tax Bill at the municipal level raises the unshakable specter of impermissible bias. The enactment of the Ticket Tax Bill would therefore raise substantial legal concerns under both the Rhode Island and U.S. Constitutions. The Ticket Tax Bill faces substantial legal challenges under the Equal Protection Clause of the Rhode Island Constitution, R.I. Const. Art. 1, § 2; the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, U.S. Const. Amend. XIV; Article I, § 10 of the U.S. Constitution; the dormant Commerce Clause of the U.S. Constitution, U.S. Const. Art. I, § 8; and the Privileges and Immunities Clause of the U.S. Constitution, U.S. Const. Art. IV, § 2.