No. 23-3581
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, et al.,

Plaintiffs-Appellees,

v.

AUSTIN KNUDSEN, et al.,

Defendants-Appellants.

On appeal from the United States District Court
for the District of Montana
Cause No. CV 23-50-BU-BMM, Honorable Brian M. Morris

APPELLANTS' OPENING BRIEF

Austin Knudsen
Montana Attorney General
Michael Russell
Thane Johnson
Alwyn Lansing
Michael Noonan
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
PO Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
Attorneys for Defendants-Appellants
Austin Knudsen and Elsie Arntzen

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: (406) 384-7990

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF JURISDICTION.....2

STATEMENT OF ISSUES PRESENTED.....3

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW 8

SUMMARY OF THE ARGUMENT 10

ARGUMENT 12

I. PLAINTIFFS LACK STANDING TO SEEK A PRELIMINARY INJUNCTION AGAINST THE STATE DEFENDANTS 13

A. PLAINTIFFS FAILED TO ESTABLISH SUFFICIENTLY CONCRETE OR PARTICULARIZED INJURY.....13

B. PLAINTIFFS CANNOT TRACE THEIR ALLEGED INJURIES TO THE STATE DEFENDANTS. 15

1. Plaintiffs Cannot Trace Any Injury To Attorney General Austin Knudsen.....16

2. Plaintiffs Cannot Trace Any Injury To Superintendent Of Public Instruction Elsie Arntzen. 19

C. ENJOINING THE STATE DEFENDANTS FROM ENFORCING HB359 DOES NOT REDRESS PLAINTIFFS' ALLEGED INJURIES. 20

II. THE DISTRICT COURT ERRED IN FINDING PLAINTIFFS LIKELY TO SUCCEED ON THE MERITS OF THEIR FIRST AND FOURTEENTH AMENDMENT FACIAL CHALLENGE 22

A. THE DISTRICT COURT INCORRECTLY APPLIED A TIERED SCRUTINY ANALYSIS TO PLAINTIFFS' OVERBREADTH CLAIM.....22

1. HB359 Is Not Overbroad Under The Plainly Legitimate Sweep Analysis. 2

2. The District Court Erred In Disregarding Whether HB359 Was Readily Susceptible To A Limiting Construction. 29

B. HB359 IS NOT A CONTENT OR VIEWPOINT-BASED RESTRICTION. 30

1. Plaintiffs' Conduct Is Not Protected Under The First Amendment Because It Is Not Inherently Expressive. 31

a. HB359 Regulates Certain Conduct Unrelated To The Suppression Of Free Speech……..……..34

b. If HB359 Regulates Speech Or Expression, It Is A Content-Neutral Restriction Under The Secondary Effects Doctrine. 38

2. The Montana Legislature Did Not Have An Impermissible Purpose Or Justification When It Passed HB359. 41

III. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR FIFTH AND FOURTEENTH AMENDMENT FACIAL CHALLENGE..... 44

A. HB359 GIVES A PERSON OF ORDINARY INTELLIGENCE A REASONABLE OPPORTUNITY TO KNOW WHAT IS PROHIBITED. 46

B. HB359 DOES NOT AUTHORIZE OR ENCOURAGE DISCRIMINATORY ENFORCEMENT.....52

IV. THE DISTRICT COURT ERRED IN FINDING THAT THE REMAINING FACTORS WEIGH IN FAVOR OF AN INJUNCTION. 54

A. THE DISTRICT COURT ERRED IN DETERMINING THAT PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION. 54

B. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR THE STATE. 55

V. IN THE ALTERNATIVE, THE DISTRICT COURT ERRED IN FAILING TO PROPERLY NARROW THE SCOPE OF ITS PRELIMINARY INJUNCTION..... 56

CONCLUSION.....58

CERTIFICATE OF COMPLIANCE.....60

CERTIFICATE OF SERVICE 60

TABLE OFAUTHORITIES

Cases

Abbott v. Perez,
138 S. Ct. 2305 (2018) 42

Alameda Books, Inc. v. City of L.A.,
631 F.3d 1031 (9th Cir. 2011) 38

Ambassador Books & Video v. City of Little Rock,
20 F.3d 858 (8th Cir. 1994) 42

Anderson v. City of Hermosa Beach,
621 F.3d 1051 (9th Cir. 2010) 32

Benisek v. Lamone,
138 S. Ct. 1942 (2018) 8

Bethel Sch. Dist. v. Fraser,
478 U.S. 675 (1986) 35

Blau v. Fort Thomas Pub. Sch. Dist.,
401 F.3d 381 (6th Cir. 2005) 32

Boardman v. Pac. Seafood Grp.,
822 F.3d 1011 (9th Cir. 2016) 55

Brandt v. Bd. of Educ. of Chi.,
480 F.3d 460 (7th Cir. 2007) 32

Bd. of Trs. of the Glazing Health & Welfare Trust v. Chambers,
941 F.3d 1195 (9th Cir. 2019) 54

Brnovich v. Democratic Nat'l Comm.,
141 S. Ct. 2321 (2021) 43

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 22, 24, 30

Brockett v. Spokane Arcades,
472 U.S. 491 (1985) 29

Buckley v. Valeo,
424 U.S. 1 (1976) 29

California v. Texas,
141 S. Ct. 2104, 2115 (2021) 56

Cal. Teachers Ass'n v. Bd. of Educ.,
271 F.3d 1141 (9th Cir. 2001) 44, 45

City of Austin v. Reagan Nat'l Advert. of Austin, LLC.,
596 U.S. 61 (2022) 41

City of Chi. v. Morales,
527 U.S. 41 (1999) 46, 52

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000) 39

City of L.A. v. Alameda Books,
535 U.S. 425 (2002) 39

Clark v. Cmty. for Creative Non-Violence,
468 U.S. 288 (1984) 33, 34

Collins v. Yellen,
141 S. Ct. 1761 (2021) 15, 20

Crawford v. Lungren,
96 F.3d 380 (9th Cir. 1996) 36

Ctr. for Fair Pub. Policy v. Maricopa Cnty.,
336 F.3d 1153 (9th Cir. 2003) 39

Davis v. Dep't of Labor & Indus.,
317 U.S. 249 (1942) 43

Doe v. Kelly,
878 F.3d 710 (9th Cir. 2017) 9

Drakes Bay Oyster Co. v. Jewell,
747 F.3d 1073 (9th Cir. 2014) 9

Edge v. City of Everett,
929 F.3d 657 (9th Cir. 2019) 32

Erznoznik v. Jacksonville,
422 U.S. 205 (1975) 30

Fantasyland Video, Inc. v. Cnty. of San Diego,
505 F.3d 996 (9th Cir. 2007) 39

FCC v. Pacifica Found.,
438 U.S. 726 (1978) 35-36, 37

Fed. Trade Comm'n v. Enforma Nat. Prods., Inc.,
362 F.3d 1204 (9th Cir. 2004) 9

Dallas v. Stanglin,
490 U.S. 19 (1989) 31

Flemming v. Nestor,
363 U.S. 603 (1960) 42

Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.,
528 U.S. 167 (2000) 13, 20

Friends of the Wild Swan v. Weber,
955 F. Supp. 2d 1191 (D. Mont. 2013) 9

Garcetti v. Ceballos,
547 U.S. 410 (2006) 16

Get Outdoors II, LCC v. City of San Diego,
506 F.3d 886 (9th Cir. 2007) 13

Gill v. Whitford,
138 S. Ct. 1916 (2018) 56

Ginsberg v. New York,
390 U.S. 629 (1968) 27, 36

Golden Gate Rest. Ass'n v. City of S.F.,
512 F.3d 1112 (9th Cir. 2008) 55

Grayned v. City of Rockford,
408 U.S. 104 (1972) 45

Hill v. Colorado,
530 U.S. 703 (2000) 45, 52, 54

hiQ v. Linkedin,
31 F.4th 1180 (9th Cir. 2022) 9

Hoffman Estates v. Flipside, Hoffman Estates,
455 U.S. 489 (1982) 46

Human Life of Wash., Inc. v. Brumsickle,
624 F.3d 990 (9th Cir. 2010) 46

Hunter v. Underwood,
471 U.S. 222 (1985) 42, 43

Iancu v. Brunetti,
139 S. Ct. 2294 (2019) 36

Interpipe Contr., Inc. v. Becerra,
898 F.3d 879 (9th Cir. 2018) 28

Juliana v. United States,
947 F.3d 1159 (9th Cir. 2020) 20

Karr v. Schmidt,
460 F.2d 609 (5th Cir. 1972) 32

Klein v. City of San Clemente,
584 F.3d 1196 (9th Cir. 2009) 54

Knox v. Brnovich,
907 F.3d 1167 (9th Cir. 2018) 33

Lopez v. Candaele,
630 F.3d 775 (9th Cir. 2010) 13

LSO, Ltd. v. Stroh,
205 F.3d 1146 (9th Cir. 2000) 13

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 13, 14, 15, 16

Members of City Council v. Taxpayers for Vincent,
466 U.S. 789 (1984) 27

Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psych.,
228 F.3d 1043 (9th Cir. 2000) 36

Nat'l Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 21-22, 22

New Motor Vehicle Bd. v. Orrin W. Fox Co.,
434 U.S. 1345 (1977) 55

New York v. Ferber,
458 U.S. 747 (1982) 27

NorCal Outdoor Media, LLC v. Omishakin,
No. 21-15877, 2022 U.S. App. LEXIS 5224 (9th Cir. Feb. 28, 2022) 13, 17

Prince v. Massachusetts,
321 U.S. 158 (1944) 58

Renton v. Playtime Theatres,
475 U.S. 41 (1986) 36-37, 38, 39, 42

Rose v. Locke,
423 U.S. 48 (1975) 45, 46

Rumsfeld v. Forum for Acad. & Institutional Rights., Inc.,
547 U.S. 47 (2006) 31

Rust v. Sullivan,
500 U.S. 173 (1991) 22, 28

Sable Communications of Cal. v. FCC,
492 U.S. 115 (1989) ..... *passim*

Spence v. Washington,
418 U.S. 405 (1974) 31

Spokeo, Inc. v. Robins,
578 U.S. 330 (2016) 12, 13

State ex rel. Fletcher *v. Dist. Court*,
260 Mont. 410, 859 P.2d 992 (Mont. 1993) 17

State ex rel. Woodahl *v. Dist. Court*,
159 Mont. 112, 495 P.2d 182 (Mont. 1972) 17-18

State v. Madsen,
2013 MT 281, ¶ 9, 372 Mont. 102, 317 P.3d 806 (Mont. 2013) 45

State v. McWilliams,
2008 MT 59, 341 Mont. 517, 178 P.3d 121 (Mont. 2008) 17

State v. Means,
177 Mont. 193, 581 P.2d 406 (Mont. 1978) 47

State v. Tichenor,
2002 MT 311, 313 Mont. 95, 60 P.3d 454 (Mont. 2002) 17

Stormans, Inc. v. Selecky,
586 F.3d 1109 (9th Cir. 2009) 55

Swearingen v. United States,
161 U.S. 446 (1896) 47

Tagami v. City of Chi.,
875 F.3d 375 (7th Cir. 2017) 33

Taub v. City & Cnty. of S.F.,
696 F. Appx. 181 (9th Cir. 2017) 34, 37

Texas v. Johnson,
491 U.S. 397 (1989) ..... *passim*

Thalheimer v. City of San Diego,
645 F.3d 1109, 1128 (9th Cir. 2011) 54

United States Dep't of Labor v. Triplett,
494 U.S. 715 (1990) 42

United States v. AMC Ent., Inc.,
549 F.3d 760 (9th Cir. 2008) 9

United States v. Hansen,
143 S. Ct. 1932 (2023) 23, 24, 26

United States v. Nat'l Treasury Emples Union,
513 U.S. 454 (1995) 57

United States v. O'Brien,
391 U.S. 367 (1968) ..... *passim*

United States v. Salerno,
481 U.S. 739 (1987) 22

United States v. Stansell,
847 F.2d 609 (9th Cir. 1988) 30

United States v. Stevens,
559 U.S. 460 (2010) 24

United States v. Swisher,
811 F.3d 299 (9th Cir. 2016) 34

United States v. Thirty-Seven (37) Photographs,
402 U.S. 363 (1971) 45

United States v. Williams,
553 U.S. 285 (2008) 23, 24, 26, 46

*Vill. of Arlington Heights v. Metro. Hous. Dev. C*orp.,
429 U.S. 252 (1977) 42

Virginia v. Am. Booksellers Ass'n,
484 U.S. 383 (1988) 30

Virginia v. Hicks,
539 U.S. 113 (2003) 24

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982) 55

Whole Woman's Health v. Jackson,
142 S. Ct. 522 (2021) 14

Winsor v. Sequoia Benefits & Ins. Servs., L.L.C.,
62 F.4th 517 (9th Cir. 2023) 15-16, 20

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 8, 9

Wit v. United Behav. Health,
58 F.4th 1080 (9th Cir. 2023) 15

Younger v. Harris,
401 U.S. 37 (1971) 14

Zalewska v. Cnty. of Sullivan,
316 F.3d 314 (2d Cir. 2003) 32

Statutes

Montana Code Annotated

§ 2-15-501(5) 18
§ 20-4-110(1) 19
§ 45-8-205(5) 26
§ 45-8-205(6) 51

United States Code

28 U.S.C. § 1292(a)(1) 2
28 U.S.C. § 1331 ..... *passim*
28 U.S.C. § 1343 2
28 U.S.C. § 1983 2

Rules

Ninth Circuit Rule 28-2.2 2

Federal Rules of Appellate Procedure

Rule 4(a)(1)(A) 3

Federal Rules of Civil Procedure

Rule 23 56

Other

Black's Law Dictionary
(Mar. 28, 2013) 47

Black's Law Dictionary
(Nov. 4, 2011) 47

INTRODUCTION

In 2023, the Montana Legislature enacted House Bill ("HB") 359 with the clear purpose of protecting its children from harm caused by increasingly sexualized conduct in public and to prevent its resources from being used to destabilize children and their schooling. HB359 furthers this purpose by prohibiting sexually oriented performances and drag story hours in specified locations and circumstances. Despite Montana's undisputed compelling interest in protecting its children from harm, eleven Plaintiffs subsequently sued to enjoin HB359, alleging *inter alia* that it is facially invalid for violating the First, Fifth, and Fourteenth Amendments of the U.S. Constitution.

The district court ultimately sided with Plaintiffs and preliminarily enjoined HB359, but its decision rests on several critical mistakes. It wrongly concluded that Plaintiffs have Article III standing given their failure to adequately demonstrate the requisite injury, causation, and redressability with respect to their sought injunctive relief against Defendants Austin Knudsen and Elsie Arntzen (the "State Defendants")[1]. It assumed—without any meaningful analysis—that simply because the conduct at issue does not meet the established test for obscenity, that conduct automatically amounts to protected expression subject to strict scrutiny. It also erred

[1] Defendant J.P. Gallagher is a separately named Defendant who undersigned counsel do not represent, to whom the preliminary injunction does not apply, and who is not a party to this appeal.

in declining to perform a First Amendment overbreadth analysis, instead effectively engaging in an as-applied tiered scrutiny analysis, but then granting facial injunctive relief. It erred in adopting Plaintiffs' self-serving facial void for vagueness argument, disregarding the plain meanings of defined and undefined terms, in favor of finding uncertainty at HB359's margins. Numerous other errors abound. For the reasons stated in this brief, this Court should vacate the district court's preliminary injunction of HB359.

STATEMENT OF JURISDICTION

Pursuant to Ninth Circuit Rule 28-2.2:

(A) The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1343 (civil rights), and 28 U.S.C. § 1983 (civil action for deprivation of rights);

(B) This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) over the appeal of the district court's interlocutory order entered on October 13, 2023, preliminarily enjoining Defendants from enforcing HB359 (1-ER-2-54);

(C) The filing dates establishing the timeliness of this appeal include the following: (i) on October 13, 2023, the district court issued its Order enjoining Defendants Austin Knudsen and Elsie Arntzen from instituting, maintaining, or prosecuting any enforcement proceedings under HB359 (1-ER-2-54); and on

November 13, 2023, Defendants filed a timely notice of appeal (3-ER-353-55) under Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred in finding that Plaintiffs have standing to seek injunctive relief against the State Defendants.

2. Whether the district court erred in finding Plaintiffs likely to succeed on the merits of their First/Fourteenth Amendment facial claim;

3. Whether the district court erred in finding Plaintiffs likely to succeed on the merits of their Fifth/Fourteenth Amendment facial claim;

4. Whether the district court erred in finding the remaining *Winter* factors weigh in favor of issuing a preliminary injunction; and

5. In the alternative, whether the district court erred in failing to properly narrow the scope of its preliminary injunction.

STATEMENT OF THE CASE

Montana's Governor signed HB359 into law on May 22, 2023. In short, HB359 places restrictions on sexually oriented businesses; identifies locations where sexually oriented performances are prohibited; and provides a private right of action to certain minors or their parents or legal guardians against a person who knowingly promotes, conducts, or participates as a performer in a performance that violates Sections 2 or 3 of the Bill. (2-ER-207.)

Pursuant to Section 2, "a sexually oriented business may not allow a person under 18 years of age to enter the premises of the business during a sexually oriented performance." (2-ER-209.) "'Sexually oriented business' means a nightclub, bar, restaurant, or similar commercial enterprise that: (a) provides for an audience of two or more individuals: (i) live nude entertainment or live nude performances; or (ii) a sexually oriented performance; and (b) authorizes on-premises consumption of alcoholic beverages." (*Id*.) "'Sexually oriented performance' means a performance that, regardless of whether performed for consideration, is intended to appeal to a prurient interest in sex and features: (a) the purposeful exposure, whether complete or partial, of: (i) a human genital, the pubic region, the human buttocks, or a female breast, if the breast is exposed below a point immediately above the top of the areola; or (ii) prosthetic genitalia, breasts, or buttocks; (b) stripping; or (c) sexual conduct. (*Id*.) Section 1 defines additional specific terms applicable to Section 2 such as "nude," "prurient interest in sex," "sexually oriented," and "stripping." (*Id*.) An owner, operator, manager, or employee of a sexually oriented business who violates Section 2's provisions are subject to fines that increase with repeated violations, and the business shall have its business license revoked upon a third violation. (2-ER-209-10.)

Section 3 prohibits a library that receives state funding from allowing a sexually oriented performance on its premises. (2-ER-210.) Additionally, a school

or library that receives state funding "may not allow a sexually oriented performance or drag story hour on its premises during regular operating hours or at any school-sanctioned extracurricular activity." (*Id.*) "'Drag story hour' means an event hosted by a drag queen or drag king who reads children's books and engages in other learning activities with minor children present." (2-ER-208.) A "drag king" or "drag queen" is "a male or female performer who adopts a flamboyant or parodic [male or female] persona with glamorous or exaggerated costumes or makeup." (*Id.*) Subsection 3 further prohibits sexually oriented performances "on public property in any location where the performance is in the presence of an individual under the age of 18" and "in a location owned by an entity that receives any form of funding from the state." (2-ER-210.) "A library, a school, or library or school personnel, a public employee, or [applicable entity] or an employee of the entity" are subject to a fine and, if applicable, adverse certification consequences for violating Section 3's provisions (*Id.*)[2]

Plaintiffs—a mix of individuals, businesses, and nonprofits—claim HB359 is unconstitutional. Adria Jawort ("Jawort") identifies as a transgender woman who "regularly speaks to libraries and other organizations . . . about Two-Spirit and transgender issues." (2-ER-273.) Rachel Corcoran ("Corcoran") is a teacher in

[2] Section 4 establishes a private right of action. (2-ER-210-11.) However, that Section is not addressed herein because the State Defendants have no role in its enforcement.

Billings who "has dressed up as fictional and historical male and female characters…[while] read[ing] to students" (*Id.*) The Imperial Sovereign Court of the State of Montana ("Imperial Court") is a nonprofit organization that educates and advocates "through the production of community-based drag performances…" and allegedly had cancelled or modified events. (2-ER-274.) Montana Book Company is "an independent LGBTQ+ owned bookstore in Helena, Montana" and is an "event space that hosts readings and performances," including "drag events." (2-ER-274-75.) Imagine Nation Brewing Company ("Imagine Nation") is a brewery that "has hosted and plans to host all-ages drag shows and drag story hours, during which it sells alcoholic beverages." (2-ER-275.) Imagine Nation "intends to apply for [state] funds when available" and has a "lending library on-site." (*Id.*)

Bumblebee Aerial Fitness ("Bumblebee") is a fitness studio located in Helena that "teaches aerial arts and choreography to students ages 14 and older, and pole fitness to students 18 and up." (*Id.*) Instructors and students perform to live audiences, and allegedly have cancelled events. (2-ER-275-76.) Montana Pride is a statewide annual Pride celebration whose permits for an event were allegedly denied by the City of Helena. (2-ER-276.) The Western Montana Community Center ("the Center"), is an organization located in Missoula that "recently produced Missoula Pride, an annual event that celebrates the LGBTQ+ community through storytelling, dancing, a parade, and drag performances." (*Id.*) The Great Falls LGBTQ+ Center

"organizes events for all audiences featuring drag performances. . ." (*Id.*) The Myrna Loy is a nonprofit that "leases a former jail building from Lewis and Clark County" and "often presents films and live performances . . . that it [] believes may violate HB359." (2-ER-277.) The Roxy Theater ("The Roxy") is a nonprofit that "authorizes on-premises consumption of alcoholic beverages" and shows films and events that it "believes may violate HB359." (2-ER-277-78.)

On July 7, 2023, Plaintiffs sued Austin Knudsen and Elsie Arntzen (the "State Defendants"), J.P. Gallagher, and the City of Helena, alleging HB359 violated the First, Fifth, and Fourteenth Amendments (3-ER-314.) On July 17, 2023, Plaintiffs filed an Amended Complaint to include another count and moved for a temporary restraining order ("TRO") and preliminary injunction. (2-ER-214-312.) The district court conducted a TRO hearing on July 26, 2023, and subsequently enjoined the State Defendants from enforcing HB359 pending its determination of Plaintiffs' entitlement to a preliminary injunction. (2-ER-106-125.) The State Defendants filed their written Response opposing a preliminary injunction on August 2, 2023. (2-ER-70-105.) The district court held the preliminary injunction hearing on August 28, 2023. (2-ER-60-61.)

On September 6, 2023, the district court dismissed the City of Helena and Count III of Plaintiffs' First Amended Complaint by stipulation of the parties. (2-ER-58-59.) On October 13, 2023, the district court entered its Order preliminarily

enjoining the State Defendants from instituting, maintaining, or prosecuting any enforcement proceedings under HB359. (1-ER-54.) The State Defendants filed their timely notice of appeal on November 13, 2023. (3-ER-353-55.)

On November 20, 2023, the parties filed a joint stipulation dismissing Austin Knudsen from Counts I and II of Plaintiffs' First Amended Complaint, leaving Defendant J.P. Gallagher as the sole Defendant for Counts I and II and the State Defendants as the only Defendants for Counts IV and V. (2-ER-56-57.) Counts I and II allege a violation of the First and Fourteenth Amendments as applied to Jawort. (2-ER-305-06.) Counts IV and V assert facial challenges to HB359. Count IV alleges that HB359 violates the First/Fourteenth Amendments and asserts that "Defendants Knudsen and Arntzen seek to expressly restrict and chill speech and expression…" (2-ER-308-09.) Count V alleges that HB359 is void for vagueness in violation of the Fifth/Fourteenth Amendments. (2-ER-310.)

STANDARD OF REVIEW

A preliminary injunction is a drastic remedy "never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 24 (2008). This extraordinary remedy "does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943–44 (2018). A preliminary injunction is permissible only when Plaintiffs carry their heavy burden of showing that (1) they have a substantial likelihood of success on

the merits; (2) they will suffer irreparable injury without one; (3) their threatened injury outweighs whatever harm the proposed injunction would cause their opponent; and (4) if issued, the injunction is in the public's interest. *Winter*, 555 U.S. at 20. The analyses of the public interest and balance of equities merge when the government is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). While this Court applies the "sliding scale" test, it does so only when "the balance of hardships tips *sharply* in the plaintiff's favor." *hiQ v. Linkedin*, 31 F.4th 1180, 1188 (9th Cir. 2022) (emphasis added). That is, "[a]ll four elements must be satisfied," *id.*, by "clear and convincing evidence," *Friends of the Wild Swan v. Weber*, 955 F. Supp. 2d 1191 (D. Mont. 2013).

This Court reviews "the legal premises underlying a preliminary injunction" de novo. *Fed. Trade Comm'n v. Enforma Nat. Prods., Inc.*, 362 F.3d 1204, 1211 (9th Cir. 2004). Otherwise, this Court reviews the district court's preliminary injunction for abuse of discretion. *Id*. (citation omitted). "The grant of a preliminary injunction constitutes an abuse of discretion if the district court's evaluation or balancing of the pertinent factors is 'illogical, implausible, or without support in the record.'" *hiQ*, 31 F.4th at 1188 (quoting *Doe v. Kelly*, 878 F.3d 710, 713 (9th Cir. 2017)). A district court also "abuses its discretion by fashioning an injunction which is overly broad." *United States v. AMC Ent., Inc.*, 549 F.3d 760, 768 (9th Cir. 2008).

SUMMARY OF THE ARGUMENT

The district court's errors in preliminarily enjoining HB359 were many and manifest. At the outset, it failed to hold Plaintiffs to their burden to establish Article III standing by demonstrating the requisite concrete injury, causation, and redressability. Plaintiffs' alleged injuries principally rest on the actions of other parties and HB359's purported chilling effect based on hypotheticals without any evidence of the State Defendants' actual or likely enforcement of HB359's provisions against them. Plaintiffs also failed to fairly trace any alleged injury to the State Defendants, ignoring the reality that Montana's 56 county attorneys—non-parties herein—are those who would initiate prosecutions under HB359. Instead, they improperly focus on HB359 itself. They also cannot demonstrate redressability for similar reasons since those 56 county attorneys remain free to prosecute under HB359, notwithstanding the district court's preliminary injunction. Plaintiffs are not entitled to such relief in the absence of standing, and this Court should reverse for this reason alone.

In the event this Court reaches the merits of Plaintiffs' claims, the district court further erred in determining Plaintiffs are likely to succeed in that regard. First, the district court failed to apply the appropriate overbreadth test, which demonstrates that HB359's plainly legitimate sweep—the protection of Montana's children from the harmful effects of sexualized conduct—heavily outweighs any purportedly

unconstitutional applications overbreadth. The district court again erred in failing to consider whether HB359 is unconstitutional in all possible applications as required in a facial challenge, instead effectively engaging in an as-applied analysis before granting facial relief. The district court further declared HB 359 to be a content and viewpoint-based restriction by assuming, without performing the requisite analysis, that the conduct in question is protected under the First Amendment. This led to the incorrect conclusion that HB 359 regulates protected expression, rather than the conduct itself, and a failure to meaningfully consider the harmful secondary effects of sexualized conduct on children.

The district court also mistakenly based its conclusions on its finding that an impermissible purpose or justification underpinned HB 359. It did so based on cherry-picked comments from four legislators, the legislative amendment process, and certain proponents HB359. It then projected the animus it perceived onto the entire Legislature in direct contravention of applicable authorities. This was clear error.

The district court further erred in finding unconstitutional vagueness based on its disagreement with either statutorily defined or undefined terms without attempting to construe their meanings based on plain meanings, common dictionary definitions, or established canons of interpretation. And even if HB 359 were

overbroad or vague, the district court failed to consider limiting constructions that may have saved the law.

Moreover, Plaintiffs' claims of irreparable injury fail for the same reasons their alleged injuries are insufficient to establish Article III standing. The balance of the equities and public interests also weigh against Plaintiffs—HB 359 reflects the public's interest in protecting Montana's children from sexualized conduct, and an inability to enforce its provisions amounts to irreparable injury to the public. The district court erred in concluding otherwise.

Lastly and in the alternative, even assuming the district court's bases for its preliminary injunction were correct, it nonetheless erred by granting an overly broad injunction. It easily could have narrowed the injunction's scope to cover only the parties to this lawsuit and Plaintiffs' alleged injuries as binding precedent requires, but it failed to do so. This Court should vacate the district court's preliminary injunction.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO SEEK A PRELIMINARY INJUNCTION AGAINST THE STATE DEFENDANTS.

To establishing standing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "[A] plaintiff must demonstrate standing separately for each

form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc*., 528 U.S. 167, 185 (2000). Here, the district court erred in determining Plaintiffs have standing to seek preliminary injunctive relief against the State Defendants because Plaintiffs failed to demonstrate sufficient injury, failed to establish the requisite causal connection, and failed to establish that such relief is substantially likely to redress their alleged injuries.

A. Plaintiffs Failed To Establish Sufficiently Concrete Or Particularized Injury.

"Although special concerns exist in the First Amendment context," this Court has "nonetheless reaffirmed that 'the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction endures.'" *NorCal Outdoor Media, LLC v. Omishakin*, No. 21-15877, 2022 U.S. App. LEXIS 5224, at *2 (9th Cir. Feb. 28, 2022) (citing *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) and quoting *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010)). "This requirement applies regardless of whether a plaintiff purports to assert an as-applied challenge or an overbreadth challenge seeking facial invalidation of a law." *Id*. (citing *Get Outdoors II, LCC v. City of San Diego*, 506 F.3d 886, 891 (9th Cir. 2007)). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 578 U.S. at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A "concrete"

injury "must actually exist," and must be "real, and not abstract." *Id*. at 340 (quotations omitted).

Here, the alleged injury at the core of Plaintiffs' facial overbreadth and vagueness claims under Counts IV and V is HB359's purported chilling effect on their First Amendment rights. (2-ER-310.).[3] However, as the Supreme Court's cases explain, "the 'chilling effect' associated with a potentially unconstitutional law being 'on the books' is insufficient to 'justify federal intervention' in a pre-enforcement suit." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 538 (2021) (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). Instead, the Supreme Court "has always required proof of a more concrete injury and compliance with traditional rules of equitable practice." *Id.* (citations omitted). "The Court has consistently applied these requirements whether the challenged law in question is said to chill the free exercise of religion, the freedom of speech, the right to bear arms, or any other right." *Id.* Plaintiffs in this case have made no allegation of any actual enforcement action taken by the State Defendants.

Since HB359's effective date, Plaintiffs allege numerous instances of conduct purportedly banned by HB359 occurring. (*See, e.g.*, 2-ER-194-95.) This alone undercuts the existence of an actual injury because the facts show the Plaintiffs

[3] The district court simply assumed that the conduct at issue is protected expression under the First Amendment. This was also erroneous as explained in Section II.B, *infra*.

engaged in such conduct with no interference by the State Defendants. Therefore, no actual injury occurred in those situations and Plaintiffs failed to demonstrate that the State Defendants are likely to enforce the law against future similar conduct. In fact, Plaintiffs' pleadings allege not a single instance of interference by the State Defendants in any activity by Plaintiffs or any pending or threatened enforcement action. The district court accordingly erred in finding that Plaintiffs satisfied the injury element of Article III standing because they neither alleged nor proved an actual, concrete injury.

B. PLAINTIFFS CANNOT TRACE THEIR ALLEGED INJURIES TO THE STATE DEFENDANTS.

The "fairly traceable" prong of Article III standing determines "whether the plaintiffs' injury can be traced to [the] allegedly unlawful conduct of the defendant, *not to the provision of law that is challenged*." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) (internal quotation marks omitted) (emphasis added). An injury is "fairly traceable" where there is a causal connection between the injury and the defendant's challenged conduct. *Wit v. United Behav. Health*, 58 F.4th 1080, 1093 (9th Cir. 2023) (quoting *Lujan*, 504 U.S at 560). "[P]laintiffs must allege that their injuries are 'fairly traceable' to [the defendant's] conduct and 'not the result of the independent action of some third party not before the court.'" *Winsor v. Sequoia Benefits & Ins. Servs.*, L.L.C., 62 F.4th 517, 525 (9th Cir. 2023) (quoting *Lujan*, 504 U.S. at 560).

1. Plaintiffs Cannot Trace Any Injury To Attorney General Austin Knudsen.

Here, Plaintiffs failed to show, or even allege, that any of their claimed injuries are traceable to any conduct or threatened conduct of Defendant Knudsen. The district court erred in ignoring this critical deficiency, instead basing its erroneous conclusion that Plaintiffs have standing on their allegations relating to another party, or HB359 itself. *See, e.g.*, 1-ER-17-18 (citing Jawort's claimed injury stemming from *Defendant Gallager's* cancellation of a lecture allegedly "in response to H.B. 359…"); 1-ER-18 ("Jawort and Corcoran directly link their speech-based injuries to H.B. 359.");[4] 1-ER-19 (finding that Imperial Court, the Center, and the Great Falls LGBTQ+ Center's alleged First Amendment injuries "satisfy the causation and redressability prongs for the same reasons as Jawort's and Corcoran's alleged speech-based injuries."); 1-ER-20-21 (Finding that the "Organizational Plaintiffs'" (Montana Pride, Imperial Court, Bumblebee, the Center, the Great Falls LGBTQ+ Center, Montana Book Co., Imagine Nation, the Roxy, and the Myrna Loy) alleged injuries "satisfy the causation and redressability prongs for the same reasons as Jawort's and Corcoran's alleged injuries."). Neither Plaintiffs nor the district court

[4] The district court also failed to acknowledge that, because Corcoran is a public employee whose alleged speech-related activities at issue occur on the job in the scope of her duties, there is no First Amendment protection for her in this context. *See Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006).

can fairly trace even one of Plaintiffs' alleged injuries to any actual, threatened, or attempted enforcement action by Defendant Knudsen.

The district court devotes much attention to the various powers of Montana's Attorney General as apparent support for the requisite causal link between Plaintiffs' purported fear of prosecution under HB359 and Defendant Knudsen. (1-ER-13-16.) However, the district court fails to acknowledge the reality that "Montana law places the authority to initiate a criminal prosecution within the 'broad discretion' of the county attorney." *Price v. Kirkegard*, No. CV 12–22–BLG–CSO, 2013 U.S. Dist. LEXIS 24795, at *18 (D. Mont. Feb. 22, 2013) (quoting *State v. Tichenor*, 2002 MT 311, ¶ 26, 313 Mont. 95, 60 P.3d 454 (Mont. 2002)); *see also State v. McWilliams*, 2008 MT 59, ¶ 29, 341 Mont. 517, 178 P.3d 121 (Mont. 2008) ("[C]ounty attorneys in Montana are charged with a duty to conduct, on the State's behalf, all prosecutions for public offenses."); *State ex rel. Fletcher v. Dist. Court*, 260 Mont. 410, 414, 859 P.2d 992, 995 (Mont. 1993) ("In Montana, a county attorney not only directs under what conditions a criminal action [is] commenced, but from the time it begins until it ends his supervision and control is complete, limited only by such restrictions as the law imposes.") (internal quotations omitted).

This has been a consistent practice in Montana law for decades. *See State ex rel. Woodahl v. Dist. Court*, 159 Mont. 112, 116, 495 P.2d 182, 185 (Mont. 1972) ("At the outset in a criminal case we note a complete absence of any constitutional

or statutory power vested in the attorney general to file an information or initiate a prosecution independent of the county attorney."). While Montana's Attorney General does have the legal authority to direct a county attorney to initiate a criminal prosecution (*see* Mont. Code Ann. § 2-15-501(5)), neither Plaintiffs nor the district court point to *any* instance where the Attorney General (past or present) has actually exercised that authority. The absence of even one such example undercuts any assertion that the Attorney General is likely to initiate a prosecution of Plaintiffs (or anyone else) under HB359 or any other law for that matter.

Against this backdrop, and considering the district court's admission that the possibility of prosecution under HB359 at the express direction of the Attorney General is remote and unprecedented,[5] it remains entirely unclear how "the threat of *attempted* prosecution by the Attorney General" could possibly "prove[] equivalent, in its capacity to chill speech, to the threat of prosecution by any county attorney in the state," particularly when those county attorneys' "authority to prosecute under the statute is not in question." (1-ER-15.) (emphasis in original). In other words, it strains the bounds of credulity to conclude that the Attorney General's *questionable* authority to prosecute is somehow equally capable of chilling speech as the

[5] *See* 1-ER-15 ("The Attorney General's authority to prosecute under H.B. 359 has not been tested."); *id.* ("The question of whether the Attorney General does indeed possess legal authority to prosecute under H.B. 359 might remain open unless and until the officer chose to attempt to prosecute under H.B. 359.").

unquestioned authority of Montana's 56 county attorneys to do so. Such contorted reasoning surely cannot suffice to relieve Plaintiffs of their burden to establish causation for purposes of Article III standing.

2. Plaintiffs Cannot Trace Any Injury To Superintendent Of Public Instruction Elsie Arntzen.

The requisite causal connection between possible enforcement action by Defendant Arntzen and alleged injury to Corcoran likewise fails,[6] but for an even more straightforward reason—Corcoran's own assertions directly contradict any purported chilling effect. Indeed, Corcoran submitted a Declaration expressing her intention of still dressing in "gendered costume[s]" while working with students. (*See* 2-ER-132.) The alleged causal link between any chilling effect and Defendant Arntzen therefore fails both as a matter of fact and logic.

Moreover, Defendant Arntzen is not the only party empowered by Montana law to initiate proceedings against Corcoran's teaching license before the Board of Public Education—the trustees of a school district may also do so with respect to licensees within their district. *See* Mont. Code Ann. § 20-4-110(1). The district court's focus on the Superintendent's hypothetical ability to bring a potentially "meritless proceeding" given the Board's ultimate adjudicative authority does not

[6] Corcoran is the only Plaintiff who is allegedly subject to hypothetical enforcement action by Defendant Arntzen pursuant to HB359's occupational licensure penalties. (*See* 2-ER-273-78.)

change the fact that school district trustees have substantially similar authority. (*See* 1-ER-16-17.) The district court further ignores the absence of any allegation or showing that any alleged injury to Corcoran is fairly traceable to Defendant Arntzen as opposed to the non-party trustees of Corcoran's school district.

Ultimately, the failure of causation for Article III standing purposes lies with the fact that Plaintiffs only trace their alleged injuries—chilling effect or otherwise—to HB359 itself, rather than any action or threatened action of the State Defendants. *See Collins*, 141 S. Ct. at 1779. Plaintiffs therefore cannot establish standing, and the district court erred in granting the preliminary injunction.

C. Enjoining The State Defendants From Enforcing HB359 Does Not Redress Plaintiffs' Alleged Injuries.

For the same reasons Plaintiffs fail to establish causal connection between the State Defendants and any cognizable injury for purposes of the Court's standing analysis, Plaintiffs cannot establish that enjoining the State Defendants redresses their alleged injuries. "To establish redressability, plaintiffs must allege that it is 'likely, as opposed to merely speculative,' that a favorable decision will redress their injuries. *Winsor*, 62 F.4th at 525 (quoting *Friends of the Earth, Inc.*, 528 U.S. at 181); *see also Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020) ("To establish Article III redressability, the plaintiffs must show that the relief they seek is…*substantially* likely to redress their injuries[.]") (emphasis added).

Here, the district court concluded that "[b]locking enforcement of [HB359] would remedy Jawort and Corcoran's actual and imminent injuries[]" (1-ER-17.), and that the other Plaintiffs had established redressability for the "same reasons[.]" (1-ER-19, 21.) However, as explained above, enjoining the State Defendants from enforcing HB359 does absolutely nothing to prevent the *only* parties likely to initiate a prosecution under HB359—any one of Monana's 56 county attorneys—from doing so. The chilling effects that Plaintiffs allege stem from the threat of potential prosecution therefore remain despite the district court's preliminary injunction.[7]

In summary, Plaintiffs failed to establish even one, no less all three, of the requisite elements of Article III standing with respect to their sought relief against the State Defendants. The district court erred in concluding otherwise, and this Court should vacate the preliminary injunction accordingly.

II. THE DISTRICT COURT ERRED IN FINDING PLAINTIFFS LIKELY TO SUCCEED ON THE MERITS OF THEIR FIRST AND FOURTEENTH AMENDMENT FACIAL CHALLENGE.

Plaintiffs raise a facial challenge to HB359 through Counts IV and V of their First Amended Complaint. (2-ER-308-10.) Consequently, they "confront a 'heavy burden' in advancing their claim[s]." *Nat'l Endowment for the Arts v. Finley*, 524

[7] The alleged threat to Corcoran's teaching license likewise remains given the ability of her school board's trustees to initiate the relevant proceedings under HB359, even assuming she has alleged a cognizable First Amendment injury, which she has not. *See* nn.4, 6, *supra*.

U.S. 569, 580 (1998) (quoting *Rust v. Sullivan*, 500 U.S. 173, 183 (1991). "'A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.'" *Rust*, 500 U.S. at 183 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). "Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *Finley*, 524 U.S. at 580 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). "To prevail, respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech." *Id*. Contrary to the district court's conclusion, Plaintiffs cannot prevail, as HB359 does not operate as a content or viewpoint speech restriction, nor does it fail on either vagueness or overbreadth grounds.

A. THE DISTRICT COURT INCORRECTLY APPLIED A TIERED SCRUTINY ANALYSIS TO PLAINTIFFS' OVERBREADTH CLAIM.

In facial challenges, the appropriate analysis is not tiered scrutiny, but "establish[ing] that no set of circumstances exists under which the [law] would be valid." *Salerno*, 481 U.S. at 745. A charge of overbreadth, however, requires "[b]reaking from [] th[is] rule[]," instead mandating a determination of whether the statute "'prohibits a substantial amount of protected speech' relative to its 'plainly

legitimate sweep.'" *United States v. Hansen*, 143 S. Ct. 1932, 1939 (2023) (citations omitted). The district court erred by applying an analysis inconsistent with this Supreme Court precedent.

Plaintiffs have asserted a facial claim to HB359, but specifically charged it to be overbroad. (2-ER-310-11.) Rather than apply the *Solerno* analysis or the plainly legitimate sweep analysis, the district court rejected both tests, reasoning that the latter only applies "in the context of speech unprotected by the First Amendment. (1-ER-22.) Because Plaintiffs allegedly engage in "protected artistic and personal expression," (2-ER-220, 284.), the district court applied a tiered scrutiny analysis instead. (1-ER-23.) The district court made this determination not by applying appropriate U.S. Supreme Court precedent, but by relying on a non-authoritative 2017 article written by a professor emeritus from Nova Southeastern University. (1-ER-21-22.) The district court erred in not applying the Supreme Court's plainly legitimate sweep analysis.

1. HB359 Is Not Overbroad Under The Plainly Legitimate Sweep Analysis.

"If the challenger demonstrates that the statute 'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep,' then society's interest in free expression outweighs its interest in the statute's lawful applications, and a court will hold the law facially invalid." *Hansen*, 143 S. Ct. 1939 (quoting *United States v. Williams*, 553 U.S. 285, 292 (2008)). But overbreadth invalidation is

"strong medicine." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Broadrick*, 413 U.S. at 613). "To justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep." *Hansen*, 143 S. Ct. at 1939. "In the absence of a lopsided ratio, courts must handle unconstitutional applications as they usually do—case-by-case." *Id*. at 1940. Ultimately, "[t]he overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (quotation and citation omitted).

A court reviewing an overbreadth claim must engage in a two-step analysis, not tiered scrutiny. "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 553 U.S. 285 at 293; *see also Hansen*, 143 S. Ct. at 1940. Taken as a whole, HB359's definitions, surrounding context, and statements of supporting legislators leave little doubt that the Legislature determined sexually oriented performances and drag story hours to be indecent and inappropriate for minors. It is also clear that the Legislature considers this conduct to be potentially harmful to minors and intends to protect them by limiting their potential exposure to it. Legislative testimony presented in support of HB359 reflects the significant public concern about the potential harm to minors and

the conclusion that they should not be exposed to this conduct.[8] HB359 is not aimed at banning or suppressing a performer's sexual conduct but is instead overwhelmingly concerned with the harmful secondary effects of sexually expressive conduct on minors. HB359 also reflects the Legislature's understanding that such conduct is not necessarily inappropriate for adult audiences considering that it limited HB359's application to the locations and circumstances within its lawful authority to regulate and where minors are more likely to be exposed to that conduct.

The Legislature accordingly defined that conduct, created a new legal category of business establishments ("sexually oriented businesses"), and created a penalty for such a business to allow a minor to enter its premises during a "sexually oriented performance." This is an offense against public order, and the other provisions of MCA Title 45, chapter 8 apply to this offense in its construction given HB359's specific codification instruction at Section 5(1). (*See* 2-ER-211.) For example, the construction of "sexually oriented performance" must incorporate the preexisting definition of "performance," which is "any motion picture, film, or

[8] *See* 2-ER-88 (citing proponent testimony referencing a "drag your kids to pride event" where the performers led children by the hand to a sign saying "it's not going to lick itself" and encouraging them to dance and a publication entitled "Drag Pedagogy: The Playful Practice of Queer Imagination in Early Childhood" and quoting statement from the same including "drag pedagogy is designed to destabilize children" and "queer and trans pedagogies seek to actively destabilize the normative function of schooling").

videotape (except a motion picture or videotape rated G, PG, PG-13, or R by the motion picture association of America); phonograph record; compact disk; tape recording; preview; trailer; play; show; skit; dance; or other exhibition played or performed before an audience of one or more, with or without consideration." Mont. Code Ann. § 45-8-205(5). This negates Plaintiffs' stated concerns that The Roxy and The Myrna Loy could commit a crime by allowing a minor to attend a PG-13 or R-rated movie. (*See* 2-ER-176-78; 2-ER-170-71.)

There also can be no doubt that the Legislature intended for HB359 to prevent public property or any funds entrusted to it by Montana's taxpayers from being used to support or subsidize the presentation of conduct that is indecent and potentially harmful to minors. This is the prevailing theme of Section 3. Ultimately, no reasonable construction of HB359 could conclude that a person can be criminalized simply for dressing in "drag" or that "drag shows" are outright banned in public as if they were legally obscene. Proper construction of HB359 withstands constitutional scrutiny.

The second step in the analysis is whether the statute "'prohibit[s] a substantial amount of protected speech' relative to its "plainly legitimate sweep." *Hansen*, 143 S. Ct. at 1946 (quoting *Williams*, 553 U.S. at 297). "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged

on overbreadth grounds." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

The Supreme Court has made clear that the government has "a compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 126 (1989). "This interest extends to shielding minors from the influence of [conduct] that is not obscene by adult standards." *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968); *New York v. Ferber*, 458 U.S. 747, 756–57 (1982)). This is exactly the interest the Legislature advanced in passing HB359 as explained above, and it constitutes a large portion of HB359's plainly legitimate sweep.

Plaintiffs characterize "drag shows" as art, but it does not necessarily follow that art cannot also be indecent and inappropriate for minors. Indeed, Imperial Court admits as much by acknowledging it distinguishes between "adults-only" and "family friendly" or "all-ages" performances. (2-ER-192.) Imperial Court also makes clear that it is well within its ability to produce drag shows under HB359, whether it be through increased age restrictions, modified costuming, or other adaptations, having done so repeatedly since HB359's enactment. (*See* 2-ER-194-95.) In other words, even Imperial Court agrees that certain variations of *its own art* are inappropriate for children, and they can and do take measures to prevent children from seeing it. Plaintiffs cannot seriously challenge the legitimate interest of the state

in regulating indecent or inappropriate conduct to minors. *Sable Comm. of Cal.*, 492 U.S. at 126. Their own allegations implicitly acknowledge HB359's legitimate sweep. (*See* 2-ER-268-312.) What they cannot show is that the whole of HB359 is substantially overbroad compared to its legitimate regulation of inappropriate and indecent conduct to minors, especially considering the dearth of any enforcement actions by the State.

Furthermore, the Legislature's intent underlying HB359's conditioning of state funding as set forth in Section 3 is clear and proper. "Because nothing requires government to assist others in funding the expression of particular ideas, including political ones, [the] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Interpipe Contr., Inc. v. Becerra*, 898 F.3d 879, 886 (9th Cir. 2018); *see also Rust*, 500 U.S. at 193. Section 3(1), (2), and (3)(b) simply deny state subsidies for the covered conduct. Those entities—so long as they comply with Section 2—may still host sexually oriented performances and drag story hours, they must just forgo state subsidies. That is plainly within the State's legitimate authority. *Interpipe Contr., Inc.*, 898 F.3d at 886. This is another considerable portion of the law's plainly legitimate sweep.

Plaintiffs read HB359 broader than the statutory text allows. HB359 does not prevent non-age-restricted sexually oriented performances at non-publicly funded

private property. HB359 does not restrict drag show story hours at libraries or schools after regular hours, or as part of non-school sanctioned extracurricular activities. Nor does HB359 apply to performances that are not intended to appeal to a prurient interest in sex. In other words, contrary to Plaintiffs' claims, HB359 incorporates understood legal terms and legitimate extensions of state authority to protect minors. *Sable Comm. of Cal.*, 492 U.S. at 126.

On balance, Plaintiffs cannot establish that HB359's alleged overbreadth is substantial, not only in an absolute sense, but also relative to its plainly legitimate sweep. Plaintiffs therefore cannot sustain their heavy burden of justifying the "strong medicine" of facial invalidation, particularly at the stage where the extraordinary and drastic remedy of a preliminary injunction is at issue. The district court erred in relying on legal theories postulated by a legal treatise over abundant authoritative caselaw that establishes the proper mode of analysis for overbreadth claims.

2. The District Court Erred In Disregarding Whether HB359 Was Readily Susceptible To A Limiting Construction.

The district court also completely disregarded the Supreme Court's admonition that existence of a First Amendment claim does not "render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett v. Spokane Arcades*, 472 U.S. 491, 502 (1985) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). "[W]here the parties challenging the statute are those who desire to engage in protected speech that the

overbroad statute purports to punish" a finding of partial invalidity is appropriate, if a limiting construction is possible. *Id.* at 504. "'Facial overbreadth has not been invoked where a *limiting* construction has been or could be placed on a challenged statute.'" *United States v. Stansell*, 847 F.2d 609, 613 (9th Cir. 1988) (emphasis in original) (quoting *Broadrick*, 413 U.S. at 612). If the statute is "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Broadrick*, 413 U.S. 601. "The key to application of this principle is that the statute must be 'readily susceptible' to the limitation[.]" *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

Here, the district court erred in failing to engage in any substantive analysis on whether a limiting construction was possible, making only a passing reference to this rule in the standing discussion. (1-ER-15.) The district court engaged in no further discussion on this issue. It therefore erred in not considering whether a limiting construction was possible before declaring HB359 overbroad.

B. HB359 Is Not A Content or Viewpoint-Based Restriction.

The district court further erred in concluding that HB359 is a content and viewpoint-based restriction subject to strict scrutiny. First, Plaintiffs' conduct is not inherently expressive, and the district court erred in assuming that it merited First Amendment Protection. Second, because HB359 is unrelated to the suppression of protected expression and only regulates conduct, if it is subject to a tiered scrutiny

analysis at all (*see* Section II.A, *supra*) it is subject to a lesser scrutiny than content-neutral restrictions. Third, the Legislature was properly concerned about the secondary effects of sexually oriented performances and "drag shows" on children.

1. Plaintiffs' Conduct Is Not Protected Under The First Amendment Because It Is Not Inherently Expressive.

The district court erred in finding that the conduct at issue is protected under the First Amendment. (1-ER-53.) The First Amendment protection on expression extends "only to conduct that is *inherently* expressive." *Rumsfeld v. Forum for Acad. & Institutional Rights., Inc*., 547 U.S. 47, 66 (2006) (emphasis added). "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410 (1974)). The Supreme Court has "considered the context in which it occurred," and whether "[t]he expressive, overly political nature of this conduct was both intentional and overwhelmingly apparent." *Id*. at 405–06. Although "[i]t is possible to find some kernel of expression in almost every activity a person undertakes. . . such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Thus, whether conduct becomes protected under the First Amendment is never assumed at the start.

Several Circuits, including this Court, have found that personal stylistic choices alone are not enough to justify First Amendment Protection.[9] "First Amendment protection is only granted to the act of wearing particular clothing or insignias where circumstances establish that an unmistakable communication is being made." *Edge v. City of Everett*, 929 F.3d 657, 668 (9th Cir. 2019) (citations omitted). This is because the Supreme Court "has consistently rejected 'the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.'" *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010) (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). For example, even a "barista's act of wearing pasties and g-strings in close proximity to paying customers" fails to demonstrate a "'great likelihood' that their intended messages related to empowerment and

[9] *See, e.g.*, *Blau v. Fort Thomas Pub. Sch. Dist*., 401 F.3d 381, 390 (6th Cir. 2005) ("the First Amendment does not protect such vague and attenuated notions of expression--namely, self-expression through any and all clothing that a 12-year old may wish to wear on a given day."); *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003) ("[A] person's choice of dress or appearance in an ordinary context does not possess the communicative elements necessary to be considered speech-like conduct entitled to First Amendment protection."); *Karr v. Schmidt*, 460 F.2d 609, 613–14 (5th Cir. 1972) (Determined that there was insufficient communicative content in a male student's choice of hair length to warrant First Amendment protection.); *Brandt v. Bd. of Educ. of Chi.*, 480 F.3d 460, 465 (7th Cir. 2007) (Although "clothes are certainly a way in which people express themselves, clothing as such is not—not normally at any rate—constitutionally protected expression.").

confidence will be understood by those who view them," thus failing to be communicative enough to merit First Amendment protection. *Edge*, 929 F.3d at 669.

The weight of this authority clarifies that engaging in sexual performances and wearing "gendered costumes" in front of children are not protected expression. (2-ER-240.) First, Plaintiffs do not establish what the "particularized message" is that they seek to convey to children. *Johnson*, 491 U.S. at 404. Further, Plaintiffs do not demonstrate a "great likelihood" that children will be able to understand that message, given their immaturity relative to adults. *Id.*; *see also Tagami v. City of Chi.*, 875 F.3d 375, 378 (7th Cir. 2017) (rejecting the argument that it was "overwhelmingly apparent" to onlookers that a woman's public nudity communicated a message of political protest against gender-specific standards of public decency). "Because the Court has eschewed a rule that 'all conduct is presumptively expressive,' individuals claiming the protection of the First Amendment must carry the burden of demonstrating that their nonverbal conduct meets the applicable standard." *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (quotation and citation omitted).[10] Plaintiffs failed to satisfy that burden, (*See*

[10] *See also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984) ("it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive.")

2-ER-214-256.) and the district court erred by presuming the conduct was expressive without any showing that it meets the test established in *Texas v. Johnson*.

a. HB359 Regulates Certain Conduct Unrelated To The Suppression Of Free Speech.

"If the purpose of a law regulating conduct is aimed at the conduct itself, rather than at the message conveyed by that conduct, the regulation is subject to the lesser scrutiny given to content-neutral restrictions. Put differently, lesser scrutiny applies if the government's interest in such a regulation 'is unrelated to the suppression of free speech.'" *United States v. Swisher*, 811 F.3d 299, 312 (9th Cir. 2016) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984)). In such cases, the *O'Brien* test applies. *Id.; see also O'Brien*, 391 U.S. at 377; *Taub v. City & Cnty. of S.F.*, 696 F. Appx. 181, 182 (9th Cir. 2017) (applying the *O'Brien* test to a public nudity ordinance.)

The *O'Brien* Court was clear: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376. And "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* Indeed, "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting written or spoken word." *Johnson*, 491 U.S. at 406

(citing *O'Brien*, 391 U.S. at 376–77). Under the *O'Brien* test, a governmental restriction on speech is constitutional if (1) the government has the power to pass the law; (2) the law furthers a substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the restriction is narrowly tailored. *O'Brien*, 391 U.S. at 367, 377.

Here, HB359 regulates conduct. Section 2 explicitly prohibits minors from entering a sexually oriented business during a sexually oriented performance. (2-ER-209-10.) The definitions for "sexually oriented business" and "sexually oriented performance" illustrate sexual *conduct*, without consideration of any specific communication. (2-ER-209.) The definition for "sexually oriented performance" applies equally in Section 3—again, without regard to message conveyed and only targeting conduct. Section 3 does not prohibit "drag story hours" at any location except a state-funded school or library during regular operating hours. (2-ER-210.) "Drag" is conduct in this context. HB359 is a conduct regulation.

The district court also erred in concluding that HB359 is viewpoint-based restriction and thus subject to strict scrutiny. (1-ER-27-30.) HB359 is viewpoint neutral and only seeks to regulate sexual conduct in the presence of minors. *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (treating punishment of "offensively lewd and indecent speech" as viewpoint neutral); *Pacifica Found.*, 438

U.S., at 745–746 (treating regulation of profane monologue as viewpoint neutral). As the Supreme Court has described,

> Some people, for example, may have the viewpoint that society should be more sexually liberated and feel that they cannot express that view sufficiently without the use of pornographic words or images. That does not automatically make a restriction on pornography into viewpoint discrimination, despite the fact that such a restriction limits communicating one's views on sexual liberation in that way.

Iancu v. Brunetti, 139 S. Ct. 2294, 2313 (2019). Similarly, HB359's prohibition on minors attending "sexually oriented performances" or "drag story hours" at state-funded schools and libraries during business hours do not constitute a viewpoint-based restriction.[11]

All four elements of the *O'Brien* test are met here. First, Montana may place restrictions on businesses limiting a minor's access to sexualized content. *See, e.g.*, *Ginsberg*, 390 U.S. at 633 (finding a statute restricting minors under age 17 from accessing sexual material constitutional); *Crawford v. Lungren*, 96 F.3d 380, 389 (9th Cir. 1996) (A state may ban public vending machines from dispensing adult-oriented publications, considered "harmful matter," to protect children); *Renton v. Playtime Theatres*, 475 U.S. 41, 55 (1986) (Zoning laws may prohibit adult theaters

[11] Even if HB359 did regulate protected speech or expression, however, as a viewpoint-neutral regulation, it does not trigger strict scrutiny. *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043, 1055 (9th Cir. 2000).

in certain areas because of negative "secondary effects" to neighborhood children, among other issues.)

Second, HB359 furthers Montana's "compelling interest in protecting the physical and psychological well-being of minors." *Sable Comm. of Cal.*, 492 U.S. at 126. This includes regulating access to indecent or inappropriate conduct. *Id*. And a State may regulate what may be indecent to minors, even if it not legally obscene. *FCC v. Pacifica Found*., 438 U.S. 726, 751 (1978). A regulation may also limit such content to a time of day when minors are unlikely to be present. *Id*. at 732.

Third, Montana's interest in protecting the physical and psychological well-being of its minors is unrelated to the suppression of free expression—rather, it regulates specific conduct in the presence of minors in certain venues. The conduct itself is not prohibited in nearly all other contexts. Finally, HB359's restrictions are narrowly tailored. Its "'incidental restriction[s] on alleged First Amendment freedoms [are] no greater than is essential to the furtherance of that interest.'" *Taub*, 696 F. Appx. at 183 (quoting *O'Brien*, 391 U.S. at 377). The restrictions on "sexual oriented performances" only apply in the presence of minors or at a state-funded school or library during regular operating hours. (2-ER-209-10.) HB359 is therefore constitutional under *O'Brien*.

b. If HB359 Regulates Speech Or Expression, It Is A Content-Neutral Restriction Under The Secondary Effects Doctrine.

The district court further erred in ignoring the secondary effects of the prohibited conduct on minors. (1-ER-26-27.) Laws designed to combat the undesirable secondary effects of certain speech are considered content-neutral. *Renton*, 475 U.S. at 49. This Court uses a three-prong test to determine the constitutionality of a law under the secondary effects doctrine: (1) whether the regulation is a complete ban on protected expression; (2) whether the law's purpose is the amelioration of secondary effects; and (3) if so, the law is subject to intermediate scrutiny and it must be determined whether the law is designed to serve a substantial government interest, and whether reasonable alternative avenues of communication remain available. *Alameda Books, Inc. v. City of L.A.*, 631 F.3d 1031, 1040 (9th Cir. 2011) (citing *Renton*, 475 U.S. at 46–47). HB359 satisfies this test.

First, as discussed above, HB359 is not a complete ban on any expression. Both "sexually oriented performances" and "drag story hours" may occur at most locations and times where minors are absent. The only restrictions are regular operating hours at state-funded schools or libraries. (*See* 2-ER-209-10.) Second, HB359's purpose is to ameliorate the secondary effects on children. When enacting such an ordinance, a legislature or municipality "must rely on evidence that

'demonstrate[s] a connection between the speech regulated…and the secondary effects that motivated adoption of the ordinance.'" *Fantasyland Video, Inc. v. Cnty. of San Diego*, 505 F.3d 996, 1001 (9th Cir. 2007) (quoting *City of L.A. v. Alameda Books*, 535 U.S. 425, 441 (2002) (plurality)). The Supreme Court has "refused to set . . . a high bar for municipalities that want to address merely the secondary effects of protected speech." *Alameda Books*, 535 U.S. at 438–39 (plurality). Consequently, "a municipality may rely on any evidence that is 'reasonably believed to be relevant.'" *Fantasyland Video, Inc.*, 505 F.3d at 1001 (quoting *Alameda Books*, 535 U.S. at 438). Moreover, "very little evidence is required." *Alameda Books*, 535 U.S. at 451. (Kennedy, J., concurring). Empirical evidence is not required, as it "would go too far in undermining the settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Id*. at 439 (plurality) (quoting *Renton*, 475 U.S. at 52). Thus, a municipality may rely on the experiences of other jurisdictions, or even anecdotal or testimonial evidence. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 312–14 (2000); *Ctr. for Fair Pub. Policy v. Maricopa Cnty.*, 336 F.3d 1153, 1168 (9th Cir. 2003).

During deliberations over HB359, the Legislature heard many concerns about the effects of "sexually oriented performances" and "drag story hours" on children. For example, HB359's sponsor referenced videos and photos showing "4- and 5-

year-old children touching drag kings and queens and stuffing money into their g-strings."[12] Another witness quoted the City Journal Magazine's investigation[13] of "drag story hours," stating, "the drag queen might appear as a comic figure, but he carries and serious message: the deconstruction of sex, the reconstruction of child sexuality, and the subversion of middle-class family life."[14] Another witness spoke of her experience at a business in Kalispell, Montana, that teaches pole dancing to children and provides dollar bills to children to participate.[15]

Another proponent described an event where children were led by drag queens to a sign stating, "it's not going to lick itself."[16] Yet another aptly characterized the issue as not only the sexualization of children, but also the sexual objectification of women:

> Children do not know what normal looks like. They only know what they are exposed to. A drag show, or a drag queen story hour, isn't simply men parading in women's attire. Subjecting children to drag shows or drag queen story hour[s] are indoctrinating and grooming children to believe that it is normal for men to play dress-up as their favorite female idol in dresses that reveal large silicone breasts while

---

[12] Mont. Leg., H. Judiciary Comm. Hrg. at 08:21:05 (February 9, 2023), available at http://tinyurl.com/pnbsf5sy

[13] Christopher F. Rufo, *The Real Story Behind Drag Queen Story Hour*, CITY J. (Oct. 2022), available at http://tinyurl.com/4sunhvtt

[14] Mont. Leg., H. Judiciary Comm. Hrg. at 08:26:06 05 (February 9, 2023), available at http://tinyurl.com/pnbsf5sy

[15] Mont. Leg., H. Judiciary Comm. Hrg. at 08:33:49 (February 9, 2023), available at http://tinyurl.com/pnbsf5sy

[16] Mont. Leg., H. Judiciary Comm. Hrg. at 08:48:27 (February 9, 2023), available at http://tinyurl.com/pnbsf5sy

> adorned in outrageous bouffant wigs and caked-on clownish makeup. Their appearance does not evoke one of a woman deserving of respect. Rather, it is a mockery of women, and perpetuates our sexual objectification.[17]

In total, several dozen proponents testified about the need to protect children. The prevailing theme was clear: constituents were very concerned about children being sexualized and the secondary effects of the conduct at issue, and the Legislature needed to act.

As established above, it is clear that HB359 furthers Montana's compelling interest in protecting the well-being of minors, and HB359 is narrowly tailored to that end.

2. The Montana Legislature Did Not Have An Impermissible Purpose Or Justification When It Passed HB359.

Even where a statute is content-neutral, a court may apply strict scrutiny if it determines that, by its legislative history, "there is evidence that an impermissible purpose or justification underpins" the law. *City of Austin v. Reagan Nat'l Advert. of Austin, LLC.*, 596 U.S. 61, 76 (2022). However, this analysis doesn't entail cherry-picking comments of individual legislators or public proponents, criticizing the amendment process, and then ascribing a motive of malintent to the entire Legislative body to invalidate a law as the district court erroneously did here.

[17] Mont. Leg., H. Judiciary Comm. Hrg. at 08:57:33 (February 9, 2023), available at http://tinyurl.com/pnbsf5sy

Laws passed by the Montana Legislature are entitled to significant presumptions of constitutionality and good faith. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990). Inquiries into the motivations for legislative acts are a "sensitive" undertaking. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Indeed, it is "a problematic undertaking" and "a hazardous matter" when attempting to "[p]rov[e] the motivation behind official action[.]" *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *O'Brien*, 391 U.S. at 383. Accordingly, invalidating a statute on these grounds is a heavy burden—"[o]nly the clearest proof could suffice to establish the unconstitutionality of a statute." *Flemming v. Nestor*, 363 U.S. 603, 617 (1960). *See also Ambassador Books & Video v. City of Little Rock*, 20 F.3d 858, 863 (8th Cir. 1994) (applying the standard to purpose-based First Amendment challenges). A finding that the restriction of First Amendment speech or expression was "a motivating factor" in enacting a statute is not itself sufficient to hold the statute presumptively invalid. *Renton*, 106 S. Ct. at 929. As the *O'Brien* Court explained:

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.
>
> [...]
>
> What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes

> are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

O'Brien, 391 U.S. at 383–84. Legislators act for independent reasons—"the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021). "It is insulting to suggest that they are mere dupes or tools." *Id.* The presumptions of constitutionality and good faith require courts to exercise "extraordinary caution" when considering claims that a legislature enacted a statute with an unlawful or improper purpose, *Miller*, 515, U.S. at 916, and to "resolv[e] all doubts in favor of" the statute's validity. *Davis v. Dep't of Labor & Indus.*, 317 U.S. 249, 258 (1942).

The district court's reliance on a few legislators' comments as support for its conclusion that "an impermissible purpose animates [HB359]" (1-ER-37) and resulting preliminary injunction directly contravenes these authorities. The district court simply cannot project the perceived motivations of four individuals onto the Legislature as a whole. *See O'Brien*, 391 U.S. at 383–84; *Hunter*, 471 U.S. at 228; *Brnovich*, 141 S. Ct. at 2350. This was clear error.

The district court's focus on HB359's various amendments is similarly improper. (*See* 2-ER-245; 1-ER-38-39.) This common legislative process cannot demonstrate, or support, an improper purpose. Debates between individual

legislators about what words to use, what definitions to apply, and how courts may or may not interpret the bills as written merely reflect a typical (robust) legislative process. This hardly amounts to the "clearest proof" required for invalidation, and the district court erred in relying on the same to apply strict scrutiny to HB359. (*See* 1-ER-37.)

III. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR FIFTH AND FOURTEENTH AMENDMENT FACIAL CHALLENGE.

The district court also erred in finding HB359 unconstitutionally vague based on terms lacking legislated definitions or disagreements with defined terms. (1-ER-49-50.) Although "vagueness concerns are more acute when a law implicates First Amendment rights," *Cal. Teachers Ass'n v. Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001), "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, 491 U.S. at 794. Instead, "[t]he touchstone of a facial vagueness challenge in the First Amendment context [] is not whether *some* amount of legitimate speech will be chilled; it is whether a *substantial* amount of legitimate speech will be chilled." *Cal. Teachers Ass'n*, 271 F.3d at 1152 (emphasis in original).

A statute can be unconstitutionally vague for only one of two independent reasons: "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even

encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citation omitted). And, like facial overbreadth, before invalidating a statute on its face, "a federal court must determine whether the statute is "readily susceptible" to a narrowing construction by the state courts." *Cal. Teachers Ass'n*, 271 F.3d at 1147. (citations omitted).

This Court has instructed that "it is solely within the province of the state courts to authoritatively construe state legislation." *Id*. at 1146–47 (citing *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369 (1971).[18] As a result, it is "a federal court's duty" to "employ traditional tools of statutory construction to determine the statute's 'allowable meaning.'" *Id*. at 1147 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). "In doing so, we look to the words of the statute itself as well as state court interpretations of the same or similar statutes." *Id.*

The "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." *Rose v. Locke*, 423 U.S. 48, 49 (1975). Moreover,

> [m]any statutes will have some inherent vagueness, for "[i]n most English words and phrases there lurk uncertainties." Even trained

[18] The Montana Supreme Court has made clear that, "[t]he Legislature need not define every term it employs in a statute. If a term is one of common usage and is readily understood, a court should presume that a reasonable person of average intelligence can understand it. The failure to include definitions of all terms does not automatically make a statute vague as long as the meaning is clear and provides a defendant with adequate notice of the proscribed conduct." *State v. Madsen*, 2013 MT 281, ¶ 9, 372 Mont. 102, 317 P.3d 806 (Mont. 2013).

> lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid. All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.

Id. (internal citations omitted). A court may also look to a standard dictionary for the definition of words or consider the neighboring words with which it is associated to narrow its meaning. *See, e.g.*, *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 500–01 (1982); *Williams*, 553 U.S. 285, 294 (2008) ("In context, however, those meanings are narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated.") Lastly, when a definition is not provided, a court can "construe that term according to its ordinary, contemporary, common meaning." *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1021 (9th Cir. 2010) (citations and internal quotations omitted).

A. HB359 Gives A Person Of Ordinary Intelligence A Reasonable Opportunity To Know What Is Prohibited.

A person of ordinary intelligence has more than a reasonable opportunity to know what HB359 prohibits. "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." *City of Chi. v. Morales*, 527 U.S. 41, 58 (1999). HB359's definitions and prohibitions provide fair notice that, in context, ameliorate vagueness concerns. The district court erred in finding HB359 unconstitutionally vague because it lacked definitions for "lewd and

lascivious," "flamboyant or parodic persona," "glamorous or exaggerated costumes and makeup," "salacious dancing," "sexual manner," and "presence of an individual under the age of 18." (1-ER-46.)

"Lewd and lascivious" are words of common legal usage—in fact, an 1896 Supreme Court pointed out that they "signify that form of immorality which has relation to sexual impurity." *Swearingen v. United States*, 161 U.S. 446, 451 (1896). More modern definitions include: "Lewd" refers to "indecent, pornographic, obscene, and lascivious."[19] "Lascivious" is anything "[t]ending to excite lust; lewd; indecent; obscene; relating to sexual impurity; tending to deprave the morals in respect to sexual relations."[20] In context, these words directly relate to sexual activity and conduct. (2-ER-209.)

"In the presence of" is also a common legal term. "Presence means "close physical proximity coupled with awareness."[21] Thus, a person under the age of 18 may not be in close physical proximity, coupled with awareness, to a sexually oriented performance.[22] (2-ER-210).) Following the canon of *noscitur a sociis*,

---

[19] *LEWD Definition & Meaning*, Black's Law Dictionary (Mar. 28, 2013), https://thelawdictionary.org/lewd/

[20] *LASCIVIOUS Definition & Meaning*, Black's Law Dictionary (Nov. 4, 2011), https://thelawdictionary.org/lascivious/

[21] Bryan A Garner, *Black's Law Dictionary*, Fifth Pocket Edition 614 (1996).

[22] For example, in Montana, an offense committed "in the presence of a police officer" means "when the officer receives knowledge of the commission of an offense in his presence through any of his senses." *State v. Means*, 177 Mont. 193, 200, 581 P.2d 406, 410 (Mont. 1978).

"salacious dancing" and "sexual manner" can clearly be understood by their neighboring words. As used in HB359, "salacious[23] dancing" is a term used to define "sexually oriented," and underscores the sexual nature of a business or performance that minors are prohibited from entering into or viewing. (2-ER-209-10) "Sexual[24] manner,"[25] as used in HB359, is a term used to further define "stripping," which, when read in context, is the following: "[s]tripping" means "removal of clothing in a *sexual manner* for the entertainment of one or more individuals." (2-ER-209).) (emphasis added). "Stripping" informs the definition of "sexually oriented." (2-ER-209-10.)

[23] "Salacious is defined as "arousing or appealing to sexual desire or imagination" *Definition of SALACIOUS*, Merriam-Webster (Nov. 21, 2008), https://www.merriam-webster.com/dictionary/salacious

[24] "Sexual" is defined as "having or involving sex." *Definition of SEXUAL*, Merriam-Webster https://www.merriam-webster.com/dictionary/sexual

[25] "Manner is defined as "a mode of procedure or way of acting." *Definition of MANNER*, Merriam-Webster (Dec. 18, 2023), https://www.merriam-webster.com/dictionary/manner

A dictionary and the canon of *noscitur a sociis* provide the requisite clarity. "Flamboyant[26] and parodic[27] persona" and "glamourous[28] and exaggerated[29] costumes" inform the definitions of "drag king" and "drag queen." (2-ER-208.) Those who dress in drag typically wear flamboyant or parodic attire, or glamourous and exaggerated costumes, while engendering the opposite sex. All these words have definitions, but they highlight the challenge in choosing the right words to describe "drag." In the "*flamboyant* world of drag,"[30] there are many definitions. For example, Merriam-Webster defines it as "entertainment in which performers *caricature* or challenge gender stereotypes. . . by using *exaggeratedly* gendered mannerisms. . . and often wear *elaborate* and *outrageous* costumes."[31] The National Center for Transgender Equality refers to a "drag artists" as "people who identify as

---

[26] "Flamboyant" is defined as, "strikingly elaborate or colorful display or behavior." *Definition of FLAMBOYANT*, Merriam-Webster (Jan. 19, 1993), https://www.merriam-webster.com/dictionary/flamboyant

[27] "Parodic" is defined as, "a feeble or ridiculous imitation." *Definition of PARODIC*, Merriam-Webster (Dec. 9, 2023), https://www.merriam-webster.com/dictionary/parodic

[28] "Glamourous" is defined as, "an exciting and often illusory and romantic attractiveness." *Definition of GLAMOUR*, Merriam-Webster (Dec. 19, 2023), https://www.merriam-webster.com/dictionary/glamour

[29] "Exaggerated" is defined as, "to enlarge beyond bounds or the truth." *Definition of EXAGGERATE*, Merriam-Webster (Dec. 9, 2023), https://www.merriam-webster.com/dictionary/exaggerate

[30] Jacob Ogles, *14 Drag Performers Who Made History*, (July 31, 2018), http://tinyurl.com/j5e68ybz

[31] *Definition of DRAG*, Merriam-Webster (Dec. 17, 2023), https://www.merriam-webster.com/dictionary/drag (emphasis added).

men and present themselves in *exaggeratedly* feminine ways as part of their performance."[32] And according to Outcoast, an LGBTQ website, "glamor drag," is defined by its "extravagance" and "opulence," which should not be confused with the many other forms of drag that each have their own unique definitions.[33] Various resources—even those used by drag performers themselves—use themes and words that the Legislature attempted to encapsulate within its definitions. The result tracks closely with them, even if it may be imperfect. Perhaps this is why the Supreme Court shuns "perfect clarity and precise guidance" in definitions, even if the "regulations [] restrict expressive activity." *Ward*, 491 U.S. at 794.

The district court also erroneously rejected the Legislature's definitions of "drag story hour," "nude," "public property," "sexually oriented," "sexually oriented business," and "stripping," because "they run the risk of vagueness and overbreadth." (1-ER-47.) First, the district court determined that a "'flamboyant or parodic' gendered persona with 'glamorous or exaggerated costumes or makeup' could be interpreted to include any number of theatrical or artistic performances." (*Id*.) But this ignores the clear context of HB359's prohibition of "drag story hours" at state-funded schools or libraries during regular operating hours or at school-

[32] *Understanding Drag*, National Center for Transgender Equality (Apr. 28, 2017), https://transequality.org/issues/resources/understanding-drag (emphasis added).

[33] http://tinyurl.com/3b8my3v7

sanctioned extracurricular activities. (*See* 2-ER-210.) No other theatrical or artistic performance is implicated in this definition, and the narrow prohibition provides fair notice. Next, the district court criticized the definition of "[s]tripping" because "[a] performer who removes no clothing or who removes only outer layers still might fall within [HB359's] definition of [s]tripping." Again, context is key: the district court's statement is true *only if* the performer sexualizes the performance of stripping or simulated stripping *in the presence of a minor*. (2-ER-209-10.) This tracks with the Legislature's goal of protecting minors from potentially harmful sexualized conduct.

The district court also asserted that "[HB359] remains silent as to whether 'depiction[s] or descriptions[s] of human genitals or of sexual conduct" encompass non-live content or literary, film, theatrical, or other artistic depictions. (1-ER-47.) However, the codified definition of "performance" establishes otherwise.[34] (2-ER-89.) Considering this definition in the context of a "sexually oriented performance," a person of ordinary intelligence can understand what it means. Finally, the district court took exception to the sub-definition of "nude," but the prohibition applies only if a minor is present at a "sexually oriented business" that provides live nude

[34] "'Performance' means any motion picture, film, or videotape (except a motion picture or videotape rated G, PG, PG-13, or R by the motion picture association of America); phonograph record; compact disk; tape recording; preview; trailer; play; show; skit; dance; or other exhibition played or performed before an audience of one or more, with or without consideration." Mont. Code Ann. § 45-8-205(6).

entertainment or performances *and* serves alcohol. (2-ER-209.) Again, context is key, and HB359 clearly provides people of ordinary intelligence with a reasonable opportunity to understand what conduct it prohibits.

B. HB359 Does Not Authorize Or Encourage Discriminatory Enforcement.

HB359 does not authorize or encourage discriminatory enforcement, because it meets "the requirement that [the] legislature establish[es] minimal guidelines to govern law enforcement." *Hill*, 530 U.S. at 732; *Morales*, 527 U.S. at 60. HB359's liability scheme at issue here consists of Sections 2 and 3. (2-ER-209-10.) Contrary to the district court's concerns, this does not "create[] a significant risk of arbitrary enforcement against people who are not drag performers but who do not conform to traditional gender and identity norms." (1-ER-48.) A plain reading of HB359 dispels such concerns.

Section 2 explicitly prohibits a minor from entering a sexually oriented business during a sexually oriented performance. (2-ER-209.) Liability attaches only to an "owner, operator, manager, or employee of a sexually oriented business." (*Id*.) A conviction results in a fine and can result in revocation of a business license for third or subsequent convictions. (*Id*.) This only applies to businesses that meet the provided definition of "sexually oriented business[.]" (*Id*.) A minor may still be on premises any time aside from when a "sexually oriented performance" occurs. (*Id*.) Moreover, a "sexually oriented performance" must be one that is "intended to appeal

to the prurient interest in sex" and displays nudity, stripping, or sexual conduct. (*Id*.) Section 2 does not provide latitude for indiscriminate enforcement considering these limitations.

Section 3 further clarifies when, where, and how HB359 prohibits "sexually oriented performances[.]" (2-ER-210.) As provided, a school or library that receives state funding "may not allow a sexually oriented performance or drag story hour on its premises during regular operating hours or at any school-sanctioned extracurricular activity." (*Id*.) HB359 also prohibits sexually oriented performances "on public property in any location where the performance is in the presence of an individual under the age of 18" and "in a location owned by an entity that receives any form of funding from the state." (*Id*.) HB359 further defines "drag story hour," drag king," and "drag queen" as noted above. (2-ER-208.) Section 3's liability only applies to "[a] library, a school, or library or school personnel, a public employee, or an entity that receives state funding or an employee of such an entity. (2-ER-210.) A conviction results in a fine and, if applicable, the initiation of proceedings to suspend or revoke a teacher, administrator, or specialist certificate. (*Id*.) HB359's time and location restrictions and definitions are sufficiently clear as to constrain indiscriminate enforcement.

In sum, HB359 both provides fair notice and prevents indiscriminate enforcement despite the "hypertechnical" and hypothetical theories proffered as

concerns. *Hill*, 530 U.S. at 733. "And while 'there is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in [] question,' because we are 'condemned to the use of words, we can never expect mathematical certainty from our language.'" *Id*. (citations and quotations omitted). But "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute. . ." *Id.* The district court therefore erred in finding HB359 facially unconstitutionally vague.

IV. THE DISTRICT COURT ERRED IN FINDING THAT THE REMAINING FACTORS WEIGH IN FAVOR OF AN INJUNCTION.

A. THE DISTRICT COURT ERRED IN DETERMINING THAT PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

"Even where a plaintiff has demonstrated a likelihood of success on the merits of a First Amendment claim, he 'must also demonstrate that he is likely to suffer irreparable injury in the absence of a preliminary injunction, and that the balance of equities and the public interest tip in his favor.'" *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011) (*overruled on other grounds by Bd. of Trs. of the Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019)) (quoting *Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009)). For the same reasons Plaintiffs cannot establish the requisite injury, causation, and redressability elements of Article III standing, they cannot

demonstrate the likelihood of suffering irreparable harm in the absence of a preliminary injunction.

B. The Balance Of Equities And Public Interest Favor The State.

A district court should consider whether a preliminary injunction would be in the public interest if "the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016). "In fact, 'courts … should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). An overbroad injunction can also implicate the public interest. *Stormans*, 586 F.3d 1109.

The district court erred in dismissing the injuries inflicted on the State by enjoining HB359. The very fact that HB359 is a duly enacted state statute weighs against granting an injunction. *Golden Gate Rest. Ass'n v. City of S.F.*, 512 F.3d 1112, 1126 (9th Cir. 2008) ("The public interest may be declared in the form of a statute."); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (A State "suffers a form of irreparable injury" any time it is prevented from "effectuating" laws "enacted by representatives of its people."). Montana, and the public at large, maintain a compelling interest in enforcing HB359—preventing minors' exposure to indecent and potentially harmful conduct. Montanans now have

a statutory structure to regulate such conduct pursuant to HB359. For the same reasons Plaintiffs cannot establish that any overbreadth of HB359 is real and substantial in relation to its plainly legitimate sweep, they failed to establish that the balance of equities and public interest weigh in their favor, and the district court erred in enjoining HB359.

V. IN THE ALTERNATIVE, THE DISTRICT COURT ERRED IN FAILING TO PROPERLY NARROW THE SCOPE OF ITS PRELIMINARY INJUNCTION.

Alternatively, the district court should not have issued a statewide injunction when a narrowly-crafted injunction applying only to the parties before it—assuming those includes *all* necessary parties—would suffice. Under our Constitution, a valid remedy "operate[s] with respect to specific parties," not on a law "in the abstract." *California v. Texas*, 141 S. Ct. 2104, 2115 (2021). This is because the "constitutionally prescribed role" of the federal judiciary is "to vindicate the individual rights of the people appearing before it." *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). Thus, judicial remedies should be "limited to the inadequacy that produced the injury in fact that the plaintiff has established," and "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Id.* at 1931 (quotation omitted). Should nonparties need to be included, the law provides such a mechanism. *See* Fed. R. Civ. P. 23. Moreover, the overbreadth doctrine sets forth a legal basis to provide relief to all members of the

public, but the district court failed to perform the requisite analysis as discussed above.

In any event, an allegedly overbroad statute does not justify an overbroad injunction. The Supreme Court provides such an example in *United States v. National Treasury Employees Union*, where the district court concluded that a statute violated the First Amendment rights of certain government employees and decided to enjoin enforcement against *all* the employees in "the entire Executive Branch of the Government." 513 U.S. 454, 477 (1995). The Supreme Court held that the district court erred in the scope of the injunction and narrowed it to cover only the plaintiffs in the case. *Id.* at 477-78. The Court reasoned that "although the occasional case requires us to entertain a facial challenge in order to vindicate a party's right not to be bound by an unconstitutional statute, we neither want nor need to provide relief to non-parties when a narrower remedy will fully protect the litigants." *Id.* (internal citations omitted).

Similarly here, the district court determined that because Plaintiffs were likely to succeed on the merits, every person in Montana, not just the those involved in the litigation, were shielded from enforcement. This was unnecessarily broad since injunctive relief as applied only to Plaintiffs would have remedied their alleged injuries. And finally, anyone who seeks to engage in the conduct at issue is either an individual, associational, or organizational party in this matter. The scope is broad

enough as it currently stands without adding in every individual in the state. Thus, assuming a preliminary injunction is warranted, and assuming the district court correctly determined that all necessary defendants are involved, it should have narrowed the scope to include only the parties in this case. This Court should therefore narrow the scope of the preliminary injunction if it determines such relief is warranted under the facts and circumstances here.

CONCLUSION

Contrary to the district court's hyperbolic reference to "men fear[ing] witches and burn[ing] women," (1-ER-52), HB359 is not a law rooted in irrationality. Exposing minors to sexualized conduct is not, and should never be, a trivial concern. This is why the Supreme Court has permitted strip clubs to be regulated and zoned away from certain areas due to harmful secondary effects. This is why the Supreme Court has allowed the regulation of indecent content played on the radio. This is why the Supreme Court has approved the punishment of people who sell indecent or obscene content to minors. This is why the Supreme Court has clearly established a state's compelling interest in protecting the physical and psychological wellbeing of minors, *Sable Comm. of Cal.*, 492 U.S. at 126, and ensuring they are "safeguarded from abuses" which might prevent their "growth into free and independent well-developed men and citizens." *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). To that end, Montana enacted HB359 as a reasonable measure to ensure the

wellbeing of its children. Plaintiffs may disagree, but they cannot thwart the will of Montana's citizens with mischaracterizations and unfounded fears. The district court erred in enjoining HB359, and this Court should reverse accordingly.

DATED this 10th day of January, 2024.

Austin Knudsen
MONTANA ATTORNEY GENERAL

/s/ Michael Noonan .
Michael Noonan
Michael Russell
Thane Johnson
Alwyn Lansing
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
PO Box 201401
Helena, MT 59620-1401

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101

ATTORNEYS FOR DEFENDANTS
AUSTIN KNUDSEN AND
ELSIE ARNTZEN

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, Michael Noonan an employee in the Office of the Attorney General of the Montana, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 13,758 words, excluding the parts of the document exempted by Rule 32(f), and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)–(7), and Circuit Rule 29-2(c)(3).

/s/ *Michael Noonan*
MICHAEL NOONAN

CERTIFICATE OF SERVICE

I certify that on this date, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

Dated: January 10, 2024

/s/ *Michael Noonan*
MICHAEL NOONAN