

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

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

Plaintiffs-Appellees

v.

AUSTIN KNUDSEN, et al.,

Defendants-Appellants.

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

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**INDEX VOLUME**

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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

**INDEX**

<b>Document</b>	<b>File Date</b>	<b>USDC Dkt. No.</b>	<b>ER No.</b>
<b>Volume 1 of 3</b>			
Order Granting Preliminary Injunction	10/13/2023	33	2-54
<b>Volume 2 of 3</b>			
Dismissal Without Prejudice	11/20/2023	51	56-57
Dismissal Without Prejudice – City of Helena	11/13/2023	30	58-59
Minute Entry	8/28/2023	26	60-61
Gallagher’s Response to Plaintiffs’ Motion for Preliminary Injunction	8/4/2023	18	62-69
State’s Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction	8/2/2023	17	70-105
Order Granting Temporary Restraining Order	7/28/2023	13	106-125
City of Helena Response to Request for Temporary Restraining Order and Preliminary Injunction	7/24/2023	10	126-128
Exhibit 10 – Declaration of Rachel Corcoran, Billings Public Schoolteacher	7/17/2023	5-10	129-132
Exhibit 9 – Declaration of Kevin Hamm, Founder and President of Happiness & Joy Foundation	7/17/2023	5-9	133-154

Exhibit 8 – Declaration of Lauren Halverson, Representative of OUTlaws Student Organization	7/17/2023	5-8	155-159
Exhibit 7 – Declaration of Chelsia Rice, Co-Owner of Montana Book Company	7/17/2023	5-7	160-165
Exhibit 6 – Declaration of Krys Holmes, Executive Director of the Myrna Loy	7/17/2023	5-6	166-171
Exhibit 5 – Declaration of Mike Steinberg, Executive Director of the Roxy Theater	7/17/2023	5-5	172-181
Exhibit 4 – Declaration of Sabrina Malecek, Owner of BumbleBee Aerial Fitness	7/17/2023	5-4	182-188
Exhibit 3 – Declaration of Annatheia Smith	7/17/2023	5-3	189-196
Exhibit 2 – Declaration of Andria Jawort	7/17/2023	5-2	197-206
Exhibit 1 – House Bill 359	7/17/2023	5-1	207-213
Brief in Support of Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction	7/17/2023	5	214-256
Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction – Emergency Relief Requested	7/17/2023	4	257-260
Exhibit 1 – House Bill 359	7/17/2023	3-1	261-267
First Amended Complaint	7/17/2023	3	268-312

<b>Volume 3 of 3</b>			
Complaint	7/7/2023	1	314-352
Defendants' Preliminary Injunction Appeal	11/13/2023	38	353-355
USDC Docket for Case No. 2:23- CV-00050-BMM, U.S. District Court District of Montana <i>Imperial Sovereign Court of the State of Montana v. Knudsen, et al</i>	1/10/2024		356-369

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**APPELLANTS' EXCERPTS OF RECORD VOLUME 1 OF 3**

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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

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BUTTE DIVISION**

THE IMPERIAL SOVEREIGN COURT OF  
THE STATE OF MONTANA; ADRIA  
JAWORT; RACHEL CORCORAN;  
MONTANA BOOK COMPANY; IMAGINE  
BREWING COMPANY, LLC d/b/a IMAGINE  
NATION BREWING  
COMPANY; BUMBLEBEE AERIAL  
FITNESS; THE WESTERN MONTANA  
COMMUNITY CENTER; MONTANA  
PRIDE; THE GREAT FALLS LGBTQ+  
COMMUNITY CENTER; THE ROXY  
THEATER; and THE MYRNA LOY,

Plaintiffs,

vs.

AUSTIN KNUDSEN; ELSIE ARNTZEN; J.P.  
GALLAGHER; and THE CITY OF HELENA,

Defendants.

**No. CV 23-50-BU-BMM**

**ORDER**

**INTRODUCTION**

Plaintiffs the Imperial Sovereign Court of the State Of Montana (“Imperial Court”), Adria Jawort (“Jawort”), Rachel Corcoran (“Corcoran”), Montana Book Company (“Montana Book Co.”), Imagine Brewing Company, LLC d/b/a Imagine Nation Brewing Company (“Imagine Nation”), BumbleBee Aerial Fitness (“BumbleBee”), the Western Montana Community Center (“the Center”), Montana

Pride, the Great Falls LGBTQ+ Community Center (“Great Falls LGBTQ+ Center”), the Roxy Theater (“the Roxy”), and the Myrna Loy (collectively “Plaintiffs”), move the Court for a preliminary injunction. (Doc. 4.) Plaintiffs challenge Montana House Bill 359 (“H.B. 359”) on the basis that the law violates the First, Fifth, and Fourteenth Amendments of the U.S. Constitution. 2023 Mont. Laws Ch. 719 (Doc. 3 at 38–43.) The Court issued a temporary restraining order (“TRO”) on July 28, 2023, following an emergency hearing. (Doc. 13.) The Court held a subsequent preliminary injunction hearing on August 28, 2023. (Doc. 26.) For the reasons set forth below, the Court will grant Plaintiffs’ preliminary injunction motion.

## **BACKGROUND**

Plaintiffs include both individuals and organizations. Montana Pride is an all-ages annual statewide celebration of Montana’s LGBTQ+ community, with events that include a parade, drag performances, a rally, and educational workshops. (Doc. 5-9 at 4.) More than 15,000 people from across the state and country attended the events in 2022. (*Id.*) Montana Pride’s thirtieth-anniversary events took place from July 30 to August 6, 2023. (*Id.* at 3–4.) Montana Pride applied for permits for the 2023 events on June 30 and July 13, 2023. (*Id.* at 3, 8–14, 16–22.) Montana Pride represents that the applications proved “functionally identical” to those that the City of Helena approved in 2022. (Doc. 5-9 at 5.)

The City of Helena supported Montana Pride’s application and acknowledged that denying the requested permits would “infringe upon Plaintiff[s]’ constitutional rights.” (Doc. 10 at 2.) The City of Helena urged the Court to block enforcement of H.B. 359 in time to allow Montana Pride to proceed without subject[ing] city employees to criminal and civil liability under [ ] H.B. 359.” (*Id.* at 2–3.) The Court granted a TRO to allow the City of Helena to issue Montana Pride’s requested permits without risk of liability pursuant to H.B. 359. (Doc. 13 at 19–20.)

Jawort, a journalist and author, is a transgender (“trans”) woman and a Two-Spirit member of the Northern Cheyenne Tribe. (Doc. 5-2 at 3.) The term “Two-Spirit” reflects “traditional Indigenous acceptance of trans and non-binary definitions of gender.” (*Id.*) Jawort planned to deliver a lecture on trans and Indigenous Montana history at the Butte Public Library on June 2, 2023. (*Id.*) Jawort alleges that officers for the City-County of Butte-Silver Bow (“Butte-Silver Bow”) ordered the library to cancel the lecture on June 1, 2023. (*Id.*) Plaintiffs attach the cancellation email that the Butte Public Library sent to Jawort. (*Id.* at 7.) The email explains that Butte-Silver Bow had determined that “hav[ing] a trans[] person in the library” posed “too much of a legal risk” under H.B. 359. (*Id.* at 3, 7.) Butte released a public statement on its official Facebook page that stated as follows:

PSA

In accordance with Governor Greg Gianforte signing H.B. 359 into law, our county cannot allow an event where a

drag king or queen reads children’s books and engages in other learning activities with minor children present. Due to this law, we have had to cancel the speaker at the Butte Public Library [who] was scheduled for Friday.

(*Id.* at 10.) Jawort intended to present as herself and not in drag. (*Id.* at 5.) Jawort further alleges that her lecture lacked “anything resembling ‘prurient interest.’” (*Id.*)

Corcoran is an educator in Billings Public Schools who dresses up as fictional and historical characters as a learning tool. (Doc. 5-10 at 3–4.) Corcoran represents that dressing up serves “to foster a successful and welcoming learning environment,” “celebrate the success of [her] students, cultivate a sense of community, and further encourage learning in the classroom.” (*Id.* at 4.) Corcoran selects characters to dress up as without regard for “the gender or sex of the person being portrayed.” (*Id.*)

Imperial Court is a Montana nonprofit membership organization that produces community-based drag performances. (Doc. 5-3 at 2–3.) Imperial Court members perform at Pride events across Montana, including the 2023 Montana Pride events. (*Id.* at 5–7.) Imperial Court also fundraises for local causes and hosts educational seminars. (*Id.* at 3.) Montana Book Co. is an independent LGBTQ+-owned bookstore in Helena, Montana, that hosts author readings, book clubs, drag story hours, and other community events. (Doc. 5-7 at 3–5.)

The Center and the Great Falls LGBTQ+ Center are LGBTQ+ community centers in Missoula and Great Falls, Montana, respectively. (Doc. 3 at 9.) Both centers organize community events that include drag performances. (*Id.*)

BumbleBee operates an aerial arts and pole fitness studio in Helena, Montana. (*Id.* at 8.) Imagine Nation is a brewery and community center in Missoula, Montana, that hosts drag events. (*Id.*)

The Roxy is a nonprofit community-owned theater in Missoula, Montana. (*Id.* at 10.) The Myrna Loy is an independent nonprofit arts and culture center in Helena, Montana. (*Id.*) Montana Book Co., the Roxy, the Myrna Loy, and Imagine Nation have received state funds, lease space from an entity that has received state funds, and/or expect to receive state funds in the future. (Doc. 5-7 at 4; Doc. 5-5 at 3; Doc. 5-6 at 3; Doc. 3 at 8.)

Austin Knudsen (“Knudsen”) is the Attorney General for the State of Montana (“the State”). (Doc. 3 at 11.) Elsie Arntzen (“Arntzen”) is the Montana Superintendent of Public Instruction. (*Id.* at 12.) J.P. Gallagher (“Gallagher”) is Butte-Silver Bow’s Chief Executive. (Doc. 3 at 11.) The City of Helena is the state capital and an incorporated municipality. (*Id.* at 12.) The City of Helena evaluates and issues permits for events held within city limits.

Representative Braxton Mitchell (“Rep. Mitchell”) introduced H.B. 359 on January 29, 2023. The Montana state legislature passed H.B. 359 on May 11, 2023. Montana Governor Greg Gianforte signed H.B. 359 into law on May 22, 2023. The statute took immediate effect. H.B. 359 § 7. The text of H.B. 359 criminalizes a wide range of conduct, including “drag story hours” in schools and libraries that receive

any amount of state funding. *Id.* § 3(2). The statute prohibits minors from attending certain “sexually oriented shows.” *Id.* § 2(1). H.B. 359 proscribes all “sexually oriented” performances in libraries or schools that receive public funding, *id.* § 3(1)–(2), on public property “in the presence of” a minor, *id.* § 3(3)(a), and in any location owned by an entity that receives any state funding. *Id.* § 3(3)(b).

H.B. 359 defines “drag story hour” as “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.” *Id.* § 1(3). The statute defines “drag king” and “drag queen” as “a male or female performer who adopts a flamboyant or parodic [male or female] persona with glamorous or exaggerated costumes and makeup.” *Id.* § 1(1), (2). H.B. 359 defines “sexually oriented performance” as “a performance that, regardless of whether performed for consideration, is intended to appeal to a prurient interest in sex and features” any of the following: “the purposeful exposure, whether complete or partial, of . . . 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 “prosthetic genitalia, breasts, or buttocks,” “stripping,” or “sexual conduct.” *Id.* § 1(10).

H.B. 359 defines “stripping” as the “removal or simulated removal of clothing in a sexual manner for the entertainment of one or more individuals,” regardless of whether nudity results. *Id.* § 1(11). The statute contains no definition for “sexual

conduct” and instead cross-references the definition contained in Montana’s criminal child abuse statute, Mont. Code Ann. § 45-5-625. H.B. 359 § 1(8) (2023). The definition of “sexually oriented” encompasses the undefined term “salacious dancing” in addition to “any lewd or lascivious depiction or description of human genitals or of sexual conduct[.]” *Id.* “Lewd” and “lascivious” are not defined. *Id.* H.B. 359 similarly fails to define “in the presence of” a minor. *Id.* § 3(3)(a).

Owners, operators, managers, and employees of “sexually oriented” businesses convicted under H.B. 359 face fines from \$1,000 to \$10,000 and, for a third or subsequent offense, mandatory revocation of business licenses. *Id.* § 2(2). Libraries, schools, public employees, and entities that receive any state funding face fines of \$5,000 and mandatory suspension (first offense) or permanent revocation (subsequent offenses) of an applicable teaching, administrative, or specialist certificate if convicted of violating H.B. 359. *Id.* § 3(4). H.B. 359 provides for a private right of action in addition to imposing criminal liability. *Id.* § 4. A minor who attends a drag story hour or “sexually oriented performance” in violation of H.B. 359 § 2, or the minor’s parent, may bring a civil action up to ten years after an alleged violation against any “person who knowingly promotes, conducts, or participates as a performer.” *Id.* § 4(1), (3).

Plaintiffs filed this action on July 7, 2023. (Doc. 1.) Plaintiffs filed an Amended Complaint on July 17, 2023. (Doc. 3.) Plaintiffs sue Knudsen and Artzen

in their official capacities, Gallagher in his individual and official capacity, and the City of Helena in its capacity as a municipal entity. (Doc. 3 at 5.) The Amended Complaint contains the following five causes of action: (I) First Amendment Free Speech Violation, as applied to Jawort; (II) Fourteenth Amendment Equal Protection Violation, as applied to Jawort; (III) First Amendment Free Speech Violation, as applied to Montana Pride; (IV) First Amendment Facial Free Speech Violation; and (V) Fifth Amendment Facial Due Process Violation. (Doc. 3 at 38–43.) In addition to injunctive relief, Plaintiffs seek declaratory judgment that H.B. 359 proves facially unconstitutional; damages in favor of Jawort and Montana Pride and against Gallagher and the City of Helena, respectively; and attorney’s fees and costs. (*Id.* at 44.)

Plaintiffs filed a TRO/preliminary injunction motion on July 17, 2023. (Doc. 4.) Plaintiffs sought an emergency TRO on or before July 30, 2023, so that Montana Pride could take place without requiring the thousands of attendees, performers, and other community members to chill their protected speech or face criminal and civil liability. (Doc. 5 at 8.) The City of Helena filed a Response in support of Plaintiffs’ TRO request on July 24, 2023. (Doc. 10.) The Court held an emergency TRO hearing on July 26, 2023. (Doc. 12.) The Court issued a limited TRO pending its determination of Plaintiffs’ entitlement to a preliminary injunction on July 28, 2023. (Doc. 13.) Knudsen and Arntzen (“State Defendants”), filed a Response on August

2, 2023. (Doc. 17.) Gallagher filed his Response and Answer on August 4, 2023, and August 8, 2023, respectively. (Doc. 18; Doc. 21.) Gallagher takes no position on the preliminary injunction motion. (Doc. 18 at 2.) The State and the City of Helena filed their Answers on August 10, 2023. (Doc. 22; Doc. 23.) The Court conducted a preliminary injunction hearing on August 28, 2023. (Doc. 26.) The Court dismissed Defendant City of Helena without prejudice and dismissed Count III of the Amended Complaint with prejudice on September 6, 2023, upon motion of the parties. (Docs. 29 and 30.)

Plaintiffs seek a preliminary injunction to bar Defendants Knudsen and Arntzen from enforcing H.B. 359 pending this Court's resolution of the Plaintiffs' Count IV and Count V regarding the constitutionality of H.B. 359. (Doc. 4.) The Court's analysis will focus on whether H.B. 359 facially violates Plaintiffs' First Amendment free speech rights and facially violates Plaintiffs' Fifth Amendment due process rights.

### **LEGAL STANDARD**

District courts possess discretion regarding the grant or denial of preliminary relief. *Env'tl. Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020). A party seeking a preliminary injunction must establish the following four elements: (1) that they are likely to succeed on the merits; (2) that they are likely to suffer irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities tips

in their favor; and (4) that a preliminary injunction would be in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). “[H]arm to the opposing party and the public interest[] merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). The Ninth Circuit evaluates the above factors under a sliding scale. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir. 2011). A stronger showing on one factor may offset a weaker showing on another. *Id.* at 1132.

## DISCUSSION

Plaintiffs urge the Court to issue a preliminary injunction to extend the TRO and prevent enforcement of H.B. 359 until the Court decides the case on the merits. The Court will address each of the *Winter* factors with respect to Plaintiffs’ request for a preliminary injunction.

### I. Likelihood of Success on the Merits.

Plaintiffs contend that they have demonstrated a likelihood of success on the merits of the following two claims: (Count IV) First Amendment facial challenge to H.B. 359, and (Count V) Fifth Amendment vagueness/overbreadth facial challenge to H.B. 359. (Doc. 5 at 18, 37.) Plaintiffs assert that H.B. 359 has chilled their speech and subjected them to a reasonable fear of prosecution for engaging in protected speech and expression. The Court must evaluate whether Plaintiffs have established standing before considering whether Plaintiffs have demonstrated a likelihood of

success on the merits of Counts IV and V. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992).

### **A. Standing.**

To establish standing, a plaintiff must demonstrate the following three factors: (1) that they suffered an injury to a legally protected interest that is concrete, particularized, and actual or imminent; (2) that the defendant likely caused the injury; and (3) that judicial relief likely would redress the injury. *Id.* at 560–61. The U.S. Supreme Court has “altered its traditional rules of standing” for overbreadth challenges to legislative acts on First Amendment grounds. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

State Defendants level two arguments against Plaintiffs’ standing. State Defendants first contend that all Plaintiffs fail to allege a cognizable injury because the State is not prosecuting any current enforcement actions under H.B. 359. (Doc. 17 at 27.) A plaintiff need not subject themselves to criminal prosecution, however, to establish a cognizable First Amendment injury. “Article III requires a threat of prosecution, not actual prosecution.” *Friends of George’s*, No. 2:23-cv-02163-TLP-tmp, 2023 WL 3790583, \*16 (W.D. Tenn. June 2, 2023). The harm of censorship “can be realized even without an actual prosecution.” *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 393 (1988). Plaintiffs also have alleged concrete injury in the form of chilled speech and cancelled and modified events, as discussed below.

State Defendants additionally assert that Knudsen and Arntzen do not represent appropriate defendants. (Doc. 17 at 28–31.) A federal action may result in an injunction to bar a responsible state official from enforcing a challenged provision, a declaratory judgment that the provision proves unconstitutional, or both. “[S]tate officials who enforce[] an unconstitutional law ‘come[] into conflict with the superior authority of [the] Constitution.’” *Ex Parte Young*, 209 U.S. 123, 159–60 (1908).

Knudsen, as Montana’s Attorney General, serves as the top state official responsible for enforcing Montana’s criminal laws. The Attorney General must perform the following functions pursuant to statutory duties: prosecute all causes in the supreme court “in which the state has an interest,” Mont. Code Ann. § 2-15-501(1) (2023); “exercise supervisory powers over county attorneys [including] the power to order and direct county attorneys in all matters pertaining to the duties of their office” upon which order a county attorney must “promptly institute and diligently prosecute in the proper court and in the name of the state of Montana any criminal or civil action or special proceeding,” Mont. Code Ann. § 2-15-501(5) (2023); “when required by the public service or directed by the governor, [] assist the county attorney of any county in the discharge of the county attorney’s duties,” Mont. Code Ann. § 2-15-501(6) (2023); “when required by the public service or directed by the governor, [] prosecute [] appropriate cases [...] in which the state has

an interest,” Mont. Code Ann. § 2-15-501(6) (2023); and “perform all other duties as required by law,” Mont. Code Ann. § 2-15-501(9) (2023).

The Montana Code fails to define the statutory phrases “required by the public service” and “in which the state has an interest.” These phrases encompass “broad and abstract terms that necessarily result in deference to the superseding state official.” Tyler Quinn Yeargain, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 Emory L.J. 95, 116 (2018). The Montana Supreme Court has interpreted the phrase “in which the state has an interest” in the context of the Attorney General’s broad power to determine when to institute legal action: “as an executive officer of the State of Montana, the Attorney General determines when to prosecute or to defend cases in which the State has an interest.” *W. Tradition P’ship, Inc. v. Att’y Gen. of State*, 291 P.3d 545, 550 (Mont. 2012).

The prosecutorial powers of the Montana Attorney General are vast. The Montana Constitution and the Montana Code do not clearly demarcate the boundaries of this power. For example, the Attorney General may “direct, in a binding fashion,” the prosecutorial powers of any county attorney and “may in effect deputize himself (or be deputized by the governor) to stand in the role of a county prosecutor, and in that role exercise the same power to enforce the statute the prosecutor would have.” *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d

908, 919, 920 (9th Cir. 2004) (state attorney general was a proper party in a challenge to a state criminal statute where state law empowered the attorney general to “assist” county attorneys and so “do every act that the county attorney can perform”).

The Attorney General’s authority to prosecute under H.B. 359 has not been tested. “[T]he consequence of [the U.S. Supreme Court’s] departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation” cures the constitutional malady. *Broadrick v. Oklahoma*, 413 U.S. at 613. 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. This uncertainty does not shield the Attorney General from the equitable power of this Court to belay the attempt.

Taken together, the ambiguity of state law and the sensitivity of First Amendment expressive rights instruct that the threat of *attempted* prosecution by the Attorney General proves equivalent, in its capacity to chill speech, to the threat of prosecution by any county attorney in the state, whose authority to prosecute under the statute is not in question. “[A] federal court may] command[] a state official to do nothing more than refrain from violating federal law” without violating the state’s sovereign immunity. *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011). Attorney General Knudsen stands as a proper party to enjoin from

enforcement of the statute.

Arntzen, as Montana’s Superintendent of Public Instruction, possesses authority to channel the powers of the Board of Public Education (“the Board”) over the certification of educators in the state. Montana law empowers the Board to initiate proceedings under Mont. Code Ann. § 20-4-110 (2023) to revoke or suspend certificates, but that power is not unlimited. The Board “may initiate proceedings [under the section] *if a request for the suspension or revocation [ . . . ] is made to it by the superintendent of public instruction,*” Mont. Code Ann. § 20-4-110(2)(b) (2023) (emphasis added), or, in limited circumstances, on the request of the trustees of a district, Mont. Code Ann. § 20-4-110(2)(a) (2023).

The Board may suspend or revoke certificates only for a finite list of reasons once those proceedings are set in motion. Mont. Code Ann. § 20-4-110(1) (2023). If a person were convicted under H.B. 359 § 3, the law requires that “proceedings [] be initiated to suspend the teacher [ . . . ] certificate of the offender under [Mont. Code Ann. §] 20-4-110.” H.B. 359 § 3(4). Upon conviction under H.B. 359 § 3 after an initial such suspension, “proceedings must be initiated to permanently revoke the teacher [ . . . ] certificate of the offender under [Mont. Code Ann. §] 20-4-110.” *Id.* These provisions demonstrate that the Superintendent of Public Instruction represents a proper party to enjoin. H.B. 359 authorizes the Superintendent of Public Instruction to permit proceedings to be initiated to suspend or revoke such a

certificate under Mont. Code Ann. § 20-4-110.

The Superintendent of Public Instruction stands as a member of a finite group legally authorized to enable the Board of Public Education to initiate proceedings to suspend or revoke certificates under Mont. Code Ann. § 20-4-110. Importantly, nothing in Montana law limits the power of the Superintendent of Public Education in making these requests. By contrast, in deciding whether to revoke or suspend a certificate, Montana law limits the Board to the list of reasons set forth in Mont. Code Ann. § 20-4-110(1) (2023). No similar provisions limit the Superintendent of Public Instruction in deciding whether “the [B]oard may initiate proceedings” under the section. The Superintendent of Public Instruction could permit the Board to initiate proceedings that eventually would fail. The hassle and embarrassment of even a meritless proceeding presents a potential occupational penalty to a targeted certificate holder. The Superintendent of Public Education’s authority to allow the initiation of proceedings under Mont. Code Ann. § 20-4-110 (2023) includes the authority to enforce H.B. 359 by requesting the initiation of proceedings in accord with its mandates. Arntzen represents a proper defendant.

**i. Individual Standing.**

The Court next will consider whether Plaintiffs have established individual standing, associational standing, and/or organizational standing. Jawort alleges actual injury to her First and Fourteenth Amendment rights flowing from the

cancellation of her June 2, 2023, lecture on trans and Indigenous Montana history at the Butte Public Library. (Doc. 5-2 at 3, 7, 10.) Jawort has proffered evidence that the event cancellation occurred in response to H.B. 359 and because of her status as a trans person and the LGBTQ+-related message she wished to deliver. (Doc. 5-2 at 3–5, 7, 10.)

Corcoran alleges imminent injury on the basis of her reasonable fear of prosecution under the plain text of H.B. 359 for dressing up in gendered costumes in the classroom. (Doc. 5-10 at 3–4.) Jawort and Corcoran directly link their speech-based injuries to H.B. 359. Blocking enforcement of H.B. 359 would remedy Jawort and Corcoran’s actual and imminent injuries. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (finding a preliminary injunction was warranted where “First Amendment interests [of moving parties] were either threatened or in fact being impaired at the time relief was sought.”) Jawort and Corcoran each have established individual standing. *Lujan*, 504 U.S. at 560–61.

**ii. Associational Standing.**

An entity possesses standing to sue on its members’ behalf when it can satisfy the following three elements: (1) that its members otherwise would have standing to sue in their own right, (2) that the interests at stake prove germane to the entity’s purpose, and (3) that neither the claim asserted nor the relief requested requires the participation of the individual members in the suit. *Hunt v. Wash. State Apple Advert.*

*Comm'n*, 432 U.S. 333, 343 (1977).

Plaintiffs allege that Imperial Court, the Center, and the Great Falls LGBTQ+ Center are membership organizations. (Doc. 5-3 at 2–3; Doc. 3 at 31.) Plaintiffs allege that all members of these organizations have suffered violations of their First Amendment rights to free speech and expression. (Doc. 3 at 32.) Imperial Court members allegedly have suffered from drag show cancellations, postponements, and modifications. (Doc. 5-3 at 5–7.) Imperial Court members also have dropped out of scheduled drag performances due to fear of criminal and civil sanctions under H.B. 359. (Doc. 3 at 30.) These alleged injuries prove cognizable and satisfy the causation and redressability prongs for the same reasons as Jawort’s and Corcoran’s alleged speech-based injuries. The Court, the Center, and the Great Falls LGBTQ+ Center have satisfied the first *Hunt* factor. 432 U.S. at 343.

The Imperial Court’s mission is to “educate and advocate for LGBTQ+ individuals and allies through the production of community-based drag performances that explore multiple gender expressions” and to “create a safe and welcoming environment.” (Doc. 5-3 at 2.) The Center and the Great Falls LGBTQ+ Center each seek to support LGBTQ+ people and communities. (Doc. 3 at 9.) The interests asserted in this action prove “germane” to the purposes of the Imperial Court, the Center, and the Great Falls LGBTQ+ Center. *Hunt*, 432 U.S. at 343.

Plaintiffs, aside from Jawort, seek only declaratory and injunctive relief rather

than damages. (Doc. 3 at 44.) The Imperial Court, the Center, and the Great Falls LGBTQ+ Center members need not be party to this action. *Hunt*, 432 U.S. at 343; *see also Garcia v. City of Los Angeles*, 611 F. Supp. 3d 941, 952 (C.D. Cal. 2020). The Court determines that the Imperial Court, the Center, and the Great Falls LGBTQ+ Center have established associational standing and may assert claims on behalf of their members. *Hunt*, 432 U.S. at 343.

### **iii. Organizational Standing.**

Organizational standing requires an organization to meet the same three *Lujan* individual standing elements: injury-in-fact, causation, and redressability. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).

With respect to the injury-in-fact element, an organization must demonstrate that its “ability to further its goals has been ‘perceptively impaired’ so as to constitute far more than simply a setback to the organization’s abstract social interests.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Montana Pride, Imperial Court, BumbleBee, the Center, the Great Falls LGBTQ+ Center, Montana Book Co., Imagine Nation, the Roxy, and the Myrna Loy (“Organizational Plaintiffs”) each allege chilled First Amendment speech and expression that satisfies the perceptive impairment injury-in-fact standard. (Doc. 3 at 32.) Organizational Plaintiffs further allege a fear of prosecution under H.B. 359,

a statute that they argue proves unconstitutionally vague and overbroad. (*Id.* at 30–37.) Imperial Court and BumbleBee additionally allege actual economic, reputational, and professional injury in the form of cancelled, postponed, or modified drag shows and pole modeling events, respectively. (Doc. 5-3 at 5–7; Doc. 5-4 at 5–6.) Organizational Plaintiffs’ alleged injuries prove cognizable and satisfy the causation and redressability prongs for the same reasons as Jawort’s and Corcoran’s alleged injuries.

Organizational Plaintiffs have established organizational standing. *Cf. Friends of George’s*, 2023 WL 3790583, at \*2–3. Each Plaintiff possesses at least one basis for standing. *Lujan*, 504 U.S. at 560–61; *Broadrick*, 413 U.S. at 612. The Court will proceed to evaluate the first *Winter* factor: likelihood of success on the merits. 555 U.S. at 22.

### **B. First Amendment Facial Claim.**

First Amendment rights do not extend to obscene speech and expression. Laws regulating obscenity, however, “must be specifically defined.” *Miller v. California*, 413 U.S. 15, 24 (1973). Speech must meet the following three criteria to qualify as legally “obscene”: (1) the speech, “taken as a whole, appeal[s] to the prurient interest in sex,” “applying contemporary community standards”; (2) the speech “portray[s] sexual conduct in a patently offensive way”; and (3) the speech, “taken as a whole, do[es] not have serious literary, artistic, political, or scientific

value.” *Id.* (internal citations and quotation marks omitted).

Existing Montana law shields minors from obscene material. Montana’s obscenity statute criminalizes purposely or knowingly providing obscene material, obscenely exposing one’s body, and giving obscene performances to minors, among other conduct. Mont. Code Ann. § 45-8-201(1) (2023). This statute employs a definition of “obscene” that incorporates the *Miller* requirements. *Id.* § 45-8-201(2). H.B. 359, by contrast, contains no requirement that, “taken as a whole” and “applying contemporary community standards” the regulated conduct “appeals to the prurient interest.” *See generally* H.B. 359. The statute similarly fails to require that speech be “patently offensive.” *Id.* H.B. 359 contains no carveout for speech or expression with serious literary, artistic, political, or scientific value. *Id.*

State Defendants conceded during the July 26, 2023, hearing that the statutory text of H.B. 359 regulates speech and expression outside that considered “obscene” under *Miller*. The Court determined in its July 28, 2023, TRO that H.B. 359 regulates protected speech as defined in *Miller*, 413 U.S. at 34–35. (Doc. 13 at 8–9.)

**i. Appropriate First Amendment Mode of Analysis.**

Defendants argue that the Court should undertake an “overbreadth” analysis rather than the standard First Amendment scrutiny analysis. Courts apply an “overbreadth” test in the context of speech unprotected by the First Amendment, including threats, “fighting words,” obscenity, and child pornography. *See* Marc

Rohr, *Parallel Doctrinal Bars: The Unexplained Relationship Between Facial Overbreadth and ‘Scrutiny’ Analysis in the Law of Freedom of Speech*, 11 ELON L.J. 95, 100 (2017). A statutory prohibition that conforms to the specific test for that category of unprotected speech (e.g., the *Miller* test for obscenity) proves constitutional. A restriction that extends beyond the category-specific test may be facially overbroad. The U.S. Supreme Court invalidated, for example, a Georgia “fighting words” statute that exceeded the judicially approved definition of that category of unprotected speech. *Gooding v. Wilson*, 405 U.S. 518, 528 (1972).

The First Amendment overbreadth analysis proves inapposite to H.B. 359. Apart from unprotected “low value speech,” federal courts reviewing restrictions on speech “because of disapproval of the ideas expressed” apply different tiers of scrutiny. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). H.B. 359 does not regulate obscenity or child pornography. The Court applies the First Amendment tiered scrutiny analysis. *Cf. Friends of George’s*, 2023 WL 3790583, at \*18; *HM Fla.-ORL, LLC v. Griffin*, No. 6:23-CV-950-GAP-LHP, 2023 WL 4157542, \*6–8 (M.D. Fla. June 23, 2023).

“[T]hat the government must remain neutral in the marketplace of ideas” represents “a central tenet of the First Amendment.” *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978). Courts subject content- and viewpoint-based restrictions on speech or expression to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155,

163 (2015). Content discrimination takes place when the government selects “the subjects that may be discussed[.]” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 59 (1983) (Brennan, J., dissenting). Viewpoint discrimination, in turn, “occurs when the government prohibits speech by particular speakers, thereby suppressing a particular view about a subject.” *Id.* The Court will consider whether H.B. 359 imposes content-based restrictions and/or viewpoint-based restrictions on speech or expression.

**ii. Whether H.B. 359 Constitutes a Content-Based Restriction.**

A regulation proves “facially content-based under the First Amendment if it ‘targets speech based on its communicative content’—that is, if it ‘applies to particular speech because of the topic discussed or the idea or message expressed.’” *City of Austin v. Reagan Nat’l Advert. of Austin, LLC.*, 596 U.S. 61, 69 (2022) (internal citation omitted). Content-based restrictions are “presumptively unconstitutional.” *Reed*, 576 U.S. at 163.

The only two other district courts to have considered First Amendment challenges to similar state “drag bans” concluded that those laws constitute facially content-based restrictions. *Friends of George’s*, 2023 WL 3790583, at \*19; *HM Fla.*, 2023 WL 4157542, at \*7. The district court in *Friends of George’s* issued a TRO blocking the Adult Entertainment Act (“AEA”), Tennessee’s drag ban, the day before it would have taken effect. 2023 WL 3790583, at \*3. The Florida drag ban at

issue in *HM Florida*, by contrast, had come into effect at the time of the district court’s ruling. 2023 WL 4157542, at \*1.

H.B. 359 bans drag story hours during “regular operating hours and at any school-sanctioned extracurricular activity” in schools and libraries that receive any public funding. H.B. 359 § 3(2). The law imposes significant restrictions on “sexually oriented” performances and “sexually oriented businesses” based upon broad definitions of sexual and gendered content. *Id.* §§ 2, 3. State Defendants argue that the codification instruction contained in H.B. 359 § 5(1) narrows the sweep of civil and criminal liability. (Doc. 17 at 20–21.) Section 5(1) of H.B. 359 incorporates the definitions contained in Montana’s criminal provisions for “Offenses Against Public Order.” H.B. 350 § 5(1) (citing Mont. Code Ann. § 45-8 (2023)). State Defendants note that the definition of “performance” contained in Mont. Code Ann. § 45-8-205 (2023), within “Offensive, Inhumane, and Indecent Conduct,” excludes films “rated G, PG, PG-13, or R by the motion picture association of America.” Mont. Code Ann. § 45-8-205(5) (2023).

H.B. 359 still restricts a broad range of other speech and expression even with the carveout for rated films. This other speech and expression ranges from theatre productions to book readings to drag shows, based upon their content. The constitutional problems with H.B. 359 statutory scheme identified by the Court in its TRO persist. (Doc. 13 at 14–16.) H.B. 359 does not qualify as a neutral time,

place, or manner regulation. *City of Austin*, 596 U.S. 61 at 69.

State Defendants also argue that H.B. 359 proves content-neutral because it addresses the Montana legislature’s concern with the “secondary effects of sexually expressive conduct on minors.” (Doc. 17 at 19–20.) None of the three cases cited by State Defendants supports this conclusion. *City of Erie v. Pap’s* upheld a municipal ordinance in Pennsylvania that banned nudity in public places. 529 U.S. 277, 282–83 (2000). The U.S. Supreme Court determined that the regulation proved “unrelated to the suppression of expression” because the city’s interest was in combatting harmful “secondary effects” of nude dancing and bore no relation to the expressive message of the conduct. *Id.* at 296. *City of Erie* evaluated the regulation under a “less stringent” standard that applies only to regulations that are unrelated to the content of the expression being limited. *Id.* The plaintiff in *City of Erie* also failed to dispute the validity of the city council’s findings about harmful secondary effects on public health, safety, and “serious criminal activity.” *Id.* at 297–98.

*Friends of George’s* rejected a similar “secondary effects” argument. 2023 WL 3790583, at \*26. The district court in *Friends of George’s* concluded that its “determination that the AEA was enacted for an impermissible purpose is broad enough to reject the notion that the AEA is aimed not at the content of expressive speech but rather at its secondary effects.” *Id.* As in *Friends of George’s*, H.B. 359 targets speech based upon content. Unlike in *City of Erie*, Plaintiffs vehemently

dispute the validity of the Montana legislature’s findings relating to drag, gender nonconformity, and harm to minors. The secondary effects doctrine does not apply.

The two other cases upon which Defendants rely prove equally inapposite. *Clark v. Community for Creative Non-Violence* concerned an advocacy group’s challenge to a Washington, D.C., ordinance that prohibited sleeping overnight in certain public parks. 468 U.S. 288, 289–90 (1984). The plaintiffs sought to sleep overnight in Lafayette Park and the National Mall as a protest of housing insecurity. *Id.* The parties agreed that the regulation was content-neutral. *Id.* at 295. The U.S. Supreme Court upheld the restriction as a valid time and place restriction “designed to limit the wear and tear on park properties” and “unrelated to suppression of expression.” *Id.* at 299. *Ward v. Rock Against Racism* involved a challenge to New York City’s sound-amplification ordinance for Central Park. 491 U.S. 781, 784 (1989). *Ward* upheld the ordinance as a content-neutral place and manner restriction that proved “narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume” in the park. *Id.* at 803.

H.B. 359 focuses on the communicative content of the speakers. H.B. 359 imposes a content-based restriction. *City of Austin*, 596 U.S. at 69. Strict scrutiny applies.

**iii. Whether H.B. 359 Constitutes a Viewpoint-Based Restriction.**

The Court also considers whether H.B. 359 engages in viewpoint-based

regulation. Government suppression of speech based on a speaker’s “specific motivating ideology,” opinion, or perspective proves impermissible. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995). Viewpoint-based restrictions on speech “raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” *R.A.V.*, 505 U.S. at 387 (1992) (internal citation and quotation marks omitted). Viewpoint-based discrimination represents “a ‘more blatant’ and ‘egregious form’ of content discrimination.” *Reed*, 576 U.S. at 168 (quoting *Rosenberger*, 515 U.S. at 829).

Tennessee’s AEA restricted the speech and expression of drag performers, defined as “male or female impersonators,” by including them under an umbrella of “adult cabaret entertainment.” Tenn. Code Ann. §§ 7-51-1401(2), (12). H.B. 359 similarly restricts “drags king[s]” and “drag queen[s],” defined as “male or female performer[s] who adopt[] a flamboyant or parodic [male or feminine] persona with glamorous or exaggerated costumes and makeup.” H.B. 359 § 1(1)–(3). The district court in *Friends of George’s* concluded that the AEA’s criminalization of “male or female impersonators” “target[ed] the viewpoint of gender identity—particularly those who wish to [portray or express] a gender that is different from” that assigned to them at birth. 2023 WL 3790583, at \*21. The same reasoning applies to H.B. 359 and its criminalization of drag performers.

H.B. 359 goes even further than the AEA. H.B. 359 places a near-blanket ban

on “drag story hour” in schools and libraries receiving public funds. H.B. 359 §§ 1(3), 3(2). The AEA, by contrast, made no mention of “drag story hour.” *See* Tenn. Code Ann. §§ 7-51-1401 *et seq.*, 39-17-901. The AEA incorporated the *Miller* obscenity test into its definitions for “harmful to minors” and “obscene.” Tenn. Code Ann. §§ 39-17-901(6), (10)–(11). H.B. 359 fails to track the *Miller* obscenity factors and contains no carveout for speech or expression possessing “serious literary, artistic, political, or scientific value.” *Miller*, 413 U.S. at 24. H.B. 359, like the AEA, “targets the viewpoint of gender identity.” *Friends of George’s*, 2023 WL 3790583, at \*21. H.B. 359’s facially viewpoint-based regulation subjects it to strict scrutiny.

**iv. Whether H.B. 359’s Legislative History Evinces an Impermissible Purpose.**

Courts apply strict scrutiny to content-neutral statutes where “there is evidence that an impermissible purpose or justification underpins” the law. *City of Austin*, 596 U.S. at 76. A court considering this question evaluates a statute’s legislative history to determine whether “an impermissible legislative motive” animates the law. *Reed*, 576 U.S. at 166. This investigation proves particularly important where a challenged law possesses no enforcement history. *Friends of George’s*, 2023 WL 3790583, at \*22 (citing *Reed*, 576 U.S. at 166). State Defendants contend that H.B. 359’s legislative history demonstrates that the Montana legislature possessed legitimate concerns about drag events causing harm to children, in part because the public expressed “significant public concern” about

drag as harmful to children. (Doc. 17 at 19.) The Court, like the district court in *Friends of George’s*, will examine H.B. 359’s legislative history. 2023 WL 3790583, at \*23–27.

Legislators’ Statements About H.B. 359’s Purpose.

The Montana legislature held public meetings on February 9, 2023, and April 4, 2023. H.B. 359 sponsor Rep. Mitchell’s opening remarks for the bill during the February 9, 2023, House Judiciary Committee Hearing lasted approximately three minutes. Mont. Leg., H. Jud. Comm. Hrg., 08:21:01–08:24:02 (Feb. 9, 2023), <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/47759?agendaId=251847>. Rep. Mitchell mentioned “drag” nine times during his opening. Rep. Mitchell explicitly stated that “[t]he reason I’m bringing this bill is because . . . drag shows in recent years have been specifically aimed at children.” *Id.* at 08:21:57. Rep. Mitchell stated that “there’s no such thing as a family-friendly drag show,” referred to drag queens as “hyper-sexualized,” and warned that “there’s clearly a sick agenda being pushed here” and that “[d]rag shows are damaging to a child’s psychology and general welfare[.]” *Id.* at 08:22:52; 08:23:16–19; 08:23:52.

Rep. Mitchell delivered the same introductory comments for H.B. 359 at the Senate Judiciary Committee Hearing on April 4, 2023. Mont. Leg., Sen. Jud. Comm. Hrg., 08:53:08 (Apr. 4, 2023), <http://sg001-harmony.sliq.net/00309/Harmony/en/>

PowerBrowser/PowerBrowserV2/20170221/-1/47987?agendaId=269135. Rep.

Mitchell made the following closing remarks:

This bill is to protect children from hypersexualized events that are meant for adults, not children. Due to the mature themes surrounding drag shows and the exposure to inappropriate activities, children may adopt and accept certain stereotypes or attitudes that could lead to social, psychological, linguistic difficulties. Children may also create an inadequate understanding of gender roles and experiences, which is damaging to their long-term social and emotional development . . . . I don't think anyone wants to go back home and say they voted to allow drag queens in schools.

*Id.* at 11:09:40. State Senator Carl Glimm (“Sen. Glimm”), the Senate carrier for the bill, focused his opening remarks in support of H.B. 359 during a Senate Floor Session on April 17, 2023, on the danger that drag events sexualize children, including a reference to unspecified “sickening examples” available via “a simple Google search.” Mont. Leg., Sen. Floor Sess., 18:09:01–18:10:14 (Apr. 17, 2023), <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46256?agendaId=273842>.

#### Amendment Process.

H.B. 359 underwent numerous amendments before being enacted. The Montana House first amended H.B. 359 on February 15, 2023. The amendment modified the definition of a “drag performance” to remove the reference to gender identity and instead encompass performances featuring “topless dancers, exotic

dancers, strippers, or male or female impersonators” who appeal to a “prurient interest.” H.B. 359.2 § 1(1). The amendment added a definition for “prurient interest” as anything “having a tendency to excite lustful thoughts.” *Id.* § 1(3). The amendment also added a prohibition on drag performances on public property where children are present and in locations owned by an entity that receives any form of state funding. *Id.* § 3(3)(A), (B).

The second amendment to H.B. 359 added “obscene” to the definition of “drag performance.” H.B. 359.3 § 1(1). The amended version of the bill defined “obscene” according to Mont. Code Ann. § 45-8-201 (2023), which incorporates the three-part *Miller* obscenity test. H.B. 359.3 § 1(7). It also defined “prurient interest” under Mont. Code Ann. § 45-8-205 (2023) and added an effective date. H.B. 359.3 §§ 1(8), 6.

The Montana Senate adopted an amendment from State Senator Chris Friedel (“Sen. Friedel”) on April 17, 2023 (“Friedel amendment”). Sen. Floor Sess. at 18:17:07 (Apr. 17, 2023). The Friedel amendment removed each reference to “drag” and “drag story hour;” replaced “drag performance” with “adult-oriented performance,” and removed the requirement that the performance be “obscene.” H.B. 359.3 § 1(1)–(2). Sen. Friedel asserted that his amendment proved necessary because a reviewing judge would “strike [H.B. 359] down for unconstitutionality.” *Id.* at 18:11:23–18:11:59. Sen. Glimm cautioned that the Friedel amendment would

“allow[] all these [drag events] under art and so it really just completely guts the bill[.]” *Id.* at 18:12:40. State Senator Brad Molnar (“Sen. Molnar”) expressed concern that the Friedel amendment would “hurt the original intention of the bill” because it would not apply to some or all drag story hours. *Id.* at 18:13:40–18:14:27.

The Montana House considered the Friedel amendment to H.B. 359 during a House Floor Session on April 24, 2023. Mont. Leg., H. Floor Sess. 16:54:20 (Apr. 24, 2023), <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/49742?agendaId=276646>. Rep. Mitchell stated during the floor session that the Friedel amendment had “completely derailed the intent of this legislation.” *Id.* at 16:54:42. Rep. Mitchell also expressed concern that the changes to the “public property [requirement] obviously would make the bill unconstitutional.” *Id.* at 16:55:12. The House rejected the Friedel amendment and sent the bill to a Free Conference Committee. *Id.* at 16:57:37.

The conference committee submitted a report two days later, on April 26, 2023. The House adopted the conference committee’s report on May 1, 2023, after less than four minutes of discussion. Mont. Leg., H. Floor Sess., 14:28:43 (May 1, 2023), <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46179?agendaId=278282>. The final version of H.B. 359 added the “drag story hour” ban in publicly funded schools and libraries; added definitions for “drag king” and “drag queen;” replaced “adult oriented” with

“sexually oriented;” and added a private right of action. *Id.* at 14:21:40; 14:22:32.

Rep. Mitchell explained that the “only time drag is referenced in this bill now is for the story hour aspect. When these folks try to perform in schools and libraries it’s usually conducted in a very sexual manner.” *Id.* at 14:21:52. Rep. Mitchell stated that that the reason “we have to specifically state [‘drag story hour’] in the bill . . . is because all that [drag performers] have to do is just call it ‘art story hour’ and they get away with it[.]” *Id.* at 14:22:08. Rep. Mitchell characterized opponents’ concerns that H.B. 359 would be applied to artistic and theatrical productions like “Ms. Doubtfire or Peter Pan” as “absolutely false.” *Id.* at 14:22:27.

The Senate adopted the conference committee’s report on May 2, 2023, following less than three minutes of discussion. Mont. Leg. Sen. Floor Sess. 14:07:26. (May 2, 2023) <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46267?agendaId=278927>. House Speaker Matt Regier (“Rep. Regier”) closed discussion of H.B. 359 by stating that “H.B. 359 doesn’t stop drag, it only protects youth from it.” *Id.* at 14:04:49.

#### Public Testimony.

Defendants additionally contend that public testimony on H.B. 359 during the 2023 Montana legislative session demonstrated “significant public concern about potential harm to minors.” (Doc. 17 at 19.) Members of the public testified at both legislative hearings on H.B. 359 on February 9, 2023, and April 4, 2023.

State Defendants first cite testimony from a private person during the House Judiciary Committee Hearing on February 9, 2023. H. Jud. Comm. Hrg. at 8:48:50 (Feb. 9, 2023). The proponent expressed concern about an out-of-state drag event that allegedly had sexualized children. *Id.* The Court lacks sufficient information to evaluate these allegations. The Court notes that anecdotal evidence about an event outside Montana, even if verified, would fail to support a causal relationship between drag story hours and performances and harm to children.

State Defendants also highlight the testimony of a proponent of H.B. 359 who referenced an academic article about “drag pedagogy” during the Senate Judiciary Committee Hearing on April 4, 2023. (Doc. 17 at 19 n.2.) The proponent quoted an excerpt from the article that drag, queer, and trans pedagogies seek to “destabilize the normative function of schooling” to support an argument that drag harms children. Sen. Jud. Comm. Hrg. at 08:58:50 (Apr. 4, 2023); *see* Harper Keenan & Lil Miss Hot Mess, *Drag Pedagogy: The Playful Practice of Queer Imagination in Early Childhood*, 50 *Curriculum Inquiry* 440, 444 (2020). The proponent mischaracterizes the article. The authors critique traditional schooling models that they claim limit critical thinking and participatory learning. The article supports the academic and developmental merits of drag in early childhood education on the basis that drag “promotes a spirit of creative inquiry and world making” and “a vision of self-determination and freedom within a collective[.]” *Id.* at 452.

Particularly concerning to the Court is the same proponent’s testimony that a Drag Queen Story Hour employee had been arrested on child pornography charges. Sen. J. Comm. Hrg. at 08:59:38 (Apr. 4, 2023). The Associated Press has refuted this claim, noting that it represents “[m]isleading, anti-LGBTQ rhetoric . . . used to target drag storytimes[.]” Ali Swenson, *Man Charged for Child Porn Didn’t Work for Drag Queen Story Hour*, AP (June 22, 2022), <https://apnews.com/article/fact-check-drag-queen-story-hour-not-arrested-416945160416>. Neither the proponent’s disagreement with the academic article, nor their reliance upon a disproved and inflammatory claim, provides a basis for a finding that drag harms children.

Twenty-eight proponents spoke in favor of H.B. 359 during the House and Senate Judiciary Committee Hearings. H. Jud. Comm. Hrg. at 08:24:22–09:08:33 (Feb. 9, 2023); Sen. Jud. Comm. Hrg. at 08:55:42–09:04:09 (Apr. 4, 2023). Speakers on behalf of the following organizations provided testimony in support: Montana Office of Public Instruction (“OPI”), Montana Family Rights Alliance, Montana Family Foundation, Moms for Liberty Yellowstone County (“Moms for Liberty”), and Mass Resistance. Eighteen people also provided testimony in support. No proponent offered evidence-based support for a link between drag and the sexualization or abuse of children.

Eighty-seven total opponents spoke against H.B. 359 during the hearings. H. Jud. Comm. Hrg. at 09:08:40–10:08:35; Sen. Jud. Comm. Hrg. at 09:04:17–

10:29:00. Seventeen organizational or institutional supporters offered testimony, including seven rights-based advocacy or policy organizations (Montana Coalition Against Domestic and Sexual Violence, American Civil Liberties Union (“ACLU”) of Montana, Human Rights Campaign, Forward Montana, Montana Budget and Policy Center, Montana Women Vote, and Montana Human Rights Network); three LGBTQ+ and/or drag-focused orgs (Montana Pride, Imperial Court, and the Jedi Order); two professional associations (Montana Federation of Public Employees and Montana Library Association); two medical providers (BridgerCare and Planned Parenthood Advocates of Montana); and four arts organizations (Myrna Loy Theater, Holter Museum of Art, Alpine Theater Project, and Grand Street Theater). Ten current state representatives spoke in opposition, representing constituents from Bozeman, Butte, Helena, Livingston, Missoula, and Poplar. Forty-nine private citizens provided additional opposition testimony.

Analysis.

The legislative history provides substantial evidence that an impermissible purpose animates H.B. 359. Sponsor Rep. Mitchell uniformly described the purpose of the law as restricting drag story hours and performances. *See, e.g.*, H. Jud. Comm. Hrg. at 08:21:57 (Feb. 9, 2023); H. Sen. Jud. Comm. Hrg. at 08:53:08 (Apr. 4, 2023); H. Floor Sess. at 14:21:52–14:22:08 (May 1, 2023). Rep. Mitchell has affirmed that H.B. 359 does not aim to restrict non-drag-related artistic content that the Court has

determined to fall within the statutory text. H. Floor Sess. at 14:22:27 (May 1, 2023).

Rep. Mitchell, Sen. Glimm, Rep. Regier, and Sen. Molnar repeated arguments that “there’s no such thing as a family-friendly drag show,” that drag performers are “hyper-sexualized,” that opponents to the bill were pushing “a sick agenda,” that “[d]rag shows are damaging to a child’s psychology and general welfare,” and that drag shows constitute “sickening examples” of the hyper-sexualization of children. H. Jud. Comm. Hrg. at 08:22:52; 08:23:16–19; 08:23:52 (Feb. 9, 2023); Sen. Floor Sess. at 18:09:01–18:10:14 (Apr. 17, 2023).

H.B. 359’s amendment process reflects a continuing focus on restricting the speech and expression of drag performers and gender non-conforming people. The Montana legislature considered and ultimately rejected incorporating the *Miller* test during the amendment process. The legislature removed references to drag in response to concerns about constitutionality. Sen. Floor Sess. at 18:11:23–18:11:59 (Apr. 17, 2023). The legislature later restored the references in a subsequent version of the bill after Rep. Mitchell and other supporters expressed concerns that the amendment would preclude H.B. 359’s application to drag performances and drag story hours and thereby had “completely derailed” the bill’s purpose. *See, e.g.*, H. Floor Sess. at 16:54:20 (Apr. 24, 2023).

The Court also takes notice of Rep. Mitchell’s acknowledgement that the Friedel amendment’s prohibition on “adult-oriented” performances in public places

in the presence of minors would prove “obviously [] unconstitutional.” *Id.* at 16:55:12. H.B. 359 as enacted substitutes “sexually oriented” for “adult oriented” and imposes an otherwise identical restriction on public performances in the undefined “presence of minors.” *Compare* H.B. 359.4 § 3(3), *with* H.B. 359 § 3(3).

Public testimony from proponents of H.B. 359 offered only anecdotal and/or unsupported evidence of a purported link between drag and gender nonconformity with harm to children. The legislative history includes extensive public concerns about the bill’s constitutionality raised by organizations, private individuals, and legislators. H.B. 359’s public testimony adds further support to the Court’s finding that the legislature passed the law for an impermissible purpose. The legislative history of H.B. 359 evinces an overt and impermissible purpose to target the speech and expression of LGBTQ+ community members, particularly trans, Two-Spirit, and gender non-conforming people. Strict scrutiny would apply even were H.B. 359’s statutory text content-neutral and viewpoint-neutral. *Reed*, 576 U.S. at 166.

### **(3) Strict Scrutiny Analysis.**

A defendant bears the burden of demonstrating that a challenged statute proves “narrowly tailored to serve compelling state interests.” *Reed*, 576 U.S. at 163 (internal citation omitted). A court must determine “whether the challenged regulation represents the least restrictive means among available, effective alternatives.” *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). State Defendants

provided no evidence during the July 26, 2023, TRO hearing to support a finding that H.B. 359 furthers a compelling government interest.

State Defendants assert in their Response that H.B. 359 addresses the Montana legislature's concern that "sexually oriented performances and drag story hours are "indecent" and "potentially harmful to minors." (Doc. 17 at 19.) The Court does not dispute that the government possesses a legitimate and compelling interest in protecting the safety and welfare of children. State Defendants have failed to demonstrate, however, that the restrictions on speech and expression imposed by H.B. 359 bear any connection to this interest. *Reed*, 576 U.S. at 163.

State Defendants urge the Court to accept a purported link between drag performances and adverse outcomes for children's wellbeing. (Doc. 17 at 19, 22.) State Defendants emphasize that Imperial Court acknowledges that some drag performances are not appropriate for children and that the organization crafts performances differently depending on the audience. (*Id.* at 22 (citing Doc. 5-3 at 4).) The fact that drag organizations carefully tailor performers' costumes and conduct to be age-appropriate for children's performances undermines the assertion that H.B. 359 responds to a real problem.

State Defendants presented no evidence before the Court to indicate that limiting children's exposure to speech and expression critical of gender norms or by gender non-conforming people bears any relationship to promoting children's

welfare. State Defendants rely largely on statements by members of the Montana legislature and witnesses at the hearings on H.B. 359 to support their claims of potential harm to children. The Montana legislature’s justification for H.B. 359 relies on a conflation of sexual abuse with exposure to sexual orientation, gender identity, and gender expression. State Defendants’ claim that H.B. 359 is “not aimed at banning or suppressing a performer’s sexual expression” reflects the same conflation. (*Id.* at 19.)

In fact, the research indicates that sexual orientation, gender identity, and gender expression do not equate to determine a person’s sexual activity. LGBTQ+ people are no more likely than heterosexual people to sexually abuse children. Gene G. Abel & Nora Harlow, *Child Molestation Prevention Study*, in THE STOP CHILD MOLESTATION BOOK (2001). Ninety percent of people who sexually abuse children are family members or trusted adults. David Finkelhor, *Characteristics of Crimes Against Juveniles*, CRIMES AGAINST CHILDREN RESEARCH CTR. & OFF. JUVENILE J. & DELINQUENCY PREVENTION (2012). The conflation of gender and sexual minority identities with child sexual abuse or “hyper-sexualization” contributes to the marginalization of LGBTQ+ people.

LGBTQ+ youth, for example, are 3.8 times more likely to experience childhood sexual abuse and 1.2 times more likely to experience parental physical abuse than their non-LGBTQ+ peers. Heather L. McCauley, Katherine Bogen,

Robert W.S. Coulter, & Emily F. Rothman, *Sexual Assault Risk and Prevention Among Sexual and Gender Minority Populations*, in *SEXUAL ASSAULT RISK REDUCTION AND RESISTANCE: THEORY, RESEARCH, AND PRACTICE*, 333–52 (L.M. Orchowski & Christine A. Gidycz eds. 2018); *see also* Nathaniel M. Tran, Laura E. Henkhaus, & Gilbert Gonzales, *Adverse Childhood Experiences and Mental Distress Among U.S. Adults by Sexual Orientation*, 79 *J. AM. MED. ASSOC. PSYCHIATRY* 377 (Feb. 2022).

Trans people are over four times more likely than cisgender people to be victims of violent crime. Andrew R. Flores, Ilan Meyer, Lynn L. Langton, & Jody L. Herman, *Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017–2018*, 111 *AM. J. PUB. H.* 726 (2022). Trans and nonbinary youth, while no more likely than cisgender youth to perpetrate sexual violence, are more than twice as likely to experience sexual violence. Michele L. Ybarra, Kimberly L. Goodman, Elizabeth Saewyc, Jillian R. Scheer, & Ida Frugård Strøm, *Youth Characteristics Associated with Sexual Violence Perpetration Among Transgender Boys and Girls, Cisgender Boys and Girls, and Nonbinary Youth*, 5 *J. AM. MED. ASSOC. NETW. OPEN* 1, 6–7 (June 2022).

The promotion of unsupported claims about LGBTQ+ people and drag performers as “groomers” feeds animus against LGBTQ+ people. This animus has pronounced consequences for children’s well-being. “Much of the distress that

LGBTQ children and adolescents experience is not the result of their gender non-conformity or LGBTQ identity . . . but rather the way they are treated for being LGBTQ[.]” Substance Abuse & Mental Health Services Administration, *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth*, U.S. DEP’T H. & HUM. SERVS. PUB. NO. (SMA) 15-4928, 20 (Oct. 2015).

A recent study found that nearly one-third of LGBTQ youth reported that their mental health was poor most of the time or always due to anti-LGBTQ+ policies and legislation. TREVOR PROJECT, *2023 U.S. National Survey on the Mental Health of LGBTQ Young People*, 13 (May 2023). Forty-one percent of LGBTQ+ youth seriously considered attempting suicide in the past year. *Id.* at 4. Most youth who are out as trans or perceived as trans while in school (K–12) experience some form of mistreatment, including being verbally harassed (54 percent), physically attacked (24 percent), and/or sexually assaulted (13 percent) because they are trans. Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet, & Ma’ayan Anafi, *2015 U.S. Transgender Survey*, NAT’L CTR. FOR TRANSGENDER EQUALITY, 4 (Dec. 2016). Seventeen percent of trans youth surveyed experienced such severe mistreatment that they left a school as a result. *Id.* The Court rejects the State’s attempt to invoke a professed concern for children’s welfare as cover for government overreach and discrimination.

State Defendants additionally rely upon *Rust v. Sullivan* and *Interpipe*

*Contracting, Inc. v. Becerra* to assert that H.B. 359 represents a valid exercise of the Montana legislature’s power to place conditions on public appropriations. 500 U.S. 173, (1991); 898 F.3d 879 (9th Cir. 2018). “Congress may selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.” *Rust*, 500 U.S. at 193.

*Rust* upheld a restriction prohibiting doctors employed by family planning clinics that received Title IX funding from discussing abortion with their patients. 500 U.S. at 203. *Interpipe* involved a challenge to SB 954, a California statute that restricted employers from deducting their employees’ wages to support the employers’ preferred industry advancement funds absent their employees’ collective consent. 898 F.3d at 903. The Ninth Circuit upheld the law on the basis that it “trim[med] a state subsidy rather than infringe[d] a First Amendment right.” *Id.* at 898. The Ninth Circuit additionally determined that SB 954 did not discriminate based upon viewpoint. *Id.* at 900–01.

Both cases prove distinguishable. Nothing about H.B. 359 allocates or places conditions upon state funding. Receipt of any amount of state funding instead serves as a prerequisite for criminal and civil liability under sections three and four. H.B. 359 §§ 3(1–(2), (3)(b), 4. A school, library, or business that has received any amount of public funding at any time proves subject to H.B. 359 regardless of the dollar

amount, ratio of state to private funding, or time elapsed since receipt of the funding. *Cf. Interpipe*, 898 F.3d at 898.

State Defendants finally argue that H.B. 359 complies with the First Amendment because it does not impose an outright ban. (Doc. 17 at 23–24.) State Defendants note that H.B. 359 “does not prevent [drag shows on] non-publicly funded private property” and “does not restrict drag show story hours at libraries or schools after regular hours, or as part of non-school sanctioned extracurricular activities.” (*Id.* at 23.) State Defendants explained during the hearing on July 26, 2023, that a drag story hour still could take place at a library at 11:00 P.M. Forcing protected expression to take place under cover of darkness, rather than banning it outright, does not save H.B. 359 from constitutional infirmity. H.B. 359 is not narrowly tailored to serve a compelling government interest. *Ashcroft*, 542 U.S. at 666. Plaintiffs likely will succeed on the merits of their First Amendment claim in Count IV.

**v. Fifth Amendment Facial Claim.**

Plaintiffs assert that H.B. 359 proves unconstitutionally vague and overbroad. (Doc. 5 at 37.) The Fifth Amendment to the U.S. Constitution requires that no person may “be held criminally responsible for conduct which [they] could not reasonably understand to be proscribed.” *United States v. Harriss*, 347 U.S. 612, 617 (1954) (internal citations omitted). Criminal laws must define an offense “with sufficient

definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A statute that fails to meet either of these requirements violates the Due Process Clause and proves facially invalid. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

Plaintiffs argue that H.B. 359 contains numerous vague and overbroad definitions. (Doc. 5 at 33–35, 38.) Plaintiffs additionally highlight that the statute fails to define other terms. (*Id.*) State Defendants assured the Court during the July 26, 2023, TRO hearing that H.B. 359’s statutory language proves sufficiently definite and tailored and that Plaintiffs face no risk of criminal prosecution under its terms. State Defendants distinguished H.B. 359 from the analogous Tennessee and Florida drag bans, each deemed unconstitutionally vague and overbroad, on the basis that those laws failed to define “lewd.” H.B. 359 fails, however, to define “lewd and lascivious.” H.B. 359 § 1(8). H.B. 359 additionally fails to define the terms “flamboyant or parodic [gendered] persona,” “glamorous or exaggerated costumes and makeup,” “salacious dancing,” “sexual manner,” and “presence of an individual under the age of 18[.]” *Id.* §§ 1(1)–(2), (8), (11), 3(3)(b).

State Defendants neglect to explain the absence of definitions for these terms in their Response. State Defendants instead offer the conclusory statement that “the vast majority of [H.B. 359’s] intended applications” cover the “intentional exposure

of minors to indecent and potentially harmful conduct in locations and contexts where such exposure is likely to occur.” (Doc. 17 at 25–26.) State Defendants further note that H.B. 359’s “defined terms, other terms defined in law, the plain meaning of its terms, narrowing context, and the Legislature’s obvious underlying intent” together clarify that the law is sufficiently clear and definite. (*Id.* at 26.) The Court disagrees.

H.B. 359’s missing definitions and its definitions for “drag king,” “drag queen,” “drag story hour,” “nude,” “public property,” “sexually oriented,” “sexually oriented business,” “sexually oriented performance,” and “stripping” run a significant risk of vagueness and overbreadth. H.B. 359 § 1(1)–(4), (6), (8)–(11). A “flamboyant or parodic” gendered persona with “glamorous or exaggerated costumes or makeup” could be interpreted to include any number of theatrical and artistic performances. *Id.* § 1(1)–(2). A performer who removes no clothing or who removes only outer layers still might fall within H.B. 359’s definition of “[s]tripping.” *Id.* § 1(11). H.B. 359 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. *Id.* § 8. “Nude,” as defined by H.B. 359, could apply both to someone fully clothed, with part of their buttocks visible through partially sheer fabric, and to someone in a bathing suit that partially uncovers the lower portion of a breast. *Id.* § 1(4)(b).

H.B. 359’s broad private right of action allows any minor or their parent to bring a suit against someone whom they believe has violated the statute up to ten years after the alleged violation. H.B. 359 § 4. H.B. 359 contains no carveout for content possessing “serious literary, artistic, political, or scientific value.” *Miller*, 413 U.S. at 24. The law makes no reference to geographical limitations. A minor could be considered “present” in a public park even if they were hundreds of yards away and out of earshot. *Id.* § 3(3)(a). Parental consent proves irrelevant to potential criminal liability. H.B. 359 provides for no affirmative defenses. *See generally* H.B. 359. The statute leaves the public in the dark about what conduct might carry criminal and civil sanctions. *Morales*, 527 U.S. at 56.

H.B. 359 fails to define the conduct that it criminalizes “with sufficient definiteness that ordinary people can understand what conduct is prohibited,” *Kolender*, 461 U.S. at 357. H.B. 359 additionally appears likely to “encourage arbitrary and discriminatory enforcement.” *Id.* H.B. 359’s liability scheme, including a private right of action, creates a significant risk of arbitrary enforcement against people who are not drag performers but who do not conform to traditional gender and identity norms. Whether a performance qualifies as “sexually oriented,” for example, rests upon a distinction between “female” and “prosthetic” breasts. H.B. 359 §§ 1(4)(b); (10)(a)(i)–(ii).

A trans man who has undergone gender affirming surgery to remove breast

tissue could face liability for showing his bare chest. *Id.*; *see also* H.B. 458. A trans woman who receives medically necessary hormone replacement therapy and who has developed breast tissue or who has undergone gender affirming surgery to receive breast implants could face similar liability. Authorizing members of the public and state authorities alike to draw such a distinction with respect to the bodies of other people likely would all but require them to engage in identity-based discrimination and gender-based discrimination. *Id.* § 1(4)(b), (10)(a)(i)–(ii).

H.B. 359 also permits private citizens and state authorities to pursue legal action based upon a judgment as to who qualifies as a “drag king” or “drag queen.” *Id.* § 1(1)–(2). This assessment appears to hinge upon a personal, subjective determination about what qualifies as a “flamboyant or parodic” gendered persona with “glamorous or exaggerated” clothing and makeup, without any statutory definition of these terms for guidance. *Id.* H.B. 359’s statutory scheme targets drag story hours and drag performances. It also targets trans, Two-Spirit, non-binary, intersex, and gender-nonconforming people, as well as others who dress or present in ways different from the gender assigned to them at birth. Butte-Silver Bow’s decision to cancel Jawort’s history lecture on the basis that “hav[ing] a trans[] person” in the Butte Public Library posed “too much of a legal risk” under H.B. 359 serves as an example of this hazard. (Doc. 5-2 at 3, 7, 10.)

H.B. 359 fails to define the conduct it criminalizes “with sufficient

definiteness that ordinary people can understand what conduct is prohibited.” *Kolender*, 461 U.S. at 357. Its terms also “encourage arbitrary and discriminatory enforcement,” particularly in light of the impermissible purpose revealed by the legislative history. *Id.* As with the Florida drag ban enjoined in *HM Florida*, H.B. 359 proves “dangerously susceptible to standardless, overbroad enforcement[.]” 2023 WL 3790583, at \*9. Plaintiffs have demonstrated a likelihood of success on the merits of Count V. *Morales*, 527 U.S. at 56. The Court determines that Plaintiffs have satisfied the first *Winter* element.

## II. Irreparable Harm.

Plaintiffs assert that irreparable harm has occurred and will continue in the absence of a preliminary injunction. (Doc. 5 at 38–39.) State Defendants counter that Plaintiffs have experienced no irreparable injury for the same reasons that they possess no standing. (Doc. 17 at 33.) The Court has considered and rejected these standing arguments above. The Government possesses a compelling state interest in children’s wellbeing and safety. This compelling interest remains untethered, however, from the text and application of H.B. 359. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Roman Cath. Diocese v. Cuomo*, 592 U.S. \_\_\_, 141 S. Ct. 63, 67 (2020). The harm of censorship “can be realized even without an actual prosecution.” *Am. Booksellers Ass’n*, 484 U.S. at 393.

Plaintiffs would continue to suffer irreparable harm in the absence of a preliminary injunction. Plaintiffs cannot avoid potential criminal and civil liability under H.B. 359 unless they engage in self-censorship or abandon their organizational missions. Imperial Court has curtailed its speech and expression, including at other recent Pride events across the state, in response to H.B. 359. (Doc. 5-3 at 5–7.) Imperial Court and BumbleBee have experienced irreparable harm due to cancelled, postponed, or modified events. (*Id.*; Doc. 5-4 at 5–6.) The Roxy represents that it is “unsure how [it] can possibly comply” with the statute. (Doc. 5-5 at 10.) The Myrna Loy similarly alleges that it “is unable to determine how we can come into compliance with H.B. 359 while still serving our mission[.]” (Doc. 5-6 at 6.) Corcoran, the Roxy, the Myrna Loy, Montana Book Co., BumbleBee, and Imagine Nation all allege fear of the potential revocation of their professional licenses or certificates pursuant to H.B. 359 § 3(3)(b), (4).

Both Plaintiffs’ alleged loss of First Amendment freedoms and their reasonable fear of criminal and civil liability under H.B. 359 constitute irreparable injury. *Roman Cath. Diocese*, 592 U.S. at \_\_\_, 141 S. Ct. at 67; *Am. Booksellers Ass’n*, 484 U.S. at 393. Plaintiffs have demonstrated irreparable harm and have satisfied the second *Winter* element.

### **III. Public Interest.**

Defendants assert that “[t]he State, and the public at large, maintains a

compelling interest in enforcing H.B. 359” because it is a statute enacted by the Montana legislature. (Doc. 17 at 33–34.) Constitutional violations never serve the public interest. *See HM Fla.*, 2023 WL 4157542, at \*9; *Friends of George’s, Inc.*, 2023 WL 2755238, at \*7. Plaintiffs have presented evidence that drag story hours, drag performances, and gender expansive speech and expression serve the public interest. (*See* Doc. 5-3 at 3–4; Doc. 5-9 at 3–4; Doc. 5-10 at 4.) No evidence before the Court indicates that State Defendants have suffered any harm following the Court’s grant of a TRO. Montana law already proscribes subjecting minors to obscenity. Mont. Code Ann. § 45-8-201 (2023). Parents simply can decide not to take their children to drag story hours or drag performances. The public interest factor strongly weighs in favor of Plaintiffs for purposes of a preliminary injunction.

### CONCLUSION

“Fear . . . cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free [people] from the bondage of irrational fears.” *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring), *overruled on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969). “[S]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975).

H.B. 359 targets protected speech and expression. The statutory text and legislative history evince anti-LGBTQ+ animus. No evidence before the Court indicates that minors face any harm from drag-related events or other speech and expression critical of gender norms. H.B. 359’s terms prove vague and overbroad, chilling protected speech and creating a risk of disproportionate enforcement against trans, Two-Spirit, and gender nonconforming people. *Morales*, 527 U.S. at 56. Plaintiffs have demonstrated entitlement to a preliminary injunction. *Winter*, 555 U.S. at 22. The Court will enjoin Defendants from enforcing H.B. 359.

The parties stipulate that Defendants Knudsen and Arntzen are not entitled to a jury trial on Plaintiffs’ claims for declaratory and injunctive relief raised in Counts IV and V. (Doc. 31.) The parties stipulate, however, that Defendant Gallagher is entitled to a jury trial on Plaintiffs’ claims under § 1983 raised in Counts I and II. (Doc. 31.) These claims relate to alleged violations of Plaintiff Jawort’s rights under the First and Fourteenth Amendments. (Doc. 3.) Plaintiffs’ Counts I and II also allege that “[f]urther implementation of [H.B.] 359 by Defendant Knudsen will result in further violation of Jawort’s First Amendment [and Fourteenth Amendment] rights.” *Id.* The parties have not stipulated that Defendant Knudsen is entitled to a jury trial on these claims, but instead represent to the Court that they “intend to identify those issues that are purely legal—and suitable for judicial resolution” as to Knudsen re Counts I and II—if indeed any such issue exists. (Doc.

31.)

Jawort allegedly has suffered speech-based irreparable professional, reputational, and dignitary harm flowing from the cancellation of her June 2, 2023, history lecture at the Butte Public Library. (Doc. 3.) Butte-Silver Bow's decision to cancel the lecture occurred despite Jawort's express intent to present as herself rather than in drag. (Doc. 5-2 at 4–5.) Jawort likely will rely on this fact in arguing that Butte-Silver Bow's actions rose to the level of identity- and/or gender-based discrimination in violation of the Equal Protection clause.

### **ORDER**

Accordingly, **IT IS ORDERED** that:

1. Plaintiffs' Motion for a Preliminary Injunction (Doc. 4) is hereby **GRANTED**.

2. Defendants Austin Knudsen, Attorney General for the State of Montana, and Elsie Arntzen, Montana Superintendent of Public Instruction, are **HEREBY ENJOINED** from instituting, maintaining, or prosecuting any enforcement proceedings under H.B. 359.

DATED this 13<sup>rd</sup> day of October, 2023.



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Brian Morris, Chief District Judge  
United States District Court

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

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

Plaintiffs-Appellees

v.

AUSTIN KNUDSEN, et al.,

Defendants-Appellants.

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

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**APPELLANTS' EXCERPTS OF RECORD VOLUME 2 OF 3**

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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

**THE UNITED STATES DISTRICT COURTS  
FOR THE DISTRICT OF MONTANA  
BUTTE DIVISION**

THE IMPERIAL SOVEREIGN COURT  
OF THE STATE OF MONTANA;  
ADRIA JAWORT; RACHEL  
CORCORAN; MONTANA BOOK  
COMPANY; IMAGINE BREWING  
COMPANY, LLC d/b/a IMAGINE  
NATION BREWING COMPANY;  
BUMBLEBEE AERIAL FITNESS;  
MONTANA PRIDE; THE WESTERN  
MONTANA COMMUNITY CENTER;  
THE GREAT FALLS LGBTQ+  
CENTER; THE ROXY THEATER; and  
THE MYRNA LOY,

Plaintiffs,

vs.

AUSTIN KNUDSEN; ELSIE  
ARNTZEN; J.P. GALLAGHER; and  
THE CITY OF HELENA,

Defendants.

Cause CV 23-50-BU-BMM

**DISMISSAL  
WITHOUT  
PREJUDICE**

The parties, through counsel, have stipulated to the dismissal of Defendant Austin Knudsen from Counts I and II. Pursuant to Fed. R. Civ. P. 41(a), Knudsen is DISMISSED from Counts I and II without prejudice. This Order does not affect: (1) Plaintiff Adria Jawort's claims against Defendant J.P. Gallagher, as presented in Counts I and II; or (2) Plaintiffs' claims against Defendants Knudsen and Elsie Arntzen, as presented in Counts IV and V.

DATED this 20th day of November, 2023.

A handwritten signature in blue ink that reads "Brian Morris". The signature is written in a cursive, flowing style.

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Brian Morris, Chief District Judge  
United States District Court

**UNITED STATES DISTRICT COURT  
FOR THE STATE OF MONTANA  
BUTTE DIVISION**

THE IMPERIAL SOVEREIGN COURT OF  
THE STATE OF MONTANA; ADRIA  
JAWORT; RACHEL CORCORAN;  
MONTANA BOOK COMPANY; IMAGINE  
BREWING COMPANY, LLC d/b/a  
IMAGINE NATION BREWING  
COMPANY; BUMBLEBEE AERIAL  
FITNESS; MONTANA PRIDE; THE  
WESTERN MONTANA COMMUNITY  
CENTER; THE GREAT FALLS LGBTQ+  
CENTER; THE ROXY THEATER; and THE  
MYRNA LOY,

Plaintiffs,

vs.

AUSTIN KNUDSEN; ELSIE ARNTZEN; J.P.  
GALLAGHER; and THE CITY OF  
HELENA,

Defendants.

Cause CV 23-50-BU-BMM

**DISMISSAL WITHOUT  
PREJUDICE**

The parties, through counsel, have stipulated to the dismissal of the City of Helena. Pursuant to Fed. R. Civ. P. 41(a)(1-2), the City of Helena is DISMISSED without prejudice, with each party to bear their own costs and fees. Count III of the First Amended Complaint is DISMISSED with prejudice, with each party to bear their own costs and fees.

DATED this 6th day of September 2023.

A handwritten signature in blue ink that reads "Brian Morris". The signature is written in a cursive, flowing style.

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Brian Morris, Chief District Judge  
United States District Court

**Lang, Dia**

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**From:** MTD\_CMECF@mtd.uscourts.gov  
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U.S. District Court

District of Montana

## Notice of Electronic Filing

The following transaction was entered on 8/28/2023 at 4:06 PM MDT and filed on 8/28/2023

**Case Name:** THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA et al v. Knudsen et al

**Case Number:** [2:23-cv-00050-BMM \[ecf.mtd.uscourts.gov\]](https://ecf.mtd.uscourts.gov/2:23-cv-00050-BMM)

**Filer:**

**Document Number:** 26(No document attached)

### Docket Text:

**MINUTE ENTRY for proceedings held before Judge Brian Morris: Motion Hearing held on 8/28/2023 re [4] MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by MONTANA BOOK COMPANY, RACHEL CORCORAN, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE WESTERN MONTANA COMMUNITY CENTER, BUMBLEBEE AERIAL FITNESS, ADRIA JAWORT, THE GREAT FALLS LGBTQ+ CENTER, THE MYRNA LOY, IMAGINE BREWING COMPANY, LLC. Present in the courtroom for the Plaintiffs are Constance Van Kley, Niki Zupanic and Rylee Summers-Flanagan, Michael Russel for State of Montana Defendants Austin Knudsen and Elise Arntzen, Rebecca Dockter for Defendant City of Helena and Cynthia Walker for Defendant J.P. Gallagher. Parties are advised of the purpose of todays hearing. Arguments are heard by Van Kley and Russell. Counsel Dockter and Walker heard briefly only as to their positions regarding the defendants they represent and state they are not part of the preliminary injunction relief being sought. The matter is deemed submitted. The Court will review the jury demand and get back to the parties as to the next step. Recess. Hearing commenced at 2:32 and concluded at 3:48. (Court Reporter Yvette Heinze.) (Law Clerk: T. Devine), (Hearing held in Helena) (HEG)**

**2:23-cv-00050-BMM Notice has been electronically mailed to:**

Thane P. Johnson thane.johnson@mt.gov, edoj@mt.gov

Rebecca Dockter rdockter@helenamt.gov, jberry@helenamt.gov, mbiddle@helenamt.gov

Cynthia L. Walker cwalker@boonekarlberg.com, bburnham@boonekarlberg.com, kstephan@boonekarlberg.com

Emily E. Jones emily@joneslawmt.com, paralegal@joneslawmt.com

Rylee K. Sommers-Flanagan rylee@uppersevenlaw.com

Constance Van Kley cgvankey@gmail.com, benji@uppersevenlaw.com, constance@uppersevenlaw.com, constance@vankleylaw.com

Alwyn Lansing alwyn.lansing@mt.gov, edoj@mt.gov

Niki Zupanic niki@uppersevenlaw.com

Michael Russell michael.russell@mt.gov, edoj@mt.gov

Shelby K. Towe stowe@boonekarlberg.com

Michael Noonan michael.noonan@mt.gov

**2:23-cv-00050-BMM Notice has been delivered by other means to:**

Cynthia L. Walker  
Shelby K. Towe  
BOONE KARLBERG P.C.  
201 West Main, Suite 300  
P. O. Box 9199  
Missoula, MT 59807-9199  
Phone: (406) 543-6646  
Fax: (406) 549-6804  
cwalker@boonekarlberg.com  
stowe@boonekarlberg.com  
*Attorneys for Defendant J.P. Gallagher*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BUTTE DIVISION

THE IMPERIAL SOVEREIGN COURT  
OF THE STATE OF MONTANA; ADRIA  
JAWORT; RACHEL CORCORAN;  
MONTANA BOOK COMPANY;  
IMAGINE BREWING COMPANY, LLC  
d/b/a IMAGINE NATION BREWING  
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WESTERN MONTANA COMMUNITY  
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CENTER; THE ROXY THEATER; and  
THE MYRNA LOY,

Plaintiffs,

v.

AUSTIN KNUDSEN; ELSIE ARNTZEN;  
and J.P. GALLAGHER; and THE CITY  
OF HELENA,

Defendants.

CV 23-50-BU-BMM

**DEFENDANT J.P. GALLAGHER'S  
RESPONSE TO PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION**

Defendant J.P. Gallagher (“Gallagher”) provides the following response to Plaintiffs’ motion for a preliminary injunction (Doc. 4) <sup>1</sup>.

## INTRODUCTION

Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction (Doc. 4) does not seek any relief against Gallagher. Plaintiffs’ motion seeks to prevent Defendants Austin Knudsen, Elsie Arntzen, and the City of Helena from enforcing House Bill 359 (“HB 359”) pending the Court’s determination of HB 359’s constitutionality. (Doc. 4, p. 2; Doc. 5, pp. 2, 35) The only claims against Gallagher in this action are the constitutional claims alleged by Plaintiff Adria Jawort (“Jawort) in Counts I and II of the First Amended Complaint. (Doc. 3, pp. 38-40)

As such, Gallagher does not take a position on whether the Court should issue a preliminary injunction against any of the other Defendants or the constitutionality of HB 359. Notwithstanding Gallagher’s lack of a position regarding the Court’s issuance of a preliminary injunction or the constitutionality of HB 359, he is submitting this response to Plaintiffs’ motion to address the allegations regarding him contained in Plaintiffs’ brief (Doc. 5).

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<sup>1</sup> Since the Court granted Plaintiffs’ request for a temporary restraining order, this response only applies to the request for preliminary injunction.

## RESPONSE BRIEF

As acknowledged by Plaintiffs throughout the documents filed by them in this action to date, it is difficult for reasonable persons to determine what is and what is not restricted by HB 359 and to determine who may be subject to the criminal and civil penalties associated with violating HB 359. (Doc. 3, ¶¶ 83-84, 86-88, 131, 136; Doc. 5, pp. 8-11, 21, 28-29, 32) As Plaintiffs stated in their brief, HB 359 bans “drag story hours” in libraries during regular operating hours. (Doc. 5, p. 2); HB 359 § 3(2). HB 359 defines “drag story hour” as “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. HB 359 § 1(3). “Drag queen” is defined as “a male or female performer who adopts a flamboyant or parodic feminine persona with glamorous or exaggerated costumes and makeup.” HB 359 § 1(2). “Drag king” is defined as “a male or female performer who adopts a flamboyant or parodic male persona with glamorous or exaggerated costumes and makeup.” HB 359 § 1(1).

Pursuant to HB 359 § 3(4), a library, library personnel, a public employee, an entity described in subsection (3)(b) (i.e., a location owned by an entity that receives any form of funding from the state), or an employee of the entity, convicted of violating the prohibition under § 3 shall be fined \$5,000. In addition, pursuant to HB 359 § 4(1), a minor who attends a performance in violation of HB 359 § 3 may bring an action within 10 years from the date the cause of action

accrues against a person who knowingly promotes, conducts, or participates as a performer in the performance. If the minor, or person bringing suit on the minor's behalf, prevails, the court shall award actual damages, including damages for psychological, emotional, economic, and physical harm, reasonable attorney fees and costs incurred in bringing the action, and statutory damages of \$5,000. HB 359 § 4(2) and (3).

Prior to Jawort's talk at the BSB Public Library scheduled to occur on June 2, 2023, Jawort posted a message on Twitter stating:

“PROHIBITING DRAG STORY HOUR IN SCHOOLS AND LIBRARIES...”

And I will def have a book & sexuality will be discussed & minors may be present, & the State of Montana doesn't legally recognize people being trans, so...

[Photo of HB 359's definition of drag queen next to photo of Jawort]

I do an LGBTQ/2 Spirit history lecture at a library June 2.  
I'm really entertaining at this one, too.  
#MostHumblest  
BUT this literally might be illegal in Mont. as a flamboyantly dressed trans woman.  
I don't get paid, but in fascist red state you pay state 4 “crimes” instead. 😊

See copy of post attached as Exhibit A to Declaration of J.P. Gallagher.

In another social media group chat prior to her scheduled talk discussing doing a drag queen story hour at a church, Jawort stated: “I would do a drag queen story hour there and then sue for 1<sup>st</sup> Amendment. In fact I have an event AT the

Butte library June 2d talking about LGBTQ history.” See copy of group chat thread attached as Exhibit B to Declaration of J.P. Gallagher.

Gallagher was unaware that a librarian at the BSB Library sent an email on June 1, 2023 to numerous people, including Jawort, informing them that Jawort’s talk scheduled on June 2, 2023 was canceled because Gallagher and the BSB County Attorney “have decided it is too much of a risk to have a trans-person in the library.” See Declaration of J.P. Gallagher, ¶ 7 (Aug. 4, 2023). This statement is not accurate and was not authorized by BSB to be made by the librarian. *Id.*

Based on the ambiguous language of HB 359, possible criminal penalties and civil liability associated with violating HB 359, and Jawort’s statements, BSB decided to cancel Jawort’s talk at the BSB Library out of an abundance of caution until it could ensure that Jawort’s talk would not violate HB 359. See Declaration of J.P. Gallagher, ¶ 6.

On June 1, 2023, Gallagher attempted to call Jawort to discuss her scheduled talk, but she declined to speak with him. *Id.*, ¶ 9. The following day, Gallagher also sent a letter to Jawort explaining BSB’s decision to cancel her talk at the BSB Library. In his letter, Gallagher stated BSB is open to discuss with Jawort rescheduling her talk with her assurance and appropriate parameters in place to ensure that HB 359, while it remains the law, will not be violated. *Id.*, ¶ 11. Gallagher went on to state that he would like to meet with Jawort to figure out a solution that will allow her to present her talk and that he would be happy to

schedule a time to meet with her at her convenience to talk through BSB's concerns and come up with a solution. *Id.*, ¶ 13. To date, Jawort has not contacted Gallagher to discuss rescheduling her talk.

Instead, on June 8, 2023, Jawort's attorney sent a litigation hold letter to BSB County Attorney Eileen Joyce stating that Jawort will provide no assurance that she will comply with HB 359. See Declaration of Eileen Joyce, ¶ 4 (Aug. 4, 2023). The letter also stated Jawort intends to file a federal lawsuit for deprivation of her constitutional rights under the First and Fourteenth Amendments, which is what occurred. *Id.*; (Doc. 1).

Prior to the filing of the complaint (Doc. 1), Jawort gave the same talk she intended to give at the BSB Library at the Carpenter's Union Hall in Butte on June 20, 2023. ¶ 14. Despite this, Jawort realleged her constitutional claims against Gallagher in the First Amended Complaint filed on July 17, 2023. (Doc. 3)

On July 28, 2023, the Court issued a temporary restraining order enjoining Defendants Austin Knudsen and Elsie Arntzen from enforcing HB 349. (Doc. 13) On August 3, 2023, Gallagher requested that the undersigned attorney extend an invitation to Jawort, through her attorneys, to speak at the BSB Public Library. See Declaration of J.P. Gallagher, ¶ 15. As of the time of filing of this response, Jawort has not contacted the Library Director to schedule a date and time to speak at the BSB Library. *Id.*, ¶ 13.

BSB made reasonable efforts to ensure that Jawort's talk at the BSB Library would not violate HB 359 to protect not only itself from exposure to potential criminal penalty<sup>2</sup> and civil liability, but to protect its employees. Gallagher attempted to communicate with Jawort to address BSB's concerns to come up with a solution that would allow her to give her scheduled talk at the Library, but Jawort declined to speak with him. BSB also invited Jawort to speak at the Library, but as of the time of filing of this response has not received a response to its invitation.

### CONCLUSION

Neither Gallagher nor BSB deprived Jawort of any of her constitutional rights. To the contrary, Gallagher made reasonable efforts to protect BSB and its employees from exposure to criminal penalty and civil liability while HB 359 was in effect. Accordingly, Gallagher denies all allegations made against him by Jawort.

DATED this 4th day of August, 2023.

/s/ Cynthia L. Walker  
Cynthia L. Walker  
BOONE KARLBERG P.C.  
*Attorneys for Defendant J.P. Gallagher*

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<sup>2</sup> Not only could BSB and its employees been subject to penalties associated with violating HB 359, but as elected officials, Gallagher and County Attorney Eileen Joyce could have faced possible charges of official misconduct under Mont. Code Ann. § 45-7-401 for allowing a talk at the Library that may be prohibited by HB 359.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2)(E), Local Rules of the United States District Court, District of Montana, I hereby certify that the textual portion of the foregoing brief uses a proportionally spaced Times New Roman typeface of 14 points, is double-spaced, and contains approximately 1,456 words, excluding the parts of the brief exempted by L.R. 7.1(d)(2)(E).

DATED this 4th day of August, 2023.

/s/ Cynthia L. Walker  
Cynthia L. Walker  
BOONE KARLBERG P.C.  
*Attorneys for Defendant J.P. Gallagher*

Austin Knudsen  
*Montana Attorney General*  
Michael Russell  
Thane Johnson  
Alwyn Lansing  
Michael Noonan  
*Assistant Attorneys General*  
MONTANA DEPARTMENT OF JUSTICE  
P.O. Box 201401  
Helena, MT 59620-1401  
Phone: (406) 444-2026  
Fax: (406) 444-3549  
*michael.russell@mt.gov*  
*thane.johnson@mt.gov*  
*alwyn.lansing@mt.gov*  
*michael.noonan@mt.gov*

Emily Jones  
*Special Assistant Attorney General*  
JONES LAW FIRM, PLLC  
115 N. Broadway, Suite 410  
Billings, MT 59101  
Phone: 406-384-7990  
*emily@joneslawmt.com*  
Attorneys for Defendants Austin Knudsen  
and Elsie Arntzen

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA, BUTTE DIVISION

THE IMPERIAL SOVEREIGN  
COURT OF THE STATE OF  
MONTANA, ET AL.,  
  
Plaintiffs,  
  
v.  
  
AUSTIN KNUDSEN; ELSIE  
ARNTZEN; J.P. GALLAGHER; AND  
THE CITY OF HELENA,  
  
Defendants.

Cause No. 2:23-cv-00050-BMM

**STATE DEFENDANTS'  
RESPONSE IN OPPOSITION  
TO PLAINTIFFS' MOTION  
FOR PRELIMINARY  
INJUNCTION**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
BACKGROUND .....	1
I. HB 359.....	1
II.Plaintiffs .....	4
PRELIMINARY INJUNCTION STANDARD .....	6
ARGUMENT .....	8
A. HB 359 IS VALID UNDER THE SUPREME COURT’S FIRST AMENDMENT OVERBREADTH ANALYSIS .....	9
1. Proper Construction of HB 359 .....	11
B. HB 359 IS NOT VOID FOR VAGUENESS .....	17
C. PLAINTIFFS FAIL TO DEMONSTRATE STANDING.....	19
1. Plaintiffs Cannot Demonstrate Any Cognizable Injury at This Stage.....	20
2. Plaintiffs Cannot Establish Causation with Respect to the State Defendants .....	21
3. Plaintiffs Fail to Establish Redressability with Respect to the State Defendants .....	24
CONCLUSION .....	27
CERTIFICATE OF SERVICE .....	29
CERTIFICATE OF COMPLIANCE.....	29

**TABLE OF AUTHORITIES**

**Cases**

*Alliance for The Wild Rockies v. Cottrell*,  
632 F.3d 1127 (9th Cir. 2011) ..... 6, 7

*Angelotti Chiropractic v. Baker*,  
791 F.3d 1075 (9th Cir. 2015) ..... 6

*Bd. of Trs. of State Univ. of N.Y. v. Fox*,  
492 U.S. 469, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) ..... 10

*Benisek v. Lamone*,  
138 S. Ct. 1942 (2018) ..... 6

*Boardman v. Pac. Seafood Grp.*,  
822 F.3d 1011 (9th Cir. 2016) ..... 26

*Bresgal v. Brock*,  
843 F.2d 1163 (9th Cir. 1987) ..... 7

*Broadrick v. Oklahoma*,  
413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) ..... 10

*Cal. Teachers Ass'n v. Bd. of Educ.*,  
271 F.3d 1141 (9th Cir. 2001) ..... 17, 19

*Califano v. Yamasaki*,  
442 U.S. 682 (1979) ..... 7

*City & Cnty. of S.F. v. U.S. Citizenship & Immigration Servs.*,  
944 F.3d 773 (9th Cir. 2019) ..... 8

*City & Cnty. Of S.F. v. Trump*,  
897 F.3d 1225 (9th Cir. 2018) ..... 7

*City of Erie v. Pap's A.M.*,  
529 U.S. 277 (2000) ..... 12, 13

*Clapper v. Amnesty Int'l USA*,  
568 U.S. 398 (2013) ..... 19

*Clark v. Community for Creative Non-Violence*,  
468 U.S. 288 (1984) ..... 12

*Clear Channel Outdoor, Inc. v. City of L.A.*,  
340 F.3d 810 (9th Cir. 2003) ..... 6

*Collins v. Yellen*,  
141 S. Ct. 1761 (2021) ..... 21

*Drakes Bay Oyster Co. v. Jewell*,  
747 F.3d 1073 (9th Cir. 2014) ..... 26

*E. Bay Sanctuary Covenant v. Barr*,  
934 F.3d 1026 (9th Cir. 2019) ..... 7

*Fed. Election Comm’n v. Cruz*,  
142 S. Ct. 1638 (2022) ..... 19

*Fraihat v. U.S. Immigration & Customs Enf’t*,  
16 F.4th 613 (9th Cir. 2021) ..... 16

*Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*,  
528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) ..... 25

*Giboney v. Empire Storage & Ice Co.*,  
336 U.S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1949) ..... 9

*Ginsberg v. New York*,  
390 U.S. 629 —40 (1968) ..... 14

*Golden Gate Rest. Ass’n v. City of S.F.*,  
512 F.3d 1112 (9th Cir. 2008) ..... 26

*Hill v. Colo.*,  
530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) ..... 17

*Interpipe Contr., Inc. v. Becerra*,  
898 F.3d 879 (9th Cir. 2018) ..... 13, 16

*Klein v. City of San Clemente*,  
584 F.3d 1196 (9th Cir. 2009) ..... 25

*Kolender v. Lawson*,  
461 U.S. 352 (1983) ..... 18

*Los Angeles Police Dept. v. United Reporting Publishing Corp.*,  
528 U.S. 32, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999) ..... 10

*Lujan v. Defs of Wildlife*,  
504 U.S. 555 ..... 21

*Members of City Council of L.A. v. Taxpayers for Vincent*,  
466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) ..... 11

*N.Y. State Club Ass'n v. City of N.Y.*,  
487 U.S. 1, 101 L. Ed. 2d 1, 108 S. Ct. 2225 (1988) ..... 10

*Nat'l Endowment for the Arts v. Finley*,  
524 U.S. 569 (1998) ..... 18

*New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*,  
434 U.S. 1345 (1977) ..... 27

*New York v. Ferber*,  
458 U.S. 747 (1982) ..... 9, 14

*Paramount Land Co. Ltd. P'ship v. Cal. Pistachio Comm'n*,  
491 F.3d 1003 (9th Cir. 2007) ..... 6

*Price v. Kirkegard*,  
No. CV 12-22-BLG-CSO, 2013 U.S. Dist. LEXIS 24795 (D. Mont. Feb. 22,  
2013) ..... 22

*Rust v. Sullivan*,  
500 U.S. 173 (1991) ..... 16

*Sable Communications of Cal. v. FCC*,  
492 U.S. 115 (1989) ..... 14, 17

*SEC v. Banc de Binary, Ltd.*, 964 F. Supp. 2d 1229 (D. Nev.  
2013) ..... 7

*Spokeo, Inc. v. Robins*,  
578 U.S. 330 (2016) ..... 19

*State ex rel. Woodahl v. Dist. Court*,  
159 Mont. 112, 495 P.2d 182, (1972) ..... 22

*Stormans, Inc. v. Selecky*,  
586 F.3d 1109 (9th Cir. 2009) ..... 26

*Thalheimer v. City of San Diego*,  
645 F.3d 1109, 1128 (9th Cir. 2011) ..... 25

*TransUnion LLC v. Ramirez*,  
141 S. Ct. 2190 (2021) ..... 20

*Trump v. Hawaii*,  
138 S. Ct. 2392, 2423 (2018) ..... 8

*United States v. Hansen*,  
216 L. Ed. 2d 692, 143 S. Ct. 1932 (2023) ..... 9, 11

*United States v. O'Brien*,  
391 U.S. 367 (1968) ..... 9

*United States v. Williams*,  
553 U.S. 285 (2008) ..... *passim*

*Virginia v. Hicks*,  
539 U.S. 113, 119- 20, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003) ..... 9, 10

*Ward v. Rock Against Racism*,  
491 U.S. 781 (1989) ..... 12, 13, 17

*Winsor v. Sequoia Benefits & Ins. Servs., L.L.C.*,  
62 F.4th 517 (9th Cir. 2023) ..... 22, 25

*Winter v. Natl. Res. Def. Council, Inc.*,  
555 U.S. 7 (2008) ..... 6, 26

*Wit v. United Behav. Health*,  
58 F.4th 1080 (9th Cir. 2023) ..... 21

*Whole Woman's Health v. Jackson*,  
142 S. Ct. 522 (2021) ..... 20

*Younger v. Harris*,  
401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) ..... 20

**Other Authorities**

**Montana Codes Annotated**

§§ 1-2-101—208 ..... 20

§ 2-15-501 ..... 31

§ 2-15-501 ..... 32

§ 7-4-2712 ..... 32

§ 20-4-110..... 33  
§ 20-4-110(2)(b) ..... 33  
§ 45-8-205(5) ..... 23

**United State Constitution**

U.S. Const. art. III ..... 19

## **INTRODUCTION**

Plaintiffs’ Motion for a Preliminary Injunction (Doc. 4/“Motion”), as well as the claims asserted in their First Amended Complaint (Doc. 3), stem from Plaintiffs’ misapprehension of House Bill 359’s (“HB 359”/“the Bill”) specific provisions and actual effect. Plaintiffs read HB 359 in a vacuum and find fault in its various provisions arising from their failure to construe the same in the full context as the Montana Legislature intended. In other words, the vagueness, overbreadth, and other alleged problems of which Plaintiffs complain are either overstated or of their own making. This case ultimately boils down to proper statutory construction, which, as explained further below, demonstrates Plaintiffs’ failure to establish any need for or entitlement to a preliminary injunction pursuant to the applicable authorities. Plaintiffs’ Motion therefore fails as a matter of law, and the Court should deny the same accordingly.

## **BACKGROUND**

### **I. HB 359.**

Montana’s Governor signed HB 359 into law on May 22, 2023. In a nutshell, HB 359 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. (Doc. 5-1, *generally*.)

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.” (*Id.* at 3.) “‘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.* at 2-3.) An owner, operator, manager, or employee of a sexually oriented business who violates Section 2’s provisions is subject to fines that increase with repeated violations, and the business shall have its business license revoked upon a third violation. (*Id.* at 3-4.)

Section 3 prohibits a library that receives state funding from allowing a sexually oriented performance on its premises. (*Id.* at 4.) 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.” (*Id.* at 2.) 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.” (*Id.* at 4.) “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.*)

Section 4 establishes a private right of action. (*Id.* at 4-5.) A minor who attends a performance in violation of Sections 2 or 3 or the minor’s parent or legal guardian “may bring an action against a person who knowingly promotes, conducts, or participates as a performer in the performance.” (*Id.* at 4.) A

successful plaintiff may be awarded actual damages, reasonable attorney fees and costs, and statutory damages. (*Id.* at 4-5.) The cause of action remains available for a period of ten years after accrual. (*Id.* at 5.)

## **II. Plaintiffs.**

Plaintiffs are a mix of individuals, businesses, and nonprofits. Adria Jawort (“Jawort”) identifies as a transgender woman who “regularly speaks to libraries and other organizations . . . about Two-Spirit and transgender issues.” (Doc. 3 at 6.) Rachel Corcoran (“Corcoran”) is a teacher in 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 non-profit organization that educates and advocates “through the production of community-based drag performances...” and allegedly has had events cancelled or modified. (*Id.* at 7.) 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.” (*Id.* at 7-8.) Imagine Brewing Company (“Imagine Brewing”) is a brewery that “has hosted and plans to host all-ages drag shows and drag story hours, during which it sells alcoholic beverages.” (*Id.* at 8.) Imagine Brewing “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 had events cancelled. (*Id.* at 8-9.) Montana Pride is a statewide annual Pride celebration whose permits for an event were allegedly denied by the City Helena. (*Id.* at 9.) 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 HB 359.” (*Id.* at 10.) 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 HB 359.” (*Id.* at 10-11.)

Plaintiffs seek a preliminary injunction barring the State Defendants from enforcing HB 359. (Doc. 5.) The predicate claims applicable to the State Defendants are Count IV, Plaintiffs’ facial First Amendment overbreadth challenge, and Count V, Plaintiffs’ facial Fifth/Fourteenth void for vagueness challenge. (Doc. 3 at 41-43.) This Response therefore only addresses Plaintiffs’

claimed entitlement to a preliminary injunction based on Counts IV and V.

### **PRELIMINARY INJUNCTION STANDARD**

“A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Fraihat v. U.S. Immigration & Customs Enf’t*, 16 F.4th 613, 635 (9th Cir. 2021) (quotations omitted). “As a matter of equitable discretion, a preliminary injunction *Benisek v. Lamone*, 138 S. Ct. 1942, 1943–44 (2018). “Rather, a court must also consider whether the movant has shown ‘that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.’” *Id.* at 1944. *See also Winter v. Natl. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

Even under the sliding scale test from *Alliance for The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011), Plaintiffs still must show a likelihood of irreparable injury and a hardship balance that tips sharply towards them. *Angelotti Chiropractic v. Baker*, 791 F.3d 1075, 1081 (9th Cir. 2015). Raising a serious constitutional question is not enough to tip the hardship scales and enjoin a duly enacted law. *See Paramount Land Co. Ltd. P’ship v. Cal. Pistachio Comm’n*, 491 F.3d 1003, 1012 (9th Cir. 2007); *see also Clear Channel Outdoor, Inc. v. City of L.A.*, 340 F.3d 810, 816 (9th Cir. 2003) (vacating a

preliminary injunction where plaintiffs were unlikely to succeed on the merits even though their First Amendment claims did raise the possibility of irreparable injury). This means there must be at least a reasonable probability of success on the merits. *See SEC v. Banc de Binary, Ltd.*, 964 F. Supp. 2d 1229, 1233 (D. Nev. 2013) (“The [Alliance for the Wild Rockies] court must have meant something like ‘reasonable probability,’ which appears to be the most lenient position on the sliding scale that can satisfy the requirement that success on the merits be ‘likely.’ If success on the merits is merely possible, but not at least reasonably probable, no set of circumstances with respect to the other prongs will justify preliminary relief.”).

Next, if a plaintiff establishes that a preliminary injunction should issue, the injunctive relief “should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). “Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown.” *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987); *cf. E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (“all injunctions—even ones involving national policies—must be ‘narrowly tailored to remedy the specific harm shown’”). “This is so, in part, because broad injunctions may stymie novel legal challenges and robust debate.” *City & Cnty. Of S.F. v. Trump*, 897 F.3d 1225,

1244 (9<sup>th</sup> Cir. 2018).<sup>1</sup>

### **ARGUMENT**

Plaintiffs’ current Motion should be denied because they cannot meet any, no less *all*, of the four elements necessary to obtain a preliminary injunction. Plaintiffs cannot show a likelihood of success on the merits, a likelihood of suffering irreparable harm, that the balance of the equities tips in their favor, or that a preliminary injunction is in the public interest. Because the test is conjunctive, any one of these deficiencies is sufficient to defeat Plaintiffs’ Motion.

#### **I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS.**

Satisfaction of a likelihood of success on the merits is “the irreducible minimum requirement to granting any equitable and extraordinary relief.” *City & Cnty. of S.F. v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773, 789 (9th Cir. 2019) (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018)). The analysis ends if the moving party fails to show a likelihood of success on the merits of its claims. *Id.* at 790 (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018)).

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<sup>1</sup> See also Doc. 5-1 at 5 (setting forth HB 359’s “Severability” clause).  
STATE DEFENDANTS’ RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS’ MOTION FOR  
PRELIMINARY INJUNCTION | 8

**A. HB 359 IS VALID UNDER THE SUPREME COURT’S FIRST AMENDMENT OVERBREADTH ANALYSIS.**

The Supreme Court has explained that it “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.” *United States v. O’Brien*, 391 U.S. 367, 376 (1968). “[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *United States v. Hansen*, 216 L. Ed. 2d 692, 710, 143 S. Ct. 1932 (2023) (brackets in original) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949)). “[W]here conduct and not merely speech is involved, [] the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *New York v. Ferber*, 458 U.S. 747, 770 (1982).

Under the Supreme Court’s First Amendment overbreadth doctrine, “a statute is facially invalid if it prohibits a substantial amount of protected speech.” *United States v. Williams*, 553 U.S. 285, 292 (2008). “The doctrine seeks to strike a balance between competing social costs.” *Id.* (citing *Virginia v. Hicks*, 539 U.S. 113, 119- 20, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003)). “On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, STATE DEFENDANTS’ RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION | 9

invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects.” *Id.*

“In order to maintain an appropriate balance, [the Supreme Court has] vigorously enforced the requirement that a statute’s overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.” *Id.* (brackets inserted, emphasis in original) (citing *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989); *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)). “Invalidation for overbreadth is ‘strong medicine’ that is not to be ‘casually employed.’” *Id.* at 293 (quotation marks omitted) (quoting *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 39, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999) (quoting *Ferber*, 458 U.S., at 769, 102 S. Ct. 3348, 73 L. Ed. 2d 1113)).

“The 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) (quoting *N.Y. State Club Ass’n v. City of N.Y.*, 487 U.S. 1, 14, 101 L. Ed. 2d 1, 108 S. Ct. 2225 (1988)). “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. at 293. *See also Hansen*, 216 L. Ed. 2d 692, 702, 143 S. Ct. 1932 (2023) (“To judge whether a statute is overbroad, we must first determine what it covers.”).

### **1. Proper Construction of HB 359.**

The MCA sets forth numerous specific rules to be followed in the construction of the laws passed by the Montana Legislature. *See* MCA, §§ 1-2-101—208. Those include Section 1-2-101 (Role of the judge—preference to construction giving each provision meaning, Section 1-2-102 (Intention of the legislature—particular and general provisions), Section 1-2-103 (Statutes in derogation of common law—liberal construction, and Section 1-2-106 (Construction of words and phrases). *See also Williams*, 553 U.S. at 294 (narrowing the meanings of words “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.”); *Id.* at 301 (acknowledging the tendency of the Supreme Court’s “overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals.”). “The ‘mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.” *Id.* at 303 (quoting *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)).

Taken as a whole, HB 359’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 the same. Legislative testimony presented in support of HB 359 reflects the significant public concern about the potential harm to minors and the conclusion that they should not be exposed to this conduct.<sup>23</sup> The Bill is not aimed at banning or suppressing a performer’s sexual expression but is instead overwhelmingly concerned with the harmful secondary effects of sexually expressive conduct on minors. The Court can therefore consider HB 359 to be

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<sup>2</sup> Mont. Leg., H. Judiciary Comm. Hrg. at 8:20:59 (Feb. 9, 2023), available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/47759?agendaId=251847>; *Id.*, at 8:48:50 (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); Mont. Leg., S Judiciary Comm. Hrg. at 8:53:02 (Apr. 4, 2023), available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/47987?agendaId=269135>. *See also Id.* at 8:58:50 (proponent testimony referencing 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”).

<sup>3</sup> The Legislature may properly rely on the experience elsewhere and the observations of legislators in concluding that this conduct causes undesirable consequences. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 312-14 (2000)

content-neutral for purposes of its analysis. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 294, (2000) (even if regulation has an incidental effect on some speakers or messages but not others, the regulation is content neutral if it can be justified without reference to the content of the expression).<sup>4</sup> HB 359 further reflects the Legislature's understanding that such conduct is not necessarily inappropriate for adult audiences considering that it limited HB 359'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 made it a criminal offense 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 Title 45, chapter 8 apply to this offense in its construction given the Bill's specific codification instruction at Section 5(1). (*See* Doc. 5-1 at 5.) For example, the construction of "sexually oriented performance" must incorporate the pre-existing definition of "performance," which is "any motion picture, film, or

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<sup>4</sup> In any case, *Ward* clarified that non-content neutral restrictions subject the law to strict scrutiny, but the Court applies a slightly different framework to First Amendment vagueness challenges, *Williams*, 553 U.S. at 292-293; and a wholly different framework towards cases involving the state withdrawing subsidies. *Interpipe Contr., Inc. v. Becerra*, 898 F.3d 879, 886 (9th Cir. 2018).

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.” MCA § 45-8-205(5). This assuages 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* Doc. 5-5 at 4-6; Doc. 5-6 at 4-5.)

There also can be no doubt that the Legislature intended for the Bill 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 the Bill 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 HB 359 withstands constitutional scrutiny.

**2. Any Overbreadth of HB 359 Is Insubstantial in Relation to Its Plainly Legitimate Sweep**

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  
STATE DEFENDANTS’ RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION | 14

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 HB 359 as explained above, and it constitutes a large portion of the Bill’s plainly legitimate sweep.

Plaintiffs characterize “drag shows” as an 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:

...The Imperial Court’s drag performances are strictly tailored based on age group, with some performances for adults-only and other performances for all-ages. We take steps to ensure that minors do not attend shows intended for our adult-only audiences...The all-ages drag performances we put on are appropriate for anybody...The costumes for these all-ages performances are also age-appropriate, with exhaustive guidelines outlining what is and is not appropriate costuming for an all-ages show...

(Doc. 5-3 at 4.) Imperial Court also makes clear that it is well within its ability to produce drag shows under HB 359, whether it be through increased age restrictions, modified costuming, or other adaptations, having done so repeatedly since the Bill was enacted. (*See Id.* at 6-7.) 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*, 492 U.S. at 126.

STATE DEFENDANTS’ RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION | 15

Throughout their complaint, they implicitly acknowledge the legitimate sweep of the law. Doc. 3, *generally*. What they cannot show is that the whole of HB 359 is substantially overbroad compared to the Bill’s legitimate regulation of inappropriate and indecent conduct to minors.

Furthermore, the Legislature’s intent underlying HB 359’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.*, 898 F.3d at 886. *See also Rust v. Sullivan*, 500 U.S. 173, 193 (1991). 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*, 898 F.3d at 886. This is another considerable portion of the Bill’s plainly legitimate sweep.

Plaintiffs read HB 359 broader than the statutory text allows. The Bill does not prevent non-age-restricted sexually oriented performances at non-publicly funded private property. The Bill 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 Section 3(3) apply to performances that are not intended to

appeal to a prurient interest in sex. In other words, contrary to Plaintiffs claims, the Bill incorporates understood legal terms and legitimate extensions of state authority to protect minors. *Sable*, 492 U.S. at 126.

On balance, Plaintiffs cannot establish that HB 359’s alleged overbreadth is substantial, not only in an absolute sense, but also relative to the Bill’s plainly legitimate sweep. Plaintiffs therefore fail to sustain their heavy burden of justifying the “strong medicine” of facial invalidation, particularly at this stage where the extraordinary and drastic remedy of a preliminary injunction is at issue. Plaintiffs Motion therefore fails.

**B. HB 359 Is Not Void for Vagueness.**

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). It follows that “uncertainty at a statute’s margins will not warrant facial invalidation if it is clear what the statute proscribes ‘in the vast majority of its intended

applications.” *Id.* at 1151 (quoting *Hill v. Colo.*, 530 U.S. 703, 733, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000)). “What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.” *Williams*, 553 U.S. at 306.

Ultimately, facial invalidation of a statute is “strong medicine” that should be employed “sparingly and only as a last resort.” *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). Thus, the party seeking facial invalidation, even in the First Amendment context, bears “a heavy burden” in advancing their claim. *Id.* See also *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (observing that the United States Supreme Court has “traditionally viewed vagueness and overbreadth as logically related and similar doctrines). See also *Williams*, 553 U.S. at 305—06 (“[T]he Eleventh Circuit’s error is more fundamental than merely its selection of unproblematic hypotheticals. Its basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. That is not so. Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.”).

Here, it is clear what HB 359 proscribes in the vast majority of its intended applications—intentional exposure of minors to indecent and potentially harmful

conduct in locations and contexts where such exposure is likely to occur. These applications are further clarified by the Bill’s defined terms, other terms defined in law, the plain meaning of its terms, narrowing context, and the Legislature’s obvious underlying intent. *See* Section I(A)(i), *supra*. Plaintiffs pick at the margins of the Bill’s provisions to highlight close cases and problematic hypotheticals, but this does not render the Bill facially unconstitutional. *Cal. Teachers Ass’n*, 271 F.3d at 1152. Even if the Court finds the Bill to be lacking perfect clarity and precise guidance, that is not enough to maintain Plaintiffs’ facial vagueness claim.

As with their First Amendment facial overbreadth challenge, Plaintiffs cannot sustain their heavy burden on their Fifth Amendment facial vagueness claim. Plaintiffs’ Motion fails for this reason as well.

**C. PLAINTIFFS FAIL TO DEMONSTRATE STANDING.**

Article III of the United States Constitution “limits federal courts’ jurisdiction to certain ‘Cases’ and ‘Controversies.’” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013). “[T]he party invoking federal jurisdiction[] bears the burden of establishing” standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To establish standing, the plaintiff must show “(1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief.” *Fed. Election Comm’n v. Cruz*, 142 S. Ct. 1638, 1646 (2022). “And standing is not dispensed in gross; rather, plaintiffs

must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages).” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). In the Eleventh Amendment context, the injury must be specific to the named state defendants, not the state generally. *Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021)

**1. Plaintiffs Cannot Demonstrate Any Cognizable Injury at This Stage.**

The alleged injury at the core of Plaintiffs’ facial overbreadth and vagueness claims under Counts IV and V is HB 359’s purported chilling effect on their First Amendment rights. 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.” *Jackson*, 142 S. Ct. at 538 (quotation marks omitted) (quoting *Younger v. Harris*, 401 U.S. 37, 42, 50-51, 91 S. Ct. 746, 27 L. Ed. 2d 669 (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.* Here, Plaintiffs have made no allegation of any actual enforcement action taken by the State Defendants, and they are not entitled to any special exemption.

Since HB 359's effective date, Plaintiffs allege numerous instances of purportedly covered conduct occurring. *See, e.g.*, Doc. 5-3 at 6-7. This weighs against an actual injury because the facts show the Plaintiffs engaged in the conduct they sought to engage in related to the State Defendants. No actual injury occurred in those situations and Plaintiffs fail to demonstrate that the State Defendants are likely to enforce the law against future similar conduct. Plaintiffs accordingly fail to satisfy the injury element of Article III standing.<sup>5</sup>

**2. Plaintiffs Cannot Establish Causation with Respect to the State Defendants.**

Even if Plaintiffs asserted a proper injury, that injury is neither “fairly traceable” to the State Defendants nor redressable by injunctive relief against them. The “fairly traceable” prong 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). 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)

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<sup>5</sup> Plaintiffs seek to enjoin Section 4. But none of the State Defendants, nor any other named Defendant, is a proper party related to that section. *Jackson*, 142 S. Ct. at 535 (“[A] federal court exercising its equitable authority may enjoin named defendants from taking specified unlawful actions. But under traditional equitable principles, no court may ‘lawfully enjoin the world at large,’ ...or purport to enjoin challenged ‘laws themselves[.]’”). The Court, therefore, cannot entertain any claims against Section 4.

(quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). “[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. 555, 560).

*Attorney General Austin Knudsen*

Plaintiffs fail to show, or even plausibly allege, that any of the alleged injuries are traceable Attorney General Knudsen. No causal connection is established because there is not one to find. First, none of the Plaintiffs are under any imminent threat of criminal prosecution, and they have not alleged that the Attorney General has sought or will seek to prosecute them under any provision of HB 359.

Second, HB 359 does not specifically provide the Attorney General with any enforcement powers, and he does not initiate prosecutions, as outlined by his general duties set forth in § 2-15-501, MCA. “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, 313 Mont. 95, 60 P.3d 454, 459 ¶ 26 (Mont. 2002)). This has been a consistent practice engrained within Montana law for decades. “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.” *State ex rel. Woodahl v. Dist. Court*, 159 Mont. 112, 116, 495 P.2d 182, 185 (1972).

Although the Attorney General may have a supervisory role over a county attorney in matters pertaining to their office, and may, when required by the public service or governor, assist the county attorney in the discharge of their duties, the power remains at the county attorney level to initiate a prosecution, should an investigation by law enforcement occur. § 2-15-501, MCA (5), (6). This is reflected in HB 359’s provisions regarding the revocation of a business license: “if applicable, the *county* or *municipality* shall revoke the business license held by the offender.” Doc. 5-1 at 3-4. The county attorney, as provided by law, is the public prosecutor and would be empowered to bring any charges contemplated by the Bill. § 7-4-2712, MCA. Stated differently, Plaintiffs have not been and are not be under any specific threat of enforcement by the Attorney General.

Superintendent of Public Instruction (“Superintendent”) Elsie Arntzen

Similarly, Plaintiffs cannot trace any injury, or threat of injury, to Superintendent Arntzen. The Board of Public Education (“Board”), not the Superintendent, possesses authority to suspend or reprimand educators. § 20-4-110, MCA; *see also* Doc. 5-1 at 5 (codifying Section 3 as part of Title 20). The Superintendent may request suspension or revocation of a license, § 20-4-110(2)(b), but the Board possesses discretion over both the initiation of proceedings, investigation, and the outcome of such proceedings based on a hypothetical Superintendent request. § 20-4-110. Should the Superintendent decide to deny the issuance or renewal of a teacher, administrator, or specialist certificate, the Board hears the appeal, and the board’s decision is final. *Id.*

In summary, the county attorneys and the Board are the entities with ultimate enforcement authority with respect to HB 359, and they are third parties not presently before this Court. Because Plaintiffs failed to allege any past, present, or future harm attributable to the State Defendants, they have failed to satisfy the causation element necessary for Article III standing.

**3. Plaintiffs Fail to Establish Redressability with Respect to the State Defendants.**

For the same reasons Plaintiffs can establish no causal connection between the State Defendants and any concrete injury for purposes of the Court’s standing analysis, Plaintiffs cannot establish that the sought injunctive relief against the State

Defendants would amount to the requisite redress. Indeed, the State Defendants herein are not the officials or entities charged with enforcing HB 359. “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.4<sup>th</sup> at 525 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)). Not only are Plaintiffs’ concerns of criminal or administrative prosecution entirely speculative, but they also failed to name the parties that would actually control the initiation and disposition of the adverse proceedings they claim to fear. Plaintiffs fail to demonstrate standing for this reason as well.

## **II. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY 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)).

Here, 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.

### **III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR THE STATE DEFENDANTS.**

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). Plaintiffs must establish that “the balance of equities tips in [their] favor.” *Winter*, 555 at 20. Likewise, a district court should also 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 very fact that HB 359 is a duly enacted state statute weighs against granting an injunction here. *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. of Cal. 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.”). The State, and the public at large, maintain a compelling interest in enforcing HB 359—preventing minors’ exposure to indecent and potentially harmful conduct. Montanans now have a statutory structure to regulate such conduct pursuant to HB 359. For the same reasons Plaintiffs cannot establish that any overbreadth of HB 359 is real and substantial in relation to the Bill’s plainly legitimate sweep, they cannot establish that the balance of equities and public interest weigh in their favor for purposes of their present Motion.

### **CONCLUSION**

For the reasons set forth above, this Court should deny Plaintiffs’ Motion for Preliminary Injunction (Doc. 4).

DATED this 2<sup>nd</sup> day of August, 2023.

Austin Knudsen  
Montana Attorney General

/s/ Michael Russell

Michael Russell

Thane Johnson

Alwyn Lansing

Michael Noonan

*Assistant Attorneys General*

MONTANA DEPARTMENT OF JUSTICE

P.O. Box 201401

Helena, MT 59620-1401

Emily Jones  
*Special Assistant Attorney General*  
JONES LAW FIRM, PLLC  
115 N. Broadway, Suite 410  
Billings, MT 59101  
Phone: 406-384-7990  
emily@joneslawmt.com

*Attorneys for State Defendants*

**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: August 2, 2023

/s/ Michael Russell

Michael Russell

**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this Brief in Opposition of Plaintiff's Motion for Preliminary Injunction is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word, is 6,378 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

/s/ Michael Russell

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BUTTE DIVISION**

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

Plaintiffs,

vs.

AUSTIN KNUDSEN; ELSIE ARNTZEN; J.P.  
GALLAGHER; and THE CITY OF HELENA,

Defendants.

**No. CV 23-50-BU-BMM**

**ORDER**

**INTRODUCTION**

The Montana legislature passed House Bill 359 (“H.B. 359”) on May 11, 2023. Montana Governor Greg Gianforte signed H.B. 359 into law on May 22, 2023. The statute took immediate effect. H.B. 359 § 7. H.B. 359 criminalizes a wide range of conduct, including “drag story hours” in schools and libraries that receive any amount of state funding. *Id.* § 3(2). The statute prohibits minors from attending “sexually oriented shows” anywhere. *Id.* § 2(1). H.B. 359 proscribes all “sexually oriented” performances in libraries or schools that receive public funding, *id.* § 3(1)–(2), on public property “in the presence of” a minor, *id.* § 3(3)(a), and in any location owned by an entity that receives any state funding. *Id.* § 3(3)(b).

Plaintiffs, the Imperial Sovereign Court of the State of Montana (“Imperial

Court”), Montana Pride, several individuals, including Adria Jawort (“Jawort”), a transgender (“trans”) and Two-Spirit journalist and author, businesses, and community groups (collectively “Plaintiffs”), move the Court for a temporary restraining order (“TRO”) and preliminary injunction against Defendants Montana Attorney General Austin Knudsen (“Knudsen”), Montana Superintendent of Public Instruction Elsie Arntzen (“Arntzen”), Butte-Silver Bow Chief Executive J.P. Gallagher (“Gallagher”), and the City of Helena. (Doc. 4.) Plaintiffs challenge H.B. 359 on the basis that the law violates the First, Fifth, and Fourteenth Amendments of the U.S. Constitution. (Doc. 3 at 38–43.) The Court conducted a TRO hearing on July 26, 2023. (Doc. 12.) For the reasons set forth below, including the time sensitive nature of Plaintiffs’ request and the necessity that the City of Helena make a permitting decision within less than 24 hours, the Court will issue a limited TRO.

## **BACKGROUND**

Plaintiffs include both individuals and organizations. Montana Pride is an all-ages annual statewide celebration of Montana’s LGBTQ+ community, with events that include a parade and drag performances. (Doc. 5-9 at 4.) More than 15,000 people from across the state and country attended the events in 2022. (*Id.*) Montana Pride’s 2023 events are scheduled to take place from July 30 to August 6, 2023. (*Id.* at 3–4.) These events would mark Montana Pride’s thirtieth anniversary. (*Id.* at 3.) Montana Pride applied for permits for the 2023 events on June 30, 2023, and July

13, 2023. (*Id.* at 3, 8–14, 16–22.) Montana Pride represents that its applications prove “functionally identical” to those approved in 2022. (Doc. 5-9 at 5.)

The City of Helena has not yet issued the requested permits. Plaintiffs allege that city officials told Montana Pride during a July 13, 2023, meeting that “the City of Helena would not issue the requested permits while H.B. 359 remained in effect and enforceable.” (*Id.*) The City of Helena clarified during the July 26, 2023, hearing that it plans to issue the permits. The City of Helena asserts, however, that the statute creates a “Hobson’s choice” by forcing the city to choose between “infring[ing] upon Plaintiff[s]’ constitutional rights and “subject[ing] city employees to criminal and civil liability under [ ] H.B. 359.” (Doc. 10 at 2.)

H.B. 359 defines “drag story hour” as “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.” *Id.* § 1(3). The statute defines “drag king” and “drag queen” as “a male or female performer who adopts a flamboyant or parodic [male or female] persona with glamorous or exaggerated costumes and makeup.” *Id.* § 1(1), (2). H.B. 359 defines “sexually oriented performance” as “a performance that, regardless of whether performed for consideration, is intended to appeal to a prurient interest in sex and features” any of the following: “the purposeful exposure, whether complete or partial, of [ ] genital[ia, the pubic region, buttocks], or a female breast, if the breast is exposed below a point immediately above the top of the areola” or “prosthetic

genitalia, breasts, or buttocks,” “stripping,” or “sexual conduct.” *Id.* § 1(10).

H.B. defines “stripping” as the “removal or simulated removal of clothing in a sexual manner for the entertainment of one or more individuals,” regardless of whether nudity results. *Id.* § 1(11). The statute contains no definition for “sexual conduct” and instead cross-references the definition contained in Montana’s criminal child abuse statute, Mont. Code Ann. § 45-5-625. H.B. 359 § 1(8). The definition of “sexually oriented” encompasses the undefined term “salacious dancing” in addition to “any lewd or lascivious depiction or description of human genitals or of sexual conduct[.]” *Id.* The law provides no definition of “lewd” or “lascivious.” *Id.* H.B. 359 similarly fails to define “in the presence of” a minor. *Id.* § 3(3)(a).

Owners, operators, managers, and employees of “sexually oriented” businesses convicted under H.B. 359 face fines from \$1,000 to \$10,000 and, for a third or subsequent offense, mandatory revocation of business licenses. *Id.* § 2(2). Libraries, schools, public employees, and entities that receive any state funding face fines of \$5,000 and mandatory suspension (first offense) or permanent revocation (subsequent offenses) of an applicable teaching, administrative, or specialist certificate if convicted of violating H.B. 359. *Id.* § 3(4). In addition to imposing criminal liability, H.B. 359 provides for a private right of action. *Id.* § 4. A minor who attends a drag story hour or “sexually oriented performance” in violation of

H.B. 359 § 2, or the minor’s parent, may bring a civil action up to ten years after an alleged violation against any “person who knowingly promotes, conducts, or participates as a performer.” *Id.* § 4(1), (3).

Plaintiffs filed this action on July 7, 2023. (Doc. 1.) Plaintiffs filed an Amended Complaint and TRO/preliminary injunction motion on July 17, 2023. (Doc. 3; Doc. 4.) Plaintiffs sue Knudsen and Artzen in their official capacities, Gallagher in his individual and official capacity, and the City of Helena in its capacity as a municipal entity. (Doc. 3 at 5.) The City of Helena filed a Response on July 24, 2023. (Doc. 10.) The State, Artzen, and Gallagher have not yet responded.

The Amended Complaint contains the following five causes of action: (I) First Amendment Free Speech Violation, as applied to Jawort; (II) Fourteenth Amendment Equal Protection Violation, as applied to Jawort; (III) First Amendment Free Speech Violation, as applied to Montana Pride; (IV) First Amendment Facial Free Speech Violation; and (V) Fifth Amendment Facial Due Process Violation. (Doc. 3 at 38–43.) Plaintiffs urge the Court to grant an emergency TRO on or before July 30, 2023, so that Montana Pride may take place without requiring attendees, performers, and other community members to chill their protected speech or face criminal and civil liability. (Doc. 5 at 8.)

### **LEGAL STANDARD**

District courts possess discretion regarding the grant or denial of preliminary

relief. *Envtl. Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020). The standard for issuing a TRO proves “essentially identical” as that for issuing a preliminary injunction. *Don’t Shoot Portland v. City of Portland*, 465 F. Supp. 3d 1150, 1154 (D. Or. 2020) (internal citations omitted). A party seeking a TRO must establish the following four elements: (1) that they are likely to succeed on the merits, (2) that they are likely to suffer irreparable harm in the absence of a TRO, (3) that the balance of equities tips in their favor, and (4) that a TRO is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). “[H]arm to the opposing party and the public interest[] merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). The Ninth Circuit evaluates the above factors under a sliding scale. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir. 2011). A stronger showing on one factor may offset a weaker showing on another. *Id.* at 1132.

## DISCUSSION

Plaintiffs urge the Court to grant an emergency TRO on or before July 30, 2023, to allow Montana Pride to obtain the requisite permits from the City of Helena and take place as planned. (Doc. 5. at 8.) The time sensitivity of Plaintiffs’ request requires the Court to issue a preliminary TRO ruling despite lacking the benefit of the parties’ full briefing. The Court will reserve ruling on Plaintiffs’ request for a preliminary injunction until the motion is briefed and the Court has conducted a

further hearing. The Court will address each of the *Winter* factors as to a TRO.

### **I. Likelihood of Success on the Merits.**

Plaintiffs contend that they have demonstrated a likelihood of success on the merits of the following two claims: (Count IV) First Amendment facial challenge to H.B. 359, and (Count V) Fifth Amendment vagueness/overbreadth facial challenge to H.B. 359. (Doc. 5 at 18, 37.) Plaintiffs assert that H.B. 359 has chilled their speech and subjected them to a reasonable fear of prosecution for engaging in protected speech and expression. Plaintiffs have established standing for the purposes of seeking a TRO. *Cf. Friends of George’s, Inc. v. Tennessee*, No. 2:23-CV-2163-TLP-TMP, 2023 WL 2755238, at \*2–3 (W.D. Tenn. Mar. 30, 2023). The Court defers its final determination of Plaintiffs’ standing pending the completion of briefing and an additional hearing. The Court will consider in turn the merits of each claim.

#### **A. First Amendment Facial Claim.**

The First Amendment does not protect obscenity. Laws regulating obscenity, however, “must be specifically defined.” *Miller v. California*, 413 U.S. 15, 24 (1973). Speech must meet the following three criteria to qualify as legally “obscene”: (1) the speech, “taken as a whole, appeal[s] to the prurient interest in sex,” “applying contemporary community standards,” (2) the speech “portray[s] sexual conduct in a patently offensive way,” and (3) the speech, “taken as a whole, do[es] not have serious literary, artistic, political, or scientific value.” *Id.* (internal

citations and quotation marks omitted).

Montana law already protects minors from obscene material. Montana’s obscenity statute criminalizes purposely or knowingly providing obscene material, obscenely exposing one’s body, and giving obscene performances to minors, among other conduct. Mont. Code Ann. § 45-8-201(1). This statute employs a definition of “obscene” that incorporates the *Miller* requirements. *Id.* § 45-8-201(2). Plaintiffs argue that the speech proscribed by H.B. 359 sweeps far beyond what qualifies as legally “obscene.” (Doc. 5 at 32.) The State conceded during the July 26, 2023, hearing that the statutory text of H.B. 359 regulates speech and expression outside that considered “obscene” under *Miller*. The Court agrees.

H.B. 359 appears to contain no requirement that, “taken as a whole” and “applying contemporary community standards” the regulated conduct “appeals to the prurient interest.” *See generally* H.B. 359. A jury must decide this question to ensure that “it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person.” *Miller*, 413 U.S. at 33. The statute similarly fails to require that speech be “patently offensive.” *See generally* H.B. 359. “Patently offensive” proves synonymous with “hard core” pornographic materials. *Miller*, 413 U.S. at 27. This type of “hard core” content may include “patently offensive representations or descriptions of ultimate sexual acts” and “lewd exhibition of the genitals.” *Id.* at 25. Finally, H.B. contains no carveout for speech

or expression with serious literary, artistic, political, or scientific value. *See generally* H.B. 359. The First Amendment protects at least some of the speech and expression regulated by H.B. 359. *Miller*, 413 U.S. at 34–35. The Court next evaluates the appropriate level of scrutiny to apply.

**(1) Level of Scrutiny.**

“[T]hat the government must remain neutral in the marketplace of ideas” represents “a central tenet of the First Amendment.” *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978). Courts subject content- and viewpoint-based restrictions on speech or expression to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Content discrimination takes place when the government selects “the subjects that may be discussed[.]” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 59 (1983) (Brennan, J., dissenting). Viewpoint discrimination, in turn, “occurs when the government prohibits speech by particular speakers, thereby suppressing a particular view[.]” *Id.*

A regulation proves “facially content-based under the First Amendment if it ‘targets speech based on its communicative content’—that is, if it ‘applies to particular speech because of the topic discussed or the idea or message expressed.’” *City of Austin v. Reagan Nat’l Advert. of Austin, LLC.*, 596 U.S. \_\_\_, 142 S. Ct. 1464, 1471 (2022) (internal citation omitted). Content-based restrictions are “presumptively unconstitutional.” *Reed*, 576 U.S. at 163.

H.B. 359 bans drag story hours during “regular operating hours and at any school-sanctioned extracurricular activity” in schools and libraries that receive any public funding. H.B. 359 § 3(2). The law imposes significant restrictions on “sexually oriented” performances and “sexually oriented businesses” based upon broad definitions of sexual and gendered content. *Id.* §§ 2, 3. H.B. 359 does not qualify as a neutral time, place, or manner regulation.

The only two other district courts to have considered First Amendment challenges to similar state “drag bans” have confirmed that those laws constitute facially content-based restrictions. *Friends of George’s*, 2023 WL 3790583, \*19 (W.D. Tenn. June 2, 2023); *HM Fla.-ORL, LLC v. Griffin*, No. 6:23-CV-950-GAP-LHP, 2023 WL 4157542, \*7 (M.D. Fla. June 23, 2023). The district court in *Friends of George’s* issued a TRO blocking the Adult Entertainment Act (“AEA”), Tennessee’s drag ban, the day before it would have taken effect. 2023 WL 3790583, at \*3. The Florida drag ban at issue in *HM Florida*, by contrast, had come into effect at the time of the district court’s ruling. 2023 WL 4157542, at \*1. The Court determines that H.B. 359’s focus on the communicative content of the speakers it seeks to regulate renders it a content-based restriction. *City of Austin*, 596 U.S. at \_\_\_, 142 S. Ct. at 1471. Strict scrutiny applies.

The Court also considers whether H.B. 359 engages in viewpoint-based regulation. Government suppression of speech based on a speaker’s “specific

motivating ideology,” opinion, or perspective proves impermissible. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995). Viewpoint-based restrictions on speech “raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (internal citation and quotation marks omitted). Viewpoint-based discrimination represents “a ‘more blatant’ and ‘egregious form’ of content discrimination.” *Reed*, 576 U.S. at 168 (quoting *Rosenberger*, 515 U.S. at 829).

The district court in *Friends of George’s* determined that the AEA qualified as a facially viewpoint-based regulation. 2023 WL 3790583, at \*20. H.B. 359 targets a speaker’s viewpoint like the Tennessee law. H.B. 359 adds a near-blanket ban on “drag story hour” in schools and libraries receiving public funds. H.B. 359 additionally fails to track the *Miller* obscenity factors and contains no carveout for speech or expression possessing “serious literary, artistic, political, or scientific value.” *Miller*, 413 U.S. at 24.

Plaintiffs argue that H.B. 359 constrains speech and expression based solely upon viewpoint. Plaintiffs highlight, for example, that Representative Braxton Mitchell’s introduction in support of H.B. 359 justified the legislation on the basis that drag shows expose children to “mature themes” and “inappropriate activities,” purportedly risking that children “adopt and accept certain stereotypes or attitudes,” “creat[ing] an inadequate understanding of gender roles” and “damag[ing]

[children’s] long-term social and emotional development.” (Doc. 5 at 29 (quoting Mont. Leg., Sen. Jud. Comm. Hrg. at 11:10:03 (Feb. 2, 2023)).) The Court acknowledges that the State has not yet had an opportunity to respond but must accept Plaintiffs’ facts as alleged. H.B. 359’s facially viewpoint-based regulation subjects it to strict scrutiny for purposes of the Court’s TRO analysis.

**(2) Strict Scrutiny Analysis.**

A defendant bears the burden of demonstrating that a challenged statute proves “narrowly tailored to serve compelling state interests.” *Reed*, 576 U.S. at 163 (internal citation omitted). A court must determine “whether the challenged regulation represents the least restrictive means among available, effective alternatives.” *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Defendants provided no evidence during the July 26, 2023, TRO hearing to support a finding that H.B. 359 furthers a compelling government interest. The Court recognizes that Defendants have not yet had a full opportunity to develop potential arguments in support of H.B. 359. The Court lacks, at this stage of the litigation, evidence of a compelling interest in restricting the artistic, cultural, political, and scientific speech and expression potentially criminalized by H.B. 359. *Reed*, 576 U.S. at 163.

H.B. 359 also appears to suffer from a lack of narrow tailoring. *Ashcroft*, 542 U.S. at 666. H.B. 359 sweeps beyond obscene conduct already proscribed by Mont. Code Ann. § 45-8-201. H.B. 359 contains no carveout for parental consent. The

Court determines, for purposes of its preliminary TRO analysis, that Defendants appear unlikely to carry their burden regarding the facial validity of H.B. 359 under the First Amendment. Plaintiffs likely succeed on the merits of Count IV.

**B. Fifth Amendment Facial Claim.**

Plaintiffs assert that H.B. 359 proves unconstitutionally vague and overbroad. (Doc. 5 at 37.) The Fifth Amendment to the U.S. Constitution requires that no person may “be held criminally responsible for conduct which [they] could not reasonably understand to be proscribed.” *United States v. Harriss*, 347 U.S. 612, 617 (1954) (internal citations omitted). The void-for-vagueness doctrine requires that criminal laws define an offense “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Statutes failing to meet either requirement violate the Due Process Clause and prove facially invalid. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

Plaintiffs argue that H.B. 359 contains numerous vague and overbroad definitions. (Doc. 5 at 33–35, 38.) Plaintiffs additionally highlight that the statute fails to define other terms. (*Id.*) The State, without the benefit of review of the legislative record, assured the Court during the July 26, 2023, TRO hearing that H.B. 359’s statutory language proves sufficiently definite and tailored to avoid constitutional problems and that Plaintiffs face no risk of criminal prosecution under

its terms. The State distinguished H.B. 359 from the unconstitutional Tennessee and Florida drag bans on the basis that those laws failed to define “lewd.”

H.B. 359 similarly fails to define “lewd” and “lascivious.” H.B. 359 § 1(8). H.B. 359 additionally fails to define the terms “flamboyant or parodic [male or female] persona,” “glamorous or exaggerated costumes and makeup,” “salacious dancing,” “sexual manner,” and “presence of an individual under the age of 18[.]” *Id.* §§ 1(1)–(2), (8), (11), 3(3)(b). The Court anticipates that the State will further develop its arguments in its to-be-submitted briefing. The absence of definitions for these terms raises concerns for the Court about vagueness and overbreadth.

The Court agrees with Plaintiffs, based upon the available record, that H.B. 359’s definitions for “drag king,” “drag queen,” “drag story hour,” “nude,” “public property,” “sexually oriented,” “sexually oriented business,” “sexually oriented performance,” and “stripping” run a significant risk of vagueness and overbreadth. H.B. 359 § 1(1)–(4), (6), (8)–(11). A “flamboyant or parodic” gendered persona with “glamorous or exaggerated costumes or makeup” could be interpreted to include any number of theatrical and artistic performances. *Id.* § 1(1)– (2). A performer who removes no clothing or who removes only outer layers still might fall within H.B. 359’s definition of “[s]tripping.” *Id.* § 1(11). H.B. 359 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. *Id.* § 8.

“Nude,” as defined by H.B. 359, appears to apply both to someone fully clothed, with part of their buttocks visible through sheer fabric, and to someone in a bathing suit that partially uncovers the lower portion of a breast. *Id.* § 1(4)(b).

H.B. 359’s broad private right of action allows any minor or their parent to bring a suit against someone whom they believe has violated the statute up to ten years after the alleged violation. H.B. 359 § 4. H.B. 359 contains no carveout for content possessing “serious literary, artistic, political, or scientific value.” *Miller*, 413 U.S. at 24. The law makes no reference to geographical limitations. Parental consent proves irrelevant to potential criminal liability. H.B. 359 provides for no affirmative defenses. *See* H.B. 359. The statute leaves the public in the dark about what conduct might carry criminal and civil sanctions. *Morales*, 527 U.S. at 56.

H.B. 359 fails to define the conduct that it criminalizes “with sufficient definiteness that ordinary people can understand what conduct is prohibited.” *Kolender*, 461 U.S. at 357. H.B. 359 additionally appears likely to “encourage arbitrary and discriminatory enforcement.” *Id.* Whether a performance qualifies as “sexually oriented,” for example, rests upon a distinction between “female” and “prosthetic” breasts. H.B. 359 § 1(4)(b), (10)(a)(i)–(ii). Authorizing members of the public and state authorities alike to draw such a distinction with respect to others’ bodies likely would require identity-based and gender-based discrimination.

H.B. 359 also permits private citizens and state authorities to pursue legal

action based upon a judgment as to who qualifies as a drag king or queen. *Id.* § 1(1)–(2). This assessment appears to hinge upon a personal, subjective determination about what qualifies as a “flamboyant or parodic” gendered persona with “glamorous or exaggerated” clothing and makeup, without any statutory definition of these terms for guidance. *Id.* The Court determines that H.B. 359’s statutory scheme likely will disproportionately harm not only drag performers, but any person who falls outside traditional gender and identity norms, including trans and Two-Spirit people. As with the Florida drag ban enjoined in *HM Florida*, H.B. 359 proves “dangerously susceptible to standardless, overbroad enforcement[.]” 2023 WL 3790583, at \*9. Plaintiffs have demonstrated a likelihood of success on the merits of Count V. The Court determines that Plaintiffs have satisfied the first *Winter* element.

## **II. Irreparable Harm.**

Plaintiffs assert that irreparable harm already has occurred and will continue to occur in the absence of a TRO. (Doc. 5 at 38–39.) The Court agrees. The Government possesses a compelling state interest in children’s wellbeing and safety. The record before the Court suggests, however, that this compelling interest remains untethered from the text and application of H.B. 359. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Roman Cath. Diocese v. Cuomo*, 592 U.S. \_\_\_, 141 S. Ct. 63, 67 (2020). The harm of censorship “can be realized even without an actual prosecution.”

*Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 393 (1988).

Montana Pride has not yet received permits from the City of Helena for the 2023 Pride events from July 30 to August 6, 2023. The City of Helena supports Montana Pride’s application but fears exposing its employees to civil and criminal liability under H.B. 359 should they permit the 2023 Montana Pride to take place as planned. (Doc. 10 at 2.) The City of Helena affirmed its view that denying Montana Pride’s permit application would “infringe upon Plaintiff[s]’ constitutional rights to freely express themselves.” (*Id.*) Plaintiffs and the thousands of community members and the local businesses who wish to participate in or attend 2023 Montana Pride face the prospect of irreparable harm in the absence of a TRO should they face attendant criminal and/or civil liability under H.B. 359 for their protected speech and expression. Montana Pride’s lead organizer alleges a fear of liability for coordinating and promoting the planned Pride events. (Doc. 5-9 at 6.)

More broadly, the Court credits Plaintiffs’ allegations that they must engage in self-censorship or abandon their organizational missions to avoid potential criminal and civil liability under H.B. 359. Imperial Court has curtailed its speech and expression, including at other recent Pride events across Montana, in response to H.B. 359. (Doc. 5-3 at 5–7.) Plaintiffs have experienced irreparable harm due to cancelled, postponed, or modified events.

Jawort, for example, alleges that she has suffered a restraint on her speech that

has caused irreparable professional, reputational, and dignitary harm. She alleges that the Butte officials cancelled her June 2, 2023, lecture on trans and Indigenous Montana history at the Butte Public Library. (Doc. 5-2 at 3, 7, 10.) Butte’s decision to cancel Jawort’s history lecture allegedly occurred despite Jawort’s express intent to present as herself rather than in drag. (Doc. 5-2 at 4–5.) Jawort has presented evidence that Butte officials made a determination that “hav[ing] a trans[] person” in the Butte Public Library posed “too much of a legal risk” under H.B. 359. (Doc. 5-2 at 3, 7, 10.)

Plaintiffs’ alleged loss of First Amendment freedoms and their reasonable fear of criminal and civil liability under H.B. 359 constitute irreparable injury. *Roman Cath. Diocese*, 592 U.S. at \_\_\_, 141 S. Ct. at 67; *Am. Booksellers Ass’n*, 484 U.S. at 393. Plaintiffs have carried their burden in demonstrating irreparable harm for purposes of a TRO. *Winter*, 555 U.S. at 22.

### **III. Public Interest.**

Plaintiffs highlight that Montana Pride has taken place for decades without incident and that Defendants will suffer no harm, other than potential dissatisfaction, should the Court grant a TRO. (Doc. 5 at 40.) Nothing in the record currently before the Court indicates that speech and expression associated with Montana Pride has harmed minors or any other community members. Montana law already proscribes subjecting minors to obscenity. Mont. Code Ann. § 45-8-201. Defendants need not

attend drag events or events with sexual content. Constitutional violations, moreover, never serve the public interest. *See HM Fla.*, 2023 WL 4157542, at \*9; *Friends of George’s, Inc.*, 2023 WL 2755238, at \*7. The public interest factor strongly weighs in favor of Plaintiffs for purposes of a TRO.

### CONCLUSION

The thirtieth annual Montana Pride is slated to begin in less than two days. Plaintiffs, along with the approximately 15,000 Montanans who wish to attend the events, cannot avoid chilled speech or exposure to potential civil or criminal liability under H.B. 359 in the absence of the extraordinary remedy of a TRO. The City of Helena faces the untenable choice between “infring[ing] upon Plaintiff[s]’ constitutional rights” and “subject[ing]” the city employees tasked with reviewing Montana Pride’s application “to civil and criminal liability under the provisions of H.B. 359.” (Doc. 10 at 2.)

The time sensitivity of Plaintiffs’ TRO request, the likelihood that significant constitutional violations to Plaintiffs have occurred and will continue without judicial intervention, and the absence of countervailing evidence currently before the Court, together require the Court to issue a TRO. The State represented during the July 26, 2023, TRO hearing that it would submit an Answer to the Amended Complaint and a Response to the preliminary injunction motion. The Court will issue its eventual order regarding Plaintiffs’ motion for a preliminary injunction only after

the parties have completed briefing and the Court has conducted a further hearing.

The district court in *Friends of George's* determined, after a full bench trial, that the Tennessee drag ban “reeks with constitutional maladies of vagueness and overbreadth fatal to statutes that regulate First Amendment rights.” 2023 WL 3790583, at \*32. H.B. 359 appears to suffer from similar “constitutional maladies.” *Id.* The Court will grant Plaintiffs’ request for a TRO. The Court will enjoin Defendants from enforcing H.B. 359 pending the Court’s determination of Plaintiffs’ entitlement to a preliminary injunction.

### ORDER

Accordingly, **IT IS ORDERED** that:

1. Plaintiffs’ Motion (Doc. 4) is hereby **GRANTED, in part, and DEFERRED, in part.** The Court will **GRANT** Plaintiffs’ request for a TRO only.
2. Defendants Knudsen and Arntzen are hereby **ENJOINED** from enforcing H.B. 359 pending the Court’s determination of Plaintiffs’ entitlement to a preliminary injunction.

DATED this 28th day of July, 2023.



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Brian Morris, Chief District Judge  
United States District Court

Rebecca J. Dockter  
Helena City Attorney  
City/County Building  
316 N. Park Street  
Helena, Montana  
(406) 447-8595  
[rdockter@helenamt.gov](mailto:rdockter@helenamt.gov)

ATTORNEY FOR DEFENDANT  
City of Helena

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA BUTTE DIVISION**

<p>THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA; ADRIA JAWORT; RACHEL CORCORAN; MONTANA BOOK COMPANY; IMAGINE BREWING COMPANY, LLC d/b/a IMAGINE NATION BREWING COMPANY; BUMBLEBEE AERIAL FITNESS; THE WESTERN MONTANA COMMUNITY CENTER; MONTANA PRIDE; THE GREAT FALLS LGBTQ+ COMMUNITY CENTER; THE ROXY THEATER; and THE MYRNA LOY,</p> <p style="text-align: right;">Plaintiffs,</p> <p>v.</p> <p>AUSTIN KNUDSEN; ELSIE ARNTZEN; J.P. GALLAGHER; and THE CITY OF HELENA</p> <p style="text-align: right;">Defendants.</p>	<p style="text-align: center;">Cause No. CV-23-50-BU-BMM</p> <p style="text-align: center;">City of Helena Response to Request for Temporary Restraining Order and Preliminary Injunction</p>
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The City of Helena, through its City Attorney, Rebecca Dockter, submits this response to the Petition for Temporary Restraining Order and Preliminary Injunction in anticipation of the Court's scheduled hearing on July 26, 2023.

The City of Helena does not dispute the claims by Plaintiffs concerning the vague and overbroad nature of HB 359, and requests this Court enjoin the implementation of HB 359 during the pendency of this matter.

House Bill 359 creates a Hobson's choice for the City. In making its permitting decision, the City itself is in the position of either choosing to infringe upon Plaintiff's constitutional rights to freely express themselves (by denying the permit – something the City is not willing to do), or subject City employees to civil and criminal liability under the provisions of HB 359. The first Pride event is planned for July 30, 2023 where this choice will have to be made.

While the City of Helena plans to issue one permit to Plaintiff Montana Pride for all planned events beginning July 30 and running through August 5, the permit places the burden upon the Pride performers to either comply with the vague, overbroad, and confusing law, or face civil and criminal liability for exercising their fundamental rights. In essence, HB 359 puts the City and the Plaintiffs in similarly untenable positions.

Therefore, the City does not dispute the need for a Temporary Restraining Order and Preliminary Injunction and respectfully requests this Court order HB 359 be enjoined prior to July 30, 2023.

Respectfully submitted this 24<sup>th</sup> day of July 2023.

Respectfully submitted,  
/s/Rebecca J. Dockter  
REBECCA J. DOCKTER  
[rdockter@helenamt.gov](mailto:rdockter@helenamt.gov)  
City of Helena  
City/County Building  
316 Park Avenue  
Helena, Montana 59601  
(40) 457-8595  
*Attorney for Defendant City of Helena*

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served upon all parties of record via CM/ECF on the 24<sup>th</sup> day of July, 2023.

/s/ Jennifer Berry

# Exhibit 10

Declaration of Rachel Corcoran,  
Billings Public Schoolteacher

Constance Van Kley  
 Rylee Sommers-Flanagan  
 Niki Zupanic  
 Upper Seven Law  
 P.O. Box 31  
 Helena, MT 59624  
 (406) 306-0330  
 constance@uppersevenlaw.com  
 rylee@uppersevenlaw.com  
 niki@uppersevenlaw.com

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA  
 BUTTE DIVISION**

THE IMPERIAL SOVEREIGN COURT  
 OF THE STATE OF MONTANA; ADRIA  
 JAWORT; RACHEL CORCORAN;  
 MONTANA BOOK COMPANY; IMAGINE  
 BREWING COMPANY, LLC d/b/a  
 IMAGINE NATION BREWING  
 COMPANY; BUMBLEBEE AERIAL  
 FITNESS; MONTANA PRIDE; THE  
 WESTERN MONTANA COMMUNITY  
 CENTER; THE GREAT FALLS LGBTQ+  
 CENTER; THE ROXY THEATER; and  
 THE MYRNA LOY,

*Plaintiffs,*

vs.

AUSTIN KNUDSEN; ELSIE ARNTZEN;  
 J.P. GALLAGHER; and THE CITY OF  
 HELENA,

*Defendants.*

Cause No. CV 23-50-BU-  
 BMM

**Declaration of  
 Rachel Corcoran**

I, Rachel Corcoran, declare as follows:

1. I am over the age of eighteen years, am competent to testify as to the matters set forth herein, and I make this declaration based upon my personal knowledge and belief.
2. I am a resident of Billings, Montana.
3. I have been a licensed teacher in Montana since 2010. I taught in Billings Public Schools for over a decade and am currently an English Language Learners Instructional Coach for Billings Public Schools.
4. Prior to becoming an instructional coach, I regularly taught Special Education classes, specifically helping highschoolers learn to love reading.
5. I frequently used costumes and props in my classroom lessons, including dressing up as fictional characters from books to further engage my students in learning. My students also dressed up as fictional characters to help them engage with the books they read.
6. I continue to dress up to celebrate Red Ribbon Week, homecoming, and other schoolwide events. When I dress up along with my students, I am showing them that we are unified, and it builds a

relationship of respect and shared excitement for learning and reading.

7. I find this teaching strategy helpful for engaging with my students and fostering a successful and welcoming learning environment.
8. I dress up as fictional and historical characters without regard for the gender or sex of the person being portrayed.
9. House Bill 359 (“HB 359”) appears to ban teachers from reading to or engaging in learning activities with students while dressed in a gendered costume at school.
10. If I read to or engage in other learning activities with students while dressed up in a gendered costume, it appears that I could face criminal, civil, and occupational penalties.
11. Though I am fearful of HB 359’s penalties, I still plan to dress up to celebrate the success of my students, cultivate a sense of community, and further encourage learning in the classroom.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 17th day of July, 2023, in Billings, Montana.

DocuSigned by:  
  
BD6D8A46587E403...

---

Rachel Corcoran

# Exhibit 9

Declaration of Kevin Hamm,  
Founder and President of Happiness & Joy  
Foundation

Constance Van Kley  
Rylee Sommers-Flanagan  
Niki Zupanic  
Upper Seven Law  
P.O. Box 31  
Helena, MT 59624  
(406) 306-0330  
constance@uppersevenlaw.com  
rylee@uppersevenlaw.com  
niki@uppersevenlaw.com

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA  
BUTTE DIVISION**

THE IMPERIAL SOVEREIGN COURT  
OF THE STATE OF MONTANA; ADRIA  
JAWORT; RACHEL CORCORAN;  
MONTANA BOOK COMPANY; IMAGINE  
BREWING COMPANY, LLC d/b/a  
IMAGINE NATION BREWING  
COMPANY; BUMBLEBEE AERIAL  
FITNESS; MONTANA PRIDE; THE  
WESTERN MONTANA COMMUNITY  
CENTER; THE GREAT FALLS LGBTQ+  
CENTER; THE ROXY THEATER; and  
THE MYRNA LOY,

*Plaintiffs,*

vs.

AUSTIN KNUDSEN; ELSIE ARNTZEN;  
J.P. GALLAGHER; and THE CITY OF  
HELENA,

*Defendants.*

Cause No. CV 23-50-BU-  
BMM

**Declaration of Kevin Hamm**

I, Kevin Hamm, declare as follows:

1. I am over the age of eighteen years, am competent to testify as to the matters set forth herein, and I make this declaration based upon my personal knowledge and belief.
2. I am a resident of East Helena, Montana.
3. I am the founder and president of the board of directors of the Happiness & Joy Foundation, a domestic nonprofit corporation created in 2014 and headquartered in Helena, Montana.
4. The Happiness & Joy Foundation organizes Montana Pride, Montana's annual statewide Pride celebration. I have been the chief organizer of Montana Pride since 2014.
5. Montana Pride is commemorating 30 years of Pride celebrations in Montana this year.
6. Montana Pride celebrates LGBTQ+ pride, acceptance, rights, and achievements. Montana Pride is intended to be a safe space for all individuals, especially those of the LGBTQ+ community.
7. Montana Pride is an all-ages celebration, with events designed to be accessible for anyone who wishes to attend. Events are age-

appropriate, and hosts are deliberate in ensuring the safety of all individuals participating or attending.

8. Montana Pride showcases several forms of entertainment and community-centered events, including drag shows, a parade, artisan markets, local business booths, a rally, and educational events.
9. Educational events that will be featured this year include an Intersex Q&A, a Death Doula event, and Queer Collaging.
10. With more than 15,000 attendees from across the state and country, Montana Pride is the largest Pride event in Montana, a significant tourist attraction, and an economic boon for the Helena region.
11. Montana Pride events are held at a variety of small businesses, in public parks, on public streets, and at other venues throughout Helena, over the course of several days.
12. This year's Montana Pride events are scheduled to begin on July 30, 2023, and end on August 6, 2023.
13. On June 30, 2023, I applied to the City of Helena for the permits necessary for several Montana Pride events to be held on city

property. I resubmitted these applications on July 13, 2023. A true and accurate copy of the applications are attached as Exhibits A and B to this declaration.

14. On July 13, 2023, I met with the City Manager, City Attorney, and other staff of the City of Helena. I was informed that the City of Helena would not issue the requested permits while HB 359 remained in effect and enforceable.
15. The Last Chance Gulch event permits I applied for this year are functionally identical to the permits the City of Helena approved last year.
16. HB 359 appears to prohibit even the partial exposure of prosthetic or natural breasts and buttocks on public property. People regularly expose these portions of the body in many public places, such as public swimming areas.
17. Montana Pride participants regularly wear costumes to celebrate and, because Montana Pride is held in the summertime, many attendees regularly wear clothing that partially exposes breasts and buttocks.

18. As the chief organizer of the Montana Pride events, I am concerned personally about civil and criminal liability under HB 359 and do not know how to limit such liability effectively. I cannot force thousands of attendees to comply with a state-sanctioned dress code.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 17th day of July, 2023, in Helena, Montana.

  
\_\_\_\_\_  
Kevin Hamm

# Exhibit A



## City of Helena Special Events Permit Form

The City's online Special Events Permit Application does not have the ability to be saved. Once you start the application, you must complete the form or your work will be lost. Before starting the application please be sure you have:

- Proof of Insurance
- Traffic Control Plan (If your event will be closing a street)
- Emergency Evacuation Plan (If your event's attendees exceeds 250 people)

City code requires all special events, including block parties, acquire special event insurance. The Montana Municipal Interlocal Authority (MMIA) has resources to help residents find insurance providers for their event. More information can be found at the [MMIA Special Events Coverage Page](#).

Acknowledge

Event Coordinator: 225 N Cruse Avenue, Suite B, Helena, MT 59601

Phone: (406) 447-8422

Email: [specialevents@helenamt.gov](mailto:specialevents@helenamt.gov)

Deadlines	
Requirement	Time Before Event Begin Date (Days)
Special Event Permit Application	30 Days
Alcohol Permit	30 Days
Traffic Control Requests	14 Days

▼ Event

### Event Information

Event Name

Montana Pride Banned Brunch

Application Date

7/13/2023

Event Type

Estimated Number of Attendees

**ER-140**

Other

Drag Show and Street Brunch

A Noise Ordinance Permit is required for an event of this size. The Noise Ordinance Permit is appended to the bottom of this form.

Due to the size of your event a member of the Helena Police Department will be in contact regarding event security details.

Due to the size of your event an Emergency Evacuation Plan is required.

**Event Coordinator Information (Person in Charge of the Event)**

Name  Email

Cell Phone  Work Phone

Address  Address 2

**Date / Time Information**

Does the Event Span Multiple Days?

No  Yes

Event Date  Start Time  End Time

Event Start Date  Event End Date  Start Time  End Time

Section 46

Event Date  Start Time  End Time

### Other Event Information

Proof of Insurance

Insurance Placeholder for permit app.pdf

Insurance requirements can be found in the City Code [§7-9-5](#)

Will your event contain alcohol?

Yes  No

An alcohol permit is required with this application (alcohol permit is included on this form).

Will your event take place on the walking mall?

Yes  No

Barricades are required for parades on the walking mall.

Will your event take place on a public park?

Yes  No

Events taking place on a public park require a different application process. Please contact Heather Kahler at (406) 447-8463

Though not required, the City of Helena encourages recycling when possible. Will recycling be provided at this event?

Yes  No

### Event Security Information

Are you seeking police presence for your event?

Yes  No

City of Helena Police Agreement

### Location / Traffic Control Information

Traffic control plans should adhere to the following:

- 20 ft. of unobstructed width must remain clear at all times for emergency traffic.
- All signage shall comply with the Manual on Uniform Traffic Control Devices (MUTCD) and any City, County, or State requirements.
- Traffic control plans should contain a vicinity map which denotes the entire area impacted by the event.
- Traffic control plans should include details for event wayfinding. Using these principles will help create good wayfinding.

- Create an identity at each location.
- Use landmarks to provide orientation clues.
- Create well-structured paths.
- Create regions of differing visual character.
- Don't give the user too many navigational choices.
- Traffic control plans should show traffic flow by arrows indicating direction and any deviations.
- Traffic control plans should show event access, staging areas, and parking accommodations.
- Traffic control plans should show pedestrian access plans including disabled accessibility.
- Traffic control plans should show emergency access points.
- Traffic control plans should denote the roadways or pedestrian facilities to be closed and where they will be closed.
- Traffic control plans should denote where road closed barricades will be, and the location of advanced warning signs and any other required signs.

Will the event require street closures?

- Yes  No

Location of Event

Banned Brunch at Front Street

Street Requiring Closure

Front Street between 13th & 14th

[Interactive Map](#)

Area Map

x\_\_\_\_xpigIY1ZmA...  
0a2e-11ee-a27d-  
0a747911150b.pdf

Traffic Control Plan

x\_\_\_\_xpigIY1ZmA...  
0a2e-11ee-a27d-  
0a747911150b.pdf

Emergency Evacuation Plan

x\_\_\_\_xpigIY1ZmA...  
0a2e-11ee-a27d-  
0a747911150b.pdf

▼ Alcohol Permit

### Alcohol Permit

General Questions

- Are you a licensed establishment permitted to sell alcohol?  
 Are you allowing consumption of alcohol as the "host"?

What is your plan for clearly designating areas where alcohol consumption is permitted? Please detail all containment and signs you plan to use?

The street ends will have road signs blocking, with signage on the inside notifying people of the open container space. The bars will be provided by downtown establishments using their catering licenses to sell into the area.

### General Guidelines

When approved, this portion of the document will be your permit. Keep this document available to present if needed.

Event Sponsors must ensure that participants are checked for legal age if served alcohol.

### Insurance Requirements

The permit holder must indemnify, defend, and hold the City and its employees and agents harmless against all claims, liability, loss, damage, or expense incurred by the City due to any injury to or death of any person or any damage to property caused by or resulting from the activities for which the permit is granted. As evidence of the applicant's ability to perform the conditions of the permit, prior to the permit being issued, applicant must provide proof of applicant's liability insurance issued by a reliable company or companies for personal injury and property damage, and which includes alcohol liability coverage, in an amount not less than one million dollars (\$1,000,000.00) per occurrence and two million dollars (\$2,000,000.00) aggregate per year for bodily injury, personal injury, and property damage, with the City named as an additional insured. (Ord. 3252, §5-20-2019).

### Acknowledgements

I have read & understand [Helena City Code Title 7, Chapter 14](#) and conditions regarding the consumption of alcohol on public right of way.

I have read & understand Helena City Code [§5-7-3](#) regarding the limitation of noise in City limits. If noise is expected to exceed allowable limits, I understand a Noise Permit is required.

I have read & understand [Helena City Code §7-14](#) regarding Insurance and Indemnification requirements: The permit holder must indemnify, defend, and hold the City and its employees and agents harmless against all claims, liability, loss, damage, or expense incurred by the City due to any injury to or death of any person or any damage to property caused by or resulting from the activities for which the permit is granted. As evidence of the applicant's ability to perform the conditions of the permit, prior to the permit being issued, applicant must provide proof of applicant's liability insurance issued by a reliable company or companies for personal injury and property damage, and which includes alcohol liability coverage, in an amount not less than one million dollars (\$1,000,000.00) per occurrence and two million dollars (\$2,000,000.00) aggregate per year for bodily injury, personal injury, and property damage, with the City named as an additional insured.

I have received, read and agree to the alcohol requirements set forth by the City of Helena and applicable state requirements.

▼ Noise Permit

**Noise Permit**

Noise permits are required for any project, special event, parade or party with noise that exceeds sound limits stated in the ordinance below. This includes parties on private or public property with or without amplified music that exceeds dB limits.

District / Zones	Limitations: 6:00AM - 11:00PM	Limitations: 11:00PM - 6:00AM
Residential	55 dB (A)	50 db (A)
Commercial	60 dB (A)	55 dB (A)
Industrial	80 dB (A)	75 dB (A)

Does your event contain any of the following

- Horns, Signaling Devices
- Sound Amplifying Equipment
- Loud Speakers, Amplifiers for Commercial Purposes
- Yelling or Shouting
- Animals
- Exhausts
- Defect in Vehicle
- Loading, Unloading, Opening Containers
- Construction Projects or Repair of Buildings
- Fireworks & Explosives

I have read & understand Helena City Code [§5-7-2](#) and [§5-7-3](#) regarding the limitation of noise in City limits. If noise is expected to exceed allowable limits, I understand a Noise Permit is required.

Noise Ordinance Permit Signature



▼ System Use [Please Do Not Alter Anything In This Section]

Event Start Date Variable Field

7/30/2023

▼ Contact Information

**Contact Information**

Department	Phone Number	Contact Reason
Police Department	(406) 447-8479	Event Security Detail
Transportation Systems	(406) 447-1566	Traffic Control Plan & Area Map
Fire Department	(406) 447-8472	EMS Services, Fire Code Information
Parking Division	(406) 447-8420	Parking Permits, Parking Logistics

▼ Acknowledgement

I acknowledge that I have received, read, and agree to follow above City of Helena Special Event Policies when holding the requested event. My signature below indicates my knowledge of the rules contained in the City of Helena Special Event Guidelines and Policies, that I have authority to legally bind any organization I represent with regard to this application, and that I /my organization agree(s) to comply with said rules.

Application Signature



▼ Director Approval Step

Comments

Insurance to come.

Digitally Signed (email verified)

 Kammi McClain

Jul 13, 2023

\_bJlXYCGQEe686Ll1wMKlvG

# Exhibit B



## City of Helena Special Events Permit Form

The City's online Special Events Permit Application does not have the ability to be saved. Once you start the application, you must complete the form or your work will be lost. Before starting the application please be sure you have:

- Proof of Insurance
- Traffic Control Plan (If your event will be closing a street)
- Emergency Evacuation Plan (If your event's attendees exceeds 250 people)

City code requires all special events, including block parties, acquire special event insurance. The Montana Municipal Interlocal Authority (MMIA) has resources to help residents find insurance providers for their event. More information can be found at the [MMIA Special Events Coverage Page](#).

Acknowledge

Event Coordinator: 225 N Cruse Avenue, Suite B, Helena, MT 59601

Phone: (406) 447-8422

Email: [specialevents@helenamt.gov](mailto:specialevents@helenamt.gov)

Deadlines	
Requirement	Time Before Event Begin Date (Days)
Special Event Permit Application	30 Days
Alcohol Permit	30 Days
Traffic Control Requests	14 Days

▼ Event

### Event Information

Event Name

Montana Pride

Application Date

7/13/2023

Event Type

Estimated Number of Attendees

ER-148

1 of 7

BlockParty

5000

A Noise Ordinance Permit is required for an event of this size. The Noise Ordinance Permit is appended to the bottom of this form.

Due to the size of your event a member of the Helena Police Department will be in contact regarding event security details.

Due to the size of your event an Emergency Evacuation Plan is required.

### Event Coordinator Information (Person in Charge of the Event)

Name	Email
Kevin Hamm	k@montanapride.org
Cell Phone	Work Phone
4064170070	
Address	Address 2
7 W 6th Ave, Ste 3d	Helena, MT 59601

### Date / Time Information

Does the Event Span Multiple Days?

No  Yes

Event Date	Start Time	End Time	
Event Start Date	Event End Date	Start Time	End Time
7/30/2023	8/5/2023	8:00 AM	11:59 PM

#### SECTION 45

Event Date	Start Time	End Time
7/30/20203	8:00 AM	4:00 PM

#### SECTION 46

Event Date

8/5/2023

Start Time

8:00 AM

End Time

2:00 AM

### Other Event Information

Proof of Insurance

event descriptions for permits signed  
copy.pdf

Insurance requirements can be found in  
the City Code [§7-9-5](#)

Will your event contain alcohol?

Yes  No

An alcohol permit is required with this  
application (alcohol permit is included on  
this form).

Will your event take place on the  
walking mall?

Yes  No

Barricades are required for parades on  
the walking mall.

Will your event take place on a  
public park?

Yes  No

Events taking place on a public park  
require a different application process.  
Please contact Heather Kahler at (406)  
447-8463

Though not required, the City of  
Helena encourages recycling when  
possible. Will recycling be provided  
at this event?

Yes  No

### Event Security Information

Are you seeking police presence for  
your event?

Yes  No

City of Helena Police Agreement  
event descriptions for  
permits signed  
copy.pdf

### Location / Traffic Control Information

Traffic control plans should adhere to the following:

- 20 ft. of unobstructed width must remain clear at all times for emergency traffic.

- All signage shall comply with the Manual on Uniform Traffic Control Devices (MUTCD) and any City, County, or State requirements.
- Traffic control plans should contain a vicinity map which denotes the entire area impacted by the event.
- Traffic control plans should include details for event wayfinding. Using these principles will help create good wayfinding.
  - Create an identity at each location.
  - Use landmarks to provide orientation clues.
  - Create well-structured paths.
  - Create regions of differing visual character.
  - Don't give the user too many navigational choices.
- Traffic control plans should show traffic flow by arrows indicating direction and any deviations.
- Traffic control plans should show event access, staging areas, and parking accommodations.
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- Traffic control plans should show emergency access points.
- Traffic control plans should denote the roadways or pedestrian facilities to be closed and where they will be closed.
- Traffic control plans should denote where road closed barricades will be, and the location of advanced warning signs and any other required signs.

Will the event require street closures?

- Yes  No

Location of Event

Last Chance Gulch

Street Requiring Closure

Last Chance Gulch & 6th Ave

[Interactive Map](#)

Area Map

event descriptions for  
permits signed  
copy.pdf

Traffic Control Plan

event descriptions for  
permits signed  
copy.pdf

Emergency Evacuation Plan

event descriptions for  
permits signed  
copy.pdf

▼ Alcohol Permit

### Alcohol Permit

General Questions

- Are you a licensed establishment permitted to sell alcohol?

Are you allowing consumption of alcohol as the "host"?

What is your plan for clearly designating areas where alcohol consumption is permitted? Please detail all containment and signs you plan to use?

for the drag brunch it's the street signs, for the weekend of the parade, we're asking for the downtown to be declared for the weekend per our pdf.

### General Guidelines

When approved, this portion of the document will be your permit. Keep this document available to present if needed.

Event Sponsors must ensure that participants are checked for legal age if served alcohol.

### Insurance Requirements

The permit holder must indemnify, defend, and hold the City and its employees and agents harmless against all claims, liability, loss, damage, or expense incurred by the City due to any injury to or death of any person or any damage to property caused by or resulting from the activities for which the permit is granted. As evidence of the applicant's ability to perform the conditions of the permit, prior to the permit being issued, applicant must provide proof of applicant's liability insurance issued by a reliable company or companies for personal injury and property damage, and which includes alcohol liability coverage, in an amount not less than one million dollars (\$1,000,000.00) per occurrence and two million dollars (\$2,000,000.00) aggregate per year for bodily injury, personal injury, and property damage, with the City named as an additional insured. (Ord. 3252, §5-20-2019).

### Acknowledgements

I have read & understand [Helena City Code Title 7, Chapter 14](#) and conditions regarding the consumption of alcohol on public right of way.

I have read & understand Helena City Code [§5-7-3](#) regarding the limitation of noise in City limits. If noise is expected to exceed allowable limits, I understand a Noise Permit is required.

I have read & understand [Helena City Code §7-14](#) regarding Insurance and Indemnification requirements: The permit holder must indemnify, defend, and hold the City and its employees and agents harmless against all claims, liability, loss, damage, or expense incurred by the City due to any injury to or death of any person or any damage to property caused by or resulting from the activities for which the permit is granted. As evidence of the applicant's ability to perform the conditions of the permit, prior to the permit being issued, applicant must provide proof of applicant's liability insurance issued by a reliable company or companies for personal injury and property damage, and which includes alcohol liability coverage, in an amount not less than one million dollars (\$1,000,000.00) per occurrence and two million dollars (\$2,000,000.00) aggregate per year for bodily injury, personal injury, and property damage, with the City named as an additional insured.

I have received, read and agree to the alcohol requirements set forth by the City of Helena and applicable state requirements.

✕   

---

  
▼ Noise Permit

**Noise Permit**

Noise permits are required for any project, special event, parade or party with noise that exceeds sound limits stated in the ordinance below. This includes parties on private or public property with or without amplified music that exceeds dB limits.

District / Zones	Limitations: 6:00AM - 11:00PM	Limitations: 11:00PM - 6:00AM
Residential	55 dB (A)	50 db (A)
Commercial	60 dB (A)	55 dB (A)
Industrial	80 dB (A)	75 dB (A)

Does your event contain any of the following

- Horns, Signaling Devices
- Sound Amplifying Equipment
- Loud Speakers, Amplifiers for Commercial Purposes
- Yelling or Shouting
- Animals
- Exhausts
- Defect in Vehicle
- Loading, Unloading, Opening Containers
- Construction Projects or Repair of Buildings
- Fireworks & Explosives

I have read & understand Helena City Code [§5-7-2](#) and [§5-7-3](#) regarding the limitation of noise in City limits. If noise is expected to exceed allowable limits, I understand a Noise Permit is required.

Noise Ordinance Permit Signature

✕   

---

▼ System Use [Please Do Not Alter Anything In This Section]

Event Start Date Variable Field

7/30/2023

▼ Contact Information

Contact Information		
Department	Phone Number	Contact Reason
Police Department	(406) 447-8479	Event Security Detail
Transportation Systems	(406) 447-1566	Traffic Control Plan & Area Map
Fire Department	(406) 447-8472	EMS Services, Fire Code Information
Parking Division	(406) 447-8420	Parking Permits, Parking Logistics

▼ Acknowledgement

I acknowledge that I have received, read, and agree to follow above City of Helena Special Event Policies when holding the requested event. My signature below indicates my knowledge of the rules contained in the City of Helena Special Event Guidelines and Policies, that I have authority to legally bind any organization I represent with regard to this application, and that I /my organization agree(s) to comply with said rules.

Application Signature



▼ Director Approval Step

Comments

Insurance to come.

Digitally Signed (email verified)

 Kammi McClain

Jul 13, 2023

\_VZ4CkCGQEe686LI1wMKlv

# Exhibit 8

Declaration of Lauren Halverson,  
Representative of OUTlaws Student Organization

Constance Van Kley  
 Rylee Sommers-Flanagan  
 Niki Zupanic  
 Upper Seven Law  
 P.O. Box 31  
 Helena, MT 59624  
 (406) 306-0330  
 constance@uppersevenlaw.com  
 rylee@uppersevenlaw.com  
 niki@uppersevenlaw.com

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA  
 BUTTE DIVISION**

THE IMPERIAL SOVEREIGN COURT  
 OF THE STATE OF MONTANA; ADRIA  
 JAWORT; RACHEL CORCORAN; THE  
 MONTANA BOOK COMPANY; IMAGINE  
 BREWING COMPANY, LLC d/b/a  
 IMAGINE NATION BREWING  
 COMPANY; BUMBLEBEE AERIAL  
 FITNESS; MONTANA PRIDE; THE  
 WESTERN MONTANA COMMUNITY  
 CENTER; THE GREAT FALLS LGBTQ+  
 CENTER; THE ROXY THEATER; and  
 THE MYRNA LOY,

*Plaintiffs,*

vs.

AUSTIN KNUDSEN; ELSIE ARNTZEN;  
 J.P. GALLAGHER; and the CITY OF  
 HELENA,

*Defendants.*

Cause No. CV 23-50-BU-  
 BMM

**Declaration of Lauren  
 Halverson, Member of  
 OUTlaws at the Alexander  
 Blewett III School of Law**

I, Lauren Halverson, declare as follows:

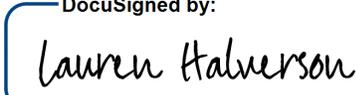
1. I am a law student at the Alexander Blewett III School of Law at the University of Montana.
2. I will begin my 2L year this upcoming fall.
3. I hope to work as a public interest attorney in housing law after receiving my Juris Doctor Degree.
4. I am a member, and nominee for vice-president, of OUTlaws—a student organization at the Alexander Blewett III School of Law.
5. OUTlaws is committed to advancing the legal rights of the LGBTQ+ community.
6. OUTlaws receives funding from the law school to carry out its programming.
7. During the fall semester, OUTlaws hosts an annual “Drag Karaoke Gong Show” to help raise funds for other Montana organizations that support LGBTQ+ issues.
8. The Drag Karaoke Gong Show is open to all persons at the Alexander Blewett III School of Law and their families.
9. OUTlaws hires drag performers to judge and perform at the Drag Karaoke Gong Show.

10. The Drag Karaoke Gong Show consists of performances by students, drag performers, and one professor selected by the student body.
11. The performances typically involve karaoke and dancing, and performers have and will, at times, simulate or actually remove outer layers of clothing.
12. Some performers have and will, at times, create the appearance of breasts using artificial material.
13. It appears that the Drag Karaoke Gong Show would be considered a “sexually oriented performance” under HB 359.
14. In 2022, the Drag Karaoke Gong Show was performed at the Ole Beck VFW Post 209.
15. The Ole Beck VFW Post 209 has received state funds through the Paycheck Protection Program and apparently is prohibited from hosting the Drag Karaoke Gong Show under HB 359.
16. HB 359 also appears to classify the Ole Beck VFW Post 209 as a sexually oriented business if it hosts the Drag Karaoke Gong Show, given that it is a bar which serves alcohol.

17. It is unclear whether HB 359 applies retroactively to businesses that have hosted the Drag Karaoke Gong Show in the past.
18. OUTlaws is uncertain where to schedule the Drag Karaoke Gong Show in 2023, as it appears that any business or on-campus location may violate HB 359 by hosting it.
19. OUTlaws is concerned about HB 359's effect on education in Montana, given that the law appears intent on keeping queer people out of education and the lives of children.
20. OUTlaws is concerned for the many transgender and non-binary people subject to the sweeping definitions in HB 359.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 17th day of July, 2023.

DocuSigned by:  
  
/s/ 754C7992844849C...  
Lauren Halverson

# Exhibit 7

Declaration of Chelsia Rice,  
Co-Owner of Montana Book Company

Constance Van Kley  
 Rylee Sommers-Flanagan  
 Niki Zupanic  
 Upper Seven Law  
 P.O. Box 31  
 Helena, MT 59624  
 (406) 306-0330  
 constance@uppersevenlaw.com  
 rylee@uppersevenlaw.com  
 niki@uppersevenlaw.com

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA  
 BUTTE DIVISION**

THE IMPERIAL SOVEREIGN COURT  
 OF THE STATE OF MONTANA; ADRIA  
 JAWORT; RACHEL CORCORAN; THE  
 MONTANA BOOK COMPANY; IMAGINE  
 BREWING COMPANY, LLC d/b/a  
 IMAGINE NATION BREWING  
 COMPANY; BUMBLEBEE AERIAL  
 FITNESS; MONTANA PRIDE; THE  
 WESTERN MONTANA COMMUNITY  
 CENTER; THE GREAT FALLS LGBTQ+  
 CENTER; THE ROXY THEATER; and  
 THE MYRNA LOY,

*Plaintiffs,*

vs.

AUSTIN KNUDSEN; ELSIE ARNTZEN;  
 J.P. GALLAGHER; and the CITY OF  
 HELENA,

*Defendants.*

Cause No. CV 23-50-BU-  
 BMM

**Declaration of Chelsia Rice**

I, Chelsia Rice, declare as follows:

1. I am over the age of eighteen years, am competent to testify as to the matters set forth herein, and I make this declaration based upon my personal knowledge and belief.
2. I am a resident of Helena, Montana.
3. I am the co-owner of the Montana Book Company, a bookstore located in the heart of downtown Helena. Montana Book Company has operated in Helena for over 45 years. My partner Charlie Crawford and I have owned it for five years.
4. Montana Book Company carries a variety of genres of new books for both adults and youth with a focus on minority voices and issues.
5. Montana Book Company also serves as an inclusive community-building place. We offer author readings, workshops, social gatherings, and regularly occurring book clubs for all ages and interests.
6. House Bill 359 (“HB 359”) appears to prohibit any private entity that receives state funding from holding a “sexually oriented performance.”

7. Montana Book Company has received state funding in the form of COVID relief, and I anticipate it may receive state funding in the future through business development grants, tax rebates, and arts and humanities grants.
8. The Montana Book Company offers books and hosts book readings that include depictions of sexual content as defined by HB 359.
9. For example, on Wednesday, June 21, 2023, Montana Book Company hosted “An Evening with Debra Magpie Earling,” in which the Montana-Native American novelist spoke about her books *Perma Red* and *The Lost Journals of Sacajawea*.
10. During the event, Ms. Magpie Earling read a chapter from her book that included descriptions of genitalia within the context of the time and culture of Sacajawea’s life. Under HB 359, the reading of this section could be considered a “sexually oriented performance.”
11. Similarly, on April 29, 2023, Montana Book Company hosted an event with Montana author Maxim Loskutoff, during which Mr. Loskutoff read from his award-winning book *Ruthie Fear* and discussed another of his stories that included a depiction of

bestiality. Under HB 359, Mr. Loskutoff's discussion could have been considered a "sexually oriented performance."

12. In order to engage the community and provide a safe space for fellow LGBTQ+ Montanans, Montana Book Company has also hosted drag story hour events during Montana Pride, at which drag performers read children's books to families. Under HB 359, the use of prosthetic cleavage at these events could be considered a "sexually oriented performance."
13. Despite threats of violence and protests, last year's event was incredibly popular with community members of all ages, drawing a crowd of over a hundred and fostering an inclusive and welcoming environment for all attendees.
14. I fear that Montana Book Company, its employees, and I could face criminal and civil penalties for offering books, author readings, and other events like those described above.
15. I have no way of knowing whether the State of Montana will enforce HB 359 to criminally charge or penalize me, Montana Book Company, or our employees.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 17th day of July, 2023, in Cutbank, Montana.

DocuSigned by:  
*Chelsia Rice*  
ACAE85981EAB459...

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Chelsia Rice

# Exhibit 6

Declaration of Krys Holmes,  
Executive Director of the Myrna Loy

Constance Van Kley  
Rylee Sommers-Flanagan  
Niki Zupanic  
Upper Seven Law  
P.O. Box 31  
Helena, MT 59624  
(406) 306-0330  
constance@uppersevenlaw.com  
rylee@uppersevenlaw.com  
niki@uppersevenlaw.com

*Attorneys for Plaintiffs*

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HELENA,

*Defendants.*

Cause No.  
CV 23-50-BU-BMM

**Declaration of Kryss Holmes,  
Executive Director of the  
Myrna Loy**

I, Krys Holmes, declare as follows:

1. I serve as the Executive Director of the Myrna Loy, 15 North Ewing Street, Helena, MT 59601
2. The Myrna Loy is a nonprofit, community owned theater located in the Rodney Street district of downtown Helena, Montana.
3. The Myrna Loy receives grant funding through the Montana Cultural Trust and the Montana Arts council, and has received grant funds through the Department of Commerce's Tourism Grant Program.
4. The Myrna Loy hosts film screenings, live music, and theater events seven days a week.
5. The Myrna Loy's mission is to inspire the creative spirits of people in and around Helena by presenting high quality, cultural significant films and performing arts, by supporting local and regional artists in their work, and by nurturing a lifelong love of the arts through education and residencies.
6. The Myrna Loy extends its reach beyond the building by conducting arts education programs across Helena, including in schools and

mental health care facilities, at hospitals and elderhomes, and through the “Rodney Street is...” art installations.

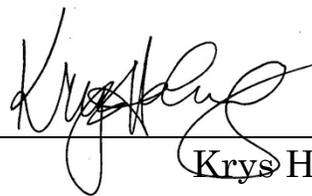
7. The Myrna Loy historically has displayed films and authorized events that include drag, flamboyant costuming, sexual content, and partial or complete nudity as defined by HB 359. All such films and events have artistic, scientific, literary, and/or cultural value.
8. HB 359 appears to prohibit such performances at The Myrna Loy because The Myrna Loy operates in a location owned by Lewis and Clark County.
9. The Myrna Loy follows the Motion Picture Association’s ratings requirements. Audience members of all ages may attend G, PG, and PG-13 films. Audience members under the age of 17 may only view R-rated films with a parent or guardian over the age of 21.
10. The Myrna Loy authorizes on-premises consumption of alcoholic beverages—beer and wine—and houses a pub.
11. Because of the facts above, it appears that The Myrna Loy would bizarrely be considered a “sexually oriented business” under HB 359.
12. The Myrna Loy recently displayed the film *Asteroid City*.

13. *Asteroid City* is a Motion Picture Association rated PG-13 film.
14. *Asteroid City* is about children scientists forced to quarantine during a stargazer convention. In one scene Actress Scarlett Johansson disrobes and steps into a bathtub. This scene appears to meet HB 359's definition of "stripping" and thus "sexually oriented performance."
15. In accordance with Motion Picture Association ratings requirements, The Myrna Loy showed *Asteroid City* to a general audience with no age restrictions.
16. It appears that The Myrna Loy could lose its operating license and the staff and Board of Directors could face criminal and civil liability for showing this PG-13 film because of HB 359.
17. I have no way of knowing whether the State of Montana will enforce HB 359 to criminally charge or penalize The Myrna Loy or its employees.
18. The Myrna Loy, its employees, and I fear that we face criminal and civil penalties for showing artistically meritorious films in compliance with industry standards.

19. HB 359 treats The Myrna Loy and other nonprofit arts centers differently than for-profit theaters, which are less likely to receive state funds.
20. Nonprofit arts centers like The Myrna Loy bring significant benefits to their communities but face steep financial challenges. Nationwide, 34% of arts centers have shut down since the Covid-19 pandemic began.
21. HB 359 creates the risk of unlimited financial liability for The Myrna Loy. I cannot predict or budget for the costs that The Myrna Loy may ultimately incur as a result of HB 359, particularly when individuals may sue the theater for ten years after an event.
22. I am unable to determine how The Myrna Loy can come into compliance with HB 359 while still serving its mission, its members, and its audience.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 16th day of July, 2023.

/s/   
Krys Holmes

# Exhibit 5

Declaration of Mike Steinberg,  
Executive Director of the Roxy Theater

Constance Van Kley  
Rylee Sommers-Flanagan  
Niki Zupanic  
Upper Seven Law  
P.O. Box 31  
Helena, MT 59624  
(406) 306-0330  
constance@uppersevenlaw.com  
rylee@uppersevenlaw.com  
niki@uppersevenlaw.com

*Attorneys for Plaintiffs*

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HELENA,

*Defendants.*

Cause No. CV 23-50-BU-  
BMM

**Declaration of Mike  
Steinberg, Executive  
Director of the Roxy  
Theater**

I, Mike Steinberg, declare as follows:

1. I serve as the Executive Director of the Roxy Theater, 718 South Higgins Ave., Missoula, Montana 59801.
2. The Roxy Theater is a nonprofit, community owned theater located in downtown Missoula, Montana.
3. The Roxy Theater receives funding from the Montana Arts Council, a state agency funded by the State of Montana.
4. The Roxy Theater hosts screenings and events seven days a week including new releases nightly and a monthly calendar of independent, foreign and classic films, theater, and community events.
5. The Roxy Theater's mission is to make the world a better place through the power of cinema, education, and community.
6. In 2022, the Roxy Theater was named the Downtown Business of the Year by the Missoula Downtown Business Association for its "extreme creativity in programming through the pandemic as well as its powerful return to in-person movies."
7. In 2022, the Roxy Theater screened 454 unique titles and had 51,911 people attend its films and special events.

8. The Roxy Theater has historically displayed films and events that appear to be “sexually oriented performances” under HB 359.
9. The Roxy Theater continues to display films and events that appear to be “sexually oriented performances” under HB 359.
10. HB 359 appears to prohibit sexually oriented performances at the Roxy Theater because the Roxy Theater is “owned by an entity that receives any form of funding from the state.”
11. The Roxy Theater authorizes on-premises consumption of alcoholic beverages. Specifically, the Roxy Theater sells beer and wine to attendees over the age of 21.
12. Because the Roxy Theater shows “sexually oriented performances” to crowds of larger than two people and authorizes the consumption of alcohol, the Roxy Theater appears to be a “sexually oriented business” under HB 359, despite the plain meaning of those words being unrelated to the purpose of our organization.
13. This upcoming week, the Roxy Theater will show the film *Asteroid City*.
14. *Asteroid City* is a Motion Picture Association rated PG-13 film.

15. *Asteroid City* is about children scientists forced to quarantine during a stargazer convention. In one scene Actress Scarlett Johansson disrobes and steps into a bathtub. This scene appears to meet HB 359’s definition of “stripping” and thus “sexually oriented performance.”
16. In accordance with Motion Picture Association ratings requirements, the Roxy Theater will show *Asteroid City* to a general audience with no age restrictions.
17. Showing *Asteroid City* to a general audience with no age restrictions appears to violate HB 359, given that the film is a sexually oriented performance and the Roxy Theater receives state funds and/or is a sexually oriented business.
18. This upcoming week, the Roxy Theater will show the film *No Hard Feelings*.
19. *No Hard Feelings* is a Motion Picture Association rated R film.
20. *No Hard Feelings* depicts a coming-of-age comedy featuring Academy Award-winning actress Jennifer Lawrence. In one scene Jennifer Lawrence’s “buttocks” and “female breast” are purposefully exposed, including “below a point immediately above

the top of the areola.” This scene appears to meet HB 359’s definition of “sexually oriented performance.”

21. In accordance with Motion Picture Association ratings requirements, the Roxy Theater will show *No Hard Feelings* to attendees 17 years old or older, and/or attendees under 17 accompanied by a parent or guardian of 21 years old or over.
22. Showing *No Hard Feelings* to attendees 17 years old or older, and/or attendees under 17 accompanied by a parent or guardian of 21 years old or over appears to violate HB 359, given that the film is a sexually oriented performance and the Roxy Theater receives state funds and/or is a sexually oriented business.
23. In June of 2023, the Roxy Theater hosted Montana’s first LGBTQ+ film festival, titled “Queerwest Film Fest.”
24. The Roxy Theater’s goal in hosting Queerwest Film Fest is to illuminate the lives, adventures, and pain of LGBTQ+ people living under the majesty, power, and complicated history of the American West.

25. Queerwest was a three-day event featuring live events, a block of shorts from filmmakers around the world, and several feature films, including the made-in-Montana *Please Baby Please*.
26. As part of Queerwest, the Roxy Theater hosted a drag show which included ten performers, both drag queens and drag kings.
27. The Queerwest drag show was presented to a packed house—selling out a theater of 66 attendees with no age limit.
28. The drag performers demonstrated their art form through both dance and comedy routines, some of which included the stripping of outer layers of clothing and the use of prosthetic breasts. There was no nudity by conventional definition at the event, nor was there exposure of prosthetic nipples.
29. The Roxy Theater intends to host Queerwest again in the future, but HB 359 appears to prohibit many of the films and events that are integral to Queerwest, including the drag show.
30. The Roxy Theater also hosts and employs transgender persons and drag queens and drag kings that perform educational events through the theater.

31. The Roxy Theater hosts a monthly series entitled “Out at the Roxy,” where LGBTQ+ pride is celebrated. This series has led “legislative talk backs” and Q&A sessions with drag queens, and it critically evaluates and appreciates media that portrays LGBTQ+ persons and events.
32. The Roxy Theater intends to continue to host “Out at the Roxy” monthly, and the next series installment is scheduled for July 24th, with a showing of the 1953 film *Glen or Glenda?* which will be open to a general audience.
33. Though it was developed as an exploitation film, Out at the Roxy intends to display Ed Wood’s *Glen or Glenda?* because it is, for its time, an astonishingly sympathetic portrayal of cross-dressing and gender nonconformity. Nominally resembling an educational reel, the film relates the stories of Glen, who struggles to tell his fiancée that he covets her angora sweaters, and a GI who undergoes reassignment surgery, but Wood conveys this narrative in a style bizarre beyond measure.
34. *Glen or Glenda?* includes a scene involving what would appear to be “stripping” under HB 359.

35. The Roxy also hosts a series entitled “Trash Vault,” where the Roxy displays a variety of movies that generally fall within the genre of cult-horror films from 1980’s and 90’s and science fiction-horror.
36. Many of the films portrayed in Trash Vault are rated R, and so are age-restricted by the Roxy, but HB 359 appears to ban those films outright.
37. Trash Vault is hosted by Roxy Employee Charlotte Macorn, who is a transgender woman, and live accompaniments of the films sometimes include drag.
38. The Roxy Theater intends to continue to the Trash Vault series.
39. I have had conversations with Board members and employees about HB 359. Through these conversations, my Board and I have become aware that the threat of criminal and civil liability concerns Board members and employees.
40. I am uncertain whether the State of Montana will enforce HB 359 to criminally charge or penalize the Roxy Theater or its employees.

41. I am uncertain whether the State of Montana will enforce HB 359 to force the withdrawal of the Roxy Theater's operating license.
42. I am uncertain whether the Roxy Theater or its employees are potentially liable to civil suit by any minor that has attended previously or will attend a showing at the Roxy Theater constituting a "sexually oriented performance."
43. The Roxy Theater and its employees are not reassessing programming in light of HB 359, because we are unsure how we can possibly comply. The law seemingly forces us to do everything about our business differently.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 17th day of July, 2023.

  
/s/ \_\_\_\_\_  
Mike Steinberg  
for The Roxy Theater

# Exhibit 4

Declaration of Sabrina Malecek,  
Owner of BumbleBee Aerial Fitness

Constance Van Kley  
 Rylee Sommers-Flanagan  
 Niki Zupanic  
 Upper Seven Law  
 P.O. Box 31  
 Helena, MT 59624  
 (406) 306-0330  
 constance@uppersevenlaw.com  
 rylee@uppersevenlaw.com  
 niki@uppersevenlaw.com

*Attorneys for Plaintiffs*

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 J.P. GALLAGHER; and the CITY OF  
 HELENA,

*Defendants.*

Cause No. CV 23-50-BU-  
 BMM

**Declaration of Sabrina  
 Malecek, owner of  
 Bumblebee Aerial Fitness**

I, Sabrina Malecek, declare as follows:

1. I am a resident of Helena, Montana.
2. I own Bumblebee Aerial Fitness, a fitness studio for all community members over the age of 14. We offer over a dozen different classes specific to skill level and age group.
3. I operate Bumblebee Aerial Fitness under my maiden name, Sabrina Harding.
4. Bumblebee Aerial Fitness is Helena's only circus studio, with a focus on pole fitness, silks hammock, and aerial hoop (lyra).
5. I am a licensed XPERT-certified instructor and I previously trained at Polecats Aerial Fitness in Las Vegas, Nevada; The Dollhouse Fitness, in San Diego, California; and at Club B-FIT in Des Moines, Iowa.
6. My instructors and I are the only XPERT Certified Instructors in the state of Montana.
7. Bumblebee Aerial Fitness is a safe space for all individuals and identities.

*Declaration of Sabrina Malecek*

**ER-184**

8. Bumblebee Aerial Fitness is active and beloved within the community. Bumblebee Aerial Fitness typically teaches 26 classes per week and sees anywhere from 20–40 clients per week.
9. Bumblebee Aerial Fitness and I regularly assist with other artistic and theatrical performances in the Helena community.
10. In April, 2023, Bumblebee Aerial Fitness provided the performers and equipment for the aerial performance during “Charlotte’s Web” at Carroll College.
11. This past spring, Bumblebee Aerial Fitness provided performers, equipment, and training to bring the magic of “Matilda” to life at the Grandstreet Theatre,
12. Bumblebee Aerial Fitness regularly provides models for figure drawing classes at the Holter Musuem of Art, and performs for the public at Lewis & Clark Brewery.
13. Bumblebee Aerial Fitness emphasizes the benefits of art in building, cultivating, and creating safe spaces within our community.
14. Bumblebee Aerial Fitness has been invited to perform at Montana Pride.

15. For the safety of our performers, we must wear costumes that are skin-tight in some areas of the body and provide some skin exposure in others; regardless, we wear more clothing than the U.S. Olympic Beach volleyball team.
16. We teach mediums of fitness that are designed to instill and inspire confidence in the dancer. There is nothing inherently sexual about aerial fitness.
17. HB 359 has opened the door for rampant discrimination against non-traditional fitness based on outdated and untrue stereotypes.
18. While there is nothing inherently sexual about our performances, clients of Bumblebee Aerial Fitness are concerned they could be arrested or fined based on obscene interpretations of their skillset and hard work because of HB 359.
19. In 5 years of operation before the passage of HB 359, Bumblebee Aerial Fitness had never had a performance canceled or indefinitely postponed.
20. However, in the wake of HB 359, a climate of fear created has diminished our ability to operate and perform.

21. Bumblebee Aerial Fitness was previously invited to model on our poles for a drawing class at Ascension Brewery in Helena, MT. That event was canceled because of HB 359.
22. Bumblebee Aerial Fitness was previously invited to perform at the Rodney Street Block party in Helena, MT, but after the passage of HB 359, the Rodney Street Block organizers backed out.
23. As a small, locally owned business, cancellations of our performances have an incredibly detrimental effect on both our profitability and reputation.
24. Beginner-level performance opportunities, typically modeling classes, have disappeared as organizations have reacted to the potential repercussions of HB 359.
25. The absence of these beginner-level performances is detrimental to both our business and our athletes because it restricts our ability to exhibit our work and impinges on our freedom of expression.
26. We rely on performances to bring in new clientele. As performances decrease, we could see our clientele stop growing and possibly diminish.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 17th day of July, 2023.

DocuSigned by:  
  
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---

Sabrina Malecek

Constance Van Kley  
 Rylee Sommers-Flanagan  
 Niki Zupanic  
 Upper Seven Law  
 P.O. Box 31  
 Helena, MT 59624  
 (406) 306-0330  
 constance@uppersevenlaw.com  
 rylee@uppersevenlaw.com  
 niki@uppersevenlaw.com

*Attorneys for Plaintiffs*

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 BMM

**Declaration of  
 Annatheia Smith**

I, Annatheia Smith, declare as follows:

1. I am over the age of eighteen years, am competent to testify as to the matters set forth herein, and I make this declaration based upon my personal knowledge and belief.
2. I am a resident of Missoula, Montana.
3. I am the president of The Imperial Sovereign Court of the State of Montana (“the Imperial Court”), a domestic nonprofit corporation founded in 1993 and headquartered in Missoula, Montana.
4. The Imperial Court is a membership organization. Individuals must be 18 years old to become a member.
5. I am a member of the Imperial Court, performing as a drag queen under the name “Diana Bourgeois.” I was named Empress 24 of the State of Montana in 2019.
6. I am a cisgender female, a mother, grandmother, and a disabled veteran who was honorably discharged.
7. The mission of the Imperial Court is to educate and advocate for LGBTQ+ individuals and allies through the production of community-based drag performances that explore multiple gender

expressions in an entertaining and educational atmosphere and create a safe and welcoming environment.

8. The Imperial Court is a prolific fundraiser, directing all net proceeds from its events to enriching the community. The Imperial Court has donated to the Bozeman Symphony, SAGA schools, and other Montana nonprofit organizations.
9. Imperial Court events also raise funds for homeless shelters and other community needs and the Imperial Court provides numerous scholarships to LGBTQ+ and allied individuals across the state.
10. Additionally, the Imperial Court supports the community by being a safe space for conversation and gatherings. For example, after a Neo-Nazi group attacked Bozeman Pride, causing injuries and emotional trauma, we opened our doors, held debrief sessions, and compiled a resource list for the community.
11. Imperial Court members are impactful educators, hosting conversations and seminars on many important topics, including consent, sober driving, gender identity, sexual orientation, and acceptance. As with all the Imperial Court's activities, these

educational events are carefully curated to be age-appropriate for each audience.

12. The Imperial Court's drag performances are strictly tailored based on age group, with some performances for adults-only and other performances for all-ages. We take steps to ensure that minors do not attend shows intended for our adult-only audiences.
13. The all-ages drag performances we put on are appropriate for anybody. We do not perform burlesque-style drag or striptease. Our performances are strictly power-lip syncing to uplifting songs.
14. The costumes for these all-ages performances are also age-appropriate, with exhaustive guidelines outlining what is and is not appropriate costuming for an all-ages show. Simply stated, if a performer could not wear it into a kindergarten class, they cannot wear it to an all-ages show.
15. Our drag performances necessarily include drag and flamboyant costuming and may also include sexual content as defined by HB 359. For example, under HB 359, the use of prosthetic cleavage at these events could be considered a "sexually oriented performance."

16. The Imperial Court produces drag shows at small business and public spaces across the state. Venues include public libraries, bookstores, bars, public parks, museums, churches, comedy clubs, schools, and even the Montana State Capitol building.
17. Many of these locations appear to be subject to the restrictions imposed by HB 359, severely curtailing our ability to perform and diminishing our reach.
18. Since HB 359 went into effect, we have had shows across the state canceled, modified, and placed in limbo.
19. While we were able to perform at Bozeman Pride on May 19 to 21, 2023, before HB 359 became effective, a show at the Museum of the Rockies originally scheduled for August 26, 2023, has been repeatedly rescheduled, with no clear sign that it will be allowed to happen at all.
20. A drag story hour event at Zoo Montana in Billings scheduled for June 22, 2023, has been postponed indefinitely due to HB 359. We successfully put on the same event at Zoo Montana just last year.

21. At Red Lodge Pride on June 2 and 3, 2023, we had to increase the restrictions for our all-ages performances and modify costuming due to concerns about HB 359's penalties. We also hired police officers for our performers' safety.
22. At Missoula Pride on June 17, 2023, event organizers modified our scheduled slate of events due to HB 359—and did not advertise the drag story hour event at all. As we did for Red Lodge Pride, we modified elements of the all-ages show in response to concerns about HB 359.
23. At Billings Pride on June 22 to 24, 2023, the drag story hour was again not advertised by event organizers and we were unable to perform any drag on public property.
24. At Anaconda Pride on June 30, 2023, in response to fears about HB 359's penalties, we changed our 16+ show to be adults-only. Unfortunately, this limited the reach of our performance and did not exercise the full community-building capacity our performance could have had.

25. At Butte Pride on July 1, 2023, we opted out of advertising our all-ages drag show and followed our new restrictions on costuming and performances due to HB 359.
26. At Libby Pride on July 8, 2023, we again did not advertise and were forced to modify the performance due to fear of HB 359's penalties.
27. Our performances planned for Montana Pride in Helena, from July 30 to August 6, 2023, are still uncertain. While we hope we can participate in uplifting and building community in downtown Helena, we anticipate that we will again follow our new, self-imposed restrictions and may not advertise our events out of fear of HB 359.
28. Across the state, our performers have been incredibly fearful of legal action being taken against them under HB 359.
29. As President of the Imperial Court, I am unable to determine how we can come into compliance with HB 359 while still serving our mission, our members, and our audience.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 17th day of July, 2023, in Missoula, Montana.

*Declaration of Annatheia Smith*



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Annatheia Smith

# Exhibit 2

Declaration of Adria Jawort

Constance Van Kley  
Rylee Sommers-Flanagan  
Niki Zupanic  
Upper Seven Law  
P.O. Box 31  
Helena, MT 59624  
(406) 306-0330  
constance@uppersevenlaw.com  
rylee@uppersevenlaw.com  
niki@uppersevenlaw.com

*Attorneys for Plaintiffs*

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BREWING COMPANY, LLC d/b/a  
IMAGINE NATION BREWING  
COMPANY; BUMBLEBEE AERIAL  
FITNESS; MONTANA PRIDE; THE  
WESTERN MONTANA COMMUNITY  
CENTER; THE GREAT FALLS LGBTQ+  
CENTER; THE ROXY THEATER; and  
THE MYRNA LOY,

*Plaintiffs,*

vs.

AUSTIN KNUDSEN; ELSIE ARNTZEN;  
J.P. GALLAGHER; and THE CITY OF  
HELENA,

*Defendants.*

Cause No.  
CV- 23-50-BU-BMM

**Declaration of Adria Jawort**

I, Adria Jawort, declare as follows:

1. I am a resident of Billings, Montana and over the age of 18.
2. I am a transgender woman.
3. I am a member of the Northern Cheyenne Tribe and part of the Two-spirit community. Two-spirit is a term used within some Indigenous communities to refer to tribal members who have both male and female traits. The term reflects traditional Indigenous acceptance of trans and non-binary definitions of gender.
4. I am a journalist and published author, and I speak regularly to libraries and other organizations for educational purposes.
5. I provide education topics including education on Indigenous and transgender history.
6. On June 2nd, 2023, I was scheduled to give a lecture on Indigenous and transgender history in Montana at the Butte Public Library.
7. The day before the lecture, a Butte Public Library librarian notified me that my lecture had been cancelled because Chief Executive J.P. Gallagher determined “it is too much of a legal risk to have a transgendered person in the library.” A true and

accurate copy of the email is attached to this declaration as Exhibit A.

8. After the event was cancelled, I reviewed the City and County of Butte-Silver Bow's Facebook page. I saw the following message relating to the cancellation:

PSA

In accordance with Governor Gianforte signing HB359 into law, our county cannot allow an event where a drag king or queen reads children's books and engages in other learning activities with minor children present. Due to this law, we have had to cancel the speaker at the Butte-Silver Bow Library that was scheduled for Friday.

A true and accurate copy of the Facebook message that I reviewed is attached to this email as Exhibit B.

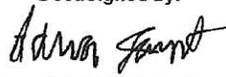
9. Had I been able to provide the scheduled lecture, I would have discussed the history of transgender and Two-spirit people in Montana. I have provided the scheduled lecture many times, including to organizations, government entities, and public libraries.
10. I do not dress in "drag" nor do I identify as a "drag queen" or "drag king" when providing public lectures. When giving talks to

libraries and other institutions about LGBTQ+ and Two-Spirit history in Montana, I appear as myself.

11. I believe my lecture was canceled because I am transgender and/or because I intended to speak about LGBTQ+ issues.
12. The content of my lecture lacks anything resembling “prurient interest.”
13. HB 359 already has denied me my constitutionally protected First Amendment rights of freedom of speech and expression.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 17th day of July, 2023.

DocuSigned by:  
  
49B5EAB3E12E4F1...

---

Adria Jawort

*Declaration of Adria Jawort*

# Exhibit A

----- Forwarded message -----

From: **Shari Curtis Butte -Silver Bow Public Library** <[programming.bsbsp@gmail.com](mailto:programming.bsbsp@gmail.com)>  
Date: Thu, Jun 1, 2023, 11:22 AM  
Subject: Re: First Fridays: Adria Jawort  
To: Jessica Ryder <[the gravelroadmt@gmail.com](mailto:the gravelroadmt@gmail.com)>, Julie Bushmaker <[juliebushmaker@gmail.com](mailto:juliebushmaker@gmail.com)>, graham <[je2gragham@gmail.com](mailto:je2gragham@gmail.com)>, Alan Kesselheim <[alandmp@aol.com](mailto:alandmp@aol.com)>, <[willoughbysa@gmail.com](mailto:willoughbysa@gmail.com)>, Karen Myers <[mysully2@yahoo.com](mailto:mysully2@yahoo.com)>, Luanne Harbert <[luanne.harbert@gmail.com](mailto:luanne.harbert@gmail.com)>, Melody Rice <[arttherapyinmt@q.com](mailto:arttherapyinmt@q.com)>, Marian Jensen <[cyberisak@gmail.com](mailto:cyberisak@gmail.com)>, CLAUDE H ORVIS <[claudeoervis2@msn.com](mailto:claudeoervis2@msn.com)>, Mccrea, Donna <[Donna.Mccrea@mso.umt.edu](mailto:Donna.Mccrea@mso.umt.edu)>, Marlene Holayter <[holayter@aol.com](mailto:holayter@aol.com)>, Andrew Zemljak <[zemmic46@hotmail.com](mailto:zemmic46@hotmail.com)>, Joe McCarthy <[joe\\_mccarthy@bresnan.net](mailto:joe_mccarthy@bresnan.net)>, Dianna Porter <[porterdianna@hotmail.com](mailto:porterdianna@hotmail.com)>, Bishop, Debbie <[dbishop14@bresnsn.net](mailto:dbishop14@bresnsn.net)>, Gene Davenport <[gene\\_d55@hotmail.com](mailto:gene_d55@hotmail.com)>, Rich Day <[richday@bresnan.net](mailto:richday@bresnan.net)>, David Braaten <[david.braaten@smsu.edu](mailto:david.braaten@smsu.edu)>, Margaret Winninghoff <[mprwinninghoff@icloud.com](mailto:mprwinninghoff@icloud.com)>, Kristi O'Leary <[kindlycatwoman@gmail.com](mailto:kindlycatwoman@gmail.com)>, Henrietta Shirk <[henrietta.shirk@gmail.com](mailto:henrietta.shirk@gmail.com)>, Adrian Jawort <[adrianjawort@gmail.com](mailto:adrianjawort@gmail.com)>

It is with much regret that I must inform you that we have to cancel tomorrow's talk. JP Gallagher, Chief Executive, and Eileen Joyce, County Attorney, have decided it is too much of a risk to have a trans-person in the library.

Please let me know if I can answer any questions

Shari

### *Shari Curtis*

Adult Services Librarian & Carle Gallery Manager  
Butte-Silver Bow Public Library  
[programming.bsbsp@gmail.com](mailto:programming.bsbsp@gmail.com)  
(406) 723-3361 x 6302

On Fri, May 26, 2023 at 8:00AM Shari Curtis Butte -Silver Bow Public Library <[programming.bsbsp@gmail.com](mailto:programming.bsbsp@gmail.com)> wrote:  
Below is the link for First Fridays this week. I will be in the library with the speaker, but if you'd like to join us virtually.

Butte-Silver Bow Public Library is inviting you to a scheduled Zoom meeting.

Topic: First Fridays: Adria Jawort  
Time: Jun 2, 2023 11:00 AM Mountain Time (US and Canada)

Join Zoom Meeting

<https://uso2web.zoom.us/j/81366311486?pwd=b3RWYnpSaGM3SVRybWJZUFdmOVZZZz09>

Meeting ID: 813 6631 1486

Passcode: 093763

One tap mobile

+16699009128,,81366311486#,,,\*093763# US (San Jose)

+17193594580,,81366311486#,,,\*093763# US

Dial by your location

+1 669 900 9128 US (San Jose)

+1 719 359 4580 US

+1 253 205 0468 US

+1 253 215 8782 US (Tacoma)

+1 346 248 7799 US (Houston)

+1 669 444 9171 US

+1 309 205 3325 US

+1 312 626 6799 US (Chicago)

+1 360 209 5623 US

+1 386 347 5053 US

+1 507 473 4847 US

+1 564 217 2000 US

+1 646 558 8656 US (New York)

+1 646 931 3860 US

+1 689 278 1000 US

+1 301 715 8592 US (Washington DC)

+1 305 224 1968 US

Meeting ID: 813 6631 1486

Passcode: 093763

Find your local number: <https://uso2web.zoom.us/j/81366311486?pwd=b3RWYnpSaGM3SVRybWJZUFdmOVZZZz09>

*Shari Curtis*

**Stuart Curtis**

Adult Services Librarian & Carle Gallery Manager  
Butte-Silver Bow Public Library  
[programming.bsbpl@gmail.com](mailto:programming.bsbpl@gmail.com)  
(406) 723-3361 x 6302

# Exhibit B

Posts About Videos More ▾



**Butte-Silver Bow**

4h · 🌐



PSA

In accordance with Governor Gianforte signing HB359 into law, our county cannot allow an event where a drag king or queen reads children's books and engages in other learning activities with minor children present. Due to this law, we have had to cancel the speaker at the Butte-Silver Bow Library that was scheduled for Friday.

🙄👍❤️ 13

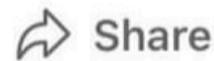
6 comments 3 shares



Like



Comment



Share



**Butte-Silver Bow**

6h · 🌐



Start of Pride month with these great human beings.



ER-206

# Exhibit 1

## House Bill 359



AN ACT PROHIBITING MINORS FROM ATTENDING SEXUALLY ORIENTED SHOWS; PROHIBITING DRAG STORY HOUR IN SCHOOLS AND LIBRARIES THAT RECEIVE PUBLIC FUNDING; PROHIBITING MINORS FROM ATTENDING SEXUALLY ORIENTED OR OBSCENE PERFORMANCES ON PUBLIC PROPERTY; PROHIBITING SEXUALLY ORIENTED PERFORMANCES IN LIBRARIES OR SCHOOLS THAT RECEIVE STATE FUNDING; PROHIBITING SEXUALLY ORIENTED PERFORMANCES ON PUBLIC PROPERTY WHERE CHILDREN ARE PRESENT; PROVIDING DEFINITIONS; PROVIDING PENALTIES; ESTABLISHING A PRIVATE RIGHT OF ACTION; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1. Definitions.** As used in [sections 1 and 2], the following definitions apply:

- (1) "Drag king" means a male or female performer who adopts a flamboyant or parodic male persona with glamorous or exaggerated costumes and makeup.
- (2) "Drag queen" means a male or female performer who adopts a flamboyant or parodic feminine persona with glamorous or exaggerated costumes and makeup.
- (3) "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.
- (4) "Nude" means:
  - (a) entirely unclothed; or
  - (b) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breast below the top of the areola of the breasts if the person is female or any portion of the genitals or buttocks.
- (5) "Prurient interest in sex" has the same meaning as provided in 45-8-205.
- (6) "Public property" means any real property owned or leased, in whole or part, by the state or a

political subdivision, as defined in 2-9-101, or held in the name of a political subdivision by a department, board, or authority of the state or a political subdivision.

(7) "Obscene" has the same meaning as provided in 45-8-201.

(8) "Sexually oriented" means any simulation of sexual activity, stripping, salacious dancing, any lewd or lascivious depiction or description of human genitals or of sexual conduct as defined in 45-5-625.

(9) "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.

(10) "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.

(11) "Stripping" means removal or simulated removal of clothing in a sexual manner for the entertainment of one or more individuals.

**Section 2. Restrictions on sexually oriented businesses -- penalty.** (1) 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) The owner, operator, manager, or employee of a sexually oriented business who is convicted of violating this section shall be fined not less than \$1,000 or more than \$5,000 for the first offense, not less than \$2,500 or more than \$5,000 for the second offense, and for third and subsequent offenses be fined

\$10,000 and, if applicable, the county or municipality shall revoke the business license held by the offender.

(3) [Sections 1 through 4] are applicable and uniform throughout the state and any political subdivisions.

**Section 3. Where sexually oriented performances are prohibited.** (1) A library that receives any form of funding from the state may not allow a sexually oriented performance as defined in [section 1] on its premises.

(2) A school or library that receives any form of funding from the state may not allow a sexually oriented performance or drag story hour, as defined in [section 1], on its premises during regular operating hours or at any school-sanctioned extracurricular activity.

(3) A sexually oriented performance is prohibited:

(a) on public property in any location where the performance is in the presence of an individual under the age of 18; and

(b) in a location owned by an entity that receives any form of funding from the state.

(4) A library, a school, or library or school personnel, a public employee, or an entity described in subsection (3)(b) or an employee of the entity convicted of violating the prohibition under this section shall be fined \$5,000 and, if applicable, proceedings must be initiated to suspend the teacher, administrator, or specialist certificate of the offender under 20-4-110 for 1 year. If an offender's certificate has previously been suspended pursuant to this subsection (4), proceedings must be initiated to permanently revoke the teacher, administrator, or specialist certificate of the offender under 20-4-110 on a subsequent violation of this section.

**Section 4. Private right of action.** (1) A minor who attends a performance in violation of [section 2] or [section 3] may bring an action against a person who knowingly promotes, conducts, or participates as a performer in the performance. The minor's parent or legal guardian may bring an action in the name of the minor for an action commenced under this section.

(2) If a person prevails in an action brought under this section, the court shall award:

(a) actual damages, including damages for psychological, emotional, economic, and physical harm;

- (b) reasonable attorney fees and costs incurred in bringing the action; and
- (c) statutory damages of \$5,000.
- (3) A person may bring an action under this section not later than 10 years from the date the cause of action accrues.

**Section 5. Codification instruction.** (1) [Sections 1 and 2] are intended to be codified as an integral part of Title 45, chapter 8, and the provisions of Title 45, chapter 8, apply to [sections 1 and 2].

(2) [Section 3] is intended to be codified as an integral part of Title 20, chapter 7, part 1, and the provisions of Title 20, chapter 7, part 1, apply to [section 3].

(3) [Section 4] is intended to be codified as an integral part of Title 27, chapter 1, and the provisions of Title 27, chapter 1, apply to [section 4].

**Section 6. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

**Section 7. Effective date.** [This act] is effective on passage and approval.

- END -

I hereby certify that the within bill,  
HB 359, originated in the House.

---

Chief Clerk of the House

---

Speaker of the House

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2023.

---

President of the Senate

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2023.

HOUSE BILL NO. 359

INTRODUCED BY B. MITCHELL, E. BUTTREY, M. CUFFE, D. SALOMON, J. READ, T. MCGILLVRAY, K. REGIER, L. JONES, E. BUTCHER, B. KEENAN, C. GLIMM, G. HERTZ, M. LANG, D. LENZ, J. HINKLE, F. MANDEVILLE, T. MANZELLA, W. MCKAMEY, M. NOLAND, S. HINEBAUCH, S. GUNDERSON, M. REGIER, D. LOGE, R. FITZGERALD, F. ANDERSON, L. SHELDON-GALLOWAY, J. TREBAS, D. BARTEL, C. KNUDSEN, B. USHER, S. VINTON, B. BEARD, M. HOPKINS, N. DURAM, J. FULLER, R. KNUDSEN, K. BOGNER, B. GILLESPIE, J. KASSMIER, B. MERCER, T. MOORE, B. LER, B. PHALEN, F. NAVE, J. CARLSON, L. BREWSTER, K. ZOLNIKOV, A. REGIER, L. REKSTEN, P. FIELDER, S. KERNS, S. GALLOWAY, S. GIST, J. SCHILLINGER, K. SEEKINS-CROWE, M. MALONE, J. GILLETTE, C. HINKLE, M. BERTOGLIO, R. MARSHALL, C. FRIEDEL, S. ESSMANN, M. YAKAWICH, T. BROCKMAN, T. SMITH, R. MINER, G. PARRY, G. OBLANDER, N. NICOL, L. DEMING, D. EMRICH, S. VANCE, T. VERMEIRE, C. SPRUNGER, T. FALK, J. BERGSTROM, G. KMETZ, P. GREEN, J. ETCHART, B. BARKER, L. HELLEGAARD, Z. WIRTH, N. HASTINGS

AN ACT PROHIBITING MINORS FROM ATTENDING SEXUALLY ORIENTED SHOWS; PROHIBITING DRAG STORY HOUR IN SCHOOLS AND LIBRARIES THAT RECEIVE PUBLIC FUNDING; PROHIBITING MINORS FROM ATTENDING SEXUALLY ORIENTED OR OBSCENE PERFORMANCES ON PUBLIC PROPERTY; PROHIBITING SEXUALLY ORIENTED PERFORMANCES IN LIBRARIES OR SCHOOLS THAT RECEIVE STATE FUNDING; PROHIBITING SEXUALLY ORIENTED PERFORMANCES ON PUBLIC PROPERTY WHERE CHILDREN ARE PRESENT; PROVIDING DEFINITIONS; PROVIDING PENALTIES; ESTABLISHING A PRIVATE RIGHT OF ACTION; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Constance Van Kley  
Rylee Sommers-Flanagan  
Niki Zupanic  
Upper Seven Law  
P.O. Box 31  
Helena, MT 59624  
(406) 306-0330  
constance@uppersevenlaw.com  
rylee@uppersevenlaw.com  
niki@uppersevenlaw.com

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA  
BUTTE DIVISION**

THE IMPERIAL SOVEREIGN COURT  
OF THE STATE OF MONTANA; ADRIA  
JAWORT; RACHEL CORCORAN;  
MONTANA BOOK COMPANY; IMAGINE  
BREWING COMPANY, LLC d/b/a  
IMAGINE NATION BREWING  
COMPANY; BUMBLEBEE AERIAL  
FITNESS; THE WESTERN MONTANA  
COMMUNITY CENTER; MONTANA  
PRIDE; THE GREAT FALLS LGBTQ+  
COMMUNITY CENTER; THE ROXY  
THEATER; and THE MYRNA LOY,

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AUSTIN KNUDSEN; ELSIE ARNTZEN;  
J.P. GALLAGHER; and THE CITY OF  
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*Defendants.*

Cause No.  
CV-23-50-BU-BMM

**Brief in Support of  
Plaintiffs' Motion for a  
Temporary Restraining  
Order and Preliminary  
Injunction**

**Emergency Relief Requested**

**Table of Contents**

Table of Contents..... ii

Table of Authorities..... iv

Exhibit List ..... vi

INTRODUCTION..... 1

LEGAL BACKGROUND..... 2

    I.    HB 359 ..... 2

        A.    Drag Story Hours ..... 2

        B.    Sexually Oriented Performances..... 4

    II.   Preexisting Montana law governing obscenity and minors..... 7

FACTS..... 8

LEGAL STANDARD ..... 11

ARGUMENT..... 12

    I.    Plaintiffs are likely to succeed on the merits of Counts III and IV  
    because HB 359 violates the First Amendment, satisfying the first  
    *Winter* requirement..... 12

        A.    HB 359 regulates protected speech..... 13

        B.    HB 359 is subject to strict scrutiny..... 18

        C.    HB 359 does not survive strict scrutiny..... 24

II. Plaintiffs are likely to prevail on the merits of Count V because  
HB 359 is void for vagueness, again satisfying the first *Winter*  
prong. .... 31

III. Plaintiffs are suffering and will continue to suffer irreparable  
harm if HB 359 is not enjoined, satisfying the second *Winter* prong. 32

IV. Defendants face no hardship, and the public interest favors  
Plaintiffs, satisfying the third and fourth *Winter* prongs..... 34

CONCLUSION ..... 35

CERTIFICATE OF COMPLIANCE ..... 36

Table of Authorities

Cases

*All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011)..... 11

*Ashcroft v. ACLU*, 542 U.S. 656 (2004) ..... 1

*Boos v. Barry*, 485 U.S. 312 (1988) ..... 19

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

*Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011) ..... *passim*

*City of Austin v. Reagan Nat’l Advert. of Austin, LLC.*,  
142 S. Ct. 1464 (2022) ..... 18, 21

*City of Ladue v. Gilleo*, 512 U.S. 43 (1994) ..... 29

*Conally v. Gen. Const. Co.*, 269 U.S. 385 (1926)..... 30

*Erznoznik v. Jacksonville*, 422 U.S. 205 (1975)..... 16

*F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978) ..... 20

*First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) ..... 29

*Friends of George’s, Inc. v. Tennessee*, No. 2:23-CV-2163-TLP-TMP,  
2023 WL 2755238 (W.D. Tenn. Mar. 31, 2023)..... 12, 19, 34

*Friends of George’s, Inc. v. Tennessee*, No. 2:23-CV-2163-TLP-TMP,  
2023 WL 3790583 (W.D. Tenn. June 2, 2023) ..... 12

*Grayned v. City of Rockford*, 408 U.S. 104 (1972) ..... 30, 31

*HM Fla.-ORL, LLC v. Griffin*, No. 6:23-CV-950-GAP-LHP, 2023 WL  
4157542 (M.D. Fla. June 23, 2023)..... 12, 34

*Jacobellis v. Ohio*, 378 U.S. 184 (1964) ..... 16

*Kois v. Wisconsin*, 408 U.S. 229 (1972) ..... 14

*Brief in Support of Plaintiffs’ Motion for a TRO and Preliminary Injunction* iv

<i>Miller v. California</i> , 413 U.S. 15 (1973) .....	13, 14, 15, 25
<i>Nken v. Holder</i> , 556 U.S. 418 (2009) .....	33
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992) .....	19, 23
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015) .....	passim
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	24, 30
<i>Roman Catholic Diocese v. Cuomo</i> , 141 S. Ct. 63 (2020).....	32
<i>Sable Commc'ns of California, Inc. v. F.C.C.</i> , 492 U.S. 115 (1989).....	24
<i>Simon &amp; Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.</i> , 502 U.S. 105 (1991) .....	19
<i>Stuhlberg Int'l Sales Co. v. John D. Brush &amp; Co.</i> , 240 F.3d 832 (9th Cir. 2001).....	11
<i>United States v. Playboy</i> , 529 U.S. 803 (2000) .....	18, 19, 23, 25
<i>Virginia v. American Bookseller's Ass'n Inc.</i> , 484 U.S. 383 (1988).....	33
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989) .....	21
<i>Winter v. Nat. Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008).....	11

### **Statutes and Regulations**

House Bill 359, 2023 Mont. Leg., 67th Sess.....	<i>passim</i>
Mont. Code Ann. § 45-8-201.....	7

### **Other Sources**

Wright & Miller, Fed. Practice & Proc. § 2951 .....	11
---	----

**Exhibits**

House Bill 359..... Ex. 1

Declaration of Adria Jawort..... Ex. 2  
    Email from S. Curtis to A. Jawort..... Ex. 2-A  
    Butte-Silver Bow Facebook Message..... Ex. 2-B

Declaration of Annatheia Smith ..... Ex. 3

Declaration of Sabrina Malecek,  
    owner of BumbleBee Aerial Fitness ..... Ex. 4

Declaration of Mike Steinberg,  
    Executive Director of The Roxy Theater ..... Ex. 5

Declaration of Krys Holmes,  
    Executive Director of The Myrna Loy ..... Ex. 6

Declaration of Chelsia Rice,  
    Co-owner of the Montana Book Company ..... Ex. 7

Declaration of Lauren Halverson,  
    Representative for OUTLaws at the  
    Alexander Blewett III School of Law ..... Ex. 8

Declaration of Kevin Hamm ..... Ex. 9  
    Front Street Permit Application..... Ex. 9-A  
    Last Chance Gulch Permit Application..... Ex. 9-B

Declaration of Rachel Corcoran, Billings Public Schoolteacher ..... Ex. 10

## INTRODUCTION

“Content-based prohibitions [on speech], enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people.” *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). Passed during the 2023 Montana legislative session, House Bill 359 (“HB 359”) has more than the “potential” to suppress speech. It *is* suppressing protected speech. On July 13, 2023, Plaintiff Montana Pride was denied permits for its thirtieth annual Pride celebration, scheduled to begin July 30, 2023. In the absence of immediate judicial relief, thousands of Montanans will be unable to assemble peaceably to celebrate the diversity of human gender and sexuality.

HB 359—a breathtakingly ambiguous and overbroad bill motivated by anti-LGBTQ+ animus—is an unconstitutional content- and viewpoint-based restriction on free speech. The bill purports to restrict “drag story hours,” and “sexually oriented performances.” But neither term is carefully defined, and neither term is limited to speech that the government lawfully may circumscribe. Already, HB 359 has restricted lawful political and artistic speech. And it will continue to do so unless and until the Court acts to enjoin further implementation.

Plaintiffs request that the Court issue a temporary restraining order and preliminary injunction against Defendants Austin Knudsen and Elsie Arntzen (collectively, the “State”) and the City of Helena. Plaintiffs seek relief by July 30 so that Montana Pride can go forward as planned.

## LEGAL BACKGROUND

### I. HB 359

HB 359 restricts two broad categories of speech and expressive activity. First, the bill bans “drag story hours” in schools and libraries. Second, it prohibits or restricts “sexually oriented performances” in various places. Both categories sweep in far more speech than the quoted terms suggest.

#### A. Drag Story Hours

HB 359 bans “drag story hours” in schools and libraries that receive any state funds. A “[d]rag story hour” is “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.” HB 359, § 1(3). And, for their part, “drag king” and “drag queen” are defined as “a male or female performer who adopts a flamboyant or parodic [male or female]

persona with glamorous or exaggerated costumes and makeup.” HB 359, § 1(1), (2). In other words, a “drag story hour” occurs whenever a person dresses in a gendered costume and has an educational interaction with children in a school or library that receives public funds—even if the school or library is not a public entity.

A person who “allow[s]” a “drag story hour” faces criminal penalties. HB 359, § 5(2) (codifying restrictions on “drag story hours” in Mont. Code Ann. title 20); Mont. Code Ann. § 20-1-207 (providing that violations of title 20 constitute misdemeanor criminal offenses). Upon conviction, “[a] library, a school, or library or school personnel, [or] a public employee” “shall be fined \$5,000.” HB 359, § 3(1), (2), (4). Further, teachers and other school personnel will see their certificates suspended (upon the first conviction) and permanently revoked (upon a second or subsequent conviction). HB 359, § 3(4).

Any person involved in a drag story hour is also subject to civil liability. HB 359, § 4(1). A minor who attends a drag story hour—even if the minor’s guardian consents—may sue any “person who knowingly promotes, conducts, or participates as a performer in the performance” within ten years of the date of the drag story hour. HB 359, § 4(1), (3).

The plaintiff is guaranteed statutory damages in the amount of \$5,000; attorney’s fees and costs; and “actual damages, including damages for psychological, emotional, economic, and physical harm.” HB 359, § 4(2).

**B. Sexually Oriented Performances**

HB 359 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”—even if the audience consists only of adults. HB 359, § 3(3). A “sexually oriented performance” is “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:

A. 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

B. prosthetic genitalia, breasts, or buttocks;

(b) stripping; or

(c) sexual conduct.

HB 359, § 1(10).

The definition of “sexually oriented performances” includes some anomalies. It is not limited to live events; there is no clear limitation on the meaning of “sexual conduct”; and “stripping” is defined as the “removal or simulated removal of clothing in a sexual manner for the entertainment of one or more individuals,” regardless of whether nudity results. HB 359, § 1(11). What is more, HB 359 includes a definition of “sexually oriented” that is even broader than “sexually oriented performances”—extending to “salacious dancing” and “any lewd and lascivious depiction or description of human genitals or of sexual conduct.” HB 359, § 1(8).<sup>1</sup>

“Sexually oriented performances” are prohibited outright in schools and libraries that receive any state funding, HB 359, § 3(1), (2); “on public property in any location where the performance is in the presence of an individual under the age of 18,” HB 359, § 3(3)(a); and “in a location owned by an entity that receives any form of funding from the state,” even if minors are not present, HB 359, § 3(3)(b).

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<sup>1</sup> Confusingly, HB 359 defines “sexual conduct” by cross-reference in the definition for “sexually oriented” but not in the definition for “sexually oriented performance.” HB 359, § 1(8), (10).

“Sexually oriented performances” are restricted in so-called and circuitously defined “sexually oriented businesses”—“nightclub[s], bar[s], restaurant[s], or similar commercial enterprise[s] that” (a) allow on-site alcohol consumption and (b) put on live nude shows or “sexually oriented performances” as defined by HB 359. HB 359, § 1(9).

Violators of the rules governing “sexually oriented performances” face overlapping penalties. “Sexually oriented businesses” and their agents and employees are subject to delicensure and mandatory criminal fines ranging from \$1,000 to \$10,000. HB 359, § 2(2); *see also id.* § 5(1) (codifying restrictions within Mont. Code Ann. title 45, the criminal code). Libraries, schools, entities that receives state funds, and their agents and employees “shall be fined \$5,000” if they “allow” a sexually oriented performance on-premises. HB 359, § 3(4).

Additionally, any person involved in a “sexually oriented performance”—“a person who knowingly promotes, conducts, or participates as a performer”—is subject to the same citizen suit provision governing “drag story hours.” HB 359, § 4(1).

## II. Preexisting Montana law governing obscenity and minors

Montana law already protects youth from exposure to obscene material to the full extent allowable under the First Amendment. Montana’s obscenity statute criminalizes, *inter alia*, purposely or knowingly providing obscene material, obscenely exposing one’s body, and giving obscene performances to minors. Mont. Code Ann. § 45-8-201.

A person cannot be convicted under § 45-8-201 unless the alleged obscenity comports with constitutional standards. *See infra* pp. 13–18.

The obscenity must:

- involve the perverted or patently offensive representation or depiction of “ultimate sexual acts,” masturbation, excretion, or “lewd exhibition of the genitals”;
- as a whole, and “applying contemporary community standards,” “appeal[] to the prurient interest in sex”;
- as a whole, be “patently offensive”; and
- as a whole, “lack[] serious literary, artistic, political, or scientific values.”

Mont. Code Ann. § 45-8-201(2); *see also id.* § 45-8-201(3) (providing right to provide contrary evidence). A person convicted of the preexisting crime of obscenity faces a maximum penalty of \$1,000. *Id.* § 45-8-201(4).

## FACTS

HB 359 went into effect on May 22, 2023. HB 359, § 7. Already, HB 359 has had widespread effects across Montana—event cancellations, chilled speech, and fear of criminal and civil liability. The harm is serious, concrete, and ongoing.

HB 359 mutated frequently during the legislative session—morphing from (1) a ban on “exhibit[ing] a gender identity that is different from a performer’s gender assigned at birth” in businesses, schools, and libraries<sup>2</sup> to (2) a ban on “male or female impersonators” in businesses and any public space where minors may be present<sup>3</sup> to (3) a ban that incorporated Montana’s existing law on obscenity<sup>4</sup> to (4) a relatively anodyne (if unnecessary) restriction on adult-oriented performances<sup>5</sup> to (5) the law now in effect. Not surprisingly, particularly

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<sup>2</sup> Available at [https://leg.mt.gov/bills/2023/HB0399//HB0359\\_1.pdf](https://leg.mt.gov/bills/2023/HB0399//HB0359_1.pdf)

<sup>3</sup> Available at [https://leg.mt.gov/bills/2023/HB0399//HB0359\\_2.pdf](https://leg.mt.gov/bills/2023/HB0399//HB0359_2.pdf)

<sup>4</sup> Available at [https://leg.mt.gov/bills/2023/HB0399//HB0359\\_3.pdf](https://leg.mt.gov/bills/2023/HB0399//HB0359_3.pdf)

<sup>5</sup> Available at [https://leg.mt.gov/bills/2023/HB0399//HB0359\\_4.pdf](https://leg.mt.gov/bills/2023/HB0399//HB0359_4.pdf)

because of the bill's vague language and confusing penalty schemes, it took some time for HB 359's breadth to be realized. There is no mistaking it now.

The first blow was struck on June 1, 2023, when Plaintiff Adria Jawort was disinvited from a scheduled appearance at the Butte Silver-Bow Public Library. Ms. Jawort, a transgender and Northern Cheyenne woman, is a recognized expert on LGBTQ+ and Two-Spirit issues in Montana. Defendant Gallagher canceled Ms. Jawort's event because "it is too much of a legal risk to have a trans-person in the library" based on his belief that the lecture would violate HB 359. Ex. 2-A, Email from S. Curtis to A. Jawort (June 1, 2023), attached to Ex. 2, Decl. of Adria Jawort ("Jawort Decl."). The City and County of Butte-Silver Bow later confirmed via Facebook post that HB 359 forced the cancellation: "[i]n accordance with Governor Gianforte signing HB359 into law, our county cannot allow an event where a drag king or queen reads children's books and engages in other learning activities with minor children present. Due to this law, we have had to cancel the speaker at the Butte-Silver Bow Library." Ex. 2-B, Butte-Silver Bow Facebook Post, attached to Ex. 2, Jawort Decl.

The hits keep coming. Plaintiffs the Imperial Sovereign Court of the State of Montana (“Imperial Court”) and Aerial BumbleBee have seen events canceled and modified. Ex. 3, Decl. of Annatheia Smith ¶¶ 18–26 (“Smith Decl.”); Ex. 4, Decl. of Sabrina Malecek, owner of BumbleBee Aerial Fitness ¶¶ 21, 22 (“Malecek Decl.”). Other plaintiffs and declarants fear that future events are prohibited under the law—even those events with years of precedent behind them. Ex. 5, Decl. of Mike Steinberg, Exec. Dir. of The Roxy Theater ¶¶ 13–43 (“Steinberg Decl.”); Ex. 6, Decl. of Krys Holmes, Exec. Dir. of The Myrna Loy ¶¶ 7–18 (“Holmes Decl.”); Ex. 7, Decl. of Chelsia Rice, co-owner of the Montana Book Company ¶¶ 8–12, 14 (“Rice Decl.”); Ex. 8, Decl. of Lauren Halverson, member of OUTLaws at the Alexander Blewett III School of Law ¶¶ 8–18 (“Halverson Decl.”).

And these fears are warranted. Underlying the present request for emergency injunctive relief, the City of Helena is refusing to issue permits for Montana Pride events. Ex. 9, Decl. of Kevin Hamm ¶ 14 (“Hamm Decl.”). With Pride scheduled to begin on July 30, 2023, thousands of people face certain suppression of their First Amendment rights absent judicial relief. Hamm Decl. ¶¶ 10–14.

Moreover, due to HB 359’s extraordinary vagueness and breadth, Montanans are unable to determine whether they must stifle their speech to avoid severe state-sanctioned penalties. Examples abound. Plaintiff Rachel Corcoran, a public school teacher, faces decertification and criminal and civil liability for wearing costumes to engage her students in school. Ex. 10, Decl. of Rachel Corcoran ¶¶ 5–11 (“Corcoran Decl.”). Plaintiffs The Roxy Theater and The Myrna Loy appear to be prohibited from showing films to audiences consistent with industry standard Motion Picture Association ratings. Steinberg Decl. ¶¶ 13–43; Holmes Decl. ¶¶ 7–18. And businesses, such as Plaintiff Montana Book Company, face criminal and civil penalties and delicensure simply for holding events featuring drag. Rice Decl. ¶¶ 8–12.

### LEGAL STANDARD

A preliminary injunction should issue when the movant establishes (1) that it will likely succeed on the merits, (2) that it will suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction will serve the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Courts in the Ninth Circuit apply a sliding scale approach to preliminary

relief. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). The reviewing court must balance the elements “so that a stronger showing of one element may offset a weaker showing of another.” *Id.*

A temporary restraining order operates to prevent irreparable injury “before the hearing for a preliminary injunction required by Rule 65(a) can be held.” Wright & Miller, Fed. Practice & Proc. § 2951. Where “the opposing party actually receives notice of the application for a restraining order, the procedure that is followed does not differ functionally from that on an application for a preliminary injunction and the proceeding is not subject to any special requirements.” *Id.* The standard for a temporary restraining order is the same as for a preliminary injunction. *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).

## ARGUMENT

- I. **Plaintiffs are likely to succeed on the merits of Counts III and IV because HB 359 violates the First Amendment, satisfying the first *Winter* requirement.**

HB 359 is no mere restriction on obscene speech. On its face, HB 359 is a content-based restriction on protected speech and expression.

HB 359 also discriminates on the basis of viewpoint: it defines the prohibited conduct based on the speaker's identity and the message conveyed. Alternatively, HB 359 was adopted because of its proponent legislators' animus toward the message that HB 359 restricts—specifically, drag. Regardless, the law is “presumptively unconstitutional” and subject to strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

HB 359 cannot survive strict scrutiny. Thus, both district courts addressing challenges to statewide drag-ban bills have granted injunctions. *See Friends of George's, Inc. v. Tennessee*, No. 2:23-CV-2163-TLP-TMP, 2023 WL 3790583 (W.D. Tenn. June 2, 2023) (permanent injunction); *HM Fla.-ORL, LLC v. Griffin*, No. 6:23-CV-950-GAP-LHP, 2023 WL 4157542 (M.D. Fla. June 23, 2023) (preliminary injunction); *Friends of George's, Inc. v. Tennessee*, No. 2:23-CV-2163-TLP-TMP, 2023 WL 2755238 (W.D. Tenn. Mar. 31, 2023) (preliminary injunction).

#### **A. HB 359 regulates protected speech.**

While obscenity is not constitutionally protected, HB 359 does not regulate only obscenity. As the bill's sponsor, Representative Braxton

Mitchell, said in his introduction of HB 359 to the Senate Judiciary Committee, “We already prohibit children from . . . viewing obscene material, viewing pornography, going to strip clubs. . . . This is not any type of First Amendment violation, and it’s time we add drag shows to that list.”<sup>6</sup> The intent was never to restrict obscenity.

The boundaries of obscenity are firmly established and much narrower than the restrictions within HB 359. Under *Miller v. California*, laws proscribing obscenity “must be specifically defined.” 413 U.S. 15, 24 (1973). HB 359 is not. *See infra* pp. 31–32. Moreover, restrictions on obscenity must meet a three-prong test. Obscenity is only speech that (1) “taken as a whole, appeal[s] to the prurient interest in sex; (2) “portray[s] sexual conduct in a patently offensive way; and (3) “taken as a whole, do[es] not have serious literary, artistic, political, or scientific value.” *Id.*

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<sup>6</sup> Mont. Leg., Sen. Jud, Comm. Hrg. at 8:55:17 (Feb. 2, 2023), *available at* <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/47759?agendaId=251847>

HB 359 does not satisfy even one of the *Miller* requirements. First, although HB 359 nods to the “prurient interest in sex” requirement, it fails to require that, “taken as a whole,” the regulated conduct does in fact “appeal[] to the prurient interest,” “applying contemporary community standards.” *Id.* (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)). This question must be decided by a jury, to ensure that “it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person.” *Id.* at 33. But no jury could determine that “contemporary community standards” allow HB 359’s blanket proscription of drag and so-defined “sexually oriented performances.” Gender-bending performances and flamboyant costumes pervade our culture, from Shakespeare to Bugs Bunny. And one need travel no farther than the nearest public beach to see “any portion of the breast below the top of the areola” or “any portion of . . . the buttocks.” HB 359, § 1(4) (defining “nude”).

Second, HB 359 extends far beyond the “patently offensive.” Setting aside that HB 359 does not even give lip service to this requirement, “patently offensive” is synonymous with “hard core”

pornographic materials, *Miller*, 413 U.S. at 27, such as “[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated,” “masturbation,” and “excretory functions” and “lewd exhibition of the genitals, *id.* at 25. “Drag story hours” are not of a kind with the examples given in *Miller*; nor is removing outer layers of clothing “in a sexual manner”; nor is the partial exposure of natural or prosthetic body parts.

Third, HB 359 includes no carveout for works and performances with “serious literary, artistic, political, or scientific value.” *Id.* at 24. This is by design. In Representative Mitchell’s words, “The reason we have to specifically . . . say that we’re prohibiting story hours is because all they do is call it art. That’s how they get around it.”<sup>7</sup> And HB 359 does, in fact, appear to regulate artistic performances even outside of

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<sup>7</sup> Mont. Leg., Free Conference Comm. Hrg. at 12:29:10 (Apr. 26, 2023), *available at* [https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230426/-1/49764#handoutFile\\_](https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230426/-1/49764#handoutFile_); *see also* Mont. Leg., Sen. Floor Sess. at 18:12:40, *available at* <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/0170221/-1/46256?agendaId=273842> (April 17, 2023) (speaking against proposed amendment because it “allows all these under ‘art,’ and so it completely guts the bill”) (Sen. Karl Glimm).

drag. For example, many films shown by Plaintiffs The Roxy Theater and The Myrna Loy fall within the definition of “sexually oriented performances.” Steinberg Decl., ¶¶ 8–9, 15, 20, 28, 34, 36; Holmes Decl., ¶¶ 7–16. But “material dealing with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied . . . constitutional protection.” *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (internal citation removed).

Nor can HB 359 be saved because it purports to protect children. First Amendment rights do not suddenly manifest when a person reaches the age of 18. Accordingly, state governments do not possess “the free-floating power to restrict the ideas to which children may be exposed.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 794 (2011) (citations and internal quotations omitted); *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–13 (1975) (“[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”).

In *Brown v. Entertainment Merchants Association*, California imposed sales restrictions and labeling requirements on “violent video games,” limiting minors’ (but not adults’) access. 564 U.S. at 789. The Supreme Court struck the law, emphatically rejecting a “wholly new category of content-based regulation that is permissible only for speech directed at children.” *Id.* at 794. “Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Id.* at 795.

Moreover, HB 359 is not even limited to minors. When an entity receives state funds in “any form,” it may never display “sexually oriented performances,” even to an age-restricted audience. HB 359 § 3(3)(b). The First Amendment protects “drag story hours” and “sexually oriented performances.”

**B. HB 359 is subject to strict scrutiny.**

**1. HB 359 is facially content- and viewpoint-based.**

“A regulation of speech is facially content-based under the First Amendment if it ‘targets speech based on its communicative content’—

that is, if it ‘applies to particular speech because of the topic discussed or the idea or message expressed.’” *City of Austin v. Reagan Nat’l Advert. of Austin, LLC.*, 142 S. Ct. 1464, 1471 (2022) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)) (brackets removed). Content-based restrictions are “presumptively unconstitutional” and “can stand only if they survive strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Reed*, 576 U.S. at 163.

HB 359 targets speech based on its communicative content—specifically drag and certain expression relating to human sexuality—all because of a purported “concern for the effect of the subject matter on young viewers.” *United States v. Playboy*, 529 U.S. 803, 811 (2000) (emphasis added) (striking federal law targeting sexually explicit cable channels). The purported concern is illegitimate, and the law restricts far more than sexually explicit speech. *See infra* pp. 23–31. But even if the law was limited to sexually explicit expression, because it “focuses only on the content of the speech and the direct impact that speech has

on its [audience],” it is content-based and subject to strict scrutiny. *Id.* at 811–12 (*quoting Boos v. Barry*, 485 U.S. 312, 321 (1988)).

The State of Montana may not target specific types of sexual expression without engaging in content-based regulation. *See Friends of George’s*, 2023 WL 2755238, at \*4 (regulation that prohibits speech “performed by entertainers like topless dancers, strippers, male or female impersonators but not others” warrants strict scrutiny). HB 359 does not restrict attendance from all live performances, only those engaged in the portrayal of a specific, enumerated subset of content—namely “drag story hours” and “sexually oriented performances” (as defined by HB 359).

Worse still, HB 359 discriminates on the basis of viewpoint, “rais[ing] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (*quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)); *see also Reed*, 576 U.S. at 168 (“Government discrimination among viewpoints—or the regulation of speech based on the ‘specific motivating ideology or the opinion or perspective of the speaker’—is a ‘more blatant’ and ‘egregious form’ of content discrimination.”).

HB 359 restricts “drag story hour[s]”—“read[ing] children’s books and engaging in other learning activities with minor children present” whenever the person in charge “adopts a flamboyant or parodic [male or female] persona with glamorous or exaggerated costumes and makeup.” HB 359, § 1(1)–(3). The restricted speech is defined in part by the identity of the messenger—“the specific motivating ideology . . . or perspective of the speaker.” *Reed*, 576 U.S. at 168. HB 359 allows reading children’s books and engaging in other learning activities with minor children present, as long as the performer is not a drag queen or king—that is, dressed in a gendered costume. Thus, the line dividing the lawful from the unlawful depends on the identity—and the viewpoint—of the speaker.

“[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.” *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978). HB 359 fails the test. HB 359 is subject to strict scrutiny. *Reed*, 576 U.S. at 164–65 (findings regarding legislative intent are unnecessary when a law is facially content- and viewpoint-based).

**2. Alternatively, the State enacted HB 359 with the intent to target speech for its content.**

Even if HB 359 was facially content- and viewpoint-neutral (and it is not), the bill’s legislative history proves that the “the purpose and justification for the law are content-based.” *Reed*, 576 U.S. at 167; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (content-neutral laws subject to strict scrutiny when they cannot be “justified without reference to the content of the regulated speech” or were adopted “because of disagreement with the message” conveyed). If “an impermissible purpose or justification” underpins a restriction on speech, the law is still subject to strict scrutiny. *City of Austin*, 142 S. Ct. 1464, 1475 (2022).

HB 359 was “adopted by the government because of disagreement with the message the speech conveys.” *Ward*, 491 U.S. at 791. HB 359 was introduced as a ban on “drag performance” “in which a performer exhibits a gender identity that is different than the performer’s gender assigned at birth using clothing, makeup, or other physical markers.”<sup>8</sup> As Representative Mitchell said in his introduction of HB 359, he wanted

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<sup>8</sup> *Available at* [https://leg.mt.gov/bills/2023/HB0399//HB0359\\_1.pdf](https://leg.mt.gov/bills/2023/HB0399//HB0359_1.pdf)

to “add drag shows to th[e] list” of expression outside the scope of the First Amendment.<sup>9</sup>

In closing, Mitchell made his intent plain:

Due to the mature themes surrounding drag shows and the exposure to inappropriate activities, children may adopt and accept certain stereotypes or attitudes that could lead to social, psychological, linguistic difficulties. Children may also create an inadequate understanding of gender roles and experiences, which is damaging to their long-term social and emotional development.<sup>10</sup>

In other words, the bill sponsor took issue with ideas expressed through drag—that gender is performed and that gender norms are deserving of satire—and, rather than confront the ideas within the marketplace, he used his position within the government to shut them down.

Even if HB 359 were content-neutral, it would be subject to strict scrutiny.

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<sup>9</sup> Mont. Leg., Sen. Jud, Comm. Hrg. at 8:55:17 (Feb. 2, 2023), *available at* <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/47759?agendaId=251847>

<sup>10</sup> Mont. Leg., Sen. Jud, Comm. Hrg. at 11:10:03 (Feb. 2, 2023), *available at* <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/47987?agendaId=269135>

**C. HB 359 does not survive strict scrutiny.**

There is only one possibility: HB 359 is “presumptively unconstitutional” and subject to strict scrutiny. *Reed*, 576 U.S. at 163. The burden is therefore on Defendant to prove that HB 359 is “narrowly tailored to serve compelling state interests.” *Id.* (quoting *R.A. V.*, 505 U.S. at 395); see also *Ashcroft*, 542 U.S. at 665 (“When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.”). “The State must specifically identify an ‘actual problem’ in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard.” *Brown*, 564 U.S. at 799 (2011). HB 359 is not the “rare” example of a constitutionally permissible restriction on speech; it cannot survive strict scrutiny. *Playboy*, 529 U.S. at 818.

**1. HB 359 does not further a compelling state interest.**

The State has no “compelling” state interest, as required to survive strict scrutiny, in restricting “drag story hours” or “sexually oriented performances,” as defined in HB 359. The bill purportedly protects children from certain categories of speech. But, where the government

restricts speech on this basis, it must “show a direct causal link between [the restricted content] and harm to minors”; “ambiguous proof will not suffice.” *Brown*, 564 U.S. at 800.

It is not enough for some legislators to believe that drag harms children. When no evidence supports a restriction on free speech, the government cannot meet its burden of identifying a compelling state interest, and the restriction cannot stand. *See Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 129–30 (1989) (“[A]side from conclusory statements during the debates by proponents of the bill, . . . the congressional record presented to us contains no evidence as to how effective or ineffective the . . . regulations were or might prove to be” (footnote omitted)); *Reno v. ACLU*, 521 U.S. 844, 858 n. 24, 875–876 n.41 (1997) (same); *Playboy*, 529 U.S. at 822 (same).

**2. Even if HB 359 did further a compelling government interest, it is not narrowly tailored to that interest.**

HB 359 is staggeringly overbroad and thus is not narrowly tailored to the State’s (non-compelling) interest in protecting minors from drag performance. *Reed*, 576 U.S. at 163. Overbreadth is of particular concern because it can chill speech and create opportunities for selective enforcement. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). These

concerns already are apparent; Plaintiffs’ speech has been chilled, and HB 359 has been used to exclusively target the LGBTQ+ community. *See* Jawort Decl., ¶¶ 6–11; Hamm Decl., ¶ 14.

As a threshold matter, HB 359 cannot stand because existing law restricts obscenity to the full measure allowed under the Constitution. “When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.” *Playboy*, 529 U.S. at 816. The State already maintains an adequately tailored law to prohibit and criminalize obscene material—Montana Code Annotated § 45-8-201, which incorporates the *Miller* test. 413 U.S. at 23–24. *See supra* pp. 7–8, 13–18. Indeed, a prior version of the bill used the term “obscene” to define the proscribed conduct according to *Miller*, and the Legislature amended the bill to remove “obscene” as a modifier.

As a result, whether due to carelessness or animus, HB 359 creeps into a broad array of protected speech that does not even involve drag.

**a. HB 359 is not narrowly tailored because it is overbroad.**

HB 359 criminalizes showing movies appropriate for minor audiences at some of Montana’s longest-running theaters, even when the

audience is in fact exclusively eighteen years of age or older. And—this is unclear, which is itself a problem—it may prohibit the public performance of dances that could be described as “salacious,” and the sale or public readings of many books that include “lewd or lascivious depiction[s] or description[s] of human genitals or sexual conduct.” HB 359, § 8.

HB 359 further prohibits any performances that involve “stripping”—defined as removing or pretending to remove clothing “in a sexual manner”—even if nudity does not result. “Sexual manner” is not defined. HB 359 thus encompasses many non-obscene theatrical, film, and drag performances—even a performance that includes a costume change or the playful removal of a scarf. HB 359 prohibits these performances in businesses that serve alcohol when minors are present, HB 359, §§ 1(9), 2; “on public property in any location where the performance is in the presence of an individual under the age of 18,” HB 359, § 3(a); and “in a location owned by an entity that receives any form of funding from the state,” even if the audience is restricted to adults, HB 359, § 3(b).

For example, theaters such as Plaintiffs The Myrna Loy and The Roxy are showing the new-release film *Asteroid City*—a film about children scientists forced to quarantine during a stargazer convention. In this PG-13 film, the actress Scarlett Johansson disrobes and steps into a bathtub. This scene presumably meets HB 359’s definition of “stripping,” and because they receive state funding, The Myrna Loy and The Roxy face criminal liability for showing the film.

Similarly, the restriction on “drag story hours” encompasses far more than drag performances in any conventional understanding of the term “drag.” The terms “drag king” and “drag queen” are defined as “a male or female performer who adopts a flamboyant or parodic [male or female] persona with glamorous or exaggerated costumes and makeup.” HB 359, § 1(1), (2). As commenters on HB 359 noted, the definitions extend to a female performer dressed as a male clown;<sup>11</sup> transgender library employees;<sup>12</sup> a recent performance of *Twelfth Night* at Carroll

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<sup>11</sup> Mont. Leg., Free Conference Comm. Hrg. at 12:12:30 (Apr. 26, 2023), available at [https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230426/-1/49764#handoutFile\\_](https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230426/-1/49764#handoutFile_). (SK Rossi, Human Rights Campaign).

<sup>12</sup> *Id.* at 12:14:15 (Sam Forstag, Montana Library Association).

College;<sup>13</sup> Disney princesses;<sup>14</sup> and students costumed as past presidents. A drag performer need not even be costumed in a manner incongruent with their sex or gender.

Moreover, the law’s criminal and civil penalties incorporate no carveout for parental consent. *See Brown*, 564 U.S. at 802–804 (striking ban on sale of violent video games to minors where industry ratings system “does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home”).

Because HB 359 extends to speech far beyond expression that may actually cause harm to minors—and even beyond the expression legislators intended to curtail—it is not narrowly tailored to a compelling state interest. HB 359 fails strict scrutiny.

**b. HB 359 is not narrowly tailored because it is also underinclusive.**

And, although overbreadth is enough, it is not all. The law is also underinclusive. *See Brown*, 564 U.S. at 802 (“Underinclusiveness raises serious doubts about whether the government is in fact pursuing the

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<sup>13</sup> *Id.* at 12:14:30.

<sup>14</sup> *Id.* at 12:15:45 (Shawn Reagor, Montana Human Rights Network).

interest it invokes, rather than disfavoring a particular speaker or viewpoint.”). “While surprising at first glance, the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles.” *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994). Even within an otherwise permissible regulation of speech, underinclusiveness “suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people.” *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785–86 (1978).

HB 359 says nothing about many sources of sexual expression that children are exposed to on a daily basis—through television, the internet, and other media. Rather, it targets drag, and it restricts only certain sexual expression and only in certain locations. What HB 359 leaves out reinforces the only conclusion to draw from what it does in fact restrict: the State is suppressing speech based on the speaker’s identity and the ideas conveyed. Because HB 359 is underinclusive, it is not narrowly tailored and fails strict scrutiny.

In sum, HB 359 regulates protected speech, discriminates on the basis of content and viewpoint, and fails strict scrutiny. Plaintiffs are likely to succeed on the merits of Counts III and IV.

**II. Plaintiffs are likely to prevail on the merits of Count V because HB 359 is void for vagueness, again satisfying the first *Winter* prong.**

A law is unconstitutionally vague if individuals of “common intelligence must necessarily guess at its meaning and differ as to its application.” *Conally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). Vagueness is of special concern where a law imposes criminal sanctions, as “[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.” *Reno*, 521 U.S. 844, 872.

Overly vague restrictions on speech are unconstitutional for three reasons. First, due process requires that a law provide “persons of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Second, laws must provide “explicit standards” to law enforcement officials, judges, and juries so as to avoid “arbitrary and discriminatory application.” *Id.* Third, a vague statute

can “inhibit the exercise” of First Amendment freedoms and may cause speakers to “steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.” *Id.* HB 359 triggers all three concerns.

First, it is seemingly impossible to determine what HB 359 does and does not proscribe. Does it extend to “salacious dancing” and literary “depiction[s] or description[s] of human genitals or of sexual conduct”? Perhaps. *See* HB 359, § 1(8). Second, HB 359 already has been applied in an arbitrary and discriminatory manner: Plaintiff Jawort’s educational lecture was canceled, and Montana Pride’s permits denied. And third, Plaintiffs and all Montanans will be required to “steer far wider [than] the unlawful zone.” *See Grayned*, 408 U.S. at 109.

HB 359 is void for vagueness, and Plaintiffs are likely to succeed on the merits of Count V.

**III. Plaintiffs are suffering and will continue to suffer irreparable harm if HB 359 is not enjoined, satisfying the second *Winter* prong.**

Plaintiffs will suffer irreparable harm in the absence of preliminary relief. Already, they must choose between silence and punishment. Thus, there can be no question that HB 359 will cause irreparable harm.

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020).

Plaintiffs have suffered harm due to the enforcement of HB 359: Adria Jawort, the Imperial Court, and BumbleBee Aerial Fitness have had events canceled. Jawort Decl. ¶¶ 6–8; Smith Decl. ¶¶ 18–20; Malecek Decl. ¶¶ 21, 22. And, on the thirtieth anniversary of Pride events in Montana, Montana Pride is on hold—and will remain on hold absent judicial relief. Hamm Decl. ¶¶ 5, 14.

Further, Plaintiffs presently must withhold speech, which constitutes harm cognizable for a preliminary injunction. The law threatens to force theater troupes into adult-only nightclubs, shut down local theaters that show films consistent with industry standards, and curtail creative teaching methods. With HB 359 in effect, Plaintiffs’ only options are (1) to self-censor or (2) to face criminal charges, civil penalties, and the loss of professional livelihood. Censorship proves “a harm that can be realized even without an actual prosecution.” *Virginia v. American Bookseller’s Ass’n Inc.*, 484 U.S. 383, 393 (1988).

**IV. Defendants face no hardship, and the public interest favors Plaintiffs, satisfying the third and fourth *Winter* prongs.**

When the government opposes the issuance of a preliminary injunction, the final two factors—the balance of the equities and the public interest—merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

Plaintiffs' freedom of speech endangers no one; they have exercised their rights for decades without incident—proof enough that granting the injunction would do no harm to the State. Existing law allows for the continued prosecution of those who actually subject minors to obscenity. And granting injunctive relief will cause no harm other than potential dissatisfaction to those who have no right to silence others and are under no obligation to attend events with drag or sexual content.

Further, the public interest is served by enjoining a facially unconstitutional law—a law that would inhibit Montanans' First Amendment rights. Any interest in suppressing or chilling speech is illegitimate. *See HM Fla.-ORL, LLC*, 2023 WL 4157542, at \*9; *Friends of George's, Inc.*, 2023 WL 2755238, at \*7. The third and fourth *Winter* prongs counsel in favor of injunctive relief.

## CONCLUSION

Plaintiffs ask the Court to issue a temporary restraining order and preliminary injunction against the State and the City of Helena.

DATED this 17th day of July, 2023.

/s/Constance Van Kley  
Constance Van Kley  
Rylee Sommers-Flanagan  
Niki Zupanic  
UPPER SEVEN LAW

*Attorneys for Plaintiffs*

## CERTIFICATE OF COMPLIANCE

Per Local Rule 7.1(d)(2)(E), I certify that this brief in support of Plaintiffs' motion for a temporary restraining order and preliminary injunction includes 6,403 words, excluding caption, certificate of compliance, table of contents and authorities, exhibit list, and certificate of service, as counted by Microsoft Word's word count feature.

/s/Constance Van Kley  
UPPER SEVEN LAW

*Attorney for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that this document was served upon the following on July 17, 2023, by delivery to a process server:

Austin Knudsen, Office of the Attorney General  
Justice Building, Third Floor  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

Elsie Arntzen, Montana Superintendent of Public Instruction  
1227 11th Ave  
P.O. Box 202501  
Helena, MT 59601

J.P. Gallagher, Chief Executive  
155 W Granite Street  
Butte, MT 59701

City of Helena  
City County Building  
316 N. Park Ave.,  
Helena, MT 59601

I further certify that courtesy copies were provided via email to legal counsel for the parties above.

/s/Constance Van Kley  
Constance Van Kley

*Attorney for Plaintiffs*

Constance Van Kley  
Rylee Sommers-Flanagan  
Niki Zupanic  
Upper Seven Law  
P.O. Box 31  
Helena, MT 59624  
(406) 306-0330  
constance@uppersevenlaw.com  
rylee@uppersevenlaw.com  
niki@uppersevenlaw.com

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA  
BUTTE DIVISION**

THE IMPERIAL SOVEREIGN COURT  
OF THE STATE OF MONTANA; ADRIA  
JAWORT; RACHEL CORCORAN; THE  
MONTANA BOOK COMPANY; IMAGINE  
BREWING COMPANY, LLC d/b/a  
IMAGINE NATION BREWING  
COMPANY; BUMBLEBEE AERIAL  
FITNESS; THE WESTERN MONTANA  
COMMUNITY CENTER; MONTANA  
PRIDE; THE GREAT FALLS LGBTQ+  
COMMUNITY CENTER; THE ROXY  
THEATER; and THE MYRNA LOY,

*Plaintiffs,*

vs.

AUSTIN KNUDSEN; ELSIE ARNTZEN;  
J.P. GALLAGHER; and THE CITY OF  
HELENA,

*Defendants.*

Cause No.  
CV-23-50-BU-BMM

**Plaintiffs' Motion for a  
Temporary Restraining  
Order and Preliminary  
Injunction**

**Emergency Relief Requested**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs The Imperial Sovereign Court of the State of Montana, Adria Jawort, Rachel Corcoran, The Montana Book Company, Imagine Brewing Company, LLC d/b/a Imagine Nation Brewing Company, Bumblebee Aerial Fitness, The Western Montana Community Center, Montana Pride, The Great Falls LGBTQ+ Community Center, The Roxy Theater, and The Myrna Loy move for a temporary restraining order and preliminary injunction to prevent Defendants Austin Knudsen, Elsie Arntzen, and the City of Helena from enforcing House Bill 359 (“HB 359”) pending this Court’s determination of HB 359’s constitutionality.

HB 359—a breathtakingly ambiguous and overbroad bill motivated by anti-LGBTQ+ animus—is an unconstitutional content- and viewpoint-based restriction on free speech in violation of the First Amendment. Preliminary relief is appropriate because: (1) plaintiffs are “likely to succeed on the merits” of their claim; (2) plaintiffs are “likely to suffer irreparable harm in the absence of preliminary relief”; (3) “the balance of equities tips in [their] favor”; and (4) “an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Constitutional harm is likely in the absence of preliminary

relief, and, in fact, has already occurred. Plaintiffs respectfully ask the Court to issue a temporary restraining order and preliminary injunction against the State and the City of Helena.

Defendants have not yet entered an appearance in this action. D. Mont. L.R. 7.1(c)(1).

Respectfully submitted this 17th day of July, 2023.

/s/Constance Van Kley  
Constance Van Kley  
Rylee Sommers-Flanagan  
Niki Zupanic  
UPPER SEVEN LAW

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

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City County Building  
316 N. Park Ave.,  
Helena, MT 59601

I further certify that courtesy copies were provided via email to legal counsel for the parties above.

/s/Constance Van Kley  
Constance Van Kley

*Attorney for Plaintiffs*

# Exhibit 1

## House Bill 359



AN ACT PROHIBITING MINORS FROM ATTENDING SEXUALLY ORIENTED SHOWS; PROHIBITING DRAG STORY HOUR IN SCHOOLS AND LIBRARIES THAT RECEIVE PUBLIC FUNDING; PROHIBITING MINORS FROM ATTENDING SEXUALLY ORIENTED OR OBSCENE PERFORMANCES ON PUBLIC PROPERTY; PROHIBITING SEXUALLY ORIENTED PERFORMANCES IN LIBRARIES OR SCHOOLS THAT RECEIVE STATE FUNDING; PROHIBITING SEXUALLY ORIENTED PERFORMANCES ON PUBLIC PROPERTY WHERE CHILDREN ARE PRESENT; PROVIDING DEFINITIONS; PROVIDING PENALTIES; ESTABLISHING A PRIVATE RIGHT OF ACTION; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1. Definitions.** As used in [sections 1 and 2], the following definitions apply:

- (1) "Drag king" means a male or female performer who adopts a flamboyant or parodic male persona with glamorous or exaggerated costumes and makeup.
- (2) "Drag queen" means a male or female performer who adopts a flamboyant or parodic feminine persona with glamorous or exaggerated costumes and makeup.
- (3) "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.
- (4) "Nude" means:
  - (a) entirely unclothed; or
  - (b) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breast below the top of the areola of the breasts if the person is female or any portion of the genitals or buttocks.
- (5) "Prurient interest in sex" has the same meaning as provided in 45-8-205.
- (6) "Public property" means any real property owned or leased, in whole or part, by the state or a

political subdivision, as defined in 2-9-101, or held in the name of a political subdivision by a department, board, or authority of the state or a political subdivision.

(7) "Obscene" has the same meaning as provided in 45-8-201.

(8) "Sexually oriented" means any simulation of sexual activity, stripping, salacious dancing, any lewd or lascivious depiction or description of human genitals or of sexual conduct as defined in 45-5-625.

(9) "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.

(10) "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.

(11) "Stripping" means removal or simulated removal of clothing in a sexual manner for the entertainment of one or more individuals.

**Section 2. Restrictions on sexually oriented businesses -- penalty.** (1) 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) The owner, operator, manager, or employee of a sexually oriented business who is convicted of violating this section shall be fined not less than \$1,000 or more than \$5,000 for the first offense, not less than \$2,500 or more than \$5,000 for the second offense, and for third and subsequent offenses be fined

\$10,000 and, if applicable, the county or municipality shall revoke the business license held by the offender.

(3) [Sections 1 through 4] are applicable and uniform throughout the state and any political subdivisions.

**Section 3. Where sexually oriented performances are prohibited.** (1) A library that receives any form of funding from the state may not allow a sexually oriented performance as defined in [section 1] on its premises.

(2) A school or library that receives any form of funding from the state may not allow a sexually oriented performance or drag story hour, as defined in [section 1], on its premises during regular operating hours or at any school-sanctioned extracurricular activity.

(3) A sexually oriented performance is prohibited:

(a) on public property in any location where the performance is in the presence of an individual under the age of 18; and

(b) in a location owned by an entity that receives any form of funding from the state.

(4) A library, a school, or library or school personnel, a public employee, or an entity described in subsection (3)(b) or an employee of the entity convicted of violating the prohibition under this section shall be fined \$5,000 and, if applicable, proceedings must be initiated to suspend the teacher, administrator, or specialist certificate of the offender under 20-4-110 for 1 year. If an offender's certificate has previously been suspended pursuant to this subsection (4), proceedings must be initiated to permanently revoke the teacher, administrator, or specialist certificate of the offender under 20-4-110 on a subsequent violation of this section.

**Section 4. Private right of action.** (1) A minor who attends a performance in violation of [section 2] or [section 3] may bring an action against a person who knowingly promotes, conducts, or participates as a performer in the performance. The minor's parent or legal guardian may bring an action in the name of the minor for an action commenced under this section.

(2) If a person prevails in an action brought under this section, the court shall award:

(a) actual damages, including damages for psychological, emotional, economic, and physical harm;

- (b) reasonable attorney fees and costs incurred in bringing the action; and
- (c) statutory damages of \$5,000.
- (3) A person may bring an action under this section not later than 10 years from the date the cause of action accrues.

**Section 5. Codification instruction.** (1) [Sections 1 and 2] are intended to be codified as an integral part of Title 45, chapter 8, and the provisions of Title 45, chapter 8, apply to [sections 1 and 2].

(2) [Section 3] is intended to be codified as an integral part of Title 20, chapter 7, part 1, and the provisions of Title 20, chapter 7, part 1, apply to [section 3].

(3) [Section 4] is intended to be codified as an integral part of Title 27, chapter 1, and the provisions of Title 27, chapter 1, apply to [section 4].

**Section 6. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

**Section 7. Effective date.** [This act] is effective on passage and approval.

- END -

I hereby certify that the within bill,  
HB 359, originated in the House.

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Chief Clerk of the House

---

Speaker of the House

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2023.

---

President of the Senate

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2023.

HOUSE BILL NO. 359

INTRODUCED BY B. MITCHELL, E. BUTTREY, M. CUFFE, D. SALOMON, J. READ, T. MCGILLVRAY, K. REGIER, L. JONES, E. BUTCHER, B. KEENAN, C. GLIMM, G. HERTZ, M. LANG, D. LENZ, J. HINKLE, F. MANDEVILLE, T. MANZELLA, W. MCKAMEY, M. NOLAND, S. HINEBAUCH, S. GUNDERSON, M. REGIER, D. LOGE, R. FITZGERALD, F. ANDERSON, L. SHELDON-GALLOWAY, J. TREBAS, D. BARTEL, C. KNUDSEN, B. USHER, S. VINTON, B. BEARD, M. HOPKINS, N. DURAM, J. FULLER, R. KNUDSEN, K. BOGNER, B. GILLESPIE, J. KASSMIER, B. MERCER, T. MOORE, B. LER, B. PHALEN, F. NAVE, J. CARLSON, L. BREWSTER, K. ZOLNIKOV, A. REGIER, L. REKSTEN, P. FIELDER, S. KERNS, S. GALLOWAY, S. GIST, J. SCHILLINGER, K. SEEKINS-CROWE, M. MALONE, J. GILLETTE, C. HINKLE, M. BERTOGLIO, R. MARSHALL, C. FRIEDEL, S. ESSMANN, M. YAKAWICH, T. BROCKMAN, T. SMITH, R. MINER, G. PARRY, G. OBLANDER, N. NICOL, L. DEMING, D. EMRICH, S. VANCE, T. VERMEIRE, C. SPRUNGER, T. FALK, J. BERGSTROM, G. KMETZ, P. GREEN, J. ETCHART, B. BARKER, L. HELLEGAARD, Z. WIRTH, N. HASTINGS

AN ACT PROHIBITING MINORS FROM ATTENDING SEXUALLY ORIENTED SHOWS; PROHIBITING DRAG STORY HOUR IN SCHOOLS AND LIBRARIES THAT RECEIVE PUBLIC FUNDING; PROHIBITING MINORS FROM ATTENDING SEXUALLY ORIENTED OR OBSCENE PERFORMANCES ON PUBLIC PROPERTY; PROHIBITING SEXUALLY ORIENTED PERFORMANCES IN LIBRARIES OR SCHOOLS THAT RECEIVE STATE FUNDING; PROHIBITING SEXUALLY ORIENTED PERFORMANCES ON PUBLIC PROPERTY WHERE CHILDREN ARE PRESENT; PROVIDING DEFINITIONS; PROVIDING PENALTIES; ESTABLISHING A PRIVATE RIGHT OF ACTION; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Constance Van Kley  
Rylee Sommers-Flanagan  
Niki Zupanic  
Upper Seven Law  
P.O. Box 31  
Helena, MT 59624  
(406) 306-0330  
constance@uppersevenlaw.com  
rylee@uppersevenlaw.com  
niki@uppersevenlaw.com

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA  
BUTTE DIVISION**

THE IMPERIAL SOVEREIGN COURT  
OF THE STATE OF MONTANA; ADRIA  
JAWORT; RACHEL CORCORAN;  
MONTANA BOOK COMPANY; IMAGINE  
BREWING COMPANY, LLC d/b/a  
IMAGINE NATION BREWING  
COMPANY; BUMBLEBEE AERIAL  
FITNESS; MONTANA PRIDE; THE  
WESTERN MONTANA COMMUNITY  
CENTER; THE GREAT FALLS LGBTQ+  
CENTER; THE ROXY THEATER; and  
THE MYRNA LOY,

*Plaintiffs,*

vs.

AUSTIN KNUDSEN; ELSIE ARNTZEN;  
J.P. GALLAGHER; and THE CITY OF  
HELENA,

*Defendants.*

Cause No.  
CV 23-50-BU-BMM

**First Amended  
Complaint**

## INTRODUCTION

1. During the 2023 Legislative Session, the Montana Legislature passed the nation’s first ban on “drag story hours”—a breathtakingly ambiguous and overbroad bill, motivated by anti-LGBTQ+ animus.

2. House Bill 359 (“HB 359”) prohibits drag performers from leading story hours in schools and libraries, which is an unconstitutional content- and viewpoint-based restriction on free speech. Ex. 1, HB 359, Mont. Leg., 68th Sess. (2023). But that’s not all: the bill bans reading to a child in a library in a superhero costume, conducting classroom activities dressed as Ms. Frizzle, inviting a Disney princess impersonator into the classroom, and staging a production of Shakespeare’s *As You Like It*. These restrictions apply regardless of a person’s gender identity and sex. *See* Tori Otten, The New Republic, *Montana’s New Anti-Drag Law Is So Vaguely Worded It Could Target Dolly Parton* (May 24, 2023).<sup>1</sup>

3. Additionally, HB 359 limits First Amendment activities of artists, businesses, and entities that receive state funds. Displaying or

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<sup>1</sup> *Available at* <https://newrepublic.com/post/172959/montana-anti-drag-law-vaguely-worded-target-dolly-parton>

disseminating obscene materials and performances has long been illegal in Montana. Mont. Code Ann. § 45-8-201. HB 359 creates new, confusing restrictions on “sexually oriented performances”—with a definition that, *inter alia*: allows the display of human cleavage but not prosthetic cleavage; restricts “stripping,” regardless of whether nudity results; and may—this is unclear—prevent allowing minors to view “any simulation of sexual activity, . . . salacious dancing, [or] any lewd or lascivious depiction or description of human genitals.” Unlike the preexisting obscenity statute, HB 359 does not incorporate the *Miller* test—the classic definition of obscenity—which safeguards artistic expression, political speech, and science. Worse still, an entity that receives *any* state funds—e.g., any art museum or independent theater—cannot display a live or prerecorded performance with essentially any sexual content, regardless of artistic merit and even if the audience is limited to adults.

4. HB 359’s penalty provisions are as confusing as they are draconian. Everyone involved in putting on a “drag” (read: costumed) story hour or so-called “sexually oriented performance” can be sued within ten years of the event by a minor who attends the performance—even if the minor and their guardian consented at the time—with

statutory damages and attorney's fees assured to the plaintiff. If the person who violates HB 359 is a library, school, teacher, school or library administrator, "entity that receives any form of funding from the state," or employee of such an entity, they shall be fined \$5,000. Moreover, teachers and other school personnel will be suspended for a year; upon a second offense, they will lose their certificates. And if the violator is a business that serves alcohol, it will be fined between \$1,000 and \$10,000 per violation and ultimately lose its business license.

5. HB 359 is a Frankenstein's monster that manages to pull together the worst of prior versions of the bill and incorporate all of the constitutional problems in drag bans recently struck down elsewhere. HB 359 is calculated to target the LGBTQ+ community, but the bill overshoots this sinister mark. HB 359 threatens teachers, artists, small businesses, and cultural and scientific institutions with criminal and professional sanctions.

## **JURISDICTION AND VENUE**

6. Plaintiffs bring this action under 42 U.S.C. § 1983. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise

under the Constitution and laws of the United States and involve the assertion of a deprivation, under color of state law, of a right under the Constitution of the United States.

7. This Court has personal jurisdiction over Defendant Austin Knudsen. Defendant Knudsen resides in and maintains his office in Montana. He is sued in his official capacity.

8. This Court has personal jurisdiction over Defendant Elsie Arntzen. Defendant Arntzen resides in and maintains her office in Montana. She is sued in her official capacity.

9. This Court has personal jurisdiction over Defendant J.P. Gallagher. Defendant Gallagher resides in and maintains his office in Montana. He is sued in his individual and official capacity.

10. This Court has personal jurisdiction over Defendant City of Helena. Defendant City of Helena is an incorporated municipality in Lewis and Clark County in the State of Montana.

11. Venue is proper in the Butte Division of the District of Montana because Butte, Montana, is home to Defendant Gallagher and the Office of the Chief Executive of the City-County of Butte-Silver Bow. 28 U.S.C. § 1391; D. Mont. L.R. 3.2(b).

12. Venue is also proper in the Butte Division because a substantial part of the events giving rise to these claims occurred in Butte, Montana.

## **PARTIES**

### **A. Individual Plaintiffs**

13. Adria Jawort is a resident of Billings, Montana. Jawort is a transgender woman, a member of the Northern Cheyenne Tribe, and a published author. She regularly speaks to libraries and other organizations across the State of Montana about Two-Spirit and transgender issues.

14. Rachel Corcoran is a resident of Billings, Montana. Corcoran is a teacher in Billings Public Schools. While teaching, she has dressed up as fictional and historic male and female characters to connect with students, enhance learning, and build community. For example, she has dressed as a crazy cat lady, the rapper Eazy-E, Tina Turner, Waldo (of *Where's Waldo?* fame), Lilo (from *Lilo & Stitch*), and Princess Bubblegum (from *Adventure Time*). While in gendered costumes, she reads to students and engages in learning activities at school. By the terms of HB 359, she is a “drag queen” or “drag king” participating in

“drag story hour” at such times. Thus, she faces criminal penalties, lawsuits, and revocation of her teaching certificate.

### **B. Business and Nonprofit Plaintiffs**

15. The Imperial Sovereign Court of the State of Montana (“the Imperial Court”) is a Montana-based nonprofit membership organization founded in 1993 that works to educate and advocate for LGBTQ+ individuals and allies through the production of community-based drag performances. The Imperial Court’s drag performances explore multiple gender expressions in an entertaining and educational atmosphere and aim to create a safe and welcoming environment. The Imperial Court also provides an LGBTQ+ scholarship and holds events to raise money for other Montana charities. Since the Legislature passed HB 359, the Imperial Court has had multiple performances cancelled or modified by partner organizations, and it anticipates that HB 359 will have a profound debilitating effect on its ability to pursue its mission.

16. Montana Book Company is an independent LGBTQ+ owned bookstore in Helena, Montana. Founded in 1978, Montana Book Company is a book retailer and event space that hosts readings and performances. In aiming to create an open and inclusive community

space for marginalized populations in Montana, Montana Book Company has hosted and plans to continue to host author readings and age-appropriate drag events open to the public. Montana Book Company has received state funds and leases space from an entity that has received state funds.

17. Imagine Brewing Company, LLC, d/b/a Imagine Nation Brewing Company (“Imagine Nation”), is a brewery and community center located in Missoula, Montana. Imagine Nation has hosted and plans to again host all-ages drag shows and drag story hours, during which it sells alcoholic beverages. Imagine Nation has not received state funds but intends to apply for such funds when available. Imagine Nation has entered into a lease-to-own agreement with the building’s owners, the former proprietors of the business, who received state funds in connection with the business. Imagine Nation has a lending library on-site.

18. BumbleBee Aerial Fitness (“BumbleBee”) is a fitness studio located in Helena, Montana. BumbleBee teaches aerial arts and choreography to students ages 14 and older, and pole fitness to students ages 18 and up. BumbleBee’s instructors and students perform before

live audiences. Bumblebee has had events canceled due to concerns about HB 359.

19. Montana Pride is Montana's annual statewide Pride celebration. Montana Pride is an all-ages celebration of Montana's LGBTQ+ community that attracts over 15,000 attendees annually. Due to HB 359, the City of Helena is refusing to issue permits to Montana Pride, which otherwise would begin on July 30, 2023.

20. Founded in 1999, The Western Montana Community Center ("the Center") is Western Montana's LGBTQ+ community center, located in Missoula, Montana. The Center offers community events, health and public safety support, and space for LGBTQ+ individuals, groups, and communities to meet and provide programming. The Center recently produced Missoula Pride, an annual event that celebrates the LGBTQ+ community through storytelling, dancing, a parade, and drag performances.

21. The Great Falls LGBTQ+ Center aims to enhance and sustain the health and well-being of the LGBTQ+ community through activities, programs, and services. It organizes events for all audiences featuring drag performances, including Pride.

22. The Myrna Loy is an independent nonprofit arts and culture center established in 1976. The Myrna Loy operates a movie theater and live performance venue in Helena, Montana, provides arts education experiences to thousands of students annually, and awards grants to Montana artists. The Myrna Loy leases a former jail building from Lewis and Clark County, having transformed it into a performance space and movie theater more than 30 years ago. The Myrna Loy often presents films and live performances with artistic and educational merit that it reasonably believes may violate HB 359.

23. The Roxy Theater (“The Roxy”) is a nonprofit, community-owned theater located in downtown Missoula, Montana, which was founded in 1937. The Roxy’s mission is to make the world a better place through the power of cinema, education, and community. The Roxy hosts screenings and events seven days a week, including new releases nightly and a monthly calendar of independent, foreign, and classic films, theater, and community events. In 2022, The Roxy screened 454 unique titles and had 51,911 people attend its films and special events. The Roxy has and continues to show films and events that The Roxy reasonably believes may violate HB 359. The Roxy authorizes on-premises

consumption of alcoholic beverages through its sale of beer and wine. The Roxy Theater receives funding from the Montana Arts Council, a state agency funded by the State of Montana.

### **C. Defendants**

24. J.P. Gallagher is the Chief Executive of the City-County of Butte-Silver Bow, Montana. Gallagher decided to cancel Plaintiff Jawort's lecture at the Butte-Silver Bow Library.

25. Austin Knudsen is the Attorney General for the State of Montana. Knudsen oversees the enforcement of the State's criminal laws. HB 359 amended Title 20 of the Montana Code to prohibit "engag[ing] in . . . learning activities with minor children present" at libraries and schools when a performer "adopts a flamboyant or parodic [male or female] persona with glamorous or exaggerated costumes and makeup." Violations of Title 20 are prosecutable as misdemeanor criminal offenses. Mont. Code Ann. § 20-1-207. HB 359 also amended Title 45 of the Montana Code to prohibit so-called "sexually oriented businesses" from allowing minors to "enter the premises of the business during a sexually oriented performance." Violations of Title 45 are

criminal offenses, and violations of the provision created by HB 359 are punishable by fines ranging from \$1,000 to \$10,000.

26. Defendant Elsie Arntzen is the Montana Superintendent of Public Instruction. Arntzen is responsible for the general supervision of Montana public schools and districts. She is responsible for “issu[ing], renew[ing], or deny[ing] teacher certification and emergency authorizations of employment.” Mont. Code Ann. § 20-3-106(2). HB 359 requires suspension and/or revocation of teacher’s certificates if the teacher, or an invited guest, “reads children’s books and engages in other learning activities with minor children present” while “adopt[ing] a flamboyant or parodic [male or female] persona with glamorous or exaggerated costumes and makeup.”

27. Defendant City of Helena is an incorporated municipality in Lewis and Clark County in the State of Montana. The City of Helena, acting through its decision-making officials, is responsible for awarding permits for events held within the city limits. Following the passage of HB 359, and pursuant to official city policy, the City of Helena denied Plaintiff Montana Pride’s application for event permits.

## LEGAL BACKGROUND

### A. Legislative History and Intent

#### i. Legislative History

28. Representative Braxton Mitchell introduced HB 359 on January 31, 2023, as a ban on drag performances in schools, libraries, and businesses with minors present. At first, “drag performance” was defined as “a performance in which a performer exhibits a gender identity that is different than the performer’s gender assigned at birth using clothing, makeup, or other physical markers and sings, lip syncs, dances, or otherwise performs for entertainment to appeal to a prurient interest.”

29. The bill was amended repeatedly—and roved between overt anti-LGBTQ+ discrimination and a coherent, though unnecessary, attempt to prevent sexual nudity in public spaces where minors are present.

30. After several substantially different amendments had been circulated and debated at length, a fourth version made its way to a free conference committee on April 26, 2023. Free conference committees reconcile differing versions of bills passed by the House and Senate.

Their format does not allow for the same robust debate and public comment as a committee hearing.

31. During the free conference committee, bill sponsor Mitchell introduced the fifth and final version of the bill. In its final form, HB 359 bans “drag story hours” in schools and libraries and prohibits businesses and state-funded entities from allowing minors to see so-called “sexually oriented performances.” It also created a private right of action to enforce any violation and became effective immediately.

32. Six legislators comprised the free conference committee that passed the final version of HB 359. Senator Andrea Olsen expressed concern that HB 359’s definitions of “drag queen,” “drag king,” and “drag story hour” would apply to Mrs. Doubtfire, Dolly Parton, Shakespeare in the Parks, Hollywood awards shows, and nearly any theater class. Mitchell disagreed, without further explanation.

33. Public commentary was limited to a total of ten minutes. Commenters described additional absurd implications of the newly amended bill, which could reach: a female performer dressed as a male

clown;<sup>2</sup> transgender library employees;<sup>3</sup> a recent performance of *Twelfth Night* at Carroll College;<sup>4</sup> Disney princesses;<sup>5</sup> and students costumed as past presidents.<sup>6</sup>

34. Olsen moved to amend Mitchell's version to remove all reference to drag. The motion did not pass, and the free conference committee passed Mitchell's version of the bill by a vote of 4 to 2.

**ii. Legislative Intent & Animus**

35. The legislative history and debate surrounding HB 359 evidences that anti-LGBTQ+ animus motivated proponents and propelled this bill to its final form. While proponents of HB 359 purported to support the bill's unconstitutional limitations on speech to "protect" children, they instead targeted protected forms of expression that made them uncomfortable.

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<sup>2</sup> Mont. Leg., Free Conference Comm. Hrg. at 12:12:30 (Apr. 26, 2023), available at [https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230426/-1/49764#handoutFile\\_](https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230426/-1/49764#handoutFile_). (SK Rossi, Human Rights Campaign).

<sup>3</sup> *Id.* at 12:14:15 (Sam Forstag, Montana Library Association).

<sup>4</sup> *Id.* at 12:14:30.

<sup>5</sup> *Id.* at 12:15:45 (Shawn Reagor, Montana Human Rights Network).

<sup>6</sup> *Id.* at 12:16:15.

36. Existing Montana law already protects youth from obscene materials to the full extent allowable under the Constitution. Mont. Code Ann. § 45-8-201; *see* Mont. Leg., S. Judiciary Comm. Hrg. at 8:55:17 (Apr. 4, 2023) (“We already prohibit children from . . . viewing obscene material, viewing pornography, going to strip clubs . . . This is not any type of First Amendment violation, and it’s time we add drag shows to that list.”) (Rep. Mitchell, introductory remarks).<sup>7</sup>

37. Adding drag shows to the list is unnecessary because “obscene” drag shows are already on the list. Montana law imposes criminal penalties on anyone who “performs an obscene act or otherwise presents an obscene exhibition of the person’s body to anyone under 18 years of age”—whether in drag or not. Mont. Code Ann. § 45-8-201(1)(d).

38. Thus, there are only two options: either HB 359 is superfluous, or it redefines “obscene” beyond constitutional limits to include drag performances, drag story hours, and a spiraling list of nebulously defined “sexually oriented performances.”

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<sup>7</sup> Available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/47987?agendaId=269135>

39. Although a prior version of the bill used “obscene” to define the proscribed conduct, the final version removed “obscene” as a modifier. Proponents intended the bill to reach beyond the ambit of Montana law that defines “obscenity” in line with “contemporary community standards.” Mont. Code Ann. § 45-8-201(2)(b)(i). The effect was to collapse the distinction between unprotected obscene speech and protected artistic and personal expression.

40. Sponsors and proponents sought to proscribe drag shows and stifle the expression of individuals who do not conform to conventional gender presentations. Drag is not definitionally obscene; it is a form of expression that exaggerates, satirizes, and critiques gender. A drag performance may be obscene, just as dance performances, films, and still images may be obscene. But nothing about HB 359’s “drag queen”—“a male or female performer who adopts a flamboyant or parodic feminine persona with glamorous or exaggerated costumes and makeup”—is inherently obscene.

41. HB 359 adds nothing to existing protections for children in Montana. It targets personal, artistic, and political expression and speech.

42. The Legislature’s animus was overt.

43. Senator Chris Friedel—who co-sponsored the bill and participated in the free conference committee not as a member but through public comment—testified that he introduced amendments based on his belief that “we need to keep things like sexual orientation out of schools and out of libraries.”<sup>8</sup>

44. During public comment on HB 359, Mitchell attacked bill opponents personally. He said, “There was mention about the amount of testimony against this bill today, but I’m sure if we got every person in this state who is working today and actually has a job unlike most of these folks here it seems like I’m sure we’d see a pretty different ratio.”<sup>9</sup>

45. In closing, Mitchell highlighted his own animus against LGBTQ+ individuals further: “Due to the mature themes surrounding drag shows and the exposure to inappropriate activities, children may

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<sup>8</sup> Mont. Leg., Free Conference Comm. Hrg. at 12:11:00 (Apr. 26, 2023), *available at* [https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230426/-1/49764#handoutFile\\_](https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230426/-1/49764#handoutFile_).

<sup>9</sup> Mont. Leg., S. Judiciary Comm. Hrg. at 11:10:30 (Apr. 4, 2023), *available at* <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/47987?agendaId=269135>

adopt and accept certain stereotypes or attitudes that could lead to social, psychological, linguistic difficulties. Children may also create an inadequate understanding of gender roles and experiences, which is damaging to their long-term social and emotional development.”<sup>10</sup>

46. After the legislative session, another co-sponsor, Senator Theresa Manzella, posted a meme to Instagram:



### B. HB 359's Impact

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<sup>10</sup> *Id.* at 11:10:05.

47. Although they were motivated exclusively by anti-LGBTQ+ animus, HB 359’s supporters ultimately took a blunt instrument to Montanans’ First Amendment rights, clumsily attacking not only “drag story hours” but broad categories of protected speech and expressive activity. As passed, HB 359 includes two categories of restrictions. First, it bans “drag story hours” in schools and libraries. Second, it prohibits or restricts “sexually oriented performances” in various places.

**i. Drag Story Hours**

48. HB 359 bans “drag story hours” in schools and libraries that receive any state funds. Neither “school” nor “library” is defined in the bill, and they do not appear to be limited to government entities.

49. “Drag story hour” is defined as “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.” HB 359, § 1(3).

50. The terms “drag king” and “drag queen” are defined as “a male or female performer who adopts a flamboyant or parodic [male or female] persona with glamorous or exaggerated costumes and makeup.” HB 359, § 1(1), (2). A person need not dress in a manner incongruous with their biological sex or gender identity to be a “drag king” or “drag queen.”

51. A person who violates the “drag story hours” restriction faces criminal penalties. Upon conviction, “[a] library, a school, or library or school personnel, [or] a public employee” “shall be fined \$5,000.” HB 359, § 3(4). If the person is a schoolteacher, administrator, or specialist, “proceedings must be initiated to suspend the . . . certificate of the offender under [Montana Code Annotated §] 20-4-110.” *Id.* Upon a second or subsequent conviction, “proceedings must be initiated to permanently revoke the teacher, administrator, or specialist certificate of the offender.” *Id.* (emphasis added).

52. Any person involved in a drag story hour—“a person who knowingly promotes, conducts, or participates as a performer”—is subject to civil liability. HB 359, § 4(1). Any minor who attends a drag story hour—even with a guardian’s consent—may sue within ten years. HB 359, § 4(3). Plaintiffs are guaranteed statutory damages of \$5,000 and attorney’s fees and costs. Plaintiffs are also entitled to “actual damages, including damages for psychological, emotional, economic, and physical harm.” HB 359, § 4(2). The citizen-suit provision is not limited to drag story hours occurring after HB 359’s effective date.

ii. **Sexually Oriented Performances**

53. In addition to the drag story hour ban, HB 359 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.” HB 359, § 3(3). It prevents “sexually oriented businesses” from hosting “sexually oriented performances” when a minor is on the premises. HB 359, § 2. HB 359’s definitions of “sexually oriented,” “sexually oriented performances,” and “sexually oriented businesses” go far beyond obscenity—unsurprisingly, as it already is illegal to display or disseminate obscenity to minors. *See* Mont. Code Ann. § 45-8-201.

54. “Sexually oriented performance” is defined as “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.

HB 359, § 1(10). The definition is not limited to live events.

55. “Stripping” is not limited to performances involving nudity; it is defined as the “removal or simulated removal of clothing in a sexual manner for” entertainment. HB 359, § 1(11).

56. “Sexual conduct” is not defined within the bill, and no cross-reference is given within the definition of “sexually oriented performance.” But another provision within the bill cross-references Montana Code Annotated § 45-5-625 to define the term “sexual conduct.” HB 359, § 1(8). Thus, it is unclear whether the meaning of “sexual conduct” within the context of “sexually oriented performances” is limited to the definition set forth in § 45-5-625.

57. “Sexually oriented” is defined as “any simulation of sexual activity, stripping, salacious dancing, any lewd or lascivious depiction or description of human genitals or of sexual conduct as defined in [Montana Code Annotated §] 45-5-625.” HB 359, § 1(8).

58. “Sexually oriented performances” are prohibited in schools and libraries that receive any state funding, HB 359, § 3(1), (2); “on public property in any location where the performance is in the presence of an individual under the age of 18,” HB 359, § 3(3)(a); and “in a location

owned by an entity that receives any form of funding from the state,” even if minors are not present, HB 359, § 3(3)(b).

59. “Sexually oriented performances” are restricted in so-called (and circuitously defined) “sexually oriented businesses.” A “[s]exually oriented business” is defined as “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.

HB 359, § 1(9).

60. Violators of the rules governing “sexually oriented performances” face various, overlapping penalties. Business owners, operators, managers, and employees are subject to mandatory criminal fines ranging from \$1,000 to \$10,000 and the loss of the business’s license. Upon conviction, “[a] library, a school, or library or school personnel, a public employee, [an entity that receives state funds], or an employee of the entity” “shall be fined \$5,000.” HB 359, § 3(4).

61. The same civil liability described in Paragraph 51 applies to “a person who knowingly promotes, conducts, or participates as a performer” in a “sexually oriented performance.” HB 359, § 4(1).

62. Montana’s existing statutory restriction on obscenity, Mont. Code Ann. § 45-8-201, incorporates the *Miller* test. Under *Miller v. California*, “[s]tate statutes designed to regulate obscene materials must be carefully limited.” 413 U.S. 15, 23–24 (1973). Laws proscribing obscenity “must be specifically defined,” and “limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Id.* at 24. HB 359 is not “specifically defined”; it is not limited to “patently offensive” performances; and it has no carveout for works with “serious literary, artistic, political, or scientific value.”

## FACTUAL ALLEGATIONS

### A. Cancellation of Adria Jawort’s Library Lecture

63. Plaintiff Adria Jawort regularly speaks to organizations and institutions, including libraries, about LGBTQ+ and Indigenous issues. Jawort’s talks are informative and audience-appropriate.

64. Jawort was scheduled to give such a talk at the Butte-Silver Bow Public Library on June 2, 2023, as part of a “First Friday” lecture series. The talk Jawort planned to give is one that she has given at other organizations and institutions, including libraries, in the past. It is designed for all ages.

65. The day before the lecture, a librarian notified Jawort that Defendant Gallagher had canceled the event because “it is too much of a legal risk to have a transgendered person in the library.”

66. A group, “White Lives Matter,” claimed responsibility for the cancellation on social media, posting to Telegram:

Victory again! Thanks to our campaign of complaints to the city, a disgusting 43 YEAR OLD MAN who wears dresses . . . was barred from reading at the Butte public library today! Just look at that pic [of Adria dressed for Halloween], proof that all of our enemies are mentally ill and pedophiles. Why else have so much grief on a banner saying ‘pedophiles not welcome’ unless they take offense because they are pedophiles? No groomers allowed, NOT IN OUR TOWN [crying with laughter emoji] [winking emoji]

67. After cancelling Jawort’s lecture, the City and County of Butte-Silver Bow posted the following message to its Facebook page:

PSA

In accordance with Governor Gianforte signing HB359 into law, our county cannot allow an event where a drag king or

queen reads children's books and engages in other learning activities with minor children present. Due to this law, we have had to cancel the speaker at the Butte-Silver Bow Library that was scheduled for Friday.

68. In later communications with Jawort, Defendant Gallagher reiterated that he canceled the lecture based on his belief that the lecture would violate HB 359.

69. Jawort is a transgender woman. She does not regularly perform as a drag queen or a drag king (though she has dressed in drag occasionally). When she gives talks to libraries and other institutions about LGBTQ+ and Two-Spirit history in Montana, she appears as herself—generally wearing dark or purple lipstick, dark eyeliner, and black dresses.

70. Had she given the scheduled lecture on June 2, 2023, Jawort would have discussed timely, politically significant issues—issues that are particularly relevant on the heels of a legislative session responsible for a number of laws targeting the LGBTQ+ community, including HB 359.

71. Jawort's lecture was canceled because she is transgender, because she wears makeup, and/or because she intended to speak about LGBTQ+ issues. No matter what combination of potential factors led to

the cancellation, the cancellation violated her constitutional rights to free speech and equal protection.

72. The cancellation caused Jawort emotional and reputational damage. By suggesting that she poses a threat to minors and cancelling her publicized lecture, Defendant Gallagher harmed Jawort's reputation as a speaker and writer on gender identity issues.

73. Jawort has experienced stress and sleeplessness as a result of the cancellation. She has been targeted on social media, leading her to reasonably fear for her safety.

#### **B. City of Helena's Denial of Permits to Montana Pride**

74. Plaintiff Montana Pride has hosted the Montana Pride event in Helena, Montana for eight years. The event attracts thousands of attendees from across Montana and the United States.

75. The Montana Pride events often include drag shows, a parade, artisan markets, local business booths, educational events, and other forms of entertainment and community-centered activities. The annual Montana Pride event is an all-ages celebration of LGBTQ+ joy and community.

76. In 2023, the Montana Pride event is scheduled to run from July 30 to August 6.

77. In accordance with municipal ordinances, Montana Pride sought to comply with all applicable City of Helena permitting regulations.

78. On July 13, 2023, Defendant City of Helena withheld permits for the Montana Pride event.

79. As of the date of filing, the permits have not been issued.

80. In denying these permits to Montana Pride, Defendant City of Helena acted through its designated decision-makers to enforce municipal policy.

81. The City of Helena denied these permits because the planned events included drag performances.

82. The previous year, in 2022, Defendant City of Helena approved Montana Pride's permit requests for the same event components that the city denied in 2023.

### C. Chilling Effect

83. Jawort and Montana Pride may be the first to have a planned event publicly cancelled or refused as a result of HB 359, but they will not be the last. No one knows what HB 359 actually prohibits.

84. Already, HB 359 has restricted the Imperial Court's usual activities. The Imperial Court performs drag shows in a variety of settings for a variety of audiences, tailoring its all-audience performances to ensure they are age-appropriate. Since HB 359's passage, the Imperial Court has suffered actual and ongoing harm: at least one venue has cancelled a performance out of fear of liability, and other venues and organizations have terminated ongoing relationships or modified scheduled events. Fearing criminal and civil sanctions, drag performers have dropped out of scheduled performances. Moreover, the Imperial Court has been unable to ascertain whether offering future performances in various venues will violate HB 359.

85. HB 359 has also restricted BumbleBee's activities, even though BumbleBee does not host drag story hours. BumbleBee's instructors and students were denied an opportunity to perform at a local brewery, where they had previously performed, due to concerns about

HB 359. BumbleBee's clients have expressed concern about possible arrest and criminal liability for public performances under HB 359, even though the performances are permissible under *Miller*.

86. Related to Pride events across Montana in 2023, the Imperial Court, the Center, and the Great Falls LGBTQ+ Center have fielded innumerable questions from members about what HB 359 does and does not allow. The organizations have been unable to answer these questions despite carefully analyzing HB 359. Members cannot reasonably determine how to comply with the law because its language is ambiguous.

87. Montana Book Company and Imagine Nation have hosted and plan to continue to host all-audience book readings and events featuring drag performers. These organizations have been unable to determine whether their events will subject them to criminal penalties.

88. The Myrna Loy and The Roxy receive funding from ticket sales, memberships, and government funding, including state funds. Because HB 359 is vague and ambiguous, The Myrna Loy and The Roxy have been unable to determine whether they will be subject to criminal penalties if they continue to show acclaimed films with artistic merit to

age-appropriate audiences using Motion Picture Association (“MPA”) rating guidelines.

89. In June 2023, The Roxy hosted Montana’s first LGBTQ+ film festival, titled “Queerwest Film Fest.” As part of Queerwest Film Fest, The Roxy hosted a live drag show with no age limit. The drag performers demonstrated their art form through both dance and comedy routines, some of which included the stripping of outer layers of clothing and the use of prosthetic breasts. There was no nudity by conventional definition at the event, nor was there exposure of prosthetic nipples.

90. The Roxy intends to host Queerwest again in the future, but HB 359 appears to prohibit many of the films and events that are integral to Queerwest, including the drag show.

91. HB 359 has chilled the Imperial Court, BumbleBee, the Center, the Great Falls LGBTQ+ Center, Montana Book Company, Imagine Nation, The Myrna Loy, and The Roxy from engaging in protected speech.

92. The confusion caused by HB 359 is not limited to organizations and their members. Based on the overbroad prohibitions on “drag queens,” “drag kings,” and “drag story hours,” Montanans will

face criminal liability for protected speech. HB 359’s definitions reach any activity involving reading children’s books and engaging in learning activities with minors when the reader appears in any gendered costume. HB 359, § 1(1), (2), (3). Such activities are prohibited in all schools and libraries that receive state funding.

93. Plaintiffs Jawort, Corcoran, and the Imperial Court face criminal, civil, and occupational penalties for allowing or participating in costumed learning activities.

94. HB 359 restricts the exposure of transgender men’s chests. Another bill passed by the 2023 Montana Legislature, Senate Bill 458, defines all humans as “female” or “male” based on their chromosomes and reproductive capacity. Sen. B. 458, § 1, Mont. Leg., 68th. Sess. (2023). HB 359 bans many performances that feature “the purposeful exposure, whether complete or partial” of “a female breast, if the breast is exposed below a point immediately above the top of the areola.” HB 359, § 1(10)(a)(i). Together, these bills ostensibly prohibit exposure of a transgender man’s chest in businesses that serve alcohol when minors are present, HB 359, §§ 1(9), 2; “on public property in any location where the performance is in the presence of an individual under the age of 18”—

e.g., sidewalks and streets, HB 359, § 3(a); and “in a location owned by an entity that receives any form of funding from the state,” even if the audience is restricted to adults, HB 359, § 3(b).

95. HB 359 likewise restricts exposure of prosthetic cleavage and expressly differentiates “female breast[s]” from “prosthetic . . . breasts.” HB 359, § 1(10)(a)(i), (ii). While performances that expose a female breast are restricted only if the breast “is exposed below a point immediately above the top of the areola,” a performance that exposes any part of a prosthetic breast is barred. *Id.* Human cleavage is allowed, whereas prosthetic cleavage is not. Thus, the bill directly targets women or men with prosthetic breasts based on their expressive activity.

96. HB 359 restricts performances that involve “stripping”—defined as removing or pretending to remove clothing “in a sexual manner”—even if nudity does not result. “Sexual manner” is not defined. HB 359 thus encompasses many non-obscene theatrical, film, and drag performances—even a performance that includes costume changes. HB 359 prohibits these performances in businesses that serve alcohol when minors are present, HB 359, §§ 1(9), 2; “on public property in any location where the performance is in the presence of an individual under

the age of 18,” HB 359, § 3(a); and “in a location owned by an entity that receives any form of funding from the state,” even if the audience is restricted to adults, HB 359, § 3(b).

97. HB 359 defines “sexually oriented” to include protected First Amendment activities, including “any simulation of sexual activity,” “salacious dancing,” and “any lewd or lascivious depiction or description of human genitals or sexual conduct.” HB 359, § 1(8). Though the term “sexually oriented” is not used as a stand-alone term elsewhere, the terms “sexually oriented performance” and “sexually oriented business” are. Montana’s Bill Drafting Manual provides that a word should not be defined if it is never used in the bill and that “[i]f a bill deletes all reference to a defined term, the definition of that term must also be deleted.” Mont. Bill Drafting Manual § 4-9(7), (8) (68<sup>th</sup> Leg., 2022).<sup>11</sup> At best, it is unclear and vague whether HB 359 prohibits any conduct or performances that could be defined as “sexually oriented.”

98. As a result of this mountain of confusing and overbroad definitions, Plaintiffs have well-founded fears of criminal and civil

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<sup>11</sup> Available at <https://leg.mt.gov/content/Publications/2022-bill-drafting-manual.pdf>.

liability. Each organizes, hosts, or participates in costumed learning activities or in events that could be “sexually oriented,” or where prosthetic cleavage may be exposed, or where “stripping” may occur.

99. For example, BumbleBee publicly performs dances that may be described as “salacious.” Montana Book Company sells and displays books that include “lewd or lascivious depiction[s] or description[s] of human genitals or sexual conduct.” The Myrna Loy and The Roxy show a broad spectrum of movies from around the world, including classic films and first-run new releases, many of which include “sexually oriented performances.”

100. In 2023, The Myrna Loy and The Roxy showed the new-release film *Asteroid City*—a quirky, visually stunning film about children scientists forced to quarantine during a stargazer convention. In this PG-13 film, the actress Scarlett Johansson disrobes and steps into a bathtub. This scene meets HB 359’s definition of “stripping.”

101. The Roxy also hosts a monthly series entitled “Out at the Roxy,” where The Roxy screens movies and holds events that celebrate LGBTQ+ pride. At past “Out at the Roxy” events, The Roxy has hosted Q&A sessions with drag queens. At a future “Out at the Roxy” event,

The Roxy intends to screen the PG-rated 1953 film *Glen or Glenda? Glen or Glenda?* includes a scene involving what appears to be “stripping” under HB 359.

102. Even with parental consent, a child who views a PG-13 film that includes a “sexually oriented performance” may sue under HB 359’s private right of action ten years later. Equally illogically, a seventeen-year-old minor who legally attends an R-rated movie<sup>12</sup> containing a “sexually oriented performance” may sue the theater.

103. Finally, HB 359 prohibits performances with artistic, scientific, political, and literary merit that feature complete or partial nudity or sexual content—even if the performances are not live and even if they are performed for an audience exclusively comprising adults—whenever the performance is “in a location owned by an entity that receives any form of funding from the state.”

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<sup>12</sup> The MPA restricts R-rated movies to seventeen-year-old individuals or younger individuals who are accompanied by a parent or adult guardian. HB 359 considers minors to be individuals under the age of eighteen.

## CLAIMS FOR RELIEF

### COUNT I:

#### Violation of Free Speech, U.S. Const. amend. 1 (as applied to Plaintiff Jawort)

42 U.S.C. § 1983

104. Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.

105. The First Amendment protects against state action that “abridg[es] the freedom of speech.” U.S. Const. amend. I.

106. Through her lecture at the Butte-Silver Bow Public Library, Jawort intended to engage in a constitutionally protected activity.

107. In cancelling Jawort’s speech, Defendant Gallagher intended to and in fact did suppress Jawort’s protected speech, denying her the opportunity to speak and denying the audience the opportunity to listen.

108. Defendant Gallagher’s cancellation of Jawort’s speech was motivated by the content of her protected speech, in violation of the First Amendment.

109. Defendant Gallagher, acting under color of state law, deprived Jawort of her rights under the United States Constitution.

110. HB 359 violates the First Amendment as applied to Jawort. Further implementation of HB 359 by Defendant Knudsen will result in further violation of Jawort's First Amendment rights.

**COUNT II:**  
**Violation of Equal Protection, U.S. Const. amend. XIV, § 2**  
**(as applied to Plaintiff Jawort)**

42 U.S.C. § 1983

111. Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.

112. The Fourteenth Amendment bars states from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV.

113. The Fourteenth Amendment protects against discrimination on the basis of sex. Sex-based discrimination is subject to intermediate scrutiny.

114. The Fourteenth Amendment protects against discrimination arising from animus.

115. When he cancelled Jawort's lecture, Defendant Gallagher violated her Equal Protection rights by discriminating against her on the basis of her gender identity.

116. HB 359 violates the Fourteenth Amendment as applied to Jawort. Further implementation of HB 359 by Defendant Knudsen will result in further violation of Jawort’s Fourteenth Amendment rights.

**COUNT III:**  
**Violation of Free Speech, U.S. Const. amend. 1**  
**(as applied to Plaintiff Montana Pride)**

42 U.S.C. § 1983

117. Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.

118. The First Amendment protects against state action that “abridg[es] the freedom of speech.” U.S. Const. amend. I.

119. Through the planned Montana Pride event, Montana Pride intended to engage in a constitutionally protected activity.

120. In denying event permits to Montana Pride, Defendant City of Helena intended to suppress and in fact is suppressing Montana Pride’s protected speech, denying it the opportunity to host constitutionally protected events, and denying the audience the opportunity to attend these events.

121. Defendant City of Helena's denial of Montana Pride's permits was motivated by the content of the protected speech planned for the event, in violation of the First Amendment.

122. Permit laws that restrict First Amendment rights must be content-neutral. Defendant City of Helena, in enforcing HB 359 and denying permits to Montana Pride, engaged in an unconstitutional content-based restriction of speech.

123. Defendant City of Helena, acting under color of state law, deprived Montana Pride of its rights under the United States Constitution.

124. HB 359 violates the First Amendment as applied to Montana Pride. Further implementation of HB 359 by Defendants Knudsen and the City of Helena will result in further violation of Montana Pride's First Amendment rights.

**COUNT IV:**  
**Violation of Free Speech, U.S. Const. amend. 1, as Incorporated Against**  
**the States, U.S. Const. amend. XIV**  
**(facial challenge to HB 359)**

125. Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.

126. Defendants Knudsen and Arntzen seek to expressly restrict and chill speech and expression protected by the First Amendment based on its content, its viewpoint, and the identity of the speaker.

127. HB 359's restrictions are content- and viewpoint-based. Thus, it is "presumptively unconstitutional" and subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

128. HB 359 does not satisfy strict scrutiny. HB 359 is not narrowly tailored to the Government's interest in protecting minors from obscenity. Preexisting Montana law fully restricts the display and dissemination of obscene materials to minors.

129. The Government has no compelling interest in protecting children from drag story hours and/or drag performances.

130. Even if the Government did have a compelling interest in protecting children from drag story hours and/or drag performances, HB 359 is not narrowly tailored to that interest. It bans innocent performances, whether they feature drag or not. Further, it prohibits protected expressive activity that is presented to adult audiences.

131. HB 359 is impermissibly vague. A reasonable person cannot know what is and what is not restricted by the law.

132. HB 359's unconstitutional applications are realistic, not fanciful, and their number is disproportionate to the bill's lawful sweep. *United States v. Hansen*, 599 U.S. \_\_\_, 5 (2023).

133. HB 359's overbreadth and vagueness chills Montanans' First Amendment rights.

**COUNT V:**  
**Violation of Due Process, U.S. Const. amend. V, as Incorporated**  
**Against the States, U.S. Const. amend. XIV**  
**(facial challenge to HB 359)**

134. Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.

135. HB 359 imposes criminal penalties, but it does not define the criminal offenses "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

136. Plaintiffs cannot know how to avoid criminal liability for engaging in speech and expressive conduct. As a result of HB 359's vagueness, Plaintiffs have been forced to refrain from engaging in constitutionally protected activity.

137. HB 359 is void for vagueness.

## PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

- a. Enter judgment for Plaintiffs and against Defendants;
- b. Grant Plaintiffs a preliminary injunction to prevent all Defendants from enforcing HB 359;
- c. Declare HB 359 facially unconstitutional;
- d. Issue an award of actual and general damages in favor of Plaintiffs Jawort and Montana Pride and against Defendants Gallagher and the City of Helena, respectively, in an amount to be determined at trial;
- e. Issue an award of punitive damages in favor of Plaintiffs Jawort and Montana Pride and against Defendants Gallagher and the City of Helena, respectively;
- f. Award Plaintiffs their costs, disbursements, and reasonable attorney's fees incurred in bringing this action, pursuant to 42 U.S.C. § 1988; and
- g. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 17th day of July, 2023.

*/s/ Constance Van Kley* \_\_\_\_\_

Constance Van Kley  
Rylee Sommers-Flanagan  
Niki Zupanic  
Upper Seven Law

*Attorneys for Plaintiffs*

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

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

Plaintiffs-Appellees

v.

AUSTIN KNUDSEN, et al.,

Defendants-Appellants.

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

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**APPELLANTS' EXCERPTS OF RECORD VOLUME 3 OF 3**

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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

Constance Van Kley  
Rylee Sommers-Flanagan  
Niki Zupanic  
Upper Seven Law  
P.O. Box 31  
Helena, MT 59624  
(406) 306-0330  
constance@uppersevenlaw.com  
rylee@uppersevenlaw.com  
niki@uppersevenlaw.com

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA  
BUTTE DIVISION**

THE IMPERIAL SOVEREIGN COURT  
OF THE STATE OF MONTANA; ADRIA  
JAWORT; RACHEL CORCORAN;  
MONTANA BOOK COMPANY; IMAGINE  
BREWING COMPANY, LLC d/b/a  
IMAGINE NATION BREWING  
COMPANY; BUMBLEBEE AERIAL  
FITNESS; THE WESTERN MONTANA  
COMMUNITY CENTER; THE GREAT  
FALLS LGBTQ+ CENTER; and THE  
MYRNA LOY,

*Plaintiffs,*

vs.

AUSTIN KNUDSEN; ELSIE ARNTZEN;  
and J.P. GALLAGHER,

*Defendants.*

Cause No. CV-23-50-BU-BMM

**Complaint**

## INTRODUCTION

1. During the 2023 Legislative Session, the Montana Legislature passed the nation’s first ban on “drag story hours”—a breathtakingly ambiguous and overbroad bill, motivated by anti-LGBTQ+ animus.

2. House Bill 359 (“HB 359”) prohibits drag performers from leading story hours in schools and libraries, which is an unconstitutional content- and viewpoint-based restriction on free speech. Ex. 1, HB 359, Mont. Leg., 68th Sess. (2023). But that’s not all: the bill bans reading to a child in a library in a superhero costume, conducting classroom activities dressed as Ms. Frizzle, inviting a Disney princess impersonator into the classroom, and staging a production of Shakespeare’s *As You Like It*. These restrictions apply regardless of a person’s gender identity and sex. *See* Tori Otten, The New Republic, *Montana’s New Anti-Drag Law Is So Vaguely Worded It Could Target Dolly Parton* (May 24, 2023).<sup>1</sup>

3. Additionally, HB 359 limits First Amendment activities of artists, businesses, and entities that receive state funds. Displaying or

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<sup>1</sup> *Available at* <https://newrepublic.com/post/172959/montana-anti-drag-law-vaguely-worded-target-dolly-parton>

disseminating obscene materials and performances has long been illegal in Montana. Mont. Code Ann. § 45-8-201. HB 359 creates new, confusing restrictions on “sexually oriented performances”—with a definition that, *inter alia*: allows the display of human cleavage but not prosthetic cleavage; restricts “stripping,” regardless of whether nudity results; and may—this is unclear—prevent allowing minors to view “any simulation of sexual activity, . . . salacious dancing, [or] any lewd or lascivious depiction or description of human genitals.” Unlike the preexisting obscenity statute, HB 359 does not incorporate the *Miller* test—the classic definition of obscenity—which safeguards artistic expression, political speech, and science. Worse still, an entity that receives *any* state funds—e.g., any art museum or independent theater—cannot display a live or prerecorded performance with essentially any sexual content, regardless of artistic merit and even if the audience is limited to adults.

4. HB 359’s penalty provisions are as confusing as they are draconian. Everyone involved in putting on a “drag” (read: costumed) story hour or so-called “sexually oriented performance” can be sued within ten years of the event by a minor who attends the performance—even if the minor and their guardian consented at the time—with

statutory damages and attorney's fees assured to the plaintiff. If the person who violates HB 359 is a library, school, teacher, school or library administrator, "entity that receives any form of funding from the state," or employee of such an entity, they shall be fined \$5,000. Moreover, teachers and other school personnel will be suspended for a year; upon a second offense, they will lose their certificates. And if the violator is a business that serves alcohol, it will be fined between \$1,000 and \$10,000 per violation and ultimately lose its business license.

5. HB 359 is a Frankenstein's monster that manages to pull together the worst of prior versions of the bill and incorporate all of the constitutional problems in drag bans recently struck down elsewhere. HB 359 is calculated to target the LGBTQ+ community, but the bill overshoots this sinister mark. HB 359 threatens teachers, artists, small businesses, and cultural and scientific institutions with criminal and professional sanctions.

## **JURISDICTION AND VENUE**

6. Plaintiffs bring this action under 42 U.S.C. § 1983. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise

under the Constitution and laws of the United States and involve the assertion of a deprivation, under color of state law, of a right under the Constitution of the United States.

7. This Court has personal jurisdiction over Defendant Austin Knudsen. Defendant Knudsen resides in and maintains his office in Montana. He is sued in his official capacity.

8. This Court has personal jurisdiction over Defendant Elsie Arntzen. Defendant Arntzen resides in and maintains her office in Montana. She is sued in her official capacity.

9. This Court has personal jurisdiction over Defendant J.P. Gallagher. Defendant Gallagher resides in and maintains his office in Montana. He is sued in his individual and official capacity.

10. Venue is proper in the Butte Division of the District of Montana because Butte, Montana, is home to Defendant Gallagher and the Office of the Chief Executive of the City-County of Butte-Silver Bow. 28 U.S.C. § 1391; D. Mont. L.R. 3.2(b).

11. Venue is also proper in the Butte Division because a substantial part of the events giving rise to these claims occurred in Butte, Montana.

## PARTIES

### A. Individual Plaintiffs

12. Adria Jawort is a resident of Billings, Montana. Jawort is a transgender woman, a member of the Northern Cheyenne Tribe, and a published author. She regularly speaks to libraries and other organizations across the State of Montana about Two-Spirit and transgender issues.

13. Rachel Corcoran is a resident of Billings, Montana. Corcoran is a teacher in Billings Public Schools. While teaching, she has dressed up as fictional and historic male and female characters to connect with students, enhance learning, and build community. For example, she has dressed as a crazy cat lady, the rapper Eazy-E, Tina Turner, Waldo (of *Where's Waldo?* fame), Lilo (from *Lilo & Stitch*), and Princess Bubblegum (from *Adventure Time*). While in gendered costumes, she reads to students and engages in learning activities at school. By the terms of HB 359, she is a “drag queen” or “drag king” participating in “drag story hour” at such times. Thus, she faces criminal penalties, lawsuits, and revocation of her teaching certificate.

## **B. Business and Nonprofit Plaintiffs**

14. The Imperial Sovereign Court of the State of Montana (“the Imperial Court”) is a Montana-based nonprofit membership organization founded in 1993 that works to educate and advocate for LGBTQ+ individuals and allies through the production of community-based drag performances. The Imperial Court’s drag performances explore multiple gender expressions in an entertaining and educational atmosphere and aim to create a safe and welcoming environment. The Imperial Court also provides an LGBTQ+ scholarship and holds events to raise money for other Montana charities. Since the Legislature passed HB 359, the Imperial Court has had multiple performances cancelled or modified by partner organizations, and it anticipates that HB 359 will have a profound debilitating effect on its ability to pursue its mission.

15. Montana Book Company is an independent LGBTQ+ owned bookstore in Helena, Montana. Founded in 1978, Montana Book Company is a book retailer and event space that hosts readings and performances. In aiming to create an open and inclusive community space for marginalized populations in Montana, Montana Book Company has hosted and plans to continue to host author readings and age-

appropriate drag events open to the public. Montana Book Company has received state funds and leases space from an entity that has received state funds.

16. Imagine Brewing Company, LLC, d/b/a Imagine Nation Brewing Company (“Imagine Nation”), is a brewery and community center located in Missoula, Montana. Imagine Nation has hosted and plans to again host all-ages drag shows and drag story hours, during which it sells alcoholic beverages. Imagine Nation has not received state funds but intends to apply for such funds when available. Imagine Nation has entered into a lease-to-own agreement with the building’s owners, the former proprietors of the business, who received state funds in connection with the business. Imagine Nation has a lending library on-site.

17. BumbleBee Aerial Fitness (“BumbleBee”) is a fitness studio located in Helena, Montana. BumbleBee teaches aerial arts and choreography to students ages 14 and older, and pole fitness to students ages 18 and up. BumbleBee’s instructors and students perform before live audiences. BumbleBee has had events canceled due to concerns about HB 359.

18. Founded in 1999, The Western Montana Community Center (“the Center”) is Western Montana’s LGBTQ+ community center, located in Missoula, Montana. The Center offers community events, health and public safety support, and space for LGBTQ+ individuals, groups, and communities to meet and provide programming. The Center recently produced Missoula Pride, an annual event that celebrates the LGBTQ+ community through storytelling, dancing, a parade, and drag performances.

19. The Great Falls LGBTQ+ Center aims to enhance and sustain the health and well-being of the LGBTQ+ community through activities, programs, and services. It organizes events for all audiences featuring drag performances, including Pride.

20. The Myrna Loy is an independent nonprofit arts and culture center established in 1976. The Myrna Loy operates a movie theater and live performance venue in Helena, Montana, provides arts education experiences to thousands of students annually, and awards grants to Montana artists. The Myrna Loy leases a former jail building from Lewis and Clark County, having transformed it into a performance space and movie theater more than 30 years ago. The Myrna Loy often presents

films and live performances with artistic and educational merit that it reasonably believes may violate HB 359.

### **C. Defendants**

21. J.P. Gallagher is the Chief Executive of the City-County of Butte-Silver Bow, Montana. Gallagher decided to cancel Plaintiff Jawort's lecture at the Butte-Silver Bow Library.

22. Austin Knudsen is the Attorney General for the State of Montana. Knudsen oversees the enforcement of the State's criminal laws. HB 359 amended Title 20 of the Montana Code to prohibit "engag[ing] in . . . learning activities with minor children present" at libraries and schools when a performer "adopts a flamboyant or parodic [male or female] persona with glamorous or exaggerated costumes and makeup." Violations of Title 20 are prosecutable as misdemeanor criminal offenses. Mont. Code Ann. § 20-1-207. HB 359 also amended Title 45 of the Montana Code to prohibit so-called "sexually oriented businesses" from allowing minors to "enter the premises of the business during a sexually oriented performance." Violations of Title 45 are criminal offenses, and violations of the provision created by HB 359 are punishable by fines ranging from \$1,000 to \$10,000.

23. Defendant Elsie Arntzen is the Montana Superintendent of Public Instruction. Arntzen is responsible for the general supervision of Montana public schools and districts. She is responsible for “issu[ing], renew[ing], or deny[ing] teacher certification and emergency authorizations of employment.” Mont. Code Ann. § 20-3-106(2). HB 359 requires suspension and/or revocation of teacher’s certificates if the teacher, or an invited guest, “reads children’s books and engages in other learning activities with minor children present” while “adopt[ing] a flamboyant or parodic [male or female] persona with glamorous or exaggerated costumes and makeup.”

## LEGAL BACKGROUND

### A. Legislative History and Intent

#### i. Legislative History

24. Representative Braxton Mitchell introduced HB 359 on January 31, 2023, as a ban on drag performances in schools, libraries, and businesses with minors present. At first, “drag performance” was defined as “a performance in which a performer exhibits a gender identity that is different than the performer’s gender assigned at birth using

clothing, makeup, or other physical markers and sings, lip syncs, dances, or otherwise performs for entertainment to appeal to a prurient interest.”

25. The bill was amended repeatedly—and roved between overt anti-LGBTQ+ discrimination and a coherent, though unnecessary, attempt to prevent sexual nudity in public spaces where minors are present.

26. After several substantially different amendments had been circulated and debated at length, a fourth version made its way to a free conference committee on April 26, 2023. Free conference committees reconcile differing versions of bills passed by the House and Senate. Their format does not allow for the same robust debate and public comment as a committee hearing.

27. During the free conference committee, bill sponsor Mitchell introduced the fifth and final version of the bill. In its final form, HB 359 bans “drag story hours” in schools and libraries and prohibits businesses and state-funded entities from allowing minors to see so-called “sexually oriented performances.” It also created a private right of action to enforce any violation and became effective immediately.

28. Six legislators comprised the free conference committee that passed the final version of HB 359. Senator Andrea Olsen expressed concern that HB 359’s definitions of “drag queen,” “drag king,” and “drag story hour” would apply to Mrs. Doubtfire, Dolly Parton, Shakespeare in the Parks, Hollywood awards shows, and nearly any theater class. Mitchell disagreed, without further explanation.

29. Public commentary was limited to a total of ten minutes. Commenters described additional absurd implications of the newly amended bill, which could reach: a female performer dressed as a male clown;<sup>2</sup> transgender library employees;<sup>3</sup> a recent performance of *Twelfth Night* at Carroll College;<sup>4</sup> Disney princesses;<sup>5</sup> and students costumed as past presidents.<sup>6</sup>

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<sup>2</sup> Mont. Leg., Free Conference Comm. Hrg. at 12:12:30 (Apr. 26, 2023), available at [https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230426/-1/49764#handoutFile\\_](https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230426/-1/49764#handoutFile_). (SK Rossi, Human Rights Campaign).

<sup>3</sup> *Id.* at 12:14:15 (Sam Forstag, Montana Library Association).

<sup>4</sup> *Id.* at 12:14:30.

<sup>5</sup> *Id.* at 12:15:45 (Shawn Reagor, Montana Human Rights Network).

<sup>6</sup> *Id.* at 12:16:15.

30. Olsen moved to amend Mitchell’s version to remove all reference to drag. The motion did not pass, and the free conference committee passed Mitchell’s version of the bill by a vote of 4 to 2.

**ii. Legislative Intent & Animus**

31. The legislative history and debate surrounding HB 359 evidences that anti-LGBTQ+ animus motivated proponents and propelled this bill to its final form. While proponents of HB 359 purported to support the bill’s unconstitutional limitations on speech to “protect” children, they instead targeted protected forms of expression that made them uncomfortable.

32. Existing Montana law already protects youth from obscene materials to the full extent allowable under the Constitution. Mont. Code Ann. § 45-8-201; *see* Mont. Leg., S. Judiciary Comm. Hrg. at 8:55:17 (Apr. 4, 2023) (“We already prohibit children from . . . viewing obscene material, viewing pornography, going to strip clubs . . . This is not any type of First Amendment violation, and it’s time we add drag shows to that list.”) (Rep. Mitchell, introductory remarks).<sup>7</sup>

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<sup>7</sup> Available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/47987?agendaId=269135>

33. Adding drag shows to the list is unnecessary because “obscene” drag shows are already on the list. Montana law imposes criminal penalties on anyone who “performs an obscene act or otherwise presents an obscene exhibition of the person’s body to anyone under 18 years of age”—whether in drag or not. Mont. Code Ann. § 45-8-201(1)(d).

34. Thus, there are only two options: either HB 359 is superfluous, or it redefines “obscene” beyond constitutional limits to include drag performances, drag story hours, and a spiraling list of nebulously defined “sexually oriented performances.”

35. Although a prior version of the bill used “obscene” to define the proscribed conduct, the final version removed “obscene” as a modifier. Proponents intended the bill to reach beyond the ambit of Montana law that defines “obscenity” in line with “contemporary community standards.” Mont. Code Ann. § 45-8-201(2)(b)(i). The effect was to collapse the distinction between unprotected obscene speech and protected artistic and personal expression.

36. Sponsors and proponents sought to proscribe drag shows and stifle the expression of individuals who do not conform to conventional gender presentations. Drag is not definitionally obscene; it is a form of

expression that exaggerates, satirizes, and critiques gender. A drag performance may be obscene, just as dance performances, films, and still images may be obscene. But nothing about HB 359’s “drag queen”—“a male or female performer who adopts a flamboyant or parodic feminine persona with glamorous or exaggerated costumes and makeup”—is inherently obscene.

37. HB 359 adds nothing to existing protections for children in Montana. It targets personal, artistic, and political expression and speech.

38. The Legislature’s animus was overt.

39. Senator Chris Friedel—who co-sponsored the bill and participated in the free conference committee not as a member but through public comment—testified that he introduced amendments based on his belief that “we need to keep things like sexual orientation out of schools and out of libraries.”<sup>8</sup>

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<sup>8</sup> Mont. Leg., Free Conference Comm. Hrg. at 12:11:00 (Apr. 26, 2023), available at [https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230426/-1/49764#handoutFile\\_](https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230426/-1/49764#handoutFile_).

40. During public comment on HB 359, Mitchell attacked bill opponents personally. He said, “There was mention about the amount of testimony against this bill today, but I’m sure if we got every person in this state who is working today and actually has a job unlike most of these folks here it seems like I’m sure we’d see a pretty different ratio.”<sup>9</sup>

41. In closing, Mitchell highlighted his own animus against LGBTQ+ individuals further: “Due to the mature themes surrounding drag shows and the exposure to inappropriate activities, children may adopt and accept certain stereotypes or attitudes that could lead to social, psychological, linguistic difficulties. Children may also create an inadequate understanding of gender roles and experiences, which is damaging to their long-term social and emotional development.”<sup>10</sup>

42. After the legislative session, another co-sponsor, Senator Theresa Manzella, posted a meme to Instagram:

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<sup>9</sup> Mont. Leg., S. Judiciary Comm. Hrg. at 11:10:30 (Apr. 4, 2023), *available at* <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/47987?agendaId=269135>

<sup>10</sup> *Id.* at 11:10:05.



manzellatheresa



18 likes

manzellatheresa Nothing like a good western

### B. HB 359's Impact

43. Although they were motivated exclusively by anti-LGBTQ+ animus, HB 359's supporters ultimately took a blunt instrument to Montanans' First Amendment rights, clumsily attacking not only "drag story hours" but broad categories of protected speech and expressive activity. As passed, HB 359 includes two categories of restrictions. First, it bans "drag story hours" in schools and libraries. Second, it prohibits or restricts "sexually oriented performances" in various places.

**i. Drag Story Hours**

44. HB 359 bans “drag story hours” in schools and libraries that receive any state funds. Neither “school” nor “library” is defined in the bill, and they do not appear to be limited to government entities.

45. “Drag story hour” is defined as “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.” HB 359, § 1(3).

46. The terms “drag king” and “drag queen” are defined as “a male or female performer who adopts a flamboyant or parodic [male or female] persona with glamorous or exaggerated costumes and makeup.” HB 359, § 1(1), (2). A person need not dress in a manner incongruous with their biological sex or gender identity to be a “drag king” or “drag queen.”

47. A person who violates the “drag story hours” restriction faces criminal penalties. Upon conviction, “[a] library, a school, or library or school personnel, [or] a public employee” “shall be fined \$5,000.” HB 359, § 3(4). If the person is a schoolteacher, administrator, or specialist, “proceedings must be initiated to suspend the . . . certificate of the offender under [Montana Code Annotated §] 20-4-110.” *Id.* Upon a second or subsequent conviction, “proceedings must be initiated to

permanently revoke the teacher, administrator, or specialist certificate of the offender.” *Id.* (emphasis added).

48. Any person involved in a drag story hour—“a person who knowingly promotes, conducts, or participates as a performer”—is subject to civil liability. HB 359, § 4(1). Any minor who attends a drag story hour—even with a guardian’s consent—may sue within ten years. HB 359, § 4(3). Plaintiffs are guaranteed statutory damages of \$5,000 and attorney’s fees and costs. Plaintiffs are also entitled to “actual damages, including damages for psychological, emotional, economic, and physical harm.” HB 359, § 4(2). The citizen-suit provision is not limited to drag story hours occurring after HB 359’s effective date.

**ii. Sexually Oriented Performances**

49. In addition to the drag story hour ban, HB 359 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.” HB 359, § 3(3). It prevents “sexually oriented businesses” from hosting “sexually oriented performances” when a minor is on the premises. HB 359, § 2. HB 359’s definitions of “sexually

oriented,” “sexually oriented performances,” and “sexually oriented businesses” go far beyond obscenity—unsurprisingly, as it already is illegal to display or disseminate obscenity to minors. *See* Mont. Code Ann. § 45-8-201.

50. “Sexually oriented performance” is defined as “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.

HB 359, § 1(10). The definition is not limited to live events.

51. “Stripping” is not limited to performances involving nudity; it is defined as the “removal or simulated removal of clothing in a sexual manner for” entertainment. HB 359, § 1(11).

52. “Sexual conduct” is not defined within the bill, and no cross-reference is given within the definition of “sexually oriented performance.” But another provision within the bill cross-references Montana Code Annotated § 45-5-625 to define the term “sexual conduct.”

HB 359, § 1(8). Thus, it is unclear whether the meaning of “sexual conduct” within the context of “sexually oriented performances” is limited to the definition set forth in § 45-5-625.

53. “Sexually oriented” is defined as “any simulation of sexual activity, stripping, salacious dancing, any lewd or lascivious depiction or description of human genitals or of sexual conduct as defined in [Montana Code Annotated §] 45-5-625.” HB 359, § 1(8).

54. “Sexually oriented performances” are prohibited in schools and libraries that receive any state funding, HB 359, § 3(1), (2); “on public property in any location where the performance is in the presence of an individual under the age of 18,” HB 359, § 3(3)(a); and “in a location owned by an entity that receives any form of funding from the state,” even if minors are not present, HB 359, § 3(3)(b).

55. “Sexually oriented performances” are restricted in so-called (and circuitously defined) “sexually oriented businesses.” A “[s]exually oriented business” is defined as “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.

HB 359, § 1(9).

56. Violators of the rules governing “sexually oriented performances” face various, overlapping penalties. Business owners, operators, managers, and employees are subject to mandatory criminal fines ranging from \$1,000 to \$10,000 and the loss of the business’s license. Upon conviction, “[a] library, a school, or library or school personnel, a public employee, [an entity that receives state funds], or an employee of the entity” “shall be fined \$5,000.” HB 359, § 3(4).

57. The same civil liability described in Paragraph 51 applies to “a person who knowingly promotes, conducts, or participates as a performer” in a “sexually oriented performance.” HB 359, § 4(1).

58. Montana’s existing statutory restriction on obscenity, Mont. Code Ann. § 45-8-201, incorporates the *Miller* test. Under *Miller v. California*, “[s]tate statutes designed to regulate obscene materials must be carefully limited.” 413 U.S. 15, 23–24 (1973). Laws proscribing obscenity “must be specifically defined,” and “limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole,

do not have serious literary, artistic, political, or scientific value.” *Id.* at 24. HB 359 is not “specifically defined”; it is not limited to “patently offensive” performances; and it has no carveout for works with “serious literary, artistic, political, or scientific value.”

## FACTUAL ALLEGATIONS

### A. Cancellation of Adria Jawort’s Library Lecture

59. Plaintiff Adria Jawort regularly speaks to organizations and institutions, including libraries, about LGBTQ+ and Indigenous issues. Jawort’s talks are informative and audience-appropriate.

60. Jawort was scheduled to give such a talk at the Butte-Silver Bow Public Library on June 2, 2023, as part of a “First Friday” lecture series. The talk Jawort planned to give is one that she has given at other organizations and institutions, including libraries, in the past. It is designed for all ages.

61. The day before the lecture, a librarian notified Jawort that Defendant Gallagher had canceled the event because “it is too much of a legal risk to have a transgendered person in the library.”

62. A group, “White Lives Matter,” claimed responsibility for the cancellation on social media, posting to Telegram:

Victory again! Thanks to our campaign of complaints to the city, a disgusting 43 YEAR OLD MAN who wears dresses . . . was barred from reading at the Butte public library today! Just look at that pic [of Adria dressed for Halloween], proof that all of our enemies are mentally ill and pedophiles. Why else have so much grief on a banner saying ‘pedophiles not welcome’ unless they take offense because they are pedophiles? No groomers allowed, NOT IN OUR TOWN [crying with laughter emoji] [winking emoji]

63. After cancelling Jawort’s lecture, the City and County of Butte-Silver Bow posted the following message to its Facebook page:

PSA

In accordance with Governor Gianforte signing HB359 into law, our county cannot allow an event where a drag king or queen reads children’s books and engages in other learning activities with minor children present. Due to this law, we have had to cancel the speaker at the Butte-Silver Bow Library that was scheduled for Friday.

64. In later communications with Jawort, Defendant Gallagher reiterated that he canceled the lecture based on his belief that the lecture would violate HB 359.

65. Jawort is a transgender woman. She does not regularly perform as a drag queen or a drag king (though she has dressed in drag occasionally). When she gives talks to libraries and other institutions about LGBTQ+ and Two-Spirit history in Montana, she appears as

herself—generally wearing dark or purple lipstick, dark eyeliner, and black dresses.

66. Had she given the scheduled lecture on June 2, 2023, Jawort would have discussed timely, politically significant issues—issues that are particularly relevant on the heels of a legislative session responsible for a number of laws targeting the LGBTQ+ community, including HB 359.

67. Jawort’s lecture was canceled because she is transgender, because she wears makeup, and/or because she intended to speak about LGBTQ+ issues. No matter what combination of potential factors led to the cancellation, the cancellation violated her constitutional rights to free speech and equal protection.

68. The cancellation caused Jawort emotional and reputational damage. By suggesting that she poses a threat to minors and cancelling her publicized lecture, Defendant Gallagher harmed Jawort’s reputation as a speaker and writer on gender identity issues.

69. Jawort has experienced stress and sleeplessness as a result of the cancellation. She has been targeted on social media, leading her to reasonably fear for her safety.

## **B. Chilling Effect**

70. Jawort may be the first to have a planned event publicly cancelled as a result of HB 359, but she will not be the last. No one knows what HB 359 actually prohibits.

71. Already, HB 359 has restricted the Imperial Court's usual activities. The Imperial Court performs drag shows in a variety of settings for a variety of audiences, tailoring its all-audience performances to ensure they are age-appropriate. Since HB 359's passage, the Imperial Court has suffered actual and ongoing harm: at least one venue has cancelled a performance out of fear of liability, and other venues and organizations have terminated ongoing relationships or modified scheduled events. Fearing criminal and civil sanctions, drag performers have dropped out of scheduled performances. Moreover, the Imperial Court has been unable to ascertain whether offering future performances in various venues will violate HB 359.

72. HB 359 has also restricted BumbleBee's activities, even though BumbleBee does not host drag story hours. BumbleBee's instructors and students were denied an opportunity to perform at a local brewery, where they had previously performed, due to concerns about

HB 359. BumbleBee’s clients have expressed concern about possible arrest and criminal liability for public performances under HB 359, even though the performances are permissible under *Miller*.

73. Related to Pride events across Montana in 2023, the Imperial Court, the Center, and the Great Falls LGBTQ+ Center have fielded innumerable questions from members about what HB 359 does and does not allow. The organizations have been unable to answer these questions despite carefully analyzing HB 359. Members cannot reasonably determine how to comply with the law because its language is ambiguous.

74. Montana Book Company and Imagine Nation have hosted and plan to continue to host all-audience book readings and events featuring drag performers. Neither organization has been unable to determine whether its events will subject it to criminal penalties.

75. The Myrna Loy receives funding from ticket sales, memberships, and government funding, including state funds. Because HB 359 is vague and ambiguous, The Myrna Loy has been unable to determine whether it will be subject to criminal penalties if it continues to show acclaimed films with artistic merit to age-appropriate audiences using Motion Picture Association (“MPA”) rating guidelines.

76. HB 359 has chilled the Imperial Court, BumbleBee, the Center, the Great Falls LGBTQ+ Center, Montana Book Company, Imagine Nation, and The Myrna Loy from engaging in protected speech.

77. The confusion caused by HB 359 is not limited to organizations and their members. Based on the overbroad prohibitions on “drag queens,” “drag kings,” and “drag story hours,” Montanans will face criminal liability for protected speech. HB 359’s definitions reach any activity involving reading children’s books and engaging in learning activities with minors when the reader appears in any gendered costume. HB 359, § 1(1), (2), (3). Such activities are prohibited in all schools and libraries that receive state funding.

78. Plaintiffs Jawort, Corcoran, and the Imperial Court face criminal, civil, and occupational penalties for allowing or participating in costumed learning activities.

79. HB 359 restricts the exposure of transgender men’s chests. Another bill passed by the 2023 Montana Legislature, Senate Bill 458, defines all humans as “female” or “male” based on their chromosomes and reproductive capacity. Sen. B. 458, § 1, Mont. Leg., 68th Sess. (2023). HB 359 bans many performances that feature “the purposeful exposure,

whether complete or partial” of “a female breast, if the breast is exposed below a point immediately above the top of the areola.” HB 359, § 1(10)(a)(i). Together, these bills ostensibly prohibit exposure of a transgender man’s chest in businesses that serve alcohol when minors are present, HB 359, §§ 1(9), 2; “on public property in any location where the performance is in the presence of an individual under the age of 18”—e.g., sidewalks and streets, HB 359, § 3(a); and “in a location owned by an entity that receives any form of funding from the state,” even if the audience is restricted to adults, HB 359, § 3(b).

80. HB 359 likewise restricts exposure of prosthetic cleavage and expressly differentiates “female breast[s]” from “prosthetic . . . breasts.” HB 359, § 1(10)(a)(i), (ii). While performances that expose a female breast are restricted only if the breast “is exposed below a point immediately above the top of the areola,” a performance that exposes any part of a prosthetic breast is barred. *Id.* Human cleavage is allowed, whereas prosthetic cleavage is not. Thus, the bill directly targets women or men with prosthetic breasts based on their expressive activity.

81. HB 359 restricts performances that involve “stripping”—defined as removing or pretending to remove clothing “in a sexual

manner”—even if nudity does not result. “Sexual manner” is not defined. HB 359 thus encompasses many non-obscene theatrical, film, and drag performances—even a performance that includes costume changes. HB 359 prohibits these performances in businesses that serve alcohol when minors are present, HB 359, §§ 1(9), 2; “on public property in any location where the performance is in the presence of an individual under the age of 18,” HB 359, § 3(a); and “in a location owned by an entity that receives any form of funding from the state,” even if the audience is restricted to adults, HB 359, § 3(b).

82. HB 359 defines “sexually oriented” to include protected First Amendment activities, including “any simulation of sexual activity,” “salacious dancing,” and “any lewd or lascivious depiction or description of human genitals or sexual conduct.” HB 359, § 1(8). Though the term “sexually oriented” is not used as a stand-alone term elsewhere, the terms “sexually oriented performance” and “sexually oriented business” are. Montana’s Bill Drafting Manual provides that a word should not be defined if it is never used in the bill and that “[i]f a bill deletes all reference to a defined term, the definition of that term must also be

deleted.” Mont. Bill Drafting Manual § 4-9(7), (8) (68th Leg., 2022).<sup>11</sup> At best, it is unclear and vague whether HB 359 prohibits any conduct or performances that could be defined as “sexually oriented.”

83. As a result of this mountain of confusing and overbroad definitions, Plaintiffs have well-founded fears of criminal and civil liability. Each organizes, hosts, or participates in costumed learning activities or in events that could be “sexually oriented,” or where prosthetic cleavage may be exposed, or where “stripping” may occur.

84. For example, BumbleBee publicly performs dances that may be described as “salacious.” Montana Book Company sells and displays books that include “lewd or lascivious depiction[s] or description[s] of human genitals or sexual conduct.” The Myrna Loy shows a broad spectrum of movies from around the world, including classic films and first-run new releases, many of which include “sexually oriented performances.”

85. In 2023, the Myrna Loy showed the new-release film *Asteroid City*—a quirky, visually stunning film about children scientists forced to

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<sup>11</sup> Available at <https://leg.mt.gov/content/Publications/2022-bill-drafting-manual.pdf>.

quarantine during a stargazer convention. In this PG-13 film, the actress Scarlett Johansson disrobes and steps into a bathtub. This scene meets HB 359’s definition of “stripping.”

86. Even with parental consent, a child who views a PG-13 film that includes a “sexually oriented performance” may sue under HB 359’s private right of action ten years later. Equally illogically, a seventeen-year-old minor who legally attends an R-rated movie<sup>12</sup> containing a “sexually oriented performance” may sue the theater.

87. Finally, HB 359 prohibits performances with artistic, scientific, political, and literary merit that feature complete or partial nudity or sexual content—even if the performances are not live and even if they are performed for an audience exclusively comprising adults—whenever the performance is “in a location owned by an entity that receives any form of funding from the state.”

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<sup>12</sup> The MPA restricts R-rated movies to seventeen-year-old individuals or younger individuals who are accompanied by a parent or adult guardian. HB 359 considers minors to be individuals under the age of eighteen.

## CLAIMS FOR RELIEF

### COUNT I:

#### Violation of Free Speech, U.S. Const. amend. 1 (as applied to Plaintiff Jawort)

42 U.S.C. § 1983

88. Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.

89. The First Amendment protects against state action that “abridg[es] the freedom of speech.” U.S. Const. amend. I.

90. Through her lecture at the Butte-Silver Bow Public Library, Jawort intended to engage in a constitutionally protected activity.

91. In cancelling Jawort’s speech, Defendant Gallagher intended to and in fact did suppress Jawort’s protected speech, denying her the opportunity to speak and denying the audience the opportunity to listen.

92. Defendant Gallagher’s cancellation of Jawort’s speech was motivated by the content of her protected speech, in violation of the First Amendment.

93. Defendant Gallagher, acting under color of state law, deprived Jawort of her rights under the United States Constitution.

94. HB 359 violates the First Amendment as applied to Jawort. Further implementation of HB 359 by Defendant Knudsen will result in further violation of Jawort's First Amendment rights.

**COUNT II:**  
**Violation of Equal Protection, U.S. Const. amend. XIV, § 2**  
**(as applied to Plaintiff Jawort)**

42 U.S.C. § 1983

95. Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.

96. The Fourteenth Amendment bars states from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV.

97. The Fourteenth Amendment protects against discrimination on the basis of sex. Sex-based discrimination is subject to intermediate scrutiny.

98. The Fourteenth Amendment protects against discrimination arising from animus.

99. When he cancelled Jawort's lecture, Defendant Gallagher violated her Equal Protection rights by discriminating against her on the basis of her gender identity.

100. HB 359 violates the Fourteenth Amendment as applied to Jawort. Further implementation of HB 359 by Defendant Knudsen will result in further violation of Jawort's Fourteenth Amendment rights.

**COUNT III:**  
**Violation of Free Speech, U.S. Const. amend. 1, as Incorporated Against**  
**the States, U.S. Const. amend. XIV**  
**(facial challenge to HB 359)**

101. Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.

102. Defendants Knudsen and Arntzen seek to expressly restrict and chill speech and expression protected by the First Amendment based on its content, its viewpoint, and the identity of the speaker.

103. HB 359's restrictions are content- and viewpoint-based. Thus, it is "presumptively unconstitutional" and subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

104. HB 359 does not satisfy strict scrutiny. HB 359 is not narrowly tailored to the Government's interest in protecting minors from obscenity. Preexisting Montana law fully restricts the display and dissemination of obscene materials to minors.

105. The Government has no compelling interest in protecting children from drag story hours and/or drag performances.

106. Even if the Government did have a compelling interest in protecting children from drag story hours and/or drag performances, HB 359 is not narrowly tailored to that interest. It bans innocent performances, whether they feature drag or not. Further, it prohibits protected expressive activity that is presented to adult audiences.

107. HB 359 is impermissibly vague. A reasonable person cannot know what is and what is not restricted by the law.

108. HB 359's unconstitutional applications are realistic, not fanciful, and their number is disproportionate to the bill's lawful sweep. *United States v. Hansen*, 599 U.S. \_\_\_, 5 (2023).

109. HB 359's overbreadth and vagueness chills Montanans' First Amendment rights.

**COUNT IV:**  
**Violation of Due Process, U.S. Const. amend. V, as Incorporated**  
**Against the States, U.S. Const. amend. XIV**  
**(facial challenge to HB 359)**

110. Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.

111. HB 359 imposes criminal penalties, but it does not define the criminal offenses "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not

encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

112. Plaintiffs cannot know how to avoid criminal liability for engaging in speech and expressive conduct. As a result of HB 359’s vagueness, Plaintiffs have been forced to refrain from engaging in constitutionally protected activity.

113. HB 359 is void for vagueness.

### **PRAYER FOR RELIEF**

Plaintiffs respectfully request that this Court:

- a. Enter judgment for Plaintiffs and against Defendants;
- b. Grant Plaintiffs a preliminary injunction to prevent all Defendants from enforcing HB 359;
- c. Declare HB 359 facially unconstitutional;
- d. Issue an award of actual and general damages in favor of Plaintiff Jawort and against Defendant Gallagher, in an amount to be determined at trial;
- e. Issue an award of punitive damages in favor of Plaintiff Jawort and against Defendant Gallagher;

- f. Award Plaintiffs their costs, disbursements, and reasonable attorney's fees incurred in bringing this action, pursuant to 42 U.S.C. § 1988; and
- g. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 6th day of July, 2023.

*/s/ Constance Van Kley*  
Constance Van Kley  
Rylee Sommers-Flanagan  
Niki Zupanic  
Upper Seven Law  
  
*Attorneys for Plaintiffs*

Austin Knudsen  
*Montana Attorney General*  
Michael Russell  
Thane Johnson  
*Assistant Attorneys General*  
MONTANA DEPARTMENT OF  
JUSTICE  
PO Box 201401  
Helena, MT 59620-1401  
Phone: (406) 444-2026  
Fax: (406) 444-3549  
*michael.russell@mt.gov*  
*thane.johnson@mt.gov*

Emily Jones  
*Special Assistant Attorney General*  
JONES LAW FIRM, PLLC  
115 N. Broadway, Suite 410  
Billings, MT 59101  
Phone: 406-384-7990  
*emily@joneslawmt.com*

Attorneys for Defendants  
Austin Knudsen and Elsie Arntzen

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA, BUTTE DIVISION

THE IMPERIAL SOVEREIGN  
COURT OF THE STATE OF  
MONTANA; ADRIA JAWORT;  
RACHEL CORCORAN; THE  
MONTANA BOOK COMPANY,  
LLC d/b/a IMAGINE NATION  
BREWING COMPANY;  
BUMBLEBEE AERIAL FITNESS;  
MONTANA PRIDE; THE WESTERN  
MONTANA COMMUNITY  
CENTER; THE GREAT FALLS  
LGBTQ+ CENTER; THE ROXY  
THEATER; and THE MYRNA LOY,

Plaintiffs,

v.

AUSTIN KNUDSEN; ELSIE  
ARNTZEN; J.P. GALLAGHER; AND  
THE CITY OF HELENA,

Defendants.

Cause No. 2:23-cv-00050-BMM

**PRELIMINARY INJUNCTION  
APPEAL**

Pursuant to Federal Rules of Appellate Procedure 3 and 4 and 28 U.S.C. § 1292(a)(1), notice is hereby given that Defendants Austin Knudsen and Elsie Artzen appeal the Court's Order filed October 13, 2023 (Doc. 33). This appeal is taken to the United States Court of Appeals for the Ninth Circuit.

DATED this 13th day of November, 2023.

Austin Knudsen  
MONTANA ATTORNEY GENERAL

/s/ Michael Russell  
Michael Russell  
Thane Johnson  
*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 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: November 13, 2023

/s/ Michael Russell  
Michael Russell

**U.S. District Court  
District of Montana (Butte)  
CIVIL DOCKET FOR CASE #: 2:23-cv-00050-BMM**

THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA et al v. Knudsen et al  
Assigned to: Judge Brian Morris  
Case in other court: Ninth Circuit, 23-03581  
Cause: 42:1983 Civil Rights Act

Date Filed: 07/07/2023  
Jury Demand: Defendant  
Nature of Suit: 440 Civil Rights: Other  
Jurisdiction: Federal Question

**Plaintiff**

**THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA**

represented by **Constance Van Kley**  
UPPER SEVEN LAW  
P.O. Box 31  
Helena, MT 59624  
406-306-0330  
Email: cgvankley@gmail.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Niki Zupanic**  
Zupanic Law PLLC  
PO Box 1982  
Helena, MT 59624  
406-461-5178  
Email: niki@zupaniclaw.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Rylee K. Sommers-Flanagan**  
UPPER SEVEN LAW  
P.O. Box 31  
Helena, MT 59624  
406-306-0330  
Email: rylee@uppersevenlaw.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**ADRIA JAWORT**

represented by **Constance Van Kley**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Niki Zupanic**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Rylee K. Sommers-Flanagan**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**RACHEL CORCORAN**

represented by **Constance Van Kley**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Niki Zupanic**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Rylee K. Sommers-Flanagan**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**MONTANA BOOK COMPANY**

represented by **Constance Van Kley**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Niki Zupanic**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Rylee K. Sommers-Flanagan**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**IMAGINE BREWING COMPANY, LLC**  
*doing business as*  
**IMAGINE NATION BREWING**  
**COMPANY**

represented by **Constance Van Kley**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Niki Zupanic**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Rylee K. Sommers-Flanagan**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**BUMBLEBEE AERIAL FITNESS**

represented by **Constance Van Kley**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Niki Zupanic**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Rylee K. Sommers-Flanagan**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**THE WESTERN MONTANA  
COMMUNITY CENTER**

represented by **Constance Van Kley**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Niki Zupanic**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Rylee K. Sommers-Flanagan**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**THE GREAT FALLS LGBTQ+  
CENTER**

represented by **Constance Van Kley**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Niki Zupanic**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Rylee K. Sommers-Flanagan**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**THE MYRNA LOY**

represented by **Constance Van Kley**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Niki Zupanic**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Rylee K. Sommers-Flanagan**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**Montana Pride**

represented by **Constance Van Kley**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Niki Zupanic**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Rylee K. Sommers-Flanagan**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**The Roxy Theater**

represented by **Constance Van Kley**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Niki Zupanic**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Rylee K. Sommers-Flanagan**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

**Austin Knudsen**

represented by **Alwyn Lansing**  
Office of the Montana Attorney General  
215 N. Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
406-444-2026  
Fax: 406-444-3549  
Email: [alwyn.lansing@mt.gov](mailto:alwyn.lansing@mt.gov)

*LEAD ATTORNEY  
ATTORNEY TO BE NOTICED*

**Emily E. Jones**  
JONES LAW FIRM, PLLC  
115 North Broadway, Suite 410  
Billings, MT 59101  
406-384-7990  
Email: emily@joneslawmt.com  
*LEAD ATTORNEY  
ATTORNEY TO BE NOTICED*

**Michael Noonan**  
Montana Department of Justice  
1233 Quail Ridge Dr  
Kalispell, MT 59901  
209-402-1253  
Email: michael.noonan@mt.gov  
*LEAD ATTORNEY  
ATTORNEY TO BE NOTICED*

**Michael Russell**  
Montana Department of Justice  
Agency Legal Services  
1712 9th Ave.  
Helena, MT 59601  
406-444-2071  
Email: michael.russell@mt.gov  
*LEAD ATTORNEY  
ATTORNEY TO BE NOTICED*

**Thane P. Johnson**  
JOHNSON BERG & SAXBY PLLP  
221 1st Avenue East  
PO Box 3038  
Kalispell, MT 59901  
406-755-5535  
Fax: 406-756-9436  
Email: thane.johnson@mt.gov  
*LEAD ATTORNEY  
ATTORNEY TO BE NOTICED*

**Defendant**

**Elsie Arntzen**

represented by **Alwyn Lansing**  
(See above for address)  
*LEAD ATTORNEY  
ATTORNEY TO BE NOTICED*

**Emily E. Jones**  
(See above for address)  
*LEAD ATTORNEY  
ATTORNEY TO BE NOTICED*

**Michael Noonan**

(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Michael Russell**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Thane P. Johnson**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Defendant**

**J.P. Gallagher**

represented by **Cynthia L. Walker**  
Boone Karlberg P.C.  
201 West Main  
P. O. Box 9199  
Suite 300  
Missoula, MT 59807-9199  
460-543-6646  
Fax: 406-549-6804  
Email: cwalker@boonekarlberg.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Shelby K. Towe**  
Boone Karlberg P.C.  
MT  
201 W. Main St.  
Suite 300  
Suite 300  
Missoula, MT 59802  
406-546-4021  
Email: stowe@boonekarlberg.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Defendant**

**The City of Helena**  
*TERMINATED: 09/06/2023*

represented by **Rebecca Dockter**  
MONTANA DEPARTMENT OF FISH  
WILDLIFE AND PARKS  
1420 East 6th Avenue  
PO Box 200701  
Helena, MT 59620-0701  
406-444-4047  
Fax: 406-444-7456  
Email: rdockter@helenamt.gov  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

Date Filed	#	Docket Text
07/07/2023	<a href="#">1</a>	COMPLAINT against All Defendants, filed by THE WESTERN MONTANA COMMUNITY CENTER, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, BUMBLEBEE AERIAL FITNESS, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE GREAT FALLS LGBTQ+ CENTER, MONTANA BOOK COMPANY, ADRIA JAWORT. (Attachments: # <a href="#">1</a> Civil Cover Sheet, # <a href="#">2</a> Knudsen Summons, # <a href="#">3</a> Arntzen Summons, # <a href="#">4</a> Gallagher Summons) (TLO) (Entered: 07/07/2023)
07/07/2023		Filing fee: \$402, receipt number AMTDC-3094973 (TLO) (Entered: 07/07/2023)
07/07/2023	<a href="#">2</a>	Summonses Issued as to Elsie Arntzen, J.P. Gallagher, Austin Knudsen. <b>Issued summons may be downloaded and printed by counsel for service.</b> (Attachments: # <a href="#">1</a> Summons Issued Knudsen, # <a href="#">2</a> Summons Issued Gallagher) (TLO) (Entered: 07/07/2023)
07/17/2023	<a href="#">3</a>	AMENDED COMPLAINT against All Defendants, filed by THE WESTERN MONTANA COMMUNITY CENTER, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, BUMBLEBEE AERIAL FITNESS, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE GREAT FALLS LGBTQ+ CENTER, MONTANA BOOK COMPANY, ADRIA JAWORT. (Attachments: # <a href="#">1</a> Exhibit 1 - HB 359, # <a href="#">2</a> Summons: City of Helena) (Van Kley, Constance) (Entered: 07/17/2023)
07/17/2023	<a href="#">4</a>	MOTION for Temporary Restraining Order , MOTION for Preliminary Injunction . Constance Van Kley appearing for Plaintiffs BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER. (Van Kley, Constance) Modified on 7/31/2023 (MMS). (Entered: 07/17/2023)
07/17/2023	<a href="#">5</a>	Brief/Memorandum in Support re <a href="#">4</a> MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER. (Attachments: # <a href="#">1</a> Exhibit 1, HB 359, # <a href="#">2</a> Exhibit 2, Jawort Decl., # <a href="#">3</a> Exhibit 3, Smith Decl., # <a href="#">4</a> Exhibit 4, Malecek Decl., # <a href="#">5</a> Exhibit 5, Steinberg Decl., # <a href="#">6</a> Exhibit 6, Holmes Decl., # <a href="#">7</a> Exhibit 7, Rice Decl., # <a href="#">8</a> Exhibit 8, Halverson Decl., # <a href="#">9</a> Exhibit 9, Hamm Decl., # <a href="#">10</a> Exhibit 10, Corcoran Decl.) (Van Kley, Constance) (Entered: 07/17/2023)
07/17/2023	<a href="#">6</a>	Summons Issued as to The City of Helena. <b>Issued summons may be downloaded and printed by counsel for service.</b> (ACC) (Entered: 07/17/2023)
07/19/2023	<a href="#">7</a>	Order Setting: Hearing set for 7/26/2023 at 02:00 PM in Helena, MT before Judge Brian Morris. Signed by Judge Brian Morris on 7/19/2023. (KAH) Modified on 7/19/2023 <b>Kim Marchwick to report</b> (HEG). (Entered: 07/19/2023)
07/24/2023	<a href="#">8</a>	NOTICE by BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater re <a href="#">7</a> Order Setting (Van Kley, Constance) (Entered: 07/24/2023)
07/24/2023	<a href="#">9</a>	NOTICE of Appearance by Rebecca Dockter on behalf of The City of Helena (Dockter,

		Rebecca) (Entered: 07/24/2023)
07/24/2023	<a href="#">10</a>	RESPONSE to Motion re <a href="#">4</a> MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by The City of Helena. (Dockter, Rebecca) (Entered: 07/24/2023)
07/26/2023	<a href="#">11</a>	NOTICE of Appearance by Cynthia L. Walker on behalf of J.P. Gallagher (Walker, Cynthia) (Entered: 07/26/2023)
07/26/2023	<a href="#">12</a>	MINUTE ENTRY for proceedings held before Judge Brian Morris: Motion Hearing held on 7/26/2023 re <a href="#">4</a> MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by MONTANA BOOK COMPANY, RACHEL CORCORAN, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE WESTERN MONTANA COMMUNITY CENTER, BUMBLEBEE AERIAL FITNESS, ADRIA JAWORT, THE GREAT FALLS LGBTQ+ CENTER, THE MYRNA LOY, IMAGINE BREWING COMPANY, LLC. Present in the courtroom for the Plaintiffs are Constance Van Kley, Niki Zupanic and Rylee Summers-Flanagan; Thane Johnson and Michael Russel for Defendants Austin Knudsen and Elise Arntzen; Rebecca Dockter for Defendant City of Helena and Cynthia Walker for Defendant J.P. Gallagher. Arguments are heard by Van Kley, Johnson and Dockter. The TRO matter is deemed submitted and an order will be issued as soon as possible. The parties are to file their responses and replies to the motion for preliminary injunction. The Court will hear arguments on the motion on August 28th at 2:30 pm in Helena. Court is in Recess. Hearing commenced at 2:01 and concluded at 3:52, ( Motion Hearing set for 8/28/2023 at 02:30 PM in Helena, MT before Judge Brian Morris.). (Court Reporter Kim Marchwick.) (Law Clerk: E. Hodges and L. Love), (Hearing held in Helena) (HEG) (Entered: 07/26/2023)
07/28/2023	<a href="#">13</a>	ORDER: Plaintiffs' Motion <a href="#">4</a> is hereby GRANTED, in part, and DEFERRED, in part. The Court will GRANT Plaintiffs' request for a TRO only. Defendants Knudsen and Arntzen are hereby ENJOINED from enforcing H.B. 359 pending the Court's determination of Plaintiff's entitlement to a preliminary injunction. Signed by Judge Brian Morris on 7/28/2023. (MMS) (Entered: 07/28/2023)
07/31/2023	<a href="#">14</a>	First MOTION for Extension of Time to File Response/Reply <i>Brief to Plaintiff's Motion for Preliminary Injunction</i> . Michael Russell appearing for Defendants Elsie Arntzen, Austin Knudsen. (Attachments: # <a href="#">1</a> Text of Proposed Order Proposed Order) (Russell, Michael) (Entered: 07/31/2023)
07/31/2023	<a href="#">15</a>	Amended MOTION for Extension of Time to File Response/Reply <i>Brief to Plaintiff's Motion for Preliminary Injunction</i> . Michael Russell appearing for Defendants Elsie Arntzen, Austin Knudsen. (Attachments: # <a href="#">1</a> Text of Proposed Order Proposed Order) (Russell, Michael) (Entered: 07/31/2023)
07/31/2023	<a href="#">16</a>	ORDER granting <a href="#">15</a> Motion for Extension of Time to File Response/Reply re <a href="#">15</a> Amended MOTION for Extension of Time to File Response/Reply <i>Brief to Plaintiff's Motion for Preliminary Injunction</i> . <b>State Defendants' Response is now due August 2, 2023</b> . Signed by Judge Brian Morris on 7/31/2023. (MMS) (Entered: 07/31/2023)
07/31/2023		Motion Hearing set for 8/28/2023 at 02:30 PM in Helena, MT before Judge Brian Morris. (MMS) (Entered: 07/31/2023)
08/02/2023	<a href="#">17</a>	RESPONSE to Motion re <a href="#">4</a> MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by Elsie Arntzen, Austin Knudsen. (Russell, Michael) (Entered: 08/02/2023)
08/04/2023	<a href="#">18</a>	RESPONSE to Motion re <a href="#">4</a> MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by J.P. Gallagher. (Walker, Cynthia) (Entered: 08/04/2023)

08/04/2023	<a href="#">19</a>	AFFIDAVIT/DECLARATION re <a href="#">18</a> Response to Motion for Preliminary Injunction by J.P. Gallagher. (Attachments: # <a href="#">1</a> Exhibit A. Twitter Post, # <a href="#">2</a> Exhibit B. Social Media Group Chat, # <a href="#">3</a> Exhibit C. Letter to Ms. Jawort) (Walker, Cynthia) (Entered: 08/04/2023)
08/04/2023	<a href="#">20</a>	AFFIDAVIT/DECLARATION re <a href="#">18</a> Response to Motion for Preliminary Injunction by J.P. Gallagher. (Attachments: # <a href="#">1</a> Exhibit A. Legal Notice and Litigation Hold Letter) (Walker, Cynthia) (Entered: 08/04/2023)
08/08/2023	<a href="#">21</a>	ANSWER to <a href="#">3</a> Amended Complaint, by J.P. Gallagher. (Walker, Cynthia) (Entered: 08/08/2023)
08/10/2023	<a href="#">22</a>	State Defendants' ANSWER to <a href="#">3</a> Amended Complaint with Jury Demand by Elsie Arntzen, Austin Knudsen. (Lansing, Alwyn) Modified on 8/10/2023 to add link(ACC). (Entered: 08/10/2023)
08/10/2023	<a href="#">23</a>	ANSWER to <a href="#">3</a> Amended Complaint, by The City of Helena. (Dockter, Rebecca) (Entered: 08/10/2023)
08/15/2023	<a href="#">24</a>	REPLY to Response to Motion re <a href="#">4</a> MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater. (Van Kley, Constance) (Entered: 08/15/2023)
08/15/2023		Terminate Deadlines as to <a href="#">4</a> Response ddl; hearing has been set. (ACC) (Entered: 08/15/2023)
08/16/2023	<a href="#">25</a>	REPLY to Response to Motion re <a href="#">4</a> MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater. (Zupanic, Niki) (Entered: 08/16/2023)
08/28/2023	26	MINUTE ENTRY for proceedings held before Judge Brian Morris: Motion Hearing held on 8/28/2023 re <a href="#">4</a> MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by MONTANA BOOK COMPANY, RACHEL CORCORAN, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE WESTERN MONTANA COMMUNITY CENTER, BUMBLEBEE AERIAL FITNESS, ADRIA JAWORT, THE GREAT FALLS LGBTQ+ CENTER, THE MYRNA LOY, IMAGINE BREWING COMPANY, LLC. Present in the courtroom for the Plaintiffs are Constance Van Kley, Niki Zupanic and Rylee Summers-Flanagan, Michael Russel for State of Montana Defendants Austin Knudsen and Elise Arntzen, Rebecca Dockter for Defendant City of Helena and Cynthia Walker for Defendant J.P. Gallagher. Parties are advised of the purpose of today's hearing. Arguments are heard by Van Kley and Russell. Counsel Dockter and Walker heard briefly only as to their positions regarding the defendants they represent and state they are not part of the preliminary injunction relief being sought. The matter is deemed submitted. The Court will review the jury demand and get back to the parties as to the next step. Recess. Hearing commenced at 2:32 and concluded at 3:48. (Court Reporter Yvette Heinze.) (Law Clerk: T. Devine), (Hearing held in Helena) (HEG) (Entered: 08/28/2023)
09/04/2023	<a href="#">27</a>	IT IS ORDERED: Parties shall submit simultaneous briefing in support of Defendants Knudsens, Arntzens, and Gallaghers right to jury trial, in 42 U.S.C. § 1983 litigation and litigation arising from the First and Fifth Amendment of the U.S. Constitution as

ER-364

		incorporated by the Fourteenth Amendment, on or before September 11, 2023. Signed by Judge Brian Morris on 9/4/2023. (SLL) (Entered: 09/04/2023)
09/05/2023	<a href="#">28</a>	IT IS HEREBY ORDERED: Parties shall submit the briefing so ordered by 5:00 PM on September 14, 2023. Signed by Judge Brian Morris on 9/5/2023. (KAH) (Entered: 09/05/2023)
09/06/2023	<a href="#">29</a>	Stipulated Motion <i>For Dismissal</i> . Rebecca Dockter appearing for Defendant The City of Helena. (Attachments: # <a href="#">1</a> Text of Proposed Order Proposed Order Dismissal) (Dockter, Rebecca) (Entered: 09/06/2023)
09/06/2023	<a href="#">30</a>	ORDER granting <a href="#">29</a> Stipulated Motion. IT IS HEREBY ORDERED that Pursuant to Fed. R. Civ. P. 41(a)(1-2), the City of Helena is DISMISSED without prejudice, with each party to bear their own costs and fees. Count III of the First Amended Complaint is DISMISSED with prejudice, with each party to bear their own costs and fees. Signed by Judge Brian Morris on 9/6/2023. (SLL) (Entered: 09/06/2023)
09/14/2023	<a href="#">31</a>	STIPULATION re <a href="#">27</a> Order, <a href="#">28</a> Order <i>re Defendants' Jury Demands</i> by BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater. (Van Kley, Constance) (Entered: 09/14/2023)
09/25/2023	<a href="#">32</a>	NOTICE of Change of Address by Niki Zupanic. <b>REMINDER: The Court no longer updates personal information or addresses in CM/ECF. You must update your address information in PACER.</b> (Zupanic, Niki) (Entered: 09/25/2023)
10/13/2023	<a href="#">33</a>	ORDER granting <a href="#">4</a> Motion for Preliminary Injunction. Defendants Austin Knudsen, Attorney General for the State of Montana, and Elsie Arntzen, Montana Superintendent of Public Instruction, are HEREBY ENJOINED from instituting, maintaining, or prosecuting any enforcement proceedings under H.B. 359. Signed by Judge Brian Morris on 10/13/2023. (MMS) (Entered: 10/13/2023)
10/30/2023	34	TEXT ORDER: IT IS HEREBY ORDERED that the relevant parties will file a joint proposed pre-trial schedule on or before November 14, 2023 as to Counts IV and V. IT IS ALSO ORDERED that a Telephonic Scheduling Conference as to Counts IV and V is set for 11/21/2023 at 01:30 PM before Judge Brian Morris. The call-in number is 877-402-9753; access code: 5136505. Signed by Judge Brian Morris on 10/30/2023. (SLL) (Entered: 10/30/2023)
10/30/2023	35	TEXT ORDER : IT IS HEREBY ORDERED that the relevant parties will file a joint proposed pre-trial schedule (jury trial) on or before November 14, 2023 as to Counts I and II. IT IS ALSO ORDERED that a Telephonic Scheduling Conference as to Counts I and II is set for 11/21/2023 at 01:45 PM before Judge Brian Morris. The call-in number is 877-402-9753; access code: 5136505. Signed by Judge Brian Morris on 10/30/2023. (SLL) (Entered: 10/30/2023)
11/02/2023	36	TEXT Order Re-Setting: IT IS HEREBY ORDERED that the Telephonic Pretrial Conference is reset for 11/29/2023 at 02:00 PM before Judge Brian Morris. The call-in number is 877-402-9753; access code: 5136505. Signed by Judge Brian Morris on 11/2/2023. (SLL) (Entered: 11/02/2023)
11/06/2023	<a href="#">37</a>	Order Setting: IT IS HEREBY ORDERED that the relevant parties will file a jointproposed pre-trial schedule on or before November 20, 2023 as to Counts IVand V. IT IS ALSO ORDERED that the relevant parties will file a joint proposed pretrial schedule (jury trial) on or before November 20, 2023 as to Counts I and II. Proposed Pretrial Order due by 11/20/2023. Telephonic Scheduling Conference set for 11/27/2023 at 01:30 PM

		before Judge Brian Morris. Signed by Judge Brian Morris on 11/6/2023. <b>**SEE ORDER FOR FULL DETAILS**</b> (ACC) (Entered: 11/06/2023)
11/13/2023	<a href="#">38</a>	NOTICE OF APPEAL as to <a href="#">33</a> Order on Motion for Preliminary Injunction, by Elsie Arntzen, Austin Knudsen. Filing fee \$ 505, receipt number AMTDC-3159514. (Attachments: # <a href="#">1</a> Exhibit State of Representation) (Russell, Michael) (Entered: 11/13/2023)
11/15/2023	<a href="#">39</a>	TRANSCRIPT ORDER FORM by Elsie Arntzen, Austin Knudsen for proceedings held on 8/28/23 before Judge Brian Morris. Court reporter Yvette Heinze. Type of transcript: 7-Day. Transcript due by 11/22/2023. (Russell, Michael) Modified on 11/15/2023 to reflect that this Transcript Order form will only be for the proceedings on 8/28/2023 as Mrs. Heinze was not the court reporter for the 7/26/2023 proceeding, Counsel Russell will submit an additional transcript request for the proceeding on 7/26/2023 for Court Reporter Kim Marchwick (SAJ). (Entered: 11/15/2023)
11/15/2023	<a href="#">40</a>	TRANSCRIPT ORDER FORM by Elsie Arntzen, Austin Knudsen for proceedings held on 7/26/23 before Judge Brian Morris. Court reporter Kim Marchwick. Type of transcript: 7-Day. Transcript due by 11/22/2023. (Russell, Michael) (Entered: 11/15/2023)
11/19/2023	<a href="#">41</a>	TRANSCRIPT of Motion Hearing held on 08/28/2023 before Judge Morris. Transcript may be viewed at the court public terminal or purchased through the court reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the clerks office, or the court reporter. NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 7 DAYS OF THIS FILING. Contact court reporter Yvette Heinze, 406-422-8619, yvettecsrrpr@gmail.com. For further information, please see the Transcript Redaction Procedure and Schedule on the Court Reporters page of our website.. Redaction Request due 12/11/2023. Redacted Transcript Deadline set for 12/20/2023. Release of Transcript Restriction set for 2/20/2024. (YMH) (Entered: 11/19/2023)
11/20/2023	<a href="#">42</a>	USCA Case Number 23-3581 and Time Scheduling Order for <a href="#">38</a> Notice of Appeal filed by Austin Knudsen, Elsie Arntzen. (MMS) (Entered: 11/20/2023)
11/20/2023	<a href="#">43</a>	PRELIMINARY PRETRIAL STATEMENT by Elsie Arntzen, Austin Knudsen. (Johnson, Thane) (Entered: 11/20/2023)
11/20/2023	<a href="#">44</a>	JOINT DISCOVERY PLAN by BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater. (Van Kley, Constance) (Entered: 11/20/2023)
11/20/2023	<a href="#">45</a>	STATEMENT OF STIPULATED FACTS by BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater. (Van Kley, Constance) (Entered: 11/20/2023)
11/20/2023	<a href="#">46</a>	JOINT DISCOVERY PLAN by BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater. (Van Kley, Constance) (Entered: 11/20/2023)

11/20/2023	<a href="#">47</a>	STATEMENT OF STIPULATED FACTS by BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater. (Van Kley, Constance) (Entered: 11/20/2023)
11/20/2023	<a href="#">48</a>	PRELIMINARY PRETRIAL STATEMENT by BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater. (Van Kley, Constance) (Entered: 11/20/2023)
11/20/2023	<a href="#">49</a>	STIPULATION of Dismissal of <i>Def. Knudsen from Counts I &amp; II</i> by BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater. (Attachments: # <a href="#">1</a> Text of Proposed Order Dismissal of Def. Knudsen from Counts I & II) (Van Kley, Constance) Modified on 11/20/2023 to change event into a pending motion (MMS). (Entered: 11/20/2023)
11/20/2023	<a href="#">50</a>	PRELIMINARY PRETRIAL STATEMENT by J.P. Gallagher. (Walker, Cynthia) (Entered: 11/20/2023)
11/20/2023	<a href="#">51</a>	ORDER granting <a href="#">49</a> Stipulated Motion. The parties, though counsel, have stipulated to the dismissal of Defendant Austin Knudsen from Counts I and II. Pursuant to Fed. R. Civ. P. 41(a), Knudsen is DISMISSED from Counts I and II without prejudice. This Order does not affect: (1) Plaintiff Adria Jaworts claims against Defendant J.P. Gallagher, as presented in Counts I and II; or (2) Plaintiffs claims against Defendants Knudsen and Elsie Arntzen, as presented in Counts IV and V. Signed by Judge Brian Morris on 11/20/2023. (MMS) (Entered: 11/20/2023)
11/21/2023	52	TEXT Order Vacating : IT IS HEREBY ORDERED that the telephonic scheduling call set for November 27, 2023 is VACATED. The Court will proceed with the Telephonic Pretrial Conference set for <b>November 29, 2023 at 2:00 p.m.</b> . Signed by Judge Brian Morris on 11/21/2023. (SLL) <b>Modified on 11/21/2023 to correct typo in docket text. The Court will proceed with the Telephonic Pretrial Conference set for November 29, 2023 at 2:00 p.m. and not November 28th.</b> NEF regenerated to counsel. (MMS). (Entered: 11/21/2023)
11/24/2023	<a href="#">53</a>	TRANSCRIPT of Motions Hearing held on Wednesday, July 26, 2023, before Judge Brian M. Morris. Transcript may be viewed at the court public terminal or purchased through the court reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the clerks office, or the court reporter. NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 7 DAYS OF THIS FILING. Contact court reporter Kim Marchwick, 406-671-2307, marchwickkim@gmail.com. For further information, please see the Transcript Redaction Procedure and Schedule on the Court Reporters page of our website.. Redaction Request due 12/15/2023. Redacted Transcript Deadline set for 12/26/2023. Release of Transcript Restriction set for 2/22/2024. (Marchwick, Kim) (Entered: 11/24/2023)
11/28/2023	<a href="#">54</a>	MOTION for Summary Judgment <i>on Counts IV &amp; V</i> . Constance Van Kley appearing for Plaintiffs BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY,

		Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater. (Van Kley, Constance) (Entered: 11/28/2023)
11/28/2023	<a href="#">55</a>	Statement of Undisputed Fact re: <a href="#">54</a> MOTION for Summary Judgment <i>on Counts IV &amp; V</i> by BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater filed by BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater. (Attachments: # <a href="#">1</a> Exhibit 1 - HB 359 v1, # <a href="#">2</a> Exhibit 2 - HB 359 v3, # <a href="#">3</a> Exhibit 3 - HB 359 v4, # <a href="#">4</a> Exhibit 4 - HB 359 Final version, # <a href="#">5</a> Exhibit 5 - Decl. of Adria Jawort, # <a href="#">6</a> Exhibit 6 - Decl. of Rachel Corcoran, # <a href="#">7</a> Exhibit 7 - Decl. of Annatheia Smith, # <a href="#">8</a> Exhibit 8 - Decl. of Mitchell Locher, # <a href="#">9</a> Exhibit 9 - Decl. of James Bamfield, # <a href="#">10</a> Exhibit 10 - Decl. of Sabrina Malecek, # <a href="#">11</a> Exhibit 11 - Decl. of Mike Steinberg, # <a href="#">12</a> Exhibit 12 - Decl. of Krys Holmes, # <a href="#">13</a> Exhibit 13 - Decl. of Chelsia Rice, # <a href="#">14</a> Exhibit 14 - Decl. of Tim Graham, # <a href="#">15</a> Exhibit 15 - Decl. of Kevin Hamm, # <a href="#">16</a> Exhibit 16 - Decl. of Andy Nelson, # <a href="#">17</a> Exhibit 17 - Decl. of Ronald Waterman) (Van Kley, Constance) (Entered: 11/28/2023)
11/28/2023	<a href="#">56</a>	Brief/Memorandum in Support re <a href="#">54</a> MOTION for Summary Judgment <i>on Counts IV &amp; V</i> filed by BUMBLEBEE AERIAL FITNESS, RACHEL CORCORAN, IMAGINE BREWING COMPANY, LLC, ADRIA JAWORT, MONTANA BOOK COMPANY, Montana Pride, THE GREAT FALLS LGBTQ+ CENTER, THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, THE MYRNA LOY, THE WESTERN MONTANA COMMUNITY CENTER, The Roxy Theater. (Van Kley, Constance) (Entered: 11/28/2023)
11/29/2023	57	<b>MINUTE ENTRY for proceedings held before Judge Brian Morris: Telephonic Pretrial Conference held on 11/29/2023. (Law Clerk: T. Devine), (SLL)</b> (Entered: 11/29/2023)
11/29/2023	<a href="#">58</a>	ORDER STAYING CASE. 1. All proceedings in this case are hereby STAYED until the appeal to the Ninth Circuit is resolved. 2. Parties shall inform the Court within ten days of the resolution of the appeal. Signed by Judge Brian Morris on 11/29/2023. (ACC) (Entered: 11/29/2023)
12/11/2023		Terminate Deadlines as to <a href="#">39</a> & <a href="#">40</a> - transcripts filed as <a href="#">41</a> & <a href="#">53</a> . (ACC) (Entered: 12/11/2023)
12/19/2023		Terminate Deadlines as to <a href="#">41</a> & <a href="#">53</a> Transcript redaction request ddls. (ACC) (Entered: 12/19/2023)
01/04/2024		Response Deadline of 12/19/2023 re <a href="#">54</a> Terminated (TLO) (Entered: 01/04/2024)

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