

No. 23-3581

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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-Appellees,

v.

AUSTIN KNUDSEN; ELSIE ARNTZEN; and J.P. GALLAGHER,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Montana
No. CV 23-50-BU-BMM
Hon. Brian M. Morris

SUPPLEMENTAL EXCERPTS OF RECORD
Volume 1 of 1

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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

Civil Docket
No.
CV-23-50-BU-BMM

Plaintiffs,

vs.

AUSTIN KNUDSEN; ELSIE ARNTZEN; JP
GALLAGHER; and THE CITY OF HELENA,

Defendants.

Transcript of Motion Hearing

Paul G Hatfield Federal Courthouse.
901 Front Street
Helena, MT 59626
Monday, August 28, 2023
2:32 p.m. to 3:48 p.m.

BEFORE THE HONORABLE BRIAN MORRIS

UNITED STATES CHIEF DISTRICT COURT JUDGE

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Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

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ALSO PRESENT:

Elsie Arntzen
Murry Warhank

1 PROCEEDINGS

2 (Open court.)

3 THE COURT: Madam Clerk, please call the next case on
4 the Court's calendar.

5 THE CLERK: Yes, Your Honor. This is the time the
6 Court has set aside for a motion hearing in Civil Cause 23-50.
7 This is a Butte Division case before Honorable Brian Morris,
8 The Imperial Sovereign Court of the State of Montana versus
9 Knudsen, et al.

10 THE COURT: Thank you.

11 Counsel, good afternoon. There's enough of you. Why
12 don't you make appearances, please.

13 MS. VAN KLEY: Your Honor, Constance Van Kley on
14 behalf of plaintiffs. And with me at counsel table are
15 Rylee Sommers-Flanagan and Niki Zupanic.

16 THE COURT: Good afternoon.

17 MR. RUSSELL: Good afternoon, Your Honor.
18 Michael Russell on behalf of Defendants Knudsen and Arntzen.

19 MS. DOCKTER: Good afternoon, Your Honor.
20 Becky Dockter with the City of Helena.

21 MS. WALKER: Good afternoon, Cindy Walker for the
22 Defendant JP Gallagher.

23 THE COURT: All right. Anyone else? Well, welcome.

24 This is a hearing set for plaintiffs' motion for
25 preliminary injunction. Since the hearing on the TRO, we've

1 had written responses filed by the state and the other
2 defendants and a reply brief from the plaintiffs.

3 One thing I will talk about at the end of the hearing
4 today and would like you to start considering now is,
5 regardless of the outcome today, if we have any further
6 proceedings and we have a bench trial in this matter, how would
7 we reach a final resolution?

8 In the Tennessee case, there was an abbreviated bench
9 trial held. I think with Florida, there's just been a
10 preliminary injunction to date. So that's something we need to
11 talk about after we finish our arguments today.

12 So this is plaintiffs' motion for preliminary
13 injunction. Who is going to argue?

14 MS. VAN KLEY: Thank you, Your Honor.

15 Good afternoon, and may it please the Court.
16 Constance Van Kley on behalf of plaintiffs for a mix of
17 individuals, organizations, and businesses affected by
18 Montana's House Bill 359.

19 Plaintiffs ask the Court to grant their motion for a
20 preliminary injunction on Counts 4 and 5, which are the facial
21 challenges to HB 359 brought under the First and Fifth
22 Amendments, respectively.

23 Because Montana Pride has concluded, we are seeking
24 relief with regard to the preliminary injunction exclusively
25 against the state defendants, Attorney General Austin Knudsen

1 and Superintendent of Public Instruction Elsie Arntzen.

2 THE COURT: All right. Let's talk about those state
3 defendants for a minute. Why are they the proper parties here?

4 MS. VAN KLEY: Thank you, Your Honor. The state
5 defendants are the proper defendants because they satisfy the
6 required elements of causation and redressability under the
7 *Lujan* standing analysis.

8 Those two considerations are somewhat collapsed in
9 this case. The question of causation is whether plaintiffs'
10 injuries are fairly traceable to the defendants.
11 Redressability kind of addresses the same question. If the
12 plaintiffs' claims are fairly traceable to the defendants, can
13 the Court grant relief that is meaningful as to these
14 particular defendants? And the answer for both questions here
15 is yes.

16 I would direct the Court's attention to the case
17 *Planned Parenthood of Idaho v Wasden*, 376 F.3d 908. It's a
18 Ninth Circuit case from 2004. In *Planned Parenthood of Idaho*,
19 the Ninth Circuit considered precisely this question: When is
20 a state attorney general properly named? And really it comes
21 down to the particular features of state law.

22 In the *Planned Parenthood of Idaho* case, the Ninth
23 Circuit said there are two times when it is appropriate to
24 bring a challenge against the state attorney general when
25 you're challenging a state criminal law. Obviously, that law

1 was criminalizing certain abortion practices. And to quote the
2 Ninth Circuit, "Where an attorney general cannot direct, in a
3 binding fashion, the prosecutorial activities of the officers
4 who actually enforce the law or bring his own prosecution, he
5 may not be a proper defendant."

6 So *Planned Parenthood of Idaho* says there are two
7 times when a state attorney general can properly be named in a
8 pre-enforcement challenge to a criminal law like this:

9 First, the state attorney general is properly named
10 when that attorney general can bind the county attorney to act
11 to initiate criminal prosecutions, to prosecute criminal
12 prosecutions, to dismiss criminal prosecutions.

13 The second is when the attorney general can actually
14 step into the shoes of the county attorney.

15 Setting aside that second path, certainly, under
16 Montana law, Attorney General Knudsen has the authority to bind
17 county attorneys to initiate and prosecute criminal cases.

18 THE COURT: What's your authority?

19 MS. VAN KLEY: There are two parts. The first is
20 Montana Code Annotated Section 2-15-501. This is the section
21 of the code that refers to the duties of the attorney general.

22 It is the duty of the attorney general -- and I
23 quote -- "to exercise supervisory powers over county attorneys
24 in all matters pertaining to the duties of their offices. The
25 supervisory powers granted to the attorney general by this

1 subsection include the power to order and to direct county
2 attorneys in all matters pertaining to the duties of their
3 office. The county attorney shall, when ordered or directed by
4 the attorney general, promptly institute and diligently
5 prosecute in the proper court and in the name of the state of
6 Montana any criminal or civil action or special proceeding."

7 County attorney does not have discretion under this
8 section of the code to refuse enforcement if directed by the
9 state attorney general.

10 THE COURT: How does Montana's duties from the
11 attorney general differ from those of the state of Tennessee?
12 There, the district court determined that the county attorney
13 in Nashville was the appropriate defendant.

14 MS. VAN KLEY: Your Honor, I think we also could name
15 a county attorney. I think a county attorney could be a proper
16 defendant in that case.

17 In the *Friends of George's* case, the parties agreed
18 to dismissal of the attorney general. I don't know the details
19 for that. They initially named the state of Tennessee, the
20 governor, and the attorney general. I don't know what happened
21 behind the scenes.

22 We could name a county attorney. We could name -- we
23 could try to get a class certified as to all the county
24 attorneys. We could name the county attorneys in every county
25 where plaintiff resides. But that's not the question -- that

1 doesn't answer the question as to whether Attorney General
2 Knudsen is a proper defendant. There isn't a need, unless you
3 have a necessary party, which nobody is arguing here. There's
4 no need to sue every single person that potentially could be
5 sued. The question here is only whether or not causation and
6 redressability are proper as to -- or are satisfied as to
7 Attorney General Knudsen.

8 THE COURT: What about with regard to Superintendent
9 Arntzen?

10 MS. VAN KLEY: So Superintendent Arntzen, similarly,
11 I don't have a case, like *Planned Parenthood of Idaho*, that
12 applies to superintendents of public instruction. The
13 superintendent of public instruction under Montana law has the
14 ability to initiate teacher disciplinary practices by
15 presenting the issue to the board.

16 And I have a statute here. The superintendent of
17 public instruction -- I'm quoting from Montana Code Annotated
18 20-3-106, "The superintendent of public instruction has the
19 general supervision of the public schools in districts of the
20 state and shall perform the following duties or acts." One of
21 those enumerated duties is to issue, renew, or deny teacher
22 certification and emergency authorizations of employment.

23 I would like to also -- this one's a little more
24 complicated. And so may I approach?

25 THE COURT: You may. Give it to the clerk, please.

1 (Complying.)

2 MS. VAN KLEY: This is the statute that's cited by
3 the state defendants in their brief. This is Section 20-4-110
4 of Montana Code Annotated. And the state defendants use this
5 section of the code to argue that, in fact, it should be the
6 Board of Public Education and not Superintendent Arntzen who
7 should be named.

8 And, again, this question of whether or not you could
9 sue somebody else does not resolve the question of whether or
10 not this particular defendant is properly sued.

11 The Board of Public Education, under Subsection 1,
12 may discipline teachers for a number of enumerated reasons that
13 involve conduct that is not similar to the conduct proscribed
14 by House Bill 359: Making a line in their request for
15 certification; being incompetent in the exercise of their
16 duties, gross neglect of duty; criminal offense involving moral
17 turpitude, not just a criminal offense; immoral conduct,
18 certain -- a number of reasons, none of which have anything to
19 do with Drag Story Hours. The House Bill Number 359 does not
20 amend this code section.

21 And so if the Board of Public Instruction were to
22 take disciplinary action against a teacher, it would be under
23 Subsection 2 of this statute. The board may initiate
24 proceedings under this section if a request for the suspension
25 or revocation is made to it by subpart B, the superintendent of

1 public instruction.

2 So the superintendent of public instruction -- and I
3 think this is true whether or not it falls under one of these
4 subsections. The superintendent of public instruction,
5 Defendant Elsie Arntzen, has the power to initiate the
6 disciplinary process with regard to teachers, including
7 Plaintiff Rachel Corcoran.

8 So as to both Defendant Knudsen and Defendant
9 Arntzen, the causation and redressability prongs of the *Lujan*
10 analysis are satisfied.

11 THE COURT: What about with regard to the private
12 right of action?

13 MS. VAN KLEY: So this comes up quite a bit in the
14 state's brief because of the case *Whole Woman's Health v*
15 *Jackson*, the US Supreme Court case dealing with Texas's SBA,
16 which included a private right of action against abortion
17 providers or citizens who assist in abortions.

18 In that case, the law SB 8, did not include criminal
19 prosecutions. There was no amendment to the criminal code.
20 Nobody had the right to bring a criminal action against the
21 individuals who were deemed to be in violation of SB 8. And
22 the Court said, with regard to that challenge, that the
23 plaintiffs didn't have standing and that the defendants were
24 not proper defendants under the *Ex Parte Young* analysis when
25 the plaintiff sued judges who are not adverse to the litigants

1 who come before them and state court clerks who do not have the
2 opportunity to exercise discretion about what they will and
3 will not docket.

4 And so although HB 359 also includes a private right
5 of action, it includes criminal penalties, which are
6 enforceable by Defendant Knudsen, and it also includes
7 occupational penalties against teachers enforceable by
8 Defendant Arntzen.

9 In the *Whole Woman's Health* case, there was also a
10 claim brought against Texas licensing officials, who under SB 8
11 had the authority to initiate disciplinary actions against
12 medical providers. The Supreme Court in *Whole Woman's Health*
13 said those claims can go forward.

14 *Whole Woman's Health* presents an interesting analysis
15 of a private right of action, but it just doesn't apply here
16 because House Bill 359 is not -- does not include solely a
17 private right of action. We are not suing judges. We are not
18 suing state court clerks. It is put to the side entirely.

19 And I think, just as we don't need to sue every
20 single defendant that we possibly could sue, the fact that
21 there are these other penalty provisions within the law does
22 not mean that our challenge to the criminal penalty provisions
23 or the occupational penalty provision regarding teachers is
24 improper.

25 I'd like to go back to the big picture of standing

1 really briefly. There's a doctrine that's sort of colloquially
2 described as "Standing for one is standing for all." To quote
3 the Ninth Circuit in *National Association of Optometrist and*
4 *Opticians v Brown*, 567 F.3d 521, "As a general rule, in an
5 injunctive case this court need not address standing of each
6 plaintiff if it concludes that one plaintiff has standing."

7 And in the First Amendment context, so long as one
8 plaintiff faces the choice of self-censorship or prosecution,
9 that plaintiff can litigate the constitutional deficiencies
10 that affect others. As the US Supreme Court said in *Broadrick*
11 *v Oklahoma*, even if an injury in fact is demonstrated, the
12 usual rule is that a party may assert only a violation of its
13 rights. "However, in the First Amendment context, litigants
14 are permitted to challenge a statute not because their own
15 rights of free expression are violated, but because of a
16 judicial prediction or assumption that the statute's very
17 existence may cause others not before the court to refrain from
18 constitutionally protected speech or existence."

19 And turning to the specifics of injury in fact in the
20 First Amendment context, I think we talked about this at the
21 TRO hearing. I won't belabor the point. But I would like to
22 just present something that the Ninth Circuit said very
23 recently, in 2018, in the case of *Italian Colors v Becerra*,
24 which is 878 F.3d 1165. "In order to avoid this chilling
25 effect, the Supreme Court has endorsed what might be called a

1 'hold your tongue and challenge now' approach rather than
2 requiring litigants to speak first and take their chances with
3 the consequences."

4 Because the fact that criminal prosecution is on the
5 other end of speech causes plaintiffs to self-censor, that
6 fact, the threat of criminal prosecution and the attendant
7 self-censorship, is an injury in the First Amendment context.

8 All of the plaintiffs suffer an injury. In fact, I'd
9 say that all of them have standing. But because of that
10 doctrine of standing for all, I'll just focus briefly on the
11 most obvious cases.

12 With regard to the -- and, again, focusing on these
13 particular defendants who are named for purposes of the
14 preliminary injunction. With regard to the Drag Story Hour
15 ban, Plaintiff Rachel Corcoran is a teacher who dresses in
16 costume. Under her interpretation of HB 359 and under my
17 interpretation of HB 359, when she dresses in costume to teach
18 to her students and those costumes have discernable gender, it
19 is at least arguably within the scope of the ban on Drag Story
20 Hours. She, therefore, faces criminal prosecution and
21 disciplinary action.

22 With regard to the other piece of the law, the ban on
23 so-called sexually oriented performances, The Roxy Theater and
24 the Myrna Loy are both sexually oriented businesses, kind of
25 absurdly, but as defined by the statute because they serve

1 alcohol on premises, and they show performances that may be
2 deemed sexually oriented performances. They are also
3 recipients of straight funds. So two different -- for two
4 different reasons, they are subject to criminal penalties.

5 Now, Your Honor, we spoke at length about the merits
6 during the temporary restraining order hearing. I don't want
7 to be redundant. I'd like to go briefly through the *Winter*
8 factors. But, first, I'd like to point out that the state in
9 its brief has really offered no evidence to rebut the arguments
10 that we raised in our brief or the determinations of the Court
11 in the temporary restraining order order.

12 THE COURT: Well, Ms. Van Kley, you are asking again
13 now for emergency relief here. What harm is imminent? The
14 last time, for the TRO hearing, the Pride event was happening
15 that weekend. What's going on that justifies the emergency
16 relief?

17 MS. VAN KLEY: Your Honor, we are asking for a
18 preliminary injunction, which does not present the same
19 concerns that a temporary restraining order presents.

20 With regard to the temporary restraining order, the
21 state had an opportunity to attend the hearing. They didn't
22 have an opportunity to present their arguments in a brief.
23 That is now fully briefed. The state has had the opportunity,
24 just as the plaintiffs did, to present declarations or other
25 evidence in support of their response to the preliminary

1 injunction motion.

2 And so this is -- the question is not whether harm is
3 going to happen right now, but whether or not harm is likely to
4 occur during the pendency of the lawsuit if there isn't a
5 preliminary injunction in place.

6 And for that, the standard of irreparable harm in the
7 First Amendment, I'll direct the Court to *Elrod v Burns*, a
8 US Supreme Court case from 1976, 427 US 334. "The loss of
9 First Amendment freedoms, for even minimal periods of time,
10 unquestionably constitutes irreparable injury."

11 Setting aside the plaintiffs -- that we just
12 discussed with regard to standing, on the whole, plaintiffs
13 have offered a significant body of evidence that their speech
14 has been chilled as a result of HB 359. We can extrapolate
15 from that very naturally that that speech is going to continue
16 to be chilled. That is irreparable injury under the
17 First Amendment, and that is what is required under the *Winter*
18 factors.

19 So if HB 359 is not preliminary enjoined, plaintiffs
20 and others will be forced to self-censor in order to avoid
21 penalties at the hands of the state. That satisfies the
22 irreparable injury prong. It really also goes to the equitable
23 considerations and public interest prongs of the *Winter*
24 analysis because the state does not have an interest in
25 violating individuals' constitutional rights. The state does

1 not have an interest in censoring speech. And existing law in
2 Montana protects minors sufficiently from speech that truly is
3 obscene.

4 Turning to the first *Winter* factor, likelihood of
5 success on the merits --

6 THE COURT: Before you go there, what about the
7 nonstate defendants, the City of Helena and JP Gallagher and
8 the City of Butte?

9 MS. VAN KLEY: Your Honor, given the representations
10 of the City of Helena at the TRO hearing, given that the
11 permits for Montana Pride did in fact issue and that the City
12 of Helena sees itself in what it described as a Hobson's
13 choice, between censoring individuals and complying with the
14 HB 359, we aren't directly seeking a preliminary injunction
15 against the City of Helena because they do not intend to
16 violate individuals' First Amendment rights.

17 With regard to Defendant JP Gallagher, Plaintiff
18 Adria Jawort's claims against him are based on past harm.
19 There's no indication that Defendant JP Gallagher is going
20 to -- that we are aware of. We don't have evidence to show
21 that JP Gallagher is going to in the future violate
22 individuals' First Amendment rights. And so our request for
23 relief on the preliminary injunction is limited to the state
24 Defendants Austin Knudsen and Elsie Arntzen.

25 THE COURT: All right.

1 MS. VAN KLEY: And we are moving for a preliminary
2 injunction under Count 4, which is the First Amendment free
3 speech claim, and, 5, the void for vagueness claim. I know we
4 talked about this quite a bit. I'd just like to address a few
5 things that came up in the state's response brief.

6 The state -- the Court determined in its TRO order
7 that HB 359 covers at least some speech that is outside the
8 scope of obscenity. And the Court determined that it did not
9 merely regulate obscenity, which is already criminalized under
10 Montana law. The state does not really dispute that. What it
11 is -- my reading of its brief is instead that it argues that
12 some drag is obscene.

13 Focusing particularly on plaintiff, the Imperial
14 Court, the state argues that because the Imperial Court
15 sometimes puts on performances for adults, it cannot also put
16 on performances for children. That is not responsive to the
17 question of whether HB 359 sweeps in speech that is nonobscene.

18 HB 359 -- and this is a way in which HB 359 is
19 distinguishable from the statutes that were considered in
20 Tennessee and in Florida and is, in fact, worse than those
21 statutes. HB 359 does not even attempt to incorporate the
22 Miller test.

23 The statute enjoined in *Friends of George's*
24 incorporated the Harmful to Minors test, which is the Miller
25 test, kind of by way of Ginsburg. It is the test for obscenity

1 as applied to minors, and the law considered in *HM Florida*
2 expressly incorporated the Miller test.

3 THE COURT: So why do you say it makes no attempt?

4 MS. VAN KLEY: I'm sorry, Your Honor?

5 THE COURT: Why do you say HB 359 makes no attempt?

6 MS. VAN KLEY: You know, maybe I should revise that.

7 It might -- it winks to the purulent interest in sex
8 requirement of the Miller test. So maybe it makes an attempt,
9 but it does not attempt to incorporate all of the requirements
10 of the Miller test.

11 Your Honor, may I --

12 THE COURT: You may.

13 (Handing documents.)

14 MS. VAN KLEY: In Section 1, Subsection 10, the
15 definition of sexually oriented performance incorporates one
16 piece of the Miller test, a sliver of it, that a performance
17 that regardless of whether performed for consideration is
18 intended to appeal to a purulent interest in sex, but it does
19 not otherwise satisfy the Miller test in a few different ways.

20 First, it does not require that it appeal to a
21 purulent interest in sex on the whole and applying contemporary
22 community standards. That is required under Miller. It does
23 not require that on the whole and, again, applying contemporary
24 community standards, the speech that is proscribed be patently
25 offensive and it does not -- and it does not require that the

1 speech on the whole has no serious literary, artistic, or
2 educational value. Miller requires all of that. And the
3 Tennessee and Florida laws, despite their flaws, at least had
4 those words on the page. HB 359 does not.

5 The state also argues -- and we explored this a
6 little bit during the TR0 hearing -- that it has the right to
7 condition state funding on certain speech. That's generally a
8 correct statement of law, but it is not unqualified. A
9 government can subsidize -- can allow subsidies that will
10 require the recipient of the funds to engage in some form of
11 speech. It has to be tied to the particular speech activities.

12 We have an example. In Montana, if you go to the
13 Roxy Theater's web page or to the Myrna Loy's web page, both
14 receive funding from the Montana Arts Council, you'll see on
15 their website that next to -- that next to its acknowledgement
16 of this funding it cites, "We receive funding that is paid for
17 by Coal Severance Taxes." So that's an example of a time in
18 which the state of Montana says, "We'll give you this money;
19 you need to include this speech on your website because you are
20 taking this money."

21 HB 359 does something very different than that. It
22 does not merely condition funding that is related to a specific
23 activity on carrying a particular message. And I will -- I am
24 looking at Section 3 of HB 359, subsection -- Section 3,
25 Subsection 3: "A sexually oriented performance is prohibited,"

1 sub b, "in a location owned by an entity that receives any form
2 of funding from the state."

3 This is not an example of the state saying, "We'll
4 give you money for your arts program, but you need to fly this
5 particular banner or hand out this leaflet." It's immediately
6 distinguishable from the cases *Rust v Sullivan* and *American*
7 *Library Association*, both of which involved funding for
8 particular activities that was very closely tethered to what
9 the government was trying to do.

10 In *American Library Association*, the federal
11 government was offering money to public libraries to expand
12 their internet access. And when public -- in order for a
13 public library to take that money, they had to agree to install
14 pornography blockers. That's an example of how this government
15 funding of speech doctrine works.

16 This is something really different. Not only that,
17 none of those cases involve the government criminalizing
18 speech. The penalty -- the penalty for a violation of one of
19 those provisions -- you don't comply with the terms of your
20 contract with the government, then the money goes back.

21 Here, however, if you don't do what we tell you to
22 do, you suffer criminal penalties. This is not the same fact
23 pattern. It's not the same issue.

24 The only conclusion is that HB 359 proscribes
25 protected speech, and it does so on the basis of content and

1 viewpoint. A law is content based when it applies to
2 particular speech because of the topic discussed or the idea or
3 message expressed. With regard to both of the categories of --
4 both of the categories of restrictions under HB 359, the law is
5 certainly content based and in some ways also viewpoint based.
6 And whenever a law is a content-based restriction on speech,
7 strict scrutiny applies.

8 Under strict scrutiny, the government has to offer a
9 compelling interest for the restriction on speech and the
10 restriction has to be narrowly tailored to that interest.
11 Neither step is met here. The only compelling interest that's
12 offered is to protect minors from harm, but there's no
13 explanation about why existing law is not adequate to do that.

14 And, in fact, the legislative record suggests that
15 the state was instead intending to protect minors from
16 divergent gender expression, which is certainly not the same
17 thing as protecting minors from truly obscene speech.

18 But even crediting the state's argument of a
19 compelling interest that this is intended to protect minors
20 from obscenity, there is -- the law is so overbroad. It is
21 also underbroad in some ways. It is overbroad because it
22 restricts speech from adults -- between adults in certain
23 places. It is overbroad because it protects innocent speech.
24 It protects -- or it proscribes innocent speech. It prevents
25 individuals from reading to children in costumes. It appears

1 to apply whether that costume is that of a -- at least on the
2 face of HB 359, it appears to apply whether the person in
3 costume is dressed as a drag queen, a drag king, a Disney
4 princess, a superhero. All of those are flamboyant or parodic
5 personas with glamorous or exaggerated costumes and makeup.
6 There is so much speech that is encompassed within HB 359 that
7 falls far outside the zone of obscenity.

8 And relatedly, plaintiffs are likely to succeed on
9 Count 5, the void for vagueness challenge, because it is nearly
10 impossible to know how to tailor one's conduct to HB 359. The
11 state's argument, as I read it, is essentially that HB 359
12 can't mean what we say it means because that would be too
13 crazy. But the question is what do the words say? And the
14 words themselves encompass a variety of innocent speech-related
15 activities, including, for example, showing PG-13 movies at the
16 Roxy Theater or the Myrna Loy.

17 And, Your Honor, we address the remaining three
18 prongs of the Miller analysis, because this is a First
19 Amendment case, because chilled speech is a result of
20 unconstitutional government action is irreparable injury. The
21 second prong of the *Winter* analysis is met because the
22 government has no interest -- no legitimate interest in
23 silencing speech. The third and fourth prongs are met as well.

24 We, therefore, ask the Court to grant our motion for
25 a preliminary injunction as to Counts 4 and 5 of the complaint

1 and against Defendants Knudsen and Arntzen.

2 THE COURT: Thank you.

3 MR. RUSSELL: Good afternoon, Your Honor.

4 THE COURT: Good afternoon.

5 MR. RUSSELL: It seems like there's confusion as to
6 the proper analysis to apply in plaintiffs' facial challenge.
7 Plaintiffs clarified that the only two counts that are at issue
8 with respect to the preliminary injunction are Counts 4 and 5,
9 which are both facial challenges to HB 359, one on First
10 Amendment grounds, the other on Fifth Amendment/Fourteenth
11 Amendment grounds.

12 That analysis is described by the Supreme Court as
13 balancing -- I can find the exact quote -- but, paraphrasing,
14 balancing the overbreadth of -- the alleged overbreadth of the
15 statute on its face, but also, in fact, judged in relation to
16 the plainly legitimate sweep of that statute.

17 And that's a very specific special test developed by
18 the US Supreme Court for this specific kind of case. And
19 that's the -- it appears to be the balancing of their
20 relaxation of the typical third-party standing requirements and
21 allowing potentially the facial invalidation of the statute.
22 Because, normally, facial invalidation or facial challenge, the
23 plaintiff has to prove unconstitutionality of the statute in
24 all possible applications. That's not the question or the test
25 when it comes to a facial challenge to the first amendment on

1 overbreadth grounds.

2 And I've seen the case law that -- it appears to me
3 that the facial challenge is synonymous with an overbreadth
4 challenge, at least in the First Amendment context. I know
5 that's what the Tennessee court noted in its opinion. And I
6 think that makes sense in this context where we're loosening
7 the third-party standing requirements.

8 So with that proper analysis in mind -- and I don't
9 need to, unless you want me to, go through the briefs.

10 THE COURT: You mentioned the Tennessee case.

11 MR. RUSSELL: Yes.

12 THE COURT: Where did that court go wrong?

13 MR. RUSSELL: Well, I'm not necessarily saying that
14 it did. It's very different --

15 THE COURT: Okay. If you don't think -- I'm sorry.
16 I shouldn't put words in your mouth. If I don't think the
17 Tennessee court was wrong, why does that statute differ from
18 HB 359 regarding its constitutionality?

19 MR. RUSSELL: Well, it's a different statute with
20 different provisions and different statutory instruction.
21 Under Montana law, the statutory construction rules are set
22 forth in title -- I think it's Title 1-2, where a statute has
23 to be construed according to its context and in relation to
24 its -- the purpose of the intent, the intent that the
25 legislature clearly -- that the legislature conveyed.

1 In any event the -- so, for example, the Tennessee
2 statute defines adult cabaret entertainment, and it has
3 different definitions. It has different provisions. It's a
4 different statute that is applied in the context of its
5 enactment and enforcement.

6 In that case, for example, the Tennessee court only
7 enjoined it with respect to the one county attorney. And I
8 don't claim to be familiar with the enforcement provisions of
9 criminal law in Tennessee, but that's one reason that it's
10 different.

11 THE COURT: Well, let's talk about that issue. You
12 argue that Attorney General Knudsen is not a proper defendant
13 here. Why?

14 MR. RUSSELL: I'm thinking that "not a proper
15 defendant" is maybe not the best way to describe it. I'm
16 thinking that the -- being a proper party is not the same as
17 being a necessary party for purposes of standing.

18 So, for example, if the Court enjoins HB 359's
19 enforcement by Attorney General Knudsen, that does not enjoin
20 its enforcement entirely. Each individual county attorney has
21 discretion to bring a charge under the laws irrespective of the
22 attorney general.

23 THE COURT: I thought counsel argued that under
24 Montana law the attorney general has the authority to direct
25 the county attorney to initiate or halt the prosecution.

1 MR. RUSSELL: And I think it does, but in conjunction
2 with the county attorney. So, in other words, if the
3 injunctive relief doesn't direct -- and I'm not sure that it
4 could; that's not the injunctive relief that's requested by
5 plaintiffs -- to direct the AG to instruct all county attorneys
6 or prohibit all of them from bringing charges under this
7 statute.

8 THE COURT: If the county attorney in some county
9 decides to bring an action, irrespective of the wishes of the
10 attorney general, doesn't MCA Section 2-15-501 allow the
11 attorney general to bind the county attorney to act in a
12 particular way?

13 MR. RUSSELL: It does.

14 THE COURT: So why wouldn't an injunction against the
15 attorney general require the attorney general to prevent other
16 county attorneys from acting?

17 MR. RUSSELL: That's not my understanding of the
18 injunctive relief requested. The injunctive relief requested
19 against the AG is that the AG not enforce it. So there are
20 many cases that are filed all the time that the AG has
21 absolutely no involvement in.

22 THE COURT: So plaintiffs, I guess, are stuck -- if
23 that were to happen, stuck bringing a new action against that
24 county attorney?

25 MR. RUSSELL: I don't pretend to direct plaintiffs

1 how to prosecute their case. But I think what you're getting
2 at, perhaps it's a defect in the pleading under Section 1983,
3 for example. I didn't see any declaratory judgment action, for
4 example, that -- and that wasn't briefed, and I don't want to
5 speak out of line on that but that -- for example, that might
6 be one.

7 THE COURT: What about the superintendent of public
8 instruction?

9 MR. RUSSELL: So similar lines on that. The
10 superintendent is not the only person or entity that can bring
11 disciplinary or licensing proceedings against a teacher or
12 administrator, et cetera.

13 And I am not aware of any statutory authority that
14 allows the superintendent to prevent the Board of Trustees for
15 a school district, for example, the other identified entity or
16 entities that could request or petition the board to initiate
17 such proceedings. I am not aware of any statutory authority
18 for that.

19 But on that note, the only plaintiff in this case
20 where the superintendent and her responsibilities or duties are
21 relevant is Plaintiff Corcoran -- sorry if I'm mispronouncing
22 the name. She has not demonstrated standing with respect to
23 this particular defendant. And that is, first of all, because
24 it's clearly established precedent that a public employee -- or
25 a state employee doesn't have First Amendment protection for

1 the speech of the -- of that employee while on the job in the
2 scope of their duties.

3 And that's my understanding of what that particular
4 plaintiff alleged was that she wouldn't be able to engage in
5 this conduct in her job, and she also alleges that she intends
6 to do it anyway. So I'm not seeing what chilling effect there
7 is with respect to her anyway. And, again, she's the only
8 plaintiff where Defendant Arntzen comes into play.

9 But with regard to the statutory construction aspect,
10 I think it's helpful to heed the codification instructions that
11 are set forth in Section 5 of HB 359. So Section 5 states
12 that -- Sections 1 and 2, the definitions and the provisions
13 regarding sexually oriented businesses are to be codified under
14 Title 45, Chapter 8. That is one.

15 I think these specific sections need to be
16 compartmentalized when it comes to their construction. Because
17 under Montana's rules of statutory construction, the statutes
18 relate to the law of the state respecting the subjects to which
19 they relate, and the provisions and all proceedings under them
20 are to be literally construed with a view to affect their
21 objects and promote justice.

22 So, for example, Section 2 would need to be construed
23 in the context of that particular statutory section which sets
24 forth the offenses against public order. I haven't seen it
25 codified yet, and I am not sure what the timeline is on that.

1 Maybe my --

2 THE COURT: So how do I do that? How would I
3 evaluate that pursuant to the rest of --

4 MR. RUSSELL: Title 45, Chapter 8.

5 THE COURT: -- Title 45, Chapter 8?

6 MR. RUSSELL: Well, for example, we brought this up
7 in the brief. You look to other terms that are defined in that
8 section of the code.

9 In the particular example we provided was the
10 definition of performance, which specifically exempts motion
11 picture -- motion pictures rated by the Motion Picture
12 Association of America, I think is the entity.

13 So these movies that the Myrna Loy and the
14 Roxy Theater bring up, they're specifically exempted from the
15 definition of performance. And simply because those
16 particular -- that particular definition applies to that -- to
17 the obscenity statutes in that section of the code doesn't mean
18 that that definition doesn't apply. So --

19 THE COURT: So how would that work in practice?

20 MR. RUSSELL: So if we're looking to see whether a
21 performance was -- violated the law, we look to see what the
22 performance is. And if this -- if these movies are exempted
23 from the definition of performance, then there's no liability,
24 no potential liability associated by playing those to a minor.

25 THE COURT: So anything besides the movies?

1 MR. RUSSELL: Well, so the definition --

2 THE COURT: What if it was a live performance?

3 MR. RUSSELL: Then that's not exempted, at least
4 under that definition.

5 And so the performance is defined as any motion
6 picture film or videotape exempting those that I mentioned --
7 phonograph, record, compact disk, et cetera -- or other
8 exhibition played or performed for an audience of one or more
9 with or without consideration.

10 So it has to be -- when construing the words in the
11 statute, they have to be construed in that context of a
12 performance. So, for example, just walking down the street in
13 a bikini that might show somebody's buttocks, that's not a
14 performance. That couldn't possibly be considered a violation
15 under this law.

16 And so that's -- with regard to Section 2, that
17 creates a specific -- a new category of -- a legal category of
18 businesses that are subject to these regulations, and it's set
19 forth in the definitions.

20 The state is not trying to -- as plaintiffs
21 mentioned, the state's not establishing a new obscenity
22 standard. We're not arguing that the performances set forth in
23 HB 359 amount to obscenity. We're arguing that they're
24 indecent and improper for minors only. And as precedent has
25 set forth, the state has compelling interest in protecting

1 minors from this kind of conduct.

2 The question then is whether any overbreadth of that
3 statute is substantial in relation to the legitimate sweep of
4 the law.

5 With regard to Section 3, that again is codified
6 under Title 20, Chapter 7-1. And that makes sense given the
7 provisions under the education code with respect to the
8 particular teachers, administrators, specialists, et cetera,
9 whose licensing may be in jeopardy if in violation of this
10 section.

11 THE COURT: So the Florida law, among other things,
12 sought to ban admitting a child to an adult live performance.
13 That was part of the analysis by the court there. Why was that
14 wrong?

15 MR. RUSSELL: Well, again, I'm not saying that was
16 necessarily wrong. I'm not sure with which part of the court's
17 opinion you are referring to necessarily. But my understanding
18 of that law is that it revised the -- I think it was -- it
19 addressed it under the licensing scheme for liquor licenses,
20 but I could be getting those mixed up.

21 But, again, that's a different law, different
22 definitions, different context.

23 It's clear from the face of the bill and from the
24 legislative history that the legislature intended -- well,
25 first of all, found that these kinds of performances are

1 inappropriate and potentially harmful to minors. And it
2 targeted the areas and context situations where minors are
3 likely to be and where these performances are likely to occur
4 and attempts to draw that line there.

5 So it's really a balancing test, and that's what the
6 court noted in the *US V Williams* case and the *Hansen* case. On
7 the one hand, it may prevent the expression covered by the
8 First Amendment; but, on the other hand, it also -- it also --
9 it protects or it -- the words are escaping me. But it
10 furthers the state's interest in protecting minors at the same
11 time.

12 So that's why I mention that this is the analysis
13 that is appropriate under this circumstance for these kinds of
14 claims.

15 With regard to concerns about code funding for
16 example, this law is not retroactive. There's no provision in
17 it making it retroactive. And Section 1-2-109 says no law
18 contained in these statutes is retroactive unless expressly so
19 declared.

20 THE COURT: How do you respond to counsel's argument
21 about the receipt of state funds? Typically, they argue,
22 that's a situation -- for example, the Arts Council requires a
23 recipient to post on their website that money comes from the
24 Coal Severance Tax, or something to that effect.

25 MR. RUSSELL: So that sounds like compelled speech.

1 In this case it's -- the state is asserting its interest in not
2 allowing its funds with the taxpayer funds to subsidize conduct
3 that is deemed to be inappropriate for minors. I'm not aware
4 of precedent that squarely addresses that in that context, but
5 the precedent we've cited in our brief we believe supports the
6 proposition that the state is not required to subsidize speech.
7 And any challenge to those regulations should be analyzed under
8 rational basis scrutiny which this law clearly satisfies.

9 So regarding the *Winter* factors, the likelihood of
10 success on the merits, of course, is the first one. And, I
11 guess, before I go further, I noticed a typo in our -- on
12 page 13 of 36, quoting *Benisek v Lamone*, "As a matter of
13 equitable discretion, a preliminary injunction" -- something
14 got lost in the formatting there, but it should say, "does not
15 follow as a matter of course from a plaintiff's showing of a
16 likelihood of success on the merits." So the Court is familiar
17 with that. I just wanted to point that out.

18 So that likelihood of success, of course, we've
19 discussed briefly that the facial challenges -- but also
20 standing, again, that you can't have success on the merits if
21 you don't have standing.

22 So with regard to the injury, the only injury that I
23 heard plaintiffs argue is the chilling effect. And in a
24 pre-enforcement action like this where none of the state
25 defendants have enforced this bill, the purported chilling

1 effect, just by the fact that the law on the books is
2 potentially unconstitutional -- or allegedly constitutional law
3 is on the books is not sufficient for purposes of establishing
4 injury -- or, well, I would argue injury under the standing
5 analysis, also irreparable harm under the *Winter* factors.
6 There has to be something more concrete, and there simply is
7 not here.

8 The closest thing that I heard was Plaintiff Jawort
9 having that performance canceled by Plaintiff Gallagher.
10 Reviewing Defendant Gallagher's submissions indicates to me
11 that there's a significant speed of fact as to the
12 circumstances of what was actually said to and from, I believe,
13 the individual who conveyed to Plaintiff Jawort that the
14 performance has been canceled. And the full -- her full
15 statements were not authorized by that defendant, and
16 Defendant Gallagher's affidavit demonstrates that he attempted
17 to reach out to Plaintiff Jawort and work out an arrangement
18 that would allow Jawort to do this performance, but those
19 attempts were rebuffed.

20 THE COURT: How would I sort out that disputed fact?

21 MR. RUSSELL: Well, at this stage, I'm not sure. I
22 mean it's -- it goes back to plaintiffs' burden. Again,
23 that's -- and maybe I'm conflating these things because that
24 doesn't -- that's not relevant to my clients with respect to
25 the facial challenge.

1 It may demonstrate potentially a problematic
2 application of this statute in one case which is in dispute,
3 but that's a heavy burden. The courts have described facial
4 invalidation as strong medicine. And on top of that, a
5 preliminary injunction is an extraordinary remedy never awarded
6 as a right.

7 So against that backdrop, these disputes to fact, I
8 don't believe the Court should give -- I don't know what the
9 truth is with respect to that issue to be honest. I don't
10 think the Court should take that into account for its purposes
11 on the preliminary injunction.

12 And on the standing, aside from the injury element,
13 causation -- and maybe this goes back to the problem with it
14 being a Section 1983 claim -- there's been no alleged injury
15 caused by Defendants Knudsen or Arntzen. There hasn't been any
16 enforcement.

17 And, again, the redressability aspect, if there were
18 to be a preliminary injunction preventing them from enforcing
19 it, I don't believe that prevents, first of all, the Board of
20 Education from enforcing a certain aspect where it has power
21 under this bill or the county attorneys to initiate proceedings
22 under this bill.

23 That's the narrow scope of the request of preliminary
24 relief as far as I am aware of.

25 Briefly, on the void for vagueness issue, I think,

1 again, everything -- all of these provisions need to be read in
2 context and alongside the other -- the statutes where they're
3 supposed to be confined. There's been, at least from the
4 allegations in the complaint and in the motion for preliminary
5 injunction, there's conflation of where, you know, Drag Story
6 Hours come into play versus sexually oriented performance or
7 drag shows. Nowhere in the bill does it say "drag show."

8 The one place that it mentions Drag Story Hours,
9 aside from the definitions, is Section 3(2). There are no
10 criminal sanctions against a performer based on the plain
11 language of this bill.

12 I'm jumping all over the place here, but I think with
13 respect to the void for vagueness issue, the test is whether
14 the statute is -- it's not whether there can be ed cases or
15 certain cases that are problematic. It's whether the statute
16 in the vast majority of its applications is clear -- or what
17 the statute prohibits, and the vast majority of its
18 applications is clear. So these arguments of what exactly
19 stripping means in a very specific situation or so on and so
20 forth.

21 I think it's clear when read in its entirety what the
22 statute -- these statutes, I should say, the three separate
23 statutes that this bill affects -- what conduct is proscribed.
24 And that is sexually oriented performances that aren't
25 necessarily obscene but are inappropriate, potentially harmful,

1 to minors, and Drag Story Hours, in this very limited context,
2 in a school or library receiving funding from the state before
3 the close of normal business hours or as part of a
4 school-sanctioned activity. That's a very narrow context with
5 respect to that portion.

6 I think in summary -- well, that's on the likelihood
7 of success on the merits. I addressed the irreparable harm.
8 All I've heard is the chilling effect, and that is not enough
9 in a pre-enforcement action.

10 But then, lastly, the last two elements of the *Winter*
11 test merge when it's a governmental defendant. The balance of
12 equities in the public interest, clearly the public's interest,
13 as demonstrated by the fact that the legislature had consensus
14 and passed this law, is in favor -- weighs in favor of allowing
15 this law to stand during the pendency of this litigation.

16 And in the absence of any enforcement action or
17 negative effects as I discussed, the balance of equities also
18 does not weigh in favor of plaintiffs under the *Winter* factors.

19 So, in summary, plaintiffs are not entitled to the
20 extraordinary remedy of preliminary injunction. They can't
21 satisfy the *Winter* factors, both because the overbreadth
22 analysis indicates that this law is -- the plainly legitimate
23 sweep of this law is far greater than the alleged overbreadth,
24 and plaintiffs can't demonstrate standing with respect to these
25 particular defendants at issue.

1 THE COURT: All right. Thank you, Counsel.

2 MR. RUSSELL: Thank you.

3 THE COURT: City of Helena.

4 MS. DOCKTER: Your Honor, may it please the Court,
5 Becky Dockter from the City of Helena.

6 We are going to forgo making any statements here
7 today given the plaintiffs' statements about the relief being
8 limited only to the state defendants. And because the facts of
9 this case bore out that the permit was issued. Montana Pride
10 events occurred. And we believe that this case is moot, and
11 it's appropriate for dismissal.

12 We will file something, if necessary, after this
13 hearing to that effect. But here today, we don't feel the need
14 to respond, unless Your Honor has questions.

15 THE COURT: No. Thank you.

16 MS. DOCKTER: Thank you.

17 Ms. Walker.

18 MS. WALKER: And the same would apply with respect to
19 Defendant JP Gallagher, Your Honor. He's not taking a position
20 on the preliminary injunction, and he's not a subject of that
21 proceeding based upon plaintiffs' acknowledgments here today.

22 THE COURT: Thank you.

23 MS. WALKER: Thank you.

24 THE COURT: Rebuttal?

25 MS. VAN KLEY: Your Honor, I'm happy to answer any

1 questions; otherwise, I will waive.

2 THE COURT: Well, why don't you answer a few
3 questions.

4 MS. VAN KLEY: I'm sorry?

5 THE COURT: Why don't you answer a few questions.

6 MS. VAN KLEY: I would love to.

7 THE COURT: So you heard counsel argue I have to read
8 section -- if you look at Section 5, it directs that Sections 1
9 and 2 of the law are codified, Title 45, Chapter 8. And as a
10 result, it has to be read in context with other definitions in
11 Title 45, Section 8.

12 MS. VAN KLEY: Your Honor --

13 THE COURT: Do you agree with that, first of all?

14 MS. VAN KLEY: I agree that it will be codified
15 there.

16 THE COURT: As a matter of statutory interpretation,
17 do you agree with the premise that the definitions in the
18 Sections 1 and 2 should be construed consistent with the
19 definitions in Title 45, Section 8?

20 MS. VAN KLEY: Your Honor, the provision which sets
21 forth the definitions within Title 45, Section 8, is 45-8-205.
22 This statute does not apply to every law that is codified
23 within the same part of the code.

24 It defines performance, and I agree with opposing
25 counsel's reading of what -- how it defines performance. The

1 definitions apply only in Sections 45-8-205 through 45-8-208.
2 HB 359 does not amend any provision that falls between 45-8-205
3 and 45-8-208.

4 That section of the code says that the definitions
5 apply exclusively -- well, it doesn't say exclusively. It says
6 that the definitions apply to those provisions, which
7 necessarily implies that they don't otherwise apply. And
8 HB 359 does not touch any of those provisions.

9 THE COURT: Do you agree with counsel that Title 45,
10 Section 8, exempts motion pictures from the definition of
11 performance?

12 MS. VAN KLEY: I agree that Section 45-8-205 exempts
13 motion pictures or videotapes rated G, PG, PG-13, or R by the
14 Motion Picture Association of America from Sections 45-8-205
15 through 45-8-208, none of which will incorporate HB 359 when
16 it's codified. And so, no, I don't agree that it applies to
17 HB 359.

18 THE COURT: How do you respond to the argument that
19 when you have a challenge like the one in issue, the void for
20 vagueness, you have to look at both factors, both the sweep of
21 the law with the alleged harm and try to balance those factors?

22 MS. VAN KLEY: Your Honor, I believe that there's a
23 little bit of confusion between what's described as the
24 overbreadth doctrine and the general First Amendment analysis.

25 So, generally, the overbreadth doctrine is used by

1 somebody who is being criminally prosecuted as a challenge to
2 the prosecution. That individual has engaged in speech that
3 can lawfully be proscribed by the state or the federal
4 government, and the response of the criminal defendant is "You
5 can't prosecute me. This law is facially invalid because of
6 its overbreadth."

7 And a relatively recent example is *United States v*
8 *Stevens*, which involves somebody who was prosecuted for selling
9 videos of dog fighting and challenged the facial
10 constitutionality of the federal law that he was indicted under
11 because he said that included a bunch of not only his speech
12 but a lot of innocent speech.

13 On the other hand, the plaintiffs in this case are
14 engaged -- when it comes to interactions with minors, they are
15 engaged exclusively in innocent speech. We are not dealing
16 with a circumstance in which somebody whose speech lawfully may
17 be proscribed is trying to say the whole statute needs to get
18 thrown out, and that's usually where that arises.

19 And I would turn to the court's analysis in *Friends*
20 *of George's*. I'm using the Pacer version. This is on page 37.
21 And the court sets forth the standard of review for the
22 First Amendment challenge.

23 And I would just point that it does not say that
24 there is a higher standard of review. The court says, "A
25 content-based regulation, which targets 'speech based on its

1 communicative content,' is presumptively unconstitutional and
2 must pass strict scrutiny."

3 The Court's first question is whether the law's
4 content based on its face as a matter of text alone; this is
5 because a facially content-based law is subject to strict
6 scrutiny regardless of the government's motive.

7 And so the same standard was applied to the
8 plaintiffs' challenge to the First Amendment in *Friends of*
9 *George's* that we are requesting here.

10 And even if it were the case that we were applying
11 this tougher standard that applies in the overbreadth doctrine
12 line of cases, the standard would be met because so much
13 speech -- and we have the examples of the motion pictures shown
14 by The Roxy Theater, by the Myrna Loy. We have the Imperial
15 Court not allowed to perform drag on the streets during
16 Billings' Pride. That is in their declaration.

17 We have the law being applied against Adria Jawort.
18 And I think, setting aside the factual disputes, what is clear
19 from Defendant JP Gallagher's response is that her talk was
20 canceled because of concerns about HB 359.

21 We have the City of Helena's response, previously, to
22 the temporary restraining order, where it says, "We are stuck
23 between a rock and a hard place. We know we have to comply
24 with the federal constitution, and we also -- we don't know how
25 to square that with HB 359. We are concerned about our

1 employees being subject to criminal liability."

2 So we have these examples of enforcement. The fact
3 that there are disputes about whether or not this speech is
4 correctly inside the scope of HB 359 really highlights the
5 overbreadth.

6 And it also goes to Count 5, void for vagueness,
7 which is separate. I will just point to the concerns that
8 motivate the void for vagueness doctrine. Those concerns are
9 the risks of self-censorship, that in order to avoid
10 prosecution an individual is going to not engage in speech that
11 should be protected.

12 The other primary motivating concern is that of
13 selective enforcement. And the record of HB 359 being on the
14 books for a short period of time shows that that is exactly
15 what happens, that the hammer comes down on individuals who are
16 transgender, who are in the drag community. And so the risk of
17 selective enforcement is not only real, it has been
18 demonstrated.

19 THE COURT: All right. Anything else?

20 MS. VAN KLEY: No, Your Honor. Thank you.

21 THE COURT: Thank you.

22 So the arguments on preliminary injunction are
23 submitted.

24 That brings us to the next question about: Where do
25 we go from here, on any further proceedings that would be

1 wanted, such as a bench trial, on the remaining claims -- or
2 all the claims, I guess, for final resolution?

3 So I'd like the parties to submit a joint filing by a
4 week from today, 5:00 o'clock. Before that time, I want you to
5 have a discussion and see where you see this going, if you want
6 to present witnesses and evidence to support your arguments or
7 if you want to submit it on the arguments and briefs we've
8 heard so far.

9 Any questions about that?

10 MS. VAN KLEY: No, Your Honor.

11 MR. RUSSELL: Yes, Your Honor. The state defendants
12 submitted jury demand in their answer. I'm not sure whether
13 that affects your --

14 THE COURT: All right. I have not seen that.

15 MR. RUSSELL: Also a week from today is Labor Day.

16 THE COURT: Good point.

17 I will review the jury demand and get back to the
18 parties as to the next step.

19 All right. Thank you, Counsel.

20 (The proceedings concluded at 3:48 p.m.)

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REPORTER'S CERTIFICATE

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REPORTER'S CERTIFICATE

I, Yvette Heinze, a Registered Professional Reporter and Certified Shorthand Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Great Falls, Montana, this 19th day of November, 2023.

/s/ Yvette Heinze

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6
7 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
8 BUTTE DIVISION

9 THE IMPERIAL SOVEREIGN COURT)
OF THE STATE OF MONTANA;)
10 ADRIA JAWORT; RACHEL CORCORAN;)
MONTANA BOOK COMPANY; IMAGINE)
11 BREWING COMPANY, LLC d/b/a)
IMAGINE NATION BREWING COMPANY;)
12 BUMBLEBEE AERIAL FITNESS;)
MONTANA PRIDE; THE WESTERN)
13 MONTANA COMMUNITY CENTER;) APPEAL NO. 23-3581
THE GREAT FALLS LGBTQ+ CENTER;) CASE NO: CV-23-50-BU-BMM
14 THE ROXY THEATER; and)
THE MYRNA LOY,)
15) Motions Hearing
Plaintiffs,)
16)
vs.)
17)
18 AUSTIN KNUDSEN; ELSIE ARNTZEN;)
J.P. GALLAGHER; and THE CITY OF)
19 HELENA,)
20 Defendants.)

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25 Proceedings recorded by machine shorthand
Transcript produced by computer-aided transcription

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TRANSCRIPT OF PROCEEDINGS
Wednesday, July 26, 2023
2:01 p.m. to 3:52 p.m.

BEFORE THE HONORABLE BRIAN M. MORRIS
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA - BUTTE DIVISION

Paul G. Hatfield Federal Courthouse
901 Front Street
Helena, Montana 59626

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1 AFTERNOON SESSION, WEDNESDAY, JULY 26, 2023

2 (Whereupon, the court convened at 2:01 p.m., with all
3 interested parties present, and the following proceedings
4 were had:)

5 THE LAW CLERK: Judge Brian Morris, United States
6 District Court for the District of Montana.

7 THE COURT: Please be seated.

8 Madam Clerk, please call the first case on the
9 Court's calender.

10 THE CLERK: Yes, Your Honor.

11 This is the time the Court has set aside for a
12 hearing in Civil Cause 23-50-BU-BMM; The Imperial Sovereign
13 Court of the State of Montana, et al., vs. Knudsen, et al.

14 THE COURT: Good afternoon. We have enough counsel
15 here, why don't we make appearances here, please.

16 Ms. Van Kley?

17 MS. VAN KLEY: Good afternoon, Your Honor.
18 Constance Van Kley on behalf of the plaintiffs.

19 THE COURT: And with you at counsel table?

20 MS. VAN KLEY: With me is Rylee Sommers-Flanagan
21 and Niki Zupanic.

22 THE COURT: And Mr. Johnson?

23 MR. JOHNSON: Good afternoon, Your Honor. I
24 represent Austin Knudsen and Elsie Arntzen.

25 THE COURT: Okay.

1 MR. JOHNSON: And Michael Russell is an Assistant
2 Attorney General, as well, representing the same.

3 THE COURT: Okay.

4 MS. DOCKTER: Good afternoon, Your Honor.
5 Becky Dockter with the City of Helena.

6 THE COURT: Okay.

7 MS. WALKER: And Cindy Walker with J P Gallagher.

8 THE COURT: Thank you.

9 All right. This is a hearing with a motion for a
10 temporary restraining order, preliminary injunction filed by
11 the plaintiffs.

12 Ms. Van Kley, do you want to go first?

13 MS. VAN KLEY: Thank you, Your Honor.

14 May it please the Court, Constance Van Kley on
15 behalf of plaintiffs, who are a broad and diverse coalition
16 of individuals, businesses, and nonprofit organizations
17 affected by Montana's House Bill 359.

18 HB 359 is unconstitutional under the First and
19 Fifth Amendments, and it is causing real harm in realtime
20 all across the State of Montana. Plaintiffs, therefore, ask
21 the Court to grant their motion for a temporary restraining
22 order in time for Montana Pride to begin this Sunday,
23 July 30th.

24 The *Winter* standard applies to the motion for a
25 temporary restraining order, just as it applies to the

1 motion for preliminary injunction. And so my plan is to
2 address the *Winter* factors, just as we did in the brief, but
3 because we're here on a temporary restraining order, I'd
4 like to start out of order with what is traditionally the
5 second factor, irreparable harm. And the --

6 THE COURT: Before you get there, Ms. Van Kley,
7 could you focus on standing for the plaintiffs?

8 MS. VAN KLEY: Yes, absolutely, Your Honor.

9 With regard to standing in the case as a whole, we
10 are looking for an injury in fact, it must be concrete and
11 particularized, it must be actual or imminent and looking
12 for causation and redressability.

13 With regard to the First Amendment standard, it is
14 clearly established that chilled speech based on a fear of
15 prosecution under the criminal laws of the state for forced
16 speech and expressive conduct confers standing. We can look
17 at a few cases that outline that.

18 One is *Babbitt v. United Farm Workers National*
19 *Union* -- that's not in our brief so I'll give you the cite.
20 It's 442 US 289 and it's a 1979 case. And I'll quote from
21 *Babbitt*: "When fear of criminal prosecution under an
22 allegedly unconstitutional statute is not imaginary or
23 wholly speculative, a plaintiff need not first expose
24 himself to actual arrest or prosecution to be entitled to
25 challenge the statute."

1 Importantly, in *Babbitt*, we were -- the Court was
2 looking at a pre-enforcement challenge, just as here we have
3 seen the law take effect, and it has directly affected the
4 plaintiffs in different ways. Nobody has been charged under
5 the criminal laws similar to *Babbitt*, and in *Babbitt* the
6 Court was particularly convinced by the fact that the state,
7 and again I will quote, "Has not disavowed any intention of
8 invoking the criminal penalty provision against individuals
9 who violate this restriction on speech."

10 So we're in the same situation here. We have
11 actual injury that has occurred, is ongoing in the form of
12 chilled speech, and we have the likelihood of criminal
13 prosecution. So we have both -- both actual and imminent
14 harm here.

15 THE COURT: Does harm apply to all plaintiffs?

16 MS. VAN KLEY: I'm sorry?

17 THE COURT: Do those harms apply to all the
18 plaintiffs?

19 MS. VAN KLEY: I think there is a spectrum of harms
20 at issue here, so Plaintiff Rachel Corcoran is a Billings
21 Public School teacher, she has standing to challenge
22 Defendant Elsie Arntzen's enforcement of the statute. The
23 other plaintiffs face the possibility of criminal liability.

24 And so we see -- we see some individuals who have
25 had the law applied against them, for example, Plaintiff

1 Adria Jawort scheduled to give a lecture at the Butte Silver
2 Bow Public Library, that lecture was cancelled because the
3 library determined that it created the risk of violating
4 HB 359.

5 I do think there is a question as to whether or not
6 her planned lecture really does fall within the purview of
7 the statute, but that certainly gives her standing to
8 challenge it on the grounds of overbreadth. Everybody who
9 engages in speech or expressive conduct and faces potential
10 criminal liability has standing to bring a pre-enforcement
11 challenge.

12 And, moreover, it isn't necessary that all
13 plaintiffs establish standing, because the rule is that
14 standing for one is standing for all, but in this case all
15 plaintiffs have standing.

16 THE COURT: What about the business entities;
17 what's the basis for their standing?

18 MS. VAN KLEY: Your Honor, if I may, I have copies
19 of HB 359 with me. May I approach and bring you a copy and
20 we can walk through it?

21 THE COURT: Give it to the clerk, please. Make
22 sure counsel has it.

23 MR. JOHNSON: I do; I do, Your Honor.

24 THE COURT: Go ahead, Ms. Van Kley.

25 MS. VAN KLEY: And so I will take a look at Section

1 2 of the statute, which is on the second page of the bill:
2 "A sexually oriented business may not allow a person under
3 18 years of age to enter the premises of a business during a
4 sexually oriented performance." We can talk as we go
5 through the argument about what exactly a "sexually oriented
6 performance" is.

7 THE COURT: What's a sexually oriented business?

8 MS. VAN KLEY: A "sexually oriented business" is
9 defined under Section 1(9). It is: A commercial
10 enterprise, nightclub, bar, restaurant, or similar
11 commercial enterprise that provides for an audience of two
12 or more individuals, live nude entertainment or live nude
13 performances or a sexually oriented performance and
14 authorizes on-premises consumption of alcoholic beverages."

15 So it's circular, with regard to the -- with regard
16 to Imagine Nation Brewing, one of the plaintiffs, they
17 authorize on-premises consumption of alcoholic beverages.
18 They are a brewery, and they put on events on premises that
19 may fall within the purview of sexually oriented
20 performances defined --

21 THE COURT: You don't challenge the ability of the
22 State to regulate sexually oriented performances, zoning
23 laws, where these businesses can be located, the type of
24 entertainment they can provide?

25 MS. VAN KLEY: Not with regard to what -- what,

1 under any ordinary understanding of the term sexually
2 oriented business would suggest. The problem here is with
3 the definition of sexually oriented business, which means
4 that businesses like Imagine Nation, which is a family
5 friendly brewery and community center.

6 THE COURT: What's a family friendly brewery?

7 MS. VAN KLEY: It is a brewery that never has any
8 events, the Imagine Nation never puts on events that are
9 limited to 18 plus or older, everything -- all of the
10 programming there is open to individuals of all ages, and
11 they have historically and intend to in the future put on
12 drag story hours, for example.

13 THE COURT: And I assume they are not allowed to
14 serve alcohol to people under 21.

15 MS. VAN KLEY: They do not and the State, without
16 question, has the ability to enforce that restriction
17 against Imagine Nation Brewing. The problem comes in when
18 you look at the definition of "sexually oriented
19 performance."

20 And that, Section 1, subsection 10 here: A
21 sexually oriented performance means a performance that,
22 regardless of whether performed for consideration, is
23 intended to appeal to a prurient interest in sex and
24 features:

25 (a), the purposeful exposure, whether complete or

1 partial, of: A human genital, the pubic region, the human
2 buttocks, or female breast if the breast is exposed below a
3 point immediately above the top of the areola; or two
4 prosthetic genitalia, breasts, or buttocks; (b) stripping;
5 or (c) sexual conduct.

6 And there, I think at first glance, it's not
7 entirely clear why that's a problem, right? Certainly, when
8 we talk about a strip club, we are talking about an
9 adult-oriented business in everybody's understanding of the
10 term.

11 But, here, when the bill defines stripping to
12 include not only the removal of clothing to the point of
13 nudity, but the simulated removal of clothing, regardless of
14 whether or not nudity may result.

15 Nudity is also defined in HB 359 or --

16 THE COURT: What is the simulated removal of
17 clothing?

18 MS. VAN KLEY: It's pretending to remove clothing,
19 Your Honor.

20 THE COURT: It's that simple?

21 MS. VAN KLEY: That's -- I don't know what else it
22 could mean.

23 THE COURT: All right.

24 MS. VAN KLEY: I don't know how else you would
25 simulate the removal of clothing, but I'll let the State

1 respond to that. That's my reading of the term.

2 And "nudity" in turn doesn't mean exclusively
3 entirely unclothed, and this is (4) within Section 1, but
4 also "clothed in a manner that leaves uncovered or visible
5 through less than fully opaque clothing any portion of the
6 breasts below the top of the areola of the breasts in the
7 person is female or any portion of the genitals or buttocks.

8 And, again, under this definition a person is nude
9 if they walk through the streets with a bikini top on or
10 wearing a Speedo, and people may not particularly appreciate
11 those displays of the human body, but you can go to any
12 public beach, and you will see partial exposure of breasts
13 or partial exposure of buttocks.

14 Another problem --

15 THE COURT: But doesn't context matter in that
16 circumstance? People at the beach wearing those type of
17 clothing as opposed to walking down Last Chance Gulch.

18 MS. VAN KLEY: Yes, Your Honor. I think -- I think
19 context does matter; and there's a way in which the existing
20 obscenity law in the State of Montana and the *Miller* test,
21 which is the test set forth by the U. S. Supreme Court in
22 *Miller v. California*, tells us how context does matter.

23 The problem here is that the statute -- the bill
24 does not track the *Miller* test the way that existing Montana
25 law does. So under the *Miller* test, conduct or expressive

1 conduct or speech that falls within the purview of obscenity
2 is outside the scope of the First Amendment.

3 So if it's obscenity, we aren't doing the viewpoint
4 or content-based test, we're not going to get to strict
5 scrutiny because obscenity is outside the scope of the First
6 Amendment, so that's a threshold question here. Does
7 this law regulate obscenity?

8 And there are two -- there are two, there are
9 overlapping penalty, for example, business like Imagine
10 Nation Brewing that allows for a -- that becomes defined as
11 a sexually oriented business because it allows a sexually
12 oriented performance, which again, includes the simulated
13 removal of clothing.

14 It also includes the exposure, et al., of the
15 prosthetic breasts, which is not limited to the exposure of
16 prosthetic breasts at a point analogous to the areola, so
17 prosthetic breasts are treated differently than natural
18 breasts. But the Imagine Nation Brewing faces criminal
19 charge if it is found to be in violation of the statute.

20 THE COURT: Ms. Van Kley, you described it as a
21 family frequently brewery. Section 2 here, and you agree
22 they can't serve alcohol to someone under 21. Section 2 of
23 the bill restricts "a sexually oriented business from
24 allowing a person under 18 to enter."

25 Any problem with that restriction?

1 MS. VAN KLEY: I would have no problem with that
2 restriction if sexually oriented performance and sexually
3 oriented business had definitions that matched with the --
4 with the constitutional standard for obscenity but they
5 don't.

6 THE COURT: The *Miller* tests?

7 MS. VAN KLEY: Yes.

8 And so taking a look at --

9 THE COURT: Is there any room for a state to go
10 beyond the *Miller* test if they if they are trying to protect
11 children, that was the alleged motivation for this law.

12 MS. VAN KLEY: Yes, Your Honor. There's -- the
13 *Miller* test still applies, but each of the pieces is a
14 little bit looser when you're dealing with children and that
15 comes from *Ginsberg*. I can give you the citation for it.
16 *Ginsberg v. New York*, it's 390 US 629, from 1968.

17 That case involved the commercial sale of what
18 we're called within the case "girly magazines" to a minor
19 who was 16 years old. And it predates *Miller*, but since
20 there's been some synthesis of these propositions, so what
21 is "obscene" as to minors can be defined a little more
22 loosely than what is obscene as to adults.

23 The *Miller* test still applies, but instead of just
24 asking, does it -- taken as a whole, does it appeal to the
25 prurient interest in sex, applying contemporary community

1 standards? That would be *Miller*, prong 1. When you track
2 them together the question is instead: Taken as a whole,
3 does it apply to the prurient interest of the sex -- in sex
4 applying contemporary community standards as to minors?

5 And *Reno*, which is a far more recent Supreme Court
6 case, it is *Reno vs. ACLU* from 1997, the Court really broke
7 down what *Ginsberg* does and does not allow. And *Reno*
8 involved a challenge to the Communications Decency Act,
9 which was an early attempt to regulate sexual content on the
10 internet in order to protect minors from it.

11 And in *Reno* the Court struck down the
12 Communications Decency Act for a number of reasons. And the
13 Court talked specifically about *Ginsberg*, and said *Ginsberg*
14 doesn't reach as broadly as to encompass every attempt by
15 the state to regulate sexual content that may be viewed by
16 minors, right?

17 And the Court laid out four reasons why *Ginsberg*
18 did not apply in that particular instance. First, and I
19 quote from *Reno*: "The prohibition against sales to minors
20 does not bar parents, who so desire, from purchasing the
21 magazines for their children."

22 They were talking about *Ginsberg*. So in *Ginsberg*
23 there was ultimately the decision could be made by the
24 parent. HB 359 is different from *Ginsberg* and more like
25 *Reno*. It takes control away from parents. There is no

1 carve-out when a parent chooses to bring their kid to a drag
2 story hour or to a so-called sexually oriented performance,
3 which could include a PG 13 movie. It could include some PG
4 movies. It certainly includes a whole lot of R-rated
5 movies.

6 The parents, under HB 359, aren't given the
7 opportunity to bring their kids to these movies consistent
8 with, you know, everybody's expectation that certainly the
9 Motion Picture Association ratings guidelines, so that's the
10 first part of *Ginsberg*, and like *Reno*, it doesn't apply
11 here.

12 Second, the New York statute addressed in *Ginsberg*
13 applied only to commercial transaction; again, not the case
14 here. We're talking about speech, in some cases -- on
15 public property in traditional property fora on city
16 streets. We're talking about speech in libraries.

17 Third, the New York statute, had its definition of
18 material that is harmful to minors with the requirement that
19 it be utterly without redeeming social importance for
20 minors. We have no similar carve-out with regard to HB 359.
21 It doesn't matter if the performance has artistic merit.

22 It doesn't matter if it has educational merit. It
23 doesn't matter if it had scientific merit or literary merit.
24 There is no carve-out within HB 359 for performances or drag
25 story hours that have redeeming social importance for

1 minors.

2 THE COURT: Ms. Van Kley, you mentioned the
3 publicly owned property. Under time, place, manner
4 restrictions, doesn't the state have slightly more leeway in
5 imposing restrictions on public property than private
6 property?

7 MS. VAN KLEY: It does, Your Honor, in some ways.

8 What the state can't do is impose a content-based
9 restriction on speech in a traditional public forum. So
10 with regard to, for example, Montana Pride, when we're
11 talking about fora that are generally made available for
12 speech and expressive activities, you apply for the permit,
13 you follow the requirements, and then you can show up.

14 The City, and this is clear from the City's filing
15 on Monday, the City does not want to be in the position of
16 scrubbing these applications for their content; and, in
17 fact, if the City did, that just wouldn't be a content and
18 viewpoint based restriction on speech, it would be a prior
19 restraint on speech.

20 It would say, you know, this is a traditional
21 public forum, this is where people gather to engage in
22 protests and in protected First Amendment activity, but you
23 can't have access to it, and so we will not allow you to
24 speak. That is what HB 359 tells city governments to do.

25 And so, yes, there are time, place, and manner

1 restrictions. Here, I don't think that we get into time,
2 place, and manner restrictions because they don't apply to
3 privately owned businesses, and they don't apply to
4 traditional public fora.

5 And then there's one more piece about why *Ginsberg*
6 didn't apply in *Reno* which also shows why it doesn't apply
7 here. And that is that in *Ginsberg*, the New York statute
8 defined a minor as a person under the age of 17; whereas,
9 the Communications Decency Act, in applying to all those
10 under 18 years, includes an additional year of those nearest
11 majority.

12 And that's not a strict test, but if you draw the
13 line at 16 and under, it's okay; and if you draw the line at
14 17 and under, it's okay. What that tells us, is that these
15 restrictions on speech have to take into account the
16 differences between a 17 year old versus a 13 year old
17 versus a 5 year old.

18 And that's where the *Miller* test requires the
19 application of contemporary community standards so that
20 there is some sort of flexibility. Because what a 17 year
21 old has -- is mature enough to see is different than what a
22 five year old is mature enough to see, but --

23 THE COURT: Ms. Van Kley, with regard to that
24 maturity level you mentioned earlier, about if a parent
25 decides to take their child, we have -- in the movie context

1 we have ratings, to tell the parent this is R, under 17, not
2 without a parent, it's going to be a rough scene. PG 13 be
3 careful, PG, nah.

4 So what obligation to these businesses who have the
5 events you are describing, do they have any obligation to
6 the public to let them know what to expect, I mean, if I
7 walk in with my young child and I'm shocked by what I see,
8 is that on me for not knowing or is that on the business for
9 not disclosing?

10 MS. VAN KLEY: Your Honor, I think there are a
11 couple -- a couple of things. With regard to -- with regard
12 to the plaintiffs to this lawsuit, thinking specifically in
13 this instance about the Roxy Theater and the Myrna Loy,
14 which are two plaintiffs, that do show films that include
15 performances that are defined under HB 359 as sexually
16 oriented performances.

17 They follow the MPA ratings guidelines. They allow
18 children under the age of 17 to attend an R-rated movie with
19 their parent, just like, you know, AMC or any other theater.
20 So they follow those -- those -- they follow the ratings
21 guidelines.

22 THE COURT: And those ratings guidelines are --
23 that's a private entity, the MPA?

24 MS. VAN KLEY: Yes. Yes.

25 With regard to the -- with regard to what we think

1 of as truly obscene speech, right? With regard to the strip
2 club, they are criminally liable under existing Montana law,
3 if they -- if they show a legitimately obscene performance
4 to a minor.

5 THE COURT: A parent wouldn't have the right to
6 come up and say, "I want my child to come in."

7 MS. VAN KLEY: No, I don't believe that that is the
8 case, yes. But, I mean, we're pretty far afield of that
9 when we're talking about, for example, with the Roxy Theater
10 and the Myrna Loy putting on the film *Asteroid City*, which
11 is rated PG 13, and includes a scene that meets the
12 definition of stripping under HB 359.

13 We are very far afield of that set of facts. We
14 are not representing any businesses that could be defined as
15 sexually oriented businesses in any reasonable understanding
16 of that phrase.

17 Turning back to the *Winter* standard. I'd like to
18 talk a little bit about irreparable harm first, and the
19 reason that I want to do that is because this is the factor
20 under the *Winter* test that tells us why this isn't just a
21 case in which a preliminary injunction is warranted. It is
22 a case in which a temporary restraining order is necessary.

23 Montana Pride is scheduled to begin this Sunday,
24 July 30th, when we filed the motion for a temporary
25 restraining order, based on a conversation between one of

1 the plaintiffs and the City of Helena. It was our
2 understanding that permits would not be issued as to certain
3 Montana Pride events.

4 We understand from the City's filing on Monday that
5 the City is planning to issue those permits; and that's
6 great, that's welcome news. We don't know for sure that it
7 won't be conditioned on compliance with state law, which
8 would require compliance with the HB 359, but regardless, it
9 doesn't moot the request for emergency request.

10 I think the confusion about the permits and the
11 City's well-grounded concern about employee liability just
12 for issuing permits to events featuring drag performances,
13 really drives home that without a TRO in place, people are
14 going to have to choose between speaking freely and facing
15 criminal prosecution.

16 And that, in itself, is not permissible under the
17 First Amendment for any length of time. I'll quote from
18 *Elrod v. Burns*: "The loss of First Amendment freedoms for
19 even minimal periods of time unquestionably constitutes
20 irreparable injury."

21 And that was repeated by the Supreme Court recently
22 in 2020 in *Roman Catholic Diocese vs. Cuomo*, and that's
23 exactly why faced with a request for a temporary restraining
24 order the Western District of Tennessee issued a TRO in the
25 *Friends of Georgia's* case, another case involving a drag

1 ban, even though in that case the law had not yet caused
2 harm to the plaintiffs.

3 THE COURT: How does the law in Tennessee compare
4 to HB 359?

5 MS. VAN KLEY: Well, they are -- they are similar
6 in some ways and different in others, which I don't think
7 gets us very far.

8 One thing that is true about the law in Tennessee
9 that is an imprisonment on the law in Montana is that it
10 does incorporate the *Ginsberg/Miller* test with regard to
11 material that is obscene to minors. The Montana's HB 359
12 does not even attempt to incorporate that provision.

13 I think the ways in which they are very similar is
14 that they both are intended to target drag performances
15 because of a perceived fear that exposing children to
16 nonconforming gender expression is harmful to minors.

17 THE COURT: What's the procedural posture of that
18 case now?

19 MS. VAN KLEY: That case has gone through trial and
20 is permanently enjoined.

21 THE COURT: Was there an appeal filed?

22 MS. VAN KLEY: I believe there was, but I don't
23 know, Your Honor.

24 THE COURT: And what about the Florida case?

25 MS. VAN KLEY: The Florida case has gone through

1 the preliminary injunction stage.

2 THE COURT: How does the law compare first?

3 MS. VAN KLEY: Oh, thank you.

4 The law, similar to the Tennessee law, we are
5 looking at a law that incorporates the *Miller* test, at least
6 on its face, says that it is applying *Miller*. We're also
7 looking at a law that intentionally targets drag
8 performances because they are a drag performances.

9 And that is a case that -- the case is
10 *HM Florida-ORL, LLC v. Griffin*, in the Middle District of
11 Florida. And that case was brought by a business that put
12 on family friendly drag performances.

13 And so HB 359 doesn't track either of these
14 statutes exactly, but it includes some -- some really --
15 some similarities and actually some differences that I think
16 are worse than the laws considered in Tennessee and Florida;
17 and, specifically, that there isn't even an attempt to
18 comply with the constitutional standard for obscenity.

19 THE COURT: All right. Let's go back to
20 irreparable harm for a moment with regard to the City of
21 Helena.

22 MS. VAN KLEY: Yes.

23 THE COURT: If they are issuing the permits, the
24 potential harm is that the jeopardy that is in place is on
25 performance who get approval for their performance or for

1 whom, for the sponsors?

2 MS. VAN KLEY: Your Honor, if and when -- and I
3 believe the City when it says it intends to issue the
4 permits, although, again, I think there's still this
5 question about whether or not there will be a demand or
6 expectation of compliance with state law. That will moot
7 Count 3 in the First Amended Complaint, which is the
8 as-applied challenge brought by Montana Pride against the
9 City of Helena.

10 THE COURT: Okay.

11 MS. VAN KLEY: However, it does not moot Counts 4
12 and 5, and plaintiffs have also moved for a TRO on Counts 4
13 and 5. And these are facial challenges; Count 4 brought
14 under the First Amendment, Count 5 brought under the Fifth
15 Amendment. These are facial challenges to the statute, and
16 plaintiffs ask the Court to enjoin implementation of the law
17 by the state Defendants Knudsen and Arntzen.

18 And it is, again, these state defendants that that
19 piece about, you know, requiring -- requiring citizens to
20 either stifle their speech or face criminal prosecution,
21 that is actual injury, that confers standing. And the
22 reality is that there is a -- there is a considerable and
23 growing body of evidence that demonstrates that HB 359 is
24 actually chilling protected speech right now.

25 We talked about Ms. Jawort, who was scheduled to

1 give a lecture, an educational lecture at a library whose
2 event was cancelled. The Imperial Sovereign Court of the
3 state of Montana has had multiple events cancelled.

4 And I would like to turn briefly to the declaration
5 of Annathea Smith, which was filed -- it's docketed as
6 Document 5-3, and Annathea Smith is the president of The
7 Imperial Sovereign Court of the State of Montana. In
8 paragraph 18, "Since HB 359 went into effect, we have had
9 shows across the state cancelled, modified, and placed in
10 limbo. A show at the Museum of the Rockies has been
11 repeatedly rescheduled without -- without an indication that
12 it will be allowed to happen at all. Drag story hour event
13 cancelled."

14 The Imperial Court changed their behavior, they
15 chilled their speech as a result of the HB 359 at different
16 Pride events across the state; most notably at Billings
17 Pride they were unable to perform any drag on public
18 property. That is paragraph 23 of that declaration.

19 THE COURT: What do you mean "perform drag"?

20 MS. VAN KLEY: They were not allowed to perform --
21 to perform in drag on city streets.

22 THE COURT: All right.

23 MS. VAN KLEY: Yeah. They have hired police
24 officers to ensure safety at events. They have changed
25 costuming. They have not advertised their events the way

1 that they had this historically. They have changed their
2 behavior this year as a result of HB 359.

3 And then turning to paragraph 27 of that same
4 declaration, I will just read it verbatim: "Our
5 performances planned for Montana Pride in Helena from
6 July 30th to August 6, 2023, are still uncertain. While we
7 hope we can participate in uplifting and building community
8 in downtown Helena, we anticipate that we will again follow
9 our new self-imposed restrictions and may not advertise our
10 events out of fear of HB 359."

11 So as long as HB 359 is in place, two things are
12 true: First, performers are currently chilling their
13 speech. And this is a separate issue, but because of how
14 vague and overbroad the law is, they are -- they are
15 probably in -- they are probably not saying things that are
16 even beyond the bounds of HB 359.

17 The second piece is, as long as HB 359 is in place
18 and not enjoined, individuals can be arrested and prosecuted
19 for violations of HB 359. And that is why we seek relief
20 against Defendant Knudsen, who under state law has the
21 ability to direct all County Attorneys in the performance of
22 their official duties.

23 And so, regardless, whether the permit issues or
24 not, Pride will not go forward unchanged and without
25 restriction, and that is a First Amendment violation. It is

1 the reason that there's a compelling need for a TRO now in
2 time for Pride to begin.

3 I'll turn next to the first *Winter* factor,
4 likelihood of success on the -- I think we did a little bit
5 of this work already, but we seek -- we seek a preliminary
6 injunction on our First and Fifth Amendment claims. I'll
7 start with the First Amendment claim, that kind of breaks
8 into three separate questions.

9 First, is this law regulating only obscene speech
10 and, therefore, outside the scope of the First Amendment
11 altogether? If the answer to that question is no, then we
12 say: Is it content or viewpoint based? And if the answer
13 to that question is yes, we apply strict scrutiny.

14 We talked to some degree about the *Miller* test. I
15 just want to be very clear about what *Miller* does require.
16 It requires that the speech or expressive conduct that is
17 being proscribed be specifically defined. That is not the
18 case with HB 359.

19 There remains, no how many times I look at this
20 law, there remains a lot of confusion what is within and
21 what is without the definition of sexually oriented
22 performances. And then the classic *Miller* factors, it has
23 to take in as a whole appeal to the prurient interest in
24 sex.

25 There is kind of a tip of hat to this requirement

1 in HB 359; however, it isn't correctly applied. It doesn't
2 require that the performance, as a whole, appeal to the
3 prurient interest in sex, and it doesn't account for the
4 application of contemporary application standards.

5 *Miller*, step 2 --

6 THE COURT: Hold on. In Section 1, "prurient
7 interest in sex," it says has the same meaning as provided
8 in 45-8-205. Subsection 1, part (5).

9 MS. VAN KLEY: Yeah, thank you, Your Honor. I
10 think I have 40 --

11 THE COURT: That's the existing law that you said
12 comports with *Miller*.

13 MS. VAN KLEY: Well, yes, I said Section 201,
14 specifically -- Section 205 defines prurient interest in sex
15 to mean "a shameful or morbid interest in sex or excretion."
16 Looking at 45-8-201, and I do have a copy of this as well.
17 May I --

18 THE COURT: And these are the 45-8-201?

19 MS. VAN KLEY: I have a copy of 45-8-201 here.

20 THE COURT: All right. Do you have that?

21 MR. JOHNSON: I do have the statute book.

22 MS. VAN KLEY: I have more.

23 MS. DOCKTER: Thank you.

24 MS. VAN KLEY: And this was amended in the 2023
25 legislative session. The amendments have not yet gone into

1 effect, and with regard to this particular law, the only
2 change is within the final subsection (5), and it is
3 modified so that cities, towns, counties, or school
4 districts may adopt ordinances that are more restrictive.

5 So with looking at 45-8-201, it is under Section
6 2(B), where we see a straightforward requirement that before
7 speech can be prescribed under this statute, it satisfied
8 the *Miller* test. And, specifically, it requires the
9 application of contrary community standards and requires
10 that, as a whole, the material appeal to the prurient
11 interest of sex.

12 But, you know, the prurient interest in sex
13 requirement of the *Miller* test is certainly the closest
14 called under *Miller*, and *Miller* includes a conjunctive, not
15 a disjunctive test. So in order to fall within the
16 constitutional standard for obscenity, it has to not only
17 appeal to the prurient interest in sex, it also has to, as a
18 whole, and, again, applying contemporary community standards
19 portray sexual conduct in a patently offensive way.

20 There is no argument that drag story hours portray
21 sexual conduct at all, let alone in a patently offensive
22 way. When we look at the definition of stripping or the
23 purposeful exposure requirements for the sexually oriented
24 performance piece. Again, this is going to encompass a
25 great deal of expressive conduct that does not involve the

1 portrayal of a sexual conduct in a patently offensive way.

2 And unlike the prurient interest in sex
3 requirement, there isn't even an attempt to incorporate this
4 into HB 359. Third, the law, in order to satisfy *Miller*,
5 taken as a whole, cannot have serious literary, artistic,
6 political, or scientific value.

7 Once again, we don't even have a nod to this
8 requirement in HB 359, and that's why we have plaintiffs
9 like the Roxy Theater and the Myrna Loy that are putting on
10 films that certainly would not fall under *Miller* because
11 they have social value.

12 Under HB 359, without that carve-out, those are
13 sexually oriented performances. And so the law certainly
14 regulates speech that is not obscene by constitutional
15 standards. It, therefore, falls within the First Amendment,
16 and the next question is whether it's a content- or
17 viewpoint-based restriction on speech.

18 There are two ways to address this question: You
19 can look at the statute on its face, and you can look at
20 legislative history. I think both of these approaches will
21 bring you to the same place.

22 I'm focusing on legislative history. It clearly
23 events as a goal to prescribe speech on the basis of content
24 and viewpoint legislators intended to target drag. As we
25 explained in our brief, legislators even said that they had

1 to call it "drag" because otherwise performers would call it
2 art, raising real concern under *Miller*.

3 Whether or not they were successful at targeting
4 drag, I think that is a wholly separate question that we can
5 address within the void for vagueness challenge, but they
6 certainly intended to target drag.

7 And they intended to target drag specifically
8 because drag questions and satirizes conventional gender
9 norms and because it celebrates nonconventional expressions
10 of gender. I will quote the bill's sponsor, Representative
11 Braxton Mitchell:

12 "Due to the mature theme surrounding drag shows and
13 the exposure to inappropriate activities, children may adopt
14 and accept certain stereotypes or attitudes that can lead to
15 social, psychological, linguistic difficulties. Children
16 may also create an inadequate understanding of gender roles
17 and experiences, which is damaging to their long-term social
18 and emotional development."

19 Setting aside the complete lack of any evidence
20 offered into the legislative record to suggest this is in
21 fact the case. What Representative Mitchell was saying, is
22 that children shouldn't be able to see drag because it may
23 make them question gender norms. That is certainly
24 targeting speech on the basis of viewpoint.

25 There's still -- there's no need even to discuss

1 Legislative history. HB 359 is content- and viewpoint-based
2 on its face. Again, it has these two pieces. There are
3 restrictions on drag queens -- or on drag story hours. If
4 you look at the definition of what is a drag story hour, it
5 is any -- "An event hosted by a drag queen or drag king who
6 reads children's books and engages in other learning
7 activities with minor children."

8 Somebody is a drag king or a drag queen if they are
9 "A male or female performer who adopts a flamboyant or
10 parodic male or female persona with glamorous or exaggerated
11 costumes and/or makeup." It is a person dressed in a
12 gendered costume engaging in learning activities with
13 children.

14 The line is drawn between individuals dressed in
15 some sort of gendered costume whether it comports with
16 biological sex and gender, identity or not, it is dressing
17 in a gendered costume and engaging in learning activities
18 with children. The line is drawn between those individuals
19 and individuals who are not dressed in gendered costume.

20 That is a restriction that is based solely on the
21 identity of the speaker. It is necessarily viewpoint book
22 based. It's a little messier when we get to the sexually
23 oriented performances, which, again, is a problem under the
24 Fifth Amendment.

25 It's hard to say exactly what is in and not in this

1 definition, but it seems to generally be a restriction on
2 speech based on some relationship to sex and/or gender, but
3 we know it's not limited to obscenity because the *Miller*
4 test does not apply, and nonobscene speech about sex is
5 constitutionally protected. We can look to *Reno* for that.

6 So HB 359 is content based, it's viewpoint based.
7 The final question is: Does it survive strict scrutiny?
8 There needs to be a compelling government interest and
9 narrow tailoring. The government has an interest that is
10 compelling in some circumstances in protecting children, but
11 that really isn't the story here.

12 Here, the government appears to be -- to intend to
13 protect children from gender nonconformity or nonobscene
14 communications which relate in some, in any way, to sex,
15 which is just another way of saying that it is a content and
16 viewpoint restriction on speech.

17 It's not compelling. There is no evidence in the
18 record to suggest that there has been any harm faced by
19 Montana children, that any Montana children have been forced
20 to attend some performance that doesn't fall within the
21 existing criminal restrictions on obscenity that causes
22 harm.

23 There's no evidence to support Representative
24 Mitchell's claims about the dangers of drag, but even if
25 there were, the law is both overbroad and under-inclusive.

1 So it fails, again, of Step 2 of strict scrutiny. It's
2 overbroad, it sweeps in speech that is not obscene as to
3 minors, it's not even indecent. It's under-inclusive
4 because it applies only to certain activity in certain
5 places. It doesn't shield minors from all drag or all
6 expressive conduct.

7 And just very briefly I will address why we are
8 also likely to succeed on the merits of Count 5, which is
9 the void for vagueness challenge. Under the Fifth
10 Amendment, there's no need to reach it, if the Court agrees
11 that plaintiffs are likely to succeed on Count 4, but it is
12 just as strong a case.

13 Essentially, the Void for Vagueness Doctrine says:
14 That criminal law have to give a fair warning of what is or
15 is not allowed to avoid a due process violation and the risk
16 of selective enforcement.

17 And we see both of these things happen, we see
18 HB 359 being used against Adria Jawort when she's going to
19 give an educational lecture at the Butte Silver Bow Public
20 Library simply because she is a transgender. We see it as
21 events are cancelled for the Imperial Court. And
22 ultimately, we just don't have a clear idea of what is and
23 is not included in HB 359.

24 So people, declarants, plaintiffs are legitimately
25 struggling to avoid liability, and they are forced to, and

1 I'll quote from the case *Grayned*: "They are forced to steer
2 far wider from the lawful zone than if the boundaries of the
3 forbidden area were clearly marked."

4 I don't think we need to spend much time on the
5 third and fourth *Winter* factors. These are equitable
6 considerations in the public interest; they merge when the
7 government is a defendant. We're dealing with essential
8 constitutional rights.

9 We are dealing with a restriction on First
10 Amendment freedom, and the -- HB 359 already has, it is
11 continuing to have a serious impact on protected speech.
12 There is no assurance that absent an injunction the law will
13 not be used to arrest and prosecute individuals engaged in
14 protected speech, and there's no countervailing public
15 interest as existing law already fully protects minors from
16 materials that meet the constitutional standard.

17 Plaintiffs, therefore, ask the Court to grant their
18 motion for a temporary restraining order.

19 THE COURT: Thank you, Ms. Van Kley. I'll give you
20 a chance to rebut.

21 MS. VAN KLEY: I'm sorry, I missed that.

22 THE COURT: I said I'll give you a chance to offer
23 rebuttal.

24 MS. VAN KLEY: Thank you.

25 THE COURT: All right.

1 Mr. Johnson.

2 MR. JOHNSON: May I just have a moment?

3 THE COURT: You may.

4 MR. JOHNSON: Your Honor, this is a classic case of
5 statutory construction, and I want to start with the
6 standing argument that was questioned initially.

7 Injury and fact. Your Honor, under House Bill 359
8 no performer can be prosecuted. There's a private cause of
9 action against a performer, but no chance for being
10 prosecuted by a performer or a marcher in the Pride parade.

11 I'm taking a look at Section 2. This is in regard
12 to sexually oriented business: "The owner, operator,
13 manager, or employee." Doesn't say anything about
14 "performer."

15 And when we go to Section 3, it talks where
16 sexually oriented performances are prohibited. It's "a
17 library or school, a library school personnel, a public
18 employee, or entity, described in Section (3)(b) or an
19 employee." There's nothing that says anything about a
20 performer or a marcher participating in a Pride parade;
21 hence, a fear of prosecution does not exist under the
22 statute.

23 Now, Ms. Corcoran, the teacher, she doesn't face
24 irreparable injury because school isn't going to start until
25 probably September, and we will have our preliminary

1 injunction by that time -- our preliminary injunction
2 hearing by that time. And the purpose of a TRO is to
3 preserve the status quo until we can get to that preliminary
4 injunction hearing.

5 So there is no -- there is no standing under -- for
6 any of these plaintiffs as we sit here right now.

7 THE COURT: What about Plaintiff Jawort?

8 MR. JOHNSON: Jawort? Jawort is a performer. She
9 has no fear of prosecution, none whatsoever. It was the
10 library that had the fear of prosecution.

11 The brewery hasn't asserted a declaration that
12 there was any injury in fact. So we have nothing there as
13 well. And that one's a different baby, Section 2, but as we
14 stand here right now, there is no -- there is no need for a
15 temporary restraining order because there is no risk of
16 irreparable harm.

17 And there is no standing for all of the plaintiffs,
18 except Ms. Corcoran, but she does not face irreparable harm
19 because we will have the preliminary injunction hearing by
20 that time.

21 Let's talk about the Imagine Nation Brewery.
22 Again, the key is reading the statute, Your Honor, and it's
23 an sexually orientated business. It may not allow a person
24 under the age of 18 years to enter the premise of the
25 business during a sexually orientated performance.

1 So that business has to be one that either is a
2 nightclub, bar or restaurant, or similar commercial
3 enterprise, and that defines the nearest antecedent, which
4 would be bar or restaurant, and it must serve alcohol.

5 So let's take a hard look at sexually orientated
6 performance, so that's the only way that that bar or
7 restaurant, the Imagine Nation Brewing, can get in any
8 punishment is if they allow an 18 year old to enter the
9 premise during a sexually orientated performance.

10 And that performance has been defined by prurient
11 interests, which as Your Honor noted, is defined under
12 Section 45-8-205, (7).

13 THE COURT: But the law goes well beyond prurient
14 interests.

15 MR. JOHNSON: It -- and then it requires -- so it
16 has to be prurient interest and one of the other -- one of
17 the other items, which is purposeful exposure of --

18 THE COURT: Where does --

19 MR. JOHNSON: -- of nudity.

20 THE COURT: Where does it say that, what section?

21 MR. JOHNSON: This is Section 1, (10) which defines
22 the sexually oriented performance. So it must appeal first
23 to the prurient interest in sex, which is defined, and
24 feature (a) the purposeful exposure, whether complete or
25 partial, of the human genitalia, et cetera, et cetera,

1 including a prosthetic, but it has to appeal to the prurient
2 interest.

3 THE COURT: If your interpretation is correct, why
4 is the law needed? We're already doing -- banning
5 performances that appeal to prurient interest.

6 MR. JOHNSON: I think there's a gap here, and I
7 think the gap is under obscenity. So I think the gap is
8 here, and especially with sexually orientated business. In
9 order for the ban -- for a business to be obscene, I mean,
10 it has to meet those definitions.

11 I think -- and it's the community standards under
12 *Miller*, and ultimately, I think, you -- arguably in this day
13 and age, I could take maybe my 17-year-old son into a strip
14 club that only shows above the waist, and that may not be
15 deemed obscene by the community standards.

16 This takes care of that. I can't take my son into
17 a bar, strip club, or restaurant or similarly commercial
18 enterprise that serves alcohol and shows nudity. I think
19 that's the difference, and that's why it's a stopgap.

20 The other reason for the House Bill 359 is the drag
21 shows. Now, that is limited to whom? It's limited to
22 schools that are publicly funded, so public schools and
23 publicly funded libraries.

24 And under Section -- and we're going to get to that
25 under Section 3(2), and I think there is an error in

1 drafting, I'd be candid on (1) versus (2), I think that
2 meant to be library and school can't permit sexually
3 oriented performances, they left out "school" -- public
4 library, public school. And they added sexually oriented
5 performances in subsection 2, but "A school or library that
6 receives any form of funding from the state may allow a drag
7 story hour --"

8 THE COURT: May?

9 MR. JOHNSON: -- on its premises during -- "may not
10 allow during regular operating hours or at a school-
11 sponsored extracurricular activity."

12 It's not saying you can't hold a drag story hour at
13 the school. I mean, you could literally, as long as it's
14 after regular hours, hold one at the Cut Bank Library or the
15 Cut Bank High School gym, that's where that's saying.

16 THE COURT: Where does it say that? Explain that
17 to me again.

18 MR. JOHNSON: Okay. Go ahead, Subsection 3,
19 subsection 2: "A school or library that receives any form
20 of funding from the state may not allow a sexually
21 orientated performance or a drag story hour as defined in
22 Section 1 on its premises during regular operating hours or
23 at a school-sanctioned extracurricular activity."

24 THE COURT: So the library is open until 9 o'clock
25 at night.

1 MR. JOHNSON: So they can do it at 11 o'clock.

2 THE COURT: They can't do it during regular hours?

3 MR. JOHNSON: They just can do it during regular
4 hours. And I don't know whether a library is open until --
5 I mean...

6 THE COURT: Right. What I was -- what are schools'
7 hours?

8 MR. JOHNSON: Schools' hours would be from when the
9 kids are there until 4 o'clock.

10 THE COURT: What about extracurricular activities?
11 You go to school, you go to basketball games.

12 MR. JOHNSON: You can't hold it at a basketball
13 game, you can't hold it at a choir concert, you can't hold
14 it at a football game.

15 THE COURT: All right. Go ahead.

16 MR. JOHNSON: So I think that's the difference, so
17 that's why there is a need for House Bill 359 because it's a
18 stopgap on what's in between obscenity and what's less than
19 obscenity, which the state has a right to limit minors from
20 seeing something that is less than obscene in accordance
21 with adult standards, and that is *Sable Communications vs.*
22 *FCC*, 492 US 115.

23 THE COURT: So the state could stop a parent from
24 taking a child to an R-rated movie?

25 MR. JOHNSON: Yeah, I think they probably could. I

1 think the state could.

2 Now, let's take a look at the state statute --

3 THE COURT: Can the state subject the parent to
4 criminal penalties for it?

5 MR. JOHNSON: Let's take the state statute though.
6 It excludes R-rated -- G through R-rated under section --
7 I'll get to it -- 45-8-205, (5). And if I -- I brought my
8 statute book, I assumed you would have one.

9 THE COURT: Go ahead, just tell me what it says.

10 MR. JOHNSON: 45-8-206 -- no, 205 (5):
11 "Performance" means any motion picture film or videotape
12 except a motion picture or videotape rated G, PG, PG 13, or
13 R by the Motion Picture Association of America." And that's
14 what's under the definitions for obscenity. It excludes it,
15 expressly excludes movies that are rated by --

16 THE COURT: Right so the Motion Picture Association
17 of America rates those films.

18 MR. JOHNSON: Correct.

19 THE COURT: Who rates some of the activities at
20 issue that are addressed by House Bill 359?

21 MR. JOHNSON: It has to appeal to the sexually --
22 it has to meet that standard, the sexually prurient
23 interest, and meet the other standards, one of the other
24 standards. So it's got two things that are required.

25 And then all it says is, you can't show it to

1 somebody under the age of 18, which the State has a right to
2 do and restrict under *Sable*, so it has that right, and it
3 has to meet that definition. Which "prurient interest" is a
4 pretty tough definition.

5 I mean, it means: A shameful or morbid interest in
6 sex or excretion.

7 THE COURT: Mr. Johnson, how do you compare the law
8 here to the law that had been --

9 MR. JOHNSON: Tennessee and Florida.

10 THE COURT: -- in Tennessee and Florida; the --

11 MR. JOHNSON: They did not define "lewd conduct."

12 THE COURT: Those two states?

13 MR. JOHNSON: Yes; that's my best reading of them.

14 I mean, I -- we've been scrambling to prepare for this
15 hearing, I have been doing the best I can. But that's my
16 understanding is the difference is, they did not define
17 "lewd conduct" as opposed to the State of Montana defined
18 "prurient interests," excluding motion pictures, defining
19 "sexual conduct" under the same section, under (8).

20 And defining "simulated." That is under -- it is
21 in the sexual conduct portion under 8(a), and it's also
22 defined in Section 45-5-625. That expressly defines
23 simulated (5) (c).

24 And so that is the difference, is Montana is using
25 definitions that are stated in statutes as opposed to the

1 Tennessee and Florida cases which did not define "lewd
2 conduct," and that's the difference.

3 So, Your Honor --

4 THE COURT: Where do those cases rely upon this
5 lack of definition lewd contact; in the orders of the
6 Courts?

7 MR. JOHNSON: It's cited. The one I have is State
8 of Florida, and I have a quote here: "Vague and overbroad
9 for similar reasons as the Tennessee such as not defining
10 "lewd conduct," and I think that was the big one. And that
11 was 2023 Westlaw 415, 7542.

12 Whereas, our statute, House Bill 359, does rely on
13 definitions, and; hence, the vague argument has a
14 substantial amount of problems because I know what I'm being
15 prosecuted for.

16 Now, let's -- so let's go to the standards with
17 regard to a temporary restraining order. Number one, there
18 must be a likelihood of success on the merits and a
19 likelihood of irreparable injury if not granted.

20 I think plaintiffs have a huge problem with that.
21 There has not been any restriction and no evidence that the
22 State -- or no evidence from the plaintiffs that the State
23 has done anything to prevent any Pride parade. And, in
24 fact, in their declarations, they have had an Anaconda Pride
25 Parade, a Libby Pride Parade, and a Red Lodge Pride Parade,

1 and I maybe missed one.

2 And there has been no evidence that has been
3 presented by the plaintiffs that the State is investigating
4 or thinking about doing any prosecution of the Pride Parade
5 in Helena and, admittedly, they've been able to conduct one.

6 And then, again, the -- a huge problem with their
7 irreparable injury is that they, under the statutes, the
8 plain meaning of the statutes, they fear no prosecution.

9 And then we also have a problem with regard to
10 Elsie Arntzen. She has sovereign immunity because she
11 cannot enforce the restriction against the teachers. Only
12 the Board of Education can, so right from the git-go, they
13 have a huge problem with Elsie Arntzen. The Board of
14 Education is given authority --

15 THE COURT: Well, she has sovereign immunity from
16 monetary damages; she doesn't have sovereign immunity from
17 an unconstitutional act.

18 MR. JOHNSON: But she isn't -- isn't given the
19 right to do anything to teachers. She can't suspend them.
20 She can't expel them. She can't do that, and that's what
21 the statute -- the house bill envisions for --

22 THE COURT: Well, what about Plaintiff Corcoran, if
23 she were to continue her performances, what potential
24 discipline would she face?

25 MR. JOHNSON: So she could face it from the Board

1 of Education, and I would acknowledge that.

2 THE COURT: The state Board of Education?

3 MR. JOHNSON: Yes. Yes. But it's a problem for
4 the plaintiffs as they stand here today, but yes, she could
5 face it from the Board of Education.

6 THE COURT: Because she is not facing any
7 discipline?

8 MR. JOHNSON: Correct, yes.

9 THE COURT: Okay.

10 MR. JOHNSON: Then we go to the likelihood of
11 success on the merits, and let's go to a facial attack. Is
12 there any set of circumstances that allows a portion of this
13 house bill to be valid? And yes, the biggest one is Section
14 2. The state has the right to -- to restrict and prevent
15 harm to minors, both psychological and physical, and that is
16 the *Sable* case.

17 And that is exactly what that's doing, and it is
18 restricted to a facility that serves alcohol and is either a
19 -- provides stripping in the form of live nude entertainment
20 or sexually oriented performances and must authorize
21 alcoholic beverages.

22 Under a facial attack, it has to be -- every
23 application must be invalid. That one is not invalid. In
24 addition --

25 THE COURT: Why?

1 MR. JOHNSON: That is not invalid.

2 THE COURT: Yes.

3 MR. JOHNSON: Because the State has the right to
4 prevent minors from seeing -- to protect their physical
5 welfare and their mental well-being, and they have the right
6 under *Sable* to restrict beyond what is deemed obscene for
7 adults.

8 THE COURT: Well, back to the R-rated movie
9 question.

10 MR. JOHNSON: Yep.

11 THE COURT: Does the State have the right to
12 prosecute a parent that takes their 14 year old to an
13 R-rated movie?

14 MR. JOHNSON: It's not violated in the statute
15 because of the definition of "performance," so your parent
16 can take -- and because it's outside of the definition of
17 performance, your parent can take the 17 year old to the
18 R-rated movie.

19 THE COURT: Well, but a parent can't take a 14 to a
20 drag story hour because of what?

21 MR. JOHNSON: Because -- okay. Let's talk about
22 drag story hour. Drag story hour is a publicly funded
23 restriction.

24 THE COURT: You mean the buildings?

25 MR. JOHNSON: Yes; it's meant for places that are

1 publicly funded.

2 THE COURT: So if the Imagine Nation Brewery or the
3 Roxy Theater hosted drag story hour, they are not subject to
4 prosecution?

5 MR. JOHNSON: Correct, that is true. It's limited
6 to libraries, libraries and schools. And the libraries and
7 schools fit under the restriction on public funds, and
8 that's also the place that receives public funding, so if
9 they receive public funding.

10 And if the government appropriates public funds to
11 establish a program, it is entitled to define the limits of
12 that program. That's the *Rust* case, where they restricted
13 speech on abortion, prior to the *Dobbs* case, they restricted
14 speech on abortion.

15 And the rationale is, you can talk about abortion
16 all you want, you just can't talk about abortion and receive
17 public funds. And the First Amendment -- the First
18 Amendment right is meant to prevent the government from
19 restricting private speech, not governmental speech.

20 And the other case is *U. S. v. American Library*
21 *Association*. If you want the cites, I can give you those to
22 you.

23 THE COURT: Yes, please.

24 MR. JOHNSON: The *U. S. vs. American Library*
25 *Association*, it's 539 US 194. I'll say that again, 539 US

1 194, and *Rust* is 500 US 173.

2 And in *U. S. vs. American Library*, it was -- they
3 were -- the government required this program to be placed on
4 the internet that prevented patrons from seeing pornography,
5 what the government deemed restricted.

6 And the U. S. Supreme Court found because it's
7 public funds, public funds to the library, that was not a
8 restriction on speech because the library had the right to
9 say, okay, I'll either accept the funds or I'll allow the
10 speech, but I just can't do both. Because the government
11 has the right to appropriate public funds to establish a
12 program and define the limits of that program.

13 THE COURT: Mr. Johnson, let's go back to the *Reno*
14 *vs. ACLU* case.

15 MR. JOHNSON: Okay.

16 THE COURT: The Communications and Decency Act. So
17 the Supreme Court strikes down an effort by Congress to
18 regulate content on the internet because children might be
19 viewing it.

20 MR. JOHNSON: Okay.

21 THE COURT: Right? That's a pretty broad area --

22 MR. JOHNSON: It's --

23 THE COURT: -- where the Congress might have
24 authority to regulate; Supreme Court says it's not -- they
25 can't go that far.

1 MR. JOHNSON: Is that -- is that an entity that is
2 receiving government funds?

3 THE COURT: No. I understand your restriction on
4 government -- the government fund restriction, but here
5 we're talking about the other businesses.

6 MR. JOHNSON: Sure.

7 THE COURT: The Imagine Nation, The Roxy Theater,
8 the Myrna Loy Theater, those places.

9 MR. JOHNSON: Okay. So let's --

10 THE COURT: -- or the Pride Parade events.

11 MR. JOHNSON: Let's take -- let's take the Roxy
12 Theater.

13 THE COURT: Okay.

14 MR. JOHNSON: The only way they have any fear of
15 being restricted is if they show a sexually oriented
16 performance to persons under the age of 18. That's -- or if
17 they receive government funds, if they are receiving
18 government funds, then that restriction can go -- and
19 doesn't necessarily have to have the minors in place because
20 that's under Section 3.

21 Because a public property in any location where the
22 performance is in the presence under the age of 18, that's
23 the Pride Parade, this is Section 3, (3) (a) and (b). So
24 (3) (b) in a location owned by an entity that receives any
25 form of funding from the State.

1 So let's take the theater, their only -- the only
2 way they get restricted is if they provide a sexually
3 orientated performance, under the definition, to people
4 under the age of 18 or if they are receiving public funds.

5 THE COURT: And it's on public property which would
6 be the Town Square.

7 MR. JOHNSON: If it's on public property then it
8 requires that 18 year olds be there.

9 THE COURT: Right. And who controls that if they
10 are have a Pride Parade down the street, who controls who's
11 standing on the sidewalk watching the parade?

12 MR. JOHNSON: Law enforcement, I would assume,
13 would be the ones that would have to control it. I mean,
14 you would -- I think the Pride Parade sponsors could say "no
15 minors allowed" and put signs up. And then if it's at the
16 minors -- then if they do it, then it's on the minor, but
17 you can put up "no minors allowed."

18 THE COURT: Where?

19 MR. JOHNSON: On the parade street; put signs up,
20 just temporary signs. I mean, that's very plausible. And
21 the rationale for there is pretty clear, it has to be a
22 sexually oriented performance that is -- appeals to the
23 prurient sexual interest, which is pretty severe, and
24 probably obscene, but maybe not rises to the level of
25 obscene.

1 And that's the rationale behind the -- behind the
2 House Bill 359 is a stopgap. We don't want that argument
3 that it has to be obscene, because the definition of obscene
4 under the statute is pretty severe.

5 THE COURT: Let's go back to the Communication and
6 Decency Act. The electronic public square is the internet;
7 the Supreme Court said Congress can't regulate content on
8 the internet --

9 MR. JOHNSON: Okay.

10 THE COURT: -- beyond the standard that -- beyond
11 those obscenity standards. Why is that different than the
12 actual public square?

13 MR. JOHNSON: Because we are dealing with minors.

14 THE COURT: Right, but minors can go on the
15 computer.

16 MR. JOHNSON: They can. Would they -- I don't
17 think there's any way of preventing them from going on it,
18 but the schools do it all the time. They prevent minors
19 from accessing --

20 THE COURT: Sure, but on a school computer.

21 MR. JOHNSON: Correct.

22 THE COURT: But what about their home computer?

23 MR. JOHNSON: Okay. Then that's up to the parent.

24 THE COURT: Right; so why it is up to the parent to
25 decide well, I'm going to take my child to the drag story

1 hour, to whatever event that is being held at this -- by
2 this plaintiff.

3 MR. JOHNSON: There's no restriction on it. There
4 is no reason that a parent can't take their that child to
5 the drag story hour. No reason. The drag story hour, the
6 only restriction on the drag story hour is in a public
7 library or a public school. That's it. And there's no
8 restriction on a parent.

9 THE COURT: So if the plaintiff Montana Book
10 Club -- Books and Toys post a drag story on it, they are not
11 subject to the law?

12 MR. JOHNSON: Yes, that's true, they're not. It's
13 only if -- the drag story hour is only limited to public
14 libraries and public schools, that's Section 3 (2).

15 Carrying it -- go ahead.

16 THE COURT: What other content can be prohibited
17 from a public school or public library?

18 MR. JOHNSON: What other content?

19 THE COURT: Yes.

20 MR. JOHNSON: Items that --

21 THE COURT: We say we don't like your point of
22 view, we are not going to allow you to speak. How do we
23 determine -- most of these public buildings, schools,
24 libraries, things of that nature, are where people come to
25 have dialog, to speak, political actors will show up and

1 give a speech oftentimes, you know, if there are any
2 problems or not, at a library or school auditorium or some
3 facility like that.

4 Is there any limit on what the State can do, what
5 kind of conduct they are prohibiting?

6 MR. JOHNSON: If they are provided public funding
7 to them, they can put legitimate restrictions, which must
8 not -- they can't be arbitrary and capricious. They have to
9 have a rational basis.

10 THE COURT: Well, isn't *Miller* determining what is
11 legitimate?

12 MR. JOHNSON: I don't think so, not when it's
13 public funding to a governmental facility, no. Then the
14 government has the right to put restrictions on that.

15 THE COURT: So what's your authority for that claim
16 that meets --

17 MR. JOHNSON: That is --

18 THE COURT: What's Supreme Court, what court--

19 MR. JOHNSON: Yes, it's the Supreme Court -- it's
20 the two cases I gave you. *Rust v. Sullivan* --

21 THE COURT: Okay.

22 MR. JOHNSON: -- and then *U. S. American Library*
23 *Association*.

24 THE COURT: Okay. All right. Go ahead.

25 MR. JOHNSON: So bottom line is, facial attack is

1 not here, so that's Count 4 and 5 against Elsie Arntzen and
2 Austin Knudsen.

3 Under facial attack, Section 2 is most definitely
4 valid and enforceable, because it is restricting sexually
5 oriented performances with regard to a person under the age
6 of 18 to facilities that either permit stripping or nudity
7 or do sexually oriented performances.

8 Section 4 is definitely in play because there's --
9 I don't think there's any plaintiff that's -- or any
10 different that has asserted a private cause of action, and
11 our clients aren't a part of that, so Section 4 is there.

12 We also believe that Section 3(1) and (2), without
13 the errors, are also clearly constitutional because it's
14 public funding and they have the ability to do that. So the
15 bottom line is, Your Honor, I don't think they can
16 prevail -- they are not likely to prevail with regard to the
17 case and --

18 THE COURT: So go back to Section 4 for a moment,
19 the private right of action.

20 MR. JOHNSON: Yeah.

21 THE COURT: That's not right now, you're telling
22 me, as though --

23 MR. JOHNSON: I know of no -- I know of no child or
24 person that is suing, and the government does not have a
25 right to sue under the private right of action, and I have a

1 case for that if you want it.

2 THE COURT: And the plaintiffs have to wait until
3 someone brings a private right of action that challenges
4 part of the statute?

5 MR. JOHNSON: None of the -- there's no defendant
6 here to even challenge and get a TRO against, we don't have
7 that right as the government. And I can give you that case
8 if you would like.

9 THE COURT: Well, it's the State's private right of
10 action?

11 MR. JOHNSON: Yes.

12 THE COURT: All right.

13 Anything else, Mr. Johnson?

14 MR. JOHNSON: The bottom line, Your Honor, is what
15 separates us -- it's *Whole Women's Health vs. Jackson*, and I
16 don't have the cite. *Whole Women's Health vs. Jackson*, that
17 is the state has no private right of action.

18 The bottom line here, Your Honor, is a restraining
19 order is not appropriate under the circumstances, especially
20 in light of the plain reading of the statute, including the
21 definitional portions that are already provided under the
22 Montana code, which I have cited.

23 First and foremost, there is no irreparable
24 imminent threat of an injury, and the plaintiffs have failed
25 to establish such by clear and convincing evidence, which is

1 required. Secondly, there is no fear of prosecution, as I
2 have indicated, and the statutes are very clear about that.

3 And the only one that is at issue is Ms. Corcoran,
4 and school won't start before we can have a preliminary
5 injunction hearing.

6 Secondly, there is no -- plaintiffs would -- cannot
7 establish that there is a likelihood of success on the
8 merits, especially with the facial attack --

9 THE COURT: Well, Mr. -- let me interrupt you for a
10 second.

11 MR. JOHNSON: Yep.

12 THE COURT: I want to go back to some of these
13 definitions.

14 MR. JOHNSON: Sure.

15 THE COURT: And this is, you would agree, that
16 under the First Amendment, there's -- a person generally has
17 the right to speech.

18 MR. JOHNSON: Yes.

19 THE COURT: There has to be a compelling state
20 interest to limit that right.

21 MR. JOHNSON: Unless it's a public fund issue
22 that that --

23 THE COURT: Then there are narrow tailoring
24 requirements, typically?

25 MR. JOHNSON: Yes.

1 THE COURT: All right. So some of these
2 definitions here: The "drag king" is a male or female
3 performer who adopts a flamboyant or parodic male persona
4 with glamorous or exaggerated costumes and makeup. Who
5 decides that? How would a court go about deciding what's
6 flamboyant or parodic?

7 MR. JOHNSON: The jury would; I mean, a finder of
8 fact. I mean, that's all I can tell you.

9 THE COURT: We put that up to a jury, that you
10 could be subject to criminal liability because you were too
11 flamboyant?

12 MR. JOHNSON: Because the school allowed it, and
13 understand who it is. It's not the performer that is
14 subject to prosecution; it's the school or the school
15 employee, that person. That's Section 3 (4). So the
16 performer can't be subject to prosecution; the drag king or
17 queen can't be.

18 THE COURT: Well, Mr. Johnson, if the scope of this
19 fashion is as limited as you say, what's the point? Why do
20 we need it?

21 MR. JOHNSON: Why do we need it? I think there's a
22 couple reasons. I think that the stopgap that I've talked
23 about, I think there is some gray area with regard to what
24 is obscene and what we want -- what the State of Montana
25 wants their children to see.

1 And the state has the right to protect children
2 with regard to material that is less-than-adult obscene. I
3 think that's the stopgap here. I think that's the one under
4 Section 2 of House Bill 359 that really is applicable under
5 this house bill.

6 THE COURT: So you say less-than-adult obscene; so
7 you mean typically the obscenities standard set forth in
8 *Miller* and Supreme Court cases apply to adult entertainment?

9 MR. JOHNSON: Yes.

10 THE COURT: But there is a lower standard for
11 children with parental consent?

12 MR. JOHNSON: There is a lower standard for
13 children, yes, and the State can govern -- the State can
14 say, "No, that's not gonna happen with -- on our public
15 dime."

16 THE COURT: All right.

17 MR. JOHNSON: That's the difference.

18 THE COURT: Anything else?

19 MR. JOHNSON: And then, Your Honor, I think it's
20 also to prevent drag story hour in public libraries and
21 schools, and that's it, but there is an exception to it;
22 those public buildings can be used for drag story hour in
23 after-hour times or not for extracurricular activity. I
24 think that's the purpose.

25 THE COURT: Why would they be singled out compared

1 to the Mother Goose story hour or some other story hour?

2 MR. JOHNSON: I think because of the definition of
3 drag king and drag queen, and the definition of drag story
4 hour; because the legislation has deemed that that's not
5 appropriate for -- for let's say kindergartners or first
6 graders or third graders. And I know -- I realize it goes
7 all the way up to seniors in high school. I understand
8 that.

9 THE COURT: So what about the -- Mr. Mitchell, the
10 sponsor?

11 MR. JOHNSON: Yes.

12 THE COURT: His statement of standards he's worried
13 about children getting the wrong impression about gender
14 roles. Is there anything in the record that supports that
15 concern?

16 MR. JOHNSON: Nothing that I have right here. I
17 mean, again, with the limited amount of time I was not able
18 to review the entire record that -- to change --

19 THE COURT: And you understand this is an emergent
20 situation?

21 MR. JOHNSON: Yeah.

22 THE COURT: I mean, you certainly have an
23 opportunity to respond fully in writing at the appropriate
24 time?

25 MR. JOHNSON: I understand.

1 THE COURT: We're operating here on an expedited
2 basis --

3 MR. JOHNSON: Yes.

4 THE COURT: -- based upon the allegations?

5 MR. JOHNSON: And I would argue that a TRO should
6 not be granted; if you are so inclined, it should be narrow
7 in scope to the portions that you deem that there is a risk
8 of irreparable injury and that they are likely to succeed on
9 their merits.

10 THE COURT: Thank you, Mr. Johnson.

11 MR. JOHNSON: Thank you.

12 THE COURT: Ms. Dockter?

13 MS. DOCKTER: May it please the Court. I'm
14 Becky Dockter; I'm here on behalf of the City of Helena, and
15 here to defend against -- or to actually provide a couple of
16 points on this matter.

17 First, the permit itself, clear up confusion about
18 the permit itself; and then the second one, to discuss the
19 impact on City of Helena and its employees in the
20 implementation of House Bill 359.

21 First, the City plans to and has always planned to
22 issue the permit for Pride. The question here that I heard
23 today was whether or not it would issue the permit
24 conditioned on House Bill 359 factors, and it does not
25 intend to -- to condition the permit at all, and I can

1 elaborate on that in a second here.

2 The reason why that is important is because the
3 burden that we see in House Bill 359 is placed under Section
4 3 on a sexually oriented performance is prohibited on
5 subsection (a) of public property in any location where the
6 performance is in the presence of an individual under the
7 age of 18 and in a location owned by an entity that receives
8 any form of funding from the State.

9 So the City of Helena receives funding from the
10 State in the form of grants and such. It has nothing to do
11 with performances on public property, but this statute
12 doesn't clarify that. More importantly, though, public
13 property includes the streets, the town squares that we've
14 already talked about, so sexually oriented performances are
15 prohibited.

16 It doesn't in that section, though we had a lot of
17 discussion about whether or not a school or library, whether
18 it's a very limited school or library, this section actually
19 is broad in that it prohibits those performances on public
20 property.

21 And then in Subsection (4) under that Section 3 --
22 sorry -- House Bill 359, Section 3, Subsection (4) includes
23 public employees. And a criminal penalty for those public
24 employees who are -- that violate and allow sexually
25 oriented performances, which again is more broad than what

1 we talked about, libraries and schools, it's on public
2 property.

3 THE COURT: Ms. Dockter, can you explain how you
4 think Subsection (4) in the language applies to public
5 employees who issues a permit or is responsible for
6 reviewing the permit.

7 MS. DOCKTER: Thank you, Your Honor.

8 In looking at a permit application for a special
9 event there are many factors to decide. There are whether
10 or not it can be safely on city streets, whether or not the
11 crowd can be dispersed amongst an area so it's not so
12 crowded, transportation, safety, police protection.

13 In, I think, last year this Pride event, which is
14 the event that we're talking about here in particular, had
15 11 or 15,000 people on the Last Chance Gulch. That is
16 something that the City actually does look at to ensure
17 those time, place, and manner restrictions to ensure that
18 those are going to be an event that can be safely held on
19 public property within the city.

20 What it doesn't do is determine content-based
21 performance on public property; for example, interviewing
22 each individual performer and asking them whether they
23 intend to appeal to the prurient interest of sex of their
24 performance in order to determine whether or not a sexually
25 oriented performance can occur on public property.

1 That's not something this country has wanted the
2 government to be involved in questioning individuals when
3 they are expressing their freedom of speech on a public town
4 square, and that's what House Bill 359 asks us to do.

5 So in issuing a permit, the burden is then on
6 plaintiffs to determine whether or not to either, as
7 plaintiffs' counsel was discussing, curtail their speech or
8 face criminal liability, although I hear what the State
9 said, it's limited.

10 I'm proposing that for the City employees and the
11 public employee section, subsection, it is much more broad
12 than how the State characterized it. Public employees in
13 just looking at allowing those performances on public
14 property face the criminality liability on Subsection --

15 THE COURT: So you are taking issue with
16 Mr. Johnson's claim that this doesn't apply to performers,
17 but it doesn't -- one of his arguments was, performers
18 aren't at risk, it's the people who sponsor. And in this
19 case, you're claiming that applies to public employees --

20 MS. DOCKTER: Your Honor, I am, yes.

21 THE COURT: Okay.

22 MS. DOCKTER: Subsection (4) then also creates a
23 conundrum, I guess, for City employees, in that it creates a
24 private right of action by a minor who attends a
25 performance, in violation, so sexually oriented performance,

1 which we have talked about what that means and its
2 vagueness, but bring an action against who knowingly
3 promotes, conducts, or participate as a performer.

4 Now, a city employee in looking at a permit, our
5 police officers last year and several years prior were
6 actually at the performance ensuring safety. Are they
7 helping them promote or conduct a performance and then are
8 subject to that private right of action as well?

9 And that's a question I believe that this Court
10 could answer in preserving the status quo to ensure public
11 employees who are doing their jobs to just analyze whether
12 or not an event can safely occur on public property are not
13 subjected to both criminal, under Section 3, and civil
14 liability under Subsection (4).

15 That is precisely the reason why Helena is issuing
16 the permit and will not condition it to House Bill 359
17 conditions. We believe that the *Reed* case that's cited in
18 the plaintiffs' brief, this *Reed vs. City of Gilbert*, where
19 it creates or it cites -- I'll read from that case:

20 "Government, including municipal government, vested
21 with state authority, has no power to restrict expression
22 because of its message, its idea, its subject matter or its
23 content." And in that case it dealt with signs, some
24 regulations on signs and the directional signs vs. political
25 signs and, basically, said that when it does on its face

1 regulate content, it's presumed unconstitutional.

2 City of Helena, in reviewing this permit, will not
3 subject its employees to asking performers whether or not
4 they intend to appeal -- it says sexually oriented
5 performance, which is singular, whether or not that
6 performer, in that performance, intends to appeal to the
7 prurient interest in sex.

8 And while the State referenced the definition of
9 prurient interest, it did -- it only referenced the
10 definition of 205. It did not incorporate any of the
11 standards of obscenity that were already found in the
12 obscenity case, and I think you heard that from plaintiffs
13 already.

14 For those reasons, we do not dispute a temporary
15 restraining order to be issued and would appreciate that as
16 well, on behalf of the City of Helena and the City
17 employees.

18 THE COURT: Thank you, Ms. Dockter.

19 MS. DOCKTER: Thank you.

20 THE COURT: Hold on.

21 Ms. Walker, did you want to address the Court
22 first? You'll have a chance, Mr. Johnson.

23 MS. WALKER: No, Your Honor. Mr. Gallagher is not
24 the subject of the motion or the --

25 THE COURT: Okay.

1 MS. WALKER: -- temporary restraining order.

2 THE COURT: All right. Let me hear from the
3 plaintiffs first, and I'll give you a chance, and then I'm
4 sure they may say something you might want to respond to.

5 MR. JOHNSON: (Indicating.)

6 THE COURT: All right.

7 Ms. Van Kley, would you please start with the
8 statutory definitions for, particularly subsection --
9 Section 1, Subsection (10), sexually oriented performance?
10 Mr. Johnson argues that all this law does is add some
11 criteria to you prurient interest standard.

12 So the appeal to a prurient interest in sex and
13 features any of the following elements and lists those in
14 Subsection (10).

15 MS. VAN KLEY: Your Honor, two things; first, under
16 *Miller*, the prurient interest in sex is only one element of
17 a test that requires three elements. There is no -- this
18 definition does not address the other two required elements
19 under *Miller*, which are that they depict sexual conduct in a
20 patently offensive way, and that there is a carve-out for
21 materials that have legitimate social value, including
22 artistic value.

23 And so it, at best, incorporates one piece of
24 *Miller*, and, again, I would disagree with the attempt to
25 distinguish the Tennessee and Florida cases. Both of those

1 laws did incorporate the *Miller* test, but because they were
2 targeted towards drag, the laws were enjoined.

3 THE COURT: Well, how do you respond to
4 Mr. Johnson's argument about those states failed to define
5 lewd.

6 MS. VAN KLEY: Your Honor -- well, two things: One
7 is, that in that quote that Mr. Johnson read, that was an
8 example of one way in which the Florida law was vague.
9 Second, there's no definition of lewd within HB 359.

10 And to Mr. Johnson's point, that there are other
11 provisions in Montana criminal code that do include more
12 targeted definitions, they are not incorporated into this
13 definition of sexually oriented performance. There is no
14 cross-reference to any other piece of the Montana code
15 within this definition.

16 There is, under Subsection (7), a definition of
17 obscene that includes a cross-reference. The word "obscene"
18 doesn't appear anywhere else in HB 359 so I don't know what
19 we do with that. It certainly is not incorporated into this
20 definition of sexually oriented performance.

21 There's also a cross-reference to sexual conduct
22 within Subsection (8) of Section 1, and I'll read that piece
23 because I do think it's important particularly for the
24 vagueness piece to read: "Sexually oriented means any
25 simulation of sexual activity, stripping, salacious dancing,

1 lewd or lascivious depiction or description of human
2 genitals or of sexual conduct as defined in 45-5-625."

3 45-5-625 has to do with criminal sexual abuse, I
4 believe. And if -- if this cross-reference to 45-5-625
5 applies to the definition of sexually oriented
6 performance --

7 THE COURT: Where is the cross-reference?

8 MS. VAN KLEY: Under Section 1, (8), there is a
9 definition of sexually oriented. Sexually oriented, again,
10 doesn't appear as a stand-alone phrase anywhere else in
11 HB 359 so I don't know what we do with it, but there is a
12 cross-reference to more a limited definition of sexual
13 conduct there.

14 If we are going to import that cross-reference into
15 the definition of sexually oriented performance under
16 Subsection (10), then we need to import all of that
17 definition of sexually oriented and so that would include
18 salacious dancing as a sexually oriented performance.

19 That would include any lewd or lascivious depiction
20 or description of human genitals, that includes books,
21 right? Like, that includes books at the Montana Book
22 Company if we are going to be willing to take that cross-
23 reference and import it into sexually oriented performance,
24 then we need to import all of it.

25 Bottom line, is Subsection (10), which is the

1 definition of sexually oriented performance, does not cross-
2 reference anything; it doesn't even attempt to incorporate
3 the other required elements of the *Miller* test nor does the
4 definition of "drag story hour," which doesn't even require
5 the prurient interest in sex.

6 THE COURT: Ms. Van Kley, what about Mr. Johnson's
7 arguments under the injury and fact. At this stage, no one
8 is facing any prosecution, and there is no imminent harm?

9 MS. VAN KLEY: Your Honor, I think there is some --
10 a conflation here, and I definitely bear some of the
11 responsibility for this. There is a conflation of injury in
12 fact with regard to standing and then the injury with regard
13 to the temporary restraining order.

14 First, to Mr. Johnson's argument, that no one
15 actually faces prosecution under the statute among the
16 plaintiffs. I disagree. Imagine Nation sells alcohol;
17 Imagine Nation, as alleged in the first amended complaint,
18 has allowed drag story hours while there is -- I agree --
19 the restriction on drag story hours doesn't apply to Imagine
20 Nation, the restriction on the exposure of prosthetic
21 breasts, which are treated differently than female breasts
22 do -- does apply to Imagine Nation.

23 The Myrna Loy and the Roxy both serve alcohol and
24 receive public funding. They are both subject to criminal
25 penalties. Rachel Corcoran, as a teacher, is subject to

1 criminal penalties, and I would just like to very briefly --

2 THE COURT: -- Mr. Johnson -- Ms. Corcoran's not
3 back in school until the fall.

4 MS. VAN KLEY: Yes. So I mean, I think when we
5 talk about injury, we talk about injury with regard to both
6 standing and with regard to the TRO. So addressing
7 specifically that argument that there is no standing to
8 challenge the law because nobody actually faces criminal
9 prosecution, that's not true.

10 Rachel Corcoran does, the Roxy does, the Myrna Loy
11 does, Imagine Nation does, and so does the Montana Book
12 Company, which receives public funding.

13 THE COURT: What about Mr. Johnson's argument, he
14 cited *U. S. vs. American Library Association* and the other
15 five -- those two cases, the Supreme Court cases about
16 public funding?

17 MS. VAN KLEY: Yes. So I think there are a few
18 points to make here. One is that is it absolutely true that
19 the government can engage in speech on its own behalf. It
20 can do that through the use of the purse.

21 So when the government conditions spending on
22 certain speech-related activities, that is allowable; that
23 is something very different than criminalizing conduct
24 because you have received public funding in the past. It
25 just is different.

1 Schools do have more latitude, and the classic case
2 is *Tinker v. Des Moines*. Schools do have more latitude as
3 long as the restrictions are used to facilitate a learning
4 environment. I have no idea how specifically targeting
5 performers, individuals who engage in learning activities
6 while wearing a gendered costume could possibly do that,
7 particularly when -- even if it were applying a rationale
8 basis, there is a very clear showing of animus.

9 THE COURT: What about Mr. Johnson's argument that
10 during regular hours you can't hold these events?

11 MS. VAN KLEY: I don't -- I don't know exactly what
12 to make of that. I mean, regardless, under -- in regular
13 hours, there are -- there is some latitude for schools,
14 again, to enact regulations in order to improve the -- and
15 protect the learning environment.

16 And so students, for example, you know are limited
17 in -- they can be disciplined for swearing in class and
18 those kinds of things. Again, whether it is -- it is
19 your -- a normal person's definition of a drag queen or if
20 it's somebody coming to school dressed in a superhero
21 costume or dressed as a Disney princess, I have no idea how
22 you can make that argument that this restriction on drag
23 story hours, as defined, actually furthers or promotes a
24 learning environment. So I think it's to the side entirely.

25 And one other point is drag story hours; again,

1 engaging in learning activities with minor children present
2 while dressed in some sort of gendered costume; well, what
3 about extracurricular activities that include theater? What
4 about a school performance of a Shakespeare play that
5 involves cross-dressing -- or doesn't -- any theatrical
6 performance probably includes people dressed in gendered
7 costumes.

8 So I think even this -- this -- I -- forcing
9 people -- whether or not a drag story hour could potentially
10 be allowed on school grounds outside of normal school
11 operating hours, I think just has no bearing. We're looking
12 at the restriction on drag story hours during
13 extracurricular activities in schools and libraries.

14 Schools, I will note, are not specifically defined
15 as public schools within the section; nor are the libraries,
16 it's a library that receives any public funding. Setting
17 that aside, we are just looking at whether or not they can
18 do the thing that is being done here, which is restricting
19 them within normal operating hours.

20 Whether or not there is any possibility that they
21 would be able to put on a drag story hour at 11:00 p.m.
22 in the library is irrelevant.

23 So going back to standing, we have -- we certainly
24 have plaintiffs who do face actual prosecution, and that is
25 a reason that we can bring in the state defendants with

1 regard to Elsie Arntzen.

2 We'll point out really quickly Montana Code
3 Annotated 23-106, Subsection 2. "The superintendent of
4 public instruction has the general supervision of the public
5 schools and districts and shall perform the following duties
6 or acts: Subsection (2), issue, renew, or deny teacher
7 certification."

8 HB 359 provides that if Section 3 provides that a
9 teacher such as Ms. Corcoran will see her certificate
10 revoked and then suspended, and that is why Defendant
11 Arntzen is included in the lawsuit.

12 And so we have the risk of actual prosecution of
13 roughly half of the plaintiffs to this lawsuit. On top of
14 that, we have the fact that all plaintiffs are suffering
15 chilled speech.

16 And I think Ms. Dockter's argument explains a
17 little bit about the effects which may be downstream but are
18 nonetheless traceable directly to enforcement of the
19 criminal laws against other entities.

20 All of the plaintiffs are unable to speak freely,
21 whether it is they themselves will directly be prosecuted,
22 roughly half of them do face that reality, roughly half of
23 them are, nonetheless, suffering from chilled speech, as a
24 result of the threat of criminal enforcement against others.

25 And then to very briefly address *Whole Women's*

1 *Health v. Hellerstedt*, which is the Texas abortion law.
2 That's a case in which there wasn't standing because there
3 was no criminal provision whatsoever. The issue there was
4 Texas created a private right of action for individuals to
5 sue other people for getting abortions or helping other
6 people get abortions.

7 And they tried to sue the clerks of court in order
8 to do that, and the Supreme Court said no, they are immune
9 under *Ex Parte Young*. You can't do that, that's -- 'cause
10 suing the Court, you're not allowed to see them. We just
11 aren't in that situation.

12 We are allowed to consider everything within HB 359
13 because there is the reality of state enforcement of this
14 law. This is not a law like SB 8 considered in *Whole*
15 *Women's Health*, which exclusively provides for a private
16 cause of action. There is action to be taken by Defendants
17 Knudsen and Arntzen.

18 And unless there are further questions, Your Honor,
19 we ask, again, that the Court grant the motion for a
20 temporary restraining order.

21 THE COURT: Thank you, Ms. Van Kley.

22 Mr. Johnson, do you wish to rebut the City of
23 Helena's arguments briefly?

24 MR. JOHNSON: Just the City of Helena, Your Honor.

25 Your Honor, the City of Helena is not a plaintiff

1 and could have made a cross-claim and did not make a
2 cross-claim and thus is not entitled to injunctive relief
3 with regard to a temporary restraining order. That's my
4 point.

5 THE COURT: Okay. Thank you.

6 MR. JOHNSON: Thank you.

7 THE COURT: All right. This matter is submitted.
8 Let's talk scheduling for a moment.

9 Mr. Johnson, when is your Answer to the Complaint
10 and the motion for preliminary injunction due?

11 MR. JOHNSON: I may need my assistant.

12 THE COURT: Take a moment and just figure that out,
13 if you would.

14 MR. JOHNSON: Thank you. The preliminary
15 injunction response is due Monday.

16 THE COURT: Due Monday?

17 MR. JOHNSON: Yes.

18 THE COURT: And how about the Answer to the
19 Complaint?

20 MR. JOHNSON: Same day -- no, following Monday.

21 THE COURT: Okay. All right. Well, then I will
22 try to get an order out on this issue as soon as possible,
23 on the temporary restraining order. We still face the
24 preliminary injunction and then ultimately the merits of the
25 underlying case.

1 So given the issues at stake, it might be helpful
2 to try to work out a schedule for the preliminary injunction
3 hearing, and today is July 26th, I believe.

4 MR. JOHNSON: Yes.

5 THE COURT: All right. So I'd like to get back
6 here -- I've not had a written response from you. I know
7 you're fighting with one hand behind your back at this
8 point, so I want to have a written response from you and
9 from the State, and then, of course, the plaintiffs have a
10 chance to offer their reply briefs.

11 And then the City of Helena and Defendant Gallagher
12 will have a chance to file their reply briefs as well. So I
13 think looking at about August 25th, that's a Friday. I have
14 to verify -- I'll have my staff contact you, but I would
15 think let's say about 1:30 on the 25th of August for the
16 preliminary injunction hearing.

17 And we'll verify that with -- if I have to change
18 that, I have a status call with counsel.

19 All right. Anything else today?

20 MR. JOHNSON: No, Your Honor. Thank you.

21 THE COURT: Well, I also want to thank all you
22 counsel for being here today. I know this is a very
23 contentious issue for some people, and I appreciate your
24 professionalism.

25 Thank you for your time.

1 (Whereupon, court adjourned at 3:52 p.m.)

2 --o0o--

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4 **CERTIFICATE OF REPORTER**

5 I, Kim Marchwick, a Registered Professional
6 Reporter and Certified Realtime Reporter, do hereby certify
7 that the foregoing 77 pages of transcript is a true and
8 correct record of the proceedings given at the time and
9 place hereinbefore mentioned; that the proceedings were
10 reported by me in machine shorthand and thereafter reduced
11 to typewritten form using Computer-Aided Transcription; that
12 after being reduced to typewritten form, a certified copy of
13 this transcript will be filed electronically with the court.

14 I further certify that I am not an attorney for,
15 nor employed by, nor related to any of the parties or
16 attorneys to this action, nor financially interested in this
17 action.

18 Whereupon, this document was signed by me in
19 Billings, Montana, this Wednesday, the 22nd day of November,
20 2023.

21 /s/ Kim Marchwick

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