23-3581

United States Court of Appeals for the Ninth Circuit

THE IMPERIAL SOVEREIGN COURT OF THE STATE OF MONTANA, ET AL.,

Plaintiffs-Appellees,

v.

AUSTIN KNUDSEN, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
Case No. cv 23-50-BU-BMM

BRIEF OF AMICUS CURIAE ACTORS' EQUITY ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES

Megan Stater Shaw
COHEN, WEISS AND SIMON LLP
909 Third Avenue, 12th Floor
New York, NY 10022
(212) 356-0205
Counsel for Actors' Equity Association

CORPORATE DISCLOSURE STATEMENT

Actors' Equity Association does not have any parent corporation and no publicly held corporation holds 10% or more of its stock because it is an unincorporated voluntary association.

Dated: February 16, 2024

/s Megan Stater Shaw
Megan Stater Shaw

Counsel for Actors' Equity Association

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STATEMENT OF INTEREST[1]

Actors' Equity Association ("Equity"), a labor organization that represents live theatrical actors and stage managers, is devoted to protecting live theatre as an essential component of a thriving civil society and the basis of its members' livelihoods. Since 1913, Equity has fought to win its members a dignified workplace at the theatre, from pay guarantees and pension and welfare benefits to the rules governing auditions. With more than 51,000 members across the nation, Equity is among the oldest and largest labor unions in the performing arts in America. Broadway tours of America's favorite musicals come to Montana each year, and approximately 35 Equity members permanently reside in Montana, where they could perform in thirteen Equity shows since 2019. Preserving the First Amendment right to perform in uncensored, controversial works of art in the public sphere is essential to Equity's mission. It is in defense of this freedom, and for the reasons set out in this brief, that Equity now urges this Court to affirm the ruling of the district court.

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), amicus certifies that no counsel for any party authored this brief in whole or in part and no person or entity other than amicus or its counsel made any monetary contribution towards its preparation or submission. Under Federal Rule of Appellate Procedure 29(a)(2), all parties to this appeal have been asked to consent to the filing of this brief, and all parties consent.

INTRODUCTION

The audience's first introduction to Lola, a principal character in the hit Broadway musical *Kinky Boots*, is in an alleyway. Charles, the inheritor of a bankrupt family shoe business, chances upon an alleyway assault: a group of men hassling a woman in high-heeled shoes. The woman uses one of her shoes to knock one man unconscious before Charles can intervene. "He wasn't the first man to fall for me," she says, slipping out of her coat and breaking into song. This is Lola, a drag queen with prosthetic breasts who performs with a retinue of Angels, all in drag. She inspires Charles to revitalize his shoe factory by manufacturing high heels for her underserved niche.[2]

Kinky Boots is a heartwarming comedy that won six Tony Awards and a Grammy.[3] It also may be prohibited by Montana's recent enactment of House Bill 359 (the "Act"). *See* First Addendum, Appellee's Br. at 74-78 (hereinafter "H.B. 359").

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[2] *See Everybody Say Yeah! Kinky Boots is Available for Licensing*, MUSIC THEATRE INT'L (Feb. 17, 2022), https://www.mtishows.com/news/everybody-say-yeah-kinky-boots-is-available-for-licensing (providing copy of libretto which describes scene at pp. 16-20).

[3] *Winners / Kinky Boots*, THE AM. THEATRE WING'S TONY AWARDS, https://www.tonyawards.com/winners/year/any/category/any/show/kinky-boots/ (last visited Oct. 27, 2023); *2013 Grammy Winners*, RECORDING ACADEMY GRAMMY AWARDS, https://www.grammy.com/awards/56th-annual-grammy-awards (last visited Oct. 27, 2023).

In February 2023, Montana state representative Braxton Mitchell sponsored a new law to prohibit drag story hours and other drag performances in Montana. Jonathon Ambarian, *Montana Lawmakers Hear Bill that Would Prevent Minors from Attending Drag Events*, KTVH (Feb. 9, 2023, 8:07 PM), https://www.ktvh.com/news/68th-session/montana-lawmakers-hear-bill-that-would-prevent-minors-from-attending-drag-events. In support of the bill, Mitchell stated, "In my humble opinion, there's no such thing as a family-friendly drag show." Amy Beth Hanson, *Montana First to Ban People Dressed in Drag from Reading to Children in Schools, Libraries*, ASSOCIATED PRESS NEWS (May 24, 2023, 10:49 AM), https://apnews.com/article/drag-story-ban-montana-transgender-445fb4579094767706102179 06b3fac5. Governor Greg Gianforte signed the Act into law on May 22, 2023. *2023 Capitol Tracker*, MONT. FREE (Aug. 28, 2023, 8:46 PM), https://apps.montanafreepress.org/capitol-tracker-2023/bills/hb-359/.

The Act prohibits "sexually oriented performance[s]" "on public property in any location where the performance is in the presence of an individual under the age of 18" or "in a location owned by an entity that receives any form of funding from the state." H.B. 359 § 3(3). It prohibits any so-called "sexually oriented business" from "allow[ing] a person under 18 years of age to enter the premises of the business during a sexually oriented performance." *Id.* § 2(1). The Act also outlaws the performance of any "drag story hour," as defined by the Act,

in any school or library "during regular operating hours or at any school-sanctioned extracurricular activity." *Id.* § 3(2). It institutes fines, the possible revocation of commercial licensure or work certification, civil liability by providing minors a private cause of action, and even criminal penalties to enforce the various provisions of this law. *Id.* §§ 2(2), 3(4), 4, 5(2); MONT. CODE ANN. § 20-1-207 (stating that violations of Title 20 constitute misdemeanor criminal offenses).

Despite over fifty years of caselaw since the Supreme Court's decision in *Miller v. California*, 413 U.S. 15 (1973), the State of Montana decided to reach beyond the limits of the First Amendment to ban protected speech. Not one element of the *Miller* test is incorporated into the Act. Rather, the Act's definition of "sexually oriented performances" and "drag story hours" vaguely target non-obscene, protected speech with no regard for safeguards to shelter artistic expression. The Act defines "sexually oriented performance[s]" as performances that "appeal to a prurient interest in sex" and feature (a) "the purposeful exposure, whether complete or partial, of" (i) "a human genital, the pubic region, the human buttocks, or a female breast, if the breast is exposed below a point immediately above the top of the areola," or (ii) "prosthetic genitalia, breasts, or buttocks," or (b) stripping, or (c) sexual conduct. H.B. 359 § 1(10). "Drag story hour[s]" are defined even more broadly to capture any "event hosted

by a drag queen or drag king who reads children's books and engages in other learning activities with minor children present." *Id.* § 1(3). Finally, a "drag queen" or "drag king" are both defined as a "male or female performer who adopts a flamboyant or parodic [male or feminine] persona with glamorous or exaggerated costumes and makeup." *Id.* § 1(1)-(2). Each of these definitions is either unconstitutionally overbroad or vague.

Equity submits this brief because it fears that the Act could be read to impact both adults' and children's access to a wide swathe of live theatre performances protected by the First Amendment. If that is not the case, then Equity cannot determine what conduct the Act prohibits. From Euripides' *Bacchae* to *Mrs. Doubtfire*, theatrical productions frequently resemble a drag show. Even more shows require actors to simulate stripping or other adult scenarios, stage raunchy and controversial scenes, or use prosthetics to enhance their breasts or buttocks in doing so. Beyond a script's requirements, directors may also take creative license to change the gender presentation of any role or require scanty or risqué costuming. As a result, Equity members cast in potentially affected roles are left with a Hobson's choice: risk criminal sanctions or the loss of income from a producer's decision to cancel a production, or decline to perform and breach their contract with the producer. These unacceptable possibilities

hinder Equity's ability to adequately advise its members and will chill protected theatrical expression in Montana.

Equity contends that the Act is unconstitutionally overbroad and vague, covers a wide range of live theatrical performances in which Equity members perform, and will deter the expression of protected speech in Montana. The First Amendment exists to protect the arts and literature from the Government as censor, even if that censorship has "the mandate or approval of a majority." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000). For these reasons, Equity argues that this Court should affirm the district court's ruling.

ARGUMENT

I. MONTANA'S ACT IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE

The First Amendment shelters the American people from overbroad laws that prohibit a substantial amount of protected expression and vague laws that fail to give adequate notice concerning the conduct they proscribe. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). The "first step" in an overbreadth analysis is to interpret how far the act reaches. *United States v. Stevens*, 559 U.S. 460, 474 (2010). After construing the statute, the question is whether the statute reaches protected speech and, if so, whether the statute restricts a substantial amount of such speech in relation to the statute's legitimate sweep. *United States v. Hansen*, 599 U.S. 762, 770 (2023);

Stevens, 559 U.S. at 473. Contra what the Appellant suggests, the standard for a facial overbreadth challenge from *United States v. Salerno*, 481 U.S. 739 (1987), does not apply in the First Amendment context. *Hansen*, 599 U.S. at 769 ("Breaking from both of these rules [including *Salerno*], the overbreadth doctrine instructs a court to hold a statute facially unconstitutional even though it has lawful applications . . . ."). *Cf.* Appellant's Br. at 22. A statute is unconstitutionally overbroad if there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court[.]" *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Likewise, a statute is unconstitutionally vague if it ties criminal culpability to enforcement standards that fail to communicate what, specifically, they prohibit. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 872-73 (1997). Criminal statutes, like the Act at issue here, "must be scrutinized with particular care[.]" *City of Houston v. Hill*, 482 U.S. 451, 459 (1987).

Appellants and Appellees disagree over whether the proper standard to evaluate Appellees' facial First Amendment challenge in this case is a traditional overbreadth analysis or a tiered scrutiny analysis. Appellant's Br. at 22-23; Appellee's Br. at 36-39. Equity contends that even if a traditional overbreadth analysis were to apply, the Act would still fail. *See also* Appellee's Br. at 55-57. Further, overbreadth (i.e., whether a statute is or is not narrowly tailored) is also a

crucial consideration in a tiered scrutiny analysis. *See, e.g.*, *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004) ("The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the [statutory] goal, for it is important to ensure that legitimate speech is not chilled or punished.") As a result, the Act fails either way by its own overreach.

Equity submits that the Act will have an inevitable chilling effect on an entire category of protected expression, risqué live theater featuring drag roles, and fails to give adequately specific guidance regarding what kinds of activities are prohibited. This overbreadth and vagueness will only deter Equity members, and other professional artists, from performing in Montana.

A. The Act Applies to Protected, Non-Obscene Speech

The First Amendment protects Americans' right to see, speak, read, and hear what they want. If offended, one may "simply . . . avert[] their eyes." *Cohen v. California*, 403 U.S. 15, 21 (1971). There are limits—defamation, threats, obscenity, child pornography—but those limits are tightly constrained. *Compare New York v. Ferber*, 458 U.S. 747 (1982) (holding that child pornography is unprotected speech), *with Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (protecting simulated child pornography). In *Miller*, the Supreme Court defined obscenity as speech which (1) "the average person, applying contemporary community standards, would find that the work, taken as a whole,

appeals to the prurient interest," (2) "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and (3) "lacks serious literary, artistic, political, or scientific value" as a whole. 413 U.S. at 24. As a result, Americans have a constitutional right to view and express sexually charged or explicit entertainment, so long as it is not constitutionally obscene. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (invalidating total ban on nude dancing). This right extends to minor children. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n.10 (1975) ("It is clear, however, that under any test of obscenity as to minors not all nudity would be proscribed. Rather, to be obscene 'such expression must be, in some significant way, erotic.'") (quoting *Cohen*, 403 U.S. at 20).

The Act captures a substantial swathe of protected speech. Its definition of "drag story hours" includes all situations where an individual who "adopts a flamboyant or parodic [male or feminine] persona with glamorous or exaggerated costumes and makeup" "reads children's books and engages in other learning activities with minor children present" while in schools or libraries that receive state funding. H.B. 359 §§ 1(1)-(3), 3(2). A "flamboyant or parodic" gendered persona does not necessarily suggest the erotic. "Flamboyance"—a word that surely varies in meaning depending on the eye of the beholder—refers to an individual's "showiness," not their seductiveness; "parody" is to amuse, not

arouse. The way that someone dresses, whether as a costume or an expression of their personal style, is protected speech if it conveys a particularized message. *Texas v. Johnson*, 491 U.S. 397, 404-405 (1989). In *Green v. Miss United States of America, LLC*, the Ninth Circuit discussed how a beauty pageant, which displays an "ideal vision of American womanhood" by banning transgender contestants, and the musical *Hamilton*, which cast actors of color as the Founding Fathers, both express messages protected by the First Amendment. 52 F.4th 773, 780-783 (9th Cir. 2022). If a beauty pageant is protected by the First Amendment, then a person who subverts an audience's expectations of such an "ideal vision of American womanhood" by dressing in drag or exaggerating their female features is too. Application of this provision of the Act therefore implicates non-obscene, non-erotic (i.e., protected) symbolic speech in virtually all its applications.

Similarly, to the extent they can be parsed (see *infra* Section I(C)), the Act's prohibitions and restrictions on "sexually oriented performances" encompass a host of protected speech. The Act defines a "sexually oriented performance" as a performance that "appeal[s] to a prurient interest in sex and features" purposeful exposure of genitalia, buttocks, "the pubic region," or the lower half of the female breast, stripping, or "sexual conduct." H.B. 359 § 1(10).

Non-obscene theatrical performances are undoubtedly protected speech. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) ("By its

nature, theater usually is the acting out—or singing out—of the written word, and frequently mixes speech with live action or conduct. But that is no reason to hold theater subject to a drastically different standard [than other forms of protected speech]."). Yet the Act captures any performance that features the exposure of prosthetics, simulated or actual stripping, or risqué clothing that exposes the underside of a female breast or the pubic region, all of which, as will be discussed further below, are commonplace in mainstream American musicals and plays. And the First Amendment does not just protect Shakespeare; it protects all performances, from the beloved to the infamous, and from the professional to the enthusiast. *Schacht v. United States*, 398 U.S. 58, 60-62 (1970) (finding that a "crude and amateurish and perhaps unappealing" skit featuring performers wearing U.S. military and Viet Cong costumes is protected speech).

Further, while the Statute's definition of "sexually oriented performance" resembles the first prong of the *Miller* test by mentioning a "prurient interest in sex," it fails to define that prurient interest by reference to community standards, much less incorporate the second and third prongs from *Miller*. Instead, the Act reaches beyond *Miller*'s narrow obscenity test to ban speech which may not be prurient to the community as a whole, may not include sexual conduct, may not be patently offensive for adults or children, or may have artistic or other value.

B. The Act is Impermissibly Overbroad

1. States Cannot Ban Protected Speech to Shelter Children.

As an initial matter, states may only restrict minors' access to protected speech "in relatively narrow and well-defined circumstances[.]" *Erznoznik*, 422 U.S. at 206-07, 213 (invalidating ordinance that prohibited drive-in theaters from showing films containing nudity when their screens were visible from a public place). This power cannot be used to totally eliminate expression appropriate for adults just because children might see or hear it. *Ashcroft*, 535 U.S. at 252; *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 131 (1989) (disallowing a ban on "dial-a-porn" messages that improperly "limit[ed] the content of adult telephone conversations to that which is suitable for children to hear").

The Act's provisions encroach upon constitutionally protected speech by prohibiting "sexually oriented performances" on both public property where a minor is present (without any guidance about how close the minor needs to be to the performance) and in any "location owned by an entity that receives" state funding, even if no minor is present. H.B. 359 § 3(3). This bans performances that the Montana legislature deems provocative in the many Montana theaters that receive Montana Arts Council grants, regardless of whether that theater admits minors to the performance or not. *See Recent MAC Grantees*, MONT. ARTS

COUNCIL, https://art.mt.gov/recent_grantees (last visited Feb. 15, 2024) (listing grant recipients for FY2024-2025 and FY 2022-2023, including theaters, musical venues, and other arts venues). Such a prohibition impermissibly restricts Montana adults' access to protected speech by forcing them to consume art approved by the Montana legislature for the consumption of children.

2. The Act Contains No Intent or Parental Consent Safeguards.

The Act prohibits minors from attending "sexually oriented performances" and "drag story hours," and punishes the hosts of such performances and activities, without any regard for the hosts' intent. In *Ginsberg v. New York*, the Supreme Court found that a statute which prohibited the sale of nude or sexually explicit pictures and magazines to minors satisfied the First Amendment. 390 U.S. 629 (1968). Although the *Ginsberg* statute restricted minors' access to non-obscene speech, it also included an express mens rea requirement: that any proscribed sale be "knowing," *id.* at 643, not conduct which minors chanced upon or tricked the proprietor into showing them by pretending to be an adult. Likewise, the statute did not prevent parents from purchasing the explicit materials themselves for their children, while the Act here provides no such carve-out. *Id.* at 639.

This presents unacceptable uncertainty. Under the Act, a proprietor of a "sexually oriented business" could believe that they have complied with the law,

only to discover to their dismay that they have been duped by a canny teenager with a fake ID card. *See* H.B. 359, § 2(1). Likewise, a group of performers who believe that a public park is empty of any minors and strike up an informal performance of scenes from *Cabaret*, a musical which features drag roles, prosthetics, and partial nudity, could simply be wrong and run afoul of the Act. *Id.* § 3(3)(a). This indeterminacy resembles the dilemma posed by attempts to regulate speech on the Internet, where users have little control over who can read what they write. *See, e.g.*, *PSINet, Inc. v. Chapman*, 362 F.3d 227, 234-35 (4th Cir. 2004). The only rational response to this indeterminacy is to cancel performances that could argued be construed as a "sexually oriented performance." This inevitably chills protected speech.

As a result, the Act is unconstitutionally overbroad. The only way to rehabilitate the Act would be to rewrite it altogether, a project which is outside the bounds of what the constitutional avoidance canon permits. *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018) (Alito, J.) ("a court relying on [the constitutional-avoidance] canon still must *interpret* the statute, not rewrite it").

C. The Act is Insufficiently Definite

Vague statutes, especially when coupled with the specter of criminal enforcement, raise "special First Amendment concerns because of [their] obvious chilling effect on free speech." *Reno*, 521 U.S. at 871-72. Here, the district court

correctly concluded that the Act does not explain what conduct, specifically, it captures. The Act requires Montanans to engage in uncertain, individual-by-individual determinations of what conduct is proscribed based on its failure to incorporate the *Miller* test for obscenity and its inability to define what it means by "sexually oriented performance" as opposed to something that is merely "sexually oriented."

A statute can be unconstitutionally vague if it uses language similar, but not identical, to legal terms of art. In *Reno*, the Supreme Court found that the statute at issue was vague because it adopted only one prong of the *Miller* test for obscenity ("depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law") and deleted the constraining element of that prong ("specifically defined by the applicable state law"). *Id.* at 872-74. As discussed above, the Act's definition of "sexually oriented performance" does not track *Miller*'s definition of obscenity because it incorporates the term "prurient interest in sex" without incorporating any other aspect of the *Miller* test. *See supra* Section I(A). This alone makes the Act unacceptably vague.

Second, the Act purports to ban or regulate "sexually oriented performances," but proffers two alternative definitions of the proscribed conduct. On the one hand, the Act defines a "sexually oriented performance" as any

"performance" that "appeal[s] to a prurient interest in sex and features" the purposeful exposure of actual or prosthetic human body parts, stripping, or sexual conduct. H.B. 359 § 1(10). On the other hand, the Act defines "sexually oriented" as "any simulation of sexual activity, stripping, salacious dancing, any lewd or lascivious depiction or description of human genitals or of sexual conduct as defined in 45-5-625." *Id.* § 1(8). As noted by the Appellant, the Montana Code also separately defines a "performance" as "any motion picture, film, or videotape (except a motion picture or videotape rated G, PG, PG-13, or R by the motion picture association of America); phonograph record; compact disk; tape recording; preview; trailer; play; show; skit; dance; or other exhibition played or performed before an audience of one or more, with or without consideration." Appellant's Br. at 25-26 (quoting MONT. CODE ANN. § 45-8-205(6)).

The relationship between each of these provisions is opaque. The preexisting definition of a "performance" in Montana's obscenity law only applies to the use of that term in Montana Code §§ 45-8-205 through 45-8-208. MONT. CODE ANN. § 45-8-205. This leaves a "performance" under H.B. 359 undefined. Likewise, the Act's free-floating definition of "sexually oriented" presents the rare case of a statute where an entire term appears to lack a referent and is, therefore, irrelevant to the interpretation of the plain meaning of the Act. On the other hand, if the term "sexually oriented" is intended to qualify the definition of a "sexually

oriented performance," it is not clear how. Does a "prurient" exposure of prosthetic breasts alone, for example, trigger the Act's mandates? Or, is the Act only implicated when a "prurient" exposure of prosthetic breasts accompanies "stripping," "salacious dancing," "any lewd or lascivious depiction or description of human genitals," or "sexual conduct"? What would be the difference? And if the latter interpretation applies, what does "salacious dancing" include? What would *not* make a "depiction or description of human genitals" "lewd or lascivious"? Why does the definition of "sexual conduct" in H.B. 359 § 1(8) incorporate the preexisting definition from Montana Code § 45-5-625(5)(b), but the definition of "sexual conduct" in H.B. 359 § 1(10)(c) does not? For the entertainment industry, where prosthetics are commonplace[4] and productions frequently include scenes that simulate stripping, see *infra* Section II(A), these questions are not mere hypotheticals, but real uncertainties that threaten performers' livelihoods.

Equity can only conclude that the Act will chill productions in Montana featuring arguably "prurient," "lewd," or "salacious" performances,

[4] *See, e.g.*, Valli Herman, *'Pam & Tommy': A Tale of Up-Dos, Fake Breasts, Tattoos … and a Talking Penis*, L.A. TIMES (Aug. 2, 2022, 6:30 AM), https://www.latimes.com/entertainment-arts/awards/story/2022-08-02/pam-and-tommy-makeup-lily-james-sebastian-stan (discussing the use of prosthetic breasts and a talking penis in Hulu's limited series *Pam & Tommy*).

especially those which include drag roles, require the use of prosthetic breasts or genitals, and include actual or simulated nudity or stripping. This makes the Act unconstitutionally vague and implicates a host of both Equity and non-Equity productions performed in Montana. *See infra* Section II(C).

II. THE ACT DETERS LIVE THEATRICAL PRODUCTIONS PERFORMED BY EQUITY MEMBERS IN MONTANA

The Act's overbreadth and vagueness will have a direct impact on all actors, including Equity members, in Montana. Equity submits that live theatre has a long history of controversial and sometimes risqué gender-bending performances which are impossible to distinguish from the shows that the Legislature evidently intended to target with the Act. Because of this, Equity cannot advise its members to perform in such productions in Montana if the Act goes into effect, a result with consequences for the local economy.

A. The Controversial Live Theatrical Productions Performed by Equity Members are Indistinguishable from Drag Shows, Use Prosthetics, and Include Nudity.

The Complaint refers to Shakespeare's use of drag roles. Am. Compl. ¶ 2. The use of drag in Shakespearean drama was not just a historical accident, but a theme throughout his oeuvre. Seven of Shakespeare's 37 extant plays involve gender-bending as a plot point. In *Twelfth Night*, Viola disguises herself as Cesario, with whom the Countess Olivia promptly falls in love. Similarly, in *As You Like It*, Rosalind flees to the Forest of Arden disguised as Ganymede, with

whom the shepherdess Phoebe falls in love. Gender-switching plays a role in *Cymbeline*, one of Shakespeare's last plays, and Act 4, scene 2 of *The Merry Wives of Windsor* features a memorable Falstaff in drag. Here, the Act lacks any guardrails to protect such performances from falling within the definition of a "drag story hour" as a prohibited "learning activit[y] with minor children present." H.B. 359 § 1(3). Such a ban would not be unprecedented. A school in New Hampshire withdrew *Twelfth Night* from instruction for "portraying homosexuality" in 1996.[5] And Shakespeare loved bawdy jokes. *See* WILLIAM SHAKESPEARE, TWELFTH NIGHT act 2, sc. 5, v. 78-79.

Shakespeare aside, musical theatre is full of gender-nonconforming roles. *Kinky Boots* features a drag queen, as does *Rent*. The musical *Priscilla, Queen of the Desert* is a story about two drag queens and a trans woman who perform a drag show in the Australian Outback. Edna Turnblad, Tracy's mother in *Hairspray*, is a drag role, as is the journalist Mary Sunshine in *Chicago*, Mrs. Doubtfire in *Mrs. Doubtfire*, and Ms. Trunchbull in *Matilda*. Peter Pan is, traditionally, a "trousers role" (where a woman dresses as a man). Directors also choose to cast men as women, or vice versa, based on their creative vision for a

[5] Nancy Roberts Trott, *School District Anti-Gay Policy Splits N.H. Town*, L.A. TIMES (Mar. 17, 1996, 12:00 AM), https://www.latimes.com/archives/la-xpm-1996-03-17-mn-47986-story.html.

particular production. In 2022, the producers of *1776* cast women for all of its Founding Father roles.[6] Each of these productions feature sets, costumes, dance, and song difficult to distinguish from the sets, costumes, dance, and song of a drag show. Three of these examples, *Kinky Boots*, *Priscilla*, *Queen of the Desert*, and *Rent*, feature drag show performers as part of their story. Many of these productions require the use of prosthetic breasts and include raunchy or provocative dance routines.

Theater also hosts performances which feature arguably "salacious dancing," "lewd or lascivious depiction[s] … of human genitals," "lewd" or "prurient" exposure of prosthetics, or partial nudity (as defined, which includes individuals where "any portion of the . . . buttocks" are visible through less-than-opaque clothing, H.B. 359 § 1(4)(b)). The current Broadway staging of *The Book of Mormon* includes a dance scene where multiple actors expose imitation male genitalia. Both *Hair* and *Cabaret* include drag roles and nudity, which can be actual or simulated. *South Pacific* and *Chicago* cast drag roles and require prosthetic breasts. Trousers roles are integral to the plots of *The Mystery of Edwin*

[6] Jeff Lunden, *In the Broadway Musical '1776,' the Revolution is in the Casting*, NPR (Oct. 15, 2022, 5:00 AM), https://www.npr.org/2022/10/15/1128740858/broadway-musical-1776-gender-race#:~:text=Roundabout%20Theatre%20Company-,Elizabeth%20A.,as%20John%20Adams%20in%201776.

Drood and *Victor/Victoria*. *Grease* features "mooning," where a character may pull down their pants and expose their buttocks (actual or simulated). In *Carrie*, the female ensemble showers behind translucent screens in one scene, staged either in the nude or while wearing nude-illusion skin parts. In *Hedwig and the Angry Inch*, the genderqueer protagonist strips down to their underwear, removing prosthetic breasts in the process. Stage directions require nudity or partial nudity (which may be actual or simulated) in *Legally Blonde*, *Venus in Fur*, *Cabaret*, *The Graduate*, *Little Shop of Horrors*, *Midsummer Night's Dream*, *POTUS*, *Spring Awakening*, *Rent*, *Heathers*, *Gypsy*, *Hair*, *The Rocky Horror Show*, *The Fully Monty*, *Flashdance*—to name only a few. *Cabaret*, *Guys and Dolls*, *Gypsy*, and *Flashdance* each include "stripping" scenes; the director may choose whether the stripping is to pasties, risqué lingerie, or partial nudity. "Salacious dancing" is commonplace, as anyone familiar with *Chicago*, *Grease*, or *Moulin Rouge* can attest.

Just as a drag queen and a musical about a drag queen, or a stripper and a musical about a stripper, are formally indistinguishable, live theatre is no stranger to controversy. Mae West never premiered *The Drag* in New York after the police charged her with public obscenity in 1927. Marybeth Hamilton, *Mae West Live: "SEX, The Drag, and 1920s Broadway"*, 36 THE MIT PRESS 82, 84 (1992). Tennessee municipal officials banned the rock musical, *Hair*, from its

public theater in 1971, a decision which the Supreme Court invalidated. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). More recently, the public backlash to children seeing *Rent* is well-documented[7] and, in 2013, critics on Twitter of the Macy's Thanksgiving Day Parade went viral, lambasting it for featuring a set piece from *Kinky Boots*.[8]

In sum, many live theatre productions feature drag, prosthetics, and sexual content, and there are commentators aplenty who accuse such productions of being inappropriate for children to see. Given the Act's overbreadth and vagueness, Equity has reason to fear that many of the productions listed above, if not all, would fall within the Act's scope.

B. By Covering Equity Productions, the Act will Chill Protected Speech in Montana.

Since 2019, eight producers in Montana hired Equity members. Additional theaters may play shows that hire Equity members via what Equity

[7] *Compare 'Rent' Controversy in Idaho: LGBT Content in Lake City Playhouse Musical Sparks Backlash*, HUFFPOST.COM (Dec. 23, 2011, 1:36 P.M.), https://www.huffpost.com/entry/rent-controversy-in-idaho_n_1167896; *Don't Say Gay? Students Say Bucks School District Killed Musical 'Rent' Because It Has Queer Relationships*, THE MORNING CALL (Apr. 19, 2022, 7:56 AM), https://www.mcall.com/2022/04/19/dont-say-gay-students-say-bucks-school-district-killed-production-of-musical-rent-because-it-has-queer-relationships/.

[8] *'Kinky Boots' Walks Tall in Macy's After Parade Controversy*, PAGE SIX (Nov. 30, 2013, 3:29 AM), https://pagesix.com/2013/11/30/kinky-boots-walks-tall-in-macys-after-thanksgiving-parade-controversy/.

terms its guest artist contract. Since the Act's passage, Equity has received inquiries from members about "what to do" if cast in a Montana production that features gender-nonconforming or drag roles.

In the face of this overbroad and vague statute, Equity members face a Hobson's choice. If a member has already accepted a role in Montana, Equity is forced to advise them to either work and risk potential criminal prosecution or civil liability, or not work and risk a producer's breach of contract claim. The only alternative for Equity's members is to decline potentially affected roles in Montana altogether. The only alternative for Equity members' employers who cannot determine whether a production could violate the Act or not is to cancel it. This will chill protected theatrical expression in the state.

C. A Chill on Live Theatrical Productions will have a Significant Economic Impact on the State of Montana.

Broadway tours are a boon for local economies. In one week in 2019, the musical *Dear Evan Hansen* played at the Paramount Theatre in Seattle for seven performances and netted nearly $1.5 million in ticket sales, the musical *Waitress* made over $1.4 million in Texas, *Miss Saigon* made nearly $1.5 million in North Carolina, and *The Phantom of the Opera* made nearly $1.4 million in Detroit.[9] The Broadway League's 2019 report for the 2016-2017 touring season

[9] Marc Hershberg, *Musicals Make More Money on the Road than on Broadway*, FORBES (Feb. 3, 2019, 6:00 PM),

found that "[o]n average, Broadway tours contributed an economic impact of 3.27 times the gross ticket sales to the economy of the metropolitan areas in which they played."[10] By this rough calculus, those shows introduced over $4.5 million dollars into each local economy in a single week. In Missoula alone, the arts and culture sector more generally represents a $54 million industry. AMS. FOR THE ARTS, *Arts & Economic Prosperity 5 in the City of Missoula, MT* 3 (2017), https://artsmissoula.org/wp-content/uploads/2019/11/MT_CityOfMissoula_AEP5_CustomizedReport_REVISED.pdf.

The Broadway tour of *Hairspray* and a local production of *Legally Blonde* are scheduled for performance in Montana this spring. The Missoula's Children's Theatre is currently producing *Rent.* Virginia City Players, whose performances feature burlesque-style vaudeville routines, recently cancelled a contract for a UK-based Equity actor slated to perform for them in drag on account of the Act.

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https://www.forbes.com/sites/marchershberg/2019/02/03/musicals-make-more-money-on-the-road-than-on-broadway/?sh=211799f8a111.

[10] *The Economic Impact of Touring Broadway 2016-2017 Season*, THE BROADWAY LEAGUE (Aug. 2020), https://www.broadwayleague.com/research/research-reports/.

Musicals featuring drag, nudity, and prosthetics are neither few nor far between. A chill on their performance would not only impact the civil liberties of actors in Montana but dampen a profitable sector of Montana's economy.

CONCLUSION

The theater provides a venue for works of undoubted artistic and socially redeeming significance. Broadway performances depict the issues roiling contemporary society, from the acceptance of a drag queen in *Kinky Boots* to the dangers of political apathy in *Cabaret*. To protect the freedom of expression, this Court should refuse the Montana legislature's desire to prioritize one vision of the social good over many and affirm the ruling of the district court.

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Respectfully submitted,

/s/ Megan Stater Shaw

Megan Stater Shaw
COHEN, WEISS AND SIMON LLP
909 Third Avenue, 12th Floor
New York, NY 10022
Telephone: (212) 356-0205
Email: MShaw@cwsny.com

Counsel for Actors' Equity Association

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains 5,527 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared in 14-point Times New Roman font, a proportionally spaced typeface.

/s/ Megan Stater Shaw
Megan Stater Shaw

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2024, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Megan Stater Shaw
Megan Stater Shaw