No. 23-5611

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRIENDS OF GEORGE'S, INC.,

Plaintiff-Appellees,

v.

STEVEN JOHN MULROY,

Defendant-Appellant.

On Appeal from the Judgment of the United States District Court for the Western District of Tennessee (No. 2:23-cv-02163) (Parker, J.)

MOTION OF BLOUNT PRIDE, INC., AND MATTHEW LOVEGOOD TO INTERVENE AS PLAINTIFFS-APPELLEES

I. INTRODUCTION

This appeal calls on this Court to adjudicate whether Tennessee's Adult Entertainment Act ("AEA"), Tenn. Code Ann. §§7-51-1401, *et seq*., is constitutional. Blount Pride, Inc.—a non-profit organization formed to celebrate and advance the interests of LGBTQ+ people in Blount County, Tennessee—and Matthew Lovegood, a drag performer (collectively, the "Intervenors"), seek to intervene to argue that it is not. No other litigants are better suited to press that claim. In all of Tennessee, only the Intervenors have been specifically targeted with enforcement of the AEA's criminal penalties, having received a threat letter from a district attorney just ten days ago for planning a Pride event that featured Matthew Lovegood's drag performance. *See* **Ex. 1** (Threat Letter).

Within a day of being threatened by a district attorney, the Intervenors sought—and on September 1, 2023, they obtained—a temporary restraining order forbidding District Attorney Ryan K. Desmond and additional municipal law enforcement officials from "enforcing, detaining, arresting, or seeking warrants or taking any other action to enforce or threaten to enforce T.C.A. § 7-51-1407" pending further orders. *See Blount Pride, Inc. v. Desmond*, No. 3:23-CV-00316-JRG-JEM, 2023 WL 5662871, at *8 (E.D. Tenn. Sept. 1, 2023). On September 7, 2023, the Eastern District of Tennessee granted the Intervenors a preliminary injunction. *See* **Ex. 2** (Sep. 7, 2023 Order Granting Preliminary Injunction). The

Intervenors' case is now stayed pending this Court's decision here. *See id.* at 2 ("this case is hereby **STAYED** pending the Sixth Circuit's decision in *Friends of George's*."). Thus, given that all agree that "the issues in [the Intervenors'] case are 'the same or substantially similar legal issues as those in *Friends of George's v. Mulroy*, No. 23-5611,'" *id.*, the Intervenors now move to intervene in this appeal, both as of right and by permission.

II. FACTUAL BACKGROUND

i. The AEA is Enacted

On March 2, 2023, Tennessee Governor Bill Lee signed the Adult Entertainment Act ("AEA") into law. *See* Public Chapter No. 2, 113th Gen. Assemb. (2023) (codified at Tenn. Code Ann. § 7-51-1401, -1407). The AEA added two newly-defined phrases to the existing "Adult Oriented Establishments" law: "adult cabaret entertainment" and "entertainer." Under the newly passed AEA,

> (12) "Adult cabaret entertainment":
>
> > (A) Means adult-oriented performances that are harmful to minors, as that term is defined in § 39-17-901, and that feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers; and
> >
> > (B) Includes a single performance or multiple performances by an entertainer; and
>
> (13) "Entertainer" means a person who provides:
>
> > (A) Entertainment within an adult-oriented establishment, regardless of whether a fee is charged or accepted for entertainment and regardless of whether entertainment is

> provided as an employee, escort as defined in § 7-51-1102, or an independent contractor; or
>
> (B) A performance of actual or simulated specified sexual activities, including removal of articles of clothing or appearing unclothed, regardless of whether a fee is charged or accepted for the performance and regardless of whether the performance is provided as an employee or an independent contractor.

Tenn. Code Ann. § 7-51-1401(12)–(13).

The AEA also established new criminal penalties. In particular, "[a] first offense for a violation of subdivision (c)(1) is a Class A misdemeanor, and a second or subsequent such offense is a Class E felony." *See* Tenn. Code Ann. § 7-51-1407(c)(3).

ii. Friends of George's Challenges the AEA's Constitutionality

The AEA was scheduled to take effect on April 1, 2023. On March 27, 2023, Friends of George's, Inc.—a drag-centric theater company in Memphis, Tennessee, and the Appellee here—filed a complaint in the United States District Court for the Western District of Tennessee asserting that the AEA is facially unconstitutional under the First Amendment and void for vagueness under the Fourteenth Amendment. Friends of George's sought a temporary restraining order enjoining the AEA's enforcement, which the district court granted. *See Friends of George's, Inc. v. Tennessee*, No. 2:23-CV-02163-TLP-TMP, 2023 WL 2755238 (W.D. Tenn. Mar. 31, 2023). After a trial on the merits, the district court also granted Friends of George's final injunctive and declaratory relief. *See Friends of Georges, Inc. v.*

Mulroy, No. 2:23-CV-02163-TLP-TMP, 2023 WL 3790583 (W.D. Tenn. June 2, 2023). This appeal followed on June 30, 2023. *See* Case No. 23-5611, DE#1 ("Notice [of Appeal] filed by Appellant Mr. Steven John Mulroy.").

iii. Blount Pride and Matthew Lovegood Are Threatened

In the late summer of 2023, Blount Pride began advertising its annual Pride festival. The all-ages event was to be held at Maryville College on September 2, 2023. *See* **Ex. 3** (Verified Compl. Case No. 1:23-cv-00196, E.D. Tenn.), at ¶ 4. As advertised, Matthew Lovegood—a drag performer and musician who performs as Flamy Grant—was slated to perform in drag. *Id.* at ¶ 5.

On August 29, 2023—just four days before the event—Blount County District Attorney Ryan K. Desmond transmitted a threat letter titled "Notice Regarding the Adult Entertainment Act." *See* **Ex. 1**. The threat letter was addressed to city and county law enforcement officials, the host site of the Pride event (Maryville College), and Blount Pride as the "*Event Organizer*." *Id.* at 1. The threat letter was emailed directly to Blount Pride's leadership in an email that stated in part: "Please see the attached notice regarding my office's prosecutorial position relative to the Adult Entertainment Act." *See* **Ex. 3** at ¶ 71.

District Attorney Desmond's threat letter stated that the Blount County District Attorney's Office was "aware of a coming event planned for September 2, 2023, that is marketing itself in a manner which raises concerns that the event may

violate certain criminal statutes"—namely, the AEA. **Ex. 1** at 1. His threat letter continued: "The Attorney General for the State of Tennessee maintains that the AEA passes constitutional muster, has appealed [*Friends of George's v. Mulroy*], and further opined that the ruling is binding only on the 30th Judicial District." *Id.* District Attorney Desmond's threat letter also added that "if sufficient evidence is presented to this office that [the AEA has] been violated, our office will ethically and justly prosecute these cases in the interest of justice." *Id.* at 2

Reasonably fearing arrest and prosecution under the AEA and a violation of their First and Fourteenth Amendment rights, the Intervenors promptly retained counsel, and they filed a Verified Complaint and emergency motion for a temporary restraining order the next day. *See* **Ex. 3**. On September 1, 2023, the District Court for the Eastern District of Tennessee granted the Intervenors a temporary restraining order. *See Blount Pride, Inc.*, 2023 WL 5662871, at *8. Yesterday—September 7, 2023—the District Court granted the Intervenors a preliminary injunction. *See* **Ex. 2**. The District Court's order also reflects the Parties' stipulation "that the issues in this case are 'the same or substantially similar legal issues as those in *Friends of George's v. Mulroy*, No. 23-5611 (6th Cir.)[.]'" *See id.* at 2. As a result, the Intervenors' own case is now stayed pending this Court's decision in this appeal. *Id.*

This chronology gives rise to unusual circumstances. Had the Intervenors been denied the preliminary injunction they sought, they could have pursued and

obtained immediate review from this Court themselves. *See* 28 U.S.C. § 1292(a)(1). Because only losers may appeal, though, *see Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001) ("A party generally cannot appeal from a judgment in its favor."), and because the Intervenors won the preliminary injunction they sought, they cannot. Thus, absent intervention, the Intervenors will be forced to depend on another litigant to pursue claims in this Court that a district court has determined will be dispositive of their own.

III. ARGUMENT

I. BLOUNT PRIDE AND MATTHEW LOVEGOOD ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

"On appeal, [this Court] may grant either intervention of right or permissive intervention." *Carter v. Welles-Bowen Realty, Inc.*, 628 F.3d 790, 790 (6th Cir. 2010) (citing *Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1006 (6th Cir.2006); Fed. R. Civ. P. 24(a), (b)(2)). As a formal matter, though, "[n]o statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1010, 212 L. Ed. 2d 114 (2022). Thus, appellate courts consider "the 'policies underlying intervention' in the district courts, including the legal 'interest' that a party seeks to 'protect' through intervention on appeal." *Id.* (internal citation omitted) (quoting Fed. Rule Civ. Proc. 24(a)(2)).

Where—as here—no statute confers an unconditional right to intervene, courts evaluating a prospective intervenor's motion to intervene consider whether intervenors have demonstrated: "(1) that the motion to intervene was timely; (2) that they have a substantial legal interest in the subject matter of the case; (3) that their ability to protect that interest may be impaired in the absence of intervention; and (4) that the parties already before the court may not adequately represent their interest." *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999). When considering these factors, "Rule 24 should be 'broadly construed in favor of potential intervenors.'" *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991)).

A. Timeliness

When considering whether a motion to intervene is timely, courts consider "'all relevant circumstances'" including: "(1) the stage of the proceedings; (2) the purpose for the intervention; (3) the length of time that the movant knew or should've known of its interest in the case; (4) the prejudice to the original parties; and (5) any unusual circumstances militating for or against intervention." *United States v. Michigan*, 68 F.4th 1021, 1024–25 (6th Cir. 2023) (citing *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)). For the reasons detailed below, considering all relevant circumstances, the Intervenors' motion to intervene is timely.

Here, the Intervenors did not have any subjective reason to believe that they were under threat of prosecution—and, thus, they did not acquire standing to sue over the unconstitutionality of the AEA—until after they were threatened on August 29, 2023. *See, e.g., McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016) (a credible threat of prosecution exists to support pre-enforcement standing "where plaintiffs allege a subjective chill *and* point to some combination of the following factors . . ."); *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty., Metro Gov't*, 479 F. Supp. 3d 543, 551 (W.D. Ky. 2020) ("A 'credible threat of prosecution' requires an allegation of subjective chill, which Nelson has undeniably alleged, and 'some combination of the following factors: . . . '"); *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 359 (D.D.C. 2020) ("post-*Laird* cases plainly establish that a subjective chill of First Amendment rights, paired with a credible threat of imminent, adverse government action against the claimant, may create a cognizable injury."). Indeed, even after the Intervenors were specifically threatened, the District Attorney who threatened them—who is represented by the same counsel as the Appellant here—maintained that the Intervenors *still* lacked standing to sue. *See* **Ex. 4** (District Attorney Ryan Desmond's Resp. in Opp. to Pls.' Mot. for a Temporary Restraining Order), at 7 (arguing that "**Plaintiffs lack standing** . . . [t]o invoke federal jurisdiction"). Thus, having moved to intervene just ten days after developing the subjective fear and credible threat of enforcement necessary to

maintain the same claims at issue in this appeal—and having intervened just one day after the District Court entered an unappealable-as-to-them order stating that this appeal will be preclusive of the Intervenors' own claims—the Intervenors' motion is timely. Certainly, the Intervenors' rapid, post-threat action cannot be described as the "'wait-and-see' approach" that this Court disfavors. *See United States v. Michigan*, 68 F.4th at 1028.

The Intervenors also note that the issues regarding which they seek to intervene concern questions of law that require no further or different argument from the Appellant (a litigant who, as noted, is also represented by the same attorney as the District Attorney the Intervenors have sued). The Appellee has not yet filed its brief in this appeal, either, so this appeal remains in its early stages. The Intervenors are willing to adhere to the same briefing schedule as the Appellee so as to prevent any delay in this appeal or prejudice to any party in it, too. For all of these reasons, the Intervenors' motion to intervene is timely.

B. Substantial, Legal Interest in Subject Matter of Case

This Court "subscribe[s] to a 'rather expansive notion of the interest sufficient to invoke intervention of right.'" *Grutter*, 188 F.3d at 398 (quoting *Michigan State AFL–CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)). Under that "expansive" standard, *id.*, "'close cases should be resolved in favor of recognizing an interest under Rule 24(a).'" *Id.* at 399 (quoting *Miller*, 103 F.3d at 1247).

Here, the Intervenors definitionally have a legal interest in their own pending legal claims, and all agree that this appeal will be outcome-determinative as to nearly all of them. *See* **Ex. 2** at 2. The Intervenors also have obvious interests in both exercising their First Amendment rights and not being arrested, prosecuted, and incarcerated for doing so. Significantly, the District Court stopped well short of ordering that the Intervenors may not be arrested and prosecuted if they do not ultimately prevail in their own case, too. *See Blount Pride, Inc.*, 2023 WL 5662871, at *7 ("the State should remain free to arrest and prosecute Plaintiffs, on a *retrospective* basis, if they violate the Act during the festival *and* ultimately do not prevail on the merits of this suit."). Thus, the Intervenors have a substantial interest in the subject matter of this appeal.

C. Impairment of Intervenors' Interests Absent Intervention

"To satisfy [the impairment] element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Miller*, 103 F.3d at 1247 (6th Cir. 1997) (citing *Purnell*, 925 F.2d at 948). "This burden is minimal." *Id.*

Here, denial of intervention would significantly impair the Intervenors' interests. This appeal will be preclusive of nearly all of the Intervenors' own pending claims. Thus, absent intervention, the Intervenors will be forced to rely on other litigants—litigants with whom they have no relationship and whose standing to

maintain the claims that they share has been contested by the Appellant here—to press claims upon which the Intervenors' liberty depends. *See Blount Pride, Inc.*, 2023 WL 5662871, at *7 ("the State should remain free to arrest and prosecute Plaintiffs, on a *retrospective* basis, if they violate the Act during the festival *and* ultimately do not prevail on the merits of this suit."). Thus, it is not only the Intervenors' right to relief that hangs in the balance of this appeal—the Intervenors' literal freedom potentially hangs in the balance as well. As a result, without the ability to argue for themselves, impairment of the Intervenors' substantial legal interests is possible if intervention is denied.

D. Inadequate Representation

As for the final element: "proposed intervenors' burden in showing inadequacy is 'minimal.'" *Grutter*, 188 F.3d at 400 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972); *Linton v. Commissioner of Health & Env't.*, 973 F.2d 1311, 1319 (6th Cir. 1992)). To satisfy this element, "proposed intervenors need show only that there is a *potential* for inadequate representation." *Id.*

Here, the Appellant has made the Intervenors' case for them. In contrast to the Intervenors—who were specifically threatened with the prospect of prosecution ten days ago, *see* **Ex. 1**—the Appellant has devoted most of its brief to the proposition that the Appellee lacks standing to maintain the claims that the

Intervenors intend to raise. *See* **Ex. 5** (Appellant's Principal Br.), at 11–32.

The Intervenors have materially different grounds for asserting their standing to challenge the AEA, though. Based on their own circumstances, the District Court in the Intervenors' case also found that three of this Court's four recognized pre-enforcement standing factors support the Intervenors' standing. *See Blount Pride, Inc.*, 2023 WL 5662871, at *5–6 (finding that the Intervenors established: (1) that "enforcement warning letters [were] sent to the plaintiffs regarding their specific conduct," (2) "an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action," and (3) "the 'defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff.'") (cleaned up).

The Appellee, by contrast, will make materially different arguments in support of its own standing. That matters—and it warrants intervention—because to demonstrate inadequacy, "'[i]t may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Grutter*, 188 F.3d at 400. Thus, the Intervenors can demonstrate inadequacy, too.

* * *

For all of these reasons, all four factors support allowing the Intervenors to intervene in this appeal as a matter of right. As a result, the Intervenors should be

permitted to intervene here as of right.

II. ALTERNATIVELY, THIS COURT SHOULD PERMIT THE INTERVENORS TO INTERVENE.

Rule 24(b) provides that, "[o]n timely motion, the court may permit anyone to intervene who: . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "Resolution of a motion for permissive intervention is committed to the discretion of the court before which intervention is sought[.]" *Cameron*, 142 S. Ct. at 1011 (citing *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-CIO, Loc. 283 v. Scofield*, 382 U.S. 205, 217, n.10 (1965); Fed. Rule Civ. Proc. 24(b)(1)(a)). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Here, the Intervenors rapidly exercised their rights and promptly sought to intervene within a matter of *days* after they were subjectively chilled, faced a credible threat of prosecution, and acquired standing to sue. *See supra* at 8–10. The Intervenors also share common claims with the Appellee that the AEA is unconstitutional under the First and Fourteenth Amendments. *Compare* **Ex. 3** at 19–20, 21–23 (asserting that the AEA violates the First and Fourteenth Amendments), *with Friends of Georges, Inc.*, 2023 WL 3790583, at *30–32 (sustaining Appellee's identical claims that the AEA violates the First and Fourteenth Amendments).

Indeed, the Intervenors' claims are so similar to the claims presented in this appeal that the Appellant's same attorneys have stipulated that "the issues in [the Intervenors'] case are 'the same or substantially similar legal issues as those" presented here. *See* **Ex. 2** at 2. Thus, if this Court does not find that the Intervenors are entitled to intervene in this appeal as a matter of right, then it should permit the Intervenors to intervene by permission instead.

IV. CONCLUSION

For the foregoing reasons, Blount Pride and Matthew Lovegood should be permitted to intervene in this appeal, either as of right or by permission.

Respectfully submitted,

By: /s/ Daniel A. Horwitz
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CERTIFICATE OF COMPLIANCE

As required by Rule 32(g) of the Fed. R. App. P. and 6th Cir. R. 32, I certify that this Motion to Intervene complies with the type-volume limitation set forth in Fed. R. App. P. 27(d)(2)(A) because it contains 3,209 words. As required by Fed. R. App. P. 27(d)(1)(E), this motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Times New Roman, 14-point font using Microsoft Word.

By: /s/ Daniel A. Horwitz
DANIEL A. HORWITZ (TN #032176)

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth 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.

By: /s/ Daniel A. Horwitz
DANIEL A. HORWITZ (TN #032176)

RYAN K. DESMOND
DISTRICT ATTORNEY GENERAL
5TH JUDICIAL DISTRICT

FROM: Ryan K. Desmond, District Attorney General, Fifth Judicial District

TO:

Ed Mitchell *Blount County Mayor*	James Berrong *Blount County Sheriff*	Greg McClain *Maryville City Manager*
Tony Crisp *Maryville Police Chief*	Mark Johnson *Alcoa City Manager*	David Carswell *Alcoa Police Chief*
Bryan Coker *President, Maryville College*	Jake Reagan *Director of Events*	Blount Pride *Event Organizer*

NOTICE REGARDING THE ADULT ENTERTAINMENT ACT

Having received numerous communications from law enforcement, local officials, and concerned citizens, the Blount County District Attorney's Office is aware of a coming event planned for September 2, 2023, that is marketing itself in a manner which raises concerns that the event may violate certain criminal statutes within the State of Tennessee. After thorough research and reflection, and in order to put potential parties on notice of possible ramifications of criminal conduct, I believe it is appropriate to share my prosecutorial position on the issues at hand.

In early 2023, the Tennessee General Assembly passed The Adult Entertainment Act (AEA) which was signed into law by the Governor of Tennessee. This law will be broken down into detail later in this correspondence. My office is aware of the June 2, 2023, District Court ruling from the Western District of Tennessee that found the AEA unconstitutional and enjoined the District Attorney of the 30th Judicial District from prosecuting cases under these criminal statutes.

It is clear from the holding and subsequent order that this enjoinder is presently only applicable to the 30th Judicial District. The Attorney General for the State of Tennessee maintains that the AEA passes constitutional muster, has appealed this holding, and further opined that the ruling is binding only on the 30th Judicial District. My legal analysis leads me to concur with the State Attorney General, both as to the constitutionality of the AEA as well as the applicability of the District Court's order controlling only the District Attorney for the 30th Judicial District.

It is my conclusion that violations of the AEA can and will be prosecuted by my office, however it is important to note that we do not prematurely evaluate the facts or evidence related to a

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potential investigation into possible criminal conduct. It is only after review of all the relevant evidence that my office will reach a position as to whether criminal conduct has occurred. I have relayed my position to local law enforcement, and they are aware that if charges are brought under this statute, and that review of the evidence substantiates the charges, the Blount County District Attorney's Office will prosecute any criminal violations, subject to our prosecutorial discretion.

It should be noted at this point that a diligent search of relevant statutory authority has revealed no mechanism under which a District Attorney General in the State of Tennessee could petition for a temporary injunction to enjoin an individual or group from organizing and holding an event that would be violative of the AEA. There are certain criminal activities in which statutes have been enacted to authorize District Attorneys to petition for temporary injunctions, but the AEA is not presently included in any such statute.

To apprise all interested parties of what conduct is criminalized under the AEA, a summary of the law is provided below:

> *Tennessee Code Annotated § 7-51-1407(a)(1) states that an adult-oriented establishment or **adult cabaret** shall not locate within one thousand feet (1,000') of a child care facility, a private, public, or charter school, a public park, family recreation center, a residence, or a place of worship.*
>
> *An **adult cabaret** is defined in Tennessee Code Annotated § 7-51-1401(2) as a cabaret that features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers.*
>
> *For the purposes of Tennessee Code Annotated § 7-51-1407(a)(1), measurements shall be made in a straight line in all directions, without regard to intervening structures or objects, from the nearest point on the property line of a parcel containing an adult-oriented establishment to the nearest point on the property line of a parcel containing a child care facility, a private, public, or charter school, a public park, family recreation center, a residence, or a place of worship.*
>
> *Tennessee Code Annotated § 7-51-1407(c)(1) states that it is an offense for a person to perform **adult cabaret entertainment:***
>
> > *(A) On public property; or*
> >
> > *(B) In a location where the adult cabaret entertainment could be viewed by a person who is not an adult.*
>
> ***Adult cabaret entertainment** is defined in Tennessee Code Annotated § 7-51-1401(3) as:*
>
> > *(A) **a**dult-oriented performances that are **harmful to minors**, as that term is defined in § 39-17-901, and that feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers; and*
> >
> > *(B) Includes a single performance or multiple performances by an entertainer.*

Harmful to Minors *is defined in Tennessee Code Annotated § 39-17-901 as that quality of any description or representation, in whatever form, of nudity, sexual excitement, sexual conduct, excess violence or sadomasochistic abuse when the matter or performance:*

(A) Would be found by the average person applying contemporary community standards to appeal predominantly to the prurient, shameful or morbid interests of minors;

(B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and

(C) Taken as whole lacks serious literary, artistic, political or scientific values for minors.

It is important to note once again that this office will not prematurely evaluate the facts or evidence related to a potential investigation into possible criminal conduct. It is certainly possible that the event in question will not violate any of the criminal statutes, however if sufficient evidence is presented to this office that these referenced criminal statutes have been violated, our office will ethically and justly prosecute these cases in the interest of justice.

Finally, it is possible that there will be both protestors and counter-protestors present at this event. The First Amendment of the United States Constitution states that Congress, "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment guarantees this right to the citizens of the State of Tennessee and the Blount County District Attorney's Office has great respect and deference to individuals' constitutional rights. It is important however to place emphasis on the word "peaceably" in the above referenced amendment. Both protestors and counter-protestors are equally subject to the laws of the State of Tennessee, including laws pertaining to assault, vandalism, criminal trespassing, and disorderly conduct. Further protestors and counter-protesters are subject to valid time, place, and manner restrictions. All laws will be applied equally and justly to any involved parties, and violations of any laws will likewise be prosecuted fairly and justly by this office.

I thank you for your time and attention to this matter.

Ryan K. Desmond
District Attorney General
Fifth Judicial District

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

BLOUNT PRIDE, INC., a 501(c)(3) nonprofit organization, and MATTHEW LOVEGOOD, Plaintiffs, v. RYAN K. DESMOND, in his individual capacity and official capacity as the District Attorney General of Blount County, Tennessee, *et al.*, Defendants.	)	No. 3:23-CV-00316-JRG-JEM

ORDER

This matter is before the Court on the parties' Joint Stipulation to Preliminary Injunction [Doc. 34], in which all the parties agree that "[t]he issues raised in this case involve the same or substantially similar legal issues as those in *Friends of George's v. Mulroy*, No. 23-5611 (6th Cir.)" and that "[i]t would be the most efficient use of party and judicial resources to stipulate to entry of a preliminary injunction," [*id.* at 2]. Defendants specifically "stipulate to the injunctive relief sought in the Plaintiffs' motion for a preliminary injunction." [*Id.*].

By agreement of the parties, therefore, Plaintiffs' Motion for Preliminary Injunction [Doc. 2] is **GRANTED**, and under Federal Rule of Civil Procedure 65(a), Defendants are hereby **ENJOINED** from enforcing Tennessee Code Annotated § 7-51-1407 in the Eastern District of Tennessee; from detaining, arresting, or seeking warrants to detain or arrest anyone for an alleged violation of Tennessee Code Annotated § 7-51-1407 in the Eastern District of Tennessee; and from taking any other action to enforce or threaten to enforce Tennessee Code Annotated § 7-51-1407 in the Eastern District of Tennessee. The Court's preliminary injunction hearing, scheduled for Friday, September 8, 2023, at 10:00 a.m. is **CANCELLED**.

In addition, in light of the parties' admission that the issues in this case are "the same or substantially similar legal issues as those in *Friends of George's v. Mulroy*, No. 23-5611 (6th Cir.)," this case is hereby **STAYED** pending the Sixth Circuit's decision in *Friends of George's*. *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016) (recognizing that a "district court has inherent power to stay proceedings pending resolution of parallel actions in other courts" (citation omitted)); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 3212597, at *2 (E.D. Mich. June 26, 2013) ("[I]t would be at odds with the notion of judicial economy for this Court to proceed in this case and risk reaching an ultimate resolution that is inconsistent with precedent the Sixth Circuit creates shortly thereafter.").

So ordered.

ENTER:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

BLOUNT PRIDE, INC., *a 501(c)3 nonprofit organization,* and MATTHEW LOVEGOOD, PLAINTIFFS, v. RYAN K. DESMOND, *in his individual and official capacity as the District Attorney General of Blount County, Tennessee,* JAMES BERRONG, *in his official capacity as Blount County Sheriff,* TONY CRISP, *in his official capacity as Maryville Police Chief,* DAVID CARSWELL, *in his official capacity as Alcoa Police Chief,* and JONATHAN SKRMETTI, *in his official capacity as Attorney General of Tennessee,* DEFENDANTS.	)	**Case No.** **COMPLAINT FOR VIOLATIONS OF THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1983**

VERIFIED COMPLAINT

TO THE HONORABLE DISTRICT COURT JUDGE:

Plaintiffs Blount Pride, Inc. and Matthew Lovegood, by and through their designated attorneys, for their Complaint allege as follows:

I. NATURE OF THE ACTION

1. This action is brought under 42 U.S.C. § 1983 and is premised on the First, and Fourteenth Amendments to the United States Constitution and Tenn. Code Ann. § 1-3-121.

II. SUBJECT MATTER AND JURISDICTION

2. This Court has original subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 on the grounds that the claims asserted herein arise under U.S.C. §§ 1983 and 1988 and supplemental jurisdiction over the Plaintiffs' state law claim under 28 U.S.C. § 1367.

3. Venue is proper in this Court and Division pursuant to 28 U.S.C. § 1391 on the grounds that all or a substantial portion of the acts giving rise to the violations alleged herein occurred in this judicial district.

III. THE PARTIES AND PERSONAL JURISDICTION

4. Plaintiff Blount Pride, Inc. is a registered 501(c)(3) non-profit organization based in Blount County, Tennessee. Blount Pride organizes and hosts an annual Pride festival in Blount County. The festival includes vendors, events, and entertainment, including drag performances by a number of individual artists. The third annual Blount Pride festival is scheduled to begin September 2, 2023.

5. Plaintiff Matthew Lovegood is a drag artist who performs under the name "Flamy Grant." They have been performing drag for more than three (3) years, and are scheduled to perform at the Blount Pride's 2023 festival.

6. Defendant Ryan K. Desmond is the District Attorney General of Blount County, Tennessee. He is responsible for prosecuting all violations of state criminal statutes, including Tenn. Code Ann. § 7-51-1407, occurring in the Fifth Judicial District of Tennessee, which is coterminous with Blount County. *See* Tenn. Code Ann. § 8-7-103(1).

7. Defendant James Berrong is the Blount County Sheriff. Blount County comprises the Fifth Judicial District of Tennessee where Defendant Desmond is the elected District Attorney. Under Tenn. Code Ann. § 8-8-201, it is the sheriff's duty to "[t]ake charge and custody of the jail of the sheriff's county, and of the prisoners therein; receive those lawfully committed, and keep

them personally...” It is the sheriff’s duty to receive and hold those committed to his custody pursuant to an arrest under Tenn. Code Ann. § 7-51-1407, *et seq*. Defendant Berrong is sued in his official capacity.

8. Defendant Tony Crisp is the Maryville City Police Chief. Maryville, Tennessee is located within Blount County and the Fifth Judicial District of Tennessee where Defendant Desmond is the elected District Attorney. It is the duty of the chief of police to, among other duties, “[p]revent the commission of crime, violations of law and of the city ordinances” *see* Tenn. Code Ann. § 6-21-602(3), including violations of Tenn. Code Ann. §7-51-1407. The chief of police is charged with the duty to prosecute violations of criminal law in court and seek warrants and serve the same. *See* Tenn. Code Ann. §6-21-604. Defendant Crisp is sued in his official capacity.

9. Defendant David Carswell is the Alcoa Police Chief. Alcoa City is located within Blount County and the Fifth Judicial District of Tennessee where Defendant Desmond is the elected District Attorney. It is the duty of the chief of police to, among other duties, “[p]revent the commission of crime, violations of law and of the city ordinances” *see* Tenn. Code Ann. § 6-21-602(3), including violations of Tenn. Code Ann. §7-51-1407. The chief of police is charged with the duty to prosecute violations of criminal law in court and seek warrants and serve the same. *See* Tenn. Code Ann. §6-21-604. Defendant Carswell is sued in his official capacity.

10. Defendant Jonathan Skrmetti is the Attorney General of Tennessee and Reporter of the State of Tennessee. The Attorney General/Reporter is headquartered at 500 Dr. Martin Luther King Jr. Under state law, he is charged with defending the constitutionality of Tennessee statutes, *see* Tenn. Code Ann. § 8-6-109(b)(9)), and is entitled to notice and to be heard in actions seeking a declaratory judgment as to the constitutionality of a statewide statute, *see* Tenn. Code Ann. § 29-14-107(b). Further, he has exclusive authority to prosecute criminal violations in Tennessee’s

appellate courts. *See* Tenn. Code Ann. § 8-6-109(b)(2); *State v. Simmons*, 610 S.W.2d 141, 142 (Tenn. Crim. App. 1980). Defendant Skrmetti is sued in his official capacity.

IV. FACTUAL ALLEGATIONS

Tennessee Legislators Fight to Prevent Family Friendly Drag Show

11. In October of 2022, Jackson Pride planned to host its third annual pride festival celebrating the diversity of the LGBTQ+ community in Jackson and West Tennessee.

12. As a part of the festival, Jackson Pride planned a family friendly, appropriate-for-all ages drag show to be performed in Conger Park in Jackson.

13. Drag is defined as "clothing more conventionally worn by the other sex, especially exaggeratedly feminine clothing, makeup, and hair adopted by a man."[1] Drag is usually performed as entertainment and often includes comedy, singing, dancing, lip-syncing, or all of the above.

14. Drag is not a new art form; nor is it inherently – or even frequently – indecent. Drag has been present in western culture dating back to Ancient Greek theatrical productions, where women were often not permitted to perform onstage or become actors. Instead, male actors would don women's attire and perform the female roles.[2]

15. The earliest productions of William Shakespeare's plays also featured male actors in drag playing the female roles.[3]

16. By the 1800s, "male or female impersonation" was known as "drag."

17. The vaudeville shows of the late 1800s and early 1900s popularized drag, or

[1] *Drag*, OxfordLearnersDictionary.com, https://www.oxfordlearnersdictionaries.com/us/definition/english/drag_1 (last visited March 25, 2023).

[2] Ken Gewertz, *When Men Were Men (and Women, Too)*, The Harvard Gazette (July 17, 2003), https://news.harvard.edu/gazette/story/2003/07/when-men-were-men-and-women-too/

[3] Lucas Garcia, *Gender on Shakespeare's Stage: A Brief History*, Writer's Theatre, (November 21, 2018), https://www.writerstheatre.org/blog/gender-shakespeares-stage-history/

"female impersonators." [4] One of the most well-known vaudeville female impersonators, Julian Eltinge, made his first appearance on Broadway in drag in 1904.[5]

18. By 1927, drag had become specifically linked with the LGBTQ+ community, and by the 1950s, drag performers began entertaining in bars and spaces that specifically catered to gay people. In the decades that followed, drag solidified itself as an art form.[6]

19. Although drag is still centered around and holds special historical significance for the LGBTQ+ community, the art form is now definitively a part of mainstream culture. One is as likely to find straight people at a drag show as gay people. RuPaul's Drag Race – a drag competition television show – has won seven Emmy Awards and is currently in its fifteenth season. The show has spinoffs in the UK, Australia, Chile, Thailand, Canada, Italy, Spain, and elsewhere.

20. Like all forms of performance art, drag encompasses a vast spectrum of expression. Every drag performer makes unique choices about attire, choreography, comedy, and music, which can range from a performer in a floor-length gown lip-syncing to Celine Dion songs and making G-rated puns, to the Rocky Horror Picture Show, to sexual innuendo and the kind of dancing one could expect to see at a Taylor Swift or Miley Cyrus concert.

21. Modern drag performances typically do not contain nudity. More often than not, drag performers wear more clothing than one would expect to see at a public beach, and many drag shows are intended to be appropriate for all ages.

22. According to Bella DuBalle, the host of the 2022 Jackson Pride drag show, the event

[4] Nan Alamilla Boyd, Wide Open Town: A History of Queer San Francisco to 1965, University of California Press, 2003.

[5] Michael F. Moore, Drag! Male and Female Impersonators on Stage, Screen, and Television: An Illustrated World History, McFarland & Company, 1994.

[6] Nan Alamilla Boyd, Wide Open Town: A History of Queer San Francisco to 1965, University of California Press, 2003.

was intended to be "family-friendly and appropriate for people of all ages." Still, DuBalle acknowledged that not every parent is comfortable with even G-rated drag, and that families should make the choice that is right for them.[7]

23. In spite of the benign content of the Jackson Pride drag show, some members of the local community took issue with the event being held in a public park. After public backlash, city officials and members of the Pride Committee agreed to move the event indoors. But for some people, this still was not enough.[8]

24. Tennessee state Representative Chris Todd, along with state Senator Ed Jackson and members of the First United Methodist Church, filed a lawsuit in Madison County chancery court, asking the court to declare the drag show a public nuisance, and to permanently enjoin the City of Jackson from granting a permit to Jackson Pride organizers.

25. In the complaint, Plaintiffs argued that a drag show, no matter how benign its contents, is an "adult cabaret," and therefore should not be permitted within 1,000 feet of a church.

26. With the date of the event just around the corner, Jackson Pride agreed to make the event age-restricted to those 18 years of age and older. Jackson Pride maintained that the event was family friendly and appropriate for all ages.[9]

27. In his comments to the press, Rep. Todd stated, "This is not something we agree with and it's not something our children need to be exposed to . . . It's been about protecting the

[7] State Rep, Performer Discuss Controversy of Jackson Pride, WBBJ News, (September 21, 2022) https://www.wbbjtv.com/2022/09/21/state-rep-performer-discuss-controversy-of-jackson-pride-drag-show/

[8] Jackson Pride organizer expresses 'joy,' Rep. Todd calls a 'win' with drag show ruling, Jackson Sun, (October 7, 2022), https://www.jacksonsun.com/story/news/2022/10/07/jackson-pride-tn-2022-drag-show-age-18-and-older/69547945007/

[9] *Id.*

kids in our community from something that is harmful to them. It's not age appropriate."[10]

28. Although Jackson Pride organizers had repeatedly stressed that the drag show was thoroughly vetted to be "family-friendly content" with no lewd or sexual content allowed, Rep. Todd insisted that the drag performances were "clearly meant to groom and recruit children to this lifestyle . . .that is child abuse and we will not have that here."[11]

29. When pressed about how he knew it was child abuse if he had not actually inquired about the show's contents, Rep. Todd repeated, "this type of performance and its content is the child abuse."[12]

30. Rep. Todd also stated, "I think moving forward, we anticipate that any kind of consideration of a drag queen event be nonexistent, and that they would realize this community is not the place for that."[13]

31. Rep. Todd's actions in Jackson were an unconstitutional government infringement on speech and expression protected by the First Amendment.

32. Tennessee already has state laws prohibiting obscenity or indecent exposure in front of minors. Rep. Todd was not seeking to enforce those laws. Instead, he sought to prevent *any* drag entertainment, no matter how G-rated, from being performed in front of children, merely because he personally disagrees with the content.

In Response to Jackson Pride, Tennessee Legislators Pass a New Law

33. After violating the First Amendment rights of Jackson Pride, Rep. Todd "was asked

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

to come up with legislation that would make this much more clear" – that drag performances in front of children are a violation of Tennessee law.

34. In January of 2023, Rep. Todd introduced House Bill 0009, which would amend T.C.A. § 7-51-1407 to ban any "adult cabaret performance" in front of children that "appealed to the prurient interests" of minors.

35. The law was later amended to cross-reference the definition of "harmful to minors" from T.C.A § 39-17-901, which regulates in part the sale and distribution of pornography and other sexually explicit content to minors.

36. When asked on the House floor why this law was necessary if such conduct was already illegal to perform in front of children, Rep. Todd stated that the bill was intended to cover conduct like that which he "dealt with in my own community this past year."[14]

37. When asked on the House floor if he knew of any instances of children being harmed by "adult cabaret performances," Rep. Todd recounted how his lawsuit forced Jackson Pride to move the family-friendly drag show indoors and to apply age restrictions, and explained, "that's exactly how this bill is structured. It doesn't prevent those performances, but it certainly says they must not be held in front of minors, and we intend to uphold that and expect law enforcement across this great state to uphold that principle and to uphold what we pass here in this legislature."[15]

38. Rep. Todd's bill did pass the legislature, and was signed into law by Governor Lee on February 27, 2023.

[14] 113th General Assembly, 9th Legislative Day, (February 23, 2023) House Floor Session - 9th Legislative Day (granicus.com)

[15] *Id.*

39. The final text of the bill, which was set to take effect April 1, 2023, reads as follows:

T.C.A. § 7-51-1407

(c)(1) It is an offense for a person to perform adult cabaret entertainment:

(A) On public property; or

(B) In a location where the adult cabaret entertainment could be viewed by a person who is not an adult.

(3) A first offense for a violation of subdivision (c)(1) is a Class A misdemeanor, and a second or subsequent such offense is a Class E felony.

T.C.A. § 7-51-1401

(3) "Adult cabaret entertainment":

(A) Means adult-oriented performances that are harmful to minors, as that term is defined in § 39-17-901 and that feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers; and

(B) Includes a single performance or multiple performances by an entertainer;

T.C.A § 39-17-901

(6) “Harmful to minors” means that quality of any description or representation, in whatever form, of nudity, sexual excitement, sexual conduct, excess violence or sadomasochistic abuse when the matter or performance:

(A) Would be found by the average person applying contemporary community standards to appeal predominantly to the prurient, shameful or morbid interests of minors;

(B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and

(C) Taken as whole lacks serious literary, artistic, political or scientific values for minors;

(2) "Community" means the judicial district, as defined in § 16-2-506, in which a violation is alleged to have occurred.

Friends of George’s, Inc. Challenges the Act in Federal Court

40. In March of 2023, a drag-centric theatre company, Friends of George’s, Inc., (FOG) filed suit in the Western District alleging that the Act is unconstitutional. FOG sought injunctive

relief against Shelby County District Attorney General, Steve Mulroy.

41. FOG alleged that the Act is facially unconstitutional under the First Amendment for several reasons.

42. First, the statute is not content-neutral and is therefore subject to strict scrutiny. It prohibits protected speech based on the identity of the speaker. *City of Austin v. Reagan Nat'l Adver. Of Austin, LLC.*, 142 S. Ct. 1464, 1471 (2022).

43. "[L]aws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys. Those laws, like those that are content based on their face, must also satisfy strict scrutiny." *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015).

44. There are two possible ways to read the definition of "adult cabaret entertainment," and both interpretations define the prohibited conduct – at least in part – by the identity of the speaker. It is unclear if "adult cabaret entertainment" includes:

1) conduct that is harmful to minors, and that separately also includes conduct that features "topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers;"
2) *or* if the conduct that is "harmful to minors" *must also include* one of the delineated entertainers.

45. Either reading of the statute is unconstitutional. The first reading of the statute includes any performance by a male or female impersonator – regardless of content.. The law "sweeps in mainstream artistic performances" as well as subjects the performer to prosecution based on "the presentation of a single performance." Those two factors are precisely what the Sixth Circuit has held "doomed the statutes . . . which were invalidated by this and other circuit courts"

on First Amendment grounds. *Entm't Prods., Inc. v. Shelby Cty.*, 588 F.3d 372, 386 (6th Cir. 2009).

46. Under this reading of the law, a drag queen wearing a mini skirt and a cropped top and dancing in front of children violates this statute, but a Tennessee Titans cheerleader wearing precisely the same outfit doing precisely the same routine does not, because she is not a "female impersonator." Thus, the prohibited speech is defined by the identity of the drag performer – and the message he conveys. That is a content-based restriction on speech protected by the First Amendment.

47. The alternative reading of the statute is no better. If the prohibited conduct *must* include one of the defined performers, then a woman in a dress who publicly performs material "harmful to minors" cannot be charged under this statute, but a man in a dress engaged in the exact same conduct could be. Once again, the restricted speech is defined in significant part by the speaker, and the message that speaker conveys.

48. Second, the statute is so broad, it is certain to have a chilling effect on protected speech.

49. The law prohibits such performances, "in a location where the adult cabaret entertainment could be viewed by a person who is not an adult."

50. There are no defined "locations" in the law. The prohibition is not limited to commercial establishments or paid performances, which means that a drag performer could be arrested for providing free entertainment at a family member's birthday party held *at that family member's house*, as long as children are present.

51. If a restaurant hosts an 18+ drag brunch, and children walk by and see it through the windows, nothing prevents the drag performers from being charged under this statute.

52. There are no affirmative defenses included in the law, and no exceptions for

minors who see drag shows with parental consent.

53. Additionally, T.C.A. § 39-17-901, which defines "harmful to minors" also defines "community" as "the judicial district, as defined in § 16-2-506, in which a violation is alleged to have occurred."

54. This means that there are thirty-one (31) potential definitions of prohibited conduct. There is no way for a performer to know what is and is not specifically prohibited from district to district.

55. There is no way for a citizen of Tennessee to be on notice for what conduct could violate this law – and possibly subject them to felony charges.

56. "The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. As a practical matter, this increased deterrent effect, coupled with the risk of discriminatory enforcement of vague regulations, poses greater U.S. Const. amend. I concerns than those implicated by certain civil regulations." *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

57. The law also opens up any establishment – or even private home – that hosts drag shows to police raids, so law enforcement can be certain that no children are present at the event.

58. Indeed, even after Jackson Pride agreed to move their family-friendly drag show indoors and restrict attendance to 18+, Rep. Todd told press that "the event will be carefully monitored by the Jackson Police Department to 'watch for' these violations."[16]

59. The fear of felony charges and the uncertainty about what *could* give rise to those charges will certainly keep citizens of Tennessee from engaging in protected speech – even speech

[16] Jackson Pride organizer expresses 'joy,' Rep. Todd calls a 'win' with drag show ruling, Jackson Sun, (October 7, 2022).

that might fall entirely outside the purview of the statute.

60. The resulting chilling effect has already been felt across the state of Tennessee, particularly by the LGBTQ+ community, for whom drag is a central and vital part of their history, culture, and celebration of identity.

61. The organizers of Knoxville Pride stated that they intend to cancel their annual October Pride events for the safety of their employees.

62. This law, which specifically targets drag performances, threatens to return the LGBTQ+ community to the days when they had to hide their identity and their art behind blacked-out windows.

63. After a hearing in which the court heard arguments from both sides, Judge Parker issued a temporary restraining order enjoining defendants from enforcing the Act. A bench trial was scheduled for May 22nd, 2023.

A Federal Judge Declares the Act Unconstitutional

64. On June 2, 2023, after a full trial on the merits, the court issued its Findings of Fact and Conclusions of Law in *Friends of George's v. Mulroy*. The court's findings are attached hereto as **EXHIBIT 1.**

65. In its 70-page analysis, the court found that the Act is a content-based, viewpoint discriminatory regulation, and that the Act is not narrowly tailored to achieve Tennessee's compelling interests. Additionally, the court concluded that the Act is unconstitutionally vague and overbroad.

66. The court granted FOG both declaratory and injunctive relief against DA Mulroy in his official capacity. The court declared that the Adult Entertainment Act is an unconstitutional restriction on free speech, and permanently enjoined DA Mulroy from enforcing the Act. The

court's Judgment is attached hereto as **EXHIBIT 2.**

67. District Attorney Mulroy's appeal is currently before the Sixth Circuit.

District Attorney General Ryan K. Desmond Threatens Enforcement of the Act Against Plaintiffs.

68. Blount Pride, Inc., is a 501(c)3 nonprofit that organizes and hosts an annual Pride festival in celebration of the LGBTQ+ community. The festival hosts live entertainment, including drag performances by individual entertainers. Blount Pride's third annual festival is scheduled to begin Saturday, September 2, 2023.

69. Blount Pride currently has no age restrictions on any event, and there are events specifically planned for children, so individuals under eighteen (18) years of age will be present on the premises.

70. Matthew Lovegood is a drag artist who performs under the name "Flamy Grant." Plaintiff Lovegood is scheduled to perform in drag at Blount Pride this year.

71. On Tuesday, August 29, just four (4) days before the festival, Blount Pride received an email from District Attorney General Ryan Desmond which stated in part, "Please see the attached notice regarding my office's prosecutorial position relative to the Adult Entertainment Act." The accompanying 3-page letter is attached hereto as **EXHIBIT 3.**

72. In the letter, Defendant Desmond asserts that he intends to enforce the Act, despite a federal court ruling in the Western District of Tennessee declaring the Act unconstitutional.

73. Upon information and belief, Defendant Desmond's decision to enforce the Act relies in part on the opinion or advice of Defendant Attorney General Jonathan Skrmetti that the district court's order applies to "only the District Attorney for the 30th Judicial District." *See* Ex. 3 at 1.

74. Defendant Desmond states that the letter is a direct response to "a coming event

planned for September 2, 2023, that is marketing itself in a manner which raises concerns that the event may violate certain criminal statutes within the State of Tennessee," and that the letter aims to "put potential parties on notice of possible ramifications of criminal conduct." Ex. 3 at 1.

75. Blount Pride's promotional materials include social media posts on Facebook and Instagram, examples of which are attached hereto as **EXHIBIT 4**. The posts include lists of vendors, planned entertainment, and photos of entertainers, including several photos of Plaintiff Lovegood's drag persona, "Flamy Grant." None of the posts are sexual in nature.

76. Defendant Desmond also addressed the letter to three law enforcement heads – Defendants Blount County Sheriff James Berrong, Alcoa Police Chief David Carswell, and Maryville Police Chief Tony Crisp (collectively the "Municipal Defendants").

77. Defendant Desmond's decision to include these law enforcement officers in his letter empowers and encourages police to enforce the unconstitutional Act. This act chills the speech of Plaintiffs and any other person in Blount County who is subject to Defendant Desmond's jurisdiction.

78. Worse, the letter specifically targets Plaintiffs for enforcement. The only other recipients are representatives of the entities where the Pride festival is being held – Maryville College and the cities of Maryville and Alcoa.

79. Upon information and belief, on August 28, 2023, Defendant Crisp contacted Maryville College, requesting Maryville College provide a copy of the contract between Plaintiff Blount Pride and Maryville College

80. The next day, August 29, 2023, Defendant Crisp called Bryan F. Coker, President of Maryville College, notifying Mr. Coker of Defendant Desmond's letter and asking to arrange a meeting between Defendant Desmond, Maryville College, and himself. Maryville College referred

Defendant Crisp to Maryville College's legal counsel. Upon information and belief, counsel for Maryville College was subsequently contacted by Defendants Desmond and Crisp later that day, August 29, 2023.

81. During the call on August 29, 2023, Defendant Crisp also notified Mr. Coker that officials at Maryville College, including Mr. Coker, could face prosecution for a misdemeanor if they violated the Act.

82. While Defendant Desmond claims that "we do not prematurely evaluate the facts or evidence related to potential investigations," he also states that his office conducted a "diligent search" to find a way to seek a prior restraint against Blount Pride:

> It should be noted at this point that a diligent search of relevant statutory authority has revealed no mechanism under which a District Attorney General in the State of Tennessee could petition for a temporary injunction to enjoin an individual or group from organizing and holding an event that would be violative of the AEA.

Ex. 3 at 2.

83. In other words, he tried to find a way to violate Plaintiffs' First Amendment rights. When that failed, he opted instead to send a threatening letter to Plaintiffs and the host site of their event.

84. Had Defendant Desmond merely wished to notify the public that he intends to enforce the Act, he could have issued a public statement to that effect. Instead, he sent a letter targeting Blount Pride and the drag artists who are scheduled to perform. The letter, and Defendants Crisp and Desmond's further attempts at intimidation, are a naked attempt to chill Plaintiffs' speech and expression in retaliation to Blount Pride's social media posts.

The *Friends of Georges* Declaration applies to the Defendant here.

85. In *Friends of Georges, Inc. v. Mulroy*, No. 223CV02163TLPTMP, 2023 WL 3790583, at *32 (W.D. Tenn. June 2, 2023), the Western District of Tennessee ruled that it

"**HOLDS** and **DECLARES** that the Adult Entertainment Act is an **UNCONSTITUTIONAL** restriction on speech." *Id.* "[T]he AEA violates the First Amendment as incorporated to Tennessee by the Fourteenth Amendment, and it cannot be enforced consistently with the supreme law of the land: the United States Constitution[,]" the Court explained. *Id.* Importantly, this ruling was also issued against "Defendant Steven J. Mulroy in his official capacity as District Attorney General of Shelby County[.]" *Id.* at *7.

86. The U.S. Supreme Court has made clear that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989). "As such, it is no different from a suit against the State itself." *Id.* (citing *Kentucky v. Graham*, 473 U.S. 159, 165–166, 105 S.Ct. 3099, 3104–3105, 87 L.Ed.2d 114 (1985); *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691, n.55 (1978) ("official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent")). Put another way: "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. at 166.

87. The import of this precedent is that the District Attorney of Shelby County—in his official capacity—is "in all respects other than name" the same as the District Attorney here. *Id.* In their official capacities, both are really the State of Tennessee as an "entity[,]" so both cases present "a suit against the State itself[,]" rather than a suit against any defendant individually. *See Will*, 491 U.S. at 71. In *Friends of Georges*, the State of Tennessee already litigated and lost the exact issue presented here, too, so the *Friends of Georges* declaration applies to this case. The State of Tennessee has not sought a stay pending appeal of the adverse declaration issued in

Friends of Georges, either.

88. Further, officers of the same government who are sued in their official capacity are in privity with one another. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402–03, 60 S. Ct. 907, 917, 84 L. Ed. 1263 (1940) ("There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government.") (citing *Tait v. W. Maryland Ry. Co.*, 289 U.S. 620, 627, 53 S. Ct. 706, 708, 77 L. Ed. 1405 (1933)); *see also Crawford v. Chabot*, 202 F.R.D. 223, 227 (W.D. Mich. 1998) ("A government official sued in his or her official capacity is considered to be in privity with the government. Therefore, a judgment for or against an official will preclude a subsequent action on the same claim by or against another official or agency of the same government. Similarly, a prior judgment involving the government will bar an action against individual officials of the government in their official capacity for the same claim.") (quoting Moore's Federal Practice 3d, § 131.40[3][e][ii] (citing *Gregory v. Chehi*, 843 F.2d 111, 120 (3d Cir.1988); *Schuster v. Martin*, 861 F.2d 1369, 1373 (5th Cir.1988); *Conner v. Reinhard*, 847 F.2d 384, 394 (7th Cir.1988); *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir.1984)). Thus, when determining whether the government is bound by an earlier adverse result, "[t]he crucial point is whether or not in the earlier litigation the representative of the [government] had authority to represent its interests in a final adjudication of the issue in controversy." *Sunshine Anthracite Coal Co.*, 310 U.S. at 403.

89. That inarguably happened in *Friends of Georges, Inc.*, 2023 WL 3790583. There, the Tennessee Attorney General's Office was served with notice of the litigation and controlled the State's defense as permitted by Tennessee law. *See id.* ("James R. Newsom, III, Robert W. Wilson, Office of the Tennessee Attorney General and Reporter, Memphis, TN, Jessica Lyn

Indingaro, Shelby County District Attorney General's Office, Memphis, TN, Steven James Griffin, Office of the Tennessee Attorney General and Reporter, Nashville, TN, James Matthew Rice, Tennessee Attorney General's Office Attorney General's Office, Nashville, TN, for Defendant."). The *Friends of Georges* declaration thus applies here for that reason, too, since the District Attorney of Shelby County and the District Attorney here are in privity with one another with respect to the official-capacity claims presented.

90. For all of these reasons, the *Friends of Georges* declaration applies to the Defendant in this case. The State of Tennessee—which is the real defendant in both suits, and which must "be treated as" such, *see Kentucky v. Graham*, 473 U.S. at 166—thus cannot attempt to relitigate the issue anew here. Instead, its remedy is appellate review in Sixth Circuit Case No. 23-5611, where—as noted above—the State of Tennessee, through the official-capacity defendant there, has neither sought nor obtained a stay. *See* **EXHIBIT 5** (Docket, Sixth Circuit Case No., 23-5611).

V. CAUSES OF ACTION

COUNT 1 – VIOLATION OF 42 U.S.C. § 1983 UNDER THE FIRST AND FOURTEENTH AMENDMENTS – FREE SPEECH (AGAINST ALL DEFENDANTS)

91. Plaintiff incorporates all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

92. As alleged above, the Defendants seek to explicitly restrict or chill speech and expression protected by the First Amendment based on its content, its message, and its messenger. The statute is therefore "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. at 163.

93. This statute cannot survive strict scrutiny. While the government has a recognized

interest in "protecting children from harmful materials," Tennessee law already protects children from obscenity and sexually explicit conduct and materials. *See generally* T.C.A. §§ 39-13-511; 39-17-910, *et seq*.

94. This law is far from narrowly tailored. It prohibits speech one could see in almost any PG-13 movie; it reaches into the private homes of Tennessee citizens, and it determines on behalf of parents what is and is not appropriate entertainment for their children.

95. Defendant Desmond, acting on the advice of Defendant AG Skrmetti, communicated to Plaintiffs via the letter that he intends to enforce the Act.

96. Defendant Desmond's letter effectively empowers the Law Enforcement Defendants to investigate alleged violations of the Act, and encourages law enforcement to specifically target Blount Pride's festival for surveillance and enforcement. Plaintiffs have a reasonable fear of enforcement from the Law Enforcement Defendants.

COUNT 2 – VIOLATION OF 42 U.S.C. § 1983 UNDER THE FIRST AMENDMENT -- RETALIATION (AGAINST DEFENDANT DESMOND IN HIS INDIVIDUAL CAPACITY)

97. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

98. The Plaintiffs, through First Amendment-protected marketing materials, announced their intention to engage in First Amendment-protected activity.

99. In response, Defendant Desmond took adverse action against them that would deter a person of ordinary firmness from continuing their conduct.

100. There is a causal connection between the Plaintiffs' First Amendment-protected activity and Defendant Desmond's adverse action.

101. Defendant Desmond sent a targeted letter threatening to prosecute Plaintiffs and

empowering law enforcement officers to investigate alleged violations of the unconstitutional Act.

102. The letter is a blatant attempt to chill Plaintiffs' speech and expression protected under the First Amendment.

103. Defendant Desmond sent the letter in direct response to Plaintiff Blount Pride's promotional social media posts. Ex 3 at 1.

104. Defendant Desmond stated in his letter that he attempted to find a way to prevent Plaintiffs from holding their event. When that failed, he sent a letter effectively encouraging law enforcement to target and surveil Blount Pride Festival.

105. Regardless of the constitutionality of the Act, Defendant Desmond's letter constitutes retaliation against Plaintiffs, because he disagrees with the content and message of Plaintiffs' speech.

COUNT 3 – VIOLATION OF 42 U.S.C. § 1983 UNDER THE FOURTEENTH AMENDMENT – VAGUENESS
(AGAINST ALL DEFENDANTS)

106. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

107. A law is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). When the government seeks to restrict protected speech, "rigorous adherence to [the fair notice] requirements is necessary to ensure that ambiguity does not chill protected speech." *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 422 (6th Cir. 2014).

108. The Act is impermissibly vague. It has neither *mens rea* requirements nor affirmative defenses.

109. The Act prohibits performances that are "harmful to minors," but "minor" is defined as "any person who has not reached eighteen (18) years of age and is not emancipated." Tenn. Code. Ann. §39-17-901(8). What is "harmful" to a five-year-old may not be harmful to a 15-year-old, but the Act does not distinguish between toddlers and teenagers.

110. The Act gives broad discretion to prosecutors and law enforcement officers to interpret the law according to their own beliefs about what conduct may violate the law. Defendant Desmond's letter exemplifies this: Blount Pride's social media posts contain no sexual, obscene, or indecent content, yet under Defendant Desmond's reading of the Act, the promotional posts give him reason to believe Plaintiffs may intend to violate the law.

111. The broad, sweeping nature of the statute, and the vagueness regarding what conduct is and is not prohibited, will have, and has had a chilling effect on the First Amendment rights of Plaintiffs and all citizens of Blount County.

COUNT 4 – TENN. CODE ANN. § 1-3-121
(AGAINST DEFENDANTS DESMOND AND SKRMETTI)

112. The Plaintiffs incorporate and reallege the foregoing allegations as if fully set forth herein.

113. Tenn. Code Ann. § 1-3-121 affords aggrieved citizens robust statutory authority to obtain injunctive relief in any action brought regarding the legality of a governmental action. See id. ("a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action.").

114. The Plaintiffs are "affected" by the illegal and unconstitutional actions of Defendant Desmond and Skrmetti, the first of whom has proposed to enforce an unconstitutional law, and the latter of whom has instructed that enforcement of an unconstitutional law is

permissible even after the law was declared unconstitutional.

115. The Plaintiffs are entitled to declaratory relief and complete injunctive relief enjoining further harm arising from these Defendants' illegal actions.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendants on each Count of the Complaint and pray for the following relief:

1. Permit Plaintiffs leave to amend this Complaint after reasonable discovery;
2. Grant Plaintiffs a Temporary Restraining Order and Preliminary Injunction, preventing Defendants from enforcing the Act;
3. Enter a judgment declaring that the Act is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;
4. Enter a judgment declaring that Defendant Desmond violated Plaintiffs' rights under the First Amendment;
5. Award Plaintiffs compensatory, incidental, and punitive damages in an amount to be shown at trial;
6. Award Plaintiffs their reasonable attorney's fees, pursuant to 42 U.S.C. § 1988;
7. Award costs and expenses incurred in this action pursuant to Rule 54 of the Federal Rules of Civil Procedure;
8. Grant the Plaintiffs such further relief as the Court may deem just and proper.

Respectfully submitted,

/s *Justin S. Gilbert*
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VERIFICATION

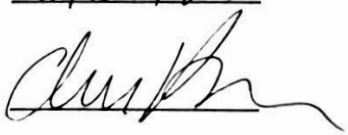
I, Ari Baker, declare as follows:

1. I am the Board President of Blount Pride, the organizational Plaintiff in this case. I am an adult citizen of the United States of America, and a resident of the State of Tennessee.

2. I have personal knowledge of the factual allegations asserted in the foregoing *Verified Complaint* that concern Blount Pride's plans to host a Pride event on September 2, 2023, and the issuance of a letter from District Attorney Ryan K. Desmond. If called on to testify, I would competently testify that those factual allegations are true.

3. Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the factual allegations asserted in the foregoing *Verified Complaint* that concern Blount Pride's plans to host a Pride event on September 2, 2023, and the issuance of a letter from District Attorney Ryan K. Desmond are true and correct.

Executed on: 8/30/23

Signature: 

VERIFICATION

I, Matthew Lovegood, declare as follows:

1. I am a Plaintiff in this case. I am an adult citizen of the United States of America.

2. I have personal knowledge of the factual allegations asserted in the foregoing *Verified Complaint* that concern Blount Pride's plans to host a Pride event on September 2, 2023 and my plans to perform in drag at this event. If called on to testify, I would competently testify that those factual allegations are true.

3. Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the factual allegations asserted in the foregoing *Verified Complaint* that concern Blount Pride's plans to host a Pride event on September 2, 2023 and my plans to perform in drag at this event are true and correct.

Executed on: August 30, 2023

Signature: Matthew Lovegood

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

BLOUNT PRIDE, INC., and MATTHEW LOVEGOOD *Plaintiffs*, v. RYAN K. DESMOND, *in his individual and official capacity as District Attorney General of Blount County, Tennessee*, JAMES BERRONG, *in his official capacity as Blount County Sheriff*, TONY CRISP, *in his official capacity as Maryville Police Chief*, DAVID CARSWELL, *in his official capacity as Alcoa Police Chief*, and JONATHAN SKRMETTI, *in his official capacity as Attorney General of Tennessee.* *Defendants.*	)	Hon. J. Ronnie Greer Civil No. 3:23-cv-00316-JRG-JEM

DISTRICT ATTORNEY RYAN DESMOND'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

The Court should deny Plaintiffs' request for a temporary restraining order. The law allows that extraordinary remedy only upon a *clear showing* of an entitlement to equitable relief. That is the opposite of what is presented here. "[E]quity [does] not aid those who have slept upon their rights." *Cont'l Can Co. v. Graham*, 220 F.2d 420, 422 (6th Cir. 1955). And this case involves improper plaintiffs asserting undeveloped (and previously rejected) constitutional theories based on a mischaracterization of the challenged law.

The General Assembly passed the Adult Entertainment Act to shield children from sexually explicit performances, and it took effect *April 1, 2023*. The Act requires adult cabaret entertainment to occur in adult-only zones and prohibits such entertainment on public property. Contrary to public portrayal, the Act does not ban drag shows—or any type of performance for that matter. It places location restrictions on performances that contain "nudity, sexual excitement, sexual conduct, excess violence or sadomasochistic abuse" "appeal[ing] predominantly to the prurient, shameful or morbid interests of minors," in a "patently offensive" way that "lacks serious literary, artistic, political or scientific value[] for minors." Tenn. Code Ann. § 39-17-901(6).

Plaintiffs have alleged no intention to stage a such a performance. That should end the matter. This Court sits "to resolve not questions and issues but 'Cases' or 'Controversies.'" *Arizona Christian School Tuition Organization v. Winn*, 563 U. S. 125, 132 (2011).

And even if Plaintiffs had standing, the Act poses no constitutional problem. The obscenity standard Plaintiffs challenge as unconstitutionally vague has already been blessed by the Supreme Court. And the First Amendment surely allows Tennessee to restrict adult entertainment to adult-only zones. A long line of cases has upheld statutes that require adult-only zones for content that is obscene as to minors, but not adults. Nothing about this case calls for a different result or supports the drastic relief requested.

This Court should not reward Plaintiffs' inexcusable delay in filing this action. The Act has been on the books for months; the show at issue has been scheduled for months; and the single-county relief provided by the Western District of Tennessee says on its face it did not shield Plaintiffs. Their failure to understand that order is no excuse. The Court should deny the motion.

BACKGROUND

Legal Background. Like all States, Tennessee has long regulated obscenity and adult entertainment. Tennessee law makes it a crime to knowingly produce, sell, or distribute "obscene matter" or "direct, present or produce any obscene . . . live performance." Tenn. Code Ann. § 39-17-902(a). And it provides heightened protections for minors. For example, § 39-17-911(b) prohibits the admission of minors to "premises . . . exhibit[ing] a motion picture, show or other presentation which . . . depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors." This statute uses a definition of "harmful to minors" that adapts for minors the three-factor obscenity standard from *Miller v. California*, 413 U.S. 15 (1973): "any description or representation . . . of nudity, sexual excitement, sexual conduct, excess violence or sadomasochistic abuse" that (1) "[w]ould be found by the average person applying contemporary community standards to appeal predominantly to the prurient, shameful or morbid interests *of minors*;" (2) "[i]s patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable *for minors*;" and (3) "[t]aken as whole lacks serious literary, artistic, political or scientific values *for minors*." Tenn. Code Ann § 39-17-901(6) (emphasis added).

Tennessee law separately regulates adult entertainment. *Id.* §§ 7-51-1401, *et seq.* Adult-oriented establishments and adult cabarets that feature "topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers" cannot be located "within one thousand feet (1,000') of a child care facility, a private, public, or charter school, a public park,

family recreation center, a residence, or a place of worship." *Id.* §§ 7-51-1401(2), -1407(a)(1). And minors cannot be admitted. *Id.* §§ 7-51-1109(a)(7), -1113(e).

The Act. The Act builds on and operates in tandem with these other statutes. In recent years, videos have emerged of events "where entertainers or performers simulated anal sex, oral sex, [and] other graphic activities with children sitting a few feet away" in various "places across the state." Ex. 1 at 566; *see id.* at 520.[1] And a drag show occurred "where an adult performer . . . talk[ed] about their tits and rubb[ed] their genitalia, grinding on the ground and spreading their legs in front of children." *Id.* at 530. These reports prompted "hundreds, if not thousands, of . . . constituents" to call their representatives "wanting to know why . . . overtly sexual entertainment could be taking place in a public area where kids are present." *Id.* at 547; *see id.* at 520.

Presented with those concerns, Tennessee's legislators investigated whether additional legislation was needed to protect minors, *Id.* at 521, and determined that the law needed to more clearly restrict sexual performances in publicly accessible spaces. *Id.* at 567.

The Act adds provisions to Tennessee's longstanding statutory framework governing adult establishments, Tenn. Code Ann. § 7-51-1407, to provide that the "type of [adult] entertainment that is already defined in [existing] statute[s] cannot take place on public property, nor can it take place in a private venue where children are present." Ex. 1 at 517; *see id.* at 547, 579-80. The new provisions clarify that it is unlawful "for a person to perform adult cabaret entertainment: (A) [o]n public property; or (B) [i]n a location where the adult cabaret entertainment could be viewed by a person who is not an adult." Tenn. Code Ann. § 7-51-1407(c)(1).

Drawing on existing law, the Act defines "adult cabaret entertainment" to have two components: [1] "adult-oriented performances that are harmful to minors, as that term is defined

[1] All record pincites and Exhibit 1 pincites refer to the "Page ID" numbers in the ECF file stamps.

in § 39-17-901, and [2] that feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers." *Id.* § 7-51-1401(12). The first component defines "harmful to minors" by cross-referencing an existing obscenity law, § 39-17-901. That definition "has been in [the Tennessee Code] for many years." Ex. 1 at 546; *see id.* at 516-17; Ex. 3 (1990 Tenn. Pub. Acts 938, ch. 1092, §§ 1-3). The second component (referencing "topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers") mirrors the longstanding definition of regulated "adult cabaret." Tenn. Code Ann. § 7-51-1401(2). For this component, the Act again pulls "word-for-word out of the current law" that "has been on the books for many, many decades." Ex. 1 at 538, 588; Ex. 4 (1987 Tenn. Pub. Acts 841, ch. 432, § 2).

Litigation History. Shortly before the Act's effective date, a drag-centric group in Memphis sued under 42 U.S.C. § 1983 seeking injunctive and declaratory relief. On June 2, 2023, the district court declared the Act unconstitutional under the First Amendment and the void-for-vagueness doctrine and permanently enjoined D.A. Mulroy from enforcing the Act in Shelby County. *Friends of George's, Inc. v. Mulroy*, 2023 WL 3790583, at *33 (W.D. Tenn. June 2, 2023). That erroneous decision has been appealed. Opening Br., Dkt Entry 26, No. 23-5611 (CA6).

Plaintiffs, Blount Pride, Inc. and Matthew Lovegood, intend to stage a drag performance at Blount Pride—a festival hosted at Maryville College. Earlier this week, D.A. Desmond sent a letter to Blount County, Maryville, and Blount Pride officials in response to communications from the community. Dkt. 1-3. This letter confirmed that the Act applied in Blount County, explaining that the relief provided in the *Friends of George's* opinion was limited to Shelby County. This had been the publicly stated position of the State for *months*. Ex. 7.

Nonetheless, just before midnight last night (days from the Blount Pride event), Plaintiffs

filed suit challenging the constitutionality of the Adult Entertainment Act and seeking a temporary restraining order. As the basis for a TRO, Plaintiffs contend that (1) the declaration from *Friends of George's* applies to defendants here, (2) the Act violates the First Amendment, and (3) the Act violates the void-for-vagueness doctrine of the Fourteenth Amendment. Dkt. 2.

ARGUMENT

The Court has no basis for granting emergency relief. The issuance of preliminary relief is an "extraordinary and drastic remedy." *Enchant Christmas Light Maze & Mkt. Ltd. v. Glowco, LLC*, 958 F.3d 532, 539 (6th Cir. 2020) (quotations omitted). It "should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Id.* To do so, "[a] plaintiff . . . *must* establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, *and* [4] that an injunction is in the public interest." *Id.* at 535-36 (quotations omitted) (emphases added); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (clarifying that the plaintiff must establish all four factors). Even then, the Court retains discretion to deny or limit relief as it deems appropriate. *See Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 102 (6th Cir. 1982). Plaintiffs have not carried the burden of persuasion at any step of the analysis.

I. Plaintiffs Have No Likelihood of Success on the Merits

A. *Friends of George's v. Mulroy* does not bind these parties of this Court.

The Declaratory Judgment Act states that "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations *of any interested party* seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201 (emphasis added). This language makes clear that "a declaratory judgment binds the parties, *but only the parties*." *Skyworks, Ltd. v. CDC*, 542 F. Supp. 3d 719, 728 (N.D. Ohio 2021), *appeal dismissed*, 2021 WL 4305879 (6th Cir. Sept. 21, 2021) (emphasis added). In fact, the Supreme

Court has explicitly held that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs[;] the State is free to prosecute others who may violate the statute." *Doran v. Salem Inn*, 422 U.S. 922, 931 (1975).

The same principle holds for defendants. Indeed, "no court may 'lawfully enjoin the world at large,' or purport to enjoin challenged 'laws themselves,' *Whole Woman's Health v. Jackson,* 142 S. Ct. 522, 535 (2021) (citation omitted), so no declaration against the world at large could be a "milder alternative" to injunction, *Perez v. Ledesma*, 401 U.S. 82, 1 11 (1971) (Brennan, J., concurring in part and dissenting in part). Instead, a declaratory judgment can only "resol[ve] . . . a 'case or controversy'" by "settling of some dispute *which affects the behavior of the defendant towards the plaintiff*." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). To bind the defendant more broadly would be to issue "an advisory opinion" not allowed by Article III. *Id.*; *see Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1032 (6th Cir. 2022); *Safety Specialty Ins. Co. v. Genesee Cnty. Bd. of Commissioners*, 53 F.4th 1014, 1021 (6th Cir. 2022).

Thus, to state what should be obvious, the court's declaration in *Friends of Georges* fixed the rights of Friends of George's in relation to Steven Mulroy, the District Attorney for Shelby County, Tennessee. *See* 2023 WL 3790583, at *12, *31-33. It binds no one in Blount County, *see id.*, nor does it restrain the Tennessee Attorney General, *see id.* *1 n.7, who cannot enforce the Adult Entertainment Act anyway, Dkt. 2 at 136 n.1.

Plaintiffs try to evade that foregone conclusion by raising a novel argument that declaratory judgment operates statewide because suits against D.A.s are suits against the State and by contending that the privity doctrine applies. Dkt. 2 at 141-44. But the Supreme Court resolved this issue decades ago in *Doran*. *See* 422 U.S. at 931. That ends the matter.

Regardless, Plaintiffs cite no authority for their expansive view of declaratory relief. Plaintiffs misplace reliance on *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), which makes clear that official-capacity actions for prospective relief, like the one brought by *Friends of George's*, "are *not* treated as actions against the State," 491 U.S. at 71 n.10 (quotations omitted) (emphasis added). And to the extent Plaintiffs mean to argue that relief against Mr. Mulroy binds *other* officials *through* the State, their failure to cite a single supporting precedent "suggests the case law is not in [their] favor." *Green Genie, Inc. v. City of Detroit*, 63 F.4th 521, 527 (6th Cir. 2023). Indeed, it is a hornbook axiom that no agent "'control[s] the principal,'" so no "district court . . . "ha[s] the power to bind [the principal] through an order directed against her servant." *Havens v. James*, 2023 WL 4982318, at *11 (2d Cir. 2023) (quotations omitted).

The declaration in *Friends of George's* binds no party to this suit.

B. Plaintiffs lack standing.

To invoke federal jurisdiction, a plaintiff must prove "an injury in fact . . . fairly traceable to the challenged conduct of the defendant . . . that is likely to be redressed by the requested relief." *FEC v. Cruz*, 142 S. Ct. 1638, 1646 (2022). An Article III injury can be established before enforcement of a statute. But to do so, a plaintiff must prove "an intention to engage in a course of conduct arguably affected with a constitutional interest[] but proscribed by" some provision of the Act. *Crawford v. Dep't of Treasury*, 868 F.3d 438, 454 (6th Cir. 2017) (quotations omitted). And it must then prove "a certain threat of prosecution if the plaintiff does indeed engage in that conduct." *Id.* at 455. Plaintiffs proved neither.

1. *Plaintiffs have not alleged an intention to stage performances that are "harmful to minors."* Standing in a pre-enforcement challenge turns on whether the statute "prevents" a plaintiff's desired conduct, *Republican Party v. Klobuchar*, 381 F.3d 785, 793 (8th Cir. 2004),

based on a proper "construction" of the restriction imposed, even in cases alleging a "chilling effect" on speech, *Fieger v. Mich. Sup. Ct.*, 553 F.3d 955, 964 (6th Cir. 2009).

By its terms, the Act regulates *only* "adult cabaret entertainment," Tenn Code Ann. § 7-51-1407(c)(1), which includes *only* "performances" deemed "harmful to minors, as that term is defined in § 39-17-901," *id.* § 7-51-1401(12). To qualify as "harmful to minors" under § 39-17-901(6), a performance must, among other things, "lack[] serious literary, artistic, political or scientific values for minors" when "[t]aken as a whole."

And the Tennessee Supreme Court has read that language to include "only . . . those materials which lack serious literary, artistic, political, or scientific value *for a reasonable 17-year-old minor*." *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993) (emphasis added). In *Davis-Kidd*, the court considered whether restrictions on the display of printed materials deemed "harmful to minors" could withstand constitutional scrutiny. *Id.* at 522. To avoid constitutional issues, the court "narrowly construed" the "third prong" of § 39- 17-901's "harmful to minors" definition to be limited to materials lacking value "*for a reasonable 17-year-old minor*." *Id.* at 527-28 (emphasis added). And the text of § 39-17-901 must have the same meaning here as it did in *Davis-Kidd*. *See Clark v. Martinez*, 543 U.S. 371, 378-80 (2005).

Standing here thus turns on irony: Plaintiffs must allege that their own shows lack value to those on the cusp of adulthood. Unsurprisingly, Plaintiffs have been unable to allege as much. Indeed, they did not even try. Plaintiffs did not "articulate, with *any* amount of specificity," the "speech or conduct" to be included in its future shows. *Fieger v. Mich. Sup. Ct.*, 553 F.3d 955, 964 (6th Cir. 2009). All the complaint asserts is that Blount Pride will have "live entertainment, including drag performances." Dkt. 1 at 14. That is it. And when Plaintiffs talked generally about drag performances, they stressed that drag is an important "art form" that "is now definitively a

part of mainstream culture." *Id.* at 5. They even drew parallels between drag and ancient Greek drama or Shakespeare. *Id.* at 4. These allegations provide absolutely no basis for concluding that Plaintiffs intend to stage shows that lack value to a reasonable 17-year-old.

Plaintiffs fear that D.A. Desmond's letter suggests there could be some false prosecution. *Id.* at 14-16. But the Sixth Circuit has repeatedly held that a "fear" of "wrongful prosecution and conviction under the Act" is "inadequate to generate a case or controversy the federal courts can hear." *Glenn v. Holder*, 690 F.3d 417, 422 (6th Cir. 2012); *see White v. United States*, 601 F.3d 545, 553 (6th Cir. 2010). Plaintiffs simply have not alleged an intention to violate the Act and, thus, cannot establish standing.

2. *Plaintiffs have not alleged a certain threat of prosecution under the Act.* Even if the Act did "proscribe[] [Plaintiffs'] intended conduct," the Sixth Circuit does not assume that every breach of the law will be prosecuted. *McKay v. Federspiel*, 823 F.3d 862, 868 (6th Cir. 2016). Instead, it assesses the imminence of enforcement through a holistic, four-part framework—the "*McKay* factors." *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 550 (6th Cir. 2021). Specifically, the Sixth Circuit requires "some combination" of the following factors: "(1) 'a history of past enforcement against the plaintiffs or others'; (2) 'enforcement warning letters sent to the plaintiffs regarding their specific conduct'; (3) 'an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action'; and (4) the 'defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff.'" *Id.* (quoting *McKay*, 823 F.3d at 869). Each of those factors cuts against Plaintiffs' assertion of standing.

No History of Past Enforcement. "A threat of future enforcement may be 'credible' when the same conduct has drawn enforcement actions or threats of enforcement in the past." *Kiser v.*

Reitz, 765 F.3d 601, 609 (6th Cir. 2014). But Plaintiffs cannot point to any prior enforcement.

No Warning Letters. General Desmond's letter did not threaten to enforce the law against Plaintiffs' "specific conduct." *Online Merchs.*, 995 F.3d at 550 (quotations omitted). Quite the contrary, the letter specifically states that "[i]t is certainly possible that [Plaintiffs' shows] will not violate any of the criminal statutes." Dkt. 1-3 at 100.

No Attributes Making Enforcement Easy. Nor does the Act "allow[] any member of the public to initiate an enforcement action." *Online Merchs.*, 995 F.3d at 550 (quotations omitted). The "universe of potential" enforcers is limited to "state officials who are constrained by . . . ethical obligations." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014).

Disavowal of Enforcement. Plaintiffs have not identified their future intended speech with any specificity, so there is no future action to disavow enforcement against.

In short, Plaintiffs did not prove any—much less, "some combination"—of the *McKay* factors, 823 F.3d at 869, and therefore did not prove a certain threat of prosecution for standing.

C. The Adult Entertainment Act is not unconstitutionally vague.

The Due Process Clause's "void for vagueness" doctrine ensures that a "person of ordinary intelligence" has "a reasonable opportunity to know what is prohibited" by the law. *Grayned v. Rockford*, 408 U.S. 104, 108 (1972). But "perfect clarity and precise guidance have never been required," even for laws "that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). The law is full of "flexible" "standards," *id.*, and "[c]lose cases can be imagined under virtually any statute," *United States v. Williams*, 553 U.S. 285, 306 (2008). The vagueness doctrine only protects against laws that altogether fail "to give ordinary people fair notice of the criminalized conduct" or are "so standardless as to invite arbitrary enforcement." *United States v. Parrish*, 942 F.3d 289, 295 (6th Cir. 2019) (cleaned up).

Plaintiffs' vagueness argument is puzzling. The Complaint challenges the definition of "harmful to minors" as unconstitutionally vague because "[w]hat is 'harmful' to a five-year-old may not be harmful to a 15-year-old." Dkt. 1 at 21-22. But the TRO motion contains a different, scattershot argument that focuses on the definition's reference to the "community." Dkt. 2 at 149-154. Either way, the decades-old definition of "harmful to minors" survives review.

1. *The U.S. Supreme Court has rejected vagueness challenges to obscenity standards modified to apply to minors.* Section 39-17-901(6)'s "harmful to minors" definition has two defining features: (1) It incorporates the three-part *Miller* obscenity standard, and (2) it modifies that standard for application to "minors." Nearly thirty States have adopted almost identical variable obscenity standards. And for good reason: The Supreme Court has approved both features of § 39-17-901(6)'s definition.

First, § 39-17-901(6)'s incorporation of the three-part *Miller* obscenity standard causes no vagueness problem. The Supreme Court has treated vagueness challenges to *Miller*'s standard as "nothing less than an invitation to overturn *Miller*." *Fort Wayne Books v. Indiana*, 489 U.S. 46, 57 (1989). And it has rejected that invitation, holding that the *Miller* obscenity standard is not unconstitutionally vague. *Id.*

Second, § 39-17-901(6)'s modification of the obscenity standard for "minors" does not somehow render it unconstitutionally vague—as the Supreme Court explained in *Ginsberg*. There, distributors challenged New York's definition of "harmful to minors" as unconstitutionally vague. 390 U.S. at 643. The appellant "challenge[d]" that definition as "void for vagueness," *id.*, claiming that "the definition of obscenity 'harmful to minors' is so vague that an honest distributor of publications cannot know when he might be held to have violated" the statute. *Id.* The Court, however, held that a "harmful to minors" definition with a variable obscenity standard "gives . . .

adequate notice of what is prohibited and does not offend the requirements of due process." *Id.*

That holding governs here. The definition in § 39-17-901(6) "alters the *Miller* test so that it can be used for determining what material is harmful to minors." *M.S. News Co. v. Casado*, 721 F.2d 1281, 1286-87 (10th Cir. 1983). "[T]his is precisely what the ordinance in *Ginsberg* did with the old [obscenity] test," and *Ginsberg* found no vagueness. *Id.* That is, "*Ginsberg* approved the use of a variable obscenity standard—an adaptation of the general standard for determining adult obscenity to reflect the prevailing standards . . . with respect to what is suitable material for minors." *Am. Booksellers v. Webb*, 919 F.2d 1493, 1496 (11th Cir. 1990) (cleaned up). A host of courts have applied *Ginsberg* to reject vagueness challenges to nearly identical definitions of "harmful to minors." *Webb*, 919 F.2d at 1505-06; *M.S. News*, 721 F.2d at 1286-87; *Simmons v. State*, 944 So. 2d 317, 329 (Fla. 2006).

In any event, the Tennessee Supreme Court's construction of Tenn. Code Ann. § 39-17-901(6) negates Plaintiffs' vagueness argument. Plaintiffs' theory depends on the notion that the "harmful to minors" standard can apply to minors from age five to seventeen. Dkt. 1 at 21-22. But that notion has been nullified by the Tennessee Supreme Court's construction of § 39-17-901(6) in *Davis-Kidd*, which limits "harmful to minors" to content that lacks value for reasonable 17-year-olds. 866 S.W.2d at 528. That controlling interpretation dispels any possible vagueness argument. *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127, n.2 (4th Cir. 1989).

In short, *Ginsberg* governs, and *Davis-Kidd* removes any doubt.

2. *The "community" standard in the "harmful to minors" definition causes no vagueness problem.* Plaintiffs suggest that the Act is vague because it defines the prohibited obscenity based on community standards in "*the judicial district.*" Dkt. 2 at 151-52; *see also* Tenn. Code Ann. § 39-17-901(2), (6)(A)-(B). But the Supreme Court has explicitly stated that "[a] State

may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification . . . *or it may choose to define the standards in more precise geographic terms*." *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (emphasis added).

The Act does just that. And there is no constitutional problem with defining the relevant "community" for a *Miller* standard as the judicial district. *Hamling v. United States*, 418 U.S. 87, 106 (1974) ("The fact that distributors of allegedly obscene materials may be subjected to varying community standards *in the various federal judicial districts* into which they transmit the materials does not render a . . . statute unconstitutional."); *United States v. Little*, 365 F. App'x 159, 164 (11th Cir. 2010) (no error in defining the community standard as "the Middle District of Florida"). In fact, defining the relevant community as the judicial district mirrors the default rule—that "obscenity is determined by the standards of the community where the trial takes place." *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996); *see also Ashcroft*, 535 U.S. at 576-77.

Put simply, even assuming that the Act creates "31 separate" obscenity standards (which, as a practical matter, seems hyperbolic), Dkt. 2 at 151, that creates no vagueness problem. "If a [performer] chooses to [perform] in[] a particular community, . . . it is the [performer's] responsibility to abide by that community's standards." *Ashcroft*, 535 U.S. at 583.

D. The Adult Entertainment Act does not run afoul of the First Amendment's Overbreadth Doctrine.

Plaintiffs also come up short on their First Amendment overbreadth claim. The overbreadth doctrine allows courts to "invalidate[] [a statute] as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quotations omitted). Invalidation for overbreadth is "strong medicine" that courts dispense "with hesitation, and . . . only as a last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982) (quotations omitted). The doctrine is

openly "disfavored." *Connection Distrib.*, 557 F.3d at 336. The Supreme Court has, therefore, "vigorously enforced" the requirement that a challenger prove a *substantial* number of unconstitutional applications. *Williams*, 553 U.S. at 292. Plaintiffs do not do so.

1. *The Act allows "Adult Cabaret Entertainment" in private, age-restricted venues.* "To judge whether a statute is overbroad," this Court "must first determine what it covers." *Hansen*, 143 S. Ct. at 1940. Here, the Court must determine how far to extend Tenn. Code Ann. § 7-51-1407(c)(1)(B)'s reference to "a location where the adult cabaret entertainment could be viewed by a person who is not adult." *Friends of George's* believed that this language means "virtually anywhere," because minors *could* sneak into locations where they are not permitted to be. 2023 WL 3790583, at *28; *id.* at *25 ("Plaintiff could build a card-checking fortress around its theatre and a child *could* still be present."). That is, the court read the adults-only provision to apply to any location where the adult cabaret entertainment could *permissibly or impermissibly* be viewed by a person who is not an adult. But the statute is more naturally read to only apply to a location where the adult cabaret entertainment could *permissibly* be viewed by a person who is not an adult.

First, "any interpretation of the [Act] that makes one [o]f its provisions irrelevant is presumptively incorrect," and the district court's broad interpretation "has exactly this effect." *United States v. Perry*, 360 F.3d 519, 537 (6th Cir. 2004). If the law could apply to locations that minors impermissibly access, then it could be applied "virtually anywhere," 2023 WL 3790583, at *28, as clever minors could theoretically sneak into any location. But if the law could apply anywhere, *the Act would not need any location provisions*. It could have stopped after "It is an offense for a person to perform adult cabaret entertainment." Tenn. Code Ann. § 7-51-1407(c)(1). The Act certainly would not need the "on public property" provision.

Second, the Court must "read [the Act's] language in its context and in the context of the

. . . statutory scheme." *Knoxville v. Netflix, Inc.*, 656 S.W.3d 106, 110 (Tenn. 2022) (quotations omitted). "Context . . . includes common sense," *Biden v. Nebraska*, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring), and "certain assumptions . . . that an ordinary reader would bring to her understanding of the statutory text." *McLemore v. Gumucio*, No. 22-5458, 2023 WL 4080102, at *1 (6th Cir. June 20, 2023). Here, an ordinary reader would read the Act's provisions assuming that existing laws would be followed. That is, common sense dictates that the Act was not drafted to include locations that minors *impermissibly* access. And the context of the "overall statutory scheme" confirms as much. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotations omitted). If the Act applied everywhere, it would conflict with the reticulated statutes addressing adult-oriented establishments by criminalizing strip clubs, as minors could sneak into these establishments. That cannot be right. The "statutory scheme should be read so as to avoid creating internal conflicts" by adopting the State's internally "consistent interpretation." *Mich. Dep't of Educ. v. U.S. Dep't of Educ.*, 875 F.2d 1196, 1202 (6th Cir. 1989).

Third, "[t]he legislative history (for those who consider it) confirms, with unusual clarity," the State's narrower interpretation. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1085 (2019). Both the Senate and House Sponsors described the Act as "clarify[ing] current law by requiring that adult-oriented performances may *only be held in age-restricted venues*." Ex. 1 at 515 (Johnson) (emphasis added); *see id.* at 575 (Todd) (same). And the legislative discussion of the bill is replete with references to requiring age-restricted venues. *Id.* at 515-16, 521, 544-45, 547, 575-76, 579.

Fourth, the Court must "construe the statute to avoid constitutional [overbreadth] problems." *Ferber*, 458 U.S. at 769 n.24. "[E]very reasonable construction must be resorted to in order to save a [legislative act] from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). "This canon [of constitutional avoidance] is normally a valuable ally for criminal

defendants," but with the "odd incentives created by the overbreadth doctrine," Plaintiffs brush it aside, erroneously "press[ing] the [the adults-only provision] toward the most expansive reading possible." *Hansen*, 143 S. Ct. at 1946.

Given these principles, the best reading of the adults-only provision is clear: It prevents adult cabaret entertainment in locations that minors can permissibly access. If this Court remains uncertain, it should abstain. *Harris Cnty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 83 (1975).

2. *The Act poses no First Amendment problem.* The Act does not call for heightened scrutiny. And, even under strict scrutiny, the Act passes constitutional review.

Heightened scrutiny is not warranted. The Act should be subjected to the lesser scrutiny applied to content-neutral restrictions. While the Act references the content of certain performances—"adult cabaret entertainment," Tenn. Code Ann. § 7-51-1401(12)—not all statutes that "reference . . . the content of speech . . . rise to the level of a presumptively impermissible content-based regulation of speech." *Connection Distrib.*, 557 F.3d at 329. In certain situations, even if a law's text is "plainly content-based" in a technical sense, courts apply "the standard applicable to content-neutral regulations"—i.e., a standard akin to intermediate scrutiny requiring an important interest and alternative avenues of communication. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998). For two independent reasons, the Act should be "treat[ed] . . . as content-neutral" and subjected to this "less[er] scrutiny." *Big Dipper Ent., LLC v. Warren*, 641 F.3d 715, 717 (6th Cir. 2011).

Adult-Only Zones. Strict scrutiny does not apply when a statute prohibits minors from accessing content that is obscene as to minors, but not as to adults, if adults can still access the regulated speech. "First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually

explicit and the audience may include children." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986). Of course, "speech within the rights of adults to hear may not be *silenced completely* in an attempt to shield children from it." *Ashcroft*, 535 U.S. at 252 (emphasis added); *see Reno v. ACLU*, 521 U.S. 844 (1997). But when analyzing the "regulation of speech unprotected as to minors that indirectly affects speech protected as to adults," courts have routinely declined to apply strict scrutiny; instead, they "have evaluated . . . restrictions on the display of material 'harmful to minors' in light of the constitutional standards for a reasonable time, place, and manner regulation" or a similar balancing test. *Webb*, 919 F.2d at 1501-02; *see Upper Midwest Booksellers v. Minneapolis*, 780 F.2d 1389, 1394 (8th Cir. 1985); *M.S. News*, 721 F.2d at 1288.

This Court should take the same approach here. The Act does not bar adults' access to the performances at issue; it merely requires these performances to take place in adult-only zones.

Secondary-Effects Doctrine. The Supreme Court's secondary-effects doctrine also cuts against strict scrutiny. Under that doctrine, "the government [can] accord differential treatment to a content-defined subclass of speech [if] that subclass [i]s associated with specific 'secondary effects' of the speech." *Daunt v. Benson*, 956 F.3d 396, 420 (6th Cir. 2020). And, here, by protecting children from obscene content, the Act inherently addresses the secondary effects associated with exposure to such content—namely, an increase in "sexual exploitation crimes." Ex. 1 at 526-28. The prevention of this type of "sexual assault" qualifies as a secondary effect. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 583 (1991) (Souter, J., concurring in judgment). The Court thus has another basis for analyzing the Act as a content-neutral regulation.

Plaintiffs' Arguments for Heightened Review Lack Merit: Plaintiffs argue that the Act (1) involves viewpoint discrimination and (2) furthers an impermissible purpose.

First, Plaintiffs claim viewpoint discrimination because the Act mentions specific

performers. But not "all regulations distinguishing between speakers warrant strict scrutiny." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 657 (1994). "[S]peaker distinctions . . . are not presumed invalid under the First Amendment" or subjected to "strict scrutiny" unless "they reflect the Government's preference for[,] . . . or aversion to[,] what the disfavored speakers have to say." *Id.* at 645, 658. The Act does no such thing.

The Act places limits on adult-oriented performances (1) that are "harmful to minors" and (2) "that feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers." Tenn. Code Ann. § 7-51-1401(12). The first component imposes a constitutional subject-matter restriction that is treated as content-neutral. *Supra* 16-17. And the second component merely identifies performers who may engage in that type of performance. The reference to categories of performers clarifies the "adult-oriented performances" that are "harmful to minors" *without* narrowing the covered speech. And since it does not narrow the speech covered by the Act, it cannot possibly impose a viewpoint-based restriction.

An example illustrates the lack of viewpoint discrimination. If the list of performers included *only* "male or female impersonators," then an argument could be made that the State was using an identity-based restriction as a "means of exercising a content preference." *Turner*, 512 U.S. at 645. In that example, the Act would be singling out performances "harmful to minors" given by a particular group that engages in a specific type of speech. But the Act does just the opposite. It lists types of performers that might engage in sexual speech "harmful to minors" and then includes a catchall—"*or similar entertainers.*" That catchall covers anyone—regardless of viewpoint—who engages in a "adulted-oriented performance" that is "harmful to minors." Tenn. Code Ann. § 39-17-901(6); *id* § 7-51-1401(12). So the list of performers in the Act imposes no viewpoint-based restriction.

Second, Plaintiffs argue that the Act's supposed purpose—the suppression of drag performers' speech—to justify the application of heightened scrutiny. But this argument rests on a misunderstanding of *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015). Plaintiffs misread *Reed*'s purpose-or-justification inquiry as allowing courts to speculate as to legislative motives. Op., R.91 at 1438-44. *Reed* does no such thing. "[T]he law forecloses this kind of adventure." *Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013).

"It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). "Inquiries into congressional motives or purposes are a hazardous matter," *id.*, and "the search for the 'actual' or 'primary' purpose of a statute is likely to be elusive," *Michael M. v. Superior Ct.*, 450 U.S. 464, 469-70 (1981). "[I]ndividual legislators may have voted for the statute for a variety of reasons," *id.* at 470. Accordingly, even in the First Amendment context, the Court has "eschew[ed]" the "guesswork" associated with determining a statute's "real" purpose. *O'Brien*, 391 U.S. at 384; *see Renton*, 475 U.S. at 47-48; *Turner*, 512 U.S. at 652. It, instead, "presume[s] that a legislature acts . . . in good faith." *United States v. Des Moines Nav. & Ry. Co.*, 142 U.S. 510, 544 (1892).

To be sure, in analyzing content-neutrality, courts have considered whether the law can be "'justified without reference to the content of the regulated speech,'" or whether the law was "adopted by the government 'because of disagreement with the message' [the speech] conveyed." *Reed*, 576 U.S. at 164 (quoting *Ward*, 491 U.S. at 791). But this inquiry—stemming from the Supreme Court's decision in *Ward*—does not give courts free rein to divine legislative motives. Courts look to the law's *stated* "justification for the government regulation," not isolated "statements" by legislators purportedly showing "an illicit motive in enacting" the law. *Erie v.*

Pap's A.M., 529 U.S. 277, 292-95 (2000); *see also Reed*, 576 U.S. at 166 (citing *United States v. Eichman*, 496 U.S. 310, 314-15 (1990) (looking to the government's "asserted interest")). In decisions after *Ward*, the Supreme Court and this Court have declined to engage in speculation as to legislative motive. *Erie*, 529 U.S. at 292; *Turner*, 512 U.S. at 652; *Bailey*, 715 F.3d at 960.

Here, the objective indicators of the legislature's purpose demonstrate no discriminatory purpose. The text—"the best indicator of intent," *Nixon v. United States*, 506 U.S. 224, 232 (1993)—affirmatively precludes the contention that the Act targets drag. The Act copies verbatim from existing laws governing adult establishments and adult cabaret—laws that existed decades before any recent controversy over drag and prohibits only highly-sexualized performances.

The legislative history likewise proves no improper purpose. The stated purpose of the Act was to protect minors from exposure to sexually explicit performances. Ex. 1 at 516-17, 520-21, 547, 549, 567-68, 602, 606. The legislature was not attempting to ban all drag performances. *Id.* at 523, 537-38, 567, 593, 602, 605. Indeed, the legislative history contains repeated references to the goal of requiring performances that contain content harmful to minors to occur in age-restricted venues. *Id.* at 515-516, 521, 544-45, 547, 575-76, 579. Plaintiffs' discussion of statements from Representative Chris Todd departs from the well-established principle that "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2256 (2022).

Without viewpoint discrimination or an impermissible purpose, strict scrutiny does not apply.

The Act passes any tier of constitutional review. The Act easily satisfies the applicable time-place-manner standard. It furthers a government interest of the utmost importance (protecting children), and it leaves open "alternative avenues of communication" (any location that complies with existing laws and excludes minors). *Renton*, 475 U.S. at 46-47.

Even if Plaintiffs' First Amendment claim warranted strict scrutiny, the Act would be constitutional because it "is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." *Ferber*, 458 U.S. at 756-57 (quotations omitted). And this "compelling interest . . . extends to shielding minors from the influence" of speech "that is not obscene by adult standards." *Sable Commc'ns v. FCC*, 492 U.S. 115, 126 (1989); *Ginsberg*, 390 U.S. at 639-40.

The Act is also narrowly tailored. It applies only to "a narrow slice of speech"—sexual speech that is obscene to minors under a variable obscenity standard. *Williams-Yulee*, 575 U.S. at 452. And it does not ban that speech; it merely requires the performances to occur in adult-only zones. The Act thus "tightly fits the State's compelling interest" by "limiting children's exposure," while "still allow[ing] adults to" view the performances. *Crawford v. Lungren*, 96 F.3d 380, 387 (9th Cir. 1996) (holding that a restriction on adult-oriented publications satisfied strict scrutiny). It "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy": exposure of children to obscene speech. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Plaintiffs suggest that the Act needs more tailoring in the form of a parental consent exception. But the State has its own "*independent* interest in the well-being of its youth." *Ginsberg*, 390 U.S. at 639-40 (emphasis added). That interest does not disappear because of parental consent. And allowing a minor to access sexualized performances with parental consent would impair the State's interest. That is why, for example, children are not allowed in strip clubs, even with their parents' consent. Tenn. Code Ann. § 7-51-1113(e). And it is why children cannot participate in pornography, even if their parents would allow it. *Connection Distrib.*, 557 F.3d at 328-29. Plaintiffs err in suggesting that laws without parental-consent exceptions categorically

raise constitutional problems.

Plaintiffs also claim the statute is not tailored because there is no explicit scienter requirement. Dkt. 2 at 137. "But there is a simple explanation for [that]: There is no need for it." *Hansen*, 143 S. Ct. at 1945. Courts presume that there is a *mens rea* requirement in criminal statutes even when a statute is "silent," unless there is "some indication of [legislative] intent" overcoming this "presumption." *Staples v. United States*, 511 U.S. 600, 605-19 (1994); *Elonis v. United States*, 575 U.S. 723, 734 (2015). And the Tennessee Supreme Court has inferred scienter for all "criminal statutes regulating obscenity," holding that "the State must establish that the defendant had knowledge of the contents and character of the" speech at issue. *Davis-Kidd*, 866 S.W.2d at 528. The Act thus "implicitly incorporates the traditional state of mind required for" all obscenity offenses. *Hansen*, 143 S. Ct. at 1945.

3. *In any event, Plaintiffs fail to establish a substantial number of unconstitutional applications.* Finally, even assuming some unconstitutional applications of the Act exist, Plaintiffs nowhere demonstrated that "the ratio of unlawful-to-lawful applications" is "lopsided enough to justify the strong medicine of facial invalidation." *Hansen*, 143 S. Ct. at 1948 (quotations omitted). The Act "complies with the First Amendment in most settings." *Connection Distrib.*, 557 F.3d at 336. It can be constitutionally applied to prevent strip performances at a shopping mall or topless dancing at a food hall. It can be constitutionally applied to prevent highly sexualized performances by exotic dancers at a water park or a sports facility. The list goes on. Plaintiffs do nothing to show that any of these applications are unconstitutional.

II. The Other Equitable Factors Favor the State.

Equity also cuts against emergency relief. The doctrine of laches bars Plaintiffs' request for a temporary restraining order. And the remaining equitable factors weigh further against relief.

Plaintiffs' delay in suing should foreclose preliminary relief. Plaintiffs' dilatory tactics alone justifies denial of the pending motion under the laches doctrine. This Court's power to issue injunctions is bounded by the principles of equity, *see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982), and "equity will not aid those who have slept upon their rights," *Cont'l Can*, 220 F.2d at 422. "A district court thus enjoys considerable discretion to apply . . . laches to a particular equitable remedy," such as a preliminary injunction or temporary restraining order. *See A.S. v. Lee*, 2021 WL 3421182, at *2 (M.D. Tenn. Aug. 5, 2021). The laches doctrine generally kicks in when a "lack of diligence" has "prejudice[d]" a defendant. *Memphis A. Phillip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789, 793 (M.D. Tenn. 2020) (quotations omitted).

Here, Plaintiffs showed an extreme lack of diligence. Plaintiffs had "everything [they] needed to file the present lawsuit" months before they initiated litigation. *See Corizon, v. Wainwright*, 2020 WL 6323134, at *7 (M.D. Tenn. Oct. 28, 2020). The Act has been in effect since April 1, 2023. *See* Ex. 2. And Blount Pride unquestionably knew about the law, Ex. 5, and knew that it intended to put on an event with live performances. *See* Ex. 6. Yet, it waited until 2 days before the planned show to sue. Waiting months before "asking for a preliminary [relief] was far too long." *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1057, 1062 n.27 (7th Cir. 2016) (two month delay); *Corizon*, 2020 WL 6323134 at *7 (three-month delay).

The recent letter from D.A. Desmond does not excuse this delay. That letter simply "confirm[s]" that the Act applies in Blount County. *Hargett*, 473 F. Supp. 3d at 796. That should have been news to no one. The *Friends of George*'s opinion specifically stated—in its standing analysis, when analyzing the merits, and when crafting injunctive relief—that its power was limited to analyzing the constitutionality of the Act in Shelby County. 2023 WL 3790583, at *12, *31-33. And General Skrmetti openly stated that "[t]he Adult Entertainment Act remains in effect

outside of Shelby County." Ex. 7. Plaintiffs' failure to understand how declaratory relief works provides no excuse. *See supra* 7.

"[N]ot much prejudice is required given the substantial delay." *Hargett*, 473 F. Supp. 3d at 800. And the prejudice is evident here: Defendants are evidentiarily hamstrung in their ability to defend themselves. *Vineberg v. Bissonnette*, 548 F.3d 50, 57 (1st Cir. 2008) (noting that "the kind of prejudice that will support a laches defense" includes inability to obtain "evidence" and "the unavailability of important witnesses"). Given the timeline forced on Defendants (and this Court), Defendants have little ability to gather basic evidence to support their standing challenge and limited ability to craft their legal arguments. On laches alone, this Court should deny relief.

Plaintiffs have not demonstrated irreparable harm. Plaintiffs establish no constitutional violation and thus establish no irreparable harm.

The balance of equities favors the State. The remaining factors—harm to the opposing party and the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). And, here, they tip sharply against preliminary relief. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (cleaned up). And, here, the State has a well-recognized, compelling interest "in safeguarding the physical and psychological well-being of . . . minor[s]." *Ferber*, 458 U.S. at 756-57 (quotations omitted); see supra at 23. An injunction reaching beyond the Plaintiffs would thwart the State's "independent interest in [protecting] the well-being of its youth"—a matter of utmost importance. *Ginsberg*, 390 U.S at 636. With matters involving the children of this State, this Court "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction," *Winter v. Nat. Res. Def. Counsil*, 555 U.S. 7, 24 (2008), and hesitate before setting

aside duly enacted legislation. The State and public interests in enforcement of the Act vastly outweigh Plaintiffs' illusory harm.

III. Any Relief Should Be Limited to the Proper Scope of This Lawsuit.

If the Court issues an injunction, it must be limited to providing Plaintiffs relief. A valid remedy "ordinarily operate[s] with respect to specific parties,'" not on "legal rules in the abstract.'" *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (cleaned up). And any remedy "must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Here, if the threatened enforcement of the Act against Plaintiffs gives rise to an injury, then an injunction preventing enforcement against Plaintiffs would redress that injury. *Id.*; *L.W.*, 73 F.4th at 414.

Any injunction here must also be limited to the constitutional problem. Under well-established remedial principles, the courts aim to "enjoin only the unconstitutional applications of a statute" or "sever its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006); Tenn. Code Ann. § 1-3-110. Here, to the extent the Act's reference to "male or female impersonators" in Tenn. Code Ann. § 7-51-1401(12)(A) causes a constitutional violation, it can and should be severed. And to the extent the supposed constitutional violation turns on the (erroneous) view that the law can be applied in situations where minors impermissibly access a forum by evading an age-restriction, the Court should "enjoin" only those allegedly "unconstitutional applications of the law while preserving the other valid applications of the law." *Connection Distrib.*, 557 F.3d at 342.

CONCLUSION

The Court should deny Plaintiffs' motion for a temporary restraining order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I filed the above document using the Court's CM/ECF system on August 31, 2023, which electronically served a copy to all counsel of record:

/s/ J. Matthew Rice
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