No.

In the Supreme Court of the United States

FRIENDS OF GEORGE'S, INC.,
PETITIONER

v.

STEVEN J. MULROY, DISTRICT ATTORNEY GENERAL OF SHELBY COUNTY, TENNESSEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MELISSA J. STEWART
DONATI LAW, PLLC
1545 Union Avenue
Memphis, TN 38104
(901) 278-1004

GREGORY M. LIPPER
Counsel of Record
LIPPER LAW PLLC
1325 G Street NW, Suite 500
Washington, DC 20005
(202) 996-0919
glipper@lipperlaw.com

QUESTION PRESENTED

In response to a drag performance at a local pride festival, the Tennessee legislature enacted the Adult Entertainment Act, which criminalizes drag and other performances that are "harmful to minors" and take place in "any location" where the performance "could be viewed" by someone "who is not an adult." Petitioner is Friends of George's, Inc. (FOG), a nonprofit organization that produces "drag-centric" performances in Shelby County, Tennessee. After FOG's First Amendment challenge to the Act, the district court enjoined enforcement of the Act in Shelby County—concluding that the Act impermissibly restricts speech on the basis of its content and viewpoint and was enacted for the purpose of chilling constitutionally protected speech by drag performers.

But a divided court of appeals imposed two narrowing constructions on the Tennessee law and held that, as revised by the court of appeals, the Act did not apply to petitioner's conduct and petitioner hence lacked Article III standing to challenge the Act in federal court. Each narrowing construction, however, contradicted the Act's text; and no Tennessee court has interpreted the 2023 Act, let alone adopted the narrowing constructions imposed by the court of appeals. The court of appeals instead extended a decades-old Tennessee Supreme Court decision, interpreting a different Tennessee law, in a manner neither dictated nor authorized by the Tennessee Supreme Court. This petition, which seeks summary reversal of the court of appeals' decision, presents the following question:

When evaluating a constitutional challenge to a state statute, may a federal court unilaterally narrow the statute's scope in a manner that contradicts the statutory text and is neither dictated nor authorized by decisions of the state's highest court.

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellees in the court of appeals) is Friends of George's, Inc.

Respondent (defendant-appellant in the court of appeals) is Steven J. Mulroy, in his official capacity as the District Attorney General of Shelby County, Tennessee.

Respondents (intervenors-appellees in the court of appeals) are Blount Pride, Inc.; and Matthew Lovegood.

CORPORATE DISCLOSURE STATEMENT

Friends of George's, Inc. is a 501(c)(3) nonprofit organization. It is not a publicly owned corporation and does not issue stock. Nor is it owned by any parent corporation with financial interest in the outcome of this case.

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Statutory Provisions 2

Statement 2

A. Two Tennessee state legislators object to, and sue to enjoin, performance of a family-friendly drag show during a pride celebration 2

B. Tennessee enacts the Adult Entertainment Act 3

C. Friends of George's challenges the AEA in federal court 5

D. The district court enjoins enforcement of the Act in Shelby County. 7

1. The district court holds that FOG has Article III standing to bring a pre-enforcement challenge to the AEA 7

2. The district court holds that the AEA restricts speech on the basis of content and viewpoint and was enacted to chill protected speech 9

3. The district court concludes that Mulroy's proposed narrowing constructions are "unmoored from the text" and would "rewrite the statute" 11

E. After narrowing the statute in two ways, the court of appeals holds that Friends of George's lacks Article III standing to challenge the AEA. 12

Reasons for Granting the Petition 14

Summary reversal is warranted because the court of appeals rewrote the AEA in a manner that was neither dictated nor authorized by the state's highest court. 14

A. The court of appeals improperly rewrote the Tennessee AEA. 15

1. The court of appeals improperly rewrote the definition of "harmful to minors" 16

2. The court of appeals improperly inserted a scienter requirement that was omitted from the AEA 18

B. Summary reversal is appropriate because the court of appeals improperly rewrote state law to foreclose judicial review on the merits. 19

Conclusion 23

TABLE OF AUTHORITIES

Cases

Allen v. *State*,
No. M2005-00601-CCA-R3-PC, 2006 WL 618297
(Tenn. Crim. App. Mar. 13, 2006) 17

Arizonans for Off. Eng. v. *Arizona*,
520 U.S. 43 (1997) 15

Arkansas v. *Sullivan*,
532 U.S. 769 (2001) (per curiam) 14

Bradshaw v. *Richey*,
546 U.S. 74 (2005) (per curiam) 15, 19, 20

City of Chicago v. *Morales*,
527 U.S. 41 (1991) 15

Davis-Kidd Booksellers, Inc. v. *McWherter*,
866 S.W.2d 520 (Tenn. 1993) 11, 17, 19

HM Fla.-ORL, LLC v. *Griffin*,
679 F. Supp. 3d 1332 (M.D. Fla. 2023) 22

Imperial Sovereign Ct. v. *Knudsen*,
699 F. Supp. 3d 1018 (D. Mont. 2023) 22

McKesson v. *Doe*,
141 S. Ct. 48 (2020) (per curiam) 15, 20, 21

Sexton v. *Beaudreaux*,
585 U.S. 961 (2018) (per curiam) 19

State v. *Cross*,
No. M2009-01179-CCA-R3-CD, 2011 WL 2085662
(Tenn. Crim. App. May 25, 2011) 17

State v. *Foster*,
No. E2018-01205-CCA-R3-CD, 2019 WL 1546996
(Tenn. Crim. App. Apr. 9, 2019) 17

State v. *Stewart*,
No. M2011-01994-CCA-R3-CD, 2013 WL 3820992
(Tenn. Crim. App. July 22, 2013) 17

United States v. *Stevens*,
559 U.S. 460 (2010) 22

Virginia v. *Am. Booksellers Ass'n, Inc.*,
484 U.S. 383 (1988) 21

Woodlands Pride, Inc. v. *Paxton*,
694 F. Supp. 3d 820 (S.D. Tex. 2023) 22

Statutes

28 U.S.C. 1254(1) 1

Adult Entertainment Act,
Tenn. Code § 7-51-1401 *et seq.* 2, 4

Tenn. Code § 7-51-1401(3)(A) 4

Tenn. Code § 7-51-1407(c)(1) 4, 5

Tenn. Code § 39-17-901 12

Tenn. Code § 39-17-901(14)(A) 5

Tenn. Code § 39-17-901(6) 5, 16, 17

Tenn. Code § 39-17-901(8) 16

Tenn. Code § 39-17-911 .... 17, 18

Tenn. Code § 39-17-914 17

Tenn. Code § 40-35-111(b)(5) 5

Tenn. Code § 49-1-221(a)(1)(C)(ii) 18

Other Authorities

Adult Entertainment Act,
2023 Tenn. Pub. Acts, ch. 2 3

Tenn. R. Sup. Ct. 1 21

In the Supreme Court of the United States

No.

FRIENDS OF GEORGE'S, INC.,
PETITIONER

v.

STEVEN J. MULROY, DISTRICT ATTORNEY GENERAL OF SHELBY COUNTY, TENNESSEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–17a) is reported at 104 F.4th 431. The opinion of the district court (App. 60a–143a) is reported at 675 F. Supp. 3d 831.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2024 (App. 1a). A petition for rehearing was denied on September 20, 2024 (App. 134a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

The relevant portions of the Adult Entertainment Act (AEA or Act), Tenn. Code § 7-51-1401 *et seq.*, are reproduced in full in the appendix to this petition (App. 136a–145a).

STATEMENT

A. Two Tennessee state legislators object to, and sue to enjoin, performance of a family-friendly drag show during a pride celebration.

In October 2022, Jackson Pride planned a drag show as part of the annual pride celebration taking place in Jackson, Tennessee. Jackson Pride's performance was open to the public and designed to be "family-friendly and appropriate for people of all ages." 2:23-cv-02176 Compl. ¶ 18. After some community members objected to the planned performance in a public park, and the resulting public backlash, city officials and members of the Jackson Pride Committee agreed to move the event indoors. *Id.* ¶ 22.

Still, two Tennessee state legislators went to court in an effort to shut down Jackson Pride's performance. State Representative Chris Todd and State Senator Ed Jackson, joined by members of the First United Methodist Church, asked the Madison County chancery court to classify the drag show as "a public nuisance" and enjoin the City of Jackson from granting a permit to Jackson Pride organizers. *Id.*, Ex. 1. The state legislators argued that any drag show, no matter what its content, was an "adult cabaret," which Tennessee law banned from taking place within 1,000 feet of a church. *Ibid.*

Although even organizers had repeatedly stressed that the drag show had been thoroughly vetted to be family-friendly, and that no lewd or sexual content was permitted, Rep. Todd claimed that the drag show was

"clearly meant to groom and recruit children to this lifestyle * * * that is child abuse and we will not have that here." *Id.* ¶ 24. When pressed about how he could make that claim without knowing anything about the show's contents, Rep. Todd repeated, "this type of performance and its content is the child abuse." *Id.* ¶ 25.

With Jackson Pride imminent and given the prospect of a long legal fight, organizers agreed to exclude anyone younger than 18 years old. "I think moving forward," said Rep. Todd, "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." *Id.* ¶ 26.

B. Tennessee enacts the Adult Entertainment Act.

1. In January of 2023, Rep. Todd introduced the Adult Entertainment Act ("the AEA" or "the Act"). See 2023 Tenn. Pub. Acts, ch. 2. Tennessee's obscenity statute already prohibits sexually explicit performances in front of children. Yet when Rep. Todd was asked about the need for the AEA—and "if there were any times when adult cabaret in public has harmed his constituents" (App. 67a)—"not once did he mention any overly sexual content that affects children" (*Id.* at 111a).

Instead, Rep. Todd invoked the Jackson Pride drag show, which he "had not yet seen." *Ibid.* He explained that "we had a local group decide to [perform] a quote 'family-friendly pride'—or a 'family friendly' drag show." *Id.* at 68a (quotation marks omitted). Due to his lawsuit against Jackson Pride, he added, "the 'drag show' was 'forced to be indoors and 18 and up only.'" *Ibid.*

"Drag," in fact, "was the one common thread in all three specific examples of conduct that was considered 'harmful to minors.'" *Id.* at 110a. Although the legislative record has few mentions of harm to minors, the record "is replete with references to the expressive conduct of 'male

or female impersonators,' 'drag shows,' 'Pride' events, and more." *Id.* at 115a.

Governor Lee signed the AEA into law on February 27, 2023. *Id.* at 57a. The Act was scheduled to take effect just over a month later, on April 1. *Id.* at 60a.

2. The Act amends Tennessee Code § 7-51-1401 *et seq.* Before the AEA, these provisions regulated the location, hours, and operations of commercial, adult-oriented businesses, such as strip clubs, and violations were misdemeanors. Under the AEA, however, these provisions would regulate performers themselves.

The Act makes it a crime "to perform adult cabaret entertainment" either on public property or at "a location" where it "could be viewed by a person who is not an adult." *Id.* § 7-51-1407(c)(1).

"Adult cabaret entertainment" is a term new to Tennessee law and extends to "male or female impersonators." In particular, the Act defines "adult cabaret entertainment" to mean (a) "adult-oriented performances," (b) "that are harmful to minors," and (c) "that feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers." *Id.* § 7-51-1401(3)(A).

The definition of "harmful to minors" is borrowed from Tennessee's law regulating displays of pornography in stores. "Harmful to minors" refers to "any description or representation"—"in whatever form"—of "nudity, sexual excitement, sexual conduct, excess violence or sadomasochistic abuse" when the 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.

Id. § 39-17-901(6). "Sexual conduct," moreover, includes acts that are "simulated." *Id.* § 39-17-901(14)(A).

Although the first violation of the AEA is a misdemeanor, any additional violation is a Class E felony. *Id.* § 7-51-1407(c)(1). A performer convicted of a second offense faces up to six years in prison. *Id.* § 40-35-111(b)(5).

C. Friends of George's challenges the AEA in federal court.

1. After the governor signed the AEA, a nonprofit group named Friends of George's (FOG) filed suit in federal court and argued that the AEA facially violates the First Amendment. App. 56a. FOG is a "drag-centric theatre group" whose shows feature "male or female impersonators." *Id.* at 81a (quotation marks omitted). Each year since 2011, FOG has performed multiple drag-centric performances without age restrictions. *Id.* at 82a. FOG performs both to "raise money for LGBTQ nonprofits" and to enable both adults and "some non-adults to enjoy drag outside of stigmatized, age-restricted venues." *Id.* at 62a (quotation marks omitted).

Instead of requiring people to visit clubs and bars, FOG holds most of its shows at Memphis's Evergreen Theater. *Ibid.* Sometimes, FOG performs at other venues, and FOG "has no control over age-restrictions there." *Id.* at 63a.

FOG's members write their own material and produce, direct, and perform in their shows. *Id.* at 62a. The shows feature both male and female impersonators; they may include, for instance, "males impersonating females

or even female actors impersonating female characters." *Ibid.*

Although the shows "can be sexual in nature," performers are never naked. *Id.* at 63a. Indeed, FOG "tries to stick around the PG-13 area and not be too risqué so as to merit an R rating." *Ibid.* (quotation marks omitted). FOG's shows "describe or represent sexual content of a wide range: from masturbation wordplay that a fifteen-year-old may or may not understand, to a thinly-veiled, but clearly-highlighted, depiction of sexual acts that would not escape an eight-year-old's attention." *Id.* at 88a–89a.

Friends of George's feared, however, that a "law enforcement officer could view [its] productions and reasonably think that they violate the AEA." *Id.* at 63a–64a. The threat of criminal prosecution—including the prospect of "felony charges"—led FOG "to alter the content of [its] productions and to spend more on security at the Evergreen Theater." *Id.* at 64a.

2. Shortly after filing suit, FOG filed a new complaint naming District Attorney General Mulroy as the defendant. 2:23-cv-02176 Compl. ¶ 6. Even after he was named as a defendant, Mulroy did not disavow the intent to enforce the Act. On the contrary, he still "intends to enforce all State of Tennessee laws that fall within his prosecutorial jurisdiction, including the felony and misdemeanor crimes recently codified at Tenn. Code Ann. § 7-51-1407." App. 60a.

After granting a temporary restraining order, the district court held a consolidated preliminary injunction hearing and trial on the merits in May 2023. *Id.* at 57a. As part of the evidentiary hearing, the district court watched "videos of three of [FOG's] productions"—two of which the district court watched in full (*Id.* at 82a n.12). Both of

those performances were held at Evergreen Theater, and FOG did not restrict attendance by age. *Id.* at 82a–83a.

During the first performance, four female impersonators discussed "various issues, punctuated by several jokes and innuendos about sexual intercourse and masturbation." *Id.* at 82a. The second performance included three female impersonators. *Id.* at 83a. During the show, performers sang a four-minute song while acting out its lyrics; "the performers made sexual gestures with each other behind a translucent curtain." *Ibid.*

In addition to the two full performances, the district court watched clips of two other performances, including FOG's 2022 holiday program. *Id.* at 63a. The court also heard, and credited, testimony about the contents of three other past FOG productions. *Id.* at 82a. These shows "are typical of [FOG's] productions since 2011." *Id.* at 63a.

D. The district court enjoins enforcement of the Act in Shelby County.

In June 2023, the district court held that the AEA violated the First Amendment and was unconstitutionally vague. The court permanently enjoined District Attorney General Mulroy from enforcing the Act in Shelby County, Tennessee. *Id* at 133a.

1. The district court holds that FOG has Article III standing to bring a pre-enforcement challenge to the AEA.

The district court first considered whether Article III permitted FOG's pre-enforcement challenge to the Act. Although in this case FOG lacked standing to sue on behalf of its members, FOG did have standing to sue on its own behalf. *Id.* at 76a–92a. In considering the threat of enforcement, the court considered only "potential enforcement in Shelby County." *Id.* at 81a. And the court concluded that FOG had Article III standing to challenge the Act, because "the certainly impending threat of the

AEA's enforcement on [FOG] caused an injury that a favorable ruling would redress." *Id.* at 89a.

The district court found that FOG intends "to continue producing drag performances with male or female impersonators" and "drag-centric performances." *Id.* at 63a. Yet given the risk of felony charges under the Act, FOG would need either to cancel its shows or add age restrictions to events that always have "been open to all ages." *Id.* at 87a (quotation marks omitted).

Although FOG believed that its performances are not harmful to minors, neither FOG nor its performers "are law enforcement officers tasked with the AEA's enforcement." *Id.* at 88a. The officer charged with enforcement, District Attorney Mulroy, "stipulate[d] that [he] intends to enforce the AEA." *Id.* at 91a. And FOG "can hold the conviction that its productions are not harmful to minors while harboring the fear that [the District Attorney], armed with a criminal statute, disagrees." *Id.* at 88a. Ultimately, Article III does not require FOG "to eat the proverbial mushroom to find out whether it is poisonous." *Id.* at 92a.

No matter what FOG believed subjectively, the Act also lacks "textual scienter requirement, safe harbors, or even affirmative defenses—like parental consent." *Id.* at 91a. What is more, the Act "covers a wide geographical reach: 'in a location where adult cabaret entertainment could be viewed by a person who is not an adult.'" *Ibid.* Under these circumstances, FOG's fear of prosecution "is not merely speculative but certainly impending." *Ibid.*

The district court further ruled that, "Plaintiff's own injury allows it to assert the interests of parties not before this court under the Supreme Court's relaxed prudential standing for First Amendment substantial overbreadth challenges." *Id.* at 84a. At trial, the court heard "uncon-

troverted evidence" that highlighted "potentially unconstitutional applications of AEA in Shelby County." *Id.* at 91a.

2. The district court holds that the AEA restricts speech on the basis of content and viewpoint and was enacted to chill protected speech.

a. On the merits, the court concluded that the Act, on its face, restricts speech on the basis of its content and viewpoint. *Id.* at 98a, 100a. As to the latter, the restriction on speech by "male or female impersonators" classifies speech according to its "viewpoint of gender identity." *Id.* at 103a. For instance, the Act is unlikely to prohibit the speech of a male who "holds a guitar and wears an 'Elvis Presley' costume that is revealing without being legally obscene," but is more likely to prohibit the speech of a female who "wore the same Elvis costume and engaged in the same performance." *Id.* at 103a–104a.

b. The court further concluded, as an alternative and independent basis for its conclusion, that the Act was enacted "for the impermissible purpose of chilling constitutionally-protected speech." *Id.* at 70a. In reaching this conclusion, the district court considered both the Act's text and, at both parties' request, the legislative history; the court considered the latter "with reluctance." *Id.* at 106a.

On its face, concluded the district court, "the AEA regulates an area that is of an alarming breadth." *Id.* at 112a. There is "neither a textual scienter requirement nor affirmative defenses," such as for parental consent. *Id.* at 124a. And while performers can be criminally liable even if minors viewed the performances with their parents' consent, the Act imposes "no punishment [on] the parent who brings their minor child to view adult cabaret entertainment." *Id.* at 120a.

In addition, the Act does not authorize performances at "age-restricted venues"; instead, it prohibits performances anywhere they "could be viewed by a person who is not an adult." Given this provision, the Act applies "anywhere in the world—anywhere a child could view it means anywhere." *Id.* at 112a. Likewise, the legislative history "strongly suggests that the AEA was passed for an impermissible purpose": "chilling constitutionally-protected speech." *Id.* at 107a. Ultimately, the court concluded, "the AEA is geared towards placing prospective blocks on drag shows—regardless of their potential harm to minors." *Id.* at 111a.

c. The court concluded that the Act did not survive strict scrutiny. District Attorney Mulroy likewise conceded that unless the district court adopted his proposed narrowing constructions, "the AEA fails strict scrutiny." *Id.* at 121a n.29.

Although Tennessee "has a compelling state interest in protecting the physical and psychological well-being of minors," the Act was neither narrowly tailored nor the least restrictive means of advancing this interest. *Id.* at 57a. Among other issues, the Act "criminally sanctions qualifying performers virtually anywhere—this includes private events at people's homes or arguably even age-restricted venues." *Id.* at 120a. The Act also "contains no textual scienter requirement and no affirmative defenses"—not even "the affirmative defense of parental consent." *Ibid.*

d. Finally, the district court held that the Act is both substantially overbroad and unconstitutionally vague. *Id.* at 125a, 130a. The Act is unconstitutionally vague because the "harmful to minors" standard "applies to minors of all ages, so it fails to provide fair notice of what is prohibited, and it encourages discriminatory enforcement." *Id.* at 70a. And it is substantially overbroad because it applies

not only on public property, but also "'anywhere' a minor could be present." *Ibid.*

3. The district court concludes that Mulroy's proposed narrowing constructions are "unmoored from the text" and would "rewrite the statute."

In both his standing and merits arguments, District Attorney General Mulroy asked the district court to apply various narrowing constructions of the Act. But these proposed narrowing constructions, the district court concluded, were "unmoored from the text" and "would require the Court to rewrite the statute." *Id.* at 71a. And the proposed constructions were neither dictated nor authorized by decisions of the Tennessee Supreme Court.

a. The district court declined to read a scienter requirement into the Act, given that no scienter requirement was found in the statutory text. *Id.* at 111a. At trial, Mulroy argued that a 1993 Tennessee Supreme Court case, *Davis-Kidd Booksellers, Inc.* v. *McWherter*, 866 S.W.2d 520 (Tenn. 1993), saves the AEA by "narrowing the AEA's scope by adding a non-textual scienter requirement of 'knowing.'" App. 111a. The court pointed out that *Davis-Kidd* construed an entirely different statute, which contained not only a scienter requirement, but "an affirmative defense for parental consent" as well as "language that explicitly attempts to create the 'adult-only' zones that Defendant ascribe to the AEA." *Id.* at 111a–112a. What is more, "[n]othing in the legislative history indicated that the legislators even contemplated adding" a scienter requirement. *Id.* at 112a.

b. Mulroy also argued that the Act applied only to performances lacking serious literary, artistic, political, or scientific value for a reasonable 17-year-old minor. *Id.* at 125a. This proposed construction, observed the district court, "veers so far from the AEA's text that neither reasonable people nor officers in Shelby County would have

fair notice of the AEA's meaning." *Id.* at 89a. Given the Act's text, "a reasonable officer watching these performances could conclude they are harmful to children, say a five- or eight-year-old, and arrest [FOG's] performers." *Id.* at 90a.

Mulroy argued, however, that the narrower standard was required by *Davis-Kidd*. But *Davis-Kidd*, the district court observed, interpreted a different Tennessee statute, which made it a "criminal offense for a person to display for sale or rental a visual depiction [of various media], which contains material harmful to minors anywhere minors are lawfully admitted." *Id.* at 112a (quoting 866 S.W.2d at 522). *Davis-Kidd* did not directly interpret § 39-17-901, which supplies the definition of "harmful to minors" to the AEA. *Id.* at 126a.

As a result, the district court declined "to accept an atextual construction of clear language." *Ibid.* Mulroy's argument, explained the court, would "transform" *Davis-Kidd* to hold "that the *harmful to minors standard in Tenn. Code. Ann. § 39-17-901* applies only to those materials" lacking value for a reasonable 17-year-old minor. *Ibid.* (emphasis in original). "The Tennessee Supreme Court never held that, and neither will this Court." *Ibid.*

E. After narrowing the statute in two ways, the court of appeals holds that Friends of George's lacks Article III standing to challenge the AEA.

A divided panel of the court of appeals reversed. The court of appeals held that FOG did not have Article III standing because it had not suffered an injury-in-fact Based on its reading of *Davis-Kidd*, the panel majority accepted two narrowing constructions of the Act that the district court had considered and rejected.

First, the panel interpreted *Davis-Kidd*, the Tennessee Supreme Court's decision interpreting a "visual depiction" law, to confine the AEA to performances that

"lack serious literary, artistic, political or scientific values for reasonable, 17-year-old minors." App. 6a. Although *Davis-Kidd* explicitly limits its holding to "the display statute, Tenn. Code Ann. § 39- 17-914," the panel majority read *Davis-Kidd* to interpret "harmful to minors" to always be confined to speech which lacks value for a reasonable 17-year-old minor. *Ibid.*

Second, while the AEA's text includes no scienter requirement, the panel applied *Davis-Kidd* to infer a scienter requirement as well. *Id.* at 15a. Although FOG argued that the absence of a scienter provision makes the Act easier to enforce, the court of appeals stated that *Davis-Kidd* implied a knowledge requirement in "all Tennessee obscenity statutes." *Ibid.* On this basis, the majority concluded that the Act is not a strict liability offense and is not easier or more likely to be enforced against FOG. *Ibid.*

Based on these narrowing constructions, the Panel determined that FOG's conduct is not prohibited by the AEA, and that FOG does not face a credible threat of enforcement.

2. Judge Mathis dissented. He explained that federal courts may apply narrowing constructions to state laws only after determining that an unconstitutional law is "readily susceptible to a narrowing construction." *Id.* at 34a. (quoting *Virginia* v. *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393, 397–98 (1988)). The Act, conversely, was not readily susceptible to the narrowing constructions adopted by the majority.

First, *Davis-Kidd* specifically limited its holding to "the display statute, Tenn. Code Ann. § 39-17-914." *Id.* at 33a (citing 866 S.W.3d at 532–533). Although a number of other Tennessee laws incorporate the same definition of

"harmful to minors," Tennessee courts have never applied *Davis-Kidd* to any law other than the original display statute. *Id.* at 33a–34a.

For example, the "harmful to minors" definition is incorporated into a 2022 statute that requires public K-12 schools to use technology for school computers to block materials "that are deemed to be harmful to minors as defined in § 39-17-901." *Id.* at 34a. "Both the legislature and grade schools will be shocked to learn that," according to the majority, "although K-12 school-age children generally range from 5 to 18 years old, public schools must bar only those materials that are harmful to a reason 17-year-old minor." *Ibid.*

Second, the Tennessee Supreme Court "did not impose a scienter requirement to the display statute at issue in that case." *Id.* at 41a. Instead, *Davis-Kidd* "noted that a scienter requirement applied already to the display statute, because of its placement in the Criminal Code." *Ibid.* (citing 866 S.W.2d at 528). The AEA, however, is not found in the Tennessee Criminal Code, and hence is not subject to the default scienter statute. *Ibid.*

REASONS FOR GRANTING THE PETITION

Summary reversal is warranted because the court of appeals rewrote the AEA in a manner that was neither dictated nor authorized by the state's highest court.

Summary reversal is warranted when a court of appeals decision is "flatly contrary to this Court's controlling precedent." *Arkansas* v. *Sullivan*, 532 U.S. 769, 771 (2001) (per curiam). Given the responsibility of sovereign states to interpret their own laws, the Court has repeatedly held that federal courts may not unilaterally rewrite or reinterpret state statutes. Federal courts, the Court has stressed, have "no authority to construe the language of a state statute more narrowly than the construction

given by that State's highest court." *City of Chicago* v. *Morales*, 527 U.S. 41, 61 (1991). Even when the state statute is novel or ambiguous, "[f]ederal courts lack competence to rule definitively on the meaning of state legislation." *Arizonans for Off. Eng.* v. *Arizona*, 520 U.S. 43, 48 (1997).

Here, however, the court of appeals rewrote the AEA in two different ways—revising the statutory definition of "harmful to minors" and inferring a scienter requirement that does not exist. These interpretations contradicted the AEA's text. The court of appeals did not seek guidance from the Tennessee Supreme Court, which has not yet interpreted the Act, let alone narrowed it. And while the court of appeals invoked the Tennessee Supreme Court's earlier decision in *Davis-Kidd*, that decision interpreted a different statute; Tennessee courts have not applied *Davis-Kidd* to similar laws, as the court of appeals mistakenly assumed.

When, as here, federal courts have tried to rewrite state law—or even to interpret an ambiguous state law without first consulting the state's highest court—the Court has not hesitated to reverse those judgments summarily. See *Bradshaw* v. *Richey*, 546 U.S. 74, 78 (2005) (per curiam); *McKesson* v. *Doe*, 141 S. Ct. 48, 50–51 (2020) (per curiam). Summary reversal is especially appropriate here. By rewriting Tennessee's AEA, the court of appeals has prevented FOG from challenging it on the merits, and has authorized Shelby County to enforce the Act's viewpoint-based criminal ban against an unpopular group's protected speech.

A. The court of appeals improperly rewrote the Tennessee AEA.

In holding that the AEA did not cover FOG's conduct, the court of appeals impermissibly rewrote the Act in two ways. First, the court of appeals rewrote the Act's specific

definition of "harmful to minors." Second, the court of appeals created a scienter requirement absent from the Act itself. Neither construction has been adopted by the Tennessee Supreme Court, which has never construed the AEA, and whose earlier decision construing a different statute has not been extended to similar laws.

1. *The court of appeals improperly rewrote the definition of "harmful to minors."*

The AEA criminalizes a wide range of speech that is "harmful to minors," whose definition the Act incorporates from Tennessee Code § 39-17-901(6). That provision refers to suitability or value to all "minors" (*ibid.*) and the same statute defines "minor" to mean "any person who has not reached eighteen (18) years of age and is not emancipated" (*id.* § 39-17-901(8)). Given the undisputed testimony that FOG's shows are unlikely to be suitable for minors of all ages, FOG faces a concrete risk of enforcement under the AEA as written.

But instead of applying the clear statutory text, however, the court of appeals held that "harmful to minors" means something narrower: lacking value for a reasonable 17-year-old minor. While the panel purported to find this requirement in a state court's interpretation of state law, the Tennessee Supreme Court's decision neither supports nor permits this interpretation.

According to the court of appeals, in *Davis-Kidd* the Tennessee Supreme Court held that the phrase "harmful to minors" always applies "'only to those materials which lack serious literary, artistic, political, or scientific value *for a reasonable 17-year-old minor.*'" App. 6a (emphasis added by panel). That misstates both the nature and scope of *Davis-Kidd*'s holding.

Davis-Kidd did not purport to narrow § 39-17-901(6) for all its applications across the Tennessee code. Instead, *Davis-Kidd* focused on one statute, Tenn. Code § 39-17-

914, which barred the display of visual materials, such as videos and magazines, containing materials "harmful to minors." According to *Davis-Kidd*, this "display statute" applies only to "materials which lack serious literary, artistic, political, or scientific value for a reasonable 17-year-old minor." 866 S.W.2d at 528. Rather than narrow the scope of § 39-17-901(6) universally, *Davis-Kidd* held only that "the display statute is readily susceptible" to this narrowing construction. 866 S.W.2d at 528; see also *id.* at 522 (same); *id.* at 532–33 (same).

Tellingly, *Davis-Kidd* also considered a constitutional challenge to a second criminal statute, Tenn. Code § 39-17-911. See 866 S.W.2d at 531. Like the display statute, § 39-17-911 adopted the definition of "harmful to minors" found in § 39-17-901(6). But *Davis-Kidd* did not apply the same narrowing construction to § 39-17-911. See 866 S.W.2d at 531. And while § 39-17-911 continues to be enforced, Tennessee courts have not narrowed it with a "reasonable 17-year-old-minor" standard. See, *e.g.*, *State* v. *Foster*, No. E2018-01205-CCA-R3-CD, 2019 WL 1546996, at *17–18 (Tenn. Crim. App. Apr. 9, 2019) (upholding conviction under § 39-17-11 for defendant who showed explicit material to a 15-year-old minor); *State* v. *Stewart,* No. M2011-01994-CCA-R3-CD, 2013 WL 3820992, at *17–18 (Tenn. Crim. App. July 22, 2013) (same for defendant who showed explicit material to a 9-year-old minor); *State* v. *Cross*, No. M2009-01179-CCA-R3-CD, 2011 WL 2085662, at *8 (Tenn. Crim. App. May 25, 2011) (same for defendant who showed explicit material to an 8-year-old minor); *Allen* v. *State*, No. M2005-00601-CCA-R3-PC, 2006 WL 618297, at *4 (Tenn. Crim. App. Mar. 13, 2006) (same for defendant who showed explicit material to a 12-year-old minor).

Likewise, and as detailed by Judge Mathis in dissent, the same language is incorporated into a recent state law

requiring public schools to block computer materials "that are deemed to be harmful to minors as defined in § 39-17-901." Tenn. Code § 49-1-221(a)(1)(C)(ii). *Davis-Kidd* notwithstanding, no Tennessee court has narrowed that law in the manner suggested by the court of appeals. Indeed, legislators, principals, teachers, and school librarians would "be shocked to learn that, although K-12 school-age children generally range from 5 to 18 years old, public schools must bar only those materials that are harmful to a reasonable 17-year-old minor." App. 34a.

Like § 39-17-911 and § 49-1-221, the AEA has not been interpreted by the Tennessee Supreme Court to focus only on value to a "reasonable 17-year-old minor." Instead of rewriting and extending *Davis-Kidd* to narrow the AEA, the court of appeals was required to accept *Davis-Kidd*'s limited scope as decided by the Tennessee Supreme Court.

2. The court of appeals improperly inserted a scienter requirement that was omitted from the AEA.

The panel improperly rewrote the AEA in a second way, by inferring a scienter requirement absent from the statutory text. In arguing that it faced a credible threat of enforcement, FOG observed that the AEA makes enforcement easier and more likely because it creates a strict-liability crime. The court of appeals majority did not suggest that FOG had overlooked a scienter provision in the AEA's text. Instead, the court of appeals applied *Davis-Kidd* to hold that for "'criminal statutes regulating obscenity, the State must establish that the defendant had *knowledge of the contents and character* of the' exhibits at issue." App. 15a (quoting 866 S.W.2d at 528) (emphasis added by court of appeals). This universal rule, however, is not found in *Davis-Kidd* and did not come from the Tennessee Supreme Court.

Davis-Kidd did not imply an atextual scienter requirement in all Tennessee obscenity laws; it did not even imply an atextual scienter requirement in the display statute at issue in *Davis-Kidd*. In the quoted language, the Tennessee Supreme Court observed that the display statute is located in Title 39—the Tennessee Criminal Code—whose text codifies a default scienter requirement to all offenses "within this title." See 866 S.W.2d at 529 (citing Tenn. Code § 39-11301). *Davis-Kidd*, in short, applied statutory text as written: Title 39's default mens rea provision applies to criminal statutes located in Title 39.

Unlike the display statute, the AEA is not located in Title 39. The AEA is located in Title 7, which does not codify a default mens rea. Because *Davis-Kidd* merely applied a textual scienter requirement as dictated by the statutory text, *Davis-Kidd* did not empower the court of appeals to invent a scienter requirement that is absent from the text of the Tennessee Code.

B. Summary reversal is appropriate because the court of appeals improperly rewrote state law to foreclose judicial review on the merits.

By twice rewriting the AEA, the court of appeals "committed fundamental errors that this Court has repeatedly admonished courts to avoid." *Sexton* v. *Beaudreaux,* 585 U.S. 961, 967 (2018) (per curiam). In this case, the court of appeals' errors are at least as fundamental as in two other courts of appeals decisions that the Court summarily reversed.

First, in *Bradshaw* v. *Richey*, the Court summarily vacated the court of appeals' decision holding that the Due Process Clause entitled the defendant to federal habeas corpus relief because he was convicted of aggravated felony murder, under Ohio law, on a theory of transferred intent. See 546 U.S. at 75. Notwithstanding a binding de-

cision from the Ohio Supreme Court permitting the application of transferred-intent doctrine to the defendant's fatal arson, the Sixth Circuit concluded that at the time "transferred intent was not a permissible theory for aggravated felony murder under Ohio law." *Id.* at 75–76.

Although the Sixth Circuit based this conclusion on a specific-intent provision in the governing Ohio statute, that reading of the statute was too broad: "this clause by its terms did not apply to every case in which the defendant was charged with aggravated felony murder, but rather only to those in which intent to kill was sought to be proved from the inherent dangerousness of the relevant felony." *Id.* at 77–78 (citing Ohio Rev. Code § 2903.01(D) (Anderson 1982)). And while the Sixth Circuit cited to dicta from a later decision of an intermediate Ohio appellate court, "that case was decided long after the 1986 offense for which [the defendant] was convicted." *Id.* at 78.

As *Richey* reflects, federal courts err when they disregard binding interpretations from a state's highest court, and also when they extend narrower state provisions or rulings beyond their proper scope. Here, the court of appeals disregarded both the precise, limited scope of *Davis-Kidd*—which predated the AEA by more than thirty years—and the specific, plain text of the AEA itself.

Second, the summary vacatur in *McKesson* v. *Doe* reinforces that even if a state law is ambiguous, federal courts err by resolving those ambiguities unilaterally, especially when the precise meaning of state law informs significant constitutional questions. In *McKesson*, the Fifth Circuit held that the First Amendment did not prohibit state tort liability against a protest's organizer for a police officer's injuries caused during the protest by an unknown third party. See 141 S. Ct. at 49–50. But the Fifth's Circuit's interpretation of the underlying state

tort law was "too uncertain a premise on which to address the [First Amendment] question presented." *Id.* at 50. Although certification usually is not mandatory, *McKesson* featured "novel issues of state law" and a potential conflict "between state law and the First Amendment." *Id.* at 51. Summary vacatur was appropriate because the Fifth Circuit "should not have ventured into so uncertain an area" of state law—one that was "fraught with implications for First Amendment rights"—"without first seeking guidance on potentially controlling" state law from the Louisiana Supreme Court. *Ibid.*

McKesson, moreover, featured state law ambiguity; in this case, the court of appeals unilaterally interpreted the Tennessee AEA contrary to its plain text. Even if the AEA's text had been more ambiguous, the court of appeals could have certified its question to the Tennessee Supreme Court, because there was "no controlling precedent" interpreting the AEA. Tenn. R. Sup. Ct. 1.

Third, there was even less basis for the court of appeals to rewrite the AEA before evaluating standing. As the dissent explained, this was the wrong order of operations. In *Virginia* v. *American Booksellers Association, Inc.*, 484 U.S. 383 (1988), the Court first concluded that, even if the statute were ambiguous, the plaintiffs had standing to bring a pre-enforcement First Amendment challenge given their "actual and well-founded fear that the law will be enforced against them." *Id.* at 393. Only then did the Court certify questions to the Virginia Supreme Court to determine whether the statutes were "readily susceptible to a narrowing construction that would make it constitutional." *Id.* at 397 (quotation marks omitted).

But when the court of appeals evaluated FOG's constitutional challenge to the AEA, the state law was nar-

rowed at the wrong time (before evaluating standing, rather than after), by the wrong actor (the federal court of appeals, rather than the Tennessee Supreme Court), using the wrong sources of law (state court decisions interpreting a different statute, rather than the plain text of the AEA itself). With the court of appeals' narrowing constructions, FOG is unable to challenge the law before it is enforced against it; without them, FOG received relief on the merits and protection from unlawful criminal prosecution (*id.* at 55a–133a).

Finally, the court of appeals' errors have allowed Shelby County to enforce criminal law of "alarming breadth" (App. 112a), that restricts speech on the basis of content and viewpoint (*Id.* at 69a), that was enacted to chill protected speech by unpopular performers (*Id.* at 70a), and that "is not narrowly tailored to further the interest of safeguarding minors" (*id.* at 48a). Other states' comparable bans on drag shows have uniformly been held to be unconstitutional and remain enjoined. See, *e.g.*, *HM Fla.-ORL, LLC* v. *Griffin*, 679 F. Supp. 3d 1332 (M.D. Fla. 2023); *Woodlands Pride, Inc.* v. *Paxton*, 694 F. Supp. 3d 820 (S.D. Tex. 2023); *Imperial Sovereign Ct.* v. *Knudsen*, 699 F. Supp. 3d 1018 (D. Mont. 2023).

Because the court of appeals rewrote and reinterpreted Tennessee law, the AEA—and only the AEA—remains fully enforceable. And FOG's performers are left "at the mercy of noblesse oblige." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010).

CONCLUSION

The petition for a writ of certiorari should be granted; the judgment of the court of appeals should be summarily vacated and the case remanded for consideration of petitioner's claims on the merits. Alternatively, the court should grant the writ of certiorari and set the case for full merits briefing and argument.

Respectfully submitted.

MELISSA J. STEWART
DONATI LAW, PLLC
1545 Union Avenue
Memphis, TN 38104
(901) 278-1004

GREGORY M. LIPPER
Counsel of Record
LIPPER LAW PLLC
1325 G Street NW, Suite 500
Washington, DC 20005
(202) 996-0919
glipper@lipperlaw.com

DECEMBER 2024

APPENDIX

TABLE OF CONTENTS

Page

Appendix A — Court of appeals opinion (July 18, 2024) ... 1a
Appendix B — District court order (June 7, 2023) ... 53a
Appendix C — District court findings of fact and conclusions of law (June 2, 2023) ... 55a
Appendix D — Court of appeals order denying rehearing (Sept. 20, 2024) ... 134a
Appendix E — Statutory provisions ... 136a
Tenn. Code:
§ 7-51-1401 ... 136a
§ 7-51-1407 ... 140a
§ 39-11-201 ... 142a
§ 39-17-901 ... 143a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5611

FRIENDS OF GEORGE'S, INC.,
PLAINTIFF-APPELLEE,

v.

STEVEN J. MULROY,
IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES AS THE DISTRICT ATTORNEY GENERAL OF SHELBY COUNTY, TENNESSEE, DEFENDANT-APPELLANT,

BLOUNT PRIDE, INC; MATTHEW LOVEGOOD,
INTERVENORS.

Appeal from the United States District Court for the Western District of Tennessee at Memphis.
No. 2:23-cv-02163—Thomas L. Parker, District Judge.

Argued: February 1, 2024

Decided and Filed: July 18, 2024

Before: SILER, NALBANDIAN, and MATHIS, Circuit Judges.

OPINION

NALBANDIAN, Circuit Judge. Tennessee's Adult Entertainment Act (AEA) makes it an offense to perform adult cabaret entertainment in public or in the potential presence of minors. Friends of George's (FOG), a theater organization that performs drag shows, challenged the AEA as facially unconstitutional. The district court agreed, declaring the AEA unconstitutional in its entirety and permanently enjoining District Attorney General Steven Mulroy from enforcing it anywhere within his jurisdiction (Shelby County, Tennessee). Mulroy now appeals, challenging both FOG's Article III standing and the merits of the injunction. FOG did not meet its burden to show standing, so we REVERSE and REMAND with instructions to DISMISS.

I.

In 2023, the Tennessee General Assembly passed the Adult Entertainment Act (AEA), which makes it an offense "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." Tenn. Code Ann. § 7-51-1407(c)(1) (2023). Although the term "adult cabaret entertainment" is new to Tennessee law, the legislature defined that statutory phrase by reference to existing Tennessee law.

"Adult cabaret entertainment" is defined as "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." Tenn. Code Ann. § 7-51-1401(3)(A) (2023). By its explicit reference to § 39-17-901, the text incorporates the following definition of "harmful to minors":

> 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.

Tenn. Code Ann. § 39-17-901(6) (2023). So the new law prevents children from viewing adult performances.

This definition has existed in the Tennessee Code for decades, *see, e.g.*, 1990 Tenn. Pub. Acts 938 (including an identical definition), and the Supreme Court of Tennessee has interpreted it to refer "only to 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, 522–23, 528 (Tenn. 1993) (emphasis added) (interpreting identical language from Tenn. Code Ann. § 39-17-901(6) (1991)). Additionally, the second component to "adult cabaret entertainment" copies verbatim from a longstanding definition of "[a]dult cabaret." *See* 1987 Tenn. Pub. Acts 842 ("'Adult cabaret' means a cabaret which features *topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers*." (emphasis added)).

Friends of George's (FOG) is an organization that aims to "provide a space outside of bars and clubs where people can enjoy drag shows." *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 843 (W.D. Tenn. 2023) (internal quotation marks omitted). It tries "to stick around the PG-13 area in writing," rather than get "too risqué." R. 81, Trial Tr., p. 30, PageID 1071. And FOG describes its drag shows as an "art form," *id.* at 23, PageID 1064, an art form it likened to "William Shakespeare's plays" and "Ancient Greek theatrical productions," R. 35, FOG Trial Br., p. 3, PageID 489. Even though FOG has never performed "a script play" or any of its "pre-scripted productions" on public property, R. 81, p. 69, PageID 1110, it sells tickets to its shows without distinguishing between adults or minors. FOG says that although its shows do not contain sexual acts, they contain descriptions and representations of sexual conduct that law enforcement might think violates the AEA.

So on March 27, 2023, FOG sought an injunction to prohibit enforcement of the AEA, arguing that the statute violates its First Amendment rights.[1] The district court granted FOG a temporary restraining order on March 31, the day before the AEA was scheduled to take effect. Declining to apply *Davis-Kidd*'s narrowing construction because it would "rewrite the AEA," the district court held that (1) FOG had standing and (2) the AEA violates the First Amendment and is unconstitutionally vague, perma-

[1] Although the AEA targets performers rather than businesses or organizations, § 7-51-1407(c)(1), FOG, as an organization, contends that it can assert standing "as the representative of its members," *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 333 (6th Cir. 2002). This is not a contested issue on appeal.

nently enjoining Mulroy from enforcing the statute anywhere within his jurisdiction (Shelby County, Tennessee). *Friends of Georges*, 675 F. Supp. 3d at 878–79.

Mulroy now appeals, arguing that (1) FOG lacks Article III standing, (2) the AEA is constitutional, and (3) even if the AEA were unconstitutional, the district court's injunction was overbroad.

II.

We review standing and legal conclusions de novo. *Sullivan v. Benningfield*, 920 F.3d 401, 407 (6th Cir. 2019); *Atkins v. Parker*, 972 F.3d 734, 739 (6th Cir. 2020). To establish Article III standing, a "plaintiff must show (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief." *FEC v. Cruz*, 596 U.S. 289, 296 (2022) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Typically "an injury" in this context requires that the government enforce the allegedly unconstitutional law against the challenging party before it has standing to sue. But we have recognized that in some circumstances, standing "can derive from an imminent, rather than an actual, injury, but only when 'the threatened injury is real, immediate, and direct.'" *Crawford v. U.S. Dep't of the Treasury*, 868 F.3d 438, 454 (6th Cir. 2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)). Thus, we have permitted *pre*-enforcement review, but only when the plaintiff (1) "alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest,'" (2) that the challenged statute proscribes, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298

(1979)), and (3) the plaintiff's intention generates a "*certainly impending*" threat of prosecution, *Crawford*, 868 F.3d at 454 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)).

A.

To determine whether FOG intends to engage in a course of conduct that the AEA arguably proscribes, *Susan B. Anthony List*, 573 U.S. at 159, we must first figure out what the AEA proscribes, *id.* at 162 (discussing the broad sweep of the Ohio law at issue). Once we account for the history of the relevant provisions as well as the relevant caselaw, that task is relatively straightforward.

The AEA makes it an offense to perform "adult cabaret entertainment" on public property or anywhere it could be viewed by a minor. § 7-51-1407(c)(1). This targets "adult- oriented performances that are harmful to minors . . . that feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers." § 7-51- 1401(3)(A). And "harmful to minors" expressly incorporates a longstanding definition under Tennessee law, which focuses on whether a performance has "serious literary, artistic, political or scientific values *for minors*." § 39-17-901(6) (emphasis added).

As we noted above, the Supreme Court of Tennessee has interpreted "harmful to minors" before, limiting it "only to those materials which lack serious literary, artistic, political, or scientific value *for a reasonable 17-year-old minor*." *Davis-Kidd*, 866 S.W.2d at 522–23, 528 (emphasis added) (interpreting identical language from Tenn. Code Ann. § 39-17-901(6) (1991)).

The district court, however, declined to apply *Davis-Kidd*'s interpretation of "harmful to minors" to the AEA, calling it "an atextual construction" and reading the

standard to require value "for children as young as four or five." *Friends of Georges*, 675 F. Supp. 3d at 875–76. This was error. It is not atextual to apply a state court's interpretation of state law. It's required. *Rhodes v. Brigano*, 91 F.3d 803, 806 (6th Cir. 1996) ("[T]his Court is bound by the state court's interpretation of its criminal laws."); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (noting that the Supreme Court "repeatedly has held that state courts are the ultimate expositors of state law and that [federal courts] are bound by their constructions except in extreme circumstances" (citing *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875); *Winters v. New York*, 333 U.S. 507 (1948))).

Moreover, the AEA's "harmful to minors" standard, as construed by the Tennessee Supreme Court (1) incorporates the Supreme Court's three-part obscenity test from *Miller v. California* and (2) modifies it to apply to minors. *Compare* 413 U.S. 15, 24 (1973), *with* § 39- 17-901(6). And the Supreme Court has rejected neither feature. First, it has already interpreted vagueness challenges against *Miller*'s obscenity test as "nothing less than an invitation to overturn *Miller*," an invitation it rejected. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 57 (1989). Second, it has also blessed state adaptations of the obscenity test to apply to minors. In *Ginsberg v. New York*, the Supreme Court upheld a "harmful to minors" standard that modified the then-existing obscenity test to apply to "any person under the age of seventeen years." 390 U.S. 629, 635, 645 (1968).

Yet the AEA is even more limited than the New York law upheld in *Ginsberg*. There, the standard was "*any person under* the age of seventeen years." *Id.* at 645 (emphasis added). But here, binding state precedent has made clear that the standard specifically considered value

for "a *reasonable 17-year-old* minor." *Davis-Kidd*, 866 S.W.2d at 528 (emphasis added). And the AEA's "harmful to minors" standard is also consistent with our sister circuits. *See, e.g.*, *M.S. News Co. v. Casado*, 721 F.2d 1281, 1286–87 (10th Cir. 1983); *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127–28 & n.2 (4th Cir. 1989); *Am. Booksellers v. Webb*, 919 F.2d 1493, 1496 (11th Cir. 1990).

In short, the AEA takes (1) adult-oriented performances lacking serious literary, artistic, political, or scientific value for a reasonable 17-year-old[2] that (2) feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers and (3) prohibits them both in public and where minors may view them.

So the burden is on FOG to allege its intention to arguably meet all three elements. Failure on any one shows that FOG's intended performances are not proscribed by the statute.

FOG doesn't perform in public, but it does sell tickets without distinguishing between adults or minors. So minors can view FOG's shows. And as a "dragcentric theatre group," its performances certainly include male or female impersonators or similar entertainers. R. 81, p. 23, PageID 1064. So the crux of this case is whether FOG has met its burden to demonstrate that its shows are arguably adult-oriented performances that lack serious value for a reasonable 17-year-old.

To answer this, we need only look at how FOG describes its performances: an "art form," *id.*, one it likened

---

[2] Tennessee law describes the "harmful to minors" standard in more detail, largely tracking the Supreme Court's *Miller* test and adapting it to minors, *see Ginsberg*, 390 U.S. at 635, but these other provisions are not at issue here.

to Shakespeare and Ancient Greek theater. FOG has not alleged that its performances lack serious value for a 17-year-old. In fact, it insists the exact opposite. Its own witness, a member of FOG's board, conceded that its shows "are definitely appropriate" for a 15- year-old and would "absolutely" have artistic value for a 17-year-old. *Id.* at 73, PageID 1114. According to the witness, FOG tries "to stick around the PG-13 area in writing," rather than get "too risqué." *Id.* at 30, PageID 1071. By its own testimony, FOG has failed to show any intention to even arguably violate the AEA.

What's more, if we accept the district court's interpretation of "harmful to minors," FOG has been breaking obscenity law for years. Before the AEA, it was already a crime to admit minors to view sexually explicit shows that are "harmful to minors" under the same statutory standard. Tenn. Code Ann. § 39-17-911(b) (2023) (unamended since 2000).[3] Yet despite selling tickets without distinguishing between adults or minors, neither FOG nor its performers have ever been charged with violating Tennessee obscenity laws or even threatened with prosecution.

FOG nonetheless claims that its productions might be *seen as* violating the AEA by law enforcement and thus could be proscribed. And at the pre-enforcement stage, FOG need not prove conclusively that its intended course of conduct violates the AEA but only that it is *arguably* proscribed by the statute. *See Davis v. Colerain Township*, 51 F.4th 164, 172 (6th Cir. 2022); *Susan B. Anthony*

---

[3] The AEA's "harmful to minors" definition applies from section 39-17-901 of the Tennessee Code through section 39-17-920, "unless the context requires otherwise." § 39-17-901. This admission law, § 39-17-911(b), is located within that range, and context does not require a different meaning.

List, 573 U.S. at 162. On the other hand, a party alleging that its conduct could be proscribed by the challenged statute cannot rely on an argument that the statute might be misconstrued by law enforcement. *See Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 544 (6th Cir. 2021). And that's essentially what FOG is asking for here—keeping in mind that the district court's rejection of *Davis-Kidd* was error.

And finally to support its claim, FOG presented videos showing sketches from past performances at trial that it believes could be construed as containing adult content. The videos specifically show FOG performers talking about masturbation, simulating sex acts behind a curtain, and engaging in phallic humor. FOG claims these clips prove that its shows may violate the AEA. The district court credited the argument, saying that a "law enforcement officer could view [FOG]'s productions and reasonably think that they violate the AEA." *Friends of Georges*, 675 F. Supp. 3d at 844.

But FOG only presented individual skits and scenes abstracted from the context of an entire show. As FOG admitted at oral argument, it puts on sketch shows, performing roughly ten skits in each. And "[t]he artistic merit of a work does not depend on the presence of a single explicit scene," because "the First Amendment requires that redeeming value be judged *by considering the work as a whole*." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248 (2002) (emphasis added) (citing *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966) (plurality opinion)); *Miller*, 413 U.S. at 24 ("A state offense must also be limited to works which, *taken as a whole*, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, *taken as a whole*, do not have

serious literary, artistic, political, or scientific value." (emphasis added)).

Therefore, to the extent the district court used FOG's videos as independent evidence showing a lack of artistic value for minors, that was also error. And FOG bears the burden to submit enough evidence for us to judge the value of its shows as a whole. Cherry-picked scenes and skits do not remedy FOG's failure to allege any intention to exhibit adult cabaret entertainment—performances lacking value for even reasonable 17-year-olds—to an audience containing minors.

So for a number of reasons, FOG cannot show a pre-enforcement injury without alleging an intention to arguably violate the AEA. *Susan B. Anthony List*, 573 U.S. at 162. It has not, so FOG lacks standing.

B.

But even if FOG alleged an intention to engage in a course of conduct arguably proscribed by the AEA, it would also need to show that this alleged intention to breach the AEA is "arguably affected with a constitutional interest." *Id.* at 159. For example, a plaintiff challenging a law banning protest must show a constitutional interest in protesting. Or a newspaper challenging a censorship law must show a constitutional interest in freely publishing.[4]

[4] This part of the standing analysis inevitably bleeds into the merits a bit because we must trace the contours of FOG's constitutional interest. *See Moncier v. Haslam*, 570 F. App'x 553, 559 (6th Cir. 2014) (finding no standing when Plaintiff had "no recognized right under the United States Constitution" to engage in his intended course of conduct); *see also Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 666–67 (8th Cir. 2023) (deciding at the standing

But the law in this area is clear—there is no constitutional interest in exhibiting indecent material to minors. The Supreme Court's "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) (citing *Ginsberg*, 390 U.S. 629). "The protections of the First Amendment have always adapted to the audience intended for the speech. Specifically, we have recognized certain speech, while fully protected when directed to adults, may be restricted when directed towards minors." *James v. Meow Media, Inc.*, 300 F.3d 683, 696 (6th Cir. 2002); *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (States may "shield[] minors from the influence of [sexual expression] that is not obscene by adult standards."). So the government "may punish adults who provide unsuitable materials to children," so long as non-obscene speech is not "silenced completely in an attempt to shield children from it." *Ashcroft*, 535 U.S. at 251–52.

And, as discussed above, when state law adapts the *Miller* test to minors, the Supreme Court has had no quibble. In fact, the Supreme Court has embraced variations of the *Miller* test that are less specific than the AEA's formulation. *Compare Ginsberg*, 390 U.S. at 645 (upholding a statute that modified the *Miller* test to apply to "*any person under* the age of seventeen years" (emphasis added)), *with Davis-Kidd*, 866 S.W.2d at 528 (interpreting

---

stage that the "student's proposed activity 'concerns political speech' and is 'arguably affected with a constitutional interest'" because the "child wishes to engage in an 'open exchange of ideas' and to express beliefs that others might find disagreeable or offensive" (quoting *Susan B. Anthony List*, 573 U.S. at 161–62)).

the "harmful to minors" standard incorporated into the AEA to specifically consider value for "a *reasonable 17-year-old* minor" (emphasis added)).

The only constitutionally protected expressions implicated by the AEA are adult-oriented performances that can be constitutionally restricted from minors but not from adults—a narrow slice of speech. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 452 (2015). And the statute doesn't even ban these performances, merely restricting them to adult-only zones. § 7-51- 1407(c)(1).

In sum, if FOG's shows, taken as a whole, are an "art form" with artistic value for a reasonable 17-year-old, then the AEA is no restriction. But if FOG deals in adult content *lacking* value for reasonable 17-year-olds, then FOG has no constitutional interest in violating the AEA by exhibiting those performances to minors. *Susan B. Anthony List*, 573 U.S. at 159. Any intention FOG might have to violate the AEA is not arguably affected with a constitutional interest. So FOG lacks pre-enforcement standing because it has shown no injury.

C.

Finally, even if we assume for the sake of argument that FOG successfully alleged an intention to engage in a course of conduct arguably affected with a constitutional interest that is also arguably proscribed by the AEA, *id.*, "mere allegations of a 'subjective chill' on protected speech are insufficient to establish an injury-in-fact for pre-enforcement standing purposes," *McKay v. Federspiel*, 823 F.3d 862, 868–69 (6th Cir. 2016). FOG must also show a "*certainly impending*" threat of prosecution. *Crawford*, 868 F.3d at 454 (quoting *Clapper*, 568 U.S. at 409).

We judge threats of prosecution using a holistic test consisting in four main "*McKay* 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."

Online Merchs. Guild v. Cameron, 995 F.3d 540, 550 (6th Cir. 2021) (quoting *McKay*, 823 F.3d at 869). Each factor cuts against FOG's claim of standing.

FOG only contends that the third and fourth factors weigh in its favor. This is probably because there is no history of past enforcement of the AEA, and FOG has received no warning letters.

As for the third factor, FOG claims that, through the AEA, Tennessee's "legislature has 'emboldened prosecutors in a way that they were not before.'" Appellee Br. at 16 (quoting *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1035 (6th Cir. 2022)). But there, the legislature "may have emboldened prosecutors" by both "making the proscription so much clearer," and by altering the "enforcement mechanism" when it was "not clear" beforehand that "prosecutors had even realized they could collaterally enforce" the prohibition at issue. *Universal Life Church*, 35 F.4th at 1035. Here, the AEA does not clarify the "harmful to minors" standard—it is unchanged. And the authority of prosecutors to enforce the law was always clear. The AEA does not "allow[] any member of the public to initiate an enforcement action."

Online Merchs., 995 F.3d at 550. Instead, "a district attorney general has the sole duty, authority, and discretion to prosecute criminal matters in the State of Tennessee." *State v. Spradlin*, 12 S.W.3d 432, 433–34 (Tenn. 2000).

FOG also argues that the AEA is easier to enforce because it is "a strict liability statute with felony penalties." Appellee Br. at 14. But the Supreme Court of Tennessee already made clear that "[i]n the context of criminal statues regulating obscenity, the State must establish that the defendant had *knowledge of the contents and character* of the" exhibits at issue. *Davis-Kidd*, 866 S.W.2d at 528 (emphasis added). So the AEA "implicitly incorporates the traditional state of mind required for" all Tennessee obscenity offenses. *United States v. Hansen*, 599 U.S. 762, 779 (2023). For all intents and purposes, the AEA is a standard criminal law with no attributes making enforcement easier or more likely.

Finally, FOG argues that "Mulroy has refused to disavow enforcement" because "he has unequivocally stated that he 'intends to enforce all State of Tennessee laws that fall within his prosecutorial jurisdiction, including the [AEA].'" Appellee Br. at 18 (quoting R. 69, Pretrial Order, p. 4, PageID 955). But the disavowal factor focuses on "a particular plaintiff." *Online Merchs.*, 995 F.3d at 550. And Mulroy's stated intention to enforce Tennessee law "in the *abstract* . . . did not suggest that he would enforce the rule against anything like [FOG's] *specific* speech." *Davis*, 51 F.4th at 174.

Under the *McKay* factors, FOG has not shown a certainly impending threat of prosecution.

A quick review of Supreme Court cases yields the same result. In *Steffel v. Thompson*, the Supreme Court found a threat of prosecution where police officers warned

the petitioner twice that if he continued distributing handbills "he will likely be prosecuted," and his companion was, in fact, "arrested and subsequently arraigned on a charge of criminal trespass." 415 U.S. 452, 456, 459 (1974). Similarly, in *Susan B. Anthony List*, the organization "was the subject of a [recent] complaint." 573 U.S. at 164. And in *Holder v. Humanitarian L. Project*, the government had already "charged about 150 persons" with violating the law and declined to disavow prosecution, should the plaintiffs "do what they say they wish to do." 561 U.S. 1, 16 (2010). FOG, by contrast, points to nothing of the like.

The district court, however, ignored *McKay* completely and, in spite of Supreme Court precedent, found "a certainly-impending threat" because it claimed that "a reasonable officer" could "arrest [FOG]'s performers" under the erroneous assumption that the AEA's "harmful to minors" standard considers "a five- or eight-year-old." *Friends of Georges*, 675 F. Supp. 3d at 857. But even if we assume for the sake of argument that this supposed threat of false *arrest* could then amount to a threat of false *prosecution*, "fear [of] wrongful prosecution and conviction under the [AEA]" is "inadequate to generate a case or controversy the federal courts can hear." *Glenn v. Holder*, 690 F.3d 417, 422 (6th Cir. 2012). FOG faces no certainly impeding threat of prosecution.

FOG has shown no pre-enforcement injury and thus lacks standing.

III.

For the reasons set forth above, we REVERSE and REMAND with instructions to DISMISS for lack of standing.[5]

DISSENT

MATHIS, Circuit Judge, dissenting. A bedrock principle of our democratic republic is the protection of unorthodox expression. The freedom to convey one's ideas—no matter how unpopular—was seen as inalienable to the human experience, and the Framers of our Federal Constitution believed such freedom was "essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). It is altogether fitting that they chose to enshrine it atop our Bill of Rights as a "fixed star in our constitutional constellation": "Congress shall make no law . . . abridging the freedom of speech." *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023) (quotation omitted); U.S. Const. amend. I.

Of course, these protections are not absolute. The Supreme Court has "long recognized that the government may regulate certain categories of expression consistent with" the First Amendment. *Virginia v. Black*, 538 U.S. 343, 358 (2003). But the Constitution does not avert its eyes merely because a law mentions such a category.

---

[5] Intervenors Blount Pride and Matthew Lovegood cannot continue this suit without FOG because they only seek relief in Blount County, Tennessee, beyond Mulroy's jurisdiction, so they also lack Article III standing. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986).

Today, we consider a challenge to Tennessee's Adult Entertainment Act ("AEA"). This law prohibits actual or simulated sexual performances by certain types of individuals (like male or female impersonators) that are harmful to minors and that are performed anywhere that a minor can view them. Friends of George's, Inc. ("FOG"), a producer of risqué drag shows in Shelby County, Tennessee, challenged the AEA because it engages in conduct that the AEA criminalizes. FOG sued Shelby County District Attorney Steven Mulroy, contending that the AEA is an unconstitutional content- and viewpoint-based restriction on speech. FOG also argued that the AEA is unconstitutionally overbroad and vague. The district court agreed with FOG and enjoined the Act's enforcement.

The majority finds that FOG lacks standing to sue Mulroy. Because Supreme Court and Sixth Circuit precedent dictate a different result, and because the part of the AEA that FOG has standing to challenge is an unconstitutional content-based restriction on speech, I respectfully dissent.

I.

In 2023, the Tennessee General Assembly enacted the AEA. The AEA amended Tenn. Code Ann. § 7-51-1407—a zoning ordinance governing "adult-oriented establishments"[1] —to impose criminal sanctions on those who perform "adult cabaret entertainment" in certain locations.

---

[1] "Adult-oriented establishment" means "any commercial establishment, business or service, or portion thereof, that offers, as its principal or predominant stock or trade, sexually-oriented material, devices, or paraphernalia or specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded or live and that restricts or purports to restrict admission or to any class of adults." Tenn. Code Ann. § 7-51-1401(5).

See Tenn. Code Ann. § 7-51-1407. Specifically, the AEA provides:

> (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.

Id. The AEA defines "adult cabaret entertainment" 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[.]

Id. § 7-51-1401(3).

Tennessee Senator Jack Johnson introduced the AEA as a bill seeking to "clarify current law."[2] R. 35-1, PageID 515. "[U]nder current law," Senator Johnson explained, "businesses that predominantly provide adult-oriented entertainment must be licensed and age restricted to prevent children from attending." *Id.* at 516; *see also* Tenn. Code Ann. § 7-51-1113(e). The AEA "simply clarifies that

---

[2] The AEA's legislative history is relevant only to the secondary-effects-doctrine discussion in Part IV.B.1 below.

if this type of adult-oriented entertainment occurs in locations that are not required to be regulated . . . because the adult entertainment is not predominant to that business" (*e.g.*, restaurants), "then that business must ensure that the location is age restricted and children are not allowed to view the performance." R. 35-1, PageID 575–76. He stressed that "the bill only applies to performances that are considered harmful to minors," as already defined in Tennessee's "obscenity statute," *see* Tenn. Code Ann. § 39-17-901(6), and that such performances would not be banned entirely: "[The bill] simply says it can't be done on public property, and if it's going to be done in a private venue, then you have to ensure that children are not present." R. 35-1, PageID 516–17. He also stated that the AEA's scope of criminality was narrowly tailored to "the entertainer who acts in violation of this law," rather than "the business where the performance took place." *Id.* at 545.

Multiple members of the Tennessee General Assembly voiced support, with some noting the importance of the bill considering recent "sexual" drag shows witnessed by children. For example, Representative Jason Zachary told of a show in Knox County that was marketed as "family-friendly," but had previously "show[n] stripping, simulating of sexual acts, and inappropriate touching" at a prior performance. *Id.* at 602. Senator Johnson stated that he had "received hundreds of calls, e-mails from outraged parents that this type of performance was taking place in front of kids." *Id.* at 520. And Senator Kerry Roberts said that he did not "think it [was] appropriate for grown men to perform in front of children simulated sex acts." *Id.* at 567.

Landon Starbuck, the founder of Freedom Forever which "combats all forms of child exploitation," testified

at a committee hearing as a supporting witness. *Id.* at 525. She declared a "pandemic of child sexual abuse in America," and claimed that "early sexualization and exposure to explicit adult content" was harmful to youths because "[i]t grooms them into accepting adult sexual behavior as normal, healthy, and even celebrated," while encouraging them to "simulate and participate in high-risk sexual behaviors." *Id.* When asked to provide an example, Ms. Starbuck mentioned an incident at Boro Pride involving "an adult performer" who spread "their legs in front of children." *Id.* at 530.

However, the AEA was not met with universal acceptance. Several individuals opposed the bill's passage, including David Taylor, a Nashville business-owner whose operations "cater predominantly to the LGBTQ+ community" and whose employees include "13 full-time and more than 60 guest drag performers." *Id.* at 533. Mr. Taylor expressed concern that the "bill places male and female impersonation in the category of strippers, go-go dancers, and exotic dancers." *Id.* at 534. Performances by strippers and other dancers are regulated because of the behavior exhibited, he reasoned; drag impersonation was distinct because it "is solely based on the choice of clothing by a human being." *Id.*

II.

Founded in 2010, FOG is a nonprofit theater company based in Memphis, Tennessee. FOG's mission is to stage three drag-centric productions a year to raise money for fellow LGBTQ organizations. These shows feature sketches that are written, produced, and performed by FOG members. When writing a show, FOG endeavors to "stick around the PG-13 area." R. 81, PageID 1071. Be-

cause its shows are performed mostly in Memphis's Evergreen Theater— which follows a general admissions policy—parents are known to bring their children.

On March 27, 2023, and shortly before the AEA was to take effect, FOG sued Mulroy under 42 U.S.C. § 1983 to enjoin its enforcement. Four days later, the district court issued a temporary restraining order enjoining the AEA's enforcement. The district court later extended the TRO and consolidated the preliminary injunction hearing with a trial on the merits.

At trial, FOG offered the testimony of several witnesses, including Vanessa Rodley—a member of FOG's board. Ms. Rodley described "content that is common in [FOG] shows" including one sketch titled "Bitch, You Stole My Purse," which featured a song referencing "blow jobs and possibly having sex," and other sketches that satirized popular figures. R. 81, PageID 1074–83. She also testified about the artistic value of FOG's sketches, surmising that she did not know if she would bring her five-year-old to a show, "but [she] would definitely [bring] a 15, 16-year old, 17-year old." *Id.* at 1114.

FOG also introduced several video clips into evidence. The district court made the following findings of fact regarding these clips:

> The first video is from a production entitled "The Tea with Sister Myotis" that Ms. Rodley claimed to be a satire of the show "The View." The video showed four individuals, whom Ms. Rodley characterized as "female impersonators." The sixteen-minute video centered on one character's discussion of various issues, punctuated by several jokes and innuendos about sex-

> ual intercourse and masturbation. . . . Ms. Rodley testified that Plaintiff held this production in the Evergreen Theater with no age restrictions.
>
> The second video is from a production entitled "Paradise by the Dashboard Light," in which six individuals—half of whom were characterized by Ms. Rodley as "female impersonators"—pretended to sing while acting out the lyrics to the song. During the four-minute song, the performers made sexual gestures with each other behind a translucent curtain. . . . Ms. Rodley testified that Plaintiff held this production in the Evergreen Theater with no age restrictions.
>
> The third video is entitled "Trixie Thunderpussy—Pussycat Song," which featured one performer whom Ms. Rodley characterized as a "female impersonator." This clip showed the performer pretending to sing the lyrics to a song while making gestures toward the pubic area. . . . Ms. Rodley testified that this production was held in an age-restricted venue and before the Plaintiff's formation as a nonprofit.

R. 91, PageID 1418–19.

III.

After a bench trial, the district court declared the AEA unconstitutional and permanently enjoined Mulroy from enforcing the law in Shelby County. This court uses various standards when reviewing a decision imposing a permanent injunction. *CSX Transp., Inc. v. City of Sebree*, 924 F.3d 276, 282 (6th Cir. 2019). "Factual findings are reviewed under the clearly erroneous standard, legal conclusions are reviewed de novo, and the scope of injunctive relief is reviewed for an abuse of discretion." *Id.* (quotation omitted).

IV.

Mulroy makes three primary arguments on appeal: (1) FOG lacked standing to sue Mulroy; (2) the AEA passes constitutional muster; and (3) the scope of the permanent injunction was improper. I address each argument in turn.

A. FOG has Article III Standing

Mulroy argues that FOG's suit should be dismissed for lack of subject-matter jurisdiction. Article III of the U.S. Constitution limits federal courts' jurisdiction to deciding "Cases" or "Controversies." U.S. Const. art. III, § 2. To that end, a party must have standing to bring an action in federal court. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). "The doctrine of standing gives meaning to" the Article III "limits by identify[ing] those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (alteration in original; quotation omitted).

As the party invoking our jurisdiction, FOG bore the burden of showing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). And because FOG is an organization, it can meet this burden in one of two ways: (1) it "can claim that it suffered an injury in its own right," or, (2) "it can assert 'standing solely as the representative of its members.'" *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). It is the former approach that is at issue. FOG needed to show that it suffered an injury in fact, that Mulroy caused the injury, and that the district court could redress the injury with a decision in FOG's favor. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). A plaintiff must prove standing "in the same way as any other matter on which the

plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. For cases that proceed to trial, like this one, "the specific facts set forth by the plaintiff to support standing 'must be supported adequately by the evidence adduced at trial.'" *TransUnion*, 594 U.S. at 431 (quoting *Lujan*, 504 U.S. at 561).

Where, as here, the plaintiff raises a pre-enforcement challenge against a statute, standing "often turns upon whether [the plaintiff] can demonstrate an 'injury in fact' before the state has actually commenced an enforcement proceeding against [it]." *Kiser v. Reitz*, 765 F.3d 601, 607 (6th Cir. 2014).

Not surprisingly, Mulroy focuses his jurisdictional challenge on the injury-in-fact component of the standing analysis. The injury-in-fact requirement helps to "ensure that the plaintiff has a personal stake in the outcome of the controversy." *Susan B. Anthony List*, 573 U.S. at 158 (citation omitted). To meet it, the plaintiff must establish "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). An injury is "imminent" if it "is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 158 (internal quotation marks omitted).

An organizational plaintiff like FOG "may sue on its own behalf because it has suffered a palpable injury as a result of the defendant['s] actions." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (internal quotation marks omitted). This occurs when the organization's "ability to further its goals has been 'perceptively impaired' so as to constitute[] far more than simply a setback to the organization's abstract social interests."

Greater Cincinnati Coal. for the Homeless v. City of Cincinnati, 56 F.3d 710, 716–17 (6th Cir. 1995) (alteration in original) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

FOG did not have to wait for Mulroy to enforce the AEA before challenging the constitutionality of the law. Threats of future harm equate to an injury in fact "as long as there is a 'substantial risk' that the harm will occur." *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 405 (6th Cir. 2019) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)). To bring a pre-enforcement challenge to a criminal statute, a plaintiff must show (1) "a *substantial probability* that the plaintiff actually will engage in conduct that is *arguably affected* with a constitutional interest," and (2) "a *certain* threat of prosecution if the plaintiff does indeed engage in that conduct." *See Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 455 (6th Cir. 2017).

FOG had standing to bring its pre-enforcement challenge. The AEA is "far more than simply a setback to [FOG's] social interests," *see Greater Cincinnati Coal. for the Homeless*, 56 F.3d at 716 (quotation omitted); FOG's "ability to further its goals [through the performance of drag-centric entertainment] has been 'perceptively impaired,'" *see id.* (quoting *Havens Realty*, 455 U.S. at 379). Given the nature of its shows, along with the general admissions policy followed by the Evergreen Theater, there is a substantial probability that FOG will engage in conduct that is arguably affected by the AEA because it performs adult cabaret entertainment in a location where it could be viewed by a minor. *See* Tenn. Code Ann. § 7-51-1407(c)(1)(B). And if it does, FOG faces a certain threat of prosecution by Mulroy.

1.

First, FOG must show "an intention to engage in a course of conduct arguably affected with a constitutional interest." *Susan B. Anthony List*, 573 U.S. at 161. To make such a showing, FOG needed to make specific factual claims of past conduct involving a constitutionally protected right, along with a stated intent to engage in substantially similar conduct in the future. *See, e.g.*, *id.* at 161–62; *Kiser*, 765 F.3d at 608 (finding requirement satisfied because petitioner "alleged that he has advertised both general dentistry and endodontic services in the past and that he intends to do so in the future."); *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 549–50 (6th Cir. 2021).

FOG did so. At trial, FOG played videos of its productions. One video showed a group of drag performers satirizing the co-hosts of The View by "describ[ing] sexual acts including intercourse and masturbation," and another video showed a group of actors satirizing a song by Meatloaf while portraying sexual acts. R. 91, 1400–01; R. 81, PageID 1081–83. The trial evidence reflected, and the district court found, that these productions were "typical of [FOG]'s productions since 2011." R. 91, PageID 1401. And FOG indicated that it intended "to continue producing these types of shows in pursuit of its mission." *Id.* Thus, FOG showed that its conduct is affected with a constitutional interest because it intends to continue producing satirical drag shows—expressive conduct protected by the First Amendment.

In addition to the verbal and written word, the First Amendment's Free Speech Clause shelters acts "sufficiently imbued with elements of communication," *i.e.*, "expressive conduct." *Texas v. Johnson*, 491 U.S. 397, 404

(1989) (citation omitted). Discerning what conduct is "expressive" requires the application of the *Spence* test, which asks: (1) whether the speaker intended to convey "a particularized message"; and (2) whether there was a great likelihood that "the message would be understood by those who viewed it." *Id.* (quoting *Spence v. Washington*, 418 U.S. 409, 410–411 (1974)).

FOG's drag shows satisfy both elements. To start, the organization's shows are intended to convey a "particularized message" because of the satirical elements found therein. And because these sketches frequently satirize popular figures, there is a "great likelihood" that they will be understood by audiences. Thus, FOG's prior conduct is arguably protected by the First Amendment. *See Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (finding fraternity's "ugly woman contest" skit featuring students dressed as satirical representations of women protected as expressive conduct). And because FOG has stated that it will continue with these kinds of sketches even if it "does not know the precise content of its future shows," it has also shown that it intends to continue to engage in substantially similar conduct. R. 81, PageID 1100; R. 91, PageID 1421.

Mulroy argues that FOG was required to articulate with more "specificity, the speech or conduct to be included in its future shows." D. 26 at p.31. For that proposition, he cites *Fieger v. Michigan Supreme Court*, 553 F.3d 957 (6th Cir. 2009). Yet *Fieger* is factually distinct, as that case involved a plaintiff who was twice charged with violating the "courtesy and civility" provisions of the Michigan Rules of Professional Conduct and who then challenged the constitutionality of those provisions on their face. *Id.* at 957. There, we held that the plaintiff

could not show a reasonable threat of future sanction because the "chain of events" that needed to occur was "simply too attenuated." *Id.* at 967. That was because the plaintiff had to establish, among other things, that he was "likely to be . . . speaking about a pending case" in the future that would subject him to the provisions; that the speech would "concern participants in that case and be vulgar, crude, or personally abusive"; and "that the Michigan Supreme Court would, in its discretion, impose . . . sanctions." *Id.*

FOG's theory of harm is not so attenuated. To the contrary, its evidence showed that it was highly likely to engage in conduct that is central to the group's mission as a "dragcentric theater group," R. 81, PageID 1064, and that its future shows are likely to involve risqué material involving "male or female impersonators" based on the content of its past shows, *see* Tenn. Code Ann. § 7-51-1401(3). This court's precedent does not require more.

2.

FOG must also show that the conduct in which it intends to engage in the future is "proscribed by a statute." *Susan B. Anthony List*, 573 U.S. at 159 (quotation omitted). This requires consideration of whether FOG's proposed future conduct violates the AEA's plain text.

Recall that the AEA makes it a Class A misdemeanor (first offense) to "perform adult cabaret entertainment" where a minor could view it or "[o]n public property." Tenn. Code Ann. § 7-51-1407(c)(1), (c)(3). The AEA defines "adult cabaret entertainment" 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[.]

Id. § 7-51-1401(3). An "entertainer" performs "actual or simulated specified sexual activities, including removal of articles of clothing or appearing unclothed." *Id.* § 7-51-1401(7)(B). A person is an adult if the person "has attained eighteen (18) years of age." *Id.* § 7-51-1401(1).

The Tennessee legislature placed the definition of "harmful to minors" in Tennessee's Criminal Code with the obscenity laws. The definition states that "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[.]

Id. § 39-17-901(6). The Tennessee legislature defines a "minor" as "any person who has not reached eighteen (18) years of age and is not emancipated." *Id.* §§ 1-3-105(16); 39-17-901(8).

So, did FOG establish at trial that they intend to engage in adult cabaret entertainment in public or in a place that minors can view the performances? Yes. FOG produces "adult-oriented performances" that feature male and female impersonators. *See id.* § 7-51-1401(3)(A). And FOG's performers could also be considered "entertainers" because they perform simulated sex acts.

FOG's evidence also showed that its productions are held in locations where they "could be viewed by a person who is not an adult." *Id.* § 7-51-1407(c)(1)(B). Due to the Evergreen Theater's general admissions policy, FOG does not distinguish between adult and child ticket holders, and it does not verify the age of attendees. Thus, a "handful of minors" are already known to attend its shows.[3] R. 81, PageID 1110.

And FOG's evidence demonstrated that its productions are arguably "harmful to minors, as that term is defined in § 39-17-901." Tenn. Code Ann. § 7-51-1401(3)(A).

---

[3] The district court also found that FOG had standing to challenge the AEA's public-property provision. *See* Tenn. Code Ann. § 7-51-1407(c)(1)(A). But the record does not support this finding. Ms. Rodley testified that FOG has never performed a pre-scripted drag show on public property. And while FOG does participate in the annual Memphis Pride Festival, it appears that the organization does not conduct "adult-oriented performances" at that event. *Id.* § 7-51-1401(3). Instead, Ms. Rodley explained that FOG merely rides a float and hands out flowers. Such activities plainly do not qualify as "adult cabaret entertainment" under the AEA. *Id.* § 7-51-1401(3).

Federal courts have an "independent obligation . . . to ensure a case or controversy exists as to each challenged provision" of a given ordinance. *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 350 (6th Cir. 2007) (quotation omitted). And we have rejected the "idea that an injury in fact under one provision creates standing to challenge" another. *Id.* For this reason, I agree with the majority that FOG lacks standing to challenge the AEA's public-property provision.

The district court considered the contents of multiple FOG sketches. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973) (explaining that the "materials" are "sufficient in themselves for the determination of" whether they lack artistic value (quotation omitted)). Those productions showed FOG performers portraying sexual acts, including sexual intercourse and masturbation. Additionally, Ms. Rodley testified to the content common in FOG's shows, including simulating oral sex. Such conduct fits the definition of "harmful to minors," particularly when younger minors are exposed to such conduct. As Ms. Rodley testified, four- or five-year-old minors were unlikely to "get any value" from such performances. R. 81, PageID 1114.

Confronted with the plain text of the AEA and the undisputed facts developed at trial, Mulroy invites this court to rewrite the Act. Although Tennessee law says that a minor is anyone under the age of 18, Tenn. Code Ann. § 1-3-105(16), Mulroy contends that a minor is a "reasonable 17-year-old." As support for his argument, Mulroy relies on an incorrect and anachronistic reading of *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

In *Davis-Kidd*, the Tennessee Supreme Court considered a First Amendment overbreadth challenge to Tennessee's display statute, which criminalizes the "display for sale or rental" of any "visual depiction" containing "material harmful to minors anywhere minors are lawfully admitted." 866 S.W.2d at 522 (emphasis omitted) (quoting Tenn. Code Ann. § 39-17-914(a) (1991)). In the introductory paragraphs of the opinion, the *Davis-Kidd* court announced that "the *display statute* is readily susceptible to a narrowing construction which makes it only applicable to those materials which lack serious literary,

artistic, political, or scientific value for a reasonable 17-year-old minor." *Id.* (emphasis added). In its analysis, the court "h[e]ld that the *display statute* applies only to those materials which lack serious literary, artistic, political, or scientific value for a reasonable 17-year-old minor." *Id.* at 528 (emphasis added). And in case a reader missed those two pronouncements, the court repeated it in the conclusion and even provided a citation to the statute it construed: "[W]e conclude that the *display statute*, Tenn. Code Ann. § 39-17-914, is not unconstitutionally overbroad with the limiting construction applied, because it proscribes only the knowing display of materials which, taken as a whole, lack serious literary, artistic, political, or scientific value for a reasonable seventeen year old minor." *Id.* at 532–33 (emphasis added).

Despite *Davis-Kidd* stating several times that it was construing the display statute, Mulroy argues that the court was in fact interpreting Tenn. Code Ann. § 39-17-901(6), the harmful-to-minors statute. And he takes it a step further by arguing that *Davis-Kidd* applied a narrowing construction to the AEA, which was enacted 30 years after *Davis-Kidd*.

The fallacy of Mulroy's argument is obvious. Other than *Davis-Kidd* citing the harmful- to-minors statute, Mulroy can point to nothing showing that the *Davis-Kidd* court construed anything other than what it said it was construing—the display statute. To the extent there was any confusion about what statute *Davis-Kidd* interpreted, post-*Davis-Kidd* cases confirm that the Tennessee Supreme Court interpreted the display statute. *See Blackwell v. Haslam*, No. M2011- 00588, 2012 WL 113655, at *5 (Tenn. Ct. App. Jan. 11, 2012); *State ex rel. Woodall v. D&L Co.*, No. W1999-00925, 2001 WL 524279, at *7–8 (Tenn. Ct. App. May 16, 2001). And, of course, Mulroy

cannot show that *Davis-Kidd* reached forward 30 years to construe the AEA. When the Tennessee legislature wants to import a court's interpretation into a statute, it knows how to do so. *See* Tenn. Code Ann. §§ 71-5-126; 45-20-111.

Nevertheless, the majority accepts Mulroy's invitation to misread *Davis-Kidd*, claiming that *Davis-Kidd* interpreted the harmful-to-minors statute. *See* Maj. Op. at 3, 5–6. The majority neglects to mention the actual law that *Davis-Kidd* interpreted—the display statute. The consequences of this misreading are far-reaching. For example, in 2022, the Tennessee legislature required public K-12 schools to obtain technology for its computers that would prohibit users from accessing materials on the computers "that are deemed to be harmful to minors, as defined in § 39-17-901." Tenn. Code Ann. § 49-1-221(a)(1)(C)(ii). Both the legislature and grade schools will be shocked to learn that, although K-12 school-age children generally range from 5 to 18 years old, public schools must bar only those materials that are harmful to a reasonable 17-year-old minor.

To be sure, we have relied on a state court's narrowing construction of a state statute in determining whether a plaintiff has sustained an injury in fact. *See Fieger*, 553 F.3d at 965. But Tennessee courts have not adopted a narrowing construction of the AEA. And it is improper for this court to adopt a narrowing construction of the AEA when assessing standing. In *Virginia v. American Booksellers Association, Inc.*, for instance, the Supreme Court found that the plaintiffs had standing before certifying questions to the state supreme court to determine if the statutes at issue were "readily susceptible to a narrowing construction." 484 U.S. 383, 393, 397–98 (1988) (internal quotation marks omitted). In First Amendment

challenges, federal courts apply their own narrowing constructions to statutes only after finding the statutes unconstitutional as written. *See, e.g.*, *Erznoznik v. Jacksonville*, 422 U.S. 205, 216 (1975) (assessing whether to apply narrowing construction after concluding challenging ordinance was unconstitutionally overbroad); *Anderson v. Spear*, 356 F.3d 651, 665–66 (6th Cir. 2004) (applying narrowing construction after determining statute was unconstitutionally overbroad).

Mulroy contends that FOG has not shown that its productions lacked serious artistic value as a whole, *see* Tenn. Code Ann. § 39-17-901(6)(C), because it presented evidence of only a few isolated scenes, rather than an entire show. Mulroy runs into a few problems with this argument. First, he argued differently before the district court. There, Mulroy acknowledged that there was "one complete show in the record." R. 85, PageID 1332. Second, the district judge stated that he viewed FOG's "full videos" before deciding whether FOG's performances were harmful to minors, rather than limiting his review to video clips that FOG showed during the trial. And third, Rodley testified about the content of FOG's shows. Mulroy put forth no evidence to rebut Rodley's description of FOG's performances.

All in all, FOG's trial evidence demonstrated that its productions are "arguably . . . proscribed by" the AEA. *See Crawford*, 868 F.3d at 454.

3.

FOG needed to also show that it faced "a credible threat of enforcement" of the AEA against it. *See Fischer v. Thomas*, 52 F.4th 303, 307 (6th Cir. 2022) (per curiam) (citations omitted). To that end, there must be "an actual and well-founded fear that the law will be enforced

against" the plaintiff. *Am. Booksellers*, 484 U.S. at 393. That is because "self- censorship" is "a harm that can be realized even without an actual prosecution." *Id.* But "mere allegations of a 'subjective chill' on protected speech are insufficient." *McKay v. Federspiel*, 823 F.3d 862, 868–69 (6th Cir. 2016) (quoting *Berry v. Schmitt*, 688 F.3d 290, 296 (6th Cir. 2012)). Subjective chill, combined with any of the following factors, establishes a credible threat of prosecution: (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) "a defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff." *Id.* at 869. Those "factors are not exhaustive, nor must each be established." *Online Merchs. Guild*, 995 F.3d at 550.

And "when dealing with pre-enforcement challenges to recently enacted (or, at least, non- moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution" absent compelling evidence to the contrary. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020) (quoting *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996)); *see also Picard v. Magliano*, 42 F.4th 89, 98 (2d Cir. 2022); *Cooksey v. Futrell*, 721 F.3d 226, 237 (4th Cir. 2013); St. *Paul Chamber of Com. v. Gaertner*, 439 F.3d 481, 486 (8th Cir. 2006); *Commodity Trend Serv. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 687 (7th Cir. 1998). "This is because a court presumes that a legislature enacts a statute

with the intent that it be enforced." *Bryant v. Woodall*, 1 F.4th 280, 286 (4th Cir. 2021) (citations omitted).

To start, the newly enacted AEA has caused FOG to chill its speech. As the district court found, "[FOG] is concerned that the AEA could subject" it to criminal "charges." R. 91, PageID 1401. That has led FOG "to alter the content of their productions, and to spend more on security at the Evergreen Theater." *Id.*

Next, consider the application of the *McKay* factors. Of course, the first two factors do not apply because the district court enjoined the AEA in Shelby County before the Act could take effect. The third *McKay* factor favors FOG because the AEA has multiple attributes that make it "easier" to be enforced. *See McKay*, 823 F.3d at 869.

For one, the AEA is a strict-liability crime. Criminal offenses housed in Tennessee's Criminal Code require "[a] culpable mental state . . . unless the definition of an offense plainly dispenses with a mental element." Tenn. Code Ann. § 39-11-301(b). "[I]ntent, knowledge or recklessness suffices to establish the culpable mental state." *Id.* § 39-11-301(c). But the AEA lacks a scienter requirement because it is not in the Criminal Code. The Tennessee legislature placed the AEA in the part of the Tennessee Code that regulates adult-oriented businesses. "[P]ublic welfare or regulatory offenses which allow for a form of strict criminal liability through statutes . . . do not require the defendant to know the facts that make his conduct illegal." *State v. Terry*, No. E2021-00406, 2022 WL 1288587, at *11 (Tenn. Crim. App. Apr. 29, 2022) (quoting *Staples v. United States*, 511 U.S. 600, 606 (1994)). Thus, to establish a violation of the AEA, a prosecutor would not have to prove that a defendant acted with a culpable mental state.

Second, the AEA's broadness makes it easier to enforce. Mulroy can prosecute a violation of the law for conduct that occurs at any location that "could be viewed by a person who is not an adult." Tenn. Code Ann. § 7-51-1407(c)(1)(B). This includes the Evergreen Theater where FOG performs—the trial evidence showed that minors have been admitted to FOG's shows. And, as Mulroy conceded at oral argument, it also includes the home where minors live or have access. Keep in mind, the AEA applies to, among others, male and female impersonators. *Id.* § 7-51-1401(3), (7). Males can impersonate females. But males can also impersonate other males. And females can impersonate males and females.

Third, the AEA's reliance on a variable-obscenity standard provides law enforcement with wide discretion in deciding what conduct is potentially "harmful to minors." Indeed, obscenity—like beauty—is in the eyes of the beholder. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it."). This likely explains why the Supreme Court abandoned their attempts at developing a unified, objective definition of the term and, instead, opted for a standard guided by the contemporary values of the relevant community. *Compare Roth v. United States*, 354 U.S. 476, 487 (1957) ("Obscene material is material which deals with sex in a manner appealing to prurient interest."), *and A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass.*, 383 U.S. 413, 418 (1966) (same), *with Miller v. California*, 413 U.S. 15, 30 (1973) ("To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility.").

The fourth *McKay* factor also favors FOG because Mulroy refuses to "disavow enforcement" of the AEA

against FOG. *McKay*, 823 F.3d at 869. He has instead expressed his intention to enforce it. And "as a district attorney general," Mulroy "has both a 'constitutional and statutory obligation to prosecute offenses committed in [Shelby] County.'" *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1035 (6th Cir. 2022) (quoting *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 208 (Tenn. 1999)); *see also* Tenn. Code Ann. § 8-7-103(1) ("Each district attorney general . . . [s]hall prosecute in the courts of the district all violations of the state criminal statutes[.]"). This court has found the fourth *McKay* factor satisfied where, although government officials had not threatened to enforce a statute against a particular party, "they also have not explicitly disavowed enforcing it in the future." *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 696 (6th Cir. 2015); *see also Universal Life*, 35 F.4th at 1035 (holding that a district attorney had not disavowed enforcement of a criminal law because he never "provided clear assurances" that he would not prosecute the plaintiffs). Because Mulroy refuses to take any affirmative step suggesting that he will not enforce the AEA against FOG, FOG has satisfied the disavow-enforcement factor. *See Am. Booksellers*, 484 U.S. at 387, 393 (finding standing to raise pre-enforcement challenge because the state had "not suggested that the newly enacted law will not be enforced").

The majority's arguments that FOG has not established a credible threat of prosecution are unavailing.

As it relates to the third *McKay* factor, the majority argues that enforcement of the AEA is not easier because a member of the public cannot initiate enforcement of the AEA. That is incorrect. Tennessee allows citizens' arrests. Thus, anyone in Tennessee can arrest another person "[f]or a public offense committed in the arresting person's

presence." Tenn. Code Ann. § 40-7-109(a)(1). This encompasses all misdemeanors committed in public and in the presence of the person making the arrest. *State v. Smith*, 695 S.W.2d 954, 959 (Tenn. 1985). A violation of the AEA is a misdemeanor. And FOG conducts its performances in public at the Evergreen Theater. Thus, anyone can make an arrest for a violation of the AEA. Tennessee law also allows anyone to present evidence to a grand jury if the person has "knowledge or proof of the commission of a public offense." Tenn. Code Ann. § 40-12-104(a). As mentioned above, Mulroy is required to "prosecute . . . all violations of state criminal statutes." *Id.* § 8-7-103(1). In *Platt v. Board of Commissioners on Grievances & Discipline of the Ohio Supreme Court*, this court found that enforcing Ohio's Judicial Code was made easier because any person could file a grievance. 769 F.3d 447, 452 (6th Cir. 2014). Surely a person making an arrest or seeking an indictment has at least the same effect as filing a grievance.

But even if the majority was correct that members of the public cannot initiate enforcement of the AEA, that does not help Mulroy. In *Universal Life*, we found that the plaintiff had standing to bring a pre-enforcement challenge to a criminal statute against the Hamilton County district attorney after the Tennessee legislature banned ministers for solemnizing weddings if they received their ordinations online and increased the criminal penalty for making false statements. 35 F.4th at 1034. This court found that Universal Life Church ministers had standing to sue the district attorney, even though no one had been prosecuted under the criminal statute, because the amendment that increased the criminal penalty for making false statements "emboldened prosecutors in a way that they were not before the amendment." *Id.* at 1035. That same rationale applies here. The majority suggests

that *Universal Life* is inapposite because the harmful-to-minors statute has not changed. But the majority fails to acknowledge that the AEA is a new statute with a criminal penalty that did not exist before the Act's enactment. And because the AEA is a new statute that restricts expressive activity, we should "assume a credible threat of prosecution" and that Mulroy intends to enforce the law. *Speech First*, 979 F.3d at 335.

The majority relies on *Davis-Kidd* to argue that a scienter requirement is automatically imputed into the AEA. But that is yet another misreading of *Davis-Kidd*. The Tennessee Supreme Court did not impose a scienter requirement to the display statute at issue in that case. Rather, *Davis-Kidd* correctly noted that a scienter requirement applied already to the display statute because of its placement in the Criminal Code. 866 S.W.2d at 528 (citing Tenn. Code Ann. § 39-11-301(c)). The AEA is different—it is not in the Criminal Code.

As to a disavowal factor, the majority contends that the focus should be on a particular plaintiff. I agree. The problem is that Mulroy has not disavowed enforcement of the AEA as to FOG. The overwhelming weight of the authority from this court supports FOG on this point. *See Kareem v. Cuyahoga Cnty. Bd. of Elections*, 95 F.4th 1019, 1027 (6th Cir. 2024); *Universal Life*, 95 F.4th at 1035; *Online Merchs. Guild*, 995 F.3d at 551 (finding the disavowal factor favored the plaintiff because the attorney general had not disavowed his enforcement activities); *Green Party*, 791 F.3d at 696; *Platt*, 769 F.3d at 452.

* * *

In sum, I conclude that FOG showed that it suffered an injury in fact. The evidence presented at trial demonstrated a "substantial probability" that FOG will engage

in conduct that is "arguably affected" by the AEA, *Crawford*, 868 F.3d at 455, and that it will face a "certain threat of prosecution" if it continues to engage in that conduct, *id.* FOG can easily establish the causation and redressability components of standing. Because Mulroy is responsible for enforcing the AEA in Shelby County, the violation of FOG's First Amendment rights is traceable to him. *See Kareem*, 95 F.4th at 1027. And FOG's request for injunctive and declaratory relief would redress its harm. *See id.* Therefore, FOG proved that it had standing to sue Mulroy.

B. The AEA is a Content-Based Restriction that Cannot Survive Strict Scrutiny

The majority reverses the district court because it finds that FOG lacks standing. So the majority does not address whether the AEA violates FOG's First Amendment rights. Because I find that FOG had standing to sue Mulroy, I must reach FOG's First Amendment challenge.

Applicable to the States through the Fourteenth Amendment, the First Amendment prohibits the government from "abridging the freedom of speech." U.S. Const. amend. I; *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243 (1936). As the Supreme Court has explained, the Free Speech Clause protects "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This includes expressive conduct that is "sufficiently imbued with elements of communication." *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 409). Like many constitutional rights, the freedom of speech and expression is not unlimited. States may "constitutionally impose reasonable time, place, and manner regulations" on speech, but they may not "discriminate in the regulation of expression on the basis of the content of that expression." *Hudgens v. NLRB*, 424 U.S. 507, 520

(1976). But "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

1.

The district court found that the AEA is a content-based regulation of speech and expression. In doing so, the district court did not err.

As the Supreme Court has told us, "[c]ontent-based laws . . . target speech based on its communicative content[.]" *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). More specifically, a law is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* "Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

The government may permissibly restrict "the content of speech in a few limited areas, which are 'of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). This low-value speech includes obscenity, defamation, true threats, and fighting words. *See id.* Outside of low-value speech, content-based laws are subject to strict scrutiny and are presumed unconstitutional. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 618 (2020) (plurality op.); *Reed*, 576 U.S. at 163. The government bears the burden of showing

that a content-based law is constitutional. *Ashcroft*, 542 U.S. at 660.

In determining whether a law is content based, courts must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011)). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.* Even laws that are facially content neutral can be "considered content-based regulations" if the laws "cannot be justified without reference to the content of the regulated speech," or the laws "were adopted by the government because of disagreement with the message [the speech] conveys." *Id.* at 164 (alteration in original; internal quotation marks omitted).

Determining whether a speech regulation is content based is a two-step inquiry. First, courts ask whether the regulation is facially content based. *Id.* at 165. Such regulations are subject to strict scrutiny "regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* (internal quotation marks omitted). But if the regulation is facially content-neutral, the second step requires consideration of whether its adoption was guided by an impermissible purpose, *i.e.*, the suppression of free expression. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *United States v. Eichman*, 496 U.S. 310, 315 (1990) ("Although the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is related to the suppression of free ex-

pression[.]" (internal quotation marks omitted)). An impermissible purpose may be gleaned by looking to "the law's justification or purpose." *Reed*, 576 U.S. at 166; *see also Sorrell*, 564 U.S. at 564; *Hill v. Colorado*, 530 U.S. 703, 711–719 (2000).

One need look no further than step one. The AEA is a facially content-based regulation that, by its terms, targets a specific category of content—"adult-oriented performances that are harmful to minors." Tenn. Code Ann. § 7-51-1401(3). The AEA applies to particular expressive conduct—adult-oriented performances—because of the message that such conduct expresses. *See Reed*, 576 U.S. at 163. Mulroy, though not conceding that the AEA is content based, agrees that the law "references the content of certain performances." D. 26 at p.55.

The Supreme Court has found that laws were content based in similar contexts. In *Ashcroft*, the Court found that the Child Online Protection Act, which criminalized posting materials on the internet that were "harmful to minors," was a content-based speech regulation. 542 U.S. at 660–66. Similarly, in *United States v. Playboy Entertainment Group, Inc.*, the Court determined that a statute regulating "sexually explicit adult [television] programming or other programming that is indecent" was a "content-based speech restriction." 529 U.S. 803, 811–813 (2000) (quotation omitted).

Although the AEA is content based, Mulroy argues that the district court should have treated the law as content neutral.

First, Mulroy contends that the AEA is nothing more than a time, place, or manner restriction that limits adult-themed performances to "adult-only zones." D. 26 at p.56.

True, "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Courts uphold such restrictions "only if they are 'justified without reference to the content of the regulated speech.'" *R.A.V.*, 505 U.S. at 386 (quoting *Ward*, 491 U.S. at 791). But the AEA did not create an adult-only zone. Instead, it criminalizes the performance of adult cabaret entertainment any place where a minor could view the performance. Tenn. Code Ann. § 7-51-1401(c)(1)(B). Because Mulroy has not identified the location of these purported adult- only zones and because he has failed to justify the restriction without referencing the content of the expression, the AEA is not a valid time, place, or manner restriction.

Second, Mulroy argues that the secondary-effects doctrine applies to the AEA. This doctrine allows the government to "accord differential treatment to a content-defined subclass of speech because that subclass was associated with specific 'secondary effects' of the speech, meaning that the differential treatment was '*justified* without reference to the content of the . . . speech.'" *Daunt v. Benson*, 956 F.3d 396, 420 (6th Cir. 2020) (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)). According to Mulroy, the AEA has the secondary effect of preventing sexual-exploitation crimes and sexual assaults. To that end, one must consider whether: (1) "the 'predominate concerns' motivating the [AEA] 'were with the secondary effects of adult [speech], and not with the content of adult [speech]'"; and (2) that a "connection [exists] between the speech regulated by the [AEA] and the secondary effects that motivated" its adoption. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440–41 (2002) (plurality op.) (quoting *Renton*, 475 U.S. at 47).

Mulroy cannot satisfy either consideration. Contrary to Mulroy's assertions, the legislative record does not reflect that sexual-exploitation crimes against children were a "predominate concern" of the Tennessee legislature. The statutory text does not mention, or create an inference, that sexual-exploitation crimes were the main concern of the legislature in passing the AEA. The legislative history bolsters this conclusion. Only one person mentioned a concern related to sexual exploitation: Ms. Starbuck, who testified as a witness at a committee hearing. The legislators did not discuss sexual exploitation or sexual assaults at all. Supporters of the AEA bill instead focused on the expressive content. And neither the text of the AEA nor the legislative record makes a connection between the conduct the AEA seeks to regulate and the risk of sexual exploitation.

In sum, the AEA is a content-based restriction on speech. It is not a time, place, or manner restriction. And the secondary-effects doctrine does not apply. Therefore, the AEA is subject to strict scrutiny.

2.

Because the AEA imposes a content-based restriction on speech, it must survive strict scrutiny. This requires Mulroy "to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quotation omitted). In other words, is the AEA the "least restrictive means [to regulate protected speech] among available, effective alternatives[?]" *United States v. Alvarez*, 567 U.S. 709, 729 (2012) (plurality op.) (quoting *Ashcroft*, 542 U.S. at 666). "Only a rare case . . . survives strict scrutiny." *Norton Outdoor Advert., Inc. v. Vill. of St. Bernard*, 99 F.4th 840, 851 (6th Cir. 2024) (internal quotation marks omitted).

Mulroy has identified a compelling interest—"safeguarding the physical and psychological well-being of a minor." *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (quotation omitted). No one disputes that the AEA furthers that interest.

But the AEA is not narrowly tailored to further the interest of safeguarding minors. As the Supreme Court has explained, if a less restrictive method is available, then "the legislature must use that alternative." *Playboy Entm't Grp.*, 529 U.S. at 813. "To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit." *Id.* "A statute that 'effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.'" *Ashcroft*, 542 U.S. at 665 (alteration in original) (quoting *Reno v. ACLU*, 521 U.S. 844, 874 (1997)).

Some of the strongest evidence that the AEA is not narrowly tailored comes from Mulroy's attempts to rewrite the Act. The AEA says that adult cabaret entertainment "[m]eans adult-oriented performances that are harmful to minors." Tenn. Code Ann. § 7-51-1401(3)(A). And under Tennessee law, a minor is anyone under the age of 18. *Id.* §§ 1-3-105(16); 7-51- 1401(1). But Mulroy argues that, through *Davis-Kidd*, the AEA limits the harmful-to-minors definition to content that lacks value to a reasonable 17-year-old minor. Also, the AEA prohibits adult cabaret entertainment "[i]n a location" that "could be viewed by a" minor. *Id.* § 7-51-1407(c)(1)(B). Mulroy tries to narrow this rather broad language to mean that such entertainment can be performed only "in private,

age-restricted venues." Additionally, Mulroy seeks to write a scienter requirement into the AEA that the plain text of the law does not support. *See Smith v. California*, 361 U.S. 147, 154–55 (1959) (finding an ordinance criminalizing the possession of obscene books unconstitutional because it did not require proof of a culpable mental state).

Another issue is that the AEA contains no affirmative defenses. Notably, it lacks a parental-consent defense, which are found commonly in statutes seeking to protect minors from indecent sexual materials. *See, e.g.*, Fla. Stat. § 847.013(3)(c); Ohio Rev. Code Ann. § 2907.31(B)(2). In fact, the Tennessee legislature codified a parental-consent exception in the display statute at issue in *Davis-Kidd*. *See* Tenn. Code Ann. § 39-17-914(b)(6). That further shows that the AEA is not narrowly tailored.

When there is "a plausible, less restrictive alternative . . . to a content-based speech restriction," the government must "prove that the alternative will be ineffective to achieve its goals." *Playboy Entm't Grp.*, 529 U.S. at 816. Mulroy cannot meet his burden. Because Mulroy proposed three alternatives—modifying the harmful-to-minors definition; limiting § 7- 51-1407(c)(1)(B)'s reach to private, age-restricted venues; and reading a scienter requirement into the AEA—he has essentially conceded that those alternatives would be effective. Not only are those alternatives effective, but they were available to the Tennessee legislature. The legislature could have incorporated *Davis-Kidd*'s narrowing construction of the display statute into the AEA just as it has included court interpretations in other statutes. *See* Tenn. Code Ann. §§ 71-5-126; 45-20-111. It could have limited § 7-51-1407(c)(1)(B)'s reach to private, age- restricted venues. And the legislature could have placed the AEA in the

Criminal Code to take advantage of the default scienter requirements contained there. *See id.* § 39-11-301(c). As to the parental-consent defense, the legislature could have copied from its display statute. *See id.* § 39- 17-914(b)(6).

The Supreme Court has found content-based restrictions similar to the AEA unconstitutional even though those laws were more narrowly tailored. In *Ashcroft*, the Court considered the Child Online Protection Act, which prohibited individuals from knowingly posting content on the internet that was "harmful to minors." 542 U.S. at 661. That law's harmful-to-minors definition resembles Tennessee's. *Id.* at 661–62 (citing 47 U.S.C. § 231(e)(6)). Even though the law contained a scienter requirement, the Court found that the government had failed to show that the law was the least restrictive alternative. *Id.* at 660–61. The Third Circuit ultimately held that the law could not withstand strict scrutiny. *ACLU v. Mukasey*, 534 F.3d 181, 207 (3d Cir. 2008). In *Reno*, the Court reviewed a challenge to the Communications Decency Act of 1996 which, in pertinent part, prohibited individuals from knowingly sending or displaying "patently offensive messages in a manner that is available to a person under 18 years of age." 521 U.S. at 859. The statute included two affirmative defenses. *Id.* at 860–61. Still, the Court held that the law could not withstand strict scrutiny. *Id.* at 878– 79; *see also Playboy Entm't Grp.*, 529 U.S. at 813. The AEA should meet the same fate.

3.

I also consider whether the AEA is subject to a "narrowing construction that would make it constitutional." *Am. Booksellers*, 484 U.S. at 397. This is possible only if the law is "readily susceptible to the limitation; we will not rewrite a state law to conform it to constitutional requirements." *Id.* (internal quotation marks omitted). That said,

this court "should not assume that state courts would broaden the reach of a statute by giving it an expansive construction." *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 441 (6th Cir. 1998) (internal quotation marks omitted). Here, no narrowing mechanism can save the AEA. At a minimum, rescuing the AEA would require: (1) writing in a scienter requirement, (2) creating affirmative defenses, and (3) limiting Tenn. Code Ann. § 7-51-1407(c)(1)(B)'s reach to private, age-restricted venues. In other words, it would require a rewrite of the AEA.

* * *

The AEA is a content-based restriction on speech that cannot withstand strict scrutiny. It therefore violates the First Amendment. As a result, I do not need to also conduct substantial-overbreadth and vagueness analyses. *See R.A.V.*, 505 U.S. at 381 & n.3.

C. Scope of Relief

The district court declared the AEA an unconstitutional restriction on speech and enjoined Mulroy from enforcing the Act in Shelby County. Mulroy does not challenge the district court's declaratory-judgment remedy, but he does contest the scope of the injunctive relief.

When a statute violates a person's free-speech rights, "[c]ourts invalidate such statutes in their entirety to prevent a chilling effect, whereby speakers self-censor protected speech to avoid the danger of possible prosecution." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1054 (6th Cir. 2015) (internal quotation marks omitted). "[B]ecause it impairs a substantial amount of speech beyond what is required to achieve acceptable objectives, 'a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated.'" *Id.*

(quoting *Citizens United v. FEC*, 558 U.S. 310, 336 (2010)); *see also Reed*, 576 U.S. at 172.

The district court erred in enjoining Mulroy from enforcing the public-property provision of the AEA, Tenn. Code Ann. § 7-51-1407(c)(1)(A), because FOG lacked standing to challenge that provision. But the district court did not err in enjoining Mulroy from enforcing Tenn. Code Ann. § 7-51-1407(c)(1)(B) because that provision is a content-based restriction on speech that fails strict scrutiny. Thus, the district court did not abuse its discretion by prohibiting Mulroy from enforcing that unconstitutional law in Shelby County.

V.

FOG had standing to bring this action against Mulroy. And the AEA is an unconstitutional content-based restriction on speech. Therefore, I would affirm the district court's decision to enjoin Mulroy from enforcing Tenn. Code Ann. § 7-51-1407(c)(1)(B) in Shelby County.

I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 23-cv-023163-TLP-tmp

FRIENDS OF GEORGE'S, INC.,
PLAINTIFF,

v.

STEVEN J. MULROY,
IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES AS THE
DISTRICT ATTORNEY GENERAL OF SHELBY COUNTY,
TENNESSEE, DEFENDANT.

JUDGMENT

JUDGMENT BY THE COURT. This action came before the Court on Plaintiff's Complaint, filed on March 27, 2023. (ECF No. 1.) In accordance with the Findings of Fact and Conclusions of Law (ECF No. 91), the Court enters this judgment in favor of Plaintiff, declaring the Adult Entertainment Act (2023 Tenn. Pub. Acts, ch. 2 (codified at Tenn. Code. Ann. §§ 7- 51-1401, and -1407)) UNCONSTITUTIONAL and PERMANENTLY ENJOINS Defendant District Attorney General Steven J. Mulroy from enforcing the Act within his jurisdiction in SHELBY COUNTY, TENNESSEE.

/s/Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE

June 7, 2023
Date

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 23-cv-023163-TLP-tmp

FRIENDS OF GEORGE'S, INC.,
PLAINTIFF,

v.

STEVEN J. MULROY,
IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES AS THE
DISTRICT ATTORNEY GENERAL OF SHELBY COUNTY,
TENNESSEE, DEFENDANT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Freedom of speech is not just about speech. It is also about the right to debate with fellow citizens on self-government,[1] to discover the truth in the marketplace of

---

[1] *See N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (establishing a heightened standard to find defamation because the government may not chill criticism of public figures).

ideas,[2] to express one's identity,[3] and to realize self-fulfillment in a free society.[4] That freedom is of first importance to many Americans such that the United States Supreme Court has relaxed procedural requirements for citizens to vindicate their right to freedom of speech,[5] while making it harder[6] for the government to regulate it. This case is about one such regulation.

The Tennessee General Assembly enacted a statute criminalizing the performance of "adult cabaret entertainment" in "any location where the adult cabaret entertainment could be viewed by a person who is not an adult." (ECF No. 19-1 at PageID 93.) Plaintiff Friends of George's, Inc. sued under 42 U.S.C. § 1983 to enjoin enforcement[7] of that statute, alleging that it is an unconstitutional restriction on free speech under the First Amendment, as incorporated to the states by the Fourteenth

---

[2] *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]hat the best test of truth is the power of the thought to get itself accepted in the competition of the market.").

[3] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that refusing to salute the American flag is a protected right to express dissent as a form of autonomy and self-expression).

[4] *Procunier v. Martinez*, 416 U.S. 396, 427 (Marshall, J., concurring).

[5] *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

[6] *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002); *see also Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011).

[7] Plaintiff first sued the State of Tennessee, Governor Bill Lee in his official and individual capacity, Attorney General Jonathan Skrmetti in his official and individual capacity, and Shelby County District Attorney General Steven Mulroy in his official and individual capacity. (ECF No. 1, 31.) Plaintiff, after conferring with Defendants, voluntarily moved to dismiss the parties other than Defendant Shelby County District Attorney General Steven J. Mulroy in his official and individual capacities. (ECF No. 60.)

Amendment of the United States Constitution. After a hearing, the Court issued a temporary restraining order that enjoined enforcement of the statute in Tennessee. (ECF No. 26.) The Court and Parties later agreed to consolidate the preliminary injunction hearing and the trial on the merits under Federal Rule of Civil Procedure 65(a)(2). (ECF No.30.) The Parties exchanged briefs and the Court held a bench trial on May 22–23, 2023.

After considering the briefs and evidence presented at trial, the Court finds that—despite Tennessee's compelling interest in protecting the psychological and physical wellbeing of children—the Adult Entertainment Act ("AEA") is an UNCONSTITUTIONAL restriction on the freedom of speech and PERMANENTLY ENJOINS Defendant Steven Mulroy from enforcing the unconstitutional statute.[8]

RULE 52(A) FINDINGS OF FACT

When parties try an action without a jury, the Court must "find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(1)(1). What follows are the Court's findings of fact.

Undisputed Facts

The Parties do not dispute that in early 2023, the Tennessee General Assembly enacted the AEA. 2023 Tenn. Pub. Acts, ch. 2 (codified at Tenn. Code. Ann. §§ 7-51-1401, -1407, and § 39-17-901). Governor Bill Lee signed the AEA into law on March 2, 2023. (ECF No. 19-1.)

---

[8] The Court took Defendant's motion to dismiss under advisement. (ECF No. 41.) In light of this ruling, the Court DENIES Defendant's motion as moot.

I. The Adult Entertainment Act

The text of the adult entertainment act reads as follows:

SECTION 1. Tennessee Code Annotated, Section 7-51-1401, is amended by adding the following language as new subdivisions:

( ) "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;

( ) "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;

SECTION 2. Tennessee Code Annotated, Section 7-51-1407, is amended by adding the following language as a new subsection:

(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.

(2) Notwithstanding§ 7-51-1406, this subsection (c) expressly:

(A) Preempts an ordinance, regulation, restriction, or license that was lawfully adopted or issued by a political subdivision prior to the effective date of this act that is in conflict with this subsection (c); and

(B) Prevents or preempts a political subdivision from enacting and enforcing in the future other ordinances, regulations, restrictions, or licenses that are in conflict with this subsection (c).

(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.

SECTION 3. This act takes effect April 1, 2023, the public welfare requiring it, and applies to prohibited conduct occurring on or after that date.

(ECF 19-1.)

A. "Harmful to Minors" Standard

The AEA incorporates the "harmful to minors" (*id.* at PageID 93) standard from Tennessee Code Annotated § 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;

Tenn. Code Ann. § 39-17-901.

B. Intended Enforcement

The Parties stipulate that Shelby County District Attorney General Steven J. Mulroy intends to enforce "all State of Tennessee laws that fall within his jurisdiction, including the felony and misdemeanor crimes recently codified at [the AEA]." (ECF No. 69 at PageID 955.)

II. Procedural Posture

Plaintiff Friends of George's, Inc. is a registered 501(c)(3) nonprofit organization based in Memphis, Tennessee, that produces "drag-centric performances, comedy sketches, and plays." (ECF No. 69 at PageID 955.) On March 27, 2023, after the AEA's enactment but before its effective date (April 1, 2023), Plaintiff sued here for an injunction. Asserting that the new law violated their First Amendment rights to free expression, Plaintiff sought to "prevent this unconstitutional statute from taking [] effect." (ECF No. 1 at PageID 13.) Plaintiff named the State

of Tennessee as the lone Defendant in the action. (*Id.* at PageID 2.) Plaintiff later amended its complaint to add Defendants Bill Lee in his official and individual capacities, and Attorney General Jonathan Skrmetti in his official and individual capacities. (ECF No. 10 at PageID 52.) Defendants moved to dismiss Plaintiff's complaint and to deny its request for a temporary restraining order, arguing that sovereign immunity barred Plaintiff's claims. (ECF No. 19.)

In response, Plaintiff sued Shelby County District Attorney General Steven J. Mulroy in his official and individual capacities. (*See* ECF No. 26 (referencing Case No. 23-2176).) The Court held a hearing in both cases and issued a TRO as to all Defendants on March 31, 2023— one day before AEA was to take effect. (ECF No. 26.) With the Parties' consent, the Court consolidated the cases and scheduled a brief period for the Parties to conduct discovery. (ECF No. 30.) The Court also consolidated the preliminary injunction hearing with the trial on the merits. (ECF No. 31.) A few weeks later, Plaintiff moved to dismiss all Defendants other than District Attorney General Steven J. Mulroy in his official and individual capacities, which the Court also granted. (ECF No. 60.)

The Court held a consolidated preliminary injunction hearing and trial on the merits on May 22–23, 2023. The Parties then sent proposed findings of fact and conclusions of law. (ECF No. 81, 82.)

The Court's Findings of Fact

The Court makes the next findings of fact from the case's record and evidence presented at the consolidated preliminary injunction hearing and trial.

I. Ms. Vanessa Rodley's Testimony

Ms. Vanessa Rodley testified as Plaintiff's board member and Rule 30(b)(6) representative.[9] Based on her uncontroverted testimony,[10] the Court finds the following:

A. Plaintiff's Mission and Operation

Plaintiff's mission is to "raise money for LGBTQ nonprofits," and to "provide a space outside of bars and clubs where people can enjoy" drag shows. (ECF No. 81 at PageID 1064.) Even though Plaintiff's members believe there is "nothing wrong" with drag shows in age-restricted venues like bars, Plaintiff seeks to provide a space for some non-adults to enjoy drag outside of stigmatized, age-restricted venues. (*Id.* at PageID 1067–68.) Drag features "male and female" impersonators, but also "nonbinary person[s]." (*Id.* at 1068–69.) Drag performers in Plaintiff's shows could be males impersonating females or even female actors impersonating female characters. (*Id.* at PageID 1069.) Plaintiff produces its own original work. (*Id.* at PageID 1065.) Its members write, produce, act, and direct. (*Id.*) They also serve as production crew members. (*Id.*) Not all members are performers. In fact, Ms. Rodley is not a performer. (*Id.* at PageID 1064–65.)

Almost all of Plaintiff's performances are in the Evergreen Theater within Shelby County in Memphis with no

[9] Under the Federal Rules of Civil Procedure, an organization may designate a person who represents the organization and testifies on its behalf. Fed. R. Civ. P. 30(b)(6). The individual "must testify about information known or reasonably available to the organization." *Id.*

[10] The Court observed Ms. Rodley's testimony at trial. Ms. Rodley seemed to testify honestly and without exaggeration. Nor did she give the Court any reason to otherwise question her credibility. For these reasons, the Court finds Ms. Rodley's testimony credible.

age-restrictions. (*Id.* at PageID 1069.) Plaintiff also produces performances at other venues, but it has no control over age-restrictions there. (*Id.* at PageID 1070.) Plaintiff's performances can be sexual, but the performers try not to get "too risqué." (ECF No. 81 at PageID 1071.) Rather, they "try to stick around the PG-13 area." (*Id.*)

B. Plaintiff's Exhibits at Trial

At trial, Plaintiff played videos of three of its productions and described, through Ms. Rodley, others as well. The Court viewed the videos in Plaintiff's exhibit after the trial. Defendant also submitted video clips of Plaintiff's 2022 holiday program, which the Court viewed before trial.

The first production Plaintiff showed is entitled "The Tea with Sister Myotis." (*See* ECF No. 80 (found at Exhibit Number 2).) Because the character describes sexual acts including intercourse and masturbation, the Court finds that the conduct of performers in this production could be interpreted by a law enforcement officer as violating the AEA.

The second production is entitled "Paradise by Dashboard Light." (*See* ECF No. 80 (found at Exhibit Number 2).) Because the characters portrayed sexual acts in this skit, the Court finds that the conduct of performers in this production could be interpreted by a law enforcement officer as violating the AEA.

Finally, the Court finds the following:

These videos are typical of Plaintiff's productions since 2011. Plaintiff intends to continue producing these types of shows in pursuit of its mission. Plaintiff is concerned that the AEA could subject Plaintiff and its members to felony charges. A law enforcement officer could

view Plaintiff's productions and reasonably think that they violate the AEA. The threat of prosecution has forced Plaintiff to alter the content of their productions, and to spend more on security at the Evergreen Theater.

Ms. Rodley is also President and Festival Director of Mid-South Pride Foundation, Inc., a nonprofit that hosts the "annual pride festival" in Memphis. She testified that since the AEA's enactment, she witnessed a "noticeable decline in sponsorship for the 2023 festival." (ECF No. 23-3 at PageID 141.) The 2022 Mid-South Pride festival had a total of 43 sponsors while on March 30, 2023—a day before this Court issued an Temporary Restraining Order enjoining the AEA's enforcement—the 2023 festival had only 23 sponsors. (*Id.* at PageID 142.) Also, while the festival secured 90% of its annual budget from sponsors 60 days before the event in 2022, it secured only 60% of its annual budget 63 days before the event this year. (*Id.*)

II. The AEA's Legislative History

The Parties both cite the Tennessee General Assembly's legislative transcript comprising four sessions—three from the Senate and one from the House. (ECF No. 35-1.) The Court summarizes the 100-page legislative history as follows:

The co-sponsors of the bill were Senator Johnson and Representative Todd. (*Id.* at PageID 521–22, 573.) Senator Johnson proposed the AEA to "clarify current law by requiring that adult-oriented performances may only be held in age-restricted venues and may never be held on public [] property." (*Id.* at PageID 515–16.) Senator Johnson observed that "[u]nder current law, [] businesses that provide predominantly adult-oriented entertainment must be licensed and age-restricted to prevent children

from entering that venue. . . . With this bill, [] only the entertainer who acts in violation of this law would be subject to the criminal penalty, not the business where the performance took place." (*Id.* at PageID 544–45.)

Senator Johnson also said that the co-sponsors "received hundreds of calls, emails from outraged parents" about performances that "any reasonable person, upon watching [the performance], would say that's in violation of the obscenity statute that we already have in current code." (*Id.* at PageID 520–21.) Speaking to law enforcement officers, the co-sponsors discovered a "loophole" in the statute that "would allow that type of entertainment to take place in public settings," so they are "just simply trying to apply the same standards to this adult- themed sexually explicit entertainment that can take place in these heavily regulated establishments." (*Id.* at PageID 521.) The co-sponsors stressed the need for age-restrictions at least six other times from the legislative transcript. (*Id.* at PageID 521, 544, 547, 575, 576, 579.)

Senator Johnson stressed that the AEA only applies to "performances that are considered harmful to minors" as already defined by language that "exists currently in our code, and it's in the obscenity statute." (*Id.* at 516–17.) He then mentioned that the AEA "doesn't ban that type of entertainment. It simply says it can't be done on public property, and if it's going to be done in a private venue, then you have to ensure that children are not present." (*Id.* at 517.)

Representative Bulso, another member of the House, observed that the AEA pulled its language from "the three-part *Miller* test coming from our U.S. Supreme Court in 1973." (*See id.* at PageID 605.)

Supporters of the AEA expressed their concern for children from these "sexually-explicit performances." (*Id.* at PageID 520–21, 547, 549, 567–68, 599, 602, 606.) Two witnesses spoke to the Senate at the AEA's introduction. (*Id.* at PageID 524.) Ms. Landon Starbuck, whose credentials include being "an advocate for children harmed by child sexualization and exploitation," spoke first. (*Id.* at PageID 525.) She told the Senate how "early sexualization and exposure to explicit adult entertainment harms children" because it grooms them into "accepting adult sexual behavior as normal, healthy, and even celebrated while it encourages them to simulate and participate in high-risk sexual behaviors." (*Id.*) In her opinion, "normalizing the sexualization of children empowers child predators and increases the demand to exploit and sexually abuse children." (*Id.* at PageID 526.) In response to a question about parental responsibility, Ms. Starbuck said "the responsibility is on parents when they see [indecent sexual acts], that's where their parental rights end and that's where a crime is committed." (*Id.* at PageID 529.) She then gave the examples of "sexually charged entertainment" performed in front of children in shows marketed as "family friendly" and concluded that "[w]e don't need a PhD to tell us that children mimic the behaviors they are exposed to." (*Id.* at PageID 527.) When asked to cite an example of a performance she found harmful to minors, Ms. Starbuck mentioned that "Boro Pride recently happened in Murfreesboro, Tennessee, where an adult performer was talking about their tits and rubbing their genitalia, grinding on the ground and spreading their legs in front of children." (*Id.* at PageID 530.)

Speaking against the bill was Mr. David Taylor, a "co-owner of four businesses in Nashville" that "cater pre-

dominantly to the LGBTQ+ community" and which employ "13 full- time and more than 60 guest drag performers with a total annual payroll of $3 million." (*Id.* at PageID 533.) He explained how his businesses are heavily regulated by the "Alcoholic Beverage Commission," yet he "has not received a citation for one of [his] drag performers" in "more than 20 years" of operation. (*Id.* at PageID 534.) Mr. Taylor is concerned about how the AEA "places male and female impersonation in the category of strippers, go-go dancers, and exotic dancers[.]" (*Id.*) He noted that their drag performers "ha[ve] never shown any more skin than a Titans cheerleader on a Sunday afternoon." (*Id.*)

Beyond the witnesses, several legislators expressed their concerns about the AEA's constitutionality, with specific reference to "drag" as an expressive art form. (*See id.* at PageID 551–53, 555–56, 561–62, 581, 590, 593, 596.) Some questioned the legitimacy of the AEA's purpose since the state "already ha[s] obscenity laws on the books if [overly-sexualized performers] are being seen in front of children[.]" (*Id.* at PageID 576, 599–600.) For example, Senator Yarboro mentioned that the AEA's language applies the state's adult-oriented entertainment regulations to public places or "anywhere where any child could view, and not just views, like anywhere where a child could view a performance. So one out of four or five people is a child in Tennessee—basically everywhere." (*Id.* at PageID 559.)

In the House, Representative Harris asked the AEA's co-sponsor, Representative Todd, if there were any times when adult cabaret in public has harmed his constituents. (*Id.* at PageID 584.) Representative Todd responded:

> [I]n my community, we had a local group decide to a quote "family-friendly pride"— or a "family friendly" drag show. And when they listed this as family friendly, my community rose up. We filed an injunction against this group, actually against the City of Jackson because our city mayor was endorsing this and refusing to use local ordinances to prevent it that were very clearly set there to prevent this type of activity in front of children.

(*Id.* at PageID 584–85.) He then described how "his community" succeeded in their suit and the "drag show" was "forced to be indoors and 18 and up only." (*Id.*) After that he "was asked to come up with legislation that would make this much more clear," and so the AEA defines the word "cabaret." (*Id.*) Representative Todd stressed that the AEA does not "prevent those performances. It certainly says that they must not be held in front of minors[.]" (*Id.* at PageID 586.) He described the AEA as a "very simple common sense bill . . . protecting children first and foremost." (*Id.* at PageID 599–600.)

Representative Clemmons observed that "[n]obody wants a minor in an establishment with a stripper. There are laws prohibiting that." (*Id.* at PageID 599–600.) He concluded by saying "you cannot exclude individual classes of people because you subjectively disagree with them . . . [the AEA's] language is vague and it's overly broad. This will not stand up in court . . . I would ask that you at least make the effort as an attorney to clean this up to bring it within constitutional muster[.]" (*Id.* at PageID 601.) Representative Todd responded, saying "I think the language is extremely clear. We've had multiple attorneys look over this. They think it's extremely solid. I'm very confident, very confident our Attorney General can stand behind this and defend this without question." (*Id.*)

For reasons it will explain later, the Court finds that the legislative transcript strongly suggests that the AEA was passed for an impermissible purpose.

RULE 52(A) CONCLUSIONS OF LAW

These are the Court's Conclusions of Law. There are several issues in this case with overlapping questions of fact and law. The Court will take the issues one at a time—reiterating some of its factual findings when appropriate and stating its legal conclusions for each issue in turn. This section will proceed in this sequence: summary of legal conclusions, appropriate party defendant, standing, standard of review, application of standard, vagueness, substantial overbreadth, remedy, and conclusion.

Summary of Legal Conclusions

After Article III standing, the central legal question in this case arises from the Parties' clashing constructions of the AEA. Plaintiff argues that the AEA is constitutionally vague in that it applies to expressive conduct that is "harmful to minors" of all ages, it is both a content- and viewpoint-based restriction, and that it is substantially overbroad because it applies to anywhere a minor could be present. Defendant makes many arguments to save the statute including that the AEA is not unconstitutionally vague because it applies only to expressive conduct that is harmful to a reasonable 17-year-old, it is content-neutral or is to be treated as such because it is predominantly concerned with the secondary effects of expressive conduct, and that it is not substantially overbroad because it applies only to public property and private venues without an age restriction.

The Court concludes that Plaintiff has proven Article III standing for a facial challenge of the AEA. Plaintiff

has organizational standing to sue for declaratory and injunctive relief, because the certainly impending threat of the AEA's enforcement on Plaintiff caused an injury that a favorable ruling would redress. Plaintiff can assert the interests of parties not before this Court to launch a facial attack on the AEA under the First Amendment's substantial overbreadth doctrine.

Defendant Steven J. Mulroy in his official capacity as District Attorney General of Shelby County is the only appropriate Defendant in this case.

The Court concludes that strict scrutiny review applies to the AEA. As a matter of text alone, the AEA is a content-, and viewpoint-based restriction on speech. The AEA was passed for the impermissible purpose of chilling constitutionally-protected speech, and the secondary-effects doctrine does not save it from strict scrutiny review.

The Court concludes that the AEA fails strict scrutiny review. Tennessee has a compelling state interest in protecting the physical and psychological well-being of minors, but Defendant has not met his burden of proving that the AEA is both narrowly tailored and the least restrictive means to advance Tennessee's interest.

The Court concludes that the AEA is both unconstitutionally vague and substantially overbroad. The AEA's "harmful to minors" standard applies to minors of all ages, so it fails to provide fair notice of what is prohibited, and it encourages discriminatory enforcement. The AEA is substantially overbroad because it applies to public property or "anywhere" a minor could be present.

Finally, the Court concludes that the constitutional-avoidance canon does not apply to the AEA's constitu-

tional defects. Defendant's proposed narrowing constructions are unmoored from the text and unsupported—if not contravened—by legislative history, which Defendant asked the Court to consider. Acceptance of Defendant's proposed narrowing construction under the guise of the constitutional-avoidance would require the Court to rewrite the statute, and to violate the principle of separation-of-powers.

Appropriate Party

At this point, the only Defendant is Steven J. Mulroy in his official capacity as District Attorney General of Shelby County and in his individual capacity. These capacities are particularly relevant in this case because the Office of the Tennessee Attorney General represents Mulroy in his official capacity, while Mulroy in his individual capacity has his own counsel. (ECF No. 34.) As an individual, Mulroy takes a different position than he does in his official capacity. Defendant argues that the Court should dismiss Mulroy in his individual capacity because Plaintiff's § 1983 action seeks equitable relief, not monetary damages. So only Mulroy in his official capacity is the appropriate party. Plaintiff disagrees based on its understanding of *Ex parte Young*, 209 U.S. 123 (1908).

Only the government, and not individuals, can violate the United States Constitution. *See Virginia v. Rives*, 100 U.S. 313, 318 (1879) ("The provisions of the Fourteenth Amendment . . . have reference to State action exclusively, and not to any action of private individuals.") But the government is also "immune from suit" under the Eleventh Amendment's doctrine of sovereign immunity. *See Alden v. Maine*, 527 U.S. 706, 754 (1999) ("Our sovereign immunity precedents establish that suits against nonconsenting States are not 'properly susceptible of litigation in courts[.]'"). *Ex parte Young* reconciles a tension between

these two principles: the Fourteenth Amendment's requirement of a state action and the Eleventh Amendment's shield of state sovereign immunity. The *Ex parte Young* "fiction" has been "accepted as 'necessary to 'permit federal courts to vindicate federal rights.'" *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 254–55 (2011). This fiction creates a "narrow exception allowing an action to prevent state officials from enforcing state laws that are contrary to federal law[.]" *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021).

The Court concludes that Mulroy in his official capacity is the only appropriate Defendant here. Plaintiff insists that this question is resolved by *Ex parte Young*'s holding that a state official who violates federal law is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 159–60. Plaintiff's observation is, at best, outdated. The Supreme Court has since held that § 1983 actions for injunctive relief allow for suits against state officers in their official capacity. *Will v. Mich. State Police*, 491 U.S. 58, 71 n.10 (1989) ("[O]fficial-capacity actions for prospective relief are not treated as actions against the State.") (citing *Ex parte Young*, 209 U.S. at 159–60). The Sixth Circuit has also held in *Kanuszewski v. Michigan Department of Health* that in declaratory and injunctive relief actions, the *Ex parte Young* exception only applies to individual officers in their official capacities. 927 F.3d 396, 417 (6th Cir. 2019).

As an individual citizen, Mr. Steven J. Mulroy has no more power to enforce the AEA than any other private citizen. But as the elected District Attorney General of Shelby County, Steven J. Mulroy is sworn to enforce state criminal laws, including the AEA. The only Defendant in

this suit who can enforce the AEA within this Court's jurisdiction in Shelby County is District Attorney General Steven J. Mulroy. Since Plaintiff's § 1983 action seeks only declaratory and injunctive relief, the *Ex parte Young* doctrine and the Fourteenth Amendment's requirement of state action preclude Plaintiff from suing Steven J. Mulroy in his individual capacity in this suit. The Court therefore DISMISSES Steven J. Mulroy in his individual capacity.

Standing

Federal courts have limited jurisdiction. Article III of the United States Constitution cabins federal jurisdiction to "Cases" or "Controversies." Without this limitation, the judiciary runs the risk of reaching responsibilities that the Constitution commits to the states, or federal executive and legislative branches. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)) ("The 'law of Art. III standing is built on a single basic idea—the idea of separation of powers.'"). Federal courts have an "independent obligation to examine their own jurisdiction," chief among them is the doctrine of standing. *See FW/PBS, Inc. v. Dallas*, 492 U.S. 215, 231 (1990).

Courts have interpreted Article III's case-or-controversy "requirement" as demanding plaintiffs to show that they have standing to sue. The standing doctrine limits the category of federal court litigants to those whose disputes are appropriately resolved through the judicial process—preventing courts from "being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). To establish standing, Plaintiffs must show that (1) they suffered an injury in fact—a legally-protected interest that is concrete, particularized, and actual or imminent, (2) that

Defendant likely caused the injury, and (3) that judicial relief would likely redress the injury. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992). The party invoking federal jurisdiction has the burden of establishing these elements. *Id.* at 561 (internal citations omitted). And standing is determined at the time of the complaint's filing. *Ohio Citizen Action v. Englewood*, 671 F.3d 564, 580 (6th Cir. 2012).

The United States Supreme Court has "altered its traditional rules of standing" for overbreadth challenges to legislative acts on First Amendment grounds—like this one. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). This departure stems from the Supreme Court's recognition that "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Id.* at 611–12. The Sixth Circuit clarified that "this exception applies only to the prudential standing doctrines, such as the prohibition on third-party standing, and not to those mandated by Article III itself, such as the injury-in-fact requirement." *Phillips v. Dewine*, 841 F.3d 405, 417 (6th Cir. 2016); *see also Birmingham v. Nessel*, No. 21-1297, 2021 WL 5712150, at *3 (6th Cir. Dec. 2, 2021) ("[A]lthough the overbreadth doctrine permits plaintiffs to bring suit even if their First Amendment rights have not been violated, they may bring suit only when they have suffered an injury or face an imminent threat that they will suffer an injury.").

The upshot is that a pre-enforcement review of a statute based on substantial overbreadth—also known as a facial attack—allows a Plaintiff to challenge an entire stat-

ute's constitutionality based on its "application to other individuals not before the court." *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335–36 (6th Cir. 2008).

This case is a pre-enforcement review of a legislative act under the First Amendment—so the Court must first determine whether the threatened enforcement of a purported law creates an Article III injury. The Supreme Court has held that when an individual is subject to a threat of enforcement, that is enough for standing. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974). In other words, actual enforcement is not required for a court to find standing. (*Id.*) But a plaintiff still needs to prove such a threat inflicts a concrete harm because fears of prosecution cannot be merely "imaginative or speculative." *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 609 (6th Cir. 2008) (citing *Younger v. Harris*, 401 U.S. 37, 42 (1971). The Sixth Circuit summed up the standard for pre-enforcement review in *Crawford v. United States Department of Treasury*:

> To have standing to bring a pre-enforcement challenge to a federal statute, there must be a *substantial probability* that the plaintiff actually will engage in conduct that is *arguably affected* with a constitutional interest, and there must be a *certain* threat of prosecution if the plaintiff does indeed engage in that conduct.

868 F.3d 438, 454–55 (6th Cir. 2017) (combining standards from *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014), *Warth v. Seldin*, 422 U.S. 490, 498 (1975), and *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013)).

Plaintiff's overlapping grounds for standing to challenge the AEA's constitutionality fall into two main categories. First, Plaintiff argues that it has associational

standing, meaning it has standing to bring claims on behalf of its members. Second, Plaintiff argues that it has organizational standing, meaning that as an organization, it has standing to bring its own claims. Since this is a facial challenge arguing that that the AEA is substantially overbroad, Plaintiff claims that it can assert the interest of parties not before this court. The Court will discuss these theories in turn.

I. Associational Standing

An entity has standing to sue on its members' behalf when it can prove these three things: (1) its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the entity's purpose, and (3) neither the claim nor the relief requested requires the participation of the individual members in the suit. *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 254–55 (6th Cir. 2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 181 (2000)). Under the first element, Plaintiff must establish that at least one of its members would have standing to sue on her own. *Id.* at 255 (citing *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 554–55 (1996)). Thus, Plaintiff must show that at least one of its members (1) suffered an injury in fact (2) that is fairly traceable to the defendant's challenged conduct, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan*, 504 U.S. at 560–61.

Plaintiff argues that it can claim associational standing because its member-performers, who are "male or female impersonators" that perform drag shows, could be prosecuted under a plain reading of the AEA. Particularly, Plaintiff is concerned that its members' drag show performances could be seen by a law enforcement officer as violating the AEA's "harmful to minors" standards under

Tennessee Code Annotated § 39-17-901. According to Plaintiff, this standard regulates not just physical portrayals of drag, but even a "description or representation, in whatever form" of sexual content that a law enforcement officer could see as rising to the level of "harmful to minors."

Defendant argues Plaintiff has not established associational standing because it has not named a single individual member. Defendant cites *Summers v. Earth Land Institute* for the proposition that a plaintiff organization must name a single individual member to establish associational standing. 555 U.S. 488, 498–499 (2009) ("This requirement of naming the affected members has never been dispensed with in light of statistical probabilities, but only where *all* the members of the organization are affected by the challenged activity."); *see also Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 543 (6th Cir. 2021) ("To satisfy [the Article III injury] element, an organization must do more than identify a likelihood that the defendant's conduct will harm an unknown member in light of the organization's extensive size or membership base. The organization must instead identify a member who has suffered (or is about to suffer) a concrete and particularized injury from the defendant's conduct. And the organization must show that its requested relief will redress this injury.") (internal citations omitted).

The Court agrees with Defendant and finds that Plaintiff failed to meet its burden of naming at least one member to establish associational standing. Plaintiff did not identify a single member in its original complaint (ECF No. 1), amended complaint (ECF No. 10), and its complaint against Defendant Mulroy in both capacities (ECF No. 32-1). At trial, Plaintiff called only one Friends of George's, Inc. member, Vanessa Rodley, who is both

Plaintiff's board member and Rule 30(b)(6) representative. Ms. Rodley testified about several topics: Plaintiff's mission, the AEA's effect on Plaintiff, the AEA's effect on another LGBTQ organization in Shelby County, among other issues. While she testified about several unnamed member-performers' fear of prosecution from the AEA, Ms. Rodley did not testify about being a performer herself and about her own fear of prosecution from the AEA. Plaintiff's failure to identify a single injured member dooms its associational standing claim.

Plaintiff invites the Court to find associational standing from the fact that all its members are harmed by the AEA. In *N.A.A.C.P. v. Alabama*, the Supreme Court held that an organization established associational standing when it asserted the rights of all its members on First Amendment Freedom of Association grounds. 357 U.S. 449 (1958). *N.A.A.C.P.* involved the organization's noncompliance with a court order requiring it to furnish a list identifying its members in the state. *Id.* at 451. The Supreme Court held that *N.A.A.C.P.* is the appropriate party to assert all its members rights "because it and its members are in every practical sense identical." *Id.* at 460.

The *N.A.A.C.P.* holding does not favor Plaintiff. It is a Freedom of Association case in which the compelled disclosure of members' affiliation with the plaintiff organization is the injury itself. It follows that the Supreme Court found the organization could properly assert its members' interests—who were not parties to the suit—as there is no need for identifying a member when disclosure of her affiliation with the entity is her injury. The same is not true in this case as Ms. Rodley testified that not all of Plaintiff's members are performers and the AEA regulates—even at its broadest reading—participation in a performance, not membership in an organization. Some

members are production crew members, producers, and writers. And Plaintiff's counsel conceded at trial that their interpretation of the AEA is that it applies to all the performers on stage. Plaintiff's counsel did not argue that writers, producers, or crew members may be affected by the AEA.

The bottom line is that Plaintiff failed to identify a single member who sustained an Article III injury.[11] It also failed to substantiate its claim that all its members would be injured by the AEA. Because the Court finds that Plaintiff cannot meet the first element of associational standing, the Court will not consider Plaintiff's arguments under the remaining elements. Therefore, Plaintiff failed to meet its burden to establish associational standing.

II. Organizational Standing

Plaintiff also claims organizational standing "because it [the organization itself] has suffered a palpable injury as result of the defendants' actions." *MX Grp., Inc. v. Covington,* 293 F.3d 326, 332–33 (6th Cir. 2002). To establish organizational standing, a plaintiff must also meet the three standing elements: injury-in-fact, causation, and redressability. *See Fair Elections Ohio v. Husted*, 770 F.3d 456, 459 (6th Cir. 2014). But an organization's "mere interest in a problem" cannot confer standing. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). It must show instead that its "ability to further its goals has been 'perceptively

[11] Plaintiff identified some of its members who are also performers at trial. (ECF No. 81 at PageID 1065.) But none of them testified or submitted declarations alleging injury to themselves. (*Id.*) Plaintiff argued that it initially disclosed to Defendant that it would identify and make available its members for depositions subject to a protective order, but Defendant never made such request. (ECF No. 81 at PageID 1140.) The Court reminds Plaintiff that it bears the burden of proving standing—not Defendant.

impaired' so as to constitute far more than simply a setback to the organization's abstract social interests." *Greater Cincinnati Coal. for the Homeless v. Cincinnati*, 56 F.3d 710 (6th Cir. 1995) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). And Plaintiff "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013).

Plaintiff argues that it has organizational standing for this pre-enforcement challenge because the AEA "perceptively impairs" its mission of raising money for LGBTQ nonprofits and taking drag into the mainstream. In other words, it would have cancelled or restricted its productions involving "male or female impersonators"—had it not been for this Court's issuance of a temporary restraining order. And that the AEA's vagueness and overbreadth chills not only its members' speech, but also the speech of other drag performers in Tennessee.

Defendant argues that Plaintiff cannot establish that the AEA will cause it to suffer an Article III injury because it disclaims any intent to engage in conduct that even arguably violates the Act. (ECF No. 64.) Defendant next retorts that Plaintiff's past performances do not violate the AEA because they could not meet the "harmful to minors" standard. Defendant also contends that Plaintiff's subjective fears of prosecution do not rise to the standard required to meet the Article III injury standard for pre-enforcement facial challenges. Finally, Defendant argues that Plaintiff has failed to identify the requisite number of substantial overbreadth applications of the AEA.

Before discussing these organizational standing arguments, the Court begins with a clarification.

A. Defendant's Objection to Franklin Pride Evidence

When the Court issued a temporary restraining order in this case, the Defendants included the State of Tennessee, Governor Lee, and Attorney General Skrmetti. Therefore, in resolving Plaintiff's claims, the Court considered Plaintiff's pleadings and declarations that referenced the AEA's impact on the entire state—to include cities outside Shelby County like Nashville, Franklin, and Knoxville. (ECF No. 23-1.) Plaintiff has since moved to voluntarily dismiss the other Defendants, leaving only District Attorney General Mulroy as the lone Defendant here. At trial, Plaintiff called Mr. Clayton Klutts, President of a Franklin-based LGBTQ organization who testified about events that occurred in Franklin. Defendant objected on relevance grounds.

The Court disregarded Mr. Klutts's testimony and any other evidence about the AEA's impact outside of Shelby County. Judicial review of the AEA's constitutionality is distinct from the Court's equitable power to issue an injunction prohibiting the AEA's enforcement. Because District Attorney General Mulroy only has enforcement powers within Shelby County, Plaintiff's standing to bring this suit could arise only from Article III injuries it could (1) fairly trace to Defendant and (2) that could be redressed with a favorable ruling concerning Defendant. Therefore, the only evidence relevant to standing in this case is limited to the AEA's potential enforcement in Shelby County.

B. Evidence at Trial on Plaintiff's Mission and Performances

Ms. Rodley testified during trial that Plaintiff is a "drag-centric theatre group" that puts on three productions a year for two purposes: to raise money for LGBTQ

nonprofits, and to provide a space outside of clubs where people can enjoy drag shows. (ECF No. 81 at PageID 1064.) She testified that Plaintiff's members fear criminal prosecution under the AEA because—as a drag-centric theatre group that features "male or female impersonators"—its performances can be sexual in nature. (*See id.* at PageID 1065–66.) Speaking in terms of movie ratings, she testified that Plaintiff tries to "stick around the PG-13 area and not be too risqué so as to merit an R rating." (*Id.* at PageID 1071.) She testified that Plaintiff does not place age restrictions on its shows. (*Id.*) Still, she admits that she does not think they would be appropriate for a five-year- old but could be appropriate for a fifteen-year-old. (*Id.* at PageID 1114.) As part of its proof, Plaintiff played three video productions during the trial.[12]

The first video is from a production entitled "The Tea with Sister Myotis" that Ms. Rodley claimed to be a satire of the show "The View." (*Id.* at PageID 1081–82.) The video showed four individuals, whom Ms. Rodley characterized as "female impersonators." (ECF No. 80 (found at Exhibit Number 2).) The sixteen-minute video centered on one character's discussion of various issues, punctuated by several jokes and innuendos about sexual intercourse and masturbation. (*Id.*) Plaintiff claims this exhibit could fall under § 39-17-901's "description or representation" of "masturbation" and "simulated ultimate sexual acts." (*Id.*) Ms. Rodley testified that Plaintiff held this

[12] In his Proposed Findings of Fact and Conclusions of Law, Defendant implies that the Court could not "evaluate the work's artistic merit as a whole," because Plaintiff played only clips, instead of full shows, at trial. (ECF 85 at PageID 1332.) Defendant did not object to this evidence at trial—but the issue is moot as the Court watched the full videos for the first and second performances.

production in the Evergreen Theater with no age restrictions.

The second video is from a production entitled "Paradise by the Dashboard Light," in which six individuals—half of whom were characterized by Ms. Rodley as "female impersonators"—pretended to sing while acting out the lyrics to the song. (ECF No. 81 at PageID 1083.) During the four-minute song, the performers made sexual gestures with each other behind a translucent curtain. (ECF No. 80 (found at Exhibit Number 2).) Plaintiff claims this performance could fall under § 39-17-901's description of "simulated ultimate sexual acts" clause. Ms. Rodley testified that Plaintiff held this production in the Evergreen Theater with no age restrictions.

The third video is entitled "Trixie Thunderpussy—Pussycat Song," which featured one performer whom Ms. Rodley characterized as a "female impersonator." (ECF No. 80 (found at Exhibit Number 2).) This clip showed the performer pretending to sing the lyrics to a song while making gestures toward the pubic area. Plaintiff claims this performance could fall under § 39-17-901's "description or representation" of "female genitals in state of sexual arousal" clause. Ms. Rodley testified that this production was held in an age-restricted venue and before the Plaintiff's formation as a nonprofit.

Ms. Rodley also testified about three of Plaintiff's past productions without playing the videos at trial. (ECF No. 81 at PageID 1074.) The first one is a "skit from Drag Rocks involving Rod Stewart." Ms. Rodley testified that the skit involved a portrayal of sexual acts between two performers, one of whom was "wearing tight, tight black pants and he is . . . wearing a penis that is over exaggerated so the audience can see it's there." The second is a performance entitled "Bitch, You Stole My Purse," which

is about a "lot lizard," and involved "blow jobs and possibly having sex as well as pooping in somebody's purse." And the third is a skit entitled "Dick in a Box," which involved "two people presenting gift packages where their penises would be . . . penis is in a box, it's got tissue around it. It's really hard to see if it is [erect] or not." Plaintiff claims these performances could fall under § 39-17-901's under various clauses to include "Representation of Excretory Function," and "Depiction of male genitals in discernibly turgid state."

C. Plaintiff Has Organizational Standing to Bring this Substantial Overbreadth Challenge

The Court finds that Plaintiff met its burden of proving organizational standing to facially challenge the AEA's constitutionality in a pre-enforcement action for three main reasons. First, Plaintiff met the Sixth Circuit's standard for pre-enforcement review under *Crawford* because it proved a "substantial probability" of engaging in conduct that is "arguably affected with a constitutional interest" and it faces a "certain threat of prosecution." 868 F.3d at 454–55. Second, Plaintiff's own injury allows it to assert the interests of parties not before this Court under the Supreme Court's relaxed prudential standing for First Amendment substantial overbreadth challenges. *See id.; Speech First, Inc. v. Schlissel*, 939 F.3d 756, 764 (6th Cir. 2019).

1. Plaintiff Met the *Crawford* Pre-enforcement Review Standard, Causation, and Redressability

The Sixth Circuit's standard for a pre-enforcement challenge to a statute has three components: (1) a substantial probability that Plaintiff will engage in a course

of conduct that is (2) arguably affected with a constitutional interest, but is proscribed by statute, and (3) certain threat of prosecution under the statute. *Crawford*, 868 F.3d at 454–55.

a. Substantial Probability of Engaging in Conduct

The Court finds Plaintiff has met the first element. An organization is injured when its "ability to further its goals has been 'perceptively impaired' so as to constitute[] far more than simply a setback to the organization's social interests." *Greater Cincinnati Coal. for the Homeless v. Cincinnati*, 56 F.3d 710, 716 (6th Cir. 1995) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Plaintiff's Amended Complaint notes that it "produces drag-centric performances, comedy sketches, and plays." (ECF No. 10 at PageID 52.) Ms. Rodley's uncontroverted testimony was that Plaintiff puts on "three productions a year to raise money for fellow LGBTQ non-profits" and provides "a space outside of the bars and clubs where people can enjoy this art form." (ECF No. 81 at 1064.) She also testified that most of their shows are held at the Evergreen Theater within Shelby County with no age restrictions. (*Id.* at PageID 1069.) She said that the exhibits Plaintiff introduced at trial constitute "content that is common in Friends of George's shows"—as a matter of fact, all but one of them are Plaintiff's productions since 2011.

The Court finds Ms. Rodley's uncontroverted testimony is credible. Based on her testimony, the Court finds that Plaintiff has been producing "drag-centric performances" since 2011 with multiple performances each year in its Evergreen Theater within Shelby County with no age restrictions, and no criminal incidents. And Plaintiff intends—beyond a substantial probability—to continue

producing drag performances with "male or female impersonators" as part of its mission of raising money for LGBTQ nonprofit organizations and taking drag shows into the mainstream. Plaintiff also intends to continue producing drag-centric performances. What is more, Plaintiff's suit to enjoin enforcement of the AEA reflects its commitment to assert "the right of artists to communicate their art and their message to the general public." (ECF No. 81 at PageID 1054.)

b. Conduct Is Arguably Affected with a Constitutional Interest but Is Proscribed by Statute

The Court finds Plaintiff has also met the second element. Defendant asks the Court to first determine the scope of the AEA to assess Plaintiff's standing. Unsurprisingly, Defendant's understanding of the AEA's scope is much narrower than Plaintiff's. To accept Defendant's position the Court would have to agree to apply the Tennessee Supreme Court's narrowing construction to the AEA's "harmful to minors" standard. *See Davis-Kidd v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993). And the Court would have to take Defendant's choice between "one of two ways" in which the AEA's applicable location can be understood. (ECF No. 85 at 1327–29.)

But this juncture is about standing to sue, not success on the merits. Plaintiff need only show that its conduct (that is expressive conduct) is "arguably affected with a constitutional interest, but proscribed by statute[.]" *Crawford v. United States*, 868 F.3d 438, 454 (6th Cir. 2017). "Arguably" is not a high standard. In fact, it is a low one. The intricacies of the AEA's constitutionality and its impact on Plaintiff's expressive conduct will be fully discussed in the merits section below. Suffice to say, in determining standing, the Court concludes that the AEA

criminalizes "performances that are harmful to minors," which include those that are "sexual in nature." (ECF No. 19-1.) And the Court finds the AEA amends Tennessee Code Annotated § 7-51-1401 and § 7-51-14707—which regulate operators of adult-oriented establishments—in one significant way that impacts Plaintiff. The AEA regulates the performers themselves, implicating their First Amendment rights with criminal consequences. After weighing the evidence at trial, the Court finds that Plaintiff's exhibits are performances that both described and represented sexual content that is arguably constitutionally-protected.

The parties dispute whether Plaintiff's performances are proscribed by the statute: Plaintiff contends that some might say their performances meet the definition of "harmful to minors" under § 39-17-901. Defendant disagrees, contending that even Plaintiff does not allege that its performances go that far. Both statements can be true—Plaintiff can believe its performances are not proscribed by statute while believing others may disagree. The Parties can litigate this question's merits, but for standing purposes, the Court finds that Plaintiff showed that its performers' conduct is at least "arguably" proscribed by § 39-17-901. The Court also finds that the Parties' dispute on this point fortify the conclusion that Plaintiff's conduct is arguably affected with a constitutional interest that is proscribed by statute.

c. Certain Threat of Prosecution Under the Statute

Finally, the Court finds Plaintiff has met the third element. Plaintiff expressed concern that the AEA "could subject them to felony charges," so it will need either to "cancel the show, or add an age restriction to an event that has always been open to all ages." (ECF No. 7 at PageID

45; ECF No. 10 at PageID 62.) Ms. Rodley testified that "some or all of [Plaintiff's] board members/performers are threatened with potential for criminal prosecution" under the AEA. (ECF No. 81 at PageID 1065–66.) Defendant's cross-examination revealed that Plaintiff does not think that their performances lack artistic value. (*Id.* at PageID 1096–97.) And Defendant's briefs emphasize that Plaintiff "disclaims that it has or will engage in any conduct" that violated the AEA. (ECF No. 58 at PageID 788.)

But neither Plaintiff nor Ms. Rodley are law enforcement officers tasked with the AEA's enforcement. Plaintiff can hold the conviction that its productions are not harmful to minors while harboring the fear that Defendant, armed with a criminal statute, disagrees. This position accords with Plaintiff's suit for a permanent injunction of the AEA. At this stage, the question before the Court is not whether Plaintiff's past conduct violates the AEA. Rather, the question is whether Plaintiff faces what *Crawford* calls a "certain threat of prosecution."[13]

The Court finds that Plaintiff's exhibits at trial "describe or represent" sexual content of a wide range: from masturbation wordplay that a fifteen-year-old may or may not understand, to a thinly-veiled, but clearly-highlighted, depiction of sexual acts that would not escape

[13] In its 2013 decision in *Clapper*, the Supreme Court noted that "threatened injury must be *certainly impending.*" *See Clapper*, 568 U.S. at 409. Later, in *Susan B. Anthony List v. Driehaus*, which set the standard for standing in pre-enforcement challenges to legislative acts, the Supreme Court used the words "credible threat of prosecution." 573 U.S. 149, 159 (2014). Decided by the Sixth Circuit in 2017, *Crawford* rephrased the standard by synthesizing *Driehaus* with *Clapper* and switched the standard's language to "certain threat of prosecution." 868 F.3d at 454–55.

an eight- year-old's attention. The line between obscenity and art is so subjective that Justice Potter Stewart's comment: "I know it when I see it" remains relatable in 2023. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). But Defendant asks the Court to take comfort in the fact that the AEA's test merely adapts the constitutionally-upheld *Miller v. California* standard and extends it to material that is harmful to minors. Defendant argues that "minor" here means reasonable 17- year-olds only. This definition of "minor" is based on Defendant's theory that the Tennessee Supreme Court's narrowing construction of a statute regulating the commercial display of adult material applies to the AEA here. (ECF No. 85 at PageID 1332–33 (citing *Davis-Kidd v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993)).)

The Court will fully discuss Defendant's arguments in the merits section. But to determine injury-in-fact, the Court only needs to find whether Plaintiff faces a certain threat of prosecution—not certain prosecution[14]—under the AEA. In other words, is there a certainly- impending threat that a Shelby County law enforcement officer will determine that Plaintiff's performances violate the AEA? The Court finds that the answer is yes. Plaintiff has met its burden of proving a "certain threat of prosecution" under the AEA for two main reasons. First, Defendant's narrowing construction by substituting 17-year-old for "minors" veers so far from the AEA's text that neither

[14] Black's Law Dictionary defines "prosecution" as "[t]he commencement and carrying out of any action or scheme." *Prosecution*, BLACK'S LAW DICTIONARY (11th ed. 2019). Both *Crawford* and *Driehaus* use the word "enforcement" interchangeably with "prosecution." 868 F.3d at 460 ("[Plaintiff] has not alleged any facts that would show a credible threat of enforcement against him."); 573 U.S. at 161 ("We agree: Petitioners have alleged a credible threat of enforcement.").

reasonable people nor officers in Shelby County would have fair notice of the AEA's meaning.[15] The Court finds that a reasonable officer watching these performances could conclude they are harmful to children, say a five- or eight-year-old, and arrest Plaintiff's performers under the AEA.

Second, even if the Court were to accept Defendant's argument that the AEA applies only to a "reasonable-17-year-old minor," Plaintiff would still face a certain threat of criminal prosecution. In *Ginsberg v. New York*, the Supreme Court's discussion on what was deemed to be harmful to "minors under 17 years of age," was the so-called "girlie" magazines—material that depicts "female nudity . . . showing female buttocks with less than an opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple[.]" 390 U.S. 629, 631–33 (1968) (internal quotations omitted). Although many could debate the artistic value of Plaintiff's performances, few would think they are less "obscene" than the "girlie magazines" found to be harmful to minors in *Ginsberg*. And none could categorically dismiss the threat that a Shelby

[15] Even if the *Davis-Kidd* opinion were attached with the AEA (it is not), some might say that an equally convincing reading of *Davis-Kidd* is that the Tennessee Supreme Court applied its narrowing construction only to the adult materials display statute (§ 39-17-914(a)) and not to the "harmful to minors" standard in § 39-17-901. Also, the Tennessee Supreme Court decided *Davis-Kidd* in 1993. In 2008, the Third Circuit reviewed the Child Online Protection Act on remand from the United States Supreme Court in *ACLU v. Mukasey*. 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (3d Cir. 2009). The Third Circuit found that the definition of "harmful to minors" in that statute—which is nearly identical to the one in the AEA—was unconstitutionally vague because it "applies in a literal sense to an infant, a five-year old, or a person just shy of age seventeen." *Id.* at 191.

County officer may find them to be harmful to minors. The obscenity standard for adults already gives a lot of discretion to an individual officer's judgment on what she considers harmful under community standards.

Section 39-17-901's "harmful to minors" standard lowers the floor for criminal behavior, equipping law enforcement officers with even more discretion. The chance that an officer could abuse that wide discretion is troubling given an art form like drag that some would say purposefully challenges the limits of society's accepted norms. And the AEA covers a wide geographical reach: "in a location where adult cabaret entertainment could be viewed by a person who is not an adult."[16]

The Court emphasizes that the fear of prosecution from law enforcement officers is not merely speculative but certainly impending. The Parties stipulate that Defendant intends to enforce the AEA. Moreover, the AEA, unlike the statutes in *Ginsberg*, *Miller*, and *Davis-Kidd*, criminally sanctions not the business operators but the performers themselves. The AEA also contains no textual scienter requirement, safe harbors, or even affirmative defenses—like parental consent—present in similar obscenity statutes as discussed more fully below.

The Court finds that Plaintiff's past performances and present efforts to continue its mission of taking drag into the mainstream subjects it to a certain threat of enforcement under the AEA. Defendant's counsel argues that they think Plaintiff's exhibits are not "harmful to minors" under the AEA. But this would lead to Plaintiff taking an

---

[16] As discussed below, while the Supreme Court upheld a similar standard in *Ginsberg* and *Miller*, this case is different because the AEA covers a much wider geographical scope than the statute in these two cases.

enormous risk. It would have to eat the proverbial mushroom to find out whether it is poisonous. *See also Babitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (observing that a plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"). Our jurisprudence does not demand such an extreme measure—Article III requires a threat of prosecution, not actual prosecution. So the Court finds Plaintiff has met Article III's injury-in- fact requirement.

d. Causation and Redressability

The Court finds that Plaintiff has shown causation and redressability, fulfilling the rest of Article III standing requirements. The AEA caused the threat of prosecution, the crux of Plaintiff's injury in this pre-enforcement action. And a favorable ruling for Plaintiff—in the form of the declaratory and injunctive relief it seeks—would redress its harm from the threat of criminal prosecution. An order declaring the AEA unconstitutional, and enjoining Defendant's enforcement of the AEA would redress Plaintiff's injury. The Court therefore finds Plaintiff has standing to bring this pre-enforcement overbreadth challenge to the AEA.

2. Plaintiff Can Assert the Interest of Parties not Before this Court

The Supreme Court has noted the particular importance of protecting the First Amendment from vague and substantially overbroad regulations that may chill speech. *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."). The Sixth Circuit has held that the

"overbreadth doctrine provides an exception to the traditional rules of standing and allows parties not yet affected by a statute to bring actions under the First Amendment based on a belief that a certain statute is so broad as to 'chill' the exercise of free speech and expression." *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995).

Allegations of a "subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013). But the Sixth Circuit noted the difference between "objective chill," which refers to laws that produce direct injuries, and "subjective chill," which refers to laws that produce no injuries. *See Speech First, Inc. v. Schlissel*, 939 F.3d 756, 764 (6th Cir. 2019) ("In order to have standing, therefore, a litigant alleging chill must still establish that a concrete harm—i.e., enforcement of a challenged statute—occurred or is imminent."). The upshot is that objective chill—in the form of an imminent criminal enforcement of a challenged statute—is sufficient to prove Article III injury. *Id.* at 765.

As the Court already discussed above, Plaintiff proved Article III standing by meeting the *Crawford* elements. Plaintiff now benefits from the First Amendment jurisprudence's relaxation of standing requirements: it can now assert the rights of parties not before this Court in its overbreadth challenge. Our Circuit's Chief Judge succinctly explained the rationale behind this powerful doctrine in *Holder*:

> [T]he whole point of a facial challenge, or what the courts in the First Amendment context have come to call an overbreadth challenge, is to permit the claimant to strike the law in its entirety based on its application to other individuals not before the court. The

> overbreadth doctrine thus changes the customary rules of constitutional litigation: It relaxes the general prohibition against vicarious litigation by allowing claimants to assert the rights of third parties, and it permits a court to strike a law in its entirety even though it legitimately may be enforced in some other settings. *Broadrick*, 413 U.S. at 612–13. Due to the risk that "enforcement of an overbroad law" may "deter[ ] people from engaging in constitutionally protected speech" and may "inhibit[ ] the free exchange of ideas," the courts will strike a law on its face "if it prohibits a substantial amount of protected speech" both "in an absolute sense" and "relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285 (2008); *see also Broadrick*, 413 U.S. at 615."

557 F.3d at 335–36. Facial invalidation of a statute is "strong medicine that is not to be casually employed." *United States v. Williams*, 553 U.S. 285, 293 (2008) (citations and internal quotations omitted). Hence, Plaintiff has the burden of proving substantial overbreadth—that is a substantial number of the AEA's applications must be "unconstitutional, in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). Since the AEA imposes criminal sanctions on speech, its chilling effect is magnified. *Cf. Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004) (observing the potential chilling effect of a regulation on speech is "eliminated, or at least diminished," when the challenged statute does not impose criminal sanctions).

Plaintiff presented uncontroverted evidence at trial demonstrating potentially unconstitutional applications of AEA in Shelby County. Although Plaintiff's associational

standing theory failed, meaning the Court did not consider the potential injuries to its members, the overbreadth doctrine now permits Plaintiff to assert those injuries on behalf of parties not before the Court. Ms. Rodley also testified as Plaintiff's board member, and as President and Festival Director of Mid-South Pride Foundation, Inc., a nonprofit that hosts the "annual pride festival" in Memphis, Tennessee. (ECF No. 23-3 at PageID 141.) Plaintiff can assert the harm that AEA purportedly inflicted on the Mid-South Pride organization and Absent Friends, another theater organization based in Memphis. Lastly, Plaintiff can present hypotheticals—as it has in both the pretrial briefs and at trial—to demonstrate unconstitutional applications of the AEA within Shelby County. *See Holder*, 557 F.3d at 335 ("Although litigation by hypothetical generally is frowned upon, if not barred in other areas of constitutional litigation, it is sometimes required in free-speech cases.") (compiling cases) (internal quotations and citations omitted). The Court will discuss the merits of these non-parties' harm in the substantial overbreadth portion of this order. At this point, the Court finds that Plaintiff can bring these claims under the First Amendment's overbreadth doctrine.

These harms from AEA's substantial overbreadth are fairly traceable to the AEA and would be redressed by the relief Plaintiff seeks: a judgment declaring the AEA unconstitutional and a permanent injunction against Defendant. The Court finds therefore that Plaintiff can assert the interests of parties not before this court.

Merits

The First Amendment generally prevents the government from making a law "abridging the freedom of speech." U.S. Const. amend. I. The Supreme Court has interpreted "speech" to include "expressive conduct."

Texas v. Johnson, 491 U.S. 397, 404 1989 ("[W]e have acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). But not all speech is valued equally. The Supreme Court has identified certain types of speech holding "such slight social value," that any interest in protecting that speech is "clearly outweighed by the social interest in order and morality." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (identifying obscenity, defamation, and fighting words as examples of "low value speech").

Outside of low value speech, federal courts reviewing restrictions on speech "because of disapproval of the ideas expressed," apply different tiers of scrutiny. *Id.* As the Court discusses below, either strict or intermediate scrutiny usually applies. The level of scrutiny depends on several factors, including whether the regulation is based on the content of, or the viewpoint expressed by, that speech.

Plaintiff argues that the AEA is a content-based, viewpoint-based, restriction on speech that fails strict scrutiny. Defendant disagrees, arguing that the AEA is a time, place, and manner restriction that should be analyzed under intermediate scrutiny. But in any event, Defendant says that the AEA passes even the higher standard of strict scrutiny. The Court begins by determining the standard of review.

I. Standard of Review

A content-based regulation, which targets "speech based on its communicative content," is presumptively unconstitutional and must pass strict scrutiny. *Reed v. Gilbert*, 576 U.S. 155, 163 (2015); *see also Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) ("As a general matter, the First

Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (citations and internal quotations omitted). By contrast, a content-neutral regulation, which is "agnostic as to content" need only meet intermediate scrutiny. *Austin v. Reagan National Advertising of Austin*, 142 S.Ct. 1464, 1471 (2022).

The Court's first question is whether the law is content-based on its face—as a matter of text alone. *See Reed*, 576 U.S. at 165. This is because a facially content-based law is subject to strict scrutiny regardless of the government's motive. *See id.* ("[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral.").

A. Is the AEA a Content-based Restriction as a Matter of Text?

Plaintiff argues that the AEA is a facially content-based restriction for two reasons. First, the AEA prohibits a specific type of content: "adult-oriented performances that are harmful to minors." (ECF No. 81 at PageID 1188.) Second, it is both a content- and viewpoint-based restriction because it targets the identity of the performers, particularly "male or female impersonators." (ECF No. 81 at PageID 1189.) At trial, Defendant conceded that the AEA "does reference content in the statute,"[17] (*id.* at PageID 1193) but insisted that the AEA does not discriminate based on viewpoint (*id.* at PageID 1198).

[17] Defendant quickly—and correctly—pointed out that sometimes, a court can conclude that a statute is content-based, but treat it as if it were content-neutral. (ECF No. 81 at PageID 1193 (referring to the "secondary effects doctrine").) The Court will discuss that issue below.

1. The AEA is a Content-Based Regulation

The Court concludes that the AEA is a facial content-based restriction. Section 2 of the AEA imposes criminal sanctions on performers of "adult cabaret entertainment" by amending Tennessee Code Annotated § 7-51-1407, the Tennessee statute that currently defines "[r]estrictions on locations of adult-oriented businesses." (ECF No. 19-1 at PageID 93–94.) Section 1 of the AEA defines "[A]dult cabaret entertainment," in part, as "adult oriented performances that are harmful to minors." (*Id.* at PageID 93.) Section 1 defines "harmful to minors," by drawing from the state's criminal code's definitions on obscenity in Tennessee Code Annotated § 39-17-901. Section 39-17-901's definition is this: "'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: [adapted *Miller*[18] three-prong test (*See supra pp.* 4–5)]." (*Id.*) At trial, the Parties did not dispute that the AEA is content-based because it targets "speech based on its communicative content"—that is, content that is not obscene for adults but may be indecent and harmful to minors. (ECF No. 81 at PageID 1189, 1193.)

But Defendant's trial brief presents an argument that the Court will now address. Defendant acknowledged that the Supreme Court in *R.A.V.*, noted that "low value" speech like fighting words and obscenity cannot be made "vehicles for content discrimination unrelated to their distinctively proscribable content." (ECF No. 58 at PageID 792 (citing 505 U.S. at 383–84).) Defendant argues that the AEA fits within one of *R.A.V.*'s exceptions to this rule: a

[18] Defendant describes the standard as an adapted version of the obscenity test in *Miller v. California*, 413 U.S. 15, 21 (1973).

state may choose to prohibit "only that obscenity which is the most patently offensive in its prurience," which the AEA does by regulating a subset of "unprotected obscene speech." (*Id.*)

The Court disagrees. There is no question that obscenity is not protected by the First Amendment. But there is a difference between material that is "obscene" in the vernacular, and material that is "obscene" under the law. *Miller v. California* provides the standard for determining "obscenity" under the law. 413 U.S. 15, 21 (1973) (setting out a three-prong standard). Legal obscenity is an exceptionally high standard as one of its prongs requires that the speech "not have serious literary, artistic, political, or scientific value." *Id.* Moreover, speech that is not obscene—which may even be harmful to minors—is a different category from obscenity. Simply put, no majority of the Supreme Court has held that sexually explicit—but not obscene—speech receives less protection than political, artistic, or scientific speech. *See Ashcroft v. A.C.L.U..*, 535 U.S. 234, 245 (2002) ("It is also well established that speech may not be prohibited because it concerns subjects affecting our sensibilities."); *Reno v. A.C.L.U.*, 521 U.S. 844, 874 (1997) (reaffirming that the First Amendment protects sexual expression which is indecent but not obscene).

The AEA's regulation of "adult-oriented performances that are harmful to minors under § 39-17-901" does target protected speech, despite Defendant claims to the contrary. Whether some of us may like it or not, the Supreme Court has interpreted the First Amendment as protecting speech that is indecent but not obscene. *See Brown v. Ent. Merchs. Ass'n.*, 564 U.S. 786, 794 (2011) ("No doubt a State possesses legitimate power to protect

children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.") (citations and internal quotations omitted); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) ("For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."). Because the AEA's text targets such speech, the Court finds it is a content-based regulation. The AEA draws distinctions based on the message a speaker conveys: adult-oriented performances that are harmful to minors are sanctioned with a criminal penalty while others are not.[19] This fact alone does not make the AEA unconstitutional—but it does make it a content-based regulation that may be possibly subject to strict scrutiny review.

2. The AEA is a Viewpoint-based Regulation

The Court also finds that the AEA is not only a content-based regulation, but also viewpoint based. Viewpoint-based regulations "raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the market place." *R.A.V.*, 505 U.S. at 387 (1992); *see also Reed*, 576 U.S. at 168 ("Government discrimination among viewpoints—or the regulation of speech based on the 'specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form' of content discrimination."). The Parties' briefs and arguments at trial focused on the AEA's textual reference to "male or female impersonators." After all, Plaintiff is a theater organization with performers who are "male or female impersonators." (ECF No. 10.) And here, the AEA regulates the performer.

---

[19] A content-based statute does not automatically merit strict scrutiny analysis. The purpose of this section is just to determine whether the AEA is facially content-based and the Court concludes that it is.

Plaintiff argues that identifying these performers—especially "male or female impersonators"—necessarily makes the statute a viewpoint-based regulation because the prohibited conduct "cannot be defined without referencing . . . the perspective of the speaker." (ECF No. 35 at 498–99.) Plaintiff claims that this formulation outlaws a "drag performer wearing a crop top and mini skirt . . . but not a Tennessee Titans cheerleader." (*Id.* at PageID 499.) Defendant disagrees, contending that the "reference to specific types of performers clarifies the speech that is 'harmful to minors' *without* narrowing the covered speech." (ECF No. 58 at PageID 797 (emphasis in original).) Defendant points to the phrase "or similar entertainers," as a catchall that would in fact criminalize a cheerleader whose performance is harmful to minors. (ECF No. 81 at PageID 1199.) And Defendant points out that the AEA's language was copied verbatim from current law that has been "on the books for many, many decades." (ECF No. 58 at PageID 782 (citing AEA's legislative history); *see also* ECF No. 81 at PageID 1205 ([Defense Counsel to the Court:] "I just want to reiterate that this language is pulled directly from a statute that's been on the books since 1995.").

Defendant is correct that the AEA incorporated this language from existing state law. In the adult entertainment context, the earliest appearance of the phrase "male or female impersonators" known to this Court is from 1987. *See The Adult-Oriented Establishment Registration Act of 1987*, 1987 Tenn. Pub. Acts 841, ch. 432, § 2. But pulling language from old law that was passed in 1987 does not insulate the AEA's language from this Court's review of a new law in 2023.

In short, the AEA uses the language in a different way. The "Adult-Oriented Establishment Registration

Act" ("AERA"), where this language first appeared, regulates adult-oriented businesses that are zoned in fixed locations in Shelby County. Meanwhile, the AEA regulates the performers themselves—implicating their First Amendment rights—in Section 2(B)'s textually-broad language of "[i]n a location where the adult cabaret entertainment could be viewed by a person who is not an adult."[20] ("Location Provision") (ECF No. 19-1 at PageID 93.) What this means is that the AERA and AEA share similar language but operate differently. Even though the "male or female impersonator" language appears in both, it employs no viewpoint-discrimination in the AERA context because it regulates the business owner—the employer of the "male or female impersonator." By contrast, the same language matters greatly in the AEA, which regulates the "male or female impersonator." Simply put, the AEA directly impacts the performers' First Amendment rights in a way that the AERA does not.

The Court finds this phrase problematic. First, while including "male or female impersonators," in a list with "topless dancers, go-go dancers, exotic dancers, strippers . . . or similar entertainers" may have escaped many readers' scrutiny in 1987, it may not do so with ease in 2023. In 1987, homosexual intercourse was considered sodomy and was a crime in Tennessee[21], "Don't Ask Don't Tell" had not

[20] The Court will discuss the Defendant's "natural reading," or in the alternative, request for a narrowing construction later in this order.

[21] *See Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. 1996) (recognizing that the right to privacy renders the state sodomy statute unconstitutional).

been enacted (much less repealed)[22] for our military, and same-sex couples did not have a recognized fundamental right to marry[23]. The phrase "similar entertainers" seems to refer to dancers traditionally associated with "adult-oriented businesses." In 1987, associating "male or female impersonators" in that category may have called for little or no concern. This Court views categorizing "male or female impersonators" as "similar entertainers" in "adult-oriented businesses" with skepticism. Regardless of the Tennessee General Assembly's intentions, the AEA's text criminalizes performances that are "harmful to minors" by "male or female impersonators," and the Court must grapple with that text. The Court finds that this phrase discriminates against the viewpoint of gender identity—particularly, those who wish to impersonate a gender that is different from the one with which they are born. An illustration might be helpful.

Assume an individual, who identifies as male, holds a guitar and wears an "Elvis Presley" costume that is revealing without being legally obscene, but indecent enough to be potentially harmful to minors.[24] If this individual "performs" by telling jokes in Elvis' voice in "a location where adult cabaret entertainment could be viewed by a person who is not an adult," it is unclear whether this

---

[22] *See Don't Ask, Don't Tell Repeal Act of 2010*, 124 Stat. 3515 (repealing 10 U.S.C. § 654, which required members of the Armed Forces to be separated for engaging in homosexual conduct).

[23] *See Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing the Fourteenth Amendment guarantees same-sex couples the right to marry).

[24] The Bluff City nods at one of its favorite sons, but the same principle applies to any other character that "male or female impersonators" may wish to portray.

person would violate the AEA.[25] One could argue, as Defendant does, that the individual would qualify as a "similar entertainer," who belongs in the same category as "topless dancers, go-go dancers, exotic dancers, strippers." But is that necessarily so? The similar entertainers' common thread—aside from being traditionally associated with "adult-oriented establishments"—is that they are all dancers of a sort. What if the Elvis impersonator does not dance?[26] Does this performance have any redeeming value to a five-year-old? It remains unclear whether that performer would violate the AEA.

But if a person who identifies as a female wore the same Elvis costume and engaged in the same performance, she would clearly be a male impersonator. The AEA is viewpoint discriminatory in that it will more likely punish the latter, but not the former, for wearing the same costume and conducting the same performance.

Defendant disagrees. He argues that if the "list of covered performers included *only* 'male or female impersonators,' then an argument could be made that the State was using an identity-based restriction." (ECF No. 58 at PageID 797.) But the Court need not encounter a law as clear as Defendant's hypothetical statute to accept the soundness of its conclusion. The Court need only ensure that the government not use a class of speech—like sexual speech that is not obscene but potentially harmful to minors—as a "vehicle for content discrimination unrelated to [its] distinctively proscribable content." *See R.A.V.*, 505

---

[25] The AEA does not define "male or female impersonator." Is a male individual who impersonates a male character a male impersonator? Likewise, is a female who dresses up as a female character a female impersonator?

[26] [omitted in original]

U.S. at 383–84. While Tennessee has the power to protect children from harmful materials, it must do so without an "unnecessarily broad suppression of speech addressed to adults." *Reno*, 875 U.S. at 875. Given an appropriate scope, it may regulate adult-oriented performers who are harmful to minors. But it cannot, in the name of protecting children, use the AEA to target speakers for a reason that is unrelated to protecting children. The Court finds that the AEA's text targets the viewpoint of gender identity—particularly those who wish to impersonate a gender that is different from the one with which they are born. This text makes the AEA a content-based, viewpoint-based regulation on speech.

B. Did the Government Pass the AEA Because of an Impermissible Purpose?

Should another court disagree and find that the AEA is a content-neutral regulation, the Court presents this alternative and independent basis for its conclusion. The Supreme Court has held that facially content-neutral laws will be considered content-based if "there is evidence that an impermissible purpose or justification underpins" the law. *Austin*, 142 S. Ct. at 1475. Courts considering this question have studied legislative history to see if there is "evidence of an impermissible legislative motive" behind a challenged act. *Reed*, 576 U.S. at 166; *Hill v. Colorado*, 530 U.S. 703 (2000) (relying on legislative history).

The Court is aware of the vagaries of using legislative history in interpreting statutory text. *See Exxon Mobil Corp. v. Allapattah Services*, 545 U.S. 546, 568 (2005) ("[L]egislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become [an exercise in] 'looking over a crowd and picking out your friends.'"). But Supreme Court precedent and practice instruct this Court to

look at the AEA's legislative history, especially in an action over a law with no enforcement history. *See Reed*, 576 U.S. at 166 (identifying cases that used legislative history in applying this test). The Parties echoed this point at trial, and asked the Court to look at both the legislative history and text to see whether Tennessee adopted the AEA for an impermissible purpose. (ECF No. 81 at PageID 1225–26). The Court, with reluctance, turns to its mandated task of examining the AEA's legislative history.

1. Impermissible Purpose from the AEA's Legislative History

The Court incorporates its summary of the AEA's legislative history from this order (*See supra* pp. 8–12.) The Court will analyze the AEA's text, and look at both text and history together to determine whether the Tennessee General Assembly passed the bill for an impermissible purpose. As the Court observed above, the legislative history strongly suggests that the AEA was passed for an impermissible purpose. (*Id.* at 12.)

2. Impermissible Purpose of the AEA's Text

The Parties remind the Court that the AEA's text is the "best indicator of intent." *Nixon v. United States*, 506 U.S. 224, 232 (1993); *But see* Antonin Scalia & Bryan A. Garner, *Reading Law*: *The Interpretation of Legal Texts* 397 (2012) (describing the idea of a statute's plain language being the best evidence of legislative intent as a "false notion"). For the same reasons that the Court found that the AEA is a viewpoint-based restriction on speech, the Court also finds that the text of the AEA, while inconclusive on its own, favors a conclusion that it was passed for an impermissible purpose.

The Court reached this conclusion for three main reasons. First, as already discussed, the AEA's text is a viewpoint-based discrimination against those who wish to impersonate a gender that is different from the one with which they are born. While not dispositive, this fact is evidence that the Tennessee General Assembly carelessly, if not intentionally, passed the AEA for the inappropriate purpose of chilling constitutionally-protected speech. More importantly, the AEA remarkably departs from the AERA because it regulates not the operator of the adult-oriented business but the performer herself. (ECF No. 19-1 at PageID 93 (showing that the AEA amends Tenn. Code Ann. § 7-51-1401 to this effect); *see also* ECF No. 35-1 at PageID 519 ("There is a first offense violation that's in the bill before you now and it would be applied to the performer[.].)

Second, the AEA's lack of a textual scienter requirement troubles the Court for a statute that regulates speech with criminal sanctions. Several cases in which the Supreme Court upheld a restriction on speech contained a textual scienter requirement of "knowing." *See e.g. New York v. Ferber*, 458 U.S. 747 (1982); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Miller*, 413 U.S. at 15. One of these cases is *Miller*, which Representative Bulso cited as a basis for the AEA's language on its "harmful to minors" standard. (ECF No. 35-1 at PageID 605 (citing 413 U.S. 15).) Having drawn language from a case analyzing a statute with a textual scienter requirement but not including that provision in the AEA can be evidence that the legislature passed the law to chill constitutionally-protected speech by lowering the requisite mens rea in the AEA to criminalize more conduct.

Third, the combination of the AEA's breadth and lack of affirmative defenses trouble the Court. The AEA criminalizes speech on "public property, or [i]n a location where the adult cabaret entertainment could be viewed by a person who is not an adult." (ECF No. 19-1 at PageID 93.) The Court will address Defendant's argument as to what he considers the purported natural reading of this language. Suffice to say for now that the Court's natural reading of the text suggests that this language is extremely broad: a child could be present in several locations around Shelby County. Without an accompanying affirmative defense, as Senator Yarboro warned, this could indicate that the AEA's text criminalizes "adult cabaret entertainment" virtually anywhere.

3. The Legislative History and the AEA's Text Indicate an Impermissible Purpose

Viewed together, the AEA's text and legislative history point this Court to the conclusion that the Tennessee General Assembly passed the AEA for an impermissible purpose. The Court finds that the AEA's text discriminates against a certain viewpoint, imposes criminal sanctions, and spans a virtually unlimited geographical area. As a criminal statute that regulates the performers, the AEA offers neither a textual scienter requirement nor affirmative defenses. For these reasons, the AEA can criminalize—or at a minimum chill—the expressive conduct of those who wish to impersonate a gender that is different from the one with which they were born in Shelby County. Such speech is protected by the First Amendment.

The Court now turns to the AEA's legislative history. Simply put, the Tennessee General Assembly enacted the AEA—a statute regulating speech with criminal sanctions—in a way that is purposefully overbroad such that

it can chill speech that may be constitutionally-protected. The Court reaches this conclusion for four main reasons.

First, the legislative history supports the Court's observation that the AEA materially changes the regulatory scheme in adult-oriented businesses. While the AERA imposed penalties on operators hosting adult-oriented entertainment when minors were present, the AEA criminally sanctions the performers themselves. Senator Johnson, the Senate sponsor, made this exact observation when he introduced the AEA. This significant shift that AEA introduces to the punitive structure—making performers criminally liable for potential underage viewing of their performances—suggests the bill's impermissible purpose. The bill criminalizes, or at least chills, the expression of a class of performers, rather than the business operators, or even parents, who facilitate the exposure of adult cabaret entertainment to minors.

Second, the legislative history lends credence to the Court's conclusion that the AEA facially discriminates against a particular viewpoint. Arguing that the AEA is an attempt create adult-only zones, Defendant noted that there are nine references in the legislative history to "age restricted venues." (ECF No. 82 at PageID 1258.) But that logic cuts both ways. A closer look at the transcript, which is only 100 pages long, reveals at least twenty-nine references to "drag," and eleven references to "male and/or female impersonators" which is part of the AEA's text. From this, the Court concludes that the legislature had a robust debate on the statutory text of "male or female impersonator." Despite repeated objections from fellow legislators about the language and purpose of the AEA and the broad sweep of the act, the legislative history shows that the legislature knew what they were doing and deliberately chose to retain those words in the

statute. So, those words are there because the legislature intended to keep them there.

The word "drag" never appears in the text of the AEA. But the Court cannot escape that "drag" was the one common thread in all three specific examples of conduct that was considered "harmful to minors," in the legislative transcript. Ms. Starbuck, the sole witness who spoke in favor of the AEA, mentioned "Boro Pride" as the specific example of a performance that is harmful to minors. (ECF No. 35-1 at PageID 530.) Representative Zachary spoke about a "drag show" in Knox County as an example of a performance that he thinks the AEA would protect children from. (*Id.* at PageID 602.) Finally, Representative Todd, the AEA's House sponsor, identified a "drag show" as an instance of adult cabaret entertainment. (*Id.* at PageID 584.)

Defendant reminds the Court that the "remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." (ECF No. 58 at 799 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979)).) While not controlling, as the co-sponsor, Representative Todd's remarks are persuasive to the Court. There is no question that the legislative history includes statements of legislators expressing their desire to protect minors from sexually explicit performances.[27] Yet when Representative Todd explained why he was "asked to come up with legis-

---

[27] For the Tennessee General Assembly's consuming concern over the health of their children through the AEA, in defending the AEA, the Tennessee Attorney General's Office asked the Court to apply a narrowing construction to the "harmful to minors" standard by ruling that "minors" meant "a reasonable 17-year-old." (ECF No. 81 at PageID 1136 (citing *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993).)

lation" that led to the AEA, he recounted the events behind a "drag show" in Jackson—in doing so, not once did he mention any overly sexual content that affects children. (ECF no. 35-1 at PageID 584–85.) He only referred to a "drag show" that was listed as "family-friendly." (*Id.*) He had not yet seen the performance and therefore could not have made a sound determination about the show's sexual impropriety for minors. His statement as House sponsor of the bill suggests that the AEA was not proposed to empower the state to protect minors from actual instances of indecent "adult cabaret entertainment," but rather that the AEA is geared towards placing prospective blocks on drag shows—regardless of their potential harm to minors.

Third, this criminal statute contains neither a textual scienter requirement nor affirmative defenses. Nothing in the legislative history indicated the legislators even contemplated adding these narrowing mechanisms to their statute that criminalized forms of expressive speech. But unlike the *Miller* test—which was discussed during deliberations and contained a textual "knowing" scienter requirement—the AEA has no textual scienter requirement.

Representative Todd asserted that attorneys reviewed the AEA and were very confident that it will be upheld in Court. Nowhere was *Davis-Kidd* discussed in the AEA's legislative history—a case of great importance to the AEA. Defendant cites *Davis-Kidd* as a case that is important to this Court's assessment of the AEA's constitutionality in that it may save the AEA from vagueness by cabining the "harmful to minors" standard, and narrowing the AEA's scope by adding a non-textual scienter requirement of "knowing." 866 S.W.2d at 528. *Davis-Kidd* contains an affirmative defense for parental consent as

well. *Id.* at 535. It even contains language that explicitly attempts to create the "adult-only" zones that Defendant ascribe to the AEA. *Id.* at 535. These facts indicate to the Court that the legislature did not bother reducing— or even contemplate reducing—the potency of their speech restriction.

Fourth, the Court finds that the AEA regulates an area that is of an alarming breadth. Representative Yarboro pointed out that the Location Provision in the AEA effectively meant that it applied to anywhere in the world—anywhere a child could view it means anywhere. Defendant pointed out at trial that the legislature "specifically referenced age-restricted venues" in the legislative history. (ECF No. 82 at PageID 1258.) But as Defendant raises in his brief, text is the best indicator of intent. And the AEA's text makes no mention of age-restricted venues. To the contrary, the AEA's Location Provision is exceptionally broad. Plaintiff could build a card-checking fortress around its theatre and a child *could* still be present. Compare this language to the one in *Davis-Kidd*: "It is unlawful for a person to display . . . [adult material] which contains material harmful to minors anywhere minors are *lawfully* admitted." 866 S.W.2d at 535 (emphasis added).

Remember the Supreme Court requires that restrictions on First Amendment Rights "must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick*, 413 U.S. at 611–12. But here the AEA's text is not narrowly drawn and the legislative history does not demonstrate a considered legislative judgment. For all these reasons, the Court makes the factual finding that the text and history

of the AEA point to a conclusion that the AEA was enacted for an impermissible purpose.

C. Does the "Secondary Effects" Doctrine Apply Here?

Under the "secondary effects" doctrine, courts must apply intermediate—not strict scrutiny—to a content-based law designed to combat the undesirable secondary effects of the regulated speech. *See Richland Bookmart, Inc. v.* Nichols, 137 F.3d 435, 440 (6th Cir. 1998) ("Accordingly, the Court in *City of Renton*, like the Court in *American Mini Theatres*, decided that the zoning ordinances at issue could be reviewed under the standard applicable to content- neutral regulations, even though the ordinances were plainly content-based.). The doctrine's definitive case is *Renton v. Playtime Theatres, Inc.*, in which the Supreme Court applied intermediate scrutiny in upholding a zoning ordinance that excluded adult-oriented theatres within 1,000 feet of any residential zone, church, park, or school. 475 U.S. 41, 46 (1986). Despite the law's content-based regulation of adult-oriented theatres, the Supreme Court in *Renton* treated the law as if it were content-neutral because the zoning ordinance "is aimed not at the *content* of the films shown at 'adult motion picture theaters,' but rather at the *secondary effects* of such theaters on the surrounding community." *Id.* at 47. The Supreme Court based its conclusion on the district court's finding that "the City Council's predominate concerns were there secondary effects of adult theaters, not with the content of the adult films themselves." (*Id.*)

Defendant claims the secondary effects doctrine applies here because "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.'" (ECF No. 58

at PageID 796.) Defendant cites the Senate session testimony of Ms. Starbuck, an "advocate for children harmed by sexualization and exploitation," who remarked that "normalizing the sexualization of children empowers child predators and increases the demand to exploit and sexually abuse children." (*Id.*) And so Defendant asks the Court to apply *Renton* in upholding the AEA because the Tennessee General Assembly's predominate concerns were not the adult cabaret entertainment performers' expressive conduct, but the "increase in sexual exploitation" they bring. (ECF No. 65 at PageID 939.)

The Court finds the secondary effects doctrine does not apply in this case. In *Renton*, the Supreme Court affirmed the district court's finding that the legislature's "predominate concerns" were not the adult theaters themselves but the secondary effects of adult theaters on the surrounding community. 475 U.S. at 47–48. This was because the legislature designed the zoning ordinance "to prevent crime, protect the city's retail trade, maintain property value, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." *Id.*

This District Court does not find that the Tennessee General Assembly's predominate concerns were "increase in sexual exploitation." Rather, the Corut finds that their predominate concerns involved the suppression of unpopular views of those who wish to impersonate a gender that is different from the one with which they were born. Defendant's identification of "increase in sexual exploitation" as the legislature's predominate concern in passing the AEA draws not from legislators, but from Ms. Starbuck's testimony. (ECF No. 58 at PageID 796) (citing ECF No. 35-1 at PageID 528 ("It's no wonder we have

skyrocketing mental health crisis amongst our confused and vulnerable youth with more sexual exploitation crimes reported than ever before."). The only other time "sexual exploitation" was mentioned in the legislative transcript was in Ms. Starbuck's testimony. (*Id.* at PageID 32 ("[Children] are seeing adults clap every time an article of clothing is removed, the adults are thunderously clapping. And so they are making associations that when you take your clothes off, you're rewarded money . . . But continuing that behavior is sending that message to children and it[']s normalizing that sexual exploitation.").) On the other hand, the record is replete with references to the expressive conduct of "male or female impersonators," "drag shows," "Pride" events, and more. The Court's determination that the AEA was enacted for an impermissible purpose is broad enough to reject the notion that the AEA is aimed not at the content of expressive speech but rather at its secondary effects.

The Court is sympathetic to the legislature's concerns about the harms from the increased sexualization of children. There is no question that Tennessee has a compelling government interest in protecting the physical and psychological well-being of minors. But Supreme Court precedent precludes Defendant from invoking the "secondary effects" doctrine to protect children from speech that is harmful to minors on the basis that the speech could make them susceptible to sexual predation. *See also Reno v. ACLU*, 521 U.S. 844, 867–68 (1997) (declining to apply the secondary effects doctrine where the purpose of the statute is to "protect children from the primary effects of 'incident' and 'patently offensive' speech rather than any 'secondary effect' of such speech").

But even if the Court grants Defendant that the "increase in sexual exploitation crimes," is a valid secondary

effect, the Court concludes that *Renton*'s holding does not control in this case because of one key difference: *Renton* is a zoning ordinance and the AEA is not. In other words, prohibiting adult-oriented businesses from locating within 1,000 feet of establishments is not the same as invoking criminal penalties against performers of "adult cabaret entertainment" in "public property" or in "any location where the adult cabaret entertainment could be viewed by a person who is not an adult."

At trial, Defendant argued that the AEA is "less restrictive" than the zoning law in *Renton* because performers "literally can [perform] at any place, any venue, so long as they're carded at the door." (ECF No. 81 at PageID 1197.) This argument relies on Defendant's reading of the AEA's Location Provision really means prohibiting such performances except "[a]nywhere people are carded at the door." (ECF No. 81 at PageID 1191–92 ("We think clearly what the legislature was saying to that language is, we want this to be carded, just like bars where alcohol is sold[.]").) Defendant offered another way to understand his position after trial: Section 2(c)(1)(B) "should be read to apply '[i]n a location where the adult cabaret entertainment could [permissibly] be viewed by a person who is not an adult.'" (ECF No. 85 at PageID 1329.)

The Court rejects Defendant's reading of the statute because it is completely unmoored from the text. Nowhere does the word "card" or "identification" appear in the AEA nor does it strongly suggest some sort of "carding" mechanism that would create specific "adult-only zones." A dictionary definition of the word "could" is the past tense of the word "can," which is an auxiliary verb that means "be physically or mentally able to" or "used to indicate possibility." *Can*, The Merriam-Webster Dictionary (rev. ed. 2022). This definition, which lends itself to a

plain meaning, is consistent with Plaintiff's position that the word "could," means "is possible." (*See also* ECF 39-2 at PageID 689.) Yet Defendant insists that the Court should add the word "permissibly" to modify "could" as a proper way to understand the statute under various canons of construction. The Court refuses to engage in such rewriting of the statute.

Still, the Court hesitantly accepts Defendant's invitation to look into the AEA's legislative history to read the legislature's intent into the statute. As the Court's discussion on that issue showed, the legislative transcript includes references to age-restricted zones in discussions led by the Senate Sponsor and House Sponsor. Yet the legislators passed a statute that mentioned nothing of the sort. Worse still, a legislator warned the sponsors of the AEA's overbreadth by prohibiting adult cabaret entertainment "anywhere a child could view a performance." (*See e.g.* ECF No. 58 [Defendant's Trial Brief] at PageID 783 ("The legislature sought to 'apply the same standards' from existing law to locations where children could be present.") And another legislator warned them the law is both vague and overbroad such that it "[would] not stand up in court." (ECF No. 35-1 at PageID 601.) Neither sponsor responded to these concerns—Representative Todd rather expressed his confidence in Defense counsel's ability to defend the AEA in court—and the Tennessee General Assembly passed the AEA in this current form.

At bottom, the Court refuses to adopt Defendant's atextual reading of the AEA[28] to effectuate the legislature's purported intent. To do so would depart from the

---

[28] Defendant argues that his construction is the best reading of the statute but in the alternative, asks this Court to invoke the constitutional avoidance canon. (ECF No. 81 at PageID 1161, 1287.) This

Court's limited role in interpreting the law. Further, the legislative history compels this conclusion. It shows that the proposed language was expressly discussed yet eventually discarded by the legislature. Therefore, the AEA is unlike *Renton*'s zoning ordinance and its holding does not control here.

II. Strict Scrutiny

The discussion above leads to one conclusion: the Court must apply strict scrutiny to the AEA. This means that the AEA is "presumptively unconstitutional." *See Reed*, 576 U.S. at 163 ("Content-based laws—those that target speech based on communicative content—are presumptively unconstitutional[.]"). The burden is therefore on Defendant to prove that the AEA is "narrowly tailored to serve compelling state interests." *Id.* (quoting *R.A.V.*, 505 U.S. at 395); *see also Ashcroft v. ACLU,* 542 U.S. 656, 665 (2004) ("When plaintiffs challenge a content- based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute."). In the end, the Court inquires "whether the challenged regulation is the least restrictive means among available, effective alternatives." *Ashcroft*, 542 U.S. at 666.

---

canon suggests that a court reading statutory language susceptible of multiple interpretations may adopt a construction that avoids serious constitutional issues. *Jennings v. Rodriguez*, 138 S.Ct. 830, 836 (2018). The Supreme Court has held that First Amendment law mandates that if a statute is "'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). But The Supreme Court's command came with a clear caveat: "We will not rewrite a state law to conform it to constitutional requirements." *Id.*; *Jennings*, 138 S.Ct. at 836 ("But a court relying on [constitutional avoidance] still must *interpret* the statute, not rewrite it.").

A. Does Tennessee Have a Compelling State Interest?

There is no question that Tennessee has a compelling state interest in "protecting the physical and psychological well-being of minors, which extended to shielding them from indecent messages that are not obscene by adult standards." *Reno*, 521 U.S. at 879 (citing *Sable Comm. of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (internal quotation marks omitted). The Parties do not dispute this issue.

B. Is the AEA Narrowly Tailored?

The Court finds the AEA is not narrowly tailored to achieve Tennessee's compelling state interests. In cases where a legislative act restricts indecent speech, which is not obscene to adults, the Supreme Court has been clear that those circumstances must be "relatively narrow and well-defined[.]" *Erznoznik*, 422 U.S. at 212; *see also Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011) ("No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed."). The Court concludes that the AEA is neither relatively narrow nor well-defined.

Defendant's position in this case has always been that strict scrutiny does not apply to the AEA. And to the extent that it does, Defendant thinks "the statute is the least restrictive means, because it opens every single venue that does not have an age restriction imposed." (ECF No. 82 at PageID 1265.) The Court has already explained its refusal to adopt Defendant's reading of AEA's Location Provision in Section 2(c)(1)(B) as creating zones for adult cabaret entertainment "anywhere that imposes an age restriction." The plain reading of Section 2(c)(1)(B) is that

the AEA criminally sanctions qualifying performers virtually anywhere—this includes private events at people's homes or arguably even age-restricted venues.

This restriction on the First Amendment rights of Shelby County residents is not only alarmingly overbroad, the AEA contains no textual scienter requirement and no affirmative defenses. *See Smith v. California*, 361 U.S. 147, 219–20 (1959) (striking down a law that did not contain a scienter requirement because of its chilling effect on speech). This includes the affirmative defense of parental consent, which reflects the "consistently recognized [constitutional principle] that the parents' claim to authority in their own household to direct the rearing of their children is a basic in the structure of society." *Ginsberg*, 390 U.S. at 639. Parental consent has been critical to the constitutionality of similar laws that restrict speech that is indecent but not obscene to adults. *See id.*; *Davis-Kidd v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993) (upholding obscenity law that contained a parental consent affirmative defense).

Still, Defendant insists that "the state's interest in protecting children is independent of the parents." (ECF No. 82 at PageID 1273.) This bold assertion may collide with the Supreme Court's holding in *Ginsberg*. But even if it did not, this argument conflicts with the notion that the AEA is narrowly-tailored to achieve the state's interest. As discussed above, the AEA changes Tennessee's punitive scheme in that it criminalizes not the business operator but the performer. The AEA inflicts no punishment to the parent who brings their minor child to view adult cabaret entertainment. If the AEA was truly designed to advance "the state's interest in protecting children independent of the parents," then its punitive scheme belies that design.

Defendant asserted that the legislative record shows that the legislature "attempted to find the least restrictive means [] and that is exactly what they did . . . [the legislature] limited [adult cabaret performance] to venues where children could not be present, and their interest here is protecting children . . . that is the best evidence of least restrictive means." (ECF No. 82 at PageID 1265–66.) Defendant also alerted the Court that Plaintiff "has not identified a single less restrictive means," and so he had no "opportunity to put any evidence on [about] any less restrictive means, because no less restrictive means was ever identified." (ECF No. 82 at PageID 1266.)

But from the very beginning of this suit, Plaintiff has raised the issues this Court just discussed about the AEA's lack of affirmative defenses, silence on a scienter requirement, novel punitive scheme, and overbroad geographical scope. (ECF No. 10 at PageID 59–60.) Instead of substantially addressing these concerns, Defendant focused his theory of the case on why the Court should adopt his reading of the AEA. The Court rejects that theory, and finds that Defendant has not met his burden of proving the AEA is the least restrictive means to achieve Tennessee's legitimate compelling interest in protecting minors.[29] Defendant's argument fails and the Court finds that the AEA is not narrowly tailored to serve its legitimate compelling interest.

III. Vagueness

The vagueness doctrine arises not from the First Amendment but from the "Due Process [of Law] Clause of the Fifth Amendment." *United States v. Williams*, 553

[29] At trial, Defendant conceded that if the Court were to apply strict scrutiny and reject his reading or narrowing-constructions, the AEA fails strict scrutiny. (ECF No. 82 at PageID 1276–77.)

U.S. 285, 304 (2008). 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." *Id.* (citing *Hill v. Colorado*¸530 U.S. 703, 732 (2000) and *Grayned v. Rockford*, 408 U.S. 104, 108–09 (1972)). While "perfect clarity and precise guidance" have never been required of free speech restrictions, a plaintiff challenging a law for overbreadth—as in this case—can "complain of the vagueness of the law as applied to the conduct of others[.]" *Id.* (citations omitted). The Sixth Circuit has held that the "strictness of our vagueness scrutiny is proportionate to the burden that the law imposes on those whom it regulates." *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 422 (6th Cir. 2014). And when it comes to restriction on speech, "rigorous adherence to [the fair notice] requirements is necessary to ensure that ambiguity does not chill protected speech. *Id.*

Plaintiff's position on its vagueness argument shifted during litigation, and found its home in the AEA's reference to Tennessee Code Annotated § 39-17-901. (ECF No. 62 at PageID 878–79.) Stated simply, Plaintiff argues that the "harmful to minors" standard incorporated in the AEA is unconstitutionally vague in that it can apply to minors from age five to seventeen years. (*Id.*) Because "'contemporary community standards' are not the same for a five-year-old and a seventeen-year-old," Plaintiff argues that what is "harmful to minors" could chill performers faced with great uncertainty as they run the risk of violating a criminal statute with their speech. (*Id.* at PageID 879.) Asked at trial whether she thinks Plaintiff's performances are "appropriate for children of any age," Ms. Rodley testified that she does not know if she would bring a five-year-old to a show, but definitely a "15-, 16-year-old,

17-year-old." (ECF No. 81 at PageID 1114.) Ms. Rodley offered uncontroverted testimony that Plaintiff considers some content, which may be appropriate for an older teenager, may not be appropriate for a younger child. (*Id.*)

Clarity on this point matters greatly to Plaintiff, an organization seeking to provide a space for drag-centric performances outside of age-restricted venues, as the expression in its productions would be chilled by the vagueness of the "harmful to minors standard." Plaintiff points the Court to the Third Circuit's 2008 decision in *A.C.LU. v. Mukasey*, which analyzed the Child Online Protection Act's ("COPA") "harmful to minors" standard. 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (3d Cir. 2009). The Third Circuit found that the definition of "harmful to minors" in that statute[30]—which is nearly identical to the one in the AEA—was unconstitutionally vague because it "applies in a literal sense to an infant, a five-year old, or a person just shy of age seventeen." *Id.* at 191.

---

[30] In the COPA statute, "'minor' means any person under 17 years of age." *Mukasey*, 534 F.3d at 184–185. "[M]aterial that is harmful to minors" includes any communication that is obscene or that:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id.

Defendant disagrees on two grounds. First, even though Defendant does not contest the substantial similarity with respect to the "harmful to minors" standard between the AEA in this case and COPA in *Mukasey*, he resists Plaintiff's attempt to extend *Mukasey*'s holding to this case. (ECF No. 65 at PageID 941.) Defendant argues that while *Mukasey* banned content harmful to minors, the AEA merely creates "adult-only" zones. (*Id.*) This argument does not convince the Court.

As already discussed above, Defendant's reading of the AEA's geographical scope is unmoored from the text and unsupported—if not contravened—by the legislative history. The AEA's expansive geographical coverage is not as meager as Defendant portrays it to be. Moreover, *Mukasey*'s rationale for its vagueness holding applies just as much in this case. The *Mukasey* panel found the "harmful to minors" standard unconstitutionally vague because they "believed that a 'Web publisher will be forced to guess at the bottom end of the range of ages to which the statute applies,' and thus will not have 'fair notice of what conduct would subject them to criminal sanctions under the COPA' and 'will be deterred from engaging in a wide range of constitutionally protected speech.'" 543 F.3d at 205.

The Court finds the same could be said here with an even greater degree of conviction because the AEA—unlike the COPA—has neither a textual scienter requirement nor affirmative defenses. Moreover, the AEA's punitive structure targets the performer—no matter if her performance is for commercial purposes or not—while COPA only punishes those who post content "on the Web 'for commercial purposes.'" For these reasons, the Due Process of Law implications and the First Amendment impact of the AEA's "harmful to minors" standard carry

more weight in this case. The Court finds that this language is unconstitutionally vague.

But Defendant is not done. Defendant's second argument claims that this Court is bound by the Tennessee Supreme Court's narrowing construction of "harmful to minors" 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) (evaluating the same "harmful to minors" standard used by the AEA"); *see also* Tenn. Code Ann. § 39-17-901.

In *Davis-Kidd*, the Tennessee Supreme Court had to resolve whether a Tennessee law that made it a "criminal offense for a person to *display* for sale or rental a visual depiction [of various media], which contains material *harmful to minors* anywhere minors are lawfully admitted." 866 S.W.2d at 522. The Tennessee Supreme Court found that the "display statute" was "readily susceptible to a narrowing construction which makes it only applicable to those materials which lack serious literary, artistic, political, or scientific value for a reasonable 17- year-old minor." *Id.* Under this narrowing construction, the Tennessee Supreme Court found that the display statute was "not overbroad and fully complies with the First Amendment." *Id.*; *see also Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (observing that the United States Supreme Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines).

The Court finds that Defendant overstates the Tennessee Supreme Court's holding in *Davis-Kidd*. The text of the Tennessee Supreme Court's opinion is clear: "Accordingly, we hold that the *display statute* applies only to those materials which lack serious literary, artistic, polit-

ical, or scientific value for a reasonable 17-year-old minor." *Davis-Kidd*, 866 S.W.2d at 528 (emphasis added). Defendant's argument would transform the Tennessee Supreme Court's holding to "Accordingly, we hold that the *'harmful to minors' standard in Tenn. Code. Ann. § 39-17-901* applies only to those materials which lack serious literary, artistic, political, or scientific value for a reasonable 17-year-old minor." The Tennessee Supreme Court never held that and neither will this Court. The Court rejects yet another offer from Defendant to accept an atextual construction of clear language. In doing so, the Court denies that it is duty bound to apply *Davis-Kidd*'s narrowing construction of a display statute to the AEA. Defendant's second argument therefore fails, and the Court finds that the AEA remains unconstitutionally vague.

IV. Substantial Overbreadth

The threat of enforcement from overbroad legislative acts "deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas." *United States v. Williams*, 553 U.S. 285, 293 (2008). First Amendment jurisprudence recognizes a "substantial overbreadth doctrine," which empowers courts to invalidate a statute on overbreadth grounds 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) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 449 n.6 (2008)). Facial challenges are "disfavored" because they risk "premature interpretation of statutes on the basis of factually barebones records," or "formulate a rule of constitutional law broader than is required by the precise facts[.]" *Wash. State Grange*, 552 U.S. at 450. This doctrine has been called "strong medicine that is not to be

casually employed." *Williams*, 553 U.S. at 293 (internal quotation marks and citations omitted omitted). The first step in overbreadth analysis is to construe the challenged statute. *Id.*

The Parties' disagreement on this issue centers on two of the AEA's provisions. First is the "harmful to minors standard as that term is defined by § 39-17-901," in Section 1(A). Second is the Location Provision in Section 2 (c)(1)(B). Plaintiff argues the text's plain meaning is that Section (1) applies to anyone below the age of 18 and Section (2) means anywhere a minor could be present, which means virtually anywhere. Defendant repeats two arguments the Court addressed above: first that the Court is bound by the Tennessee Supreme Court's narrowing construction of the "harmful to minors standard" in *Davis-Kidd*, 866 S.W.2d at 528, and second, that the "most natural reading, at least in [Defendant's] view" of Section 2(c)(1)(B) is that it permits adult cabaret entertainment "[a]nywhere people are carded at the door."

The Court has already explained its rejection of Defendant's position that the Tennessee Supreme Court's narrowing construction in *Davis-Kidd* is binding here (*See supra* pp. 62–63), and Defendant's natural reading of the second provision (*See supra* pp. 54–55). In this light, the Court finds that Plaintiff carried its burden of proving the AEA's substantial overbreadth in relation to its plainly legitimate sweep. The Court notes—as it will discuss more fully below—that its power to issue any injunction is limited to Defendant District Attorney Mulroy of Shelby County. The Court's analysis of Plaintiff's organizational standing ignored any testimony and other evidence that Plaintiff proffered from outside Shelby County. For the same reasons, the Court limits its inquiry for the statute's "plainly legitimate sweep" to Shelby

County only. While Plaintiff needs to demonstrate unconstitutional applications of the AEA, it need only show substantial overbreadth in relation to the AEA's reach in Shelby County—and not the entire State.[31]

At trial, Plaintiff presented evidence of the AEA's harm on its "male or female impersonator[]" members who perform drag shows. As Ms. Rodley testified, some of Plaintiff's performances, featuring Plaintiff's member-performers, might not be appropriate—or at least devoid of any redeemable social value—for children as young as four or five.

The threat of prosecution from a law officer armed with a vague "harmful to minors" standard from the AEA could chill a drag show group into paralysis. After all, a statute imposing criminal sanctions on speech magnifies any chill it inflicts on those who fear prosecution for their expression. The Court finds that these members' harms, which the Court disregarded under associational standing, add to the number of unconstitutional applications of the AEA in Shelby County under the substantial overbreadth doctrine.

Plaintiff also submitted a declaration from Ms. Mystie-Elizabeth Watson, Producer and Director of Absent Friends. (ECF No. 23-2 at PageID 138.) Absent Friends is a theater organization that hosts monthly shows of a musical comedy that incorporates live actors—among them drag performers. (*Id.* at 139.) Ms. Watson attested that due to their drag performers' fear of potential prosecution from the AEA, they had to place a previously-unneeded age-restriction on their shows,

---

[31] This distinction ultimately made no difference as the Court's analysis of the AEA ultimately found that the overbroad statute applied to virtually anywhere in Tennessee and anyone not over 18.

which have historically been attended by families with minor teenagers. (*Id.*) Their performers fear police surveillance and the risk of criminal charges. (*Id.*) The Court finds that Ms. Watson's uncontested affidavit not only shows another unconstitutional application of the AEA, it also corroborates the Plaintiff's members' fears of prosecution from an overbroad statute.

Ms. Rodley also provided uncontroverted testimony as President and Festival Director of Mid-South Pride, which hosts the Regional Pride Festival for the LGBTQ community in Memphis. She testified that since the AEA's enactment, she witnessed a "noticeable decline in sponsorship for the 2023 festival." (ECF No. 23-3 at PageID 141.) The 2022 Mid-South Pride festival had a total of 43 sponsors while on March 30, 2023—a day before this Court issued an Temporary Restraining Order enjoining the AEA's enforcement—the 2023 festival had only 23 sponsors. (*Id.* at PageID 142.) Also, while the festival secured 90% of its annual budget from sponsors 60 days before the event in 2022, it secured only 60% of its annual budget 63 days before the event this year. (*Id.*) The Court finds that these injuries to Mid-South Pride's organization show another unconstitutional application of the AEA. The Court finds that the AEA's impact on a major festival for the LGBTQ community in Memphis matters greatly in assessing the AEA's unconstitutionality in relation to its plainly legitimate sweep in Shelby County.

The Court can recount the hypotheticals the Parties discussed from both the Temporary Restraining Order hearing and trial, but that would be unnecessary. For the above reasons, the Court finds that Plaintiff carried its burden of proving the AEA's substantial overbreadth in relation to its plainly legitimate sweep in Shelby County.

The Court understands that the overbreadth doctrine is strong medicine. But a debilitated patient should not forgo medicine on account of its strength. This statute—which is barely two pages long—reeks with constitutional maladies of vagueness and overbreadth fatal to statutes that regulate First Amendment rights. The virulence of the AEA's overbreadth chills a large amount of speech, and calls for this strong medicine.

Remedy

Plaintiff seeks a declaratory judgment that the entire AEA is unconstitutional and an injunction against Defendant from enforcing its provisions in Shelby County. The Court considers these requests in turn.

I. Declaratory Judgment

Declaratory relief under the Declaratory Judgment Act is "not precluded when . . . a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute." *Ellis v. Dyson*, 421 U.S. 426 (1975). For all the above reasons, Plaintiff—and the non-parties whose interests Plaintiff asserts—face a certain threat of criminal prosecution from an unconstitutional legislative act. Plaintiff therefore has a "continuing, actual controversy, as is mandated by both the Declaratory Judgment Act and Art[icle] III of the Constitution[.]" *Id.* at 433. The Court answers the central question of law in this case and GRANTS Plaintiff's request for a declaratory judgment.

The Court therefore HOLDS and DECLARES that the Adult Entertainment Act is an UNCONSTITUTIONAL restriction on speech. (ECF No. 19-1.) The Court concludes that the 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.

II. Injunctive Relief

Plaintiff also seeks injunctive relief against District Attorney General Steven J. Mulroy. A party in a § 1983 action is "entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law." *Saieg v. Dearborn*, 641 F.3d 727, 733 (6th Cir. 2011) (internal quotation marks omitted). A party seeking a permanent injunction must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

Plaintiff meets all four factors. First, Plaintiff suffered an irreparable injury in the form of an objective chill to its First Amendment rights—along with other parties whose rights Plaintiff asserted—from the threat of the AEA's enforcement in Shelby County. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Second, monetary damages are inadequate here because the First Amendment rights of Shelby County residents are at stake with criminal consequences.

Third, the balance of equities favor granting an injunction because without it, Plaintiff—and other Shelby

County residents—will be barred from engaging in protected First Amendment expression. Defendants also agreed that the state's existing obscenity laws can punish most—and possibly all—of the conduct that the AEA seeks to regulate. And fourth, public interest would not be disserved by a permanent injunction because "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

For the above reasons, the Court ENJOINS District Attorney Steven J. Mulroy from enforcing the Adult Entertainment Act within his jurisdiction in SHELBY COUNTY, TENNESSEE. (ECF No. 19-1.)

CONCLUSION

Let there be no mistake about this Court's recognition that Tennessee has a compelling government interest in protecting its minor population. Scores of concerned Tennesseans asked the Court to uphold the Adult Entertainment Act because their State supposedly enacted it to protect their children. Tennesseans deserve to know that their State's defense of the AEA primarily involved a request for the Court to alter the AEA by changing the meaning of "minors" to a "reasonable 17-year-old minor." In other words, while its citizens believed this powerful law would protect all children, the State's lawyers told the Court this law will only protect 17-year-olds. This is only one of several ways in which Tennessee asked this Court to rewrite the AEA.

To rewrite this law would not only violate the separation-of-powers principle, but it would also offer perverse incentives for legislators to continue their troubling trend of abdicating their responsibilities in exercising "consid-

ered legislative judgment." The Tennessee General Assembly can certainly use its mandate to pass laws that their communities demand. But that mandate as to speech is limited by the First Amendment to the United States Constitution, which commands that laws infringing on the Freedom of Speech must be narrow and well-defined. The AEA is neither.

The Court therefore DECLARES that the Adult Entertainment Act IS UNCONSTITUTIONAL and ENJOINS District Attorney Steven J. Mulroy from enforcing the AEA within his jurisdiction in SHELBY COUNTY, TENNESSEE.

SO ORDERED, this 2nd day of June, 2023.

/s/ Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE

APPENDIX D

No. 23-5611

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRIENDS OF GEORGE'S, INC.,
PLAINTIFF-APPELLEE,

v.

STEVEN J. MULROY,
IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES AS THE
DISTRICT ATTORNEY GENERAL OF SHELBY COUNTY,
TENNESSEE, DEFENDANT-APPELLANT.

ORDER

Before: SILER, NALBANDIAN, and MATHIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Mathis would grant rehearing for the reasons stated in his dissent.

It is further ORDERED that the motions of Brice M. Timmons and Craig A. Edgington for leave to withdraw as counsel for the appellee, are GRANTED.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

FILED
Sep 20, 2024
KELLY L. STEPHENS, Clerk

APPENDIX E

1. Tenn. Code § 7-51-1401

As used in this part, unless the context otherwise requires:

(1) "Adult" means a person who has attained eighteen (18) years of age;

(2) "Adult cabaret" means a cabaret that features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers;

(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;

(4) "Adult entertainment" means any exhibition of any adult-oriented motion picture, live performance, display or dance of any type, that has as a significant or substantial portion of such performance, any actual or simulated performance of specified sexual activities, including removal of articles of clothing or appearing unclothed;

(5) "Adult-oriented establishment" means any commercial establishment, business or service, or portion thereof, that offers, as its principal or predominant stock or trade, sexually-oriented material, devices, or paraphernalia or specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded or live and that restricts or purports to restrict admission to

adults or to any class of adults. "Adult-oriented establishment" includes, but is not limited to:

(A) "Adult book stores" means any corporation, partnership or business of any kind that has as its principal or predominant stock or trade, books, magazines or other periodicals and that offers, sells, provides or rents for a fee:

(i) Is available for viewing by patrons on the premises by means of the operation of movie machines or slide projectors;

(ii) Has a substantial portion of its contents devoted to the pictorial depiction of sadism, masochism or bestiality; or

(iii) Has as its principal theme the depiction of sexual activity by, or lascivious exhibition of, the uncovered genitals, pubic region or buttocks of children who are or appear to be under eighteen (18) years of age;

(B) "Adult motion picture theatres" means an enclosed building used for presenting film presentations that are distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities for observation by patrons therein; and

(C) "Adult shows" or "adult peep shows" means all adult shows, exhibitions, performances or presentations that contain acts or depictions of specified sexual activities;

(6) "Bestiality" means sexual activity, actual or simulated, between a human being and an animal;

(7) "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;

(8) "Family recreation center" means any facility, which is oriented principally toward meeting the athletic or recreational needs of families and whose targeted customer is a minor child, including, but not limited to, the provision of one (1) or more of the following:

(A) Ice skating;

(B) Roller skating;

(C) Skateboarding;

(D) Paintball;

(E) Mini-golf;

(F) Bowling;

(G) Go-carts;

(H) Climbing facilities;

(I) Athletic fields or courts; or

(J) Other similar athletic or recreation activities;

(9) "Masochism" means sexual gratification achieved by a person through, or the association of sexual activity with, submission or subjection to physical pain, suffering, humiliation, torture or death;

(10) "Person" means an individual, partnership, limited partnership, firm, corporation or association;

(11) "Sadism" means sexual gratification achieved through, or the association of sexual activity with, the infliction of physical pain, suffering, humiliation, torture or death upon another person or animal;

(12) "Sexually-oriented material" means any book, article, magazine, publication or written matter of any kind, drawing, etching, painting, photograph, motion picture film or sound recording that depicts sexual activity, actual or simulated, involving human beings or human beings and animals, that exhibits uncovered human genitals or pubic region in a lewd or lascivious manner, or that exhibits human male genitals in a discernibly turgid state, even if completely covered; and

(13) "Specified sexual activities" means activities, services or performances that include the following sexual activities or the exhibition of the following anatomical areas:

(A) Human genitals in a state of sexual stimulation or arousal;

(B) Acts of human masturbation, sexual intercourse, sodomy, cunnilingus, fellatio or any excretory function, or representation thereof; or

(C) Fondling or erotic touching of human genitals, pubic region, buttocks or female breasts.

2. Tenn. Code § 7-51-1407

(a)(1) 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.

(2) For the purposes of subdivision (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.

(b) Subsection (a) shall not apply to an adult-oriented business located in an otherwise prohibited location in operation on July 1, 2007, and the business activity shall be deemed an existing use of the property; provided, that the business remains in continuous operation as an adult-oriented business regardless of change of ownership.

(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.

(2) Notwithstanding § 7-51-1406, this subsection (c) expressly:

(A) Preempts an ordinance, regulation, restriction, or license that was lawfully adopted or issued by a political subdivision prior to the effective date of this act that is in conflict with this subsection (c); and

(B) Prevents or preempts a political subdivision from enacting and enforcing in the future other ordinances, regulations, restrictions, or licenses that are in conflict with this subsection (c).

(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.

3. Tenn. Code § 39-11-301

(a)(1) A person commits an offense who acts intentionally, knowingly, recklessly or with criminal negligence, as the definition of the offense requires, with respect to each element of the offense.

(2) When the law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly or recklessly. When recklessness suffices to establish an element, that element is also established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, that element is also established if a person acts intentionally.

(b) A culpable mental state is required within this title unless the definition of an offense plainly dispenses with a mental element.

(c) If the definition of an offense within this title does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state.

4. Tenn. Code § 39-17-901

The following definitions apply in this part, unless the context requires otherwise:

(1) "Actual or constructive knowledge" means that a person is deemed to have constructive knowledge of the contents of material who has knowledge of facts that would put a reasonable and prudent person on notice as to the suspect nature of the material;

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

(3) "Distribute means to transfer possession of, whether with or without consideration;

(4) "Excess violence" means the depiction of acts of violence in such a graphic or bloody manner as to exceed common limits of custom and candor, or in such a manner that it is apparent that the predominant appeal of the material is portrayal of violence for violence's sake;

(5) "Final judgment" or "conviction" means all direct appeals have been exhausted including an application for appeal or for certiorari to the Tennessee or United States supreme court;

(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;

(7) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture film, videocassette or other pictorial representation, or any statue, figure, device, theatrical production or electrical reproduction, or any other article, equipment, machine or material that is obscene as defined by this part;

(8) "Minor" means any person who has not reached eighteen (18) years of age and is not emancipated;

(9) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering or the showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state;

(10) "Obscene" means:

(A) The average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(B) The average person applying contemporary community standards would find that the work depicts or describes, in a patently offensive way, sexual conduct; and

(C) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value;

(11) “Patently offensive” means that which goes substantially beyond customary limits of candor in describing or representing such matters;

(12) “Prurient interest” means a shameful or morbid interest in sex;

(13) “Sadomasochistic abuse” means flagellation or torture or physical restraint by or upon a person for the purpose of sexual gratification of either person;

(14) “Sexual conduct” means:

(A) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. A sexual act is simulated when it depicts explicit sexual activity that gives the appearance of ultimate sexual acts, anal, oral or genital. "Ultimate sexual acts" means sexual intercourse, anal or otherwise, fellatio, cunnilingus or sodomy; or

(B) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals; and

(15) “Sexual excitement” means the condition of human male or female genitals when in a state of sexual stimulation or arousal.