No. 23A-___

In the

Supreme Court of the United States

MELANIE GRIFFIN,
SECRETARY OF THE FLORIDA DEPARTMENT OF
BUSINESS AND PROFESSIONAL REGULATION,
Applicant,

v.

HM FLORIDA-ORL, LLC,
Respondent.

APPLICATION FOR A PARTIAL STAY PENDING APPEAL IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND PENDING FURTHER PROCEEDINGS IN THIS COURT

Directed to the Honorable Clarence Thomas, Associate Justice
of the Supreme Court of the United States and Circuit Justice
for the United States Court of Appeals for the Eleventh Circuit

October 19, 2023

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PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding below.

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Pursuant to this Court's Rules 22 and 23 and the All Writs Act, 28 U.S.C. § 1651, Defendant-Applicant Melanie Griffin, in her official capacity as Secretary of the Florida Department of Business and Professional Regulation, respectfully applies for a partial stay of the preliminary injunction issued by the U.S. District Court for the Middle District of Florida, pending appeal before the United States Court of Appeals for the Eleventh Circuit and, if necessary, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

The district court entered a universal preliminary injunction enjoining application of Florida's Protection of Children Act throughout Florida "against anyone and everyone, even though the plaintiff HM Florida-ORL, LLC's asserted injury would be remedied by an injunction protecting only HM from prosecution." App. 12a (Brasher, J., dissenting from denial of partial stay). That decision inflicts irreparable harm on Florida and its children by purporting to erase from Florida's statute books a law designed to prevent the exposure of children to sexually explicit live performances.

The district court concluded that Florida's statute transgressed the First Amendment and the Due Process Clause. Florida strongly disagrees with that conclusion and has appealed the injunction. But Florida did not seek to stay that injunction below as it applies to the sole plaintiff in this case, and it does not here—in part because, in Florida's view, the conduct plaintiff is suing to protect does not actually violate the statute. Instead, Florida now applies for a partial stay of the injunction to the extent it sweeps beyond the plaintiff and enjoins the statute universally.

That portion of the injunction exceeded the district court's remedial authority. As this Court has explained, any "'remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)); *see also Madsen v. Women's Health*

Ctr., Inc., 512 U.S. 753, 765 (1994); *United States v. Texas*, 143 S. Ct. 1964, 1980 (2023) (Gorsuch, J., concurring in judgment, joined by Thomas & Barrett, JJ.) (observing that "[t]raditionally, when a federal court finds a remedy merited, it provides party-specific relief"; decrying "the rise of the universal injunction" (cleaned up)). This is not a class action, and there is but one plaintiff: a restaurant in Orlando, Florida, known as Hamburger Mary's, which claims that the statute unconstitutionally deters it from presenting to children live drag shows that are not sexually explicit. App. 107a, 124a. Even if such performances violated the statute, all Hamburger Mary's needs to remedy its alleged injury is an injunction precluding the State from enforcing the statute against Hamburger Mary's. Extending that relief to others not before the Court did nothing to alleviate Hamburger Mary's asserted injury and exceeded the district court's remedial authority.

The equities also favor Florida. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (alteration accepted) (citation omitted). Florida is now unable to enforce its statute at all, to the detriment of Florida's children and the State's sovereign prerogative to protect them from harm. Meanwhile, Hamburger Mary's would suffer no harm whatsoever from a partial stay,

which would not, pending further appellate proceedings, disturb the injunction as it applies to Hamburger Mary's.

Florida filed a stay motion to this effect in the Eleventh Circuit, but a divided panel denied it. Florida now presents the same request to this Court. This Court has previously granted such a request, *see U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939, 939 (1993) (staying "so much of" injunction "as grants relief to persons other than" plaintiff, "pending disposition of the appeal"), and should do so again here. The U.S. Solicitor General filed a similar request for a partial stay of a universal injunction in *Sessions v. City of Chicago*, No. 17A1379 (U.S. June 18, 2018), but withdrew the application after the court of appeals granted the relief the United States sought in the application. If the Eleventh Circuit ultimately affirms the district court's universal injunction, there is a "fair prospect" this Court will reverse and narrow it to the plaintiff. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

There is also a "reasonable probability" that four members of this Court will grant certiorari to review the Eleventh Circuit's ruling, assuming it affirms the district court. *Id.*. The courts of appeals are deeply divided on whether injunctive relief may be extended to parties not before the court. And that question is immensely important. Lower courts in recent years have increasingly issued universal injunctions, which stunt the development of the law, encourage forum-shopping, and cause chaos.

JURISDICTION

This Court, or any Justice thereof, has jurisdiction to issue a stay pending resolution of an appeal before a court of appeals. *See* 28 U.S.C. § 1651(a) (authorizing this Court to "issue all writs necessary or appropriate in aid of" its jurisdiction).

STATEMENT

This case concerns the constitutionality of Florida's Protection of Children Act, 2023 Fla. Laws ch. 94 (May 17, 2023) (SB 1438) (App. 128a). The law makes it a misdemeanor to knowingly admit a child to an "adult live performance," defined as a sexually explicit show that would be obscene "for the age of the child present." Fla. Stat. § 827.11(1)(a), (3), (4). The variable-obscenity standard in the statute tracks the one approved by this Court in *Ginsberg v. New York*, 390 U.S. 629 (1968), with the additional refinement that obscenity is measured by the age of the child in question and not by children as an undifferentiated group.

The plaintiff operates an Orlando restaurant and bar known as Hamburger Mary's. Hamburger Mary's features entertainment that includes drag-show performances, comedy sketches, and dancing. App. 108a. On May 22, 2023, Hamburger Mary's sued the Secretary in her official capacity, challenging the constitutionality of the Protection of Children Act on its face. App. 107a, 115a. Hamburger Mary's claimed that the Act had prompted it to ex-

clude children from its drag shows, resulting in loss of business, App. 124a, even though Hamburger Mary's professed that those shows contained "no lewd activity, sexually explicit shows, disorderly conduct, public exposure, obscene exhibition, or anything inappropriate for a child to see," App. 112a. In other words, Hamburger Mary's asserted a First Amendment right to do something it does not claim to do (or intend to do)—admit children to sexually explicit live performances—and further contended that the statute was unconstitutionally vague. App. 115a–24a.

Hamburger Mary's also moved for a preliminary injunction. App. 80a. Florida responded that the law was constitutional and that, if the court disagreed, it should limit any injunction to Hamburger Mary's. App. 78a. But the district court concluded that the statute was unconstitutionally overbroad and vague. App. 48a–52a. It granted a preliminary injunction, not just as to Hamburger Mary's but also as to any person or entity who might be subject to the Act. App. 53a.

Florida appealed and asked the district court to stay, pending appeal, the preliminary injunction as it applied to nonparties. The district court denied the stay motion. App. 28a. The district court thought it appropriate to extend the injunction to nonparties even if not needed to remedy the plaintiff's injury, because it had invalidated the statute on its face under the First Amendment overbreadth doctrine, and because Hamburger Mary's was, in

the Court's view, "not the only party suffering injury as a result of the" statute. App. 22a.

Florida then applied for a partial stay in the Eleventh Circuit. A divided motions panel denied the stay on much the same logic as the district court. The panel majority acknowledged that Florida had cited "cases provid[ing] some support for a partial stay" and that the "governing law" was at least "divided or unclear." App. 11a. But the majority reasoned that a departure from basic remedial principles was appropriate, given the "First Amendment doctrine of overbreadth," which is meant to "vindicate the rights of others not before the court." App. 7a (quotation omitted).

Judge Brasher dissented. Framing the question as whether a district court may "unnecessarily extend an injunction to nonparties when an individual plaintiff's injury can be completely redressed by party-specific relief," he thought the answer was "an emphatic 'no.'" App. 12a. In concluding otherwise based on the First Amendment overbreadth doctrine, the panel majority "conflate[d] the merits of a legal claim with the scope of the remedy for that claim." App. 14a.

Florida now seeks the same relief it sought in the district court and Eleventh Circuit: a stay that limits the preliminary injunction to Hamburger Mary's, the only plaintiff in the case, pending appeal and further proceedings in this Court.

REASONS FOR GRANTING THE STAY

Pursuant to this Court's Rules 22 and 23 and the All Writs Act, 28 U.S.C. § 1651, a single Justice or the entire Court may stay a district court order pending appeal. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 542 (2017); *Mikutaitis v. United States*, 478 U.S. 1306 (1986) (Stevens, J., in chambers); Stephen M. Shapiro et al., *Supreme Court Practice* § 17.6, at 17-13 (11th ed. 2019). "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* (citations omitted). But this case is not close. Those considerations overwhelmingly support issuing a partial stay to the extent the district court granted relief to persons who are not parties to the case.

I. IF THE ELEVENTH CIRCUIT AFFIRMS, THERE IS A FAIR PROSPECT THAT A MAJORITY OF THIS COURT WILL RULE THAT THE DISTRICT COURT ERRED IN AWARDING UNIVERSAL RELIEF.

There is a fair prospect that this Court will reverse if the Eleventh Circuit affirms the full scope of the district court's injunction. In granting universal relief, the district court exceeded its remedial powers.

A. The district court erred in awarding preliminary injunctive relief beyond what was necessary to prevent injury to Hamburger Mary's.

1. This Court has made clear that any "remedy" awarded to the plaintiff must be "limited to the inadequacy that produced the injury in fact that the plaintiff has established." *DaimlerChrysler*, 547 U.S. at 353 (quoting *Lewis*, 518 U.S. at 357). This Court has therefore repeatedly held that the scope of an injunction—especially when it seeks to enjoin presumptively valid governmental action—should generally apply only to the party before the Court. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010) ("Respondents in this case do not represent a class, so they could not seek to enjoin [an administrative] order on the ground that it might cause harm to other parties."); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (observing that "neither declaratory nor injunctive relief can directly interfere with the enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs"). "Traditionally," in short, "when a federal court

finds a remedy merited, it provides party-specific relief." *Texas*, 143 S. Ct. at 1980 (Gorsuch, J., concurring in judgment, joined by Thomas & Barrett, JJ.).

In *Lewis*, for example, the district court had "mandated sweeping changes designed to ensure that the Arizona Department of Corrections would 'provide meaningful access to the Courts for all present and future prisoners.'" 518 U.S. at 347 (citation omitted). But the district court had "found actual injury on the part of only one named plaintiff," who claimed to have suffered the dismissal of a complaint due to his illiteracy. *Id*. at 358. This Court therefore "eliminate[d] from the proper scope of the injunction provisions directed at" other problems alleged to have injured "the inmate population at large." *Id*. These other problems "ha[d] not been found to have harmed any plaintiff in th[e] lawsuit, and hence were not the proper object of th[e] District Court's remediation." *Id*.

Those principles show that granting universal relief to Hamburger Mary's is plainly inappropriate. Hamburger Mary's asserts that the Protection of Children Act chills its speech, but an injunction limited to it would fully remedy that injury. No other plaintiff joined this lawsuit, nor did the district court certify Hamburger Mary's as a class representative. And Hamburger Mary's has not alleged, much less proven, that application of the Protection of Children Act to others in the State of Florida will cause actual or imminent injury to Hamburger Mary's itself. It was a serious error for the

district court nonetheless to enjoin the statute as it may apply to the rest of the world.

2. Traditional remedial principles reinforce that conclusion. The remedial powers of a federal court are defined by what relief "was traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999); *see also id.* at 318 ("the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789"); *Boyle v. Zacharie & Turner*, 31 U.S. 648, 658 (1832) (Story, J.) ("[T]he remedies in equity are to be administered . . . according to the practice of courts of equity in the parent country"). Universal injunctions "appear to conflict with several principles of equity." *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).[1] One is that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Another is to "'take care to make

[1] The question at issue here involves the nonstatutory remedial powers of the federal courts. That question is distinct from whether a court is authorized to vacate federal agency action as to parties other than the challenging plaintiff under the Administrative Procedure Act, which authorizes courts to "set aside" unlawful rules. 5 U.S.C. § 706(2). *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 1012–16 (2018).

no decree [that would] affect' the rights of nonparties." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 427 (2017) (quoting *Joy v. Wirtz*, 13 F. Cas. 1172, 1174 (C.C.D. Pa. 1806) (No. 7,554) (Washington, Circuit Justice) (creditors' bill)). Equity did recognize an exception that "permit[ted] a portion of the parties in interest to represent the entire body." *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 363 (1921) (quoting *Smith v. Swormstedt*, 57 U.S. 288, 303 (1853)). This device—variously termed the "representative suit" or "bill of peace"—was the precursor of the modern Rule 23 class action. *See* Joseph Story, *Commentaries on Equity Pleadings* §§ 77–135, at 101–78 (4th ed. 1848); Frederic Calvert, *A Treatise upon the Law Respecting Parties to Suits in Equity* 30–34 (2d ed. 1847); *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) ("The class suit was an invention of equity[.]"). But again, this is not a class action. Because Rule 23 has replaced the representative suit in modern equity jurisprudence, Hamburger Mary's cannot invoke these older exceptions to do an end-run around the requirements of Rule 23. *See Rodgers v. Bryant*, 942 F.3d 451, 464 (8th Cir. 2019) (Stras, J., concurring in part and dissenting in part).

The traditional equitable remedy most analogous to what Hamburger Mary's seeks here—the injunction to stay proceedings at law—was "directed only to the parties." 2 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* § 875, at 166 (2d ed. 1839). For ex-

ample, in *Scott v. Donald*, the respondent had sued certain constables of South Carolina, arguing that they had confiscated his alcohol under a statute that was unconstitutional. 165 U.S. 58, 59, 66, 78–86 (1897). This Court agreed that the statute was unconstitutional. *Id.* at 99–101. But in a separate opinion, it reversed the award of an injunction protecting everyone else subject to the statute. *See Scott v. Donald*, 165 U.S. 107, 115–17 (1897). As this Court explained, "[t]he theory of the decree is that the plaintiff is one of a class of persons whose rights are infringed and threatened, and that he so represents such class that he may pray an injunction on behalf of all persons that constitute it." *Id.* at 115. "It is, indeed, possible that there may be others in like case with the plaintiff, and that such persons may be numerous." *Id.* "[B]ut such a state of facts is too conjectural to furnish a safe basis upon which a court of equity ought to grant an injunction." *Id.*

This Court reaffirmed these principles in *Lewis*, holding that a "systemwide" injunction went beyond the equitable powers of a district court even when directed to the one Article III injury found in that case: inadequate legal services for illiterate prison inmates. 518 U.S. at 359–60 & n.7. Two inmates had incurred that injury: one whose illiteracy had led to the dismissal of a complaint and another who "had once been unable to file a legal action" because of his illiteracy. *Id.* at 359–60 (cleaned up). But these shortfalls "were a patently inadequate basis for a conclusion of systemwide violation and im-

position of systemwide relief." *Id*. at 359 ("[G]ranting a remedy beyond what was necessary to provide relief to [the two inmates] was therefore improper." *Id*. at 360.[2]

3. Universal injunctions "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). "They continue to deprive other lower courts of the chance to weigh in on important questions before this Court has to decide them. They continue to encourage parties to engage in forum shopping and circumvent rules governing class-wide relief." *Texas*, 143 S. Ct. at 1980 (Gorsuch, J., concurring in judgment, joined by Thomas and Barrett, JJ.). And they "tend to force judges into

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[2] When a plaintiff requires broad relief to get complete redress, the injunction may rightly be broad, but it is still party-specific. *See, e.g.*, *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018) ("[A]n injunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit . . . if such breadth is necessary to give prevailing parties the relief to which they are entitled." (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987)). "Injunctions barring public nuisances [a]re an example[:] While these injunctions benefit[] third parties, that benefit [i]s merely a consequence of providing relief to the plaintiff." *Trump v. Hawaii*, 138 S. Ct. at 2427 (Thomas, J., concurring). This kind of injunction is not universal, at least not in the problematic sense of being broader than necessary to afford the plaintiffs complete relief. Such injunctions benefit nonparties in a way that is "merely incidental." *Id*. That is not true of the preliminary injunction in this case, which went well beyond what was necessary to provide complete relief to the plaintiff and which the District Court pointedly issued to prevent the putative "chilling effect on all members of society who fall within [the statute's] reach." App. 22a.

making rushed, high-stakes, low-information decisions." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in grant of stay, joined by Thomas, J.).

This is a case in point. The Protection of Children Act took effect on May 17, 2023. Hamburger Mary's filed its verified complaint on May 22, 2023, and its motion for a temporary restraining order and preliminary injunction the following day. The district court scheduled a non-evidentiary hearing for June 6 and directed the state defendants to respond to the motion by June 2. The district court entered the preliminary injunction on June 23. Florida's law has been effectively repealed ever since.

B. Neither facial invalidity nor overbreadth standing entitles Hamburger Mary's to universal relief.

The Eleventh Circuit panel majority did not dispute that generally, "injunctions should be limited in scope to the extent necessary to protect the interest of the parties." App. 7a (quotation omitted). But it thought that an exception to that rule obtained here because the district court had invalidated the Protection of Children Act on its face based on the overbreadth doctrine, and because that doctrine "operates as an exception to the normal rules of standing." App. 7a (quoting *Reagan v. Time*, 468 U.S. 641, 651 n.8 (1984)).

As Judge Brasher explained in dissent, however, that reasoning "conflates the merits of a legal claim with the scope of the remedy for that claim."

App. 14a (Brasher, J., dissenting from denial of partial stay). Overbreadth is not an exception to the rules of Article III standing. It is an exception to the rules for *prudential* standing, *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956–57 (1984), specifically, the rule that a party "cannot rest his claim to relief on the legal rights or interests of third parties," *Warth v. Seldin*, 422 U.S. 490, 499 (1975). It thus expands the range of substantive arguments that a plaintiff can raise on the merits. *See* Henry P. Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1, 4 (1982). But it says nothing about the relief to which a successful plaintiff is entitled, which is still limited to the plaintiff's injury in fact. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 853–54, 881 (1991).

This Court made that point clear in *United States v. National Treasury Employees Union* ("*NTEU*"), 513 U.S. 454 (1995). There the Court held that a federal statute banning federal employees' receipt of honoraria violated the First Amendment. It reasoned that the prohibition was overbroad in extending to "employees below grade GS-16." *Id.* at 477. But it still ruled that an injunction preventing enforcement of the statute "should be limited to the parties before the Court." *Id.* As this Court explained, "we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." *Id.* at 478.

This Court reached the same remedial conclusion after sustaining an overbreadth claim in *Doran*. There this Court affirmed the award of a preliminary injunction preventing a New York town from enforcing an ordinance banning topless dancing against two of the three respondent corporations in the case. The Court found that the two corporations were likely to succeed on their claims that the ordinance was overbroad in its application both to establishments that served liquor and to establishments that did not. 422 U.S. at 932–33. But the Court reversed the award of a preliminary injunction preventing enforcement of the ordinance against the third respondent on grounds of *Younger* abstention, given that the third respondent was already being prosecuted in state court. *Id*. at 929. "Moreover," said the Court, "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute." *Id*. at 931.

2. The panel majority was aware of and cited those cases, App. 6a, which Florida had relied upon in its stay papers. Instead of following them, however, the panel majority took its cue from "a handful of cases in which no one challenged the extra-party scope of the injunction at issue." App. 15a (Brasher, J., dissenting from denial of partial stay).

For example, the panel majority labored to discover in the convoluted history of *Ashcroft v. ACLU*, 542 U.S. 656 (2004), implicit sanction for universal relief in a First Amendment overbreadth case. App. 8a–9a. But as Judge Brasher explained in dissent, "the government did not challenge the injunction in *Ashcroft* on the grounds that it extended to nonparties, and [this Court] did not address that question." App. 15a (Brasher, J., dissenting from denial of partial stay); *see also Rodgers*, 942 F.3d at 468 n.11 (Stras, J., concurring in part and dissenting in part) (noting the same). At most, *ACLU* represents a drive-by remedial holding entitled to no precedential weight. *See* App. 15a (Brasher, J., dissenting from denial of partial stay) ("questions that 'merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents'" (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (refusing to afford any "precedential effect" to "drive-by jurisdictional rulings" reached "without discussion by the Court").

The panel majority also made much of dicta from *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and *Virginia v. Hicks*, 539 U.S. 113 (2003). In *Broadrick*, this Court opined that "any enforcement of a[n overbroad] statute . . . is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to con-

stitutionally protected expression." 413 U.S. at 613. In *Hicks*, the Court said that a determination of overbreadth "suffices to invalidate *all* enforcement of that law," and characterized a finding of overbreadth as an "expansive *remedy*," which was justified by the "concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech." 539 U.S. at 119 (emphasis added).

In neither case, however, was any plaintiff seeking the award of an injunction beyond the plaintiff's claimed injury. In fact, any discussion of remedy was beside the point. In both cases this Court concluded that the laws in question were not substantially overbroad. *Hicks*, 539 U.S. at 121–24; *Broadrick*, 413 U.S. at 616–18. The language in those cases about the "expansive remedy" of overbreadth and "any enforcement" being "totally forbidden" is thus better understood as speaking to the precedential effect of an overbreadth holding, not to the proper scope of equitable relief.

II. IF THE ELEVENTH CIRCUIT AFFIRMS THE DISTRICT COURT'S AWARD OF A UNIVERSAL INJUNCTION, THERE IS A REASONABLE PROBABILITY THAT FOUR MEMBERS OF THIS COURT WILL VOTE TO GRANT CERTIORARI IN THE CASE.

This Court is likely to grant review if the Eleventh Circuit affirms the universal scope of the injunction. Although it was once axiomatic that a court's equitable authority extends only to preventing irreparable harm to the plaintiff, *see Yamasaki*, 442 U.S. at 702, "in recent years a number of

lower courts have asserted the authority to issue decrees that purport to define the rights and duties of sometimes millions of people who are not parties before them." *Texas*, 143 S. Ct. at 1980 (Gorsuch, J., concurring in judgment, joined by Thomas & Barrett, JJ.). The Court is likely to grant review to consider whether that practice is consistent with principle and precedent.

There is now a growing disparity in the lower courts on the propriety of extending injunctive relief to nonparties. The Fourth, Seventh, and Eighth Circuits, on the one hand, have held that the need to protect nonparties "similarly situated" to the plaintiff may justify a district court's issuing a universal injunction. *Roe v. U.S. Dep't of Def.*, 947 F.3d 207, 232 (4th Cir. 2020); *City of Chicago v. Barr*, 961 F.3d 882, 916 (7th Cir. 2020); *see also Rodgers*, 942 F.3d at 458 (affirming universal injunction because the challenged law "impact[ed] the entire state"). The First, Fifth, Sixth, Ninth, and Eleventh Circuits on the other hand (notwithstanding the panel ruling in this case), have held that protecting the interests of nonparties is not a valid basis to issue a universal injunction. *Brown v. Trs. of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) (vacating universal injunction as to nonparties because "such breadth [was] [un]necessary to give [plaintiff] relief"); *Louisiana v. Becerra*, 20 F.4th 260, 263–64 (5th Cir. 2021) (rejecting existence of nonparties "who also need protection" as valid basis for universal injunction); *L.W. v. Skrmetti*, 73 F.4th 408, 415 (6th Cir. 2023) ("A court order that goes beyond the inju-

ries of a particular plaintiff to enjoin government action against nonparties exceeds the norms of judicial power."); *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) (holding that universal injunctions are appropriate only if "necessary to redress the [plaintiff's] injury"); *Georgia v. President of the U.S.*, 46 F.4th 1283, 1306–07 (11th Cir. 2022) (rejecting protection of nonparties as a valid basis for a universal injunction).

Compounding the confusion, the Third Circuit, despite holding that injunctive relief should generally be limited to preventing harm to plaintiffs, has left open the possibility for an exception that would allow universal injunctions when a statute is held facially unconstitutional. *Free Speech Coal., Inc. v. Att'y Gen.*, 974 F.3d 408, 430–31 (3d Cir. 2020). Similarly, the panel majority here agreed that "[a]s a general matter," courts should not issue injunctions to benefit nonparties, App. 7a, but it then left the universal injunction fully in effect because it found the law to be "unclear" on whether a special exception for facial overbreadth exists. App. 11a.

The Court is likely to grant review to clear up this confusion. As the U.S. Solicitor General explained in asking this Court for a similar partial stay of a universal injunction, the increasing prevalence of universal injunctions that are unnecessary to protect the interests of the parties permits a single plaintiff to "effectively nullif[y]" state and federal laws. Application for Partial Stay Pending Rehearing En Banc at 18, *Sessions v. City of Chicago*,

No. 17A1379 (June 18, 2018). Universal injunctions strain federal courts by "preventing legal questions from percolating . . . , encouraging forum shopping, and making every case" an emergency. *Trump v. Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring). And the practice does not just allow one judge effectively to nullify a statute. It permits one judge effectively to nullify the rulings of other courts that ruled in favor of the government. *See Dep't of Homeland Sec.*, 140 S. Ct. at 599 (Gorsuch, J., concurring in grant of stay, joined by Thomas, J.) (noting that none of the previous litigation on the same issue "matters much at this point" because a district court issued a universal injunction). Needing only one judge to side with them, plaintiffs enjoy "a nearly boundless opportunity to shop for a friendly forum to secure a win" while the government must remain undefeated to have any hope of enforcing its law. *Id.* at 601. This continued "chaos for litigants, the government, [and] courts" is "patently unworkable." *Id.* at 600. The Court is likely to intervene to do something about it.

III. ABSENT A STAY, FLORIDA WILL CONTINUE TO SUFFER IRREPARABLE HARM TO ITS SOVEREIGN INTEREST IN ENFORCING ITS LAWS.

"Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (alteration accepted) (citation omitted). That harm is magnified when a state

is universally stripped of its ability to enforce a law it is otherwise entitled to enforce. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). As long as the district court's preliminary injunction remains in place, Florida is powerless to enforce a law its elected representatives have enacted for the protection of its children.

IV. THE BALANCE OF EQUITIES FAVORS A STAY.

The first three factors overwhelmingly justify a partial stay. The balance of equities also favors a partial stay.

Hamburger Mary's suffers no harm from a stay of the injunction only as to nonparties. Again, an injunction limited to Hamburger Mary's still protects Hamburger Mary's fully from the chill that it claims in its complaint. The public also has an interest in the enforcement of laws enacted by its elected representatives. *Strange v. Searcy*, 574 U.S. 1145, 1146 (2015) (Thomas, J., dissenting from denial of application for stay, joined by Scalia, J.). The balance of equities breaks any tie in favor of the State.

CONCLUSION

For all these reasons, the application for a partial stay pending appeal, and pending further proceedings in this Court, should be granted.

Respectfully submitted,

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Attorney General

October 19, 2023

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In the

Supreme Court of the United States

MELANIE GRIFFIN,
SECRETARY OF THE FLORIDA DEPARTMENT OF
BUSINESS AND PROFESSIONAL REGULATION,
Applicant,

v.

HM FLORIDA-ORL, LLC,
Respondent.

APPENDIX

Page

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-12160

HM FLORIDA-ORL, LLC,

Plaintiff-Appellee,

versus

GOVERNOR OF FLORIDA, et al.,

Defendants,

SECRETARY OF THE FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:23-cv-00950-GAP-LHP

Before JORDAN, ROSENBAUM, and BRASHER, Circuit Judges.

BY THE COURT:

For the reasons which follow, the motion for a partial stay of the district court's preliminary injunction is denied.

I

HM Florida operates a restaurant in Orlando. It frequently presents drag show performances, comedy sketches, and dancing, including so-called "family friendly" drag performances on Sundays where children are invited to attend.

Invoking 42 U.S.C. § 1983, HM Florida sued Melanie Griffin, the Secretary of the Department of Business and Professional Regulation of the State of Florida, in her official capacity to challenge the constitutionality of Fla. Stat. § 827.11. This statute prohibits

any person from knowingly admitting a child to an "adult live performance."[1]

The district court granted HM's motion for a preliminary injunction, ruling in part that HM had shown a substantial likelihood of success on the merits. The district court ruled that § 827.11 is likely overbroad (and therefore likely unconstitutional) under the First Amendment because "lewd conduct" and "lewd exposure of prosthetic or imitation genitals or breasts" are not defined in the statute. *See* D.E. 30 at 20-24. The preliminary injunction issued by the district court prohibited Secretary Griffin from enforcing § 827.11. *See* D.E. 30 at 25 ("Melanie Griffin, in her official capacity as Secretary of the Florida Department of Business

[1] The statute defines "adult live performance" as:

> Any show, exhibition, or other presentation in front of a live audience which, in whole or in part, depicts or simulates nudity, sexual conduct, sexual excitement, or specific sexual activities as those terms are defined in s. 827.001, lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts when it:
>
> 1. Predominantly appeals to a prurient, shameful, or morbid interest;
>
> 2. Is patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and
>
> 3. Taken as a whole, is without serious literary, artistic, political, or scientific value for the age of the child present.

and Professional Regulation, is hereby ENJOINED from instituting, maintaining, or prosecuting any enforcement proceedings under the Act[.]").[2]

Secretary Griffin asked the district court for a partial stay of the preliminaty injunction so that she could enforce § 827.11 against everyone but HM. The district court denied the motion for a partial stay, explaining that it had concluded that § 827.11 was likely overbroad, and therefore likely to be unconstitutional on its face. The district court also explained that, where overbreadth is the constitutional problem, a preliminary injunction prohibiting all enforcement of the statute is appropriate. *See* D.E. 41 at 4-8.

After appealing the district court's preliminary injunction, Secretary Griffin has moved for a partial stay of the injunction. She argues that we should stay the preliminary injunction in part to allow her to enforce § 827.11 as to all parties except HM. Not surprisingly, HM opposes the motion.

II

In reviewing Secretary Griffin's motion for a partial stay of the preliminary injunction, "we consider the following factors: "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant will be

[2]By its terms, the preliminary injunction did not purport to run against non-parties. *See generally* Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 Utah L. Rev. 381, 441-46 (2002).

irreparably injured absent a stay, (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies. The first two factors are the most critical. It is not enough that the chance of success on the merits be better than negligible. ... By the same token, simply showing some possibility of irreparable injury ... fails to satisfy the second factor." *Robinson v. Atty. General of Alabama*, 957 F.3d 1171, 1176-77 (11th Cir. 2020) (internal quotation marks and citation omitted).

The district court, in granting a preliminary injunction and denying the motion for a partial stay, did not definitively rule on the merits of the case. Today, we likewise do not conclusively resolve the merits of Secretary Griffin's appeal. A preliminary injunction is reviewed under the deferential abuse of discretion standard, *see Benisek v. Lamone*, 138 S.Ct. 1942, 1943 (2018), so the narrow question for us is whether Secretary Griffin has made a strong showing that the district court abused its discretion with respect to the scope of the preliminary injunction.

III

Secretary Griffin asserts that, pending resolution of her appeal, she should be allowed to enforce § 827.11 as to everyone but HM. Citing cases criticizing the issuance of universal/nationwide injunctions, *see, e.g., Georgia v. President of the United States*, 46 F.4th 1283, 1306-07 (11th Cir. 2022) (majority opinion) ("reviewing courts should . . . be skeptical of [universal] injunctions premised on the need to protect nonparties"), she argues that the district

court could only award injunctive relief vis-à-vis HM and could not prevent enforcement of § 827.11 against other persons or entities.

As noted, the district court concluded that HM established a substantial likelihood of prevailing on its claim that § 827.11 is overbroad in violation of the First Amendment. And for purposes of her motion for partial stay, Secretary Griffin does not take issue with the merits of the district court's overbreadth ruling. The question, then, is whether Secretary Griffin has made a strong showing that the district court abused its discretion in issuing a preliminary injunction that prohibited her from enforcing § 827.11—which is likely overbroad and unconstitutional—against anyone.

Secretary Griffin also cites to *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975), where the Supreme Court said that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute." And she argues that in some First Amendment cases the Supreme Court has limited injunctive relief to the parties before it or just reversed the particular defendant's conviction. *See, e.g., United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 477 (1995); *Thornhill v. Alabama*, 310 U.S. 88, 91 (1940). *Accord* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L. J. 853, 853-54 (1991) (citing *Doran* for the proposition that when "a lower federal court pronounces a state statute void for overbreadth," the "binding effect of the federal judgment extends no further than the parties to the lawsuit," and asserting that "[a]gainst nonparties, the state remains free to lodge criminal prosecutions").

As a general matter, injunctions should be "limited in scope to the extent necessary to protect the interests of the parties." *Garrido v. Dudek*, 731 F.3d 1152, 1159 (11th Cir. 2013). The First Amendment doctrine of overbreadth, however, is meant to "vindicate the rights of others not before the court." *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1271 (11th Cir. 2006). As a result, it "operates as an exception to the normal rules of standing." *Regan v. Time*, 468 U.S. 641, 651 n.8 (1984).

The problem for Secretary Griffin is that statutes which are unconstitutionally overbroad are "properly subject to facial attack." *Secretary of State of Md. v. Joseph H. Munro, Inc.*, 467 U.S. 947, 968 (1984) (rejecting argument that state statute found to be overbroad should not "str[uck] down on its face"). As a result, a successful overbreadth challenge "suffices to invalidate *all* enforcement of th[e] law 'until and unless a limiting construction or partial invalidation so narrows it as to remove the threat or deterrence to constitutionally protected expression.'" *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (emphasis in original) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). The Supreme Court has "provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—specially when the overbroad statute imposes criminal sanctions." *Id.* "Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces the[ ] social costs caused by the withholding of protected speech." *Id.* (emphasis in original).

Take *Ashcroft v. ACLU*, 542 U.S. 656 (2004), which involved First Amendment challenges to a federal law, the Child Online Protection Act. The district court concluded that the plaintiffs were likely to succeed on their claims that the Act violated the First Amendment and issued a preliminary injunction prohibiting the Attorney General from enforcing or prosecuting matters under the Act. *See ACLU v. Reno*, 266 F.Supp.2d 473, 498-99 (E.D. Pa. 1999). The district court specifically rejected the government's argument that the preliminary injunction should be limited to the plaintiffs who had filed suit, explaining that the Attorney General had "presented no binding authority or persuasive reason that [it] should not enjoin total enforcement of [the Act]." *Id.* at 499 n.8. On remand from the Supreme Court, the Third Circuit upheld the issuance of the preliminary injunction, and ruled in part that the plaintiffs were likely to prevail on their claim that the Act was overbroad in violation of the First Amendment. *See ACLU v. Ashcroft*, 322 F.3d 240, 266-71 (3d Cir. 2003).

When the case came before it again, the Supreme Court affirmed. Without addressing the overbreadth claim, the Court held that the district court and the Third Circuit had properly concluded that the plaintiffs were likely to prevail on their claims that the Act violated the First Amendment, and then upheld the issuance of the preliminary injunction—which prohibited enforcement and prosecution altogether—with these words: "There are also important practical reasons to let the injunction stand pending a full trial on the merits. First, the potential harms from reversing the injunction outweigh those of leaving it in place by mistake. Where a

prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech. The harm done from letting the injunction stand pending a trial on the merits, in contrast, will not be extensive. No prosecutions have yet been undertaken under the law, so none will be disrupted if the injunction stands. Further, if the injunction is upheld, the Government in the interim can enforce obscenity laws already on the books." *Ashcroft*, 542 U.S. at 670-71 (citation omitted).

Our cases also support the scope of the district court's preliminary injunction. In *FF Cosmetics Fl, Inc. v. City of Miami Beach*, 126 F.Supp.3d 1316, 1332, 1334 (S.D. Fla. 2015), the district court ruled in part that the plaintiffs were likely to succeed on their claim that a city anti-handbilling ordinance prohibited "far more than commercial speech" and was overbroad and unconstitutional under the First Amendment. The district court then issued a preliminary injunction prohibiting the city from enforcing the anti-handbilling ordinance altogether. *See id.* at 1336. On appeal, we affirmed the district court's ruling on the overbreadth claim and upheld the preliminary injunction. *See FF Cosmetics Fl, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1303-04 (11th Cir. 2017) (relying on *Broadrick* and explaining that enforcement of the overbroad ordinance was "totally forbidden" until it was judicially narrowed or partially invalidated because "of a judicial prediction or assumption that the statute's very existence may cause others not before the

court to refrain from constitutionally protected speech or expression").

FF Cosmetics is not an outlier in our circuit. In other cases where a law has been found to be overbroad in violation of the First Amendment, we have affirmed injunctions preventing enforcement of a law or ordinance against nonparties as well as parties. *See, e.g., KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1262, 1273 (2006) (permanent injunction: "Quite simply, the district court did not abuse its discretion by enjoining the enforcement of section 1.0 of the [billboard] ordinance."); *Clean Up '84 v. Heinrich*, 759 F.2d 1511, 1512–1514 (11th Cir. 1985) (affirming a district court's ruling that a Florida statute prohibiting the solicitation of signatures on petitions within 100 yards of a polling place was facially overbroad and affirming a preliminary injunction prohibiting enforcement of the statute).

To recap, the district court concluded that § 827.11 was likely overbroad and unconstitutional under the First Amendment, and Secretary Griffin does not take issue with that ruling in her motion for a partial stay. Given Supreme Court cases like *Ashcroft* and Eleventh Circuit cases like *FF Cosmetics*—which have affirmed preliminary injunctions barring enforcement of a statute or ordinance which is likely overbroad—Secretary Griffin has not made a substantial showing that the district court erred in crafting the preliminary injunction to prohibit her from enforcing § 827.11.

In his dissent, our colleague asserts that we should grant the partial stay because a federal court cannot unnecessarily extend an

injunction to nonparties when an individual plaintiff's injury can be completely redressed by party-specific relief. He cites to Supreme Court cases like *Doran* and *National Treasury Employees Union* and to our decision in *Georgia*. We recognize that these cases provide some support for a partial stay, but they are not the only authorities on point, and given the division of authority in both the Supreme Court and in this circuit we cannot say that the district court abused its discretion. When the governing law is divided or unclear, it is difficult to say that a district court has committed a "clear error of judgment," *Emergency Recovery, Inc. v. Hufnagle*, 77 F. 4th 1317, 1324 (11th Cir. 2023), in choosing one line of authority over another.

IV

Secretary Griffin's motion for a partial stay is denied.

BRASHER, Circuit Judge, dissenting from the order denying the motion for a partial stay:

I would grant the motion for a partial stay pending appeal. The district court issued a universal injunction prohibiting the enforcement of a state criminal law against anyone and everyone, even though the plaintiff HM Florida-ORL, LLC's asserted injury would be remedied by an injunction protecting only HM from prosecution. Although we have granted partial stays in comparable cases when a district court has gone too far in enjoining the enforcement of a state law, *see Garcia v. Executive Director, Florida Commission on Ethics*, No. 23-10872 (11th Cir. June 5, 2023), the majority fails to stay the overbroad injunction in this case. Because this result is contrary to our precedents, I respectfully dissent.

The appellant's motion raises the following question: Can a district court unnecessarily extend an injunction to nonparties when an individual plaintiff's injury can be completely redressed by party-specific relief? The answer under our precedents is an emphatic "no." *See Georgia v. President of the United States*, 46 F.4th 1283, 1303–08 (11th Cir. 2022). Because the federal courts may resolve only concrete cases or controversies, we are limited to "vindicat[ing] the individual rights of the people appearing before" us. *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). That means "remedies should be limited to the inadequacy that produced the injury in fact that the plaintiff has established, and no more burdensome to the defendant than necessary to provide complete relief to the

plaintiffs." *Georgia*, 46 F.4th at 1303 (internal quotation marks and citations omitted).

These principles are nonnegotiable in every case, but they are especially salient when we are enjoining a government officer from enforcing a law. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) ("[T]he inability to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State."). We have held that a universal injunction against the enforcement of a law is justified only if "an injunction limited in scope" would not "provide complete relief to the plaintiffs." *Georgia*, 46 F.4th at 1303–04 (citation omitted); *see id.* at 1308.

The majority makes no attempt to explain why the district court needed to enjoin the enforcement of the challenged law against nonparties to provide complete relief to HM. That's because it didn't. HM runs a restaurant and nightclub in Orlando. HM's injury is the fear of being prosecuted for violating Florida Statutes section 827.11. A preliminary injunction prohibiting state officials from enforcing that law against HM and anyone acting in concert with HM would completely remedy HM's injury. *See* Fed. R. Civ. P. 65(d). Nothing more is necessary or appropriate. Under our precedents, that's the end of the matter, and the motion for a partial stay should be granted.

The majority says that we don't need to follow these established principles because HM brought a First Amendment *overbreadth* challenge to this statute instead of some other kind of claim.

But I don't see how the nature of HM's claim moves the needle. A district court can't enter an overbroad injunction just because it's dealing with an overbroad statute.

To hold otherwise, the majority conflates the merits of a legal claim with the scope of the remedy for that claim. The First Amendment overbreadth doctrine is relevant to the former, but not the latter. That is, the doctrine recognizes that a state law may be unconstitutional because of how it applies to most people, even if there is no problem with the statute as it applies to the plaintiff's unique circumstances. *See Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973). But a plaintiff with a successful overbreadth claim gets the same relief as a plaintiff with any other successful claim—a remedy that is "no more burdensome to the defendant than necessary to provide complete relief." *Georgia*, 46 F.4th at 1303; *see also* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 853-54 (1991).

The Supreme Court made this same point in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995). After concluding that a statute violated the First Amendment rights of certain government employees, the district court issued an injunction that banned the enforcement of the statute against all the employees in "the entire Executive Branch of the Government." *Id.* at 477. The Supreme Court held that the district court had erred and modified the injunction, narrowing it to cover only the plaintiffs in the case. *Id.* at 477–78. The Supreme Court explained that "although the occasional case requires us to entertain a facial challenge in

order to vindicate a party's right not to be bound by an unconstitutional statute, we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." *Id.* (internal citations omitted).

The majority refuses to follow the Supreme Court's decision in *National Treasury Employees Union* or our decision in *Georgia*. Instead, the majority relies on a handful of cases in which no one challenged the extra-party scope of the injunction at issue. These cases contribute to what we have disapprovingly identified as "several decades of tacit acquiescence in universal . . . remedies." *Georgia*, 46 F.4th at 1306; *see also Rodgers v. Bryant*, 942 F.3d 451, 467–68 (8th Cir. 2019) (Stras, J., concurring in part and dissenting in part). But they are neither binding nor persuasive. It has long been the law that questions that "merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

For example, the majority says that *Ashcroft v. ACLU*, 542 U.S. 656, 670–71 (2004), supports its position. But, just as in the other cases cited by the majority, the government did not challenge the injunction in *Ashcroft* on the grounds that it extended to nonparties, and the Supreme Court did not address that question. The Supreme Court instead considered whether the plaintiffs had established a likelihood of success on the merits such that *any* preliminary injunction should have been entered at all. 542 U.S. at 664–70. That is, the question presented in *Ashcroft* was "[w]hether the Child

Online Protection Act violates the First Amendment to the United States Constitution." *See* Br. for Pet'rs, *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (No. 03-218), 2003 WL 22970843. "Nowhere did the Supreme Court [in *Ashcroft*] address the scope of the injunction, much less decide that universal preliminary injunctions are appropriate whenever a facial challenge is likely to succeed." *Rodgers*, 942 F.3d at 468 n.11 (Stras, J., concurring in part and dissenting in part) (citing *Ashcroft*, 542 U.S. at 670–71).

But even if *Ashcroft* implicitly approved a nonparty injunction in that case, it wouldn't support the majority's position that a nonparty injunction could be appropriate here. In *Ashcroft*, a dozen plaintiffs—including membership organizations like the ACLU and mass media organizations like the Salon Media Group, Inc—sued to enjoin the operation of a law that regulated content on the internet. *See* Br. for Respondents, *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (No. 03-218), 2004 WL 103831, at *2, *5 n.2; *see also Ashcroft*, 542 U.S. at 663. Given the nature of that law and those plaintiffs, it's easy to see how a district court could reasonably believe a broad injunction would be necessary to provide complete relief—an injunction directed only to the ACLU's thousands of members and Salon.com's millions of online readers would not even be administrable. *But see Georgia*, 46 F.4th at 1307 (casting doubt on whether such considerations justify nonparty relief). Here, however, we have a single plaintiff that operates a single brick-and-mortar restaurant in a single city. An injunction addressed to everyone in Miami, Tallahassee, Jacksonville, Tampa, and everywhere else in Florida provides no benefit to that plaintiff and solves no

administrability concern, but it nonetheless imposes significant burdens on the defendant.

In short, this motion requires us to determine what relief is necessary to remedy HM's injury. The majority doesn't even ask that question, much less give the right answer. Because HM's injury would be remedied by an injunction prohibiting enforcement of Florida Statutes section 827.11 against HM, I respectfully dissent from the majority's decision to deny the motion for a partial stay.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HM FLORIDA-ORL, LLC,

Plaintiff,

v. Case No: 6:23-cv-950-GAP-LHP

MELANIE GRIFFIN,

Defendant

ORDER

This cause is before the Court for consideration without oral argument on Defendant's Motion for Partial Stay (Doc. 33) and Plaintiff's Response in Opposition thereto (Doc. 36).

I. Background

Florida Governor Ron DeSantis signed Senate Bill 1438 (the "Act") into law on May 17, 2023. *See* 2023 Fla. Laws ch. 2023-94. The Act created a new statute[1]—Fla. Stat. § 827.11—prohibiting any person from knowingly admitting a child to an "adult live performance." Plaintiff HM Florida-ORL, LLC ("Plaintiff"), which

[1] The Act also amended three existing laws. *See* 2023 Fla. Laws ch. 2023-94; *see also* Fla. Stat. §§ 255.70(1)-(3), 509.26(10), and 561.29(1).

frequently presents drag show performances at its Hamburger Mary's Restaurant and Bar in Orlando, brought suit under 42 U.S.C. § 1983, alleging that the Act "seeks to explicitly restrict, or chill speech and expression protected by the First Amendment based on its content, its message, and its messenger." Doc. 1, ¶ 50.

On June 24, 2023, the Court entered its Amended Order granting Plaintiff's Motion for Preliminary Injunction, finding it likely that the Act could not survive strict scrutiny because it did not employ sufficient narrowly tailored means to further the state's compelling interest in protecting minors from obscene performances. Doc. 30 at 16-20. The Court also found it likely that the language of the Act, which included terms like "lewd conduct" and "lewd exposure of prosthetic or imitation genitals or breasts," was unconstitutionally vague and overbroad on its face. *Id.* at 20-24; *see also* Fla. Stat. § 827.11(1)(a). In its Order, the Court enjoined Defendant Melanie Griffin ("Defendant"), "in her official capacity as Secretary of the Florida Department of Business and Professional Regulation [("DBPR")]…from instituting, maintaining, or prosecuting any enforcement proceedings under the Act." Doc. 30 at 25. In other words, the Court temporarily enjoined Defendant's enforcement of a facially unconstitutional statute. *Id.*

By her motion, Defendant seeks to neuter the Court's injunction, restricting her enforcement only as to Plaintiff and leaving every other Floridian exposed to the chilling effect of this facially unconstitutional statute. *See* Doc. 33 at 1.

II. Legal Standard

The Court may stay an injunction pending appeal to secure the opposing party's rights. Fed R. Civ. P. 62(d).[2] "In the case of a non-money judgment, whether a stay is warranted under Rule 62(d) depends upon: (1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Venus Lines Agency v. CVG Industria Venezolana de Aluminio, C.A.*, 210 F.3d 1309, 1313-14 (11th Cir. 2000) (internal quotations omitted). "Considering that this test is so similar to that applied when considering a preliminary injunction, courts rarely stay a preliminary injunction pending appeal." *Honeyfund.com, Inc. v. DeSantis*, No. 4:22-cv-227-MW/MAF, 2022 WL 3486962, at *15 (N.D. Fla. 2022).

III. Analysis

A. Likelihood of Success[3]

[2] Appellate procedural rules ordinarily require parties to move for a stay in the district court before doing so in the appellate court. Fed. R. App. P. 8(a)(1).

[3] The Court notes at the outset that there is scant precedent addressing Defendant's argument seeking to limit the injunction only to her enforcement against the Plaintiff. The body of case law cited by Defendant primarily analyzes the appropriate scope of injunctive relief in the distinct contexts of nationwide injunctions, *see, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 166 (2010), and those affecting private parties which do not involve facially unconstitutional violations of the First Amendment, *see, e.g., Grupo Mexicano de Desarrollo S.A. v. Alliance Bond*

First, the Court considers whether Defendant "has made a strong showing that [she] is likely to succeed on the merits" of her motion to stay the injunction as to non-parties. *Venus Lines Agency*, 210 F.3d at 1313. Injunctive relief is generally restricted to the "extent necessary to protect the interests of the parties" and "limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Georgia v. President of the United States*, 46 F.4th 1283, 1303 (11th Cir. 2022) (quoting *Kenner v. Convergys Corp.*, 342 F.3d 1264, 1269 (11th Cir. 2003) and *Gill v. Whitford*, 138 S.Ct. 1916, 1931 (2018)). "The scope of injunctive relief is dictated by the extent of the violation established." *Georgia*, 46 F.4th at 1306 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

The Court has found that the Act likely "imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack." *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967-68 (1984). A statute subject to facial attack is likewise susceptible to facial enjoinment. *See Califano*, 442 U.S. at 702. This is especially so in the First Amendment overbreadth context because plaintiffs "are

Fund, Inc., 527 U.S. 308, 318 (1999).

permitted to challenge a statute not [only] because their own rights of free expression are violated, but because…the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

Defendant argues that the Court does not have the authority to protect the constitutional rights of non-parties to this suit. Doc. 33 at 2. Apart from a distinguishable unpublished decision, however, she does not point to any precedent where a court has restricted a preliminary injunction of such a broadly applicable, facially invalid restriction on First Amendment speech to only the plaintiff(s). *See id*. at 3-6. This Act, unlike those in most of the cases cited by Defendant, has not merely been adjudged likely unconstitutional in a limited range of applications, and therefore capable of mitigation. *See, e.g.*, *Secretary of State of Md.*, 467 U.S. at 964-65. Rather, it was found likely to be unconstitutional on its face. *See* Doc. 30 at 15-16.

Plaintiff is not the only party suffering injury as a result of the passage of the Act; it has a chilling effect on all members of society who fall within its reach. Therefore, enjoining Defendant's enforcement of the statute against any party is the appropriate remedy. *See Broadrick*, 413 U.S. at 613 ("The consequence of our departure from traditional rules of standing in the First Amendment area is that *any enforcement of a statute thus placed at issue is totally forbidden* until and unless a limiting

construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.") (emphasis added).

In support of her argument to the contrary, Defendant contends that the Eleventh Circuit is "both weary and wary" of "universal" injunctions but cites primarily to cases invalidating nationwide injunctions on limited classes of persons. *See* Doc. 33 at 3; *see also, e.g., Georgia*, 46 F.4th at 1307-08. As the Court has previously explained, its injunction is neither nationwide, nor does it pertain only to a limited class of individuals. *See* Doc. 30 at 25. Defendant's citations to dicta in cases where the Eleventh Circuit discussed various district courts' perceived abuses of nationwide injunctions are simply inapposite. *See, e.g.*, Doc. 33 at 3 (citing *Georgia*, 46 F.4th at 1303 (focusing on the scope of the federal Procurement Act and how it pertained to a limited class of federal contractors) and *U.S. v. National Treasury Emp. Union*, 513 U.S. 454, 457 (1995) (analyzing a challenge to a federal ban on accepting compensation for public engagements brought by federal executive branch employees)). The parties and issues in the cases Defendant cites bear no resemblance to the instant dispute.

Defendant also cites to *Garcia et al v. Executive Dir., Fla. Comm'n on Ethics*, No. 23-10872, ECF No. 33 (11th Cir. June 5, 2023). However, *Garcia* is an unpublished decision and, as such, is not entitled to precedential effect. *Ray v. McCullough Payne & Haan, LLC*, 838 F.3d 1107, 1109 (11th Cir. 2016) ("In this Court, unpublished

decisions, with or without opinion, are not precedential and they bind no one.") (citing 11th Cir. R. 36-2 and collecting cases). That proposition is especially acute in *Garcia*, which contains no substantive analysis.[4] *Garcia,* slip op. at 1. Not only is *Garcia* unentitled to precedential effect, but it, too, deals only with a limited universe of potential plaintiffs: public officers. *Id*. The district court in that case had already adjudged some plaintiffs to have standing while others did not, further distinguishing the instant matter. *Id.* Although *Garcia* involved a First Amendment challenge based on overbreadth, the ban on lobbying by elected officials does not impact the vast majority of Floridians. *See* Complaint for Preliminary and Permanent Injunctions and Declaratory Judgment at 2, *Garcia et al v. Stillman et al*, No. 1:22-cv-24156-BB (S.D. Fla. December 21, 2022).

The Act here is not cabined to a limited, discrete class of people like the public officials in *Garcia,* or the federal contractors in *Georgia*. *See id.*; *Georgia,* 46 F.4th at 1289. To limit Defendant's enforcement of the Act only to Plaintiff would subject everyone else in Florida to the chilling effect of a facially unconstitutional statute. Consequently, a statewide injunction which includes non-parties accords with "the

[4] Like its own opinion, one of the two cases relied upon by the Eleventh Circuit contains no analysis whatsoever from which this Court might extract any substantive guidance. *See Garcia*, slip op. at 1 (citing *Wolf v. Cook Cnty., Ill.*, 140 S.Ct. 681(2020)).

extent of the violation established." *See Georgia*, 46 F.4th at 1303. Thus, Defendant is not likely to succeed on the merits of her Motion for Partial Stay.

B. Remaining Factors

1. Irreparable Injury

The other factors also weigh against Defendant's motion. First, Defendant has presented no evidence or compelling argument that she will suffer irreparable harm. *See* Doc. 33 at 6. Instead, she baldly proclaims that Florida "suffers a form of irreparable injury" any time it is enjoined from enforcing one of its statutes. *See id.* (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012)) (emphasis added). In *Maryland*, however, the Supreme Court's statement was supported by evidence of ongoing, concrete harm to law enforcement and public safety.[5] 567 U.S. at 1303. Defendant has presented no such support here. *See* Doc. 33 at 6. Her position that the state suffers irreparable harm any time it is enjoined from enforcing one of its statutes defies common sense and is not supported by any meaningful precedent. *Cf. Ex Parte Young*, 209 U.S. 123, 155-56 (1908) ("[I]ndividuals who, as officers of the

[5] The original quotation comes from a case approving the stay of an injunction which enjoined enforcement of a California law requiring auto dealers to give notice to their competitors when relocating or building new dealerships on Fourteenth Amendment due process grounds. *New Motor Vehicle Bd. of California v. Orrin W. Fox. Co.*, 434 U.S. 1345, 1347-48 (1977). The quotation lies at the end of a paragraph describing the ongoing and concrete harm California suffered from being prohibited from regulating new auto dealerships, and is qualified by the opening clause omitted from Defendant's citation: "It seems to me that…" *Id.* at 1351. Again, this case is inapposite here.

state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten…to enforce against parties affected an unconstitutional act…may be enjoined by a Federal court of equity from such action."); *see also Green v. Mansour*, 474 U.S. 64, 68 (1985) ("*Young* also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent continuing violation of federal law.").

2. Balance of Harms

The balance of harms weighs heavily in favor of protecting Floridians from this unconstitutional statute. On one hand, for the other interested parties—*i.e.*, all Floridians—"[t]here is a potential for extraordinary harm and a serious chill upon protected speech." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 671 (2004). Indeed, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparably injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Conversely, the harm to Defendant if her motion is denied is minimal. She complains that the "portion of the injunction that applies to nonparties threatens Florida," but constitutionally valid statutes already exist to further the state's compelling interest in protecting minors from exposure to obscene exhibitions. *See* Doc. 33 at 2; *see also Ashcroft*, 542 U.S. at 670-71 ("[I]f the injunction is upheld, the Government in the interim can enforce obscenity laws already on the books."). For

instance, Fla. Stat. § 847.013 prohibits the exposure of minors to obscene "motion pictures, exhibitions, shows, presentations, or representations."

Moreover, inconsistencies between the Act and statutes like Fla. Stat. § 847.013(3)(c)—which allows minors to view films that include obscene content with parental consent—further undercut Defendant's cries of harm. *See also* Fla. Stat. § 1014 *et seq* (the "Parents' Bill of Rights," which reserves the right of parents to direct the moral upbringing of their children). She slyly argues that any potential parties experiencing a chill "have the tools" to challenge the statute in their own right, yet the Supreme Court has long recognized that, "[w]here a prosecution is a likely possibility…speakers may self-censor rather than risk the perils of trial." *Ashcroft*, 542 U.S. at 670-71; *see also Broadrick*, 413 U.S. at 612. Defendant's suggestion that any other harmed parties should bear the cost and delay of litigating their free speech rights simply does not comport with First Amendment principles. All of these harms weigh heavily in favor of protecting non-parties from enforcement of this unconstitutional statute.

3. Public Interest

Protecting the right to freedom of speech is the epitome of acting in the public interest. It is no accident that this freedom is enshrined in the *First* Amendment. This injunction protects Plaintiff's interests, but because the statute is facially unconstitutional, the injunction necessarily must extend to protect all Floridians.

" '[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn.' Error in marking that line exacts an extraordinary cost." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817 (2000) (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)). Any prejudice suffered by Defendant here is *de minimis* and does not warrant risking the dangerous exposure of the public's interest in free speech to that "extraordinary cost." *See id.* Therefore, the public interest is best served by preserving this Court's injunction enjoining Defendant's enforcement of the Act against any party.

IV. Conclusion

Accordingly, it is **ORDERED** that Defendant's motion for partial stay is hereby **DENIED**.

DONE and **ORDERED** in Orlando, Florida on July 19, 2023.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HM FLORIDA-ORL, LLC,

Plaintiff,

v. Case No: 6:23-cv-950-GAP-LHP

MELANIE GRIFFIN,

Defendant

ORDER[1]

This case addresses the constitutionality of Florida Statute § 827.11. The state claims that this statute seeks to protect children generally from obscene live performances. However, as explained *infra*, Florida already has statutes that provide such protection. Rather, this statute is specifically designed to suppress the speech of drag queen performers. In the words of the bill's sponsor in the House, State Representative Randy Fine: "…HB 1423…will protect our children by ending the gateway propaganda to this evil — 'Drag Queen Story Time.' "[2]

[1] The Court has filed this Amended Order to include discussion in Sec. III.B.1.b. inadvertently omitted from the original filing.

[2] *See* State Representative Randy Fine, FACEBOOK (April 12, 2023), https://www.facebook.com/voterandyfine/posts/761831661970637?ref=embed_post.

This cause came before the Court for consideration on Plaintiff's Supplemental Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 6).[3] Defendant responded in opposition to the motion and simultaneously moved to dismiss (Doc. 21) Plaintiff's action. The Court conducted a non-evidentiary hearing on June 6, 2023, and subsequently considered Plaintiff's Response (Doc. 28) to Defendant's Motion to Dismiss.

I. Background

A. House Bill 1423/Senate Bill 1438

On May 17, 2023, Florida Governor Ron DeSantis signed Senate Bill 1438 (the "Act") into law.[4] *See* 2023 Fla. Laws ch. 2023-94. Along with amending three existing laws,[5] the Act created a new statute—Fla. Stat. § 827.11—which prohibits any person from knowingly admitting a child to an "adult live performance." *Id.* §§ 1-4. Violation of the statute authorizes the Florida Department of Business and Professional Regulation ("DBPR") to impose fines and revoke or suspend the operating and/or liquor license of any public lodging, food service establishment,

[3] Because notice was not impractical in this matter, the Court treats Plaintiff's Motion as one for Preliminary Injunction under Local Rule 6.02. *See* Doc. 7.

[4] The Act took effect upon being signed into law. 2023 Fla. Laws ch. 2023-94, § 5. Its companion bill in the House was HB 1423. THE FLORIDA SENATE, 2023 Session Bills, *SB 1438* (June 22, 2023), https://www.flsenate.gov/Session/Bill/2023/1438.

[5] *See* Fla. Stat. §§ 255.70(1)-(3), 509.26(10), and 561.29(1).

or other licensee.[6] Fla. Stat. §§ 509.261(10), 561.29(1). In addition, any person who violates § 827.11 may be prosecuted and subject to punishment as a misdemeanor of the first degree. *See* Fla. Stat. § 827.11(3)-(4); *see also id.* § 775.082(4)(a) & § 775.083(1)(d).

The statute defines an "adult live performance" as:

> [A]ny show, exhibition, or other presentation in front of a live audience which, in whole or in part, depicts or simulates nudity, sexual conduct, sexual excitement, or specific sexual activities as those terms are defined in s. 827.001, *lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts when it*:
>
> 1. Predominantly appeals to a prurient, shameful, or morbid interest;
>
> 2. Is patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and
>
> 3. Taken as a whole, is without serious literary, artistic, political, or scientific value for the age of the child present.

Id. § 827.11(1)(a) (emphasis added). It prohibits any defense based on "a person's ignorance of a child's age, a child's misrepresentation of his or her age, or a bona

[6] Fla. Stat. § 509.261 was amended to add subsection (10), authorizing the state to "fine, suspend, or revoke the license" of lodging and food services establishments that admit a child to an adult live performance. *Id.* § 509.261(10)(a). In addition to the ability to suspend or revoke a license, it provides that the state may issue a $5,000 fine for a first violation and a $10,000 fine for second or subsequent violations. *Id.* § 509.261(10)(c)-(d).

Fla. Stat. § 561.29 was amended to apply the same scheme to liquor licenses. *Id.* § 561.29(1).

fide belief of a child's consent." *Id.* § 827.11(2). The term "child" is not specifically defined by the new statute.[7] Neither are the terms "live performance," "lewd conduct,"[8] or "lewd exposure of prosthetic or imitation genitals or breasts" defined.

B. Posture

Plaintiff HM Florida-ORL, LLC ("Plaintiff"), is a Florida for-profit business operating Hamburger Mary's Restaurant and Bar in Orlando. Doc. 1, ¶ 4. Plaintiff frequently presents drag show performances, comedy sketches, and dancing, including "family friendly" drag performances on Sundays where children are invited to attend. *Id.* ¶¶ 4, 12. Plaintiff brought suit under 42 U.S.C. § 1983 on May 22, 2023, alleging that the Act "seeks to explicitly restrict, or chill speech and expression protected by the First Amendment based on its content, its message, and its messenger." Doc. 1, ¶ 50. Since the passage of the Act, Plaintiff has been forced

[7] Chapter 827 of the Florida Statutes pertains generally to the "abuse of children." Section 827.01 defines a "child" as "any person under the age of 18 years." Fla. Stat. § 827.01.

[8] The Court consulted Fla. Stat. § 800.04—which covers "lewd or lascivious offenses"—to obtain guidance on the meaning of "lewd conduct." Alas, such offenses are defined only by their own terms. *See, e.g.*, § 800.04(6) ("A person who…[i]ntentionally touches a person 16 years of age *in a lewd or lascivious manner*; or…[s]olicits a person under 16 years of age to commit a *lewd or lascivious act* …commits *lewd or lascivious conduct*."). The Florida Supreme Court's jury instructions offer an inkling into covered conduct, but likewise leave the reader with more questions than answers. *See* THE FLORIDA BAR, Criminal Jury Instructions Chapter 11, § 11.10(d) (accessed June 16, 2023), available at https://www.floridabar.org/rules/florida-standard-jury-instructions/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-11/[hereinafter "Jury Instructions"]. According to these Instructions, "[t]he words 'lewd' and 'lascivious' mean the same thing: a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act." *Id.*

to cancel its family drag shows, alleging that "[t]hey cannot take place if the law is allowed to stand." *Id.* ¶¶ 43, 49; *see also id.* ¶¶ 23-25, 37-39.

In support of its allegations, Plaintiff claims that the statute is not sufficiently narrowly tailored to achieve a compelling government interest and that it is unconstitutionally vague and overbroad. *Id.* ¶¶ 30-45. Plaintiff points to the ambiguity of terms like "lewd conduct" and "child," and the broad subjectivity that must necessarily be employed to enforce such language. *Id.* ¶ 30.c.3-4. What may be obscene for a child of four may not be obscene for a seventeen-year-old, *id.* ¶ 30.c.4, but Plaintiff alleges it cannot risk its business licenses or an arrest trying to guess how regulators will enforce the statute. *Id.* ¶ 43.

In justification of its self-censorship, Plaintiff also cites to recent efforts by Defendant Secretary of DBPR Melanie Griffin ("Defendant") to revoke the liquor license of Orlando's Plaza Live (the "Plaza Live") venue after it hosted an "A Drag Queen Christmas" show.[9] *Id.* ¶¶ 23-25. On December 28, 2022—the day of the show—Defendant sent the Plaza Live a letter stating that she "ha[d] reason to believe that th[e] drag show is of a sexual nature involving…the sexualization of

[9] *See* Amanda Rabines, *Florida moves to revoke Orlando event venue's liquor license after drag queen show*, TAMPA BAY TIMES (February 5, 2023), https://www.tampabay.com/news/florida-politics/2023/02/05/florida-moves-revoke-orlando-event-venues-liquor-license-after-drag-queen-show/; *see also* Doc. 21-5 (*Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco v. The Orlando Philharmonic Plaza Foundation Inc.*, Case No. 2022-061146 (filed Feb. 3, 2023)).

children's stories." Doc. 21-5 at 14. Defendant clearly stated that, "if you allow children to attend the…drag show at your facility, you are putting your license in jeopardy." *Id.* However, despite the fact that undercover state agents reportedly observed "no lewd acts such as exposure of genital organs,"[10] Defendant has continued to prosecute its administrative complaint under existing lewd and lascivious exhibition and other obscenity and nuisance statutes. *See* Doc. 21-5; *see also Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco v. The Orlando Philharmonic Plaza Foundation Inc.*, Case No. 2022-061146 (filed Feb. 3, 2023).

Plaintiff alleges that the Act was passed to stop children from attending drag shows by authorizing Defendant to suspend or revoke the licenses of businesses like theirs. Doc. 6, ¶¶ 25-27. Consequently, Plaintiff seeks a preliminary injunction to enjoin any further enforcement of the Act until a trial is held on its constitutionality. *See id.* at 26. Defendant counters that Plaintiff's motion should be denied and its Complaint should be dismissed because the statute is constitutional and furthers the compelling state interest of protecting children from exposure to "age-inappropriate, sexually explicit live performances." Doc. 21 at 3.

[10] *See* Nicholas Nehamas & Ana Ceballos, *Florida undercover agents reported no 'lewd acts' at drag show targeted by DeSantis*, TAMPA BAY TIMES (March 20, 2023), https://www.tampabay.com/news/florida-politics/2023/03/20/desantis-drag-show-lewd-liquor-license-complaint-lgbtq/.

II. Legal Standards

A. Motion to Dismiss

In ruling on a motion to dismiss, the Court must view the complaint in the light most favorable to the plaintiff, *see, e.g., Jackson v. Okaloosa County*, 21 F.3d 1531, 1534 (11th Cir. 1994), and must limit its consideration to the pleadings and any exhibits attached thereto. *See* Fed. R. Civ. P. 10(c); *see also GSW, Inc. v. Long Cnty.*, 999 F.2d 1508, 1510 (11th Cir. 1993). The Court will liberally construe the complaint's allegations in the Plaintiff's favor. *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). However, "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003).

In reviewing a complaint on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "courts must be mindful that the Federal Rules require only that the complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 880 (11th Cir. 2003) (citing Fed. R. Civ. P. 8(a)). This is a liberal pleading requirement, one that does not require a plaintiff to plead with particularity every element of a cause of action. *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001). However, a plaintiff's obligation to provide the grounds for his or her entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the

elements of a cause of action will not do. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007). The complaint's factual allegations "must be enough to raise a right to relief above the speculative level," *id.* at 555, and cross "the line from conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).

B. Preliminary Injunction

District courts are empowered to grant a preliminary injunction "only if the moving party establishes that: (1) it has a substantial likelihood of success on the merits; (2) it will suffer an irreparable injury unless the injunction is granted; (3) the harm from the threatened injury outweighs the harm the injunction would cause the opposing party; and (4) the injunction would not be adverse to the public interest." *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1270–71 (11th Cir. 2020) (citations omitted). The third and fourth factors "merge when the [g]overnment is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

III. Analysis

A. Defendant's Motion to Dismiss

In her Motion to Dismiss Plaintiff's Complaint, Defendant makes three principal arguments: (1) the Complaint should be dismissed as a "shotgun pleading"; (2) Plaintiff lacks Article III standing to bring this case; and (3) the State of Florida and Governor Ron DeSantis are protected from this suit by sovereign immunity and should be dismissed. *See* Doc. 21, 15-22. At the June 6, 2023, hearing,

however, the parties stipulated to the dismissal of Defendants Governor Ron DeSantis and the State of Florida, rendering Defendant's sovereign immunity arguments moot.[11] *See* Doc. 26. Consequently, the Court only addresses Defendant's shotgun pleading and standing arguments.

1. Shotgun Pleading

Complaints filed in violation of Rule 8(a)(2) or Rule (10)(b) of the Federal Rules of Civil Procedure are disparagingly referred to as "shotgun pleadings." *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1320 (11th Cir. 2015). The Eleventh Circuit has identified four principal varieties of shotgun pleadings, unified by their failure "to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* at 1323. One such variety of shotgun pleading "commits the sin of not separating into a different count each cause of action or claim for relief." *Id.* Defendant argues that Plaintiff's Complaint "consists of a single Count 1 with a mish-mash of different, vaguely articulated constitutional theories presented in non-consecutively numbered paragraphs." Doc. 21 at 16. They further complain that "[s]ome paragraphs are not numbered at

[11] Likewise, there is no residual dispute that Defendant Melanie Griffin is a proper party. *See* Docs. 25-26.

all; some employing numbering systems that do not match the ones preceding it." *Id.*

Plaintiff's Complaint does not constitute a shotgun pleading. The Complaint, in Count I, clearly uses an outline format with subsections of descending alphanumeric delineation (*i.e.*, I, A, 1, a., i., etc.), as is ubiquitous in the legal profession. *See* Doc. 1 at 10-14. True, two paragraphs are not numbered at all; however, a cursory glance reveals those paragraphs to be quotations following a colon. *Id.* at 10-11. While Plaintiff's Complaint may leave room for improvement, its logical outline structure in no way equates to a "mish-mash" that leaves Defendant to "speculate as to which claims [she] should be defending against." *See* Doc. 21 at 16; *see also Weiland*, 792 F.3d at n. 12. Plaintiff plainly asserts one count under 42 U.S.C. § 1983—with several constitutional theories to support it—which requires no further demarcation. *See Weiland*, 792 F.3d at 1323.

2. Standing

To establish standing to bring its constitutional challenge, Plaintiff must show that: "(1) [it] has suffered, or imminently will suffer, an injury-in-fact; (2) the injury is fairly traceable to the operation of the [Act]; and (3) a favorable judgment is likely to redress the injury." *Harrell v. The Florida Bar*, 608 F.3d 1241, 1253 (11th Cir. 2010) (citing *Kelly v. Harris*, 331 F.3d 817, 819–20 (11th Cir. 2003)). The injury-in-fact requirement is applied "most loosely where First Amendment rights are involved,

lest free speech be chilled even before the law or regulation is enforced." *Id.* at 1254. Indeed, "it is well-established that an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences." *Id.* (quoting *Pittman v. Cole*, 267 F.3d 1269, 1283 (11th Cir. 2001) (internal quotation marks omitted)).

First, Plaintiff alleges that the Act is written so broadly as to have a "chilling effect on the First Amendment rights of the citizens of Florida." Doc. 6, ¶ 51. Based upon the vagueness of the Act, Plaintiff asserts that "it has a reasonable fear of prosecution for conducting shows similar to those it has performed in the past, which may be punishable by the statute with criminal effect." *Id.* ¶ 54.a. Plaintiff alleges its family drag shows—despite not being obscene—could be construed to fall within the Act's purview of proscribed conduct as it is presently written. *See id.*; *see also supra* at note 8. Plaintiff argues that it "should not be required to eat the proverbial mushroom to find out whether it is poisonous." Doc. 6, ¶ 54.a. Longstanding precedent supports this contention. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) *(*"Where the alleged danger of legislation is one of self-censorship, harm can be realized even without an actual prosecution."). After all, "it is the existence, not the imposition, of standardless requirements that causes [the] injury." *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1275 (11th Cir. 2006).

In addition, Plaintiff has alleged it is already suffering significant injury-in-fact from its self-censorship. Doc. 1, ¶ 43. Upon passage of the bill, Plaintiff advised its customers that children would no longer be permitted to attend its drag shows. *Id.* This resulted in the immediate cancellation of "20% of their bookings…for the May 21, 2023, show and for future bookings." *Id.* Defendant contends that Plaintiff's intended conduct does not amount to conduct "arguably proscribed" by the Act, Doc. 21 at 18 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014)), dubiously proclaiming that if Plaintiff's performances are what they say they are, then they should have no fear of prosecution. *Id.* at 23.

However, as Plaintiff responds, because it cannot know what is encompassed by the terms "lewd conduct" or "lewd exhibition of prosthetic genitals or breasts," it cannot know with any confidence whether its shows will expose it to liability under the Act. *See* Doc. 28 at 4; *see also* Fla. Stat. § 827.11(1)(a). Plaintiff, informed by the vague statutory language and Defendant's enforcement activity against the Plaza Live, has been forced to chill its regular practice of opening many of its performances to all ages—at an economic loss. Doc. 28 at 4. Plaintiff has sufficiently "alleged an intention to engage in a course of conduct arguably affected with a

constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution[.]" *Driehaus*, 573 U.S. at 160.[12]

Defendant argues that this case is more like *Younger v. Harris*, 401 U.S. 37 (1971), because the administrative actions it has taken against the Plaza Live (and others) involved distinct, *obscene* drag shows and those entities are not being prosecuted under the Act. Doc. 21 at 19-20. However, Plaintiff does not challenge the constitutionality of the statutes that those entities are being prosecuted under. *See generally* Doc. 1. Instead, it merely highlights those cases as indicative of Defendant's appetite for finding obscenity in drag performances, even where undercover state agents have reportedly concluded none exists. *See* Doc. 6, ¶ 55. Coupled with statements by lawmakers, including a statement made by one of the Act's sponsors that the Act was designed to target drag shows,[13] Plaintiff's fear of

[12] Defendant is authorized by the Florida Statutes to enforce the Act's amended language in §§ 509.261 and 561.29, which is governed by the creation of § 827.11. *See generally* Doc. 21 at I.D; *see also infra* at note 11. "If a challenged law or rule was recently enacted…an intent to enforce the rule may be inferred." *Harrell*, 608 F.3d at 1257 (citing *Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 821 (5th Cir.1979) (explaining that a court can "assume that law enforcement agencies will not disregard…a recent expression of the legislature's will")).

[13] *See supra* at note 2. Additionally, on the day of a legislative subcommittee hearing on the bill, Representative Randy Fine—who sponsored the legislation—posted on Facebook that the Act would "ban the City of Melbourne from 'welcoming' drag queen adult entertainers from grooming our children! Promises made, promises kept!" State Representative Randy Fine, FACEBOOK (April 12, 2023), https://www.facebook.com/voterandyfine/posts/782903609863442.

prosecution based on the Act's alleged vague construction is not unfounded. At worst, Plaintiff certainly claims that "a prosecution is remotely possible" if it does not self-censor. *Younger*, 401 U.S. at 42.

Finally, it is clear that Plaintiff's injury is fairly traceable to the operation of the Act and would be redressed by a favorable judgment against the Defendant. *See Harrell*, 608 F.3d at 1253. Plaintiff has sufficiently alleged in its Complaint that the Act—particularly its use of the terms "live performance," "child," "lewd conduct," and "lewd exposure of prosthetic or imitation genitals or breasts"—at least arguably creates a substantial risk to its licenses due to its vague and overbroad language. Doc. 6, ¶¶ 46-49. Plaintiff's actions of self-censorship represent a reasonable attempt to "steer wide of any possible violation lest [it] be unwittingly ensnared." *Harrell*, 608 F.3d at 1255 (quoting *Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 820 (5th Cir.1979)).[14] And, "[a]s for the redressability prong, if the challenged rules are stricken as unconstitutional, [Plaintiff] simply need not contend with them any longer." *Harrell*, 608 F.3d at 1257. Therefore, Plaintiff has Article III standing to pursue its claim. *See Harrell*, 608 F.3d at 1253.

Accordingly, Defendant's Motion to Dismiss will be **DENIED**.

[14] The Eleventh Circuit adopted as binding precedent the decisions of the former Fifth Circuit rendered before the close of business on September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

B. Plaintiff's Motion for Preliminary Injunction

Having determined that Plaintiff has standing to bring its claim and that the Complaint is properly pled, the Court now analyzes Plaintiff's Motion for Preliminary Injunction as applied to the remaining Defendant.

1. Substantial Likelihood of Success on the Merits

a. First Amendment Grounds

i. The Act is a Facially Content-Based Regulation

"A regulation of speech is facially content based under the First Amendment if it 'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *City of Austin, Tex. v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). Applied here, the Act criminalizes allowing children to attend performances based on the communicative content of "adult live performances." Only content that "depicts or simulates nudity, sexual content, sexual excitement…lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts when it…offends the prevailing standards in the adult community…with respect to what is suitable material…for the age of [a] child present" is prohibited by the Act. Fla. Stat. § 827.11(a).

The absence of any argument to the contrary by Defendant bolsters the conclusion that this is plainly a facially content-based regulation. *See City of Austin*,

142 S. Ct. at 1471. Like in *United States v. Playboy*, the "overriding justification for the regulation is concern for the effect of the *subject matter* on young viewers." 529 U.S. 803, 811 (2000) (emphasis added). The Act "focuses only on the content of the speech and the direct impact that speech has on its [viewers]." *Id.* at 811-12 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). It does not restrict the attendance of children from all live performances, only those engaged in the portrayal of a specific, enumerated subset of content. *See* Fla. Stat. § 827.11(1)(a). Because the Act is content-based on its face, there is "no need to consider the government's justifications or purposes for enacting the [Act] to determine whether it is subject to strict scrutiny." *See Reed*, 576 U.S. at 164-65.

ii. The Act Does Not Survive Strict Scrutiny

Because the Act is facially content-based, it is subject to strict scrutiny, and the government must use the least restrictive means available to achieve a compelling purpose. *Reed*, 576 U.S. at 163 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.")). Obscenity has long been recognized as a limited category of unprotected speech. *See Miller v. California*, 413 U.S. 15, 23 (1973). Plaintiff likewise concedes that "there is a compelling interest in protecting the physical and

psychological well-being of minors." Doc. 1, ¶ 30.b. (quoting *Sable Comms. of Cal., Inc. v. FCC*, 482 U.S. 115, 126 (1989)). However, Plaintiff argues that the Act is not "narrowly tailored." *Id.* ¶ 30.c.; *see also R.A.V.*, 505 U.S. at 395.

In their Response, Defendants argue that the Act's language and restrictions track those upheld in *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). There are several significant distinctions, however, between the narrowly tailored statute in *Ginsberg* and Fla. Stat. § 827.11. First, the Supreme Court in *Ginsberg* "relied not only on the State's independent interest in the well-being of its youth, but also on the consistent recognition of the principle that 'the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.' " *Reno v. ACLU*, 521 U.S. 844, 865 (1997). The prohibition against the sale to minors of material considered obscene for their age in the statute at issue in *Ginsberg* "d[id] not bar parents who so desire[d] from purchasing magazines for their children." *Id.* The Act does not allow for the exercise of parental discretion, stating plainly that "[a] person may not knowingly admit a child to an adult live performance," explicitly foreclosing any defense based on a "bona fide belief of a child's consent."[15] Fla. Stat. §§ 827.11(2)-(3).

[15] The Court assumes this language refers to *parental* consent, as it is unclear how, for instance, a sixteen-year-old could "legally" consent to viewing a show they are criminally prohibited from seeing until the age of eighteen.

Second, the statute in *Ginsberg* only applied to commercial transactions, as opposed to the apparent universal application of § 827.11 to anyone, anywhere—the statute does not define a "live performance," which could conceivably range from a sold-out burlesque show to a skit at a backyard family barbecue. *See id.*; *Reno*, 521 U.S. at 865. Third, and arguably most importantly, the Act here does not define several important terms: "live performance;" "child;"[16] "lewd conduct;" and "lewd exposure of prosthetic or imitation genitals or breasts." *See Reno*, 521 U.S. at 865 (distinguishing *Ginsberg* from a statute which included, without definition, the term "indecent"). These ambiguities, especially those pertaining to "lewd" conduct and exposure of prosthetics, represent a material departure from the established obscenity outline set forth in *Miller*. 43 U.S. at 24; *see also, e.g., Am. Booksellers v. Webb*, 919 F.2d 1493, 1496, 1513 (11th Cir. 1990).

Similarly indicative of the Florida Legislature's failure to narrowly tailor § 827.11 is its inevitable clash with the Florida "Parents' Bill of Rights" and other laws. *See* Fla. Stat. § 1014 (2023). In pertinent part, Fla. Stat. § 1014 states that: "All parental rights are reserved to the parent of a minor child in this

[16] In *Ginsberg*, the statute at issue defined a minor as a person under seventeen, whereas here the Act presumably applies to all persons under eighteen. *Reno*, 521 U.S. at 865-66. Defendant argues that the flexibility inherent in § 827.11's reference to "suitable material or conduct *for the age of the child present*" allays concerns voiced by the Third Circuit in *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003). Doc. 21 at 11 (emphasis added). On the contrary, this merely introduces an even more impossible standard for businesses and individuals to comprehend.

state…including…[t]he right to direct the upbringing and the moral or religious training of his or her minor child." *Id.* § 1014.04(1)(b). This comports with other laws in Florida, such as § 847.013, which governs the exposure of minors to "harmful motion pictures, *exhibitions, shows, presentations*, or representations." *Id.* (emphasis added). That law prohibits the kind of obscene material described in *Miller* and, indeed, the Act here, with the exception that it does not incorporate ambiguities like "lewd conduct" or "lewd exposure of prosthetic or imitation genitals or breasts." *Id.* § 847.013(3). Importantly, however, that law *does* include a limiting provision which allows for a minor accompanied by his or her parents to attend any such exhibitions, regardless of the minor's age. *Id.* § 847.013(3)(c).

Like the statute in *Reno*, "the many ambiguities concerning the scope of [§ 827.11's] coverage render it problematic for purposes of the First Amendment." 521 U.S. at 870. Unlike comparable statutes which target commercial activity and are more narrowly tailored in their scope to allow for parental discretion, specific age thresholds, and clearly defined terms, § 827.11 proscribes conduct universally and threatens to permit "a standardless sweep [which would] allow[] policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974). Including an exception for parental consent, as it did in § 847.013, is at least one less restrictive means through which the Legislature could have sought to further the state's compelling interest in protecting minors from

obscene performances. Following the logic of *Ginsberg* and *Reno*, where such a fundamental consideration is found lacking, § 827.11 is not sufficiently narrowly tailored to survive strict scrutiny. *See Reed*, 576 U.S. at 163; *Playboy*, 529 U.S. at 813. Plaintiff is therefore likely to succeed on its First Amendment claims.

b. Vagueness and Overbreadth

Plaintiff's Complaint also alleges that § 827.11 is unconstitutionally vague and overbroad. Doc. 1, ¶¶ 37-41. The "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Courts must primarily focus on "the requirement that legislatures establish minimal guidelines to govern law enforcement." *Id.* at 358. Additionally, "[t]he showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep'… suffices to invalidate all enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.' " *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

As alluded to above, there are several aspects of § 827.11 that raise vagueness concerns. *See infra* at 16-17. Most relevant is the inclusion of "lewd conduct" and

"lewd exposure of prosthetic or imitation genitals or breasts." Fla. Stat. § 827.11(1)(a). Not only does the statute fail to define these terms, but one must resort to state jury instructions to find *any* articulated definition of "lewd conduct." *See* Jury Instructions, *supra* at note 8. Once discovered, this definition serves only to further broaden the scope of what may be covered by using terms like "wicked," "lustful," and "unchaste"—all vulnerable to broad subjectivity which ultimately leaves an individual of common intelligence to "necessarily guess at [their] meaning." *See id.*; *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

Defendant limited its retort to this characterization of "lewd conduct" to a footnote in its Response. *See* Doc. 21 at note 3. Seeking support for a definition of "lewd conduct" that is not vague, Defendant cites to two cases. *Id*. In the first, which regarded the importation of obscene articles to the United States, the Supreme Court construed several terms—including "lewd"—in a footnote in anticipation of future challenges to their "vagueness…as used to describe regulated material in 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462."[17] *United States v. 12 200-Ft. Reels of Super 8mm. Film,* 413 U.S. 123, 130 n.7 (1973). The Supreme Court indicated that, in the context of those statutes, those terms should be interpreted in line with the "hard core

[17] 18 U.S.C. § 1462 governs the importation of obscene articles to the United States and sets criminal penalties. 19 U.S.C. § 1305(a) governs the importation of obscene articles to the United States in the context of customs duties.

sexual conduct given as examples in *Miller*" or any other definitions imparted by Congress. *Id.* (internal quotations omitted). But the terms in that case were interpreted—prospectively—in a markedly distinguishable context from Defendant's (and the public's) task in determining the application of the terms "lewd conduct" or "lewd exposure of prosthetic or imitation genitals or breasts" to describe an "adult live performance" under Fla. Stat. § 827.11. *See id.*

Defendant also cites to *Chesebrough v. State*, where the Florida Supreme Court addressed the vagueness of the terms "lewd" and "lascivious." 255 So. 2d 675, 677 (Fla. 1971). *Chesebrough* undertook a review of these definitions but succeeded only in creating further ambiguity by proclaiming words like "lewd" to be "in common use, and the[ir] definitions indicate with reasonable certainty the character of the acts and conduct" prohibited. *Id.* That calculation was understandably less opaque in a case which held that sexual intercourse exhibited to a fourteen-year-old was sufficient to constitute "a lewd and lascivious act". *Id.* at 679.

However, recognizing definitions of "lewd" to include conduct "connot[ing] wicked, lustful, unchaste, licentious, or sensual design on the part of the perpetrator" in an individual criminal context does not aide Defendant in her administrative determination of whether an "adult live performance" is covered by Fla. Stat. § 827.11. *See id.* at 677 (quoting *Boles v. State*, 158 Fla. 220, 27 So.2d 293 (1946)). Nor does it aid the public in its own efforts to avoid criminal prosecution.

Chesebrough chiefly serves to acknowledge the vagueness inherent in words like "lewd" by collecting the wide variety of definitions accorded to them by courts over the years. *Id.* at 677-79. Despite determining that such a morass was sufficient to pass constitutional muster, it primarily held that this particular egregious act sufficiently fell within the bounds of a "lewd and lascivious act." *Id.* at 679. While terms like "lewd and lascivious" may have been in common use fifty years ago, definitions like "an unlawful indulgence in lust, eager for sexual indulgence," do very little to inform a "person of ordinary understanding [today]…what conduct on his part is condemned" under Fla. Stat. § 827.11. *Id.* at 677.

A fully clothed drag queen with cleavage-displaying prosthetic breasts reading an age-appropriate story to children may be adjudged "wicked"—and thus "lewd"—by some,[18] but such a scenario would not constitute the kind of obscene conduct prohibited by the statutes in cases like *Miller*. Moreover, the Act's focus on "prosthetic or imitation genitals or breasts" raises a host of other concerns not simply answered—what are the implications for cancer survivors with prosthetic genitals or breasts? It is this vague language—dangerously susceptible to standardless, overbroad enforcement which could sweep up substantial protected

[18] House Bill Sponsor Randy Fine stated that he introduced the bill to protect children from "Drag Queen Story Time." *See supra* at note 2.

speech—which distinguishes § 827.11 and renders Plaintiff's claim likely to succeed on the merits.

2. Irreparable Injury

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Plaintiff has alleged that the vague and overbroad language of the statute affords such wide enforcement discretion to DBPR that "[t]he reader is only made to guess what conduct is prohibited." Doc. 1, ¶ 30.c.9. Consequently, Plaintiff has had to prohibit children from attending their drag shows because "[t]hey simply cannot take the chance that their business or liquor licenses would be suspended for hosting a drag show where children attend." *Id.* ¶ 43. Plaintiff has adequately pled that it is suffering irreparable injury.

3. Harm and Public Interest

Defendant professes that a statewide preliminary injunction would "harm the public by exposing children to 'adult live performances.' " Doc. 21 at 24. This concern rings hollow, however, when accompanied by the knowledge that Florida state law, presently and independently of the instant statutory scheme, permits any minor to attend an R-rated film at a movie theater if accompanied by a parent or guardian. *See* Fla. Stat. § 847.013(3)(c). Such R-Rated films routinely convey content at least as objectionable as that covered by § 827.11.

Plaintiff contends that its fifteen years of incident-free, harmless drag shows demonstrates the absence of any substantial harm to Defendant or to the public interest. *See* Doc. 6, ¶ 57. Moreover, existing obscenity laws provide Defendant with the necessary authority to protect children from any constitutionally unprotected obscene exhibitions or shows. *See*, *e.g.*, § 847.013(3)(a). The harm to Plaintiff clearly outweighs any purported evils not covered by Florida law and a preliminary injunction would not be adverse to the public interest.

IV. Conclusion

Accordingly, it is **ORDERED** that Defendant's Motion to Dismiss (Doc. 21) is hereby **DENIED** and Plaintiff's Motion for Preliminary Injunction (Doc. 6) is **GRANTED.**

V. Preliminary Injunction

For the reasons stated above, Defendant Melanie Griffin, in her official capacity as Secretary of the Florida Department of Business and Professional Regulation, is hereby **ENJOINED** from instituting, maintaining, or prosecuting any enforcement proceedings under the Act[19] until further order of the Court following a trial on the merits of this case.

[19] This injunction shall apply to proceedings instituted, maintained, or prosecuted under the statutes amended and created by SB 1423. *See* Fla. Stats. §§ 255.70(1)-(3), 509.26(10), 561.29(1), and 827.11.

DONE and **ORDERED** in Chambers, Orlando, Florida on June 24, 2023.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HM FLORIDA-ORL, LLC, Plaintiff, v. THE STATE OF FLORIDA; RON DESANTIS, in his official and individual capacity as Governor of Florida; and MELANIE GRIFFIN, in her official capacity as Secretary of the Department of Business and Professional Regulation, State of Florida, Defendants.	Case No. 6:23-cv-00950

DEFENDANTS' MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION[1]

On May 17, 2023, Governor Ron DeSantis signed the Protection of Children Act into law. *See* Fla. Laws ch. 2023-94 (SB 1438) (Ex. A). The Act makes it a misdemeanor to "knowingly admit a child to an adult live performance." Fla. Stat. § 827.11(3), (4). It defines an "adult live performance" as a sexually explicit show that the adult community of the state would consider patently offensive "for the age of the child present." *Id.* § 827.11(1)(a). In other words, it is the policy of Florida that a five-year-old should not be admitted to a nude dance at a strip club.

[1] This combined motion and response is 24 pages long. Defendants are aware that Rule 3.01 of the Local Rules of the United States District Court for the Middle District of Florida sets a limit of 25 pages for a motion and 20 pages for a response. Defendants believe that their decision to combine the two pleadings warrants application of the 25-page limit. Furthermore, Plaintiff's motion for a preliminary injunction itself spilled onto 27 pages.

Several days later, Plaintiff HM FLORIDA-ORL, LLC ("HM") filed this complaint. Though no enforcement action has been instituted against it—and though it disclaims any desire to violate the Act—HM requests a preliminary injunction on the ground that the Act is facially unconstitutional. The Act, HM asserts, has chilled the company's free speech, as HM will no longer allow children to attend drag shows hosted at its bar and restaurant.

Not only should the preliminary injunction be denied, but HM's complaint is also due to be dismissed. The Protection of Children Act is constitutional. The Act's definition of "adult live performance" tracks obscenity standards approved in cases such as *Ginsberg v. New York*, 390 U.S. 629 (1968), *United States v. Miller*, 413 U.S. 15 (1973), and *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990), with the additional refinement that obscenity is measured according to the age of the child exposed to the "adult live performance." The Act does not prevent establishments from continuing to stage "adult live performances" or deny access by adults to those performances. It merely requires the exclusion of children for whom the performance would not be age-appropriate. And contrary to HM's implication, the Act does not target drag shows; by its terms, it protects children from exposure to any kind of sexually explicit live performance that is obscene for the age of the child present. And apart from the Act's constitutionality, HM's complaint should be dismissed because it is a prototypical instance of impermissible shotgun pleading; because HM lacks standing; and because Defendants State of Florida and Governor DeSantis have sovereign immunity.

Even if the Court disagrees and further regards HM as likely to succeed on the merits of its complaint, the Court should still deny HM's motion for a preliminary injunction. HM has not shown that it will suffer injury, let alone irreparable injury, without a preliminary injunction. HM claims it has excluded children from its performances because of the Act, but it also claims no intention to host performances that even arguably would require it to exclude children. Assuming HM's allegations regarding those performances are true, HM remains free to continue to operate its restaurant and bar, with its liquor license intact, and host the performances it describes in its complaint—with children present. Enjoining the Act thus will prevent no harm to HM. But it will do great harm to the State's interest in protecting children from exposure to age-inappropriate, sexually explicit live performances in other venues, particularly if the Court grants the statewide relief HM apparently seeks, which would itself be improper.

BACKGROUND

A. The Statute

At the time the Protection of Children Act was enacted, a number of Florida statutes protected children from sexually explicit performances and materials deemed harmful to minors, but each had a limited scope. For instance, Fla. Stat. § 847.013(3)(a) made it a misdemeanor to "knowingly sell to a minor an admission ticket or pass or knowingly admit a minor for a monetary consideration to premises whereon there is exhibited a motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts nudity, sexual conduct,

sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors," as defined in Fla. Stat. § 847.001(7). That statute thus was limited to exposures accompanied by the exchange of consideration. Another statute, Fla. Stat. § 800.04(7), made it a felony to engage in a "lewd and lascivious exhibition" in the presence of a child under 16, but the definition of "lewd and lascivious exhibition" was limited to certain live or simulated sex acts, such as masturbation or bestiality.

The Protection of Children Act brings together in one place a comprehensive prohibition on exposing children to age-inappropriate, sexually explicit live performances, irrespective of any exchange of consideration, with propriety of the exposure gauged specifically to the age of the child present. The Act gives the Department of Business and Professional Regulation the power to levy fines and to revoke the licenses of establishments that violate the Act. Fla. Stat. §§ 509.261(10), 561.29(1). And by deeming a violation of the Act to be "an immediate, serious danger to the public health, safety, or welfare for the purposes of s. 120.60(6)," the Act affords the Department emergency powers to revoke, suspend, or limit licenses not clearly available under other statutes. Fla. Stat. §§ 509.261(10)(b), 561.29(1)(*l*)1.

The Act makes it a first-degree misdemeanor to "knowingly admit a child to an adult live performance." Fla. Stat. § 827.21(3), (4). As defined by the Act, an "adult live performance" has two components. First, the performance must be a "show, exhibition, or other presentation in front of a live audience which, in whole or in part, depicts or simulates nudity, sexual conduct, sexual excitement, or

specific sexual activities as those terms are defined in s. 847.001, lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts." *Id.* § 827.11(1)(a). Second, the performance must satisfy a variable obscenity standard derived from the Supreme Court's decisions in *Ginsberg* and *Miller*. Under that standard, the performance must "[p]redominantly appeal[] to a prurient, shameful, or morbid interest"; be "patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present"; and "[t]aken as a whole," be "without serious literary, artistic, political, or scientific value for the age of the child present." Fla. Stat. § 827.11(1)(a)1.–3.

Nowhere does the Protection of Children Act target or even mention drag performances. The Act protects children from exposure to age-inappropriate sexually explicit live performances, no matter who performs them or what social viewpoint they seek to convey. It is similar in this regard to existing Florida statutes, such as Sections 847.012 and 847.013, which restrict the exposure of minors to sexually explicit materials, images, and films, and mention nothing of depicting individuals who happened to be dressed in drag.

B. This Lawsuit

On May 22, five days after the Protection of Children Act was signed into law, HM sued the State of Florida, Governor Ron DeSantis, and Melanie Griffin, the Secretary of the Department of Business and Professional Responsibility ("DBPR"), and moved for a preliminary injunction. HM seeks to enjoin most of the

operative provisions of the Protection of Children Act, including Section 827.11, which makes it a misdemeanor to knowingly admit a child to an "adult live performance," and Sections 561.29 and 509.261, which authorize DBPR to fine, suspend, or revoke licenses of establishments that admit children to "adult live performances."

HM states that it operates a restaurant and a bar, with a liquor license, featuring entertainment that includes drag show performances, comedy sketches, and dancing. DE1 at 2. HM says that it offers "family friendly" drag performances on Sundays that children are invited to attend. *Id.* HM insists that "[t]here is no lewd activity, sexually explicit shows, disorderly conduct, public exposure, obscene exhibition, or anything inappropriate for a child to see." DE1 at 6. But on the occasion that its performances are "not suitable for children," HM avers, "children are not allowed to attend and the venue announces this in advance on their website and in their advertising." DE1 at 19. HM does not state that it is subject to any pending enforcement action or that it has been subject to one in the past.

HM says it has "advised its customers that children would not be permitted to attend any drag shows," DE1 at 18, but it bases this approach on an unreasonably expansive interpretation of the Act. On its telling, the term "adult live performances" would include any show featuring "female impersonators," covering classics like "I Love Lucy" and "Some Like It Hot." DE1 at 17. While acknowledging that the Act "does not mention 'drag' by name," HM nevertheless asserts that the Act "targets drag queens." DE1 at 11, 16.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To obtain a preliminary injunction, a litigant must establish each of the following four elements: "that (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Swain v. Junior*, 961 F.3d 1276, 1284–85 (11th Cir. 2020) (citation omitted). HM does not meet either of these standards.

ARGUMENT

I. HM's complaint should be dismissed.

A. The Protection of Children Act is constitutional.

HM's complaint should be dismissed because the Protection of Children Act is constitutional. Though inartfully pled, HM's complaint and PI motion appear to contend that the Protection of Children Act is unconstitutional for four separate reasons. None is correct.

1. HM first asserts that the Protection of Children Act is content-based and fails to survive the resulting strict scrutiny because it is not narrowly tailored and "overbroad." DE1 at 10–11. But a statute is overbroad only if it "prohibits a

substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). And here, the Protection of Children Act restricts conduct unprotected by the First Amendment: admission of a child to a sexually explicit performance that is obscene for the age of the child present. It applies only to a subset of obscenity—"adult live performances" where children are present—but this feature does not require close First Amendment scrutiny because such "discrimination consists entirely of the very reason the entire class of speech at issue is proscribable"—i.e., protecting a vulnerable class from materials obscene as to them. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (noting that "a State might choose to prohibit only that obscenity . . . which involves the most lascivious displays of sexual activity" without triggering strict scrutiny); *see also Virginia v. Black*, 538 U.S. 343, 361–62 (2003). It is well established that the government has a "compelling interest in protecting the physical and psychological well-being of minors," which "extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (citations omitted). And courts have repeatedly upheld statutes vindicating this interest by denying children access to sexually explicit material that is not denied to adults. *See, e.g.*, *Ginsberg*, 390 U.S. at 636–43; *Webb*, 919 F.2d at 1501.

"The first step in overbreadth analysis is to construe the challenged statute." *Williams*, 553 U.S. at 293. To achieve its legitimate aims, the Protection of Children Act uses an obscenity standard that measures whether an "adult live performance" is appropriate for a child to view according to the child's age. As noted, the Act

makes it a misdemeanor to "knowingly admit a child to an adult live performance." Fla. Stat. § 827.11(3), (4). "Adult live performance" means:

> [A]ny show, exhibition, or other presentation in front of a live audience which, in whole or in part, depicts or simulates nudity, sexual conduct, sexual excitement, or specific sexual activities as those terms are defined in s. 847.001, lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts when it:
>
> 1. Predominantly appeals to a prurient, shameful, or morbid interest;
>
> 2. Is patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and
>
> 3. Taken as a whole, is without serious literary, artistic, political, or scientific value for the age of the child present.

Fla. Stat. § 827.11(1)(a).

This language is constitutional. First, as required by *Miller*, 413 U.S. at 24, the Protection of Children Act "confine[s] the permissible scope of [its] regulation to works which depict or describe sexual conduct" that is "specifically defined" in the statute—e.g., "nudity, sexual conduct, sexual excitement, or specific sexual activities as those terms are defined in s. 847.001." Fla. Stat. § 827.11(1)(a). Second, as *Miller* also requires, 413 U.S. at 24, the Protection of Children Act defines obscenity by the familiar three-part test (prurient interest; patent offensiveness; lack of redeeming social value), with adjustments to account for the fact that children are the ones viewing the performances.

Those adjustments have been approved in other cases. In *Ginsberg*, the Supreme Court upheld a New York statute's use of what it called a "variable" obscenity standard for minors, which closely resembles the language in the Protection of

Children Act. 390 U.S. at 635 n.4, 637. The statute prohibited the sale to minors of materials deemed "harmful to minors," which it defined as "that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse" when the representation:

> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors.

Id. at 646.

Similarly, in *Webb*, the Eleventh Circuit upheld a Georgia statute that criminalized providing to minors material deemed "harmful to minors," defined as "that quality of description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse," when it

> (A) Taken as a whole, predominantly appeals to the prurient, shameful, or morbid interest of minors;
>
> (B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> (C) Is, when taken as a whole, lacking in serious literary, artistic, political, or scientific value for minors.

919 F.2d at 1513.[2]

[2] The only difference between the Georgia statute upheld in *Webb* and the New York statute upheld in *Ginsberg* is that the third part of the test reflected an updating based on the intervening Supreme Court decision in *Miller*, 413 U.S. at 24, such that a greater quantum of "literary, artistic, political, or scientific value" was necessary to justify exposure of the minor to otherwise age-inappropriate material. Florida's Protection of Children Act reflects the same updating.

Compared to the statutes upheld in *Ginsberg* and *Webb*, the Protection of Children Act is even more carefully tailored: its variable-obscenity standard ties what is considered obscene for the child to the actual age of the child at the "adult live performance." That refinement addresses an issue the Third Circuit deemed problematic in *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), *aff'd*, *Ashcroft v. ACLU*, 542 U.S. 656 (2004). The statute there employed a "harmful to minors" test that ignored the age of the particular child. The Third Circuit was concerned that what is obscene for a "five-year-old" might not be obscene for "a person just shy of age seventeen." *Id.* at 254. The Protection of Children Act allays that concern by basing the prohibition in the Act on the age of the actual child in question.

The Act also does not unnecessarily deny adults access to material that is constitutionally protected for them. *See, e.g.*, *Sable*, 492 U.S. at 126. The Act proscribes only the knowing exposure of children to "adult live performances." It does not prohibit the performances themselves or deny access to adults who wish to view them. Because the Act does not affect the First Amendment rights of adults, it is reasonably tailored and not overbroad. *See, e.g.*, *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 389 (1988); *Webb*, 919 F.2d at 1501–02.

2. HM next argues that the Protection of Children Act should be subject to strict scrutiny because it was "adopted by the government because of disagreement with the message the speech conveys." DE1 at 16 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015)). The message that HM seems to have in mind is the social viewpoint inherent in drag performances. *See* DE1 at 6–8, 15–16. But the Act does

not discriminate among viewpoints. It applies to any kind of "show, exhibition, or other presentation in front of a live audience," as long as the performance is sexually explicit and meets the obscenity standard. Fla. Stat. § 827.11(a). Other live performances, conveying other social viewpoints, could also meet this test—for example, a patriotic cabaret with risqué performances that caters to servicemembers. The objective of the Act is to protect children from any kind of age-inappropriate, sexually explicit live performance, irrespective of the performers' sexual preferences or whether they are in common dress or drag. This purpose is not viewpoint-discriminatory.

HM further asserts that, even though the Act mentions nothing of drag performances on its face, a deeper probe into the subjective motives of certain legislators will expose a viewpoint-discriminatory goal of targeting drag shows specifically. DE1 at 16–17. The Eleventh Circuit has held "many times" that "when a statute is facially constitutional, a plaintiff cannot bring a free-speech challenge by claiming that the lawmakers who passed it acted with a constitutionally impermissible purpose." *NetChoice LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1224 (11th Cir. 2022) (quoting *In re Hubbard*, 803 F.3d 1298, 1312 (11th Cir. 2015)). Isolated, subjective remarks by lawmakers thus fall short of demonstrating that the government has regulated speech "because of disagreement with the message the speech conveys." *Reed*, 576 U.S. at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *see United States v. O'Brien*, 391 U.S. 367, 384 (1968) (court may

not invalidate statute "constitutional on its face" "on the basis of what fewer than a handful of [legislators] said about it").

In any event, the legislative history of the Act only confirms that the purpose of the statute is viewpoint-neutral. In its lone citation to portions of the legislative record, HM points to references in the House and Senate staff analyses to the December performance of "A Drag Queen Christmas." DE1 at 16–17. But those documents (accompanied by disclaimers that they "do[] not reflect the intent or official position of the bill's introducer or the Florida Senate") cite that incident because of stated concerns that children under 16 were allowed to view "sexual conduct, simulated sexual activity, and lewd, vulgar, and indecent displays." *E.g.*, Professional Staff of the Committee on Judiciary, *Bill Analysis and Fiscal Impact Statement—SB 1438—Protection of Children* at 5–6 (Mar. 20, 2023), https://tinyurl.com/mrxw344v. Nothing in these analyses indicates an aim to suppress a particular social message, such as that conveyed by performers dressed in drag.

HM notes that "Florida already has on its books, laws preventing exposure of minors to lewd, sexually explicit, obscene, vulgar or indecent displays." DE1 at 9. It cites a recent case in which a district court preliminarily enjoined a Tennessee statute criminalizing the performance of "adult cabaret entertainment" in the presence of children, in part on the ground of its "redundancy" with existing Tennessee statutes. *Friends of George's, Inc., v. Tennessee*, No. 2:23-cv-02163, 2023 WL 2755238, at *5 (W.D. Tenn. Mar. 31, 2023). The court viewed this redundancy as evidence that the statute was adopted "because of disagreement with the message

[the speech] conveys." *Id.* (quoting *Ward*, 491 U.S. at 791). As already noted, however, the Protection of Children Act fills certain gaps in existing Florida statutes with respect to protection of children and so is not redundant. Moreover, statutes overlap with each other all the time without provoking constitutional scrutiny. *See, e.g.*, *Conage v. United States*, 346 So. 3d 594, 602 (Fla. 2022) (noting ways Florida's drug-trafficking statute is "redundan[t]" and "overlap[ping]" in its design). That some expressive conduct might happen to violate more than one statute cannot by itself be justification for imputing a viewpoint-discriminatory intent to the later-enacted statute, when that statute is neutral on its face and in its purpose and is carefully crafted to prohibit only speech unprotected by the First Amendment.

3. For many of the same reasons, HM is incorrect that the Protection of Children Act "prohibits protected speech based on the identity of the speaker." DE1 at 10. The Act prohibits the knowing exposure of children to "adult live performances" no matter who is leading or performing it. And the objective purpose, again, is not to target drag queens but to protect children from exposure to age-inappropriate, sexually explicit live performances. The Act thus differs materially from the Tennessee statute in *Friends of George's*, which applied to "adult cabaret entertainment" performed by "entertainers like topless dancers, strippers, male or female impersonators *but not others*." 2023 WL 2755238, at *4 (emphasis added). Florida's law does not so discriminate.

4. Last, HM contends that the Protection of Children Act is unconstitutionally vague—i.e., insufficiently precise to give "'adequate notice of what is

prohibited,'" as required by due process. *Ginsberg*, 390 U.S. at 643 (quoting *Roth v. United States*, 354 U.S. 476, 492 (1957)). HM complains, for instance, that "[t]he terms 'predominately,' 'shameful or morbid' are vague terms subject to the interpretation of the reader and not subjective." DE1 at 14. But those same terms appear in the statutes upheld in *Ginsberg*, 390 U.S. at 633, and *Webb*, 919 F.2d at 1513. The same is true for HM's contention that the phrase "lewd conduct" in the Act is vague. DE1 at 13.[3] HM can therefore prevail only if the Court deviates from decades of controlling precedent.

B. HM's complaint is a shotgun pleading.

HM's complaint should also be dismissed as a shotgun pleading. "A shotgun pleading is a complaint that violates either Federal Rule of Civil Procedure 8(a)(2) or Rule 10(b), or both." *Barmapov v. Amuial*, 986 F.3d 1321, 1324 (11th Cir. 2021). "The self-evident purpose of these rules is to require the pleader to present his claims discretely and succinctly, so that[] his adversary can discern what he is claiming and frame a responsive pleading." *Id.* (internal quotations omitted).

The Eleventh Circuit has identified four examples of pleading practices that constitute impermissible shotgun pleading. One is failing to separate "each cause

[3] *See, e.g.*, *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973) ("If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral,' . . . we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller*" (citations omitted)); *Chesebrough v. State*, 255 So. 2d 675, 677 (Fla. 1971) ("'Lewd' and 'lascivious' are words in common use, and the definitions indicate with reasonable certainty the character of acts and conduct which the Legislature intended to prohibit and punish, so that a person of ordinary understanding may know what conduct on his part is condemned.").

of action or claim for relief" into a different count. *Id.* at 1325. HM's complaint is deficient in this regard. It consists of a single Count I with a mish-mash of different, vaguely articulated constitutional theories presented in non-consecutively numbered paragraphs. Some of the paragraphs in Count I are not numbered at all; some employ numbering systems that do not match the ones preceding it.

Part I.A represents Defendants' best attempt to identify and respond to the various claims sprinkled throughout HM's single-count complaint. Under the aegis of the First Amendment, HM seems to present three speech-based theories (overbreadth, discriminatory legislative purpose, and speaker-based discrimination) and one (vagueness) that actually arises under the Due Process Clause of the Fourteenth Amendment. The complaint fails to disambiguate the constitutional theories and allege them in separate counts, leaving Defendants to "speculate as to which" claims they should be defending against or which allegations HM proposes would support any of those claims. *Weiland v. Palm Beach Cty. Sheriff's Off.*, 792 F.3d 1313, 1323 & nn. 12–13 (11th Cir. 2015) (citation omitted).

C. HM does not have Article III standing.

Another important reason that HM's complaint should be dismissed is that HM lacks standing—"an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To have standing, HM must show "(1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020)

(citing *Lujan*, 504 U.S. at 560–61)). HM has not stated facts sufficient to show injury in fact, let alone traceability or redressability.

To establish injury in fact, HM must show injury that is "concrete, particularized, and actual or imminent." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). HM cannot evade this requirement by challenging the Protection of Children Act as overbroad. "The overbreadth doctrine does not relieve a plaintiff of the burden to prove constitutional standing, which requires that 'the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action,'" *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1270 (11th Cir. 2006) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)), before the plaintiff then may assert the First Amendment rights of third parties.

Here, HM does not claim that it is the subject of any enforcement action or that it has been the subject of one in the past; it instead brings a pre-enforcement challenge to prevent one from happening. To do so, HM must show both "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute" and a "credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). HM need not "confess that [it] will in fact violate that law," *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014), nor must it "first expose [itself] to actual arrest or prosecution to be entitled to challenge a statute that [it] claims deters the exercise of [its] constitutional rights," *Steffel v. Thompson*, 415 U.S. 452, 459

(1974). It must, however, at least show an intent to engage in conduct "arguably proscribed" by that law. *Driehaus*, 572 U.S. at 162.

HM states no such intention. Rather, HM insists that the performances it hosts at its establishment feature "no lewd activity, sexually explicit shows, disorderly conduct, public exposure, obscene exhibition, or anything inappropriate for a child to see." DE1 at 6. If "the entertainment is not suitable for children, children are not allowed to attend and the venue announces this in advance on their website and in their advertising." DE1 at 19. Nothing HM describes in its complaint even arguably contravenes the Protection of Children Act or suggests that enforcement action is imminent.

That likewise disposes of any contention that HM has already suffered injury based on the alleged chilling effect of the Protection of Children Act. *See Harrell v. The Florida Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010). HM says it now bars children from attending its performances because it fears prosecution. DE1 at 9, 18. But "one cannot demonstrate standing merely by announcing a chill." *Equality Fla. v. Fla. State Bd. of Educ.*, No. 4:22-cv-134, 2022 WL 19263602, at *3 (N.D. Fla. Sept 29, 2022). HM "must show that the challenged law arguably forbids the chilled speech and that exercising the speech may have real consequences." *Id.* Like the plaintiff in *Dermer v. Miami-Dade County*, 599 F.3d 1217, 1220 (11th Cir. 2010), HM has "failed to provide the court with anything more than generalizations" about its performances, from which this Court could determine that these performances even arguably fall within the Protection of Children Act.

HM refers in its complaint to other enforcement proceedings against establishments that have apparently allowed children to view certain sexually explicit drag performances. DE1 at 2–3 & nn. 1–3. HM suggests that these proceedings have deterred it from allowing children at its events. In *Driehaus*, the Supreme Court allowed standing to a plaintiff who had been inhibited from making certain political statements because of a prior enforcement proceeding against another individual, but only because the plaintiff had "alleged an intent to engage *in the same speech* that was the subject of [the] prior enforcement proceeding." 573 U.S. at 166 (emphasis added). The proceedings to which HM refers, by contrast, involve different statutes and different performances. *See* Exs. B–E (declaration of DBPR deputy general counsel; three administrative complaints). Based on the generalizations in HM's complaint, HM's performances are unlike the ones at issue in these other proceedings and do not permit a parallel like what the Court was able to draw in *Driehaus*.

HM is thus more like the plaintiffs in *Younger v. Harris*, 401 U.S. 37 (1971), who sought to intervene in the prosecution of an individual under a California leafletting statute, contending that the prosecution inhibited their own leafletting activity. The putative intervenors did not have standing, the Supreme Court held, because they did "not claim that they ha[d] ever been threatened with prosecution, that a prosecution [was] likely, or even that a prosecution [was] remotely possible." *Id.* at 42. They claimed instead that the prosecution made them "feel inhibited."

Id. This did not establish a "genuine controversy" as to these plaintiffs or entitle them to enjoin the prosecution. *Id.*

HM also lacks standing because any conjectural injury is neither traceable to nor redressable by Defendants. "The principal problem is that most of [HM's] alleged harm is not plausibly tied to the law's *enforcement* so much as the law's very *existence*." *Equality Fla.*, 2022 WL 19263602, at *2. HM appears to predicate standing on the alleged chilling effect of what it *perceives* to have been the purpose of the Act, rather than its actual, objective purpose. Like the plaintiffs in *Equality Florida*, HM essentially "contend[s] the law's passage, the sentiment behind it, the Legislators' motivation, and the message the law conveys all cause them harm." *Id.* This abstract injury could not have been caused by Defendants, nor is there anything they could do to remedy it.

D. The State of Florida and Governor DeSantis have sovereign immunity.

The final reason HM's complaint is unlikely to succeed on the merits, at least as to two of the Defendants, is that the State of Florida and Governor DeSantis have sovereign immunity under the Eleventh Amendment.

The State of Florida is immune because it has not consented to this lawsuit and no federal statute has validly abrogated the State's immunity. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54–55 (1996). As a state official, Governor DeSantis is similarly immune. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89,

101–02 (1984); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).[4] *Ex parte Young* carves out an exception to this immunity for when the plaintiff seeks "prospective equitable relief to end continuing violations of federal law." *Lane v. Cent. Ala. Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014) (per curiam) (quotations and internal emphases omitted). But to fit this exception, the Governor must have "some connection with [] enforcement," which arises from "being specially charged with the duty to enforce the statute." *Ex parte Young*, 209 U.S. 123, 157–58 (1908); *see Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998). The Governor lacks this connection. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 534 (2022) ("While *Ex parte Young* authorizes federal courts to enjoin certain state officials from enforcing state laws, the petitioners do not direct this Court to any enforcement authority the attorney general possesses in connection with S.B. 8 that a federal court might enjoin[.]").

At most, the Governor has a general duty to take care that the laws of the State of Florida are executed, Fla. Const. art. IV, § 1(a), and the authority to supervise the various state departments, Fla. Const. art. IV, § 6. These are not enough. "The required 'connection' is not 'merely the general duty to see that the laws of

[4] This is true whether the Governor is sued in his official or in his individual capacity. "The Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest." *Pennhurst*, 465 U.S. at 101 (quotations omitted). As a "general rule," "relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Id.* That includes where the relief sought would "interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting." *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1277 n.3 (11th Cir. 1998). Enjoining enforcement of a state law would "operate against" the sovereign in precisely those ways.

the state are implemented,' but 'the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quoting *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (en banc) (plurality op.)). The Act assigns enforcement responsibility to two divisions of the Department of Business and Professional Regulation: the Division of Hotels and Restaurants and the Division of Alcoholic Beverages and Tobacco. It is the Secretary of the Department of Business and Professional Regulation who is vested with the responsibility to "[p]lan, direct, coordinate, and execute the powers, duties, and functions vested in that department or vested in a division, bureau, or section of that department." Fla. Stat. § 20.05(1)(a). And responsibility for prosecuting misdemeanors under the Act in circuit court would fall to the local State Attorney. *See* Fla. Const. art. V, § 17.

II. Even if the Court does not dismiss HM's complaint, it should deny preliminary injunctive relief.

It follows from the foregoing analysis that HM has failed to meet the first prerequisite for a preliminary injunction—likelihood of success on the merits. But even if the Court disagrees, it should still deny HM's motion, because HM has failed to meet any of the remaining prerequisites. HM has not shown irreparable injury—"'the *sine qua non* of injunctive relief.'" *Ne. Fla. Chapter of Ass'n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (quotation omitted). To justify a preliminary injunction, the putative irreparable injury "must be neither remote nor speculative, but actual and imminent." *Id.* (quoting

Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 973 (2d Cir. 1989)). Taking HM's complaint at face value, HM faces no threat of irreparable injury, actual or imminent, because the performances it claims are characteristic of its Sunday Brunch drag show do not violate the Protection of Children Act. HM thus can continue to operate its restaurant, serve alcohol at its bar, and host live performances, all without excluding children. It does not require a preliminary injunction to do so. For this reason alone, HM's motion should be denied.

The final two factors in the preliminary-injunction test are the balance of harms and the public interest. "[W]here the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest." *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Again, HM has claimed no intention to engage in any conduct actually or even arguably prohibited by the Protection of Children Act. HM thus cannot identify any threatened injury that would outweigh the impairment a preliminary injunction would cause to the State of Florida's interest in protecting children from exposure to age-inappropriate, sexually explicit live performances. And because HM lacks overbreadth standing, *see supra* pp. 17–20, it cannot use alleged injury to third parties as a basis for preliminary injunctive relief. *Compare Garcia v. Stillman*, No. 22-cv-24156, 2023 WL 3478450, at *2 (S.D. Fla. May 16, 2023).[5]

[5] *See also Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish . . . that *he* is likely to suffer irreparable harm" (emphasis

HM apparently seeks statewide relief, asking the Court to issue an injunction "preventing [the Act] from taking effect." DE6 at 26. This Court should not award HM any relief, for the reasons discussed, but if it does, it should limit that relief to the parties and not extend it statewide. *See, e.g.*, *United States v. Nat'l Treas. Emps. Union*, 513 U.S. 454, 477–78 (1995); *Georgia v. President of the United States*, 46 F.4th 1283, 1303–04 (11th Cir. 2022). A statewide injunction would harm the public by exposing children to "adult live performances" in other venues less scrupulous than HM professes to be.

CONCLUSION

HM's complaint should be dismissed. In the alternative, HM's motion for a preliminary injunction should be denied.

Respectfully submitted,

June 2, 2023

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added)); *Flowers Indus. v. FTC*, 849 F.2d 551, 552 (11th Cir. 1988); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 822 (9th Cir. 2018); *Oviedo Medical Center, LLC v. Adventis Health Sys./Sunbelt, Inc.*, No. 6:19-cv-1711, 2020 WL 4218276, at *2 (M.D. Fla. Apr. 28, 2020).

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2022, a true and correct copy of the foregoing was filed with the Court's CM/ECF system, which will provide service to all parties.

/s/ Nathan A. Forrester
Senior Deputy Solicitor General

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

HM FLORIDA-ORL, LLC,	)	
Plaintiff,	)	
v.	)	Case No.
THE STATE OF FLORIDA,	)	
ON DESANTIS, in his official , and	)	COMPLAINT FOR VIOLATIONS OF THE
and individual capacity as Governor	)	CIVIL RIGHT ACT OF 1871, 42 U.S.C.
of Florida, MELANIE GRIFFIN, in her	)	Section 1983
official capacity as Secretary of THE	)	
STATE DEPARTMENT OF BUSINESS	)	
AND PROFESSIONAL REGULATION,	)	
STATE OF FLORIDA,	)	
Defendants.	)	
	)	

PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION WITH INCORPORATED MEMORANDUM OF LAW

The Plaintiff, HM FLORIDA-ORL, LLC, by and through counsel, moves this Honorable Court to issue a Temporary Restraining Order preventing Plaintiffs from enforcing the amendments and additions to Florida state statutes 509.261, 561.29, and 827.11:

I. NATURE OF THE ACTION

1. This action is brought under 42 U.S.C. Section 1983 and is premised on the First and Fourteenth Amendments to the United States Constitution.

II. SUBJECT MATTER AND JURISDICTION

2. This Court has original subject matter jurisdiction pursuant to 28 U.S.C. Sections 1331 and 1343 on the grounds that the claims asserted herein arise under U.S.C. Sections 1983 and 1988.

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

III. THE PARTIES AND PERSONAL JURISDICTION

4. Plaintiff, HM FLORIDA-ORL, LLC, is a Florida limited liability company registered in the State of Florida in Orlando, Florida since 2008 that is a restaurant and bar serving alcohol and presents drag show performances, comedy sketches, and dancing.

5. Defendant RON DESANTIS is the Governor of the State of Florida. He is sued in his official capacity and individual capacity. Defendant DESANTIS may be served with process at his office, 400 S Monroe St, Tallahassee, FL 32399.

6. Defendant MELANIE GRIFFIN is the Secretary of the State Department of Business and Professional Regulation for the state of Florida. She is sued in her official capacity and individual capacity. Defendant GRIFFIN may be served with process at at her office, 2601 Blairstone Rd, Tallahassee, FL 32399.

7. Defendant STATE OF FLORIDA may be served with process via service upon the Secretary of State at 500 S. Bronough St., Tallahassee, Fl. 32399.

8. All Defendants are collectively referred to hereinafter as "the State".

IV. FACTUAL ALLEGATIONS

Florida Governor and Legislators Fight to Prevent Family Friendly Drag Show

9. In December 2022, the State of Florida began administrative proceedings with the Department of Business and Professional Regulation for violating public nuisance, lewd activity

and disorderly conduct laws. One business is a hotel associated with a performance center, and another is a performing arts center, which both hosted an event entitled, "A Drag Queen Christmas", and the other is a restaurant that hosted a drag queen weekend brunch. DBPR is seeking to revoke the liquor licenses of these businesses.[1] The venues are accused to failing to provide notice of the "sexually explicit nature of the performance" DBPR alleges that the "sexually explicit show" would constitute a public nuisance, lewd activity, and disorderly conduct when minors are in attendance.[2] Revocation of their liquor license was one of the penalties the venues would suffer. The allegations are that drag shows are tantamount to "lewd exhibition, operating a lewd establishment, public exposure, obscene exhibition, breach of the peace and public nuisance.[3] The case is pending.

10. On May 17, 2023, Governor Desantis signed into law an amendment to Florida Statute 509.261 to include the following provisions:

> (10)(a) The division may fine, suspend, or revoke the license of any public lodging establishment or public food service establishment if the establishment admits a child to an adult live performance, in violation of s. 827.11.

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[1] Tampa Bay Times, Ana Ceballos and Joey Flechas, *Florida goes after liquor license of Miami hotel over drag show*, March 14, 2023, https://www.tampabay.com/news/florida-politics/2023/03/14/drag-queen-minors-liquor-license-lgbtq-hotel-miami/

[2] Administrative Complaint, *Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, Petitioner, v. HRM Owner, LLC, d/b/a Hyatt Regency Miami*, March 14, 2023

[3] The statutes that were allegedly violated and listed in the complaint were: Lew or lascivious exhibition in the presence of a minor less than 16 years of age (s. 800.04(7)(a), F.S.); Operation of any place, structure, building, or conveyance for the purposes of lewdness (s. 796.07(2)(a0, F.S.); The unlawful exposing or exhibiting of one's sexual organs in public or on the private premises of another in a vulgar or indecent manner (s. 800.03, F.S.); Knowingly promoting, conducting, performing, or participating in an obscene show, exhibition, or performance by live persons or a live person before an audience (s. 847.011(4), F.S.; Breach of the peace and disorderly conduct with acts that are of such nature as to corrupt the public morals, or outrage the sense of public decency (s. 877.03, F.S.); and Maintaining a nuisance by erecting or maintaining a structure that tends to annoy the community or injure the health or the community, or becomes manifestly injurious to the morals or manners of the people (s. 8230.5(1), F.S.)

(b) A violation of this subsection constitutes an immediate serious danger to the public health, safety, or welfare for the purposes of s. 120.60(6).

(c) Notwithstanding subsection (1), the division may issue a $10,000 fine for an establishment's second or subsequent violation of this subsection.

And also signed into law was:

Paragraph (1) of section 561.29, Florida Statutes, was amended to include the following language:

561.29 Revocation and suspension of license; power to subpoena. –

(1) The division is given full power and authority to revoke or suspend the license of any person holding a license under the Beverage Law, when it is determined or found by the division upon sufficient cause appearing of:

(1) Maintaining a licensed premises that admits a child to an adult live performance in violation of s. 827.11.

1. A violation of this paragraph constitutes an immediate, serious danger to the public health, safety, or welfare for the purposes of s. 120.60(6).

2. The division may issue a $5,000 fine for a first violation of this paragraph.

3. The division may issue a $10,000 find for a second or subsequent violation of this paragraph.

And Section 827.11 Florida Statutes was created to read:

827.11 Exposing children to an adult live performance. –

(1) As used in this section, the term:

(a) "Adult live performance" means any show, exhibition, or other presentation in front of a live audience which, in whole or in part, depicts or simulates nudity, sexual conduct, sexual excitement, specific sexual activities as those terms are defined in s. 847.011, lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts when it:

1. Predominantly appeals to a prurient, shameful, or morbid interest;

2. Is patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and

3. Taken as a whole, is without serious literary, artistic, political, or scientific value for the age of the child present.

(b) Knowingly" means having general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

1. The character and content of any adult live performance described in this section which is reasonably susceptible of examination by the defendant; and

2. The age of the child.

(2) A person's ignorance of a child's age, a child's misrepresentation of his or her age, or a bona fide belief of a child's consent may not be raised as a defense in a prosecution for a violation of this section.

(3) A person may not knowingly admit a child to an adult live performance.

(4) A violation of subsection (3) constitutes a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

11. Plaintiff's restaurant, HAMBURGER MARY'S, has for fifteen years presented drag performances at its venue.

12. Plaintiff offers "family friendly" drag performances announced on Sundays where children are invited to attend. There is no lewd activity, sexually explicit shows, disorderly conduct, public exposure, obscene exhibition, or anything inappropriate for a child to see.

13. Drag is defined as "clothing more conventionally worn by the other sex, especially exaggeratedly feminine clothing, makeup, and hair adopted by a man"[4] Drag is usually performed as entertainment and often includes comedy, singing, dancing, lip-syncing, or all of the above. Prosthetic breasts are commonly used by men impersonating women as part of the art.

14. Drag is not a new art form; nor is it inherently – or even frequently – indecent. Drag has been present in western culture dating back to Ancient Greek theatrical productions, where women were often not permitted to perform onstage or become actors. Instead, male actors would don women's attire and perform the female roles.[5]

15. The earliest productions of William Shakespeare's plays also featured male actors in drag playing the female roles.[6]

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

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

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

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

17. The vaudeville shows of the late 1800s and early 1900s popularized drag, or "female impersonators."[7] One of the most well-known vaudeville female impersonators, Julian Eltinge, made his first appearance on Broadway in drag in 1904.[8]

18. By 1927, drag had become specifically linked with the LGBTQIA community, and by the 1950s, drag performers began entertaining in bars and spaces that specifically catered to gay people. In the decades that followed, drag solidified itself as an art form.[9]

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

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

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[7] Nan Alamilla Boyd, Wide Open Town: A History of Queer San Francisco to 1965, University of California Press, 2003.
[8] Michael F. Moore, Drag! Male and Female Impersonators on State, Screen, and Television: An illustrated World History, McFarland & Company, 1994.
[9] Nan Alamilla Boyd, Wide Open Town: A History of Queer San Francisco to 1965, University of California Press, 2003.

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

22. The Sunday Brunch drag show at Hamburger Mary's has traditionally hosted gay, straight, couples, married couples, children, and grandchildren, as it is a wholesome form of art and entertainment. It is a form of family entertainment, enjoyed by all.

23. Undercover state agents were sent by the administration of Republican Florida Gov. Ron DeSantis to spy on an Orlando drag show — and they found nothing "lewd" about it, according to the Miami Herald. Yet, Florida has moved to revoke the venue operator's liquor license, alleging in an official complaint that the venue violated state law "by allowing performers to expose genitals in a lewd or lascivious manner and by conducting acts simulating sexual activity in the presence of children younger than 16 years of age."[10]

24. Undercover agents who attended the December 28, 2022 show titled, "A Drag Queen Christmas," at Orlando's Plaza Live recorded the performance on their state-issued iPhone's and spotted three children at the drag show, according to the Herald, which obtained and published an incident report from the agents. "Besides some of the outfits being provocative (bikinis and short shorts), agents did not witness any lewd acts such as exposure of genital organs," the agents wrote in their report, according to the newspaper. "The performers did not have any physical contact while performing to the rhythm of the music with any patrons."[11]

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[10] Miami Herald reports undercover agents saw nothing 'lewd' at Orlando drag show. Florida is going after venue anyway : r/Miami (reddit.com)

[11] DeSantis Admin Sent Undercover Agents to Drag Show, Found Nothing 'Lewd' (businessinsider.com) https://www.businessinsider.com/desantis-florida-undercover-agents-drag-show-found-nothing-lewd-2023-3

25. It is apparent from the actions of the State of Florida, that it intends to consider drag shows to be a public nuisance, lewd, disorderly, sexually explicit involving public exposure and obscene and that it is necessary to protect children from this art form, in spite of evidence to the contrary. Such is the Summary Analysis of the Florida Senate when it passed the law signed by Governor Desantis.[12]

26. Florida already has on its books, laws preventing exposure of minors to lewd, sexually explicit, obscene, vulgar or indecent displays. Florida Statute Chapter 847 and the power to revoke licenses of establishments that are maintaining a nuisance on the premises in Florida Statute 561.29.

27. The law, as passed, intends to use the FDBP to revoke or suspend the licenses of businesses if it admits a child to an adult live performance, in violation of s. 509.261[13] It reads: (10)(a) The division may fine, suspend, or revoke the license of any public lodging establishment or public food service establishment if the establishment admits a child to an adult live performance, in violation of s. 827.11. (b) A violation of this subsection constitutes an immediate serious danger to the public health, safety, or welfare for the purposes of s. 120.60(6).

28. Upon the announcement that the bill had been signed and the law was in effect, Hamburger Mary's advised its customers that children would not be permitted to attend any drag shows. Immediately, 20% of their bookings cancelled for the May 21, 2023 show and for future bookings. In addition to the loss of customer's cancelling, the establishment has had to ban children from the family friendly performances because they simply cannot take the chance that their business or liquor licenses would be suspended for hosting a drag show where children attend. In addition, the

[12] Text of Bill Analysis and Fiscal Impact Statement, The Florida Senate, SB 1438
[13] Text of 509.261)10)(a) Florida Statutes for Revocation or suspension of licenses; fines; procedure.

criminal penalties of the law put individuals at risk of prosecution because of the content of their speech. Also recently, the Port St. Lucie Pride event was forced to cancel the parade due the pending state law restricting drag performances.[14] The Florida Gay Pride Parade was canceled by the Pride Alliance of the Treasure Cost in anticipation of the signing of the laws complained of in this Complaint.[15] Florida City canceled it Pride Parade that has traditionally been part of Pridefest in response to the anticipated law.[16] The law and anticipation of it has had a chilling effect upon free speech in Florida.

V. CAUSES OF ACTION

COUNT 1 – VIOLATION OF 42 U.S.C. SECTION 1983 UNDER THE FIRST AMENDMENT

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

30. The statute is facially unconstitutional under the First Amendment for several reasons.

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

a. "To survive strict scrutiny analysis, a statute must**: (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least**

[14] https://news.yahoo.com/florida-city-scales-back-pride=160251520.html.
[15] https://www.nbcmiami.com/news/local/florida-gay ...
[16] https://people.com/politics/florida-pride-parade-canceled-anit-drag-bill

restrictive means of achieving that interest." *Sable Communications of Cal, Inc. v. Fed Communications Commission,* 482 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed. 2d 93 (1989).

b. Plaintiff concedes that the Supreme Court has held that "there is a **compelling interest** in protecting the physical and psychological well-being of minors." *Sable,* 492 U.S. at 126, 109 S.Ct. at 2836.

c. **The statute, however, is not tailored narrowly enough** to satisfy the First Amendment's requirements. It is simply too vague and overbroad. The vagueness doctrine was described by the U.S. Supreme Court as follows:

"Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained 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. Although ordinarily a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others, we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech. But perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States v. Williams,* ___ U.S. ___, 128 S.Ct 1830, 1845 (2008).

"What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal

culpability to whether the defendant's conduct was 'annoying' or 'indecent' wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id* at 1846.

1. The language used in the statute is meant to be and is primarily vague and indistinct. It does not mention "drag" by name but it is so broad as to include this art form in the State's interpretation under the newly created or amended laws in question.

2. Any person under the age of eighteen is included. The definition in 827.11(1)(b) of "Knowingly" necessarily requires an accused person to determine if the material is "patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present". Requiring Plaintiff to consider the age of the child, then determine what the prevailing standards are in the adult community, then determine what is suitable material or conduct for the age of the child, is overly broad and susceptible of interpretation if the person accused of exposing the minor to "adult live performances" is required to figure out if they are impermissibly doing so to any minor, or one that will be less or more affected by the performance. Each patron who looks to be under the age of eighteen would have to be examined to determine their level of maturity and how any drag performance might affect them in order for the management to determine if the material is suitable for the child, considering only the child's age, according to the statute. The definition requires the person accused to examine the character and content of the performance to determine if it is "reasonably susceptible of examination" for further inspection or inquiry, taking into consideration only the age of the child. The standard is too vague to know what is and what is not statutorily permissible. See *ACLU v. Ashcroft,* at 322 F.3d 255.

3. 827.11(1)(a) describes "adult live performance" in part to be "patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable

material or conduct for the age of the child present;" This language is impermissibly vague. Plaintiff will be forced to guess at the bottom end of the range of ages of children to which the statute applies and thus will not have "fair notice of what conduct would subject them to criminal sanctions" under the law and "will be deterred from engaging in a wide range of constitutionally protected speech." *ACLU v. Ashcroft,* at 322 F.3d at 268. . "Adult live performance" as defined in the bill defines the prohibited conduct by the identity of the speaker.[17] "Lewd conduct" is part of the definition. It is a vague term subject to interpretation. A man, dressed as a woman wearing a prosthetic breast, reading books to children of five years of age, may qualify to some as lewd conduct, simply because the message of the sender in how they are dressed.

4. The definition of "child" as is commonly used, and as is applied in the statute is overinclusive because it "broadens the reach of 'material that is harmful to minors' under the statute to encompass a vast array of speech that is clearly protected for adults – and indeed, may not be obscene as to older minors. . . ." *Id* at 268, *American Civil* at 206. 8. The definition of "child" is not specifically set forth in the statute, however, the common meaning under Florida law is an individual who has not yet reached the age of eighteen years. The statute does not distinguish between a child of 4 and a person of 17 ½. The term is synonymous with "minor". Use of the term "minor" has previously been determined to be not narrowly tailored enough to satisfy First Amendment requirement. *American Civil Liberties Union v. Ashcroft*, 332 F. 3d 240, 255 (3rd Cir. 2003), *aff'd Ashcroft v. American Civil Liberties Union,* 542 U.S. 656, 12 S.Ct. 2783, 159 L.Ed.2d 690 (2004).

[17] Florida Statute 827.11(1)(a)

5. Furthermore, the inclusion of "community standards" exacerbates the constitutional problems for the statute in that it further widens the spectrum of protected speech that the statute affects. It requires the most restrictive and conservative state's community standards in order to avoid criminal liability. *Id* at 270. "Community standards" has been found to be unconstitutionally overbroad. *ACLU v. Reno*, 217 F.3d 162, 173 (3rd Cir. 2000).

6. The conduct that is offensive must "predominately appeal to a prurient, shameful, or morbid interest; and is patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and taken as a whole, is without serious literary, artistic, political, or scientific value for the age of the child present.". [18] The terms "predominately", "shameful or morbid" are vague terms subject to the interpretation of the reader and not subjective. What is suitable material or conduct for the age of the child present is too indistinct for the speaker to know what is prohibited. Again, some might consider a man in a dress reading to five years told to be unsuitable conduct.

7. "Patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present" is similarly vague and indistinct as standards in different parts of the state differ, as do what is suitable material for different aged children. [19] This is not a subjective standard subject to identification by the reader as to what is prohibited.

8. FS 827.11(1)(b) requires the Plaintiff to make a determination of the "character and content of the adult performances" they intent to produce and "the age of the child." This is

[18] Florida Statute 827.11(1)(a)1
[19] Florida Statute 827.11(1)(a)2

impermissibly overbroad. Simply stated, what might be inappropriate for a child of five to see is not necessarily inappropriate for a minor of seventeen years.

9. "Without serious literary, artistic political or scientific value for the age of the child present."[20] This obligation cannot be met by a subjective standard. Seeing a performer in clothing not gender usual, dancing and singing, may be perfect for a two year old to see, but by whose standard is this decision to be made? The reader is only made to guess what conduct is prohibited.

d. The burden is on the Government to prove that the statute contains **the least restrictive alternatives** to accomplish the aims of the legislation. *Ashcroft v. ACLU,*542 U.S. at 665, 124 S.Ct. at 2791. "[T]he burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Id.* Citing *Reno v. ACLU*, 521 U.S. 844 at 874, 117S.Ct. at 2346. The wide swath with which Florida Statute 827.11 is painted captures all persons under the age of eighteen under the umbrella of the State's intent to protect minors without definition of how the age of the child applies to general knowledge of or belief that warrants further inspection or inquiry of whether the intended performance is prohibited.

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

33. An examination of similar legislation was conducted by the United States District Court for the Western District of Tennessee, Western Division in the recent case of *Friends of George's, Inc. v. State of Tennessee, et al,* 2:23-cv-02163-TLP-tmp and 2:23-cv-02176-TLP-tmp where a

[20] Florida Statute 827.11(1)(a)3

temporary restraining order was entered against a state law criminalizing the performance of "adult cabaret entertainment" in any location that it could be viewed by a person not an adult. The constitutional evaluation is instructive and relied upon herein.

34. The First Amendment generally prevents states from limiting speech and expressive conduct based on the ideas expressed. *Texas v. Johnson*, 491 U.S. 397, 406 (1989). So, content-based regulations are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). In *Reed v. Town of Gilbert*, the United States Supreme Court observed that there are two ways to determine whether a law is content-based regulation. 576 U.S. 155, 163-64 (2015). First, a law is content-based on its face by "defining regulated speech by particular subject matter." *Id.* Second a law may appear to be content-neutral on its face but courts consider it to be content-based if it was "adopted by the government 'because of disagreement with the message [the speech] conveys." *Id* at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

35. Content-based regulations must survive strict scrutiny to be constitutional. *Reed*, 576 U.S. at 171 (2015). This is an exceptionally high bar – it means that the law is presumptively unconstitutional. Id. The Court will only uphold the law if it is justified by a compelling government interest, and it is narrowly drawn to serve that interest. *Id.* At 175 (Breyer.J., concurring)(observing that strict scrutiny in speech cases is "almost certain legal condemnation").

36. If the State is to argue that the acts prohibited by the new laws are already codified in the statutes and the new laws are content-neutral, the United States Supreme Court precedent under *Reed* requires the Court to consider the legislative history of the suspect legislation. See *Reed,* 576 U.S. at 164. It is apparent that the law was enacted because of a disagreement with a particular message or messenger. As stated herein, the Summary Analysis of the House and Senate bills cite as recent events the complaints filed by the DBPR against venues that hosted an event entitled, "A

Drag Queen Christmas". It is unquestionable that the State's interest is to stop children from attending drag events at restaurants, performances, bars, and any other events. As such, the statute is view-point discriminatory because it targets drag queens.

37. The United States Supreme Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). A law is unconstitutionally vague if individuals of "common intelligence must necessarily guess at its meaning and differ as to its application[.]" *Conally v. Gen. Const. Co.*, 269 U.W. 385 (1926). A law is unconstitutionally overbroad if it sweeps in more speech than is necessary to satisfy the state's interest, regulating both protected and unprotected speech. See *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). The United States Supreme Court has described the overbreadth doctrine as a "strong medicine," that justifies invalidation of laws that can chill the effects of speech through self-censorship on the regulated, and can spark the harms of selective enforcement on the regulator. *Id.* At 613; *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)(noting that overbreadth and vagueness doctrines check the legislature's need to establish minimal guidelines to govern law enforcement to avoid a standardless sweep of enforcement).

38. The statute prohibits what is described as adult live performances, which would include female impersonators, by implication, anyplace in the state. Even though businesses are targeted in Section 509.261, the law also creates Florida Statute 827.11 to apply anywhere in the state, such as a public parade, or a person's back yard. As was pointed out by the United States District Court, Western District of Tennessee in *Friends of George's, Inc., v. State of Tennessee, et al*, 2:23-cv-02163-TLP-tmp, in granting its temporary restraining order on March 31, 2023, "What if a minor browsing the worldwide web from a public library views an adult live performance? Ultimately, the Statute's broad language clashes with the First Amendments' tight constraints."

39. While the evidence of lewd conduct at "A Drag Queen Christmas" was not substantiated by the undercover state agents who attended (see above), this has not stopped the State from enacting the proposed law with the intent of stopping drag performances anywhere in Florida, using the alleged lewd conduct of "A Drag Queen Christmas" as its motivation. The State's rationale would stop any performance of Victor/Victoria, La Cage Aux Folles, Milton Berle, I Love Lucy, or Some Like It Hot, all American performance staples where the characters perform in clothing usually worn by the opposite sex. Any suggestion that the outfit a person wears is necessarily harmful to a child strains credulity.

40. The application of the statute as written is so broad as to have a chilling effect on protected speech.

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

42. The amendments to Florida Statute Section 827.11, Florida Statutes, also open up any establishment – or even a private home – that hosts drag shows to police raids, so law enforcement can be certain that no children are present at the event.

This Law Will Violate the Constitutional Rights of Plaintiff, HM FLORIDA-ORL, LLC

43. The uncertainty about what specific conduct this law prohibits, as well as the threat of police surveillance and criminal charges, is precisely what concerns the Plaintiff in this case.

44. Since its opening in 2008, Hamburger Mary's has hosted drag-centric performances, comedy sketches, bingo, trivia, and dancing. Traditionally, their performances have been open to all ages.

45. Hamburger Mary's is recognized by the LGBTQIA and the straight communities as supplying family friendly entertainment. At such times, as the entertainment is not suitable for children, children are not allowed to attend and the venue announces this in advance on their website and in their advertising.

46. The family drag shows have been cancelled. They cannot take place if the law is allowed to stand. Plaintiff will suffer deprivation of its First Amendment rights.

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

48. This statute cannot survive strict scrutiny. While the government has a recognized interest in "protecting children from harmful materials," Florida law already protects children from obscenity and sexually explicit conduct and materials. Florida Statutes Chapter 847.

49. Legislators and the Governor have made it clear that this law was created to prevent children from drag shows. The government does not have a compelling interest in protecting children from drag shows.

50. Even if the State could identify a compelling interest, this law is far from narrowly tailored. It is broad enough to encompass even the most innocent drag performances, to reach into the

private homes of Florida citizens, and to determine on behalf of parents what is and is not appropriate entertainment for their children.

51. The broad, sweeping nature of the statute, and the vagueness regarding what conduct is and is not prohibited, will have a chilling effect on the First Amendment rights of the citizens of Florida.

A Temporary Restraining Order in necessary to prevent harm to free speech

52. Plaintiff acknowledges that a Temporary Restraining Order is an extraordinary remedy. Courts issue TROs to "preserve the status quo so that a reasoned resolution of a dispute may be had." *Proctor & Gamble Co. v. Bankers Trust Co.,* 78 F.3d 219, 227 (6th Cir. 1996). As such Plaintiff has the burden of showing they are entitled to a preliminary injunction. *See Jones v. Caruso,* 569 F. 3d 258, 265 (6th Cir. 2009).

53. Courts consider TRO motions under the same four-factor test for preliminary injunction motions: **(1) whether the movant has a strong likelihood of success on the merits, (2) whether the movant would suffer irreparable harm absent a TRO, (3) whether granting a TRO would cause "substantial harm" to others, and (4) whether the public interest would be served by the issuance of a TRO.** *See Ohio Republican Party v. Brunner,* 543 F.3d 357, 361 (6th Cir. 2008). In cases about a constitutional challenge to a state law, "the first factor [likelihood of success on the merits] is typically dispositive." *Vitolo v. Guzman,* 999 F.3d 353, 360 (6th Cir. 2021). And the third and fourth factors "merge when the Government is the opposing party." *Nken v. Holder,* 556 U.S. 418, 435 (2009).

54. In order to conduct a review of the four factors as applied to this case, Plaintiff first must show Article III **standing**, that it has suffered an injury in fact – a legally protected interest that is

concrete, particularized, and actual or imminent, that Defendants likely caused the injury, and that judicial relief would likely redress the injury. *Lujan v. Def. of Wildlife,* 504 U.S. 555, 560-61 (1992). The United States Supreme Court has held that overbreadth challenges to a statute restricting free speech justify a "lessening of prudential limitations on standing." *Sec'y of State of Md. V. Munson,* 467 U.S. 947, 956-57 (1984).

a. The fact that the statutes are both vague and overly-broad indicates that Plaintiff has suffered an actual, concrete, and particularized injury in that it has a reasonable fear of prosecution for conducting shows similar to those it has performed in the past, which may be punishable by the statutes with criminal effect. Plaintiff is unable to advertise or put on shows that would admit minors due to the statutes. Plaintiff should not be required to eat the proverbial mushroom to find out whether it is poisonous. The law does not require this for standing.

b. If Defendants are saying they are not tasked with enforcement, Plaintiff would point out that the State Division of Hotels and Restaurants of the Department of Business and Professional Regulation is tasked with enforcement in the Florida Statute 509.261. The criminal penalties are enforceable under the laws of the State of Florida, as Defendant. The statutes present a reasonable risk that both the Governor and Attorney General may investigate and criminally prosecute Plaintiff for hosting its performances. *See United States v. Stevens,* 559 U.S. 460 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). ("The State has not suggested that the newly enacted [speech restriction] law will not be enforced, and we see no reason to assume otherwise . . . Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution").

55. **The likelihood is that Plaintiff will succeed on the merits.** The statute is content based regulation. The First Amendment generally prevents states from limiting speech and expressive conduct based on the ideas expressed. *Texas v. Johnson,* 491 U.S. 397, 406 (1989). So, content based regulations are presumptively invalid. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992). In *Reed v. Town of Gilbert,* the United States Supreme Court observed that there are two ways to determine whether a law is a content based regulation. 576 U.S. 155, 163-64 (2015). First, a law is content based on its face by "defining regulated speech by particular subject matter." *Id.* Second, a law may appear to be content neutral on its face but courts consider it to be content based if it was "adopted by the government 'because of disagreement with the message [the speech] conveys." *Id.* at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

a. Content based regulations must survive strict scrutiny to be constitutional. *Reed*, 576 U.S. at 171 (2015). This is an exceptionally high bar – it means that the law is presumptively unconstitutional. *Id.* The Court will only uphold the law if it is justified by a compelling government interest, and it is narrowly drawn to serve that interest. Id. At 175 (Breyer, J., concurring)(observing that strict scrutiny in speech cases is "almost certain legal condemnation").

b. There is an argument that the statutes in question are not content based, but content neutral. Even content neutral regulation can be considered content based. Since there are already statutes on the books outlawing certain "lewd" behavior, the purpose of the amendments and additional statutes become a concern for the court. The statutes may be considered content neutral, but they should be considered a content based regulation "because of disagreement with the message [the speech] conveys." *Ward,* 491 U.S. at 791. If the statutes are facially content neutral, the United States Supreme Court precedent under Reed requires the Court to consider legislative history. *See Reed,* 576 U.S. at 164.

c. An examination of the legislative history reveals in the Summary Analysis in both the House and Senate versions of the statute, that "according to recent news stories, at least three business with liquor licenses in the state are currently being administratively charged by DBPR with violating public nuisance, lewd activity and disorderly conduct laws. One business is a hotel associated with a performance center, and another is a performing arts center, which both hosted an event entitled "A Drag Queen Christmas"; and the other is a restaurant that hosted a drag queen weekend brunch. DBPR is seeking to revoke the liquor licenses of these businesses."[21]

d. Undercover state agents were sent by the administration of Republican Florida Gov. Ron DeSantis to spy on an Orlando drag show — and they found nothing "lewd" about it, according to the Miami Herald. Yet, Florida has moved to revoke the venue operator's liquor license, alleging in an official complaint that the venue violated state law "by allowing performers to expose genitals in a lewd or lascivious manner and by conducting acts simulating sexual activity in the presence of children younger than 16 years of age."

e. Undercover agents who attended the December 28, 2022 show titled, "A Drag Queen Christmas," at Orlando's Plaza Live recorded the performance on their state-issued iPhone's and spotted three children at the drag show, according to the Herald, which obtained and published an incident report from the agents. "Besides some of the outfits being provocative (bikinis and short shorts), agents did not witness any lewd acts such as exposure of genital organs," the agents wrote

[21]Tampa Bay Times, Ana Ceballos and Joey Flechas, Florida goes after liquor license of Miami hotel over drag show, March 14, 2023, https://www.tampabay.com/news/florida=politics/2023/03/14/drag-queen-minors-liquor-license-lgbtq-hotel-miami/

in their report, according to the newspaper. "The performers did not have any physical contact while performing to the rhythm of the music with any patrons."[22]

f. In spite of the evidence to the contrary that the drag show in question was not "lewd" or "inappropriate for children", the statute was passed and signed into law by the Governor. The lack of the statutes' purpose considering current state obscenity laws, along with the statutes' legislative history, it is likely that the court will be subjecting the statutes to strict scrutiny. As a result, Plaintiff has a sufficient likelihood of success on the merits of the case.

g. The statutes are vague and overbroad. The United States Supreme Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) A law is unconstitutionally vague if individuals of "common intelligence must necessarily guess at its meaning and differ as to its application[.]" *Conally v. Gen. Const. Co.*, 269 U.S. 385 (1926). A law is unconstitutionally overbroad if it sweeps in more speech than is necessary to satisfy the state's interest, regulating both protected and unprotected speech. See *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). The United States Supreme Court has described the overbreadth doctrine as a "strong medicine," that justifies invalidation of laws that can chill the effects of speech through self censorship on the regulated, and can spark the harms of selective enforcement on the regulator. *Id.* At 613; *Kolender v. Lawson*, 461 U.S. 325, 358 (1983)(noting that overbreadth and vagueness doctrines check the legislature's need to establish minimal guidelines to govern law enforcement to avoid a standardless sweep of enforcement).

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[22] DeSantis Admin Sent Undercover Agents to Drag Show, Found Nothing 'Lewd' (businessinsider.com) https://www.businessinsider.com/desantis-florida-undercover-agents-drag-show-found-nothing-lewd-2023-3

h. The statute tracks the same language from the state's existing regulations on adult oriented establishments, Florida Statutes Chapters 847 and 561. The prohibitions added to Florida Statute 827.11 do not limit the offensive activity to businesses. It reaches conduct of performers virtually anywhere.

56. Absent an injunction, Plaintiff will be barred by criminal penalties from engaging in protected First Amendment expression. 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**.") Because of the statutes' vagueness and overbreadth, it is unclear whether Plaintiff's allowing performances may be penalized. If the drag shows occur and Defendants prosecute Plaintiff, it will likely suffer irreparable harm with criminal sanctions. These penalties carry with them, among other things, potential loss of liberty and great reputational harm, not to mention denial of a means of livelihood by the suspension of Plaintiff's right to sell liquor or conduct its business. But even without enforcement, the vague and overly broad nature of the statutes can have a chilling effect on speech.

57. **Whether granting a TRO would cause "substantial harm" to others.** The fifteen year history of Plaintiff's drag shows without incident and totally devoid of evidence to harm to children or any other person is proof enough that the granting of the TRO would not cause any harm to anyone.

58. **Whether the public interest would be served by the issuance of a TRO.** In spite of Defendants' suspected argument that the public has an interest in ensuring that its officials are not subject to an aimless injunction and to insure that children are not exposed to lewd and offensive performances, a TRO is required by law. Since Plaintiff has been engaging in this type of speech for many years without incident, granting the TRO will cause no harm other than potential

dissatisfaction by some legislators and the Governor, who are under no obligation to attend the shows. Simply stated, there is no public interest in preventing children from seeing drag shows. There is no leap to be taken from a drag show performance to exposing children to lewd or improper displays.

59. The existing obscenity laws can prosecute most or all of the conduct that the statutes seek to regulate. Issuing a TRO merely preserves the status quo and benefits the public interest by clarifying the scope of a law that could impact the First Amendment Rights of Florida citizens and businesses.

WHEREFORE, Plaintiff demands a Temporary Restraining Order against Defendants and prays for the following relief:

1. Grant Plaintiff a Temporary Restraining Order and Preliminary Injunction preventing this unconstitutional statutes from taking effect;

2. Award Plaintiff its reasonable attorney's fees, pursuant to 42 U.S.C. Section 1988.

3. Award costs and expenses incurred in this action pursuant to Rule 54 of the Federal Rules of Civil Procedure.

4. Grant the Plaintiff such further relief as the Court may deem just and proper.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Defendants named herein via service of process with the Verified Complaint.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

HM FLORIDA-ORL, LLC,	)	
Plaintiff	)	
v.	)	Case No.
THE STATE OF FLORIDA,	)	
RON DESANTIS, in his official	)	COMPLAINT FOR VIOLATIONS OF THE
And individual capacity as Governor	)	CIVIL RIGHT ACT OF 1871, 42 U.S.C.
Of Florida, MELANIE GRIFFIN, in her	)	Section 1983
Official capacity as Secretary of THE	)	
STATE DEPARTMENT OF BUSINESS	)	
AND PROFESSIONAL REGULATION,	)	
STATE OF FLORIDA,	)	
Defendants.	)	
	)	

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF

The Plaintiff, by and through counsel, files this Complaint against Defendants and state:

I. NATURE OF THE ACTION

1. This action is brought under 42 U.S.C. Section 1983 and is premised on the First and Fourteenth Amendments to the United States Constitution.

II. SUBJECT MATTER AND JURISDICTION

2. This Court has original subject matter jurisdiction pursuant to 28 U.S.C. Sections 1331 and 1343 on the grounds that the claims asserted herein arise under U.S.C. Sections 1983 and 1988.

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

III. THE PARTIES AND PERSONAL JURISDICTION

4. Plaintiff, HM FLORIDA-ORL, LLC, is a Florida limited liability company registered in the State of Florida in Orlando, Florida since 2008 that is a restaurant and bar serving alcohol and presents drag show performances, comedy sketches, and dancing.

5. Defendant RON DESANTIS is the Governor of the State of Florida. He is sued in his official capacity and individual capacity. Defendant DESANTIS may be served with process at his office, 400 S Monroe St, Tallahassee, FL 32399.

6. Defendant MELANIE GRIFFIN is the Secretary of the State Department of Business and Professional Regulation for the state of Florida. She is sued in her official capacity and individual capacity. Defendant GRIFFIN may be served with process at her office, 2601 Blairstone Rd, Tallahassee, FL 32399.

7. Defendant STATE OF FLORIDA ay be served with process via service upon the Secretary of State at 500 S. Bronough St., Tallahassee, Fl. 32399.

8. All Defendants are collectively referred to hereinafter as "the State".

IV. FACTUAL ALLEGATIONS

Florida Governor and Legislators Fight to Prevent Family Friendly Drag Show

9. In December 2022, the State of Florida began administrative proceedings with the Department of Business and Professional Regulation for violating public nuisance, lewd activity

and disorderly conduct laws. One business is a hotel associated with a performance center, and another is a performing arts center, which both hosted an event entitled, "A Drag Queen Christmas", and the other is a restaurant that hosted a drag queen weekend brunch. DBPR is seeking to revoke the liquor licenses of these businesses.[1] The venues are accused to failing to provide notice of the "sexually explicit nature of the performance" DBPR alleges that the "sexually explicit show" would constitute a public nuisance, lewd activity, and disorderly conduct when minors are in attendance.[2] Revocation of their liquor license was one of the penalties the venues would suffer. The allegations are that drag shows are tantamount to "lewd exhibition, operating a lewd establishment, public exposure, obscene exhibition, breach of the peace and public nuisance.[3] The case is pending.

10. On May 17, 2023, Governor Desantis signed into law an amendment to Florida Statute 509.261 to include the following provisions:

> (10)(a) The division may fine, suspend, or revoke the license of any public lodging establishment or public food service establishment if the establishment admits a child to an adult live performance, in violation of s. 827.11.

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[1] Tampa Bay Times, Ana Ceballos and Joey Flechas, *Florida goes after liquor license of Miami hotel over drag show*, March 14, 2023, https://www.tampabay.com/news/florida-politics/2023/03/14/drag-queen-minors-liquor-license-lgbtq-hotel-miami/

[2] Administrative Complaint, *Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, Petitioner, v. HRM Owner, LLC, d/b/a Hyatt Regency Miami*, March 14, 2023

[3] The statutes that were allegedly violated and listed in the complaint were: Lewd or lascivious exhibition in the presence of a minor less than 16 years of age (s. 800.04(7)(a), F.S.); Operation of any place, structure, building, or conveyance for the purposes of lewdness (s. 796.07(2)(a0, F.S.); The unlawful exposing or exhibiting of one's sexual organs in public or on the private premises of another in a vulgar or indecent manner (s. 800.03, F.S.); Knowingly promoting, conducting, performing, or participating in an obscene show, exhibition, or performance by live persons or a live person before an audience (s. 847.011(4), F.S.; Breach of the peace and disorderly conduct with acts that are of such nature as to corrupt the public morals, or outrage the sense of public decency (s. 877.03, F.S.); and Maintaining a nuisance by erecting or maintaining a structure that tends to annoy the community or injure the health or the community, or becomes manifestly injurious to the morals or manners of the people (s. 8230.5(1), F.S.)

(b) A violation of this subsection constitutes an immediate serious danger to the public health, safety, or welfare for the purposes of s. 120.60(6).

(c) Notwithstanding subsection (1), the division may issue a $10,000 fine for an establishment's second or subsequent violation of this subsection.

Paragraph (1) of section 561.29, Florida Statutes, was amended to include the following language:

561.29 Revocation and suspension of license; power to subpoena. –

(1) The division is given full power and authority to revoke or suspend the license of any person holding a license under the Beverage Law, when it is determined or found by the division upon sufficient cause appearing of:

(1) Maintaining a licensed premises that admits a child to an adult live performance in violation of s. 827.11.

1. A violation of this paragraph constitutes an immediate, serious danger to the public health, safety, or welfare for the purposes of s. 120.60(6).

2. The division may issue a $5,000 fine for a first violation of this paragraph.

3. The division may issue a $10,000 find for a second or subsequent violation of this paragraph.

Section 827.11 Florida Statutes was created to read:

827.11 Exposing children to an adult live performance. –

(1) As used in this section, the term:

(a) "Adult live performance" means any show, exhibition, or other presentation in front of a live audience which, in whole or in part, depicts or simulates nudity, sexual conduct, secual excitement, specific sexual activities as those terms are defined in s. 847.011, lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts when it:

1. Predominantly appeals to a prurient, shameful, or morbid interest;

2. Is patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and

3. Taken as a whole, is without serious literary, artistic, political, or scientific value for the age of the child present.

(b) Knowingly" means having general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

1. The character and content of any adult live performance described in this section which is reasonably susceptible of examination by the defendant; and

2. The age of the child.

(2) A person's ignorance of a child's age, a child's misrepresentation of his or her age, or a bona fide belief of a child's consent may not be raised as a defense in a prosecution for a violation of this section.

(3) A person may not knowingly admit a child to an adult live performance.

(4) A violation of subsection (3) constitutes a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

11. Plaintiff's restaurant, HAMBURGER MARY'S, has presented drag performances at its venue since 2008.

12. Plaintiff offers "family friendly" drag performances announced on Sundays where children are invited to attend. There is no lewd activity, sexually explicit shows, disorderly conduct, public exposure, obscene exhibition, or anything inappropriate for a child to see.

13. Drag is defined as "clothing more conventionally worn by the other sex, especially exaggeratedly feminine clothing, makeup, and hair adopted by a man"[4] Drag is usually performed as entertainment and often includes comedy, singing, dancing, lip-syncing, or all of the above. Prosthetic breasts are commonly used by men impersonating women as part of the art.

14. Drag is not a new art form; nor is it inherently – or even frequently – indecent. Drag has been present in western culture dating back to Ancient Greek theatrical productions, where women were often not permitted to perform onstage or become actors. Instead, male actors would don women's attire and perform the female roles.[5]

15. The earliest productions of William Shakespeare's plays also featured male actors in drag playing the female roles.[6]

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

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

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

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

17. The vaudeville shows of the late 1800s and early 1900s popularized drag, or "female impersonators."[7] One of the most well-known vaudeville female impersonators, Julian Eltinge, made his first appearance on Broadway in drag in 1904.[8]

18. By 1927, drag had become specifically linked with the LGBTQIA community, and by the 1950s, drag performers began entertaining in bars and spaces that specifically catered to gay people. In the decades that followed, drag solidified itself as an art form.[9]

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

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

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[7] Nan Alamilla Boyd, Wide Open Town: A History of Queer San Francisco to 1965, University of California Press, 2003.
[8] Michael F. Moore, Drag! Male and Female Impersonators on State, Screen, and Television: An illustrated World History, McFarland & Company, 1994.
[9] Nan Alamilla Boyd, Wide Open Town: A History of Queer San Francisco to 1965, University of California Press, 2003.

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

22. The Sunday Brunch drag show at Hamburger Mary's has traditionally hosted gay, straight, couples, married couples, children, and grandchildren, as it is a wholesome form of art and entertainment. It is a form of family entertainment, enjoyed by all.

23. Undercover state agents were sent by the administration of Republican Florida Gov. Ron DeSantis to spy on an Orlando drag show — and they found nothing "lewd" about it, according to the Miami Herald. Yet, Florida has moved to revoke the venue operator's liquor license, alleging in an official complaint that the venue violated state law "by allowing performers to expose genitals in a lewd or lascivious manner and by conducting acts simulating sexual activity in the presence of children younger than 16 years of age."[10]

24. Undercover agents who attended the December 28, 2022 show titled, "A Drag Queen Christmas," at Orlando's Plaza Live recorded the performance on their state-issued iPhone's and spotted three children at the drag show, according to the Herald, which obtained and published an incident report from the agents. "Besides some of the outfits being provocative (bikinis and short shorts), agents did not witness any lewd acts such as exposure of genital organs," the agents wrote in their report, according to the newspaper. "The performers did not have any physical contact while performing to the rhythm of the music with any patrons."[11]

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[10] Miami Herald reports undercover agents saw nothing 'lewd' at Orlando drag show. Florida is going after venue anyway : r/Miami (reddit.com)

[11] DeSantis Admin Sent Undercover Agents to Drag Show, Found Nothing 'Lewd' (businessinsider.com) https://www.businessinsider.com/desantis-florida-undercover-agents-drag-show-found-nothing-lewd-2023-3

25. It is apparent from the actions of the State of Florida, that it intends to consider drag shows to be a public nuisance, lewd, disorderly, sexually explicit involving public exposure and obscene and that it is necessary to protect children from this art form, in spite of evidence to the contrary. Such is the Summary Analysis of the Florida Senate when it passed the law signed by Governor Desantis.[12]

26. Florida already has, on its books, laws preventing exposure of minors to lewd, sexually explicit, obscene, vulgar or indecent displays. Florida Statute Chapter 847.

27. The law, as passed, intends to use the FDBP to revoke or suspend the licenses of businesses if it admits a child to an adult live performance, in violation of s. 827.11[13] It reads: (10)(a) The division may fine, suspend, or revoke the license of any public lodging establishment or public food service establishment if the establishment admits a child to an adult live performance, in violation of s. 827.11. (b) A violation of this subsection constitutes an immediate serious danger to the public health, safety, or welfare for the purposes of s. 120.60(6).

V. CAUSES OF ACTION

COUNT 1 – VIOLATION OF 42 U.S.C. SECTION 1983 UNDER THE FIRST AMENDMENT

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

29. The statute is facially unconstitutional under the First Amendment for several reasons.

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[12] Text of Bill Analysis and Fiscal Impact Statement, The Florida Senate, SB 1438

[13] Text of 509.261 Florida Statutes for Revocation or suspension of licenses; fines; procedure.

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

a. "To survive strict scrutiny analysis, a statute must: **(1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of achieving that interest.**" *Sable Communications of Cal, Inc. v. Fed Communications Commission,* 482 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed. 2d 93 (1989).

b. Plaintiff concedes that the Supreme Court has held that "there is a **compelling interest** in protecting the physical and psychological well-being of minors." *Sable,* 492 U.S. at 126, 109 S.Ct. at 2836.

c. **The statute, however, is not tailored narrowly enough** to satisfy the First Amendment's requirements. It is simply too vague and overbroad. The vagueness doctrine was described by the U.S. Supreme Court as follows:

"Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained 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. Although ordinarily a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others, we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected

speech. But perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States v. Williams*, ___ U.S. ___, 128 S.Ct 1830, 1845 (2008).

"What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent' wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id* at 1846.

1. The language used in the statute is meant to be and is primarily vague and indistinct. It does not mention "drag" by name but it is so broad as to include this art form in the State's interpretation under the newly created or amended laws in question.

2. Any person under the age of eighteen is included. The definition in 827.11(1)(b) of "**Knowingly**" necessarily requires an accused person to determine if the material is "patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present". Requiring Plaintiff to consider the age of the child, then determine what the prevailing standards are in the adult community, then determine what is suitable material or conduct for the age of the child, is overly broad and susceptible of interpretation if the person accused of exposing the minor to "adult live performances" is required to figure out if they are impermissibly doing so to any minor, or one that will be less or more affected by the performance. Each patron who looks to be under the age of eighteen would have to be examined to determine their level of maturity and how any drag performance might affect them in order for the management to determine if the material is suitable for the child, considering only the child's age, according to the statute. The definition requires the person accused to examine the character and content of the performance to determine if it is

"reasonably susceptible of examination" for further inspection or inquiry, taking into consideration only the age of the child. The standard is too vague to know what is and what is not statutorily permissible. See *ACLU v. Ashcroft,* at 322 F.3d 255.

3. 827.11(1)(a) describes "**adult live performance**" in part to be "patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present;" This language is impermissibly vague. Plaintiff will be forced to guess at the bottom end of the range of ages of children to which the statute applies and thus will not have "fair notice of what conduct would subject them to criminal sanctions" under the law and "will be deterred from engaging in a wide range of constitutionally protected speech." *ACLU v. Ashcroft,* at 322 F.3d at 268. . "Adult live performance" as defined in the bill defines the prohibited conduct by the identity of the speaker.[14] "Lewd conduct" is part of the definition. It is a vague term subject to interpretation. A man, dressed as a woman wearing a prosthetic breast, reading books to children of five years of age, may qualify to some as lewd conduct, simply because the message of the sender in how they are dressed.

4. The definition of "**child**" as is commonly used, and as is applied in the statute is overinclusive because it "broadens the reach of 'material that is harmful to minors' under the statute to encompass a vast array of speech that is clearly protected for adults – and indeed, may not be obscene as to older minors. . . ." *Id* at 268, *American Civil* at 206. 8. The definition of "child" is not specifically set forth in the statute, however, the common meaning under Florida law is an individual who has not yet reached the age of eighteen years. The statute does not distinguish between a child of 4 and a person of 17 ½. The term is synonymous with "minor". Use of the term

[14] Florida Statute 827.11(1)(a)

"minor" has previously been determined to be not narrowly tailored enough to satisfy First Amendment requirement. *American Civil Liberties Union v. Ashcroft*, 332 F. 3d 240, 255 (3rd Cir. 2003), *aff'd Ashcroft v. American Civil Liberties Union,* 542 U.S. 656, 12 S.Ct. 2783, 159 L.Ed.2d 690 (2004).

5. Furthermore, the inclusion of "**community standards**" exacerbates the constitutional problems for the statute in that it further widens the spectrum of protected speech that the statute affects. It requires the most restrictive and conservative state's community standards in order to avoid criminal liability. *Id* at 270. "Community standards" has been found to be unconstitutionally overbroad. *ACLU v. Reno*, 217 F.3d 162, 173 (3rd Cir. 2000).

6. The conduct that is offensive must "**predominately appeal to a prurient, shameful, or morbid interest; and is patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and taken as a whole, is without serious literary, artistic, political, or scientific value for the age of the child present.**".[15] The terms "**predominately**", "**shameful or morbid**" are vague terms subject to the interpretation of the reader and not subjective. What is suitable material or conduct for the age of the child present is too indistinct for the speaker to know what is prohibited. Again, some might consider a man in a dress reading to five years told to be unsuitable conduct.

7. "**Patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present**" is similarly vague and indistinct as standards in different parts of the state differ, as do what is

[15] Florida Statute 827.11(1)(a)1

suitable material for different aged children. [16] This is not a subjective standard subject to identification by the reader as to what is prohibited.

8. FS 827.11(1)(b) requires the Plaintiff to make a determination of the "**character and content of the adult performances**" they intent to produce and "**the age of the child**." This is impermissibly overbroad. Simply stated, what might be inappropriate for a child of five to see is not necessarily inappropriate for a minor of seventeen years.

9. "**Without serious literary, artistic political or scientific value for the age of the child present**." [17] This obligation cannot be met by a subjective standard. Seeing a performer in clothing not gender usual, dancing and singing, may be perfect for a two year old to see, but by whose standard is this decision to be made? The reader is only made to guess what conduct is prohibited.

d. The burden is on the Government to prove that the statute contains **the least restrictive alternatives** to accomplish the aims of the legislation. *Ashcroft v. ACLU,*542 U.S. at 665, 124 S.Ct. at 2791. "[T]he burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Id.* Citing *Reno v. ACLU*, 521 U.S. 844 at 874, 117S.Ct. at 2346. The wide swath with which Florida Statute 827.11 is painted captures all persons under the age of eighteen under the umbrella of the State's intent to protect minors without definition of how the age of the child applies to general knowledge of or belief that warrants further inspection or inquiry of whether the intended performance is prohibited.

[16] Florida Statute 827.11(1)(a)2
[17] Florida Statute 827.11(1)(a)3

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

32. An examination of similar legislation was conducted by the United States District Court for the Western District of Tennessee, Western Division in the recent case of *Friends of George's, Inc. v. State of Tennessee, et al,* 2:23-cv-02163-TLP-tmp and 2:23-cv-02176-TLP-tmp where a temporary restraining order was entered against a state law criminalizing the performance of "adult cabaret entertainment" in any location that it could be viewed by a person not an adult. The constitutional evaluation is instructive and relied upon herein.

33. The First Amendment generally prevents states from limiting speech and expressive conduct based on the ideas expressed. *Texas v. Johnson*, 491 U.S. 397, 406 (1989). So, content-based regulations are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). In *Reed v. Town of Gilbert*, the United States Supreme Court observed that there are two ways to determine whether a law is content-based regulation. 576 U.S. 155, 163-64 (2015). First, a law is content-based on its face by "defining regulated speech by particular subject matter." *Id.* Second a law may appear to be content-neutral on its face but courts consider it to be content-based if it was "adopted by the government 'because of disagreement with the message [the speech] conveys." *Id* at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

34. Content-based regulations must survive strict scrutiny to be constitutional. *Reed*, 576 U.S. at 171 (2015). This is an exceptionally high bar – it means that the law is presumptively unconstitutional. Id. The Court will only uphold the law if it is justified by a compelling

government interest, and it is narrowly drawn to serve that interest. *Id.* At 175 (Breyer.J., concurring)(observing that strict scrutiny in speech cases is "almost certain legal condemnation").

35. If the State is to argue that the acts prohibited by the new laws are already codified in the statutes and the new laws are content-neutral, the United States Supreme Court precedent under *Reed* requires the Court to consider the legislative history of the suspect legislation. See *Reed,* 576 U.S. at 164. It is apparent that the law was enacted because of a disagreement with a particular message or messenger. As stated herein, the Summary Analysis of the House and Senate bills cite as recent events the complaints filed by the DBPR against venues that hosted an event entitled, "A Drag Queen Christmas". It is unquestionable that the State's interest is to stop children from attending drag events at restaurants, performances, bars, and any other events. As such, the statute is view-point discriminatory because it targets drag queens.

36. The United States Supreme Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). A law is unconstitutionally vague if individuals of "common intelligence must necessarily guess at its meaning and differ as to its application[.]" *Conally v. Gen. Const. Co.*, 269 U.W. 385 (1926). A law is unconstitutionally overbroad if it sweeps in more speech than is necessary to satisfy the state's interest, regulating both protected and unprotected speech. See *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). The United States Supreme Court has described the overbreadth doctrine as a "strong medicine," that justifies invalidation of laws that can chill the effects of speech through self-censorship on the regulated, and can spark the harms of selective enforcement on the regulator. *Id.* At 613; *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)(noting that overbreadth and vagueness doctrines check the legislature's need to establish minimal guidelines to govern law enforcement to avoid a standardless sweep of enforcement).

37. The statute prohibits what is described as adult live performances, which would include female impersonators, by implication, anyplace in the state. Even though businesses are targeted in Section 509.261, the law also creates Florida Statute 827.11 to apply anywhere in the state, such as a public parade, or a person's back yard. As was pointed out by the United States District Court, Western District of Tennessee in *Friends of George's, Inc., v. State of Tennessee, et al*, 2:23-cv-02163-TLP-tmp, in granting its temporary restraining order on March 31, 2023, "What if a minor browsing the worldwide web from a public library views an adult live performance? Ultimately, the Statute's broad language clashes with the First Amendments' tight constraints."

38. While the evidence of lewd conduct at "A Drag Queen Christmas" was not substantiated by the undercover state agents who attended (see above), this has not stopped the State from enacting the proposed law with the intent of stopping drag performances anywhere in Florida, using the alleged lewd conduct of "A Drag Queen Christmas" as its motivation. The State's rationale would stop any performance of Victor/Victoria, La Cage Aux Folles, Milton Berle, I Love Lucy, or Some Like It Hot; all American performance staples where the characters perform in clothing usually worn by the opposite sex. Any suggestion that the outfit a person wears is necessarily harmful to a child strains credulity.

39. The application of the statute as written is so broad as to have a chilling effect on protected speech.

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

41. The amendments to Florida Statute Section 827.11, Florida Statutes, also open up any establishment – or even a private home – that hosts drag shows to police raids, so law enforcement can be certain that no children are present at the event.

42. The application of the statute as written is so broad as to have a chilling effect on protected speech.

43. Upon the announcement that the bill had been signed and the law was in effect, Hamburger Mary's advised its customers that children would not be permitted to attend any drag shows. Immediately, 20% of their bookings cancelled for the May 21, 2023 show and for future bookings. They simply cannot take the chance that their business or liquor licenses would be suspended for hosting a drag show where children attend. In addition, the criminal penalties of the law put individuals at risk of prosecution because of the content of their speech.

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

45. The amendments to Florida Statute Section 827.11, Florida Statutes, also opens up any establishment – or even a private home – that hosts drag shows to police raids, so law enforcement can be certain that no children are present at the event.

This Law Will Violate the Constitutional Rights of Plaintiff, HM FLORIDA-ORL, LLC

46. The uncertainty about what specific conduct this law prohibits, as well as the threat of police surveillance and criminal charges, is precisely what concerns the Plaintiff in this case.

47. Since its opening in 2008, Hamburger Mary's has hosted drag-centric performances, comedy sketches, bingo, trivia, and dancing. Traditionally, their performances have been open to all ages.

48. Hamburger Mary's is recognized by the LGBTQIA and the straight communities as supplying family friendly entertainment. At such times, as the entertainment is not suitable for children, children are not allowed to attend and the venue announces this in advance on their website and in their advertising.

49. The family drag shows have been cancelled. They cannot take place if the law is allowed to stand. Plaintiff will suffer a deprivation of its First Amendment rights.

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

51. This statute cannot survive strict scrutiny. While the government has a recognized interest in "protecting children from harmful materials," Florida law already protects children from obscenity and sexually explicit conduct and materials. Florida Statutes Chapter 847.

52. Legislators and the Governor have made it clear that this law was created to prevent children from drag shows. The government does not have a compelling interest in protecting children from drag shows.

53. Even if the State could identify a compelling interest, this law is far from narrowly tailored. It is broad enough to encompass even the most innocent drag performances, to reach into the

private homes of Florida citizens, and to determine on behalf of parents what is and is not appropriate entertainment for their children.

54. The broad, sweeping nature of the statute, and the vagueness regarding what conduct is and is not prohibited, will have a chilling effect on the First Amendment rights of the citizens of Florida.

VI. PRAYER FOR RELIEF

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

1. That the Defendants be permanently enjoined from enforcing the amendments to section 509.261, Florida Statutes;

2. That the Defendants be permanently enjoined from enforcing the amendments to 561.29, Florida Statutes;

3. That the Defendants be permanently enjoined from enforcing Section 827.11, Florida Statutes;

4. Award costs and expenses incurred in this action pursuant to Rule 54 of the Federal Rules of Civil Procedure.

5. Grant the Plaintiff such further relief as the Court may deem just and proper.

State of Florida

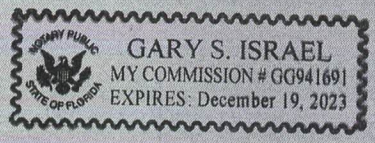
County of Orange

BEFORE ME, the undersigned authority, remotely appeared JOHN PAONESSA, who after being duly sworn does state that he is the authorized representative of PLAINTIFF, and that the foregoing is true and correct.

Notary Public, State of Florida

JOHN PAONESSA, authorized representative of HM FLORIDA-ORL, LLC

My Commission Expires:



Personally known

Respectfully submitted,

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CHAPTER 2023-94

Senate Bill No. 1438

An act relating to the protection of children; creating s. 255.70, F.S.; defining the term "governmental entity"; prohibiting a governmental entity from issuing a permit or otherwise authorizing a person to conduct a performance in violation of specified provisions; providing criminal penalties; amending s. 509.261, F.S.; authorizing the Division of Hotels and Restaurants of the Department of Business and Professional Regulation to fine, suspend, or revoke the license of any public lodging establishment or public food service establishment if the establishment admits a child to an adult live performance; specifying that a specified violation constitutes an immediate, serious danger to the public health, safety, or welfare; authorizing the division to issue specified fines for first, second, and subsequent violations of certain provisions; amending s. 561.29, F.S.; specifying that the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation is given full power and authority to revoke or suspend the license of any person issued under the Beverage Law when it is determined or found by the division upon sufficient cause appearing that he or she is maintaining a licensed premises that admits a child to an adult live performance; specifying that a specified violation constitutes an immediate serious danger to the public health, safety, or welfare; authorizing the division to issue specified fines for first, second, and subsequent violations of certain provisions; creating s. 827.11, F.S.; defining the terms "adult live performance" and "knowingly"; prohibiting the raising of specified arguments as a defense in a prosecution for certain violations; prohibiting a person from knowingly admitting a child to an adult live performance; providing criminal penalties; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 255.70, Florida Statutes, is created to read:

255.70 Public permitting.—

(1) As used in this section, the term "governmental entity" means any state, county, district, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency, person, partnership, or corporation or business entity acting on behalf of any public agency.

(2) A governmental entity may not issue a permit or otherwise authorize a person to conduct a performance in violation of s. 827.11.

(3) If a violation of s. 827.11 occurs for a lawfully issued permit or other authorization, the individual who was issued the permit or other

authorization commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 2. Subsection (10) is added to section 509.261, Florida Statutes, to read:

509.261 Revocation or suspension of licenses; fines; procedure.—

(10)(a) The division may fine, suspend, or revoke the license of any public lodging establishment or public food service establishment if the establishment admits a child to an adult live performance, in violation of s. 827.11.

(b) A violation of this subsection constitutes an immediate serious danger to the public health, safety, or welfare for the purposes of s. 120.60(6).

(c) Notwithstanding subsection (1), the division may issue a $5,000 fine for an establishment's first violation of this subsection.

(d) Notwithstanding subsection (1), the division may issue a $10,000 fine for an establishment's second or subsequent violation of this subsection.

Section 3. Paragraph (l) is added to subsection (1) of section 561.29, Florida Statutes, to read:

561.29 Revocation and suspension of license; power to subpoena.—

(1) The division is given full power and authority to revoke or suspend the license of any person holding a license under the Beverage Law, when it is determined or found by the division upon sufficient cause appearing of:

(l) Maintaining a licensed premises that admits a child to an adult live performance in violation of s. 827.11.

1. A violation of this paragraph constitutes an immediate, serious danger to the public health, safety, or welfare for the purposes of s. 120.60(6).

2. The division may issue a $5,000 fine for a first violation of this paragraph.

3. The division may issue a $10,000 fine for a second or subsequent violation of this paragraph.

Section 4. Section 827.11, Florida Statutes, is created to read:

827.11 Exposing children to an adult live performance.—

(1) As used in this section, the term:

(a) "Adult live performance" means any show, exhibition, or other presentation in front of a live audience which, in whole or in part, depicts or simulates nudity, sexual conduct, sexual excitement, or specific sexual

activities as those terms are defined in s. 847.001, lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts when it:

1. Predominantly appeals to a prurient, shameful, or morbid interest;

2. Is patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and

3. Taken as a whole, is without serious literary, artistic, political, or scientific value for the age of the child present.

(b) "Knowingly" means having general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

1. The character and content of any adult live performance described in this section which is reasonably susceptible of examination by the defendant; and

2. The age of the child.

(2) A person's ignorance of a child's age, a child's misrepresentation of his or her age, or a bona fide belief of a child's consent may not be raised as a defense in a prosecution for a violation of this section.

(3) A person may not knowingly admit a child to an adult live performance.

(4) A violation of subsection (3) constitutes a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 5. This act shall take effect upon becoming a law.

Approved by the Governor May 17, 2023.

Filed in Office Secretary of State May 17, 2023.

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-10872

RENE GARCIA,
JAVIER FERNANDEZ,
MACK BERNARD,
WILLIAM PROCTOR,

Plaintiffs-Appellees,

versus

EXECUTIVE DIRECTOR, FLORIDA COMMISSION ON ETHICS,
JOHN GRANT,
Commissioner, Florida Commission on Ethics,
GLENTON GILZEAN, JR.,
Chairman, Florida Commission on Ethics,
MICHELLE ANCHORS,
Commissioner, Florida Commission on Ethics,
in her official capacity,
WILLIAM P. CERVONE, et. al.,

Commissioner, Florida Commission on Ethics,
in his official capacity,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:22-cv-24156-BB

Before JILL PRYOR, GRANT and LUCK, Circuit Judges.

BY THE COURT:

Defendants-Appellants' motion to stay, in part, the district court's preliminary injunction is GRANTED. Neither the need to protect third parties, *see Georgia v. President of the United States*, 46 F.4th 1283, 1306 (11th Cir. 2022), nor the statewide as opposed to nationwide coverage of the injunction, *see Wolf v. Cook County, Illinois*, 140 S. Ct. 681 (2020), warrants its broad application to every "public officer," as that term is defined in article 2, section 8(f)(1) of the Florida Constitution, as amended.

The district court ruled that Rene Garcia and Javier Fernandez were the only public officials in the lawsuit who had standing to challenge the constitutionality of article 2, section 8(f)(2) of the Florida Constitution ("In-Office Restrictions"). Accordingly, we

stay that part of the preliminary injunction barring enforcement of the In-Office Restrictions against public officials other than Garcia and Fernandez.

No. 23A-___

In the
Supreme Court of the United States

MELANIE GRIFFIN,
SECRETARY OF THE FLORIDA DEPARTMENT OF
BUSINESS AND PROFESSIONAL REGULATION,
Applicant,

v.

HM FLORIDA-ORL, LLC,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that on this 19th day of October 2023, I caused a copy of the foregoing Application for a Stay Pending Appeal in the United States Court of Appeals for the Eleventh Circuit and Pending Further Proceedings in This Court to be served by e-mail on the counsel identified below, and that a hard copy will be served on each counsel by overnight delivery on the 19th day of October 2023. All parties required to be served have been served.

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