No. 23-12160

United States Court of Appeals for the Eleventh Circuit

HM FLORIDA-ORL, LLC,

Plaintiff-Appellee,

v.

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

En Banc Brief by Amicus Curiae Liberty Counsel in Support of Appellant and Seeking Reversal of the District Court

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Liberty Counsel hereby certifies that the following individuals and entities are known to have an interest in the outcome of this case:

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national civil liberties organization that provides education and legal defense on issues relating to religious liberty, sanctity of life, and the family. Liberty Counsel has been substantially involved in advocating for both the First Amendment and families. Liberty Counsel frequently represent clients in First Amendment litigation at the United States Supreme Court, in every federal circuit court of appeals, and in numerous federal district courts. Its attorneys have spoken and testified before Congress on matters relating to government infringement on First Amendment rights. Liberty Counsel routinely advises and represents parents alarmed by the increasing exposure of children to sexually suggestive material and performances—whether in public schools or in publicly funded spaces such as parks and libraries.

In addition to its general interest in protecting the innocence of children in a manner that does not erode the First Amendment's legitimate scope, Liberty Counsel has a uniquely specific interest in asking the Court to uphold Florida's Protection of Children Act. Last year, Liberty Counsel filed an amicus brief and sought to intervene on behalf of affected parents in the matter of *Naples Pride v. City of*

[1] No counsel for any party authored this brief in whole or in part, and no person other than Amicus or its counsel made a monetary contribution intended to fund this brief's preparation or submission.

Naples, et al., No. 2:25-cv-00291-JES-DNF, which litigation is still ongoing in the Middle District of Florida. Had enforcement of the Protection of Children Act not been universally enjoined, Section 255.70, Florida Statutes, created by the Act, would have necessarily resulted in dismissal of the litigation by which Naples Pride is challenging the Naples City Council's permit restrictions on its Pridefest requiring the event's drag performance be held indoors and limited to attendance by adults only. Naples Pride insists that the City's denial of its request to hold a drag show on an outdoor stage in a public park in eyeshot of a children's playground violates its First Amendment rights. This is the sort of harm the Florida legislature sought to address by the Protection of Children Act.

ARGUMENT

I. The district court erred in granting a preliminary injunction to Hamburger Mary's because the entity lacks standing to sue.

Typically, "[t]o establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014) (internal quotation marks omitted). However, where as here, there is no conventional "injury in fact," a plaintiff can establish standing "where he alleges '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 thereunder.'" *Driehaus* at 159 (quoting *Babbitt v. Farm Workers,* 442 U.S. 289, 298 (1979)). Hamburger Mary's lacks standing under either standard.

Senate Bill 1438 ("the Act"), the conglomeration of statutory enactments and amendments complained of by Hamburger Mary's and enjoined wholesale by the district court, is aimed at shielding children from what the Act terms "adult live performances." The Act, entitled by the Florida legislature the "Protection of Children Act," has several components, including the creation of Fla. Stat. § 827.11, which instituted criminal and civil penalties for private commercial establishments that admit children to adult live performances. The civil penalties include fines and possible suspension or revocation of the establishment's business and/or beverage license(s).

Hamburger Mary's alleged in its complaint that it is a Florida "restaurant and bar serving alcohol and presents drag show performances, comedy sketches, and dancing." Dkt.[2] 1, ¶ 4. The complaint further alleges that Hamburger Mary's "offers 'family friendly' drag shows announced on Sundays where children are invited to attend." Dkt. 1, ¶ 12. Critically for the standing analysis, Hamburger Mary's plainly states, "There is no lewd activity, sexually explicit shows, disorderly conduct, public

[2] Docket references are to the district court docket (Case No. 6:23-cv-00950-GAP-LHP). No record on appeal nor appendix containing the complaint has been filed in this Court.

exposure, obscene exhibition, or anything inappropriate for a child to see" at the shows to which children are admitted. *Id.*

Section 827.11, Florida Statutes reads (in pertinent part):

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.

Id.

Hamburger Mary's disavows that any of the shows at its establishment to which children are admitted fall within the ambit of the statutory definition of "adult live performance." Hamburger Mary's has not "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest," *Driehaus* at 161, and therefore lacks standing to have its abstract grievances redressed in court.

Unlike plaintiff Susan B. Anthony list in *Driehaus*, there is no basis on this record to conclude that Hamburger Mary's "intended future conduct is 'arguably... proscribed by [the] statute' they wish to challenge." *Driehaus* at 162 (quoting *Babbitt, supra,* at 298). On the contrary, Hamburger Mary's proclaims it only admits

children to performances that are age-appropriate. Hamburger Mary's does not attempt to mount an as-applied challenge to the statute because it cannot. It has never been prosecuted nor identified by the State for enforcement of this or any other child endangerment statute. Although a threat of future enforcement can be sufficient to establish standing, that threat must be substantial. The wholly speculative concern of enforcement professed by Hamburger Mary's here is a far cry from the substantial and imminent threat the law requires. *See, e.g., Driehaus* at 164 ("Finally, the threat of future enforcement of the false statement statute is substantial. Most obviously, there is a history of past enforcement here: SBA was the subject of a complaint in a recent election cycle. We have observed that past enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical.'") (internal citations omitted). The facts of this case are more akin to those of the dismissed appellees in *Younger v. Harris*, 401 U.S. 37 (1971), whom the Court found "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible." *Id.* at 41-42. "And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases." *Id.* at 42.

Hamburger Mary's asked the district court to declare the Act unconstitutional on its face based on overbreadth and vagueness, only. Its lone avowed basis for standing is its concern that the State may seek to enforce the Act against it, and that

concern caused it to voluntarily bar children from entry to drag performances on its premises. Hamburger Mary's alleges in its complaint that upon the Act being signed into law, it advised its customers that children would not be permitted to attend any drag performance at its establishment, and "[i]mmediately, 20% of their bookings cancelled for the May 21, 2023 show and for future bookings." Dkt. 1, ¶ 43. The district court found this voluntary limitation implemented by Hamburger Mary's sufficient to establish standing, but, even if drag exhibition in front of children were entitled to First Amendment protection (which it is not), "the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Younger* at 51.

Finally, we would be remiss not to point out that, "Facial challenges are fundamentally at odds with Article III." *Moody v. NetChoice, LLC*, 603 U.S. 707, 752 (2024). (Thomas, J., concurring). It is fundamental to our constitutional structure of government that courts have "no jurisdiction to pronounce any statute... irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Id.* at 753. The district court should have declined jurisdiction in this action, and exceeded the bounds of its authority by enjoining the Act on the record before it. [3]

[3] Facial challenges not only exceed the bounds of Article III authority but "also intrude[] upon powers reserved to the Legislative and Executive Branches and the

II. The district court erred in issuing a preliminary injunction because Hamburger Mary's is not likely to prevail on the merits of its claim.

A. The district court erred in subjecting the Act to strict scrutiny because the object of the law—obscenity in the presence of minors—is not entitled to First Amendment protection.

Hamburger Mary's contends that the Act is "view-point (*sic*) discriminatory because it targets drag queens" (dkt. 1, ¶ 35) and should therefore be subjected to strict scrutiny. The district court agreed. But, the Supreme Court "ha[s] long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment." *United States v. Williams*, 553 U.S. 285, 288 (2008) (citing *Roth v. United States,* 354 U.S. 476, 484–485 (1957)).

Generally, "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based[.]" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 166 (2015). "From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572

States. *Moody v. NetChoice, LLC*, 603 U.S. 707, 757 (2024) (Thomas, J., concurring).

(1942)). One such area is obscenity. *Id.* at 383 (citing *Miller v. California,* 413 U.S. 15 (1973)). "[T]hese areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content*…" *Id.* (emphasis in original). Moreover, "[w]hen the basis for [such] discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *Id.* at 388. The Court made clear that another permissible basis for content-based restrictions upon a "subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech…" *Id.* at 389 (collecting cases). The Court even expressly stated that, "A State could, for example, permit all obscene live performances except those involving minors." *Id.*

The law at issue in this case is aimed at shielding children from obscene live performances. Both because it is directed at obscenity and the secondary effects or harm caused to children when exposed to obscene live performances, strict scrutiny is neither necessary or appropriate. The district court erred in analyzing the likelihood of success of Hamburger Mary's claims under this standard.

B. The Protection of Children Act is not overbroad.

In addition to erroneously subjecting the Act to strict scrutiny and determining that the Act is not likely to survive that rigorous standard of review, the district court erred in finding that Hamburger Mary's is likely to prevail on its facial attack on the Act. To prevail on a facial challenge to a statute, "a plaintiff must ordinarily 'establish that no set of circumstances exists under which the Act would be valid.'" *Moody v. NetChoice, LLC*, 603 U.S. 707, 754-55 (2024) (Thomas, J., concurring) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). "In the First Amendment context, we have sometimes applied an even looser standard, called the overbreadth doctrine, which requires a plaintiff to establish only that a statute prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." *Id.* (quoting *Williams* at 292 (2008)) (cleaned up).

As explained by the Supreme Court in *Net Choice* in vacating this Court's Opinion upholding a preliminary injunction enjoining enforcement of another Florida statute,[4] this Court's task when faced with a facial challenge to a state statute on First Amendment grounds is to determine:

> …whether a law's unconstitutional applications are substantial compared to its constitutional ones. To make that judgment, a court must determine a law's full set of applications, evaluate which are constitutional and which are not, and compare the one to the other.

[4] The Supreme Court's decision also vacated a Fifth Circuit Opinion staying a district court injunction enjoining a similar Texas statute.

Id. at 718. Importantly, "[i]In determining whether a statute's overbreadth is substantial, [courts are to] consider a statute's application to real-world conduct, not fanciful hypotheticals." *United States v. Stevens*, 559 U.S. 460, 485 (2010) (Alito, J., dissenting) (citing cases). The Supreme Court has "repeatedly emphasized that an overbreadth claimant bears the burden of demonstrating, "from the text of [the law] *and from actual fact,*" that substantial overbreadth exists." *Id.* (quoting *Virginia v. Hicks,* 539 U.S. 113, 122 (2003)) (emphasis in original).

Here, there are no real-world applications of the Act for the Court to assess because the district court enjoined the Act almost immediately upon its passage. Not only that, the district court made no effort to undertake any meaningful inquiry into the sweep of the Act, lawful or otherwise. The Supreme Court recently prescribed a detailed process courts are to undertake to make such determinations:

> The first step in the proper facial analysis is to assess the state laws' scope. What activities, by what actors, do the laws prohibit or otherwise regulate?...The next order of business is to decide which of the laws' applications violate the First Amendment, and to measure them against the rest. For the content-moderation provisions, that means asking, as to every covered platform or function, whether there is an intrusion on protected editorial discretion.

NetChoice at 724-25. The district court did none of this. Insofar as the district court failed to perform the requisite analysis to determine if the Act is, in fact, overbroad, its determination that Hamburger Mary's is likely to prevail on is facial attack is unsound as a matter of law.

This Court should do what the Supreme Court did in *Net Choice*—vacate the preliminary injunction and remand the matter to the district court to perform the detailed analysis required of it. *Id.* at 726 ("[W]e vacate the decisions below and remand these cases. That will enable the lower courts to consider the scope of the laws' applications, and weigh the unconstitutional as against the constitutional ones."). The district court here did precisely what the Supreme Court warned about—"short circuited the democratic process by preventing a duly enacted law from being implemented in a constitutional way." *Id.* at 723 (cleaned up). The court should have instead acknowledged that "facial challenges [are] hard to win," and denied the preliminary injunction. *Id.*

C. The Protection of Children Act is not unconstitutionally vague.

The district court largely rested its conclusion that Hamburger Mary's is likely to succeed on the merits of its overall suit on its vagueness claim. The court took issue with two aspects of the law in particular—the absence of an age-by-age catalog of what activity transgresses the law, and use of the term "lewd." We deal with each in turn.

1. The Act incorporates a commonly accepted "Miller for minors" test.

Initially, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.* (quoting *Ward v. Rock Against*

Racism, 491 U.S. 781, 794 (1989)). *Miller v. California*, 413 U.S. 15 (1973) is the authoritative case used by legislatures in crafting obscenity regulations that pass constitutional muster, and by courts that review such regulations. The Florida legislature tracked the language of *Miller* in drafting the Protection of Children Act, thus ensuring its constitutionality.

Miller instructs:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,..; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value…

Id. at 23-25 (internal citations omitted). The Court went on to state:

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra: (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated[;] (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Id. at 25. The legislature was clearly mindful of the parameters set forth by *Miller*, and, as such, the Act is within constitutional bounds as it pertains to regulating obscenity.

The legislature endeavored, to its credit, to make the Act even more precise by inserting the words "for the age of the child present" as a caveat to the various aspects of the *Miller* test. Fla. Stat. 827.11(1)(a-2) and (a-3). The district court took issue with this. But, differentiating between material appropriate for adults versus material appropriate for minors is nothing new, and such a distinction has long been upheld by the Supreme Court. *See Ginsberg v. State of N.Y.*, 390 U.S. 629 (1968). State laws invoking a similar "Miller for minors" test, as it is oft referred to, remain on the books. *See, e.g.*, Fla. Stat. § 847.001(7); Ala. Code § 13A-12-200.1(11); Ga. Code Ann. § 20-2-324.6(a). Tailoring the regulation to the age of the child present as opposed to drawing an arbitrary line at age 17 makes the law more precise, which is the opposite of vague.

Determining the appropriateness of an adult live performance for the age of the child present may require some thought and discretion on the part of Hamburger Mary's and other establishments hosting adult live performances, but "[c]lose cases can be imagined under virtually any statute." *Williams* at 306. "The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Id.* "The result of the Miller cases [] as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary

community standards' would reach in a given case." *Hamling v. United States*, 418 U.S. 87, 105 (1974). The Act now being scrutinized specifies that one must "***knowingly*** admit a child to an adult live performance" to violate the Act. Fla. Stat. § 827.11(3) (emphasis added). This leaves room for a jury of one's peers to adjudicate one charged with violation of the Act not guilty if the prosecution does not meet its burden of proof that the individual or entity granting a child admission to the performance "ha[d] 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." Fla. Stat. § 827.11(1)(b). Even if such exercise were imprecise, "'many decisions have recognized that these terms of obscenity statutes are not precise." *Hamling* at 111 (cleaned up). The Supreme Court "has consistently held that lack of precision is not itself offensive to the requirements of due process." *Id.*

2. The term 'lewd' is defined and its use widely accepted in Florida law.

Apart from the Miller for minors test, the district court attributed its assessment that the Act is unconstitutionally vague to the inclusion of the terms "lewd conduct" and "lewd exposure of prosthetic or imitation genitals or breasts."

679 F. Supp. 3d at 1344. The latter phrase appears quite detailed,[5] so the court's concern must be with the term "lewd."

The Supreme Court has indeed "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." *Williams* at 306. But "lewd," as used in the Act, has ample narrowing context and a settled legal meaning. Use of the term also abounds throughout Florida (and other) state statutes. If "lewd" is unconstitutionally vague, much of the law needs to be rewritten, and, in all likelihood, many convictions overturned.

Indeed, a Florida statute was previously challenged on vagueness grounds for use of the term "lewd," and the Florida Supreme Court denied the challenge and crystallized the definition of the term. That definition still stands and informs the legislature in its drafting, inclusive of the Act. That authoritative and binding precedent also necessarily informs this Court with respect to the vagueness challenge now before it. The Florida Supreme Court explained:

> 'Lewd' and 'lascivious' are words in common use, and the definitions indicate with reasonable certainty the character of acts and conduct

[5] The phrase is also rooted in caselaw. As the Supreme Court recognized, "[t]he term 'lewd exhibition of the genitals' is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation." *New York v. Ferber*, 458 U.S. 747, 765 (1982) (internal citation omitted).

> which the Legislature intended to prohibit and punish, so that a person of ordinary understanding may know what conduct on his part is condemned. Lewdness may be defined as the unlawful indulgence of lust, signifying that form of immorality which has a relation to sexual impurity. It is generally used to indicate gross indecency with respect to the sexual relations…'Lewd', 'lascivious', and 'indecent' are synonyms and connote wicked, lustful, unchaste, licentious, or sensual design on the part of the perpetrator.

Chesebrough v. State, 255 So. 2d 675, 677-78 (Fla. 1971) (internal citations omitted). An even fuller analysis with ample citations to various authorities is found in the Florida Supreme Court's opinion. The United States Supreme Court has also upheld statutes using the term "lewd" against vagueness challenges. *See Hamling* at 112; *see also F.C.C. v. Pacifica Found.*, 438 U.S. 726, 740 (1978).

Even if the term "lewd" is not mathematically precise, "[i]f the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike…" *Miller* at 27-28. This cannot be the outcome justice or the Constitution requires.

3. Any questions of statutory interpretation should have been certified to the Florida Supreme Court.

If any doubt remained as to the meaning of "lewd" or any other statutory term, the district court had an obligation to certify the question to the Florida Supreme Court. Just as it did in *Dream Defs. v. Governor of Fla.*, 119 F.4th 872 (11th Cir.

2024), this Court should rely upon the rightful authority of the highest state court to make the determination whether the Act is in fact vague (or overbroad), as alleged.

This Court is in good company recognizing the authority of the State Supreme Court in interpreting state statutes. The United States Supreme Court has affirmed this precept time and time again. *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997) (citing *Reetz v. Bozanich,* 397 U.S. 82, 86–87 (1970)) ("Federal courts lack competence to rule definitively on the meaning of state legislation…").

III. Because obscenity is not afforded First Amendment protection, the district court erred in its irreparable injury analysis.

The district court found that the irreparable harm prong of the preliminary injunction analysis was met on the basis of constitutional injury alone. That is, the court rightly recognized that, "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). But, the court erroneously found that such injury exists under the facts presented.

As described in Section II. A., *supra*, the court was wrong in its assessment of the constitutional protection afforded to sexually explicit drag performances, and thus the constitutional harm when such activity is enjoined. Put simply, there is none.

The district court added:

> 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.

HM Florida-ORL, LLC v. Griffin, 679 F. Supp. 3d 1332, 1344 (M.D. Fla. 2023). "[T]he existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Younger* at 51. In response to the professed self-censorship undertaken by Hamburger Mary's, this Court should echo the sentiment of the United States Supreme Court that, "We do not see the harsh hand of censorship of ideas—good or bad, sound or unsound—and 'repression' of political liberty lurking in every state regulation of commercial exploitation of human interest in sex. *Miller* at 35-36 (1973).

IV. The public interest is served by shielding children from lewd and obscene conduct.

"It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Ferber* at 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). Beyond compelling, "the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses'

which might prevent their 'growth into free and independent well-developed men and citizens.'" *Ginsberg* at 640-41. Particularly in this era rife with gender dysphoria, willful child mutilation, grooming, and child sex trafficking, it is perhaps more important now than ever that children be protected from exposure to obscene live performances involving simulated sex acts and promoting gender confusion by displaying prosthetic sexual organs.

The district court expressed concern over the limitation of this Act on the ability of parents to choose to expose children to adult content. The moral turpitude of some parents cannot serve to deter the State from addressing these important concerns in guarding the health, safety, and morals of our nation's future leaders. The concerns and protections of the State and parents should be—and assumedly in most cases are—aligned in this regard and serve to bolster one another's interests in protecting children from exposure to inappropriate sexual content.

V. The scope of the preliminary injunction, if allowed to stand, must be limited to enforcement against Hamburger Mary's only.

"[T]he only remedy a plaintiff should leave a federal court with is one limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Net Choice* at 755 (Thomas, J., concurring) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (internal quotation marks omitted). A sweeping injunction against enforcement of a duly enacted state law in all circumstances, even against

nonparties, is beyond the authority of lower federal courts. *Trump v. CASA, Inc.*, 606 U.S. 831, 841 (2025) ("A universal injunction can be justified only as an exercise of equitable authority, yet Congress has granted federal courts no such power.).

The Supreme Court has observed that "the remedy sought by a facial challenge is akin to a universal injunction—a practice that is itself 'inconsistent with longstanding limits on equitable relief and the power of Article III courts.'" *Id.* at 756 (Thomas, J., concurring) (quoting *Trump v. Hawaii*, 585 U.S. 667, 713 (2018) (Thomas, J., concurring)). "Procedures for testing the constitutionality of a statute 'on its face'…and for then enjoining all action to enforce the statute…are fundamentally at odds with the function of the federal courts in our constitutional plan.". *Younger* at 52. "Federal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional." *Id.* at 46.

The district court enjoining enforcement of the Act on the basis that Hamburger Mary's barred children from drag shows at its establishment without any actual threat of enforcement by the State was wholly improper and without legal support or precedent. "Just as the incidental 'chilling effect' of [state] statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the important and necessary task

of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution." *Younger* at 52.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges this Court to reverse the district court and vacate the preliminary injunction or, alternatively, limit the scope of the preliminary injunction to enjoin enforcement of the Act as against Hamburger Mary's only.

Dated: February 25, 2025

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is produced in Times New Roman, 14-point font and contains 4,993 words exclusive of those items not required to be included in the word count.

s/Kristina S. Heuser
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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2026, I caused a true and correct copy of the foregoing to be filed electronically with this Court. Service will be effectuated on all counsel of record via the Court's ECF/electronic notification system.

/s/ Kristina S. Heuser
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