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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

VISUAL ARTS COLLECTIVE, LLC, *et al.* Plaintiffs, v. COLONEL RALPH POWELL, Director of the Idaho State Police, *et al.* Defendants.	Case No. **BRIEF IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION**

The State of Idaho is using its alcohol laws to shut down significant, award-winning artists and art venues. The Visual Arts Collective, lead plaintiff in this case, is a mixed-use fine art gallery in Garden City. In March this year, the gallery held a burlesque performance featuring celebrated local artist and Idaho Commission on the Arts grantee Anne McDonald. *See* Frankie Barnhill, "How Anne McDonald Makes Art Accessible With Boise Burlesque Show," *Boise State Public Radio*, June 6, 2014, https://perma.cc/7Y9J-XSZY. Despite McDonald's extensive

professional training in acting, acrobatics, dance, and burlesque (*see* Declar. McDonald ¶¶ 5–17), despite the widely-accepted cultural significance of burlesque and its inherent political messages (*see id.* ¶¶ 25–26; Declar. Hanna ¶¶ 24–30), and despite the Visual Arts Collective's role as Idaho's primary alternative cultural space for respected and emerging artists and performers (*see* Declar. Bubb ¶¶ 3–11), the defendants ("State") served the Visual Arts Collective with a violation notice and threatened to revoke the VAC's license to serve alcohol. Because of the violation, the VAC was compelled to agree to a fine and a license suspension, and now the administrative proceeding is over.

But the Idaho statute, I.C. § 23-614, that the State cited the Visual Arts Collective for still remains. It restricts costuming, touching, and movement in any performance at a venue licensed to serve alcohol in Idaho, and bans simulated sex scenes altogether. It even restricts the clothing that patrons can wear. And the State has made clear to the VAC that a second violation will be punished even more severely than the first. (Declar. Stimpert ¶ 27).

The plaintiffs bring this urgent motion for a preliminary injunction because their performances planned for this fall will violate I.C. § 23-614. Most immediately, on October 13, 2016, the Alley Repertory Theater will open its fall season at the VAC with a production of the play The Totalitarians, a dark comedy that takes aim at our current broken political system. The show is critically acclaimed, *see, e.g.*, Missy Frederick, "Theater Review: 'The Totalitarians,'" *Washingtonian*, June 10, 2014, https://perma.cc/KWH9-DRC2, but will violate the statute: one actor will touch another on the buttocks and genitals as part of a simulated hernia exam, and there will be simulated sex scenes. (Declar. Main ¶ 21). McDonald and the VAC have other performances already scheduled that will violate the statute as well. Accordingly, they ask this Court to enjoin this sweepingly overbroad and vague law.

FACTUAL BACKGROUND

Plaintiff Visual Arts Collective (VAC) is a mixed-use contemporary fine art gallery in Garden City, Idaho, committed to presenting exhibitions and events for artists working in visual and performance art, film, music and theater. (Verified Complt. ¶ 5; Stimpert Declar. ¶¶ 2, 5). The Visual Arts Collective is dedicated to providing the community with opportunities to explore various artistic disciplines, and has been the recipient of grants from prestigious art foundations and sponsors, including the Robert Rauschenberg Foundation. (Verified Complt. ¶1 6; Stimpert Declar. ¶¶ 6-12).

The VAC also has a liquor license issued by the Idaho State Police, Bureau of Alcohol Beverage Control. This allows it to sell alcoholic beverages on its premises during its events. The Visual Arts Collective is not a bar or nightclub, though, and does not sell alcohol except during gallery viewing hours, primarily on Saturday afternoons, and artistic performances. (Verified Complt. ¶21; Stimpert Declar. ¶¶ 13-15). Maintaining a liquor license is essential to the VAC's mission to provide subsidized space for artists and nonprofits to produce work. Revenues from the sale of liquor provide ninety percent of the VAC's revenue to operate the space. *Id*.

Plaintiff Anne McDonald is a Boise performance artist, producer, theater director, and instructor. She is trained as a classical actor, obtaining her B.A. from Boise State University, with a degree in theatre arts. (Verified Complt. ¶ 25; Declar. McDonald ¶¶ 5, 8). Ms. McDonald performs her neo-burlesque shows regularly at the Visual Arts Collective, which provides a critical venue for her art. (Verified Complt. ¶ 7; Declar. McDonald ¶¶ 2, 18-21). Burlesque is an old art form, which emerged in London in the 1830's, presenting an absurd or comically exaggerated imitation, usually of a literary or dramatic work. (Verified Complt. ¶ 34). Burlesque's principal cultural legacy is the fact that it forever changed the role of the woman on

the American stage and called attention to the entire question of the "place" of woman in American society. *Id*. Ms. McDonald's burlesque acts deal openly with gender issues, sexuality, gay rights and politics. (Verified Complt. ¶ 27).

Plaintiff Alley Repertory Theater is an Idaho nonprofit. The Theater company performs and rehearses its regular theater season at the Visual Arts Collective. (Verified Complt. ¶ 9, 30. Declar. Alley Rep. ¶ 9). The Theater strives to be a preeminent theater collective in the Treasure Valley. It provides professional opportunities to local and national performance-based artists and presents theater productions, discussion forums, and theater development. *Id*. ¶ 6-8.

On the evening of Friday March 18, 2016, undercover Idaho State Police officers, Defendants Szeles and West, attended a series of neo-burlesque performances produced by Ms. McDonald at the Visual Arts Collective, featuring herself and other local and regional artists. (Verified Complt. ¶ 32- 33). Alcohol drinks were sold during the show, as authorized by the VAC's liquor license. *Id*. ¶ 37. As part of the performances, some of the artists wore pasties and thongs, and therefore revealed portions of their breasts below the areola (while the areola remained concealed) and the cleft of their buttocks. No part of the evening's performance was obscene, as defined by Idaho statute under chapter 41, title 18, or federal law. *Id*. ¶ 40.

Based upon the undercover officers' observations, on May 5, 2016, the Bureau of ABC served the Visual Arts Collective with an administrative complaint, seeking the most severe sanction: revocation of the Visual Arts Collective's alcohol license. *Id*. ¶ 41. The administrative complaint alleges that on the evening of March 18, 2016, the Visual Arts Collective did nothing to prevent the exposure, to viewing by others, of the portion of some of the female performers' breasts below the top of the areola, or the cleft of their buttocks, in violation of Idaho Code § 23-614(1)(a). *Id*. A conviction for a violation of any provision of I.C. § 23-614 is a criminal

misdemeanor punishable by a minimum sentence of thirty days in jail or a fine up to $300.00 or both. *Id*. ¶43. Idaho Code § 23-614 also authorizes the State to punish fine art galleries and performance venues of dance, theater, and music for non-obscene expression by suspending or revoking their liquor license, or by imposing a fine, or both. *Id*.

In order to continue its mission as a fine art gallery and performance venue, the Visual Arts Collective negotiated a settlement with the State, agreeing to a fine and license suspension to resolve the administrative complaint against it. *Id*. ¶ 44. The VAC did so because it cannot exist without a license to serve alcohol, as this revenue allows it to operate this important community art venue. The administrative action has been resolved and is no longer pending. *Id*.

The enforcement of I.C. § 23-614 significantly harms all three plaintiffs and leaves them without alternative avenues for expression of the ideas and messages the statute suppresses. (Verified Complt. ¶¶ 48, 50, 51, 53, 56 and 60). Plaintiffs have the right to conduct non-obscene artistic performances on the premises of the VAC free of interference from State officials, even though some portion of the performances or the clothing of the performers or patrons may fall within the proscriptions of I.C. § 23-614. *Id*. ¶47.

Specifically, the Visual Arts Collective is harmed because the statute severely limits its ability to function as an artistic performance venue. *Id*. ¶ 51. It is now forced to censor its own performances. It is forced to insist that all artists who perform at its venue comply with the severe artistic restrictions I.C. § 23-614 imposes upon them. It must limit their artistic expression, including their body movement and costumes, so as not to jeopardize the existence of the venue, despite the fact that the vast array of prohibited acts or expressions under I.C. § 23-614 are commonly viewed in theaters, during ballets, and at concerts, throughout many artistic venues across Idaho. *Id*.

The Plaintiffs are also confounded by the vagueness of Idaho Code § 23-614, and its sweeping scope, which on its face prohibits a ballerina from being hoisted by her buttocks, or a guitar player from gyrating his or her hips. Likewise, patrons who enter wearing dresses or tops with "keyhole" cutouts, tops with deep cleavage, or pants worn low on the waist also run afoul of the statute and threaten the VAC with criminal sanction. *Id*. ¶ 52.

As a frequent performer at the Visual Arts Collective, Anne McDonald's protected First Amendment freedom of speech is also severely curtailed by the Bureau of ABC's enforcement of I.C. § 23-614 against the Visual Arts Collective. *Id*. ¶ 53.She can no longer perform at the Visual Arts Collective in her creative costumes without significant alteration, and must restrict her body movements and other content of her performances. *Id*. Because of the speech limitations imposed by this statute, her burlesque performance and that of other performers must be self-censored, and dramatically altered, as burlesque necessarily entails the expression that Idaho Code § 23-614 prohibits. (Hanna Declar. ¶ 25). This has dramatically chilled her artistic expression in violation of her First Amendment rights guaranteed under the Constitution.

The ABC's enforcement of Idaho Code § 23-614 has also severely limited Alley Repertory Theater's ability to function as a theater in its home at the Visual Arts Collective. (Verified Complt.¶ 56). During the Alley Repertory Theater's 2016–2017 season at the Visual Arts Collective, the Theater will perform a series of three contemporary plays. *Id*. ¶ 59. The first critically acclaimed play is The Totalitarians, scheduled to begin its run at the Visual Arts Collective on October 13, 2016. Performed as scripted, this acclaimed theatre production will violate Idaho Code § 23-614. (Main Declar. ¶ 21). Under I.C. § 23-614, the Alley Repertory Theater will be forced to censor its performances.

As a constitutionally infirm and overbroad statute, I.C. § 23-614 also chills the First Amendment rights of other artistic venues and artists in District of Idaho not before the Court. (Verified Complt. ¶ 63).

STANDARD FOR DECISION

The standards for preliminary injunction motions involving First Amendment claims are different than normal. The conventional standard requires the Court to separately analyze four factors before issuing a preliminary injunction: whether (1) the movants are likely to succeed on the merits and (2) likely to suffer irreparable harm, (3) whether the balance of equities tips in the movants' favor, and (4) whether the injunction is in the public interest. *Winter v. Natural Resources Council*, 555 U.S. 7, 20 (2008). In freedom of speech cases, a colorable First Amendment claim is irreparable injury sufficient for a preliminary injunction, and there is significant public interest in upholding First Amendment principles. *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014). Thus, in a *First Amendment* case, if there are even serious questions going to the merits, a preliminary injunction is appropriate if the balance of equities tips sharply in the plaintiffs' favor. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011).

The burden also shifts. Although ordinarily the parties moving for a preliminary injunction bear the burden of showing likely success on the merits, in cases where the plaintiffs make a colorable First Amendment claim, the burden shifts to the State to justify its speech restrictions. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011). First Amendment claims must be given "special solicitude" in general, *Lovell v. Poway Unified School Dist.*, 90 F.3d 367, 370 (9th Cir. 1996), and criminal laws regulating speech, like the misdemeanor statute at issue here, must be scrutinized with particular care. *City of Houston v. Hill*, 482 U.S. 451, 459 (1987).

ARGUMENT

I. LIKELIHOOD OF SUCCESS

A. Freedom of Speech

1. The Statute Restricts Protected Expression.

"In evaluating the free speech rights of adults, we have made it perfectly clear that [s]exual expression which is indecent but not obscene is protected by the First Amendment." *Reno v. ACLU*, 521 U.S. 844, 874 (1997). Even fully nude dancing in a strip club is protected expression under the First Amendment. *See Nite Moves Entertainment, Inc. v. City of Boise*, 153 F. Supp. 2d 1198, 1204 (D. Idaho 2001) (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–566 (1991) (plurality opinion) and *Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981)). Though strip club nude dancing may be in the "outer ambit" of the First Amendment's protection, *Nite Moves Entertainment*, 153 F. Supp. 2d at 1204, a wide range of nudity used in other expressive contexts enjoys greater protection. "[W]e would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments," the Supreme Court has taken pains to point out, "were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater." *California v. LaRue*, 409 U.S. 109, 118 (1972).

A few years later, the Court clarified that it is only "the customary 'barroom' type of nude dancing" that barely enjoys First Amendment protection. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). Nude expression in the "theater" and the "opera house," or in ballet, to the contrary, has "unquestionable artistic and socially redeeming significance." *Id.*; *see also NEA v. Finley*, 524 U.S. 569, 603 (1998) (holding that "art is entitled to full protection" under the First Amendment). The Ninth Circuit confirmed this distinction, noting that the conduct in *LaRue*

"spoke more to a 'gross sexuality than of communication.'" *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1019 (9th Cir. 2004) (quoting *LaRue*, 409 U.S. at 118).

The speech prohibited by Idaho Code § 23-614 has caused the VAC to censor, and to insist that performers self-censor, their artistic performances. (Stimpert Declar. ¶¶ 28, 33). Many of Alley Repertory Theater's performances at the VAC are also criminalized by this statute, which restricts what can be performed, what actors can wear and what artistic messages the plays can express. (Main Declar. ¶ 11, 15). Idaho Code § 23-614 directly chills the artistic expression of performer Anne McDonald as well. Burlesque often includes suggestive performances that are integral to the art form. Idaho's law takes aim at these core aspects of the art. (McDonald Declar. ¶¶ 28, 30). Despite the fact that "[b]urlesque is an art with serious artistic value", I.C. § 23-614 flat out prohibits the American theater art of burlesque. (Hanna Decl. ¶¶ 22, 24, 25).

2. The Statute is Overinclusive.

The conventional First Amendment analysis of statutes like I.C. § 23-614 applies a four part test from *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The restriction must (1) be within the constitutional power of the government to enact, (2) serve a substantial government interest, (3) not be related to the suppression of free expression, and (4) not be any greater than necessary to serve the substantial government interest. *Nite Moves Entertainment*, 153 F. Supp. 2d at 1205. The State cannot meet the second, third, or fourth requirement here. However, the Court need only consider the fourth one, because it is obvious that I.C. § 23-614(1)(a) through (d) are substantially broader than necessary to achieve any important government interest that the State might advance.

Once upon a time, the U.S. Supreme Court upheld prohibitions like I.C. § 23-614 based on "the wide latitude" that the Twenty-first Amendment grants States in regulating alcohol.

LaRue, 409 U.S. at 116. But a quarter century later, the Court backtracked. It expressly overruled *LaRue* and held that "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996). Several years later, the Ninth Circuit reviewed a challenge to liquor laws with language nearly identical to restrictions at issue in *LaRue* and in I.C. § 23-614. *Compare LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1159 (9th Cir. 2000) (quoting challenged regulation) *with LaRue*, 409 U.S. at 111–112 (quoting challenged regulation) *and* I.C. § 23-614(1). The Ninth Circuit concluded that *44 Liquormart* was very clear: "the Twenty-first Amendment does not authorize the states to enact liquor regulations that would otherwise be prevented by the First Amendment in other contexts." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1151 (9th Cir. 2000). The court went on to conclude decisively that, at least by 1997, "no reasonable official could have believed that [a liquor law] could constitutionally be employed to impede LSO's right to display non-obscene art on the premises of an ABC licensee." *Id.* at 1160.

In other words, the courts give no special deference to liquor regulations after *44 Liquormart* and *LSO*. *See LSO*, 205 F.3d at 1159; *see also Giovani Carandola, Ltd., v. Bason*, 303 F.3d 507, 513 n.2 (4th Cir. 2002) ("[T]he fact that the challenged restrictions regulate liquor licenses does not affect the level of scrutiny."). The Ninth Circuit put it plainly: "liquor regulations [can] not be used to impose restrictions on speech that would otherwise be prohibited under the First Amendment." *LSO*, 205 F.3d at 1159. The question, therefore, is whether the State of Idaho can prohibit things like the exposure of "the female breast below the top of the areola" or "acts which simulate sexual intercourse" on private property open to the public. I.C. § 23-614(1)(a), (d). It cannot.

(a) Costuming and patron dress restrictions

As for the restrictions on stage costumes and patron's clothing at I.C. § 23-614(1)(a), this Court effectively decided this issue 15 years ago. In *Nite Moves Entertainment*, the Court struck down the City of Boise's nudity ordinance on First Amendment grounds, holding that it failed the requirement that the restriction be "narrowly tailored to correct the social ill at which it is targeted." *Nite Moves Entertainment*, 153 F. Supp. 2d at 1209 (internal quotation marks omitted). A restriction cannot be "narrowly tailored," the court said, "where a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals." *Id.* (internal quotation marks and ellipsis omitted). The City of Boise's restriction was very similar to the current dress restriction at I.C. § 23-614(1)(a). It banned:

> the showing, in a public place, of the human male or female *genitals, pubic area, anus or buttocks or cleft of the buttocks with less than a fully opaque covering, the showing of the female breast with less than fully opaque covering of any part of the breast below the top of the areola*, or the showing of covered male genitals in a discernibly turgid state.

Id. at 1201 (emphasis added). This "burden[ed] substantially more speech than is necessary to further the government's legitimate interests," this Court concluded, and therefore was unconstitutional. *Id.* at 1210. Both the City of Boise ordinance and I.C. § 23-614(1)(a) require much more than "pasties and a G-string." *Id.* Wherever the constitutional line may be, I.C. § 23-614(1)(a) falls below it for the same reasons that the Boise ordinance did. *See Nites Moves Entertainment*, 153 F. Supp. 2d at 1210. Because the State actually enforces I.C. § 23-614(1)(a) beyond the adult theater context, *see* Complaint at ¶ 41, it is even more clearly unconstitutional than was the Boise ordinance. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 585 n.2 (1991)

(Souter, J., concurring*) (distinguishing the result in *Barnes* from nudity restrictions applied "somewhere other than an 'adult' theater," where "it would be difficult to see" how such restrictions would further any important government interest); *see also J.L. Spoons, Inc. v. Dragani*, 538 F.3d 379, 385 (6th Cir. 2008) (holding that a nudity ban that "covered expressive conduct with literary and artistic value that is not generally associated with prostitution, sexual assault, or other crimes" would be overbroad).

(b) Touch restrictions

The sweep of the touch restrictions in I.C. § 23-614(1)(b) is also far too expansive. All touching of the breast and buttocks is prohibited, without exception. Alley Repertory Theater's hernia exam scene in The Totalitarians (Main Declar. ¶ 21) is banned entirely, for example. A ballerina hoisting another in the air is forbidden. The restriction applies to sexual and nonsexual touching alike, and there is no exemption for legitimate works of art. *See J.L. Spoons*, 538 F.3d at 384 (upholding touching restriction because it "applies only if the purpose of the contact is to arouse sexually or to gratify either person" and "[b]y its own terms, . . . does not apply to contact done in furtherance of legitimate works of art for the purpose of conveying artistic meaning"). The Fourth Circuit identified this problem succinctly when it considered a nearly identical statute. *See Legend Night Club v. Miller*, 637 F.3d 291, 295 (4th Cir. 2011) (quoting challenged statute). "These restrictions have the same prohibitory effect on much non-erotic dance—such as a ballet in which one dancer touches another's buttock during a lift—and all nudity or simulated

* Justice Souter's concurrence in *Barnes* is the controlling opinion. *See Giovani Carandola*, 303 F.3d at 519 & n.5; *Le v. City of Citrus Heights*, No. CIV.S-98-2305WBS/DAD, 1999 WL 420158, at *8 (E.D. Cal. June 15, 1999) ("Appellate courts that have reached the issue agree that Justice Souter's opinion, as the concurrence based on the narrowest ground, states the holding of *Barnes*."); *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)).

nudity, however brief, in productions with clear artistic merit—such as the Pulitzer Prize winning play, *Wit*." *Id.* at 299–300 (internal quotation marks omitted). Thus, the *Legend* court struck down a liquor regulation virtually identical to I.C. § 23-614, because "a statute prohibiting such a broad swath of expressive conduct cannot pass constitutional muster."

The Ninth Circuit reached the same conclusion. In *Dream Palace*, the Circuit struck down a restriction that banned "fondling or other erotic touching of the human genitals, pubic region, buttocks, anus or female breast," holding that the ban swept too broadly. 384 F.3d at 1017. The county in that case could (and did) take other reasonable steps "to guard against the kind of 'gross sexual conduct' or 'bacchanalian revelries' that were the target of the regulation in *LaRue*," the court held, without restricting "the *particular* movements and gestures a dancer may or may not make during the course of a performance." *Id.* at 1019. The State of Idaho can (and does), too. Accordingly, I.C. § 23-614's touching ban is unconstitutional for the same reasons.

(c) Device restrictions

Dream Palace also addressed a "device" restriction like the one at at I.C. § 23-614(1)(c). The Idaho statute prohibits artists from wearing "any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof." The ordinance in *Dream Palace* likewise regulated "seminude" performance, which was defined to include "a state of dress in which . . . portions of the body . . . are covered by . . . devices." 384 F.3d at 1018. The Fourth Circuit in *Legend* considered a statute even more closely identical to I.C. § 23-614(1)(c), prohibiting establishments licensed to sell alcohol from permitting any person "to wear or use any device or covering exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion of it." 637 F.3d at 295. Both the Ninth and the Fourth Circuit struck down these restrictions as overbroad. *See Dream Palace*, 384 F.3d at 1021; *Legend Night Club*, 637 F.3d at

302. "The statute imposes restrictions that extend well beyond strip clubs and other establishments primarily offering adult entertainment." *Legend Night Club*, 637 F.3d at 299. Whatever problems the State thinks these devices may cause, as the Ninth Circuit pointed out in *Dream Palace*, the State can "utilize a variety of less restrictive and more direct means to fight" those problems (if they even exist). 384 F.3d at 1021. The device restrictions are not sufficiently narrowly tailored.

(d) Simulated sex restrictions

As for the simulated sex restriction in I.C. § 23-614(1)(d), the Ninth Circuit decided that issue in *Dream Palace* as well. The ordinance in that case also included a prohibition of

> Sex acts, normal or perverted, actual or simulated, including acts of human masturbation, sexual intercourse, oral copulation or sodomy.

Id. at 1026, 1031. The Circuit struck that provision down, concluding that it was "far too broad." *Id.* at 1021. "If Elvis' gyrating hips can fairly be understood to constitute a 'simulated sex act,' one can fully appreciate the potential scope of the restrictions placed on erotic dancers in Maricopa County." *Id.* at 1018. The restrictions at I.C. § 23-614(1)(d) are essentially identical, and therefore they are also unconstitutional.

3. The Statute is Content Based.

The analysis above assumes that I.C. § 23-614 is content neutral, even though it is not. Yet, even if the Court assumes that the statute is content-neutral and applies the intermediate scrutiny described in *O'Brien*, the statute is unconstitutional because it is not sufficiently narrowly tailored. Nevertheless, the Supreme Court's recent decision in *Reed v. Town of Gilbert* leaves no doubt that I.C. § 23-614 is content based on its face. 135 S. Ct. 2218, 2227 (2015).

In *Reed*, the Court adopted a new, bright line test for determining whether a law is content based. *See United States v. Swisher*, 811 F.3d 299, 313 (9th Cir. 2016) (noting that *Reed*

provides "authoritative direction for differentiating between content-neutral and content-based enactments"); *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (noting that *Reed* "conflicts with, and therefore abrogates, our previous descriptions of content neutrality"); *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) (noting that "*Reed* understands content discrimination differently" than prior decisions). Under *Reed*, a court must look first to the face of the challenged law. *Reed*, 135 S. Ct. at 2228. If the law defines regulated speech "by particular subject matter" or "by its function or purpose," then the law is content based on its face. *Id.* at 2227. Before *Reed*, a statute that regulated speech based on subject matter, or that had a sufficient content-neutral purpose, was sometimes subject to intermediate rather than strict scrutiny. *See Cahaly*, 796 F.3d at 405; *Norton*, 806 F.3d at 412. But under *Reed*, if the law is content based on its face, the analysis stops there and the reviewing court must apply strict scrutiny, regardless of the State's motives behind the law. *Reed*, 135 S. Ct. at 2227. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* at 2228; *see also Cahaly*, 796 F.3d at 405 (holding that, under *Reed*, if a law is content based on its face, then "the government's justification or purpose in enacting the law is irrelevant"). The Supreme Court was unequivocal on this point, reiterating that "an innocuous justification cannot transform a content-based law into one that is content-neutral." *Reed*, 135 S. Ct. at 2228.

Here, I.C. § 23-614 is obviously content based on its face, because it regulates protected speech based on its subject matter. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S.

425, 448 (2002) (Kennedy, J., concurring[†]) (holding that laws restricting adult entertainment are content based on their face). Accordingly, "[w]e thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny." *Reed*, 135 S. Ct. at 2227. Under strict scrutiny, I.C. § 23-614 would have to be "the least restrictive means among available, effective alternatives" to pass constitutional muster. *ALDF v. Otter*, 118 F. Supp. 3d 1195, 1208 (D. Idaho 2015). Because I.C. § 23-614 is not even sufficiently tailored to pass intermediate scrutiny, it obviously cannot survive "least restrictive means" scrutiny.

B. Vagueness

The Court could also conclude that I.C. § 23-614 is likely unconstitutional because of its vagueness. Vague laws fail to provide fair warning, lend themselves to ad hoc and subjective enforcement, and inhibit the exercise of First Amendment freedoms. *California Teachers Association v. Board of Education*, 271 F.3d 1141, 1150 (9th Cir. 2001). The Court must apply doubly heightened scrutiny in determining whether I.C. § 23-614 is too vague: because it is a law restricting speech and therefore must be written with "narrow specificity," *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002), and because it is a criminal statute and therefore is "more searchingly examined for vagueness" than other laws, *Levas & Levas v. Village of Antioch*, 684 F.2d 446, 452 (7th Cir. 1982). Vagueness raises extraordinarily heightened concerns in these contexts "because of its obvious chilling effect on free speech." *Reno*, 521 U.S. at 872.

Under vagueness scrutiny, a law is invalid if it either (1) fails "to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits," or (2) allows for

[†] Like Justice Souter's opinion in *Barnes*, Justice Kennedy's opinion is the controlling opinion in *Alameda Books* because it is the narrowest opinion joining the plurality's judgment. *Center For Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1161 (9th Cir. 2003).

"arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). The provisions of I.C. § 23-614 fail under both tests. The dress restrictions of I.C. § 23-614(1)(a) apply to "any person on the premises," including audience members, yet prohibit ordinary clothing styles with widespread acceptance, like keyhole dresses, open back dresses, tops with deep necklines, and many tank tops. Does the Visual Arts Collective have to turn a woman away at the door because she is wearing keyhole cocktail dress? Must it be constantly vigilant for patrons sitting or bending over in casual clothes, to make sure they do not "expose to view . . . any portion of . . . the cleft of the buttocks"? I.C. § 23-614(1)(a). Must it constantly check the waistlines of all patrons and performers to ensure that no pubic hair is peeking out? How does the VAC (or any law enforcement officer) determine where a person's chest hair ends and his pubic hair begins?

Also, because I.C. § 23-614(1)(a) regulates only the "female" breast, how does the Visual Arts Collective or the State Police determine the sex of a transgender performer? Does a bearded male transgender performer who has had his breasts removed violate the statute if he takes his shirt off? What if his driver's license and passport state that he is male, though his birth certificate lists his "sex" as "female"? Can a transgender female with male genitalia, but who appears completely feminine and has large breast implants perform topless? How will any law enforcement officer know the sex or gender of any performer or patron? By guessing?

Which movements and gestures simulate sexual intercourse? Do "Elvis' gyrating hips" cross the line? *See Dream Palace*, 384 F.3d at 1018. Does a historical play depicting the infamously common American practice of whipping Black slaves violate the statute because it includes "flagellation"? Under what circumstances can a person eat a banana on stage: when will the State Police decide that it is simulated "oral copulation"? What about "sodomy"—will the

State Police decide that simulated sodomy violates the statute even though Idaho's actual sodomy laws are unconstitutional under *Lawrence v. Texas*, 539 U.S. 558 (2003)? What about other "sexual acts which are prohibited by law," like unmarried sex, I.C. § 18-6603, which Idaho has also never repealed after *Lawrence*?

The statute raises a raft of questions, all left to the "moment-to-moment judgment of the policeman on his beat." *Kolender v. Lawson*, 461 U.S. 352, 359 (1983); *see also Morales*, 527 U.S. at 57 ("the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering is covered by the ordinance and what is not"). This leaves the Visual Arts Collective and performers who perform anywhere alcohol is served without any meaningful notice about what they can and cannot do. It also subjects them and any other theater with a license to arbitrary and discriminatory enforcement. Accordingly, the statute is unconstitutional because it is too vague.

C. Equal Protection

The breast ban in I.C. § 23-614(1)(a) is also likely unconstitutional for a third reason: it is a facially gender-based classification. After the Supreme Court's landmark decision in *United States v. Virginia*, gender-based classifications may be used to compensate women for economic disabilities or to promote equal opportunity, but they "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." 518 U.S. 515, 533–534 (1996) (internal citation omitted). After *Virginia*, these classifications are subject to "demanding" scrutiny. *Id.* at 533. Under that scrutiny, the State bears the burden and "must convince the reviewing court that the law's proffered justification for the gender classification is exceedingly persuasive." *Id.* (internal quotation marks omitted).

"A law that facially dictates that a man may do X while a woman may not, or vice versa, constitutes, without more, a gender classification." *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J., concurring). The State's purpose is irrelevant. *Id.* at 481 (quoting *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 277–78 (1979)). The State therefore must show that restricting only the female breast "serve[s] important government objectives and [is] substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). The legislature's justifications must have resulted from "reasoned analysis rather than through the mechanical application of traditional, often inaccurate assumptions about the proper roles of men and women." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 726 (1982). The restriction in I.C. § 23-614(1)(a) fails this test because its purpose is rooted in "promoting and enforcing gender stereotyping," which is not a legitimate governmental interest after *Virginia*. *Latta*, 771 F.3d at 490 (Berzon, J., concurring). This becomes obvious upon considering the statute's application to transgender performers. Although the provision's vagueness makes it impossible to determine how the Idaho State Police would determine whether any breast is "male" or "female," no matter how the State interprets the statute—whether as prohibiting only breasts that look female to an officer or only breasts of people who are legally determined to be female—the point could only be to police gender norms. As the Supreme Court made clear in *Virginia*, though, "generalizations about 'the way women are,'" and "estimates of what is appropriate for *most women*" are no longer legitimate justifications for gender-based classifications. 518 U.S. at 550.

As with the other provisions, which must be invalidated on First Amendment and vagueness grounds, the State has other, more direct ways it may legitimately prevent harm. What

it may not constitutionally do, however, is directly regulate speech or gender roles in the way that I.C. § 23-614 does.

II. REMAINING PRELIMINARY INJUNCTION REQUIREMENTS

A colorable *First Amendment* claim is enough, alone, to establish irreparable injury. *Harris*, 772 F.3d at 583. Likewise, there is a significant public interest in upholding First Amendment principles. *Id*. The balance of equities tips sharply in the plaintiffs' favor, as well, as they stand to lose basic freedoms and the State already has existing statutes to police any actually unsafe conduct. *See, e.g.*, I.C. §§ 18-903 (punishing unlawful touching), 18-5613 (punishing prostitution); 18-6104 (punishing rape). There is no harm to the State: it is "in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Giovani Carandola*, 303 F.3d at 521.

The F.R.C.P. 65(c) bond requirement should be waived here because "to require a bond would have a negative impact on plaintiff's constitutional rights, as well as the constitutional rights of other members of the public affected." *Baca v. Moreno Valley Unified School Dist*., 936 F. Supp. 719, 738 (C.D. Cal. 1996). There is also no realistic chance of harm to the State. *See Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009). "Requiring a bond to issue before enjoining potentially unconstitutional conduct by a governmental entity simply seems inappropriate, because the rights potentially impinged by the governmental entity's actions are of such gravity that protection of those rights should not be contingent upon an ability to pay." *Bible Club v. Placentia-Yorba Linda School Dist.*, 573 F. Supp. 2d 1291, 1302 (C.D. Cal. 2008).

CONCLUSION

The Court should grant the motion and enter a preliminary injunction.

Respectfully submitted,

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/s/ Richard Eppink
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