

TO: House Judiciary Committee

FROM: Gary Daniels, Legislative Director, ACLU of Ohio

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RE: House Bill 249 – Opponent Testimony

To Chairman Thomas, Vice Chair Swearingen, Ranking Member Synenberg, and members of the House Judiciary Committee, thank you for this opportunity to provide opponent testimony for House Bill 249.



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On its face, HB 249 seems relatively simple. Drag performances remain legal in “adult cabarets” and are not permitted in other locations or establishments if they are deemed “harmful to minors” or “obscene” and occur where at least one minor could be, but is not required to be, present.

Those of us concerned about the First Amendment implications of HB 249 know these types of laws have been purposely used to target unpopular speech and art for many decades. Indeed, over the years, movies, TV shows, books, comic books, video games, websites, and more have been subjected to these fuzzy restrictions.

So, what exactly is the problem with such laws and their intersection with free speech and free expression? The concerns lie with the vague, overbroad, and nonsensical text of the laws themselves that can be easily contorted, twisted, and misapplied to numerous types of speech, art, and performances.

Consider Ohio’s “harmful to juveniles” law, defined via ORC Sec. 2907.01(E)-(F):

*(E) "Harmful to juveniles" means that quality of any material or performance **describing or representing** nudity, **sexual conduct**, **sexual excitement**, or sado-masochistic abuse in any form to which all of the following apply:*

(1) The material or performance, when considered as a whole, appeals to the prurient interest of juveniles in sex.

*(2) The material or performance is **patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles.***

*(3) The material or performance, when considered as a whole, **lacks serious literary, artistic, political, and scientific value for juveniles.***

Under current law, applicable to HB 249, who exactly decides what is “patently offensive?” Who gets to determine what are the “prevailing standards in the adult community as a whole with respect to what is suitable for juveniles.” What person is tasked with deciding whether or not an performance “lacks serious literary, artistic, political, and scientific value?” What in the world is “sexual excitement?”

Of course, the truth here is the interpretations and applications of these terms and phrases are left entirely to a police officer who cites or arrests the suspect and the prosecutor who charges them. That is, if you are led to believe such situations require or result, to use but one example, in a careful deliberation or examination of what the “prevailing standards” are in any particular community, I have bad news.

The same is true for the text of Ohio’s obscenity law (ORC Sec. 2907.01(F)) and obscenity laws in general:

*(F) When considered as a whole, and **judged with reference to ordinary adults** or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:*

*(1) Its dominant appeal is to **prurient interest**;*

*(2) Its dominant tendency is to **arouse lust** by displaying or depicting sexual activity, masturbation, **sexual excitement**, or nudity **in a way that tends to represent human beings as mere objects of sexual appetite**;*

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

*(5) It contains a **series of displays or descriptions** of sexual activity, masturbation, **sexual excitement**, **nudity**, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, **the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest**, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a **genuine** scientific, educational, sociological, moral, or artistic purpose.*

I suspect if I were to privately and individually poll everyone in this room as to what these terms and phrases mean, how they should be defined, and how they should be applied, there would quite naturally be a wide range of opinions. And therein lies the fundamental problem with these indecency and obscenity laws – they are vague enough, they are broad enough, they can be unfairly and unnecessarily applied to all kinds of art, media, performances, and more, including drag performances.

This uncertainty and the fear such terms can be defined as broadly as possible by the authorities will cause some not to perform for fear they will be targeted and prosecuted. In First Amendment parlance, this is known as a “chilling effect.” That is a back door victory for those who wish to limit or eliminate such things as drag performances even when no citation, arrest, prosecution, or conviction occurs.

Ohio has plenty of legitimate problems. Drag shows are not one of them. For all these reasons and more, the ACLU of Ohio encourages this committee’s rejection of House Bill 249.