



House Bill 249 Opponent Testimony

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House Judiciary Committee

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Chair Thomas, Vice Chair Swearingen, Ranking Member Synenberg, and members of the House Judiciary Committee:

On behalf of the Office of the Ohio Public Defender (OPD), thank you for the opportunity to submit opponent testimony on House Bill 249 (HB 249). As the provider of legal representation for indigent Ohioans accused of crimes, we find severe defects in HB 249 from an operational, evidentiary, and constitutional standpoint. By establishing new criminal offenses based on highly subjective criteria and redefining fundamental anatomical terms, the bill violates the U.S. Constitution's Fourteenth Amendment's void-for-vagueness doctrine, triggers inevitable First and Fourth Amendment violations, and creates unrealistic enforcement standards.

The most immediate functional impediment to enforcing HB 249 lies in its violation of the Fourteenth Amendment's Due Process Clause. The foundation of American criminal jurisprudence is that criminal statutes must be drafted with sufficient clarity to inform the public of what conduct is proscribed and to establish objective standards that prevent arbitrary and discriminatory enforcement by police.¹ HB 249 fails this test.

A key element of the offense of an unlawful adult cabaret performance includes public performances featuring entertainers who "exhibit a gender identity that is different from the performer's or entertainer's biological sex using clothing, makeup, prosthetic or imitation genitals or breasts, or other physical markers." From a practical law enforcement perspective, this language delegates complex sociological determinations to the subjective, impromptu judgment of individual law enforcement officers.

¹ *Connally v. General Construction Co.*, 269 U.S. 385 (1926).



The Ohio Revised Code provides no objective, statutory baseline defining exactly which specific articles of clothing, styles of makeup, or physical markers belong exclusively to the "male" or "female" sex. As a result, the bill offers no clear guidance for determining when expressive conduct crosses the line into criminal liability.

For example, what level of "makeup" applied by a male theatrical performer would transform a lawful performance into a criminal offense? Would Shakespeare productions become subject to criminal liability? Would a female comedian wearing a tailored masculine suit and a false mustache "exhibit a gender identity different from her biological sex?" Because the bill provides no clear rules distinguishing between everyday fashion choices or theatrical costuming and criminalized "gender exhibition," law enforcement officers are left without explicit, objective standards to guide enforcement. This absence of clear statutory boundaries creates significant uncertainty and raises vagueness concerns triggering due process implications and risks arbitrary or discriminatory enforcement.

HB 249 faces another hurdle under the First Amendment of the U.S. Constitution and Article I, Section 11 of the Ohio Constitution, which protects freedom of speech and expression. The United States Supreme Court has long recognized that live entertainment — including theatrical performances, dance, and music — constitute expressive conduct entitled to robust First Amendment protection.² By explicitly targeting performers who exhibit a gender identity different from their biological sex, HB 249 is not a neutral time, place, and manner restriction; it functions as a facially content-based and viewpoint-based restriction on protected expression. Under Ohio Supreme Court precedent, content-based restrictions are presumed invalid and are subject to strict scrutiny, meaning the state must prove the restriction is the absolute least restrictive means of achieving a compelling state interest. HB 249 fails this test.

Rather than relying on existing criminal statutes or local ordinances that already address obscenity or exposure of minors to inappropriate material, the bill imposes criminal sanctions across a wide range of expressive performances and risks criminalizing protected expression.

While the protection of minors from "obscenity" is a recognized state interest, HB 249 attempts to bypass the standards of obscenity law. The definitive constitutional standard for identifying unprotected obscenity is the Miller test, which requires a trier of fact to determine if a work, taken as a whole, appeals to a prurient interest, is patently offensive, and lacks serious

² *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).



literary, artistic, political, or scientific value.³ Ohio's existing statutory definitions of "obscenity" and "harmful to juveniles" under R.C. 2907.01 were carefully drafted to mirror this standard. HB 249 evades this standard.

The bill also associates specific forms of gender expression (e.g., cross-dressing and drag) with a "prurient interest," stripping away the constitutional mandate to evaluate the artistic or theatrical value of the performance as a whole. This language makes the legislation substantially overbroad, sweeping up protected expression into its criminal prohibitions. Under the vague and sweeping definitions in this bill, mainstream theatrical productions such as Shakespearean plays, "Mrs. Doubtfire," comedy sketches, and musical performances could all be subject to criminal sanctions.

Beyond the vagueness of the prohibited conduct, the evidentiary requirements necessary to secure a criminal conviction under HB 249 represent a functional impossibility. To prove that a person exhibited a gender identity different from their biological sex, the state must first prove the person's "biological sex" beyond a reasonable doubt. The bill explicitly defines biological sex by referencing internal and invisible markers: "sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth." From a prosecutorial standpoint, this definition is extraordinarily difficult to apply in a criminal proceeding. Law enforcement cannot visually confirm a performer's chromosomal makeup or internal gonads during a performance. To enforce the law as written, the government would be required to deploy highly invasive investigatory techniques to prove a performer's sex chromosomes, such as subpoenaing historical pediatric medical records or DNA testing of the accused. In practice, the bill creates substantial evidentiary obstacles and raises privacy concerns simply to prove biological questions that are unrelated to the underlying expressive conduct at issue.

HB 249 also amends the public indecency statute by replacing the undefined term "private parts" with the defined term "private area." While intended to close perceived loopholes regarding anatomical exposure, the new statutory definition of "private area" expands the definition to include the buttocks — whether nude or covered by an undergarment. This statutory change triggers public indecency charges where a person recklessly exposes the buttocks even when they are covered by an undergarment, if the exposure is likely to affront others. Law enforcement would theoretically be tasked with policing sagging pants that reveal

³ *Miller v. California*, 413 U.S. 15 (1973).



boxer shorts, revealing swimwear at public beaches, or accidental wardrobe malfunctions. Because public indecency escalates to higher-degree misdemeanors or even fifth-degree felonies upon subsequent convictions, this expanded definition will lead to criminal liability for conduct that does not rise to criminal obscenity.

HB 249 creates vague and difficult to enforce criminal offenses that are fundamentally incompatible with the realities of law enforcement and constitutional jurisprudence. As drafted, the bill introduces significant uncertainty regarding what is prohibited and expands criminal liability in ways that risk arbitrary enforcement while raising substantial First Amendment and due process concerns. If enacted, its passage is likely to result in prolonged constitutional litigation and create uncertainty for law enforcement and the public. For these reasons, the Office of the Ohio Public Defender opposes House Bill 249.

Respectfully,



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