

SENATE BILL No. 149

By Committee on Federal and State Affairs

2-2

1 AN ACT concerning crimes, punishment and criminal procedure; relating
2 to obscene performances; expanding the crime of promoting obscenity
3 to minors to include drag performances; amending K.S.A. 2022 Supp.
4 21-6401 and repealing the existing section.

5
6 *Be it enacted by the Legislature of the State of Kansas:*

7 Section 1. K.S.A. 2022 Supp. 21-6401 is hereby amended to read as
8 follows: 21-6401. (a) Promoting obscenity is recklessly:

9 (1) Manufacturing, mailing, transmitting, publishing, distributing,
10 presenting, exhibiting or advertising any obscene material or obscene
11 device;

12 (2) possessing any obscene material or obscene device with intent to
13 mail, transmit, publish, distribute, present, exhibit or advertise such
14 material or device;

15 (3) offering or agreeing to manufacture, mail, transmit, publish,
16 distribute, present, exhibit or advertise any obscene material or obscene
17 device; or

18 (4) producing, presenting or directing an obscene performance or
19 participating in a portion thereof ~~which~~ that is obscene or ~~which~~ that
20 contributes to its obscenity.

21 (b) Promoting obscenity to minors is promoting obscenity, as defined
22 in subsection (a), where a recipient of the obscene material or obscene
23 device or a member of the audience of an obscene performance is a child
24 under the age of 18 years. *As used in this subsection, an obscene*
25 *performance includes, but is not limited to, a drag performance.*

26 (c) (1) Promoting obscenity is a:

27 (A) Class A nonperson misdemeanor, except as provided in (c)(1)(B);
28 and

29 (B) severity level 9, person felony upon a second or subsequent
30 conviction.

31 (2) Promoting obscenity to minors is a:

32 (A) Class A nonperson misdemeanor, except as provided in (c)(2)(B);
33 and

34 (B) severity level 8, person felony upon a second or subsequent
35 conviction.

36 (3) Conviction of a violation of a municipal ordinance prohibiting

1 acts which constitute promoting obscenity or promoting obscenity to
2 minors shall be considered a conviction of promoting obscenity or
3 promoting obscenity to minors for the purpose of determining the number
4 of prior convictions and the classification of the crime under this section.

5 (d) Upon any conviction of promoting obscenity or promoting
6 obscenity to minors, the court may require, in addition to any fine or
7 imprisonment imposed, that the defendant enter into a reasonable
8 recognizance with good and sufficient surety, in such sum as the court may
9 direct, but not to exceed \$50,000, conditioned that, in the event the
10 defendant is convicted of a subsequent offense of promoting obscenity or
11 promoting obscenity to minors within two years after such conviction, the
12 defendant shall forfeit the recognizance.

13 (e) Evidence that materials or devices were promoted to emphasize
14 their prurient appeal shall be relevant in determining the question of the
15 obscenity of such materials or devices. There shall be a rebuttable
16 presumption that a person promoting obscene materials or obscene devices
17 did so knowingly or recklessly if:

18 (1) The materials or devices were promoted to emphasize their
19 prurient appeal; or

20 (2) the person is not a wholesaler and promotes the materials or
21 devices in the course of the person's business.

22 (f) As used in this section:

23 (1) Any material or performance is "obscene" if:

24 (A) The average person applying contemporary community standards
25 would find that the material or performance, taken as a whole, appeals to
26 the prurient interest;

27 (B) the average person applying contemporary community standards
28 would find that the material or performance has patently offensive
29 representations or descriptions of:

30 (i) Ultimate sexual acts, normal or perverted, actual or simulated,
31 including sexual intercourse or sodomy; or

32 (ii) masturbation, excretory functions, sadomasochistic abuse or lewd
33 exhibition of the genitals; and

34 (C) taken as a whole, a reasonable person would find that the material
35 or performance lacks serious literary, educational, artistic, political or
36 scientific value;

37 (2) *"drag performance" means a performance in which one or more*
38 *performers:*

39 (A) *Exhibits a gender identity that is different from the performer's*
40 *gender assigned at birth using clothing, makeup or other accessories that*
41 *are traditionally worn by members of and are meant to exaggerate the*
42 *gender identity of the performer's opposite sex; and*

43 (B) *sings, lip-synchs, dances or otherwise performs before an*

1 *audience of at least two persons for entertainment, whether performed for*
2 *payment or not;*

3 (3) "material" means any tangible thing which is capable of being
4 used or adapted to arouse interest, whether through the medium of reading,
5 observation, sound or other manner;

6 ~~(3)~~(4) "obscene device" means a device, including a dildo or artificial
7 vagina, designed or marketed as useful primarily for the stimulation of
8 human genital organs, except such devices disseminated or promoted for
9 the purpose of medical or psychological therapy;

10 ~~(4)~~(5) "performance" means any play, motion picture, dance or other
11 exhibition performed before an audience;

12 ~~(5)~~(6) "sexual intercourse" and "sodomy" mean the same as in K.S.A.
13 2022 Supp. 21-5501, and amendments thereto; and

14 ~~(6)~~(7) "wholesaler" means a person who distributes or offers for
15 distribution obscene materials or devices only for resale and not to the
16 consumer and who does not manufacture, publish or produce such
17 materials or devices.

18 (g) It shall be a defense to a prosecution for promoting obscenity and
19 promoting obscenity to minors that the:

20 (1) Persons to whom the allegedly obscene material or obscene
21 device was disseminated, or the audience to an allegedly obscene
22 performance, consisted of persons or institutions having scientific,
23 educational or governmental justification for possessing or viewing the
24 same;

25 (2) defendant is an officer, director, trustee or employee of a public
26 library and the allegedly obscene material was acquired by such library
27 and was disseminated in accordance with regular library policies approved
28 by its governing body; or

29 (3) allegedly obscene material or obscene device was purchased,
30 leased or otherwise acquired by a public, private or parochial school,
31 college or university, and that such material or device was either sold,
32 leased, distributed or disseminated by a teacher, instructor, professor or
33 other faculty member or administrator of such school as part of or
34 incidental to an approved course or program of instruction at such school.

35 (h) Notwithstanding the provisions of K.S.A. 2022 Supp. 21-5204,
36 and amendments thereto, to the contrary, it shall be an affirmative defense
37 to any prosecution for promoting obscenity to minors that:

38 (1) The defendant had reasonable cause to believe that the minor
39 involved was 18 years old or over, and such minor exhibited to the
40 defendant a draft card, driver's license, birth certificate or other official or
41 apparently official document purporting to establish that such minor was
42 18 years old or more; or

43 (2) an exhibition in a state of nudity is for a bona fide scientific or

1 medical purpose, or for an educational or cultural purpose for a bona fide
2 school, museum or library.

3 (i) The provisions of this section and the provisions of ordinances of
4 any city prescribing a criminal penalty for exhibit of any obscene motion
5 picture shown in a commercial showing to the general public shall not
6 apply to a projectionist, or assistant projectionist, if such projectionist or
7 assistant projectionist has no financial interest in the show or in its place of
8 presentation other than regular employment as a projectionist or assistant
9 projectionist and no personal knowledge of the contents of the motion
10 picture. The provisions of this section shall not exempt any projectionist or
11 assistant projectionist from criminal liability for any act unrelated to
12 projection of motion pictures in commercial showings to the general
13 public.

14 Sec. 2. K.S.A. 2022 Supp. 21-6401 is hereby repealed.

15 Sec. 3. This act shall take effect and be in force from and after its
16 publication in the statute book.