

# **WEST VIRGINIA LEGISLATURE**

**2023 REGULAR SESSION**

**Introduced**

## **Senate Bill 278**

By Senator Azinger

[Introduced January 18, 2023; referred  
to the Committee on the Judiciary]

1 A BILL amend and reenact §61-8-9 and §61-8-27 of the Code of West Virginia, 1931, as amended;  
 2 to amend and reenact §61-8A-1 of said code; and to amend and reenact §61-9-1, §61-9-3,  
 3 §61-9-4, §61-9-5, §61-9-6, §61-9-8, §61-9-9, and §61-9-10, all generally relating to  
 4 protecting minors from exposure to indecent displays of a sexually explicit nature,  
 5 including but not limited to, transvestite and/or transgender exposure in performances or  
 6 displays to minors.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 8. CRIMES AGAINST CHASTITY, MORALITY AND DECENCY.**

**§61-8-9. Indecent exposure.**

1 (a) A person is guilty of indecent exposure when such person intentionally engages in  
 2 obscene matter or sexually explicit conduct as defined in §61-8A-1 of this code, or exposes his or  
 3 her sex organs or anus or the sex organs or anus of another person, or intentionally causes such  
 4 exposure by another or engages in any overt act of sexual gratification, and does so under  
 5 circumstances in which the person knows that the conduct is likely to cause affront or alarm:  
 6 *Provided*, That it is not considered indecent exposure for a mother to breast feed a child in any  
 7 location, public or private.

8 (b) Except as provided in subsection (c), any person who violates the provisions of this  
 9 section shall be guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail not  
 10 more than ~~ninety days~~ six months, or fined not more than \$250 1,000, or both fined and confined.

11 (c) Any person who violates the provisions of subsection (a) of this section by intentionally  
 12 exposing himself or herself to another person and the exposure was done for the purpose of  
 13 sexual gratification, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not  
 14 more than \$2,500 or confined in jail not more than twelve months, or both. For a second offense,  
 15 the person is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$4  
 16 5,000 and confined in jail for not less than ~~thirty days~~ six months nor more than twelve months. For  
 17 a third or subsequent offense, the person is guilty of a felony and, upon conviction thereof, shall be

18 fined not more than ~~\$3,000~~ 7,500 and imprisoned in a state correctional facility for not less than  
19 one year nor more than five years.

**§61-8-27. Unlawful admission of children to a venue, dance house, etc.; penalty.**

1 Any proprietor or any person in charge of: (1) any venue where obscene matter or sexually  
2 explicit conduct as defined in §61-8A-1 of this code is engaged in or displayed or allowed to be  
3 engaged in or displayed, or (2) a dance house, concert saloon, theater, museum, or similar place  
4 of amusement, or other place, where wines or spirituous or malt liquors are sold or given away, or  
5 (3) any place of entertainment injurious to health or morals who admits or permits to remain therein  
6 any minor under the age of 18 years, ~~unless accompanied by his or her parent or guardian~~ is guilty  
7 of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding \$2500:  
8 *Provided*, That there is exemption from theis prohibitions under subsections (ii) and (iii) for: (a) A  
9 private bakery, private cigar shop, private caterer, private club restaurant, private manufacturer  
10 club, private fair and festival, private resort hotel, private hotel, private golf club, private food truck,  
11 private nine-hole golf course, private tennis club, private wedding venue or barn, private outdoor  
12 dining and private outdoor street dining, private multi-vendor fair and festival license, private  
13 farmers market, private college sports stadium or coliseum, private professional sports stadium,  
14 and a private multi-sports complex licensed pursuant to §60-7-1 *et seq.* of this code and in  
15 compliance with, §60-7-2(6)(iv), §60-7-2(7)(D), §60-7-2(8)(I), §60-7-2(10)(L), §60-7-2(11)(D),  
16 §60-7-2(12)(H), §60-7-2(13)(6), §60-7-2(14)(H), 60-7-2(15)(H), §60-7-2(16)(G), §60-7-2(17)(G),  
17 §60-7-2(18)(H), §60-7-2(19)(H), §60-7-2(20)(H), §60-7-2(21)(L), §60-7-2(22)(H), §60-7-2(23)(H),  
18 §60-7-8c(b)(14), §60-7-8d, and §60-8-32a of this code; or (b) a private club with more than 1,000  
19 members that is in good standing with the Alcohol Beverage Control Commissioner, that has been  
20 approved by the Alcohol Beverage Control Commissioner; and which has designated certain  
21 seating areas on its licensed premises as nonalcoholic liquor and nonintoxicating beer areas, as  
22 noted in the licensee's floorplan, by using a mandatory carding or identification program by which  
23 all members or guests being served or sold alcoholic liquors, nonintoxicating beer or

24 nonintoxicating craft beer are asked and required to provide their proper identification to verify  
 25 their identity and further that they are of legal drinking age, 21 years of age or older, prior to each  
 26 sale or service of alcoholic liquors, nonintoxicating beer or nonintoxicating craft beer: Provided  
 27 further, That no exemption exists whatsoever for the prohibition set forth in subsection (i).

**ARTICLE 8A. PREPARATION, DISTRIBUTION OR EXHIBITION OF OBSCENE  
 MATTER TO MINORS.**

**§61-8A-1.**

**Definitions.**

1 When used in this article, the following words, and any variations thereof required by the  
 2 context, shall have the meaning ascribed to them in this section:

3 (a) "Adult" means a person eighteen years of age or older.

4 (b) "Computer" means an electronic, magnetic, optical, electrochemical or other high-  
 5 speed data processing device performing logical, arithmetic or storage functions and includes any  
 6 data storage facility or communication facility directly related to or operating in conjunction with  
 7 such device. As used in this article, computer includes file servers, mainframe systems, desktop  
 8 personal computers, laptop personal computers, tablet personal computers, cellular telephones,  
 9 game consoles and any electronic data storage device or equipment. The term "computer"  
 10 includes any connected or directly related device, equipment or facility which enables the  
 11 computer to store, retrieve or communicate computer programs, computer data or the results of  
 12 computer operations to or from a person, another computer or another device, but such term does  
 13 not include an automated typewriter or typesetter, a portable hand-held calculator or other similar  
 14 device.

15 (c) "Computer network" means the interconnection of hardware or wireless communication  
 16 lines with a computer through remote terminals, or a complex consisting of two or more  
 17 interconnected computers.

18 (d) "Display" means to show, exhibit or expose matter, in a manner visible to general or

19 invited public, including minors. As used in this article, display shall include the placing or  
20 exhibiting of matter on or in a billboard, viewing screen, theater, marquee, newsstand, display  
21 rack, window, showcase, display case or similar public place.

22 (e) "Distribute" means to transfer possession, transport, transmit, sell or rent, whether with  
23 or without consideration.

24 (f) "Employee" means any individual who renders personal services in the course of a  
25 business, who receives compensation and who has no financial interest in the ownership or  
26 operation of the business other than his or her salary or wages.

27 (g) "Graphic", when used with respect to a depiction of sexually explicit conduct, means  
28 that a viewer can observe any part of the genitals or pubic area of any depicted person or animal  
29 during any part of the time that the sexually explicit conduct is being depicted.

30 (h) "Identifiable minor" means a person: (A) who was a minor at the time the visual  
31 depiction was created, adapted, or modified; or (B) whose image as a minor was used in creating,  
32 adapting, or modifying the visual depiction; and (C) who is recognizable as an actual person by the  
33 person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other  
34 recognizable feature; and shall not be construed to require proof of the actual identity of the  
35 identifiable minor.

36 (i) "Indistinguishable" used with respect to a depiction, means virtually indistinguishable, in  
37 that the depiction is such that an ordinary person viewing the depiction would conclude that the  
38 depiction is of an actual minor engaged in sexually explicit conduct.

39 (j) "Internet" means the international computer network of both federal and nonfederal  
40 interoperable packet switched data networks.

41 (j) (k) "Knowledge of the character of the matter" means having awareness of or notice of  
42 the overall sexual content and character of matter as depicting, representing or describing  
43 obscene matter.

44 (k) (l) "Matter" means any visual, audio, or physical item, article, production transmission,

45 publication, display, exposure, exhibition, or live performance, or reproduction thereof, including  
46 any two- or three- dimensional visual or written material, stereopticon, moving picture, slide, film,  
47 picture, drawing, not exceeding \$500 video, graphic, graphic novel, or computer generated or  
48 reproduced image; or any book, not exceeding \$500 magazine, newspaper or other visual or  
49 written material; or any motion picture or other pictorial representation; or any statue or other  
50 figure; or any recording, transcription, or mechanical, chemical, or electrical reproduction; or any  
51 other articles, video laser disc, computer hardware and software, or computer generated images  
52 or message recording, transcription, or object, or any public or commercial live exhibition  
53 performed for consideration or before an audience of one or more.

54 ~~(t)~~ (m) "Minor" means an unemancipated person under eighteen years of age.

55 ~~(m)~~(n) "Obscene matter" means matter that:

56 (1) An average person, applying contemporary adult community standards, would find,  
57 taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is  
58 pandered to a prurient interest;

59 (2) An average person, applying community standards, would find depicts or describes, in  
60 a patently offensive way, sexually explicit conduct; and

61 (3) A reasonable person would find, taken as a whole, lacks serious literary, artistic,  
62 political or scientific value.

63 (4) For the purposes of any prohibition, protection, or requirement under any and all  
64 articles and sections of this code protecting children from exposure to indecent displays of an  
65 obscene or sexually explicit nature, such prohibited displays shall include, but not be limited to,  
66 any transvestite and/or transgender exposure, performances, or display to any minor.

67 ~~(n)~~ (o) "Parent" includes a biological or adoptive parent, legal guardian or legal custodian.

68 ~~(o)~~ (p) "Person" means any adult, partnership, firm, association, corporation or other legal  
69 entity.

70 ~~(p)~~(q) "Sexually explicit conduct" means an ultimate definitive sexual act between persons

71 of the same or opposite sex, normal or perverted, actual or simulated, including genital-genital,  
 72 oral-genital, anal-genital, or oral-anal sexual intercourse, sodomy, oral copulation of any kind,  
 73 sexual bestiality, sexual sadism and masochism, masturbation, excretory functions and lewd  
 74 exhibition of the anus, genitals or pubic area of any person, or lascivious simulated sexual  
 75 intercourse where the genitals, breast, or pubic area of any person is exhibited.

**ARTICLE 9. EQUITABLE REMEDIES IN AID OF CHASTITY, MORALITY AND  
 DECENCY.**

**§61-9-1. Definition of terms.**

1 For the purposes of this article the terms "place," "person," "nuisance" are defined as  
 2 follows:" Place" shall include any building, structure, erection or place, or any separate part or  
 3 portion thereof, or the ground itself; "person" shall include any individual, corporation, association,  
 4 partnership, trustee, lessee, agent or assignee; "nuisance" shall mean any place as above defined  
 5 in or upon which lewdness, obscene matter, sexually explicit conduct as defined in §61-8A-1 of  
 6 this code, assignation, or prostitution is conducted, permitted, continued or exists, and the  
 7 personal property and contents used in conducting or maintaining any such place for any such  
 8 purpose.

**§61-9-3. Suit to enjoin; by whom instituted.**

1 Whenever a nuisance exists, as defined in §61-9-1 of this code, the Attorney General of  
 2 the state, the prosecuting attorney of the county wherein the same exists, or any person who is a  
 3 citizen, resident or taxpayer of the county, may bring suit in equity in the name of the State of West  
 4 Virginia, upon the relation of such Attorney General, prosecuting attorney, or any person, to abate  
 5 such nuisance and to perpetually enjoin the person or persons maintaining ~~the same~~ any such  
 6 nuisance from further maintenance thereof.

**§61-9-4. Venue; procedure; temporary injunction; order closing place; vacation of orders;  
 bond.**

1           Such suit shall be brought in the circuit court of the county in which the property is located,  
2 or in any other court of the county having equity jurisdiction. The bill of complaint and other  
3 pleadings, and all proceedings in the case, shall conform to the law of the state with respect to  
4 equity procedure and to the rules and principles governing courts of equity, except so far as  
5 otherwise herein provided.

6           At the time of the commencement of the suit, or at any time during the pendency thereof,  
7 the plaintiff or his or her attorney may file in the office of the clerk of the county court of the county  
8 in which such property is located a memorandum or notice setting forth the title of the case, the  
9 court in which it is pending, the general object of the suit, a brief description of the property to be  
10 affected thereby, and the name of the person or persons whose estate is intended to be affected  
11 by such suit. Such notice shall immediately be recorded by the clerk of the county court in the deed  
12 book, and he or she shall index the same in the name of all the parties whose interest in such  
13 property is to be affected; and such notice shall, from and after its recordation, be notice to all  
14 purchasers of such property of the pendency of such suit.

15           Upon the application for an injunction in such suit, the court or judge may, in his or her  
16 discretion, enjoin the defendants and all other persons from removing or in any manner interfering  
17 with the personal property and contents of the place where such nuisance is alleged to exist, until  
18 the final decision of the case. A copy of such injunction order may be posted in a conspicuous  
19 place upon the premises proceeded against, and any person thereafter removing or interfering  
20 with such property shall be guilty of a violation of such injunction, and any person removing or  
21 mutilating such copy of the order so posted, while the same remains in force, shall be guilty of  
22 contempt of court, provided such posted notice or order contains thereon or therein a notice to that  
23 effect. The officer serving such injunction order shall forthwith make and return into court an  
24 inventory of the personal property and contents situated in the building or place proceeded against  
25 and used in conducting or maintaining such nuisance.

26           If, at the time of granting a temporary injunction, the same shall appear proper, the court or



27 judge granting the same may order the place proceeded against to be closed and not used for any  
 28 purpose until the final decision of the case: *Provided, however,* That the owner of any property so  
 29 closed or restrained may appear at any time before final hearing and decision, and upon payment  
 30 of all the costs incurred, and upon the filing of a bond, with sureties to be approved by the clerk, in  
 31 the amount of the full value of the property, to be ascertained by the court or judge, conditioned  
 32 that such owner will immediately abate the nuisance and prevent the same from being established  
 33 or kept until final decision of the case, then and in that case the court or judge, if satisfied of the  
 34 good faith of the owner of the real or personal property and of his or her innocence of any  
 35 knowledge of the use of such property as a nuisance, and that with reasonable care and diligence  
 36 such owner could not have known thereof, may deliver such property to the owner thereof and  
 37 vacate any order theretofore made for the closing of such real property, or restraining the removal  
 38 or interference with such personal property. The release of any real or personal property under the  
 39 provisions of this section, however, shall not release it from any judgment, lien, penalty or liability  
 40 to which it may be subject by law. The court may award reimbursement of any and all attorneys  
 41 fees, witness fees, and costs incurred by any party who prevails in the bringing of suit to enjoin any  
 42 such \_\_\_\_\_ nuisance.

**§61-9-5. Prima facie evidence of nuisance; prosecution of complaint; dismissal; costs; permanent injunction.**

1 In such suit evidence of the general reputation of the place, or an admission or finding of  
 2 guilt of any person under the criminal laws against prostitution, obscene matter, sexually explicit  
 3 conduct as defined in §61-8A-1 of this code, lewdness or assignation at any such place, shall be  
 4 admissible for the purpose of proving the existence of such nuisance, and shall be prima facie  
 5 evidence of such nuisance and of knowledge thereof and acquiescence and participation therein  
 6 on the part of the person or persons charged with maintaining such nuisance as herein defined. If  
 7 the complaint is filed by a person who is a citizen, resident or taxpayer of the county, it shall not be  
 8 dismissed except upon a sworn statement by the complainant and his or her or its attorney, setting

9 forth the reasons why the action should be dismissed and the dismissal approved by the  
10 prosecuting attorney in writing or in open court. If the court or judge is of opinion that the action  
11 ought not to be dismissed, he or she may direct the prosecuting attorney to prosecute such action  
12 to judgment at the expense of the county, and if any such action is continued more than one term  
13 of court, any person who is a citizen, resident or taxpayer of the county, or the Attorney General, or  
14 the prosecuting attorney, may be substituted for the complainant and prosecute such suit to final  
15 decree. If the Attorney General, or the prosecuting attorney, is substituted for the complainant  
16 such Attorney General or prosecuting attorney shall zealously and promptly prosecute such suit to  
17 final decree. If the suit is brought by any person who is a citizen, resident or taxpayer of the county  
18 and the court finds and enters of record in the case that there were no reasonable grounds or  
19 cause for such suit, the costs may be taxed to such person. If the existence of the nuisance be  
20 established upon the trial, a decree shall be entered which shall perpetually enjoin the defendants  
21 and any other person or persons from further maintaining the nuisance at the place complained of  
22 and the defendants from maintaining such nuisance elsewhere within the county.

**§61-9-6. Order of abatement; sale of personal property; renewal of bond or continuance of  
closing order; release of property; breaking in or entering closed property; sheriff's  
fees.**

1 If the existence of such nuisance be admitted or established in a suit as provided in this  
2 article, an order of abatement shall be entered as part of the decree in the case, which order shall  
3 direct the removal from the place of all personal property and contents used in conducting the  
4 nuisance, and not already released by and under the authority of the court as provided in section  
5 four of this article, and shall direct the sale of such thereof as belongs to the defendants notified or  
6 appearing in the manner provided for the sale of personal property under execution. Such order  
7 shall also require the renewal for one year of any bond furnished by the owner of the real property  
8 as provided in section four, or, if not so furnished, shall continue for one year any closing order  
9 issued at the time of granting the temporary injunction, or, if no such closing order was then issued,

10 shall include an order directing the effectual closing of the place against its use for any purpose,  
 11 and so keeping it closed for a period of one year unless sooner released: *Provided, however,* That  
 12 the owner of any place so closed and not released under bond as hereinbefore provided may then  
 13 or thereafter appear and obtain such release in the manner and upon fulfilling the requirements as  
 14 hereinbefore provided. The release of the property under the provisions of this section shall not  
 15 release it from any judgment, lien, penalty, or liability, to which it may be subject by law. Owners of  
 16 unsold personal property and contents so seized shall appear and claim the same within ten days  
 17 after such order of abatement is made, and if it has not been proved to the satisfaction of the court  
 18 that such owner had knowledge of such use thereof, or, that with reasonable care and diligence,  
 19 he or she could not have known thereof, such unsold personal property and contents shall be  
 20 delivered to the owner, otherwise it shall be sold as hereinbefore provided. If any person shall  
 21 break and enter or use any place so directed to be closed, he or she shall be punished as for  
 22 contempt as provided hereinafter, in addition to any other penalties imposed by law. For removing  
 23 and selling personal property and contents, the sheriff shall be entitled to charge and receive the  
 24 same fees as he or she would for levying upon and selling like property on execution; and for  
 25 closing the place and keeping it closed, a reasonable sum shall be allowed by the court.

**§61-9-8. Violation of injunction or closing order; trial; penalty.**

1 In case of the violation of any injunction or closing order granted under the provisions of  
 2 this article, or the commission of any contempt of court in proceedings under this article, the court,  
 3 or a judge thereof in vacation, may summarily try and punish the offender. The proceedings shall  
 4 conform to the practice in other suits in equity for violations of injunctions, and proceedings for  
 5 contempt of court. The trial may be had upon affidavits, or either party may demand the production  
 6 and oral examination of the witnesses. A party found guilty of contempt under the provisions of this  
 7 article shall be punished by a fine of not less than ~~\$100~~ \$1,000 nor more than ~~\$1,000~~ \$5,000, or by  
 8 imprisonment in the county jail not more than six months, or by both such fine and imprisonment.

**§61-9-9. Permanent injunction; tax imposed on property.**

1           Whenever a permanent injunction is granted against any person or persons for  
2 maintaining a nuisance as in this article defined, there shall be imposed upon such nuisance and  
3 against the person or persons maintaining the same a tax of ~~\$300~~ \$1,000: *Provided, however,*  
4 That such tax may not be imposed upon the personal property or against the owner or owners  
5 thereof who have proven innocence as hereinbefore provided, or upon the real property or against  
6 the owner or owners thereof who shall show to the satisfaction of the court or judge thereof, at the  
7 time of the granting of the permanent injunction, that he or she or they have in good faith  
8 permanently abated the nuisance complained of. The imposition of such tax shall be made by the  
9 court as a part of the proceedings, and the clerk of such court shall make and certify a return of the  
10 imposition of such tax thereon to the county assessor, who shall enter the same as a tax upon the  
11 property and against the persons upon which or whom the lien was imposed, as a proper tax and  
12 charge upon such real or personal property, when making up his or her assessments for the next  
13 ensuing year, unless the same shall have been paid before such books are made up; and the  
14 same shall be and remain a perpetual lien upon all property, both real and personal, used for the  
15 purposes of maintaining such nuisance, except as herein excepted, until fully paid. The payment  
16 of such tax shall not relieve the persons or property from any other taxes provided by law. The  
17 provisions of the laws relating to the collection of taxes in this state, the delinquency thereof, and  
18 sale of property for taxes, shall govern in the collection of the tax herein prescribed insofar as the  
19 same are applicable; and the said tax collected shall be applied in payment of any deficiency in the  
20 costs of the action and abatement on behalf of the state to the extent of such deficiency after the  
21 application thereto of the proceeds of the sale of the personal property as hereinbefore provided,  
22 and the remainder of such tax, together with the unexpended portion of the proceeds of personal  
23 property, shall be paid into the county treasury.

**§61-9-10. Notice to collect tax.**

1           When such nuisance has been found to exist under any equity proceedings as in this  
2 article provided, and the owner or agent of such place whereon the same has been found to exist

3 was not a party to such proceedings and has not appeared therein, the said tax of ~~\$300~~ \$1,000  
4 shall, nevertheless, be imposed against the person served or appearing and against the property  
5 as in this article set forth. But no such tax shall be certified to the assessor or enforced against  
6 such property, unless the owner thereof shall have appeared therein or shall be served with  
7 summons or notice therein, and the provisions of existing laws regarding the service of process  
8 shall be applied to service in proceedings under this article. The person in whose name the real  
9 estate affected by the action stands on the land books of the county for purposes of taxation shall  
10 be presumed to be the owner thereof, and in case of unknown persons having or claiming any  
11 ownership, right, title, or interest in property affected by the action, such may be made parties to  
12 the action by designating them in the summons and complaint as "all other persons unknown  
13 claiming any ownership, right, title, or interest in the property affected by the action," and service  
14 thereon be had by publishing such summons in the same manner prescribed by law.

NOTE: The purpose of this bill is to protect minors from indecent displays of a sexually explicit nature, including but not limited to, transvestite and/or transgender performances or displays to minors.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.