

[DO NOT PUBLISH]

In the  
United States Court of Appeals  
For the Eleventh Circuit

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No. 24-11915

Non-Argument Calendar

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FANNIE'S, INC.,  
d.b.a. Fannies Cabaret,

Plaintiff-Appellant,

*versus*

CITY OF SOUTH FULTON,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Northern District of Georgia  
D.C. Docket No. 1:23-cv-04513-JPB

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Before ROSENBAUM, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

Fannies Cabaret is an adult club that, until recently, both offered live nude dancing and served alcohol. In 2021, the City of South Fulton annexed the land where Fannies is located, making Fannies subject to the City’s alcohol and sexually oriented business ordinances, which together prohibit the sale or consumption of alcohol where live nude entertainment is offered. Claiming that the deprivation of alcohol sales and other restrictions would lead to its inevitable (and intended) demise, Fannies sued the City on First Amendment grounds and moved for preliminary injunctive relief. The district court denied injunctive relief while permitting some claims to go forward, and Fannies appeals. After careful review, we affirm the denial of a preliminary injunction.

## I.

As relevant here, Fannies sought injunctive relief before the district court on two grounds. First, Fannies claimed that § 16-5006 of the alcohol code, which bans live nude entertainment at establishments licensed to serve alcohol, was unconstitutionally overbroad because it lacked any “mainstream” exception. And second, Fannies contended that the licensing regulations for sexually oriented businesses (SOB licensing code), which also prohibit the possession, use, or consumption of alcohol in such businesses, should be treated as content-based regulations subject to strict scrutiny, and that, in any case, they failed intermediate scrutiny.

The district court declined to preliminarily enjoin the City from enforcing the alcohol bans at Fannies. With respect to overbreadth, the court found that Fannies had failed to include any “factual allegations regarding the claimed overbreadth,” and that its legal arguments in the motion for preliminary injunction and the response in opposition to the City’s motion to dismiss came too late. As for the SOB licensing code, the court found that it was likely subject to intermediate scrutiny as secondary-effects legislation, and that Fannies had not shown that the SOB licensing code failed to satisfy intermediate scrutiny. Fannies appeals.

## II.

We have jurisdiction to review interlocutory orders denying injunctive relief.<sup>1</sup> 28 U.S.C. 1292(a)(1). “Because of the extraordinary and drastic nature of preliminary injunctive relief, we will disturb the denial of a preliminary injunction only if the district court

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<sup>1</sup> The City also disputes Fannies’s standing to challenge the provisions at issue, but we see no reason to disturb the district court’s considered findings on these matters. *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005) (“We review standing determinations *de novo*.”). The City concedes that Fannies suffered injuries from the application of the alcohol bans in the alcohol ordinance and the SOB licensing code. And “[t]he overbreadth doctrine allows plaintiffs to bring a facial challenge to the provisions under which the plaintiff suffered an ‘injury in fact’” on facts other than those that apply to the plaintiff. *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1270–71 (11th Cir. 2006). While the City draws distinctions among specific provisions of the SOB licensing code, claiming that Fannies lacks standing as to some provisions but not others, those issues are unnecessary to resolve in the context of this appeal.

abused its discretion.” *Haitian Refugee Ctr., Inc. v. Christopher*, 43 F.3d 1431, 1432 (11th Cir. 1995) (quotation marks omitted). No deference is owed, however, where the court “misapplies the law.” *Id.*; see *Speer v. Miller*, 15 F.3d 1007, 1009 (11th Cir. 1994). We review legal conclusions *de novo*. *Mills v. Hamm*, 102 F.4th 1245, 1248 (11th Cir. 2024).

### III.

We start with Fannies’s overbreadth claim. We conclude that the district court erred by failing to consider Fannies’s legal arguments on the merits of this claim, but that no injunction should issue for lack of a showing of irreparable harm.

The First Amendment overbreadth doctrine allows a party to challenge a law on its face, rather than as applied to the party, because the law also threatens others not before the court who may refrain from engaging in legally protected expression rather than risking prosecution or challenging the law. *Cheshire Bridge Holdings, LLC v. City of Atlanta*, 15 F.4th 1362, 1370 (11th Cir. 2021). To prevail, plaintiffs must show that the challenged law is “substantial[ly] overbroad” relative to its legitimate sweep. *Id.* Plaintiffs “bear the burden of demonstrating from the text of the challenged provisions and from actual fact that a substantial number of instances exist in which the provisions cannot be applied constitutionally.” *Id.* at 1370–71 (cleaned up). But such proof of “actual fact” is “not a requirement in an overbreadth case,” meaning the plaintiff can rely on the text alone. *Id.* at 1377–78.

There's no dispute that Fannies's complaint provided fair notice of its First Amendment claim that § 16-5006 of the alcohol ordinance was unconstitutionally overbroad. Instead, the district court faulted Fannies for "failure to support this claim with factual allegations." "But because [Fannies] mounted [a] facial overbreadth challenge[] the underlying facts are largely irrelevant." *Id.* at 1365. Nor is there "a requirement in an overbreadth case" for plaintiffs to establish instances of overbreadth in "actual fact," even if we assume for the sake of argument that such instances must be specifically alleged in the complaint. *Id.* at 1377–78.

Rather, Fannies can rely on the text of the challenged provisions alone to establish overbreadth. *See id.* And determining the scope of a statute on its face, including hypothetical application scenarios, presents a question of law. *See, e.g., United States v. Daniels*, 685 F.3d 1237, 1244 (11th Cir. 2012) ("The interpretation of a statute is a question of law subject to *de novo* review."). Indeed, "the first step in overbreadth analysis is to construe the provisions being challenged; it is impossible to determine whether a law reaches too far without knowing what it covers." *Cheshire Bridge*, 15 F.4th at 1367 (cleaned up). Thus, the district court erred by failing to consider Fannies's legal arguments about the scope of the challenged provision in its motion for preliminary injunction and its response in opposition to the motion to dismiss.

Because the district court did not fully address Fannies's likelihood of success on the merits of its overbreadth claim, or any of the other injunctive-relief factors, we would ordinarily vacate and

remand for the court to consider these issues in the first instance. *Smith v. Casey*, 741 F.3d 1236, 1243 n.7 (11th Cir. 2014) (“With respect to a decision we would review only for an abuse of discretion, we generally decline to substitute our judgment about the matter when the district court has not yet decided it and leave the decision for the district court to make in the first instance.”). We decline that route here, though, because Fannies cannot make a showing of irreparable injury absent an injunction against § 16-5006. *See Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (“[E]ven if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper.”).

As we explain below, the district court properly declined to enjoin the SOB licensing code, which independently prohibits the possession or consumption of alcohol at Fannies. So even if we enjoined § 16-5006 of the alcohol code as substantially overbroad, Fannies is still subject to the SOB licensing code’s alcohol ban. *See Curves, LLC v. Spalding County*, 685 F.3d 1284, 1292 (11th Cir. 2012) (declining to address the constitutionality of an alcohol ordinance where another ordinance “constitutionally prohibits the same acts Plaintiffs desire to engage in (selling alcohol and providing nude dancing)”). Thus, an injunction would have little to no practical effect on Fannies pending final resolution of its claims, making preliminary injunctive relief inappropriate. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (“The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.”).

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#### IV.

The district court did not abuse its discretion by denying preliminary injunctive relief as to the SOB licensing code.

For starters, we agree with the court that the SOB licensing code is likely subject to intermediate scrutiny, not strict scrutiny. We recently reaffirmed “that regulations that target undesirable secondary effects of protected expression are deemed content neutral, and courts review them with an intermediate level of scrutiny,” *Wacko’s Too, Inc. v. City of Jacksonville*, 134 F.4th 1178, 1187 (11th Cir. 2025) (quotation marks omitted), notwithstanding the Supreme Court’s decision in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

On its face, the SOB licensing code is based on a secondary-effects rationale, and we cannot say at this early stage that Fannies is likely to succeed in casting “direct doubt” on that rationale.<sup>2</sup> *Zibtluda, LLC v. Gwinnett County*, 411 F.3d 1278, 1287 (11th Cir. 2005); see, e.g., *Artistic Entm’t, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1309 (11th Cir. 2000) (“Given the wealth of documentary evidence and testimony presented to it, we conclude that the Warner Robins City Council had an adequate basis for concluding that proscribing the sale and consumption of alcohol would reduce the crime and other social costs associated with adult businesses.”). Fannies’s contention that the City acted with the intent to suppress

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<sup>2</sup> We note that the court reserved ruling on this question pending further development of the record.

speech is largely “circumstantial, inferential, and remote,” based on the City’s knowledge of the experiences of other cities in imposing similar alcohol bans. *Zibtluda*, 411 F.3d at 1288. But contrary to Fannies’s suggestion, the City was permitted to consider “the experience of other cities” and “studies done in other cities.” *Wacko’s Too*, 134 F.4th at 1189. And “we will not strike down an otherwise constitutional statute on the basis of an alleged legislative illicit motive.” *Zibtluda*, 411 F.3d at 1289 (quotation marks omitted).

The district court also reasonably concluded that the City’s SOB licensing code likely satisfied intermediate scrutiny. We have repeatedly upheld “similar nude-dancing-while-selling-alcohol bans.” *Curves*, 685 F.3d at 1287, 1290 & n.7 (upholding an ordinance that prohibited nude dancing or certain “simulated” sexual activity where alcohol was served or consumed); *Sammy’s of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 995–96 (11th Cir. 1998) (upholding an ordinance that prohibited nude dancing at establishments licensed to serve alcohol); *see also Artistic Entm’t, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1309 (11th Cir. 2000) (upholding a ban on the sale and consumption of alcohol at adult businesses); *Wise Enters., Inc. v. Unified Gov’t of Athens-Clarke Cnty.*, 217 F.3d 1360, 1363 (11th Cir. 2000) (same). While Fannies cites the effects of the SOB licensing code and the alcohol bans on the economic viability of their business, nothing in the SOB licensing code prohibits Fannies from continuing to offer nude dancing. *See Sammy’s of Mobile*, 140 F.3d at 998 (“In prohibiting nude dancing where liquor is sold, the ordinance restricts only the place or manner of nude dancing without regulating any particular message it might convey.”). “[N]or does



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it limit the number of establishments where nude dancing can occur.” *Wise Enters.*, 217 F.3d at 1363.

Given our precedent upholding alcohol bans similar to the City’s, which Fannies does not attempt to distinguish on appeal, the district court did not abuse its discretion in concluding that Fannies was unlikely to succeed on the merits of this challenge to the SOB licensing code.

V.

In sum, we affirm the denial of Fannies’s motion for preliminary injunctive relief.

**AFFIRMED.**