No. 23-20480

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE WOODLANDS PRIDE, INCORPORATED; ABILENE PRIDE ALLIANCE; EXTRAGRAMS, L.L.C.; 360 QUEEN ENTERTAINMENT, L.L.C.; BRIGITTE BANDIT,

Plaintiffs-Appellees,

v.

WARREN KENNETH PAXTON, IN AN OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; BRETT LIGON, IN AN OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF MONTGOMERY COUNTY; MONTGOMERY COUNTY, TEXAS; JAMES HICKS, IN AN OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF TAYLOR COUNTY; TAYLOR COUNTY, TEXAS; CITY OF ABILENE, TEXAS,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
Civil Action No. 4:23-cv-02847

BRIEF OF *AMICUS CURIAE* DRAMATISTS LEGAL DEFENSE FUND IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for The Dramatists Legal Defense Fund hereby certifies that it is not a publicly-traded entity, it does not have a corporate parent, and there is no publicly held corporation that owns 10% or more of its stock.

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The Dramatists Legal Defense Fund (the "DLDF") respectfully submits this memorandum of law as *amicus curiae* in support of Plaintiffs-Appellees and to apprise the Court of additional considerations.

STATEMENT OF INTEREST

The Dramatists Guild of America, Inc. (the "Guild") formed the DLDF in 2009 to advocate for free expression in the dramatic arts as guaranteed in the First Amendment of the United States Constitution.

The DLDF is governed by an elected board of directors that currently includes such renowned dramatists as J.T. Rogers (*Oslo*, *Blood and Gifts*), Lydia Diamond (*Stick Fly*), Robert Schenkkan (*Kentucky Cycle*, *All the Way*), and the current President, John Weidman (*Assassins*, *Contact*, *Anything Goes*). The Board also includes several lawyers well-established within the theater industry as well as noted actor Raul Esparza (*Ferdinand*, *Law & Order: Special Victims Unit*). The sole member of the DLDF is the Guild, a century-old trade association with a governing board of playwrights and musical theater authors that includes Marsha Norman (*The Color Purple*, *'Night Mother*), Stephen Schwartz (*Wicked*, *Godspell*, *Pippin*), Tony Kushner (*Angels in America*), and Lynn Nottage (*Sweat*, *Ruined*). The current president of the Guild is Amanda Green *(Hands on a Hardbody, Bring It On*).

While Appellees are not a part of the DLDF, the DLDF and the Guild recognize that their interests and the interests of the public are threatened by

Appellants' attempts to uphold an unconstitutional law, which not only targets members of the LGBTQ+ community, but theatrical performances in general, particularly because of the history and expressive use of drag in theater. Because the DLDF's mission is to advocate for free expression while advancing the interests of theater writers and their audiences, the DLDF takes great exception to any law that attempts to curtail the free expression of any playwright, actor, or artist. As shown below, this unconstitutional law threatens to chill the speech of theatrical performances in Texas (and beyond) by threatening criminal sanctions on performers and their proprietors. The DLDF, in its mission to advocate for free expression, cannot let that stand unopposed.

All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2023, in a regressive rampage, the Texas Legislature passed a slew of new laws aiming to punish the LGBTQ+ community. Senate Bill 12 ("S.B. 12"), one of two bills specifically aimed at drag, was passed, criminalizing "sexually oriented performances" that "appeal to the prurient interest in sex." The other bill, S.B. 1601, which ultimately did not become law, sought to strip public funding from municipal libraries that hosted "an event at which a man presenting as a woman or a woman presenting as a man reads a book or a story to a minor for entertainment," *i.e.*, drag story hours. At the same time, Texas legislators passed bills to prevent trans kids from receiving gender affirming care.[1] Supporters of these bills, like Lieutenant Governor Dan Patrick, claimed that they wanted to prevent children from being "sexualized and scarred for life by harmful drag performances."[2] But the real purpose is clear: this package of laws is meant to push drag and the LGBTQ+ community back into the shadows.

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[1] David Montgomery and J. David Goodman, Texas Legislature Bans Transgender Medical Care for Children, The New York Times (May 17, 2023) https://www.nytimes.com/2023/05/17/us/texas-transgender-care-ban-children.html#:~:text=Over%20the%20opposition%20of%20Democrats%20and%20the%20loud,state%20to%20ban%20transition%20medical%20care%20for%20minors.

[2] Lt. Gov. Dan Patrick: Statement on the Passage of Senate Bill 12 – Banning Children's Exposure to Drag Shows (Apr. 5, 2023), https://www.ltgov.texas.gov/2023/04/05/lt-gov-dan-patrick-statement-on-the-passage-of-senate-bill-12-banning-childrens-exposure-to-drag-shows/

Since the Stonewall Riots in 1969, America has grappled with whether and how to accept the LGBTQ+ community as a part of mainstream culture. That history is complex and scattered with policy failures and public callousness but, in the 21st century, social and political acceptance has blossomed and steadied. Sodomy laws used to criminalize same sex relationships are now unconstitutional; the Supreme Court finally recognized the sanctity of same sex marriage; and, most recently, trans and nonbinary visibility has increased.[3] For the LGBTQ+ community and its allies, these changes are long-awaited and hard-earned steps towards civil and social equality.

Politicians and activist groups, however, have reacted by sparking a moral panic. Moral panics and legislative overcorrections are negative reactions to progress, broadening social norms, and democratic (and demographic) changes in society. Like moral panics before this one, opponents focus on modes of communication—comic books, *People v. Bookcase, Inc.*, 201 N.E.2d 14, 19 (N.Y. 1964), movies, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497 (1952), rap music, *Luke Recs., Inc. v. Navarro*, 960 F.2d 134, 136 (11th Cir. 1992), video games, *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 804 (2011), and, most recently, social media,

[3] Especially in the last 10 years, there have been multiple award-winning television series centered on trans and non-binary characters including *Pose* and *Transparent*. Further, multiple trans actors, writers, and directors have been featured in television, cinema, and the theatre.

see e.g., *Marland v. Trump*, 498 F. Supp. 3d 624 (E.D. Pa. 2020)—to prevent the spread of ideas.[4] The new target is drag—a performance style closely linked with the LGBTQ+ community—which has become the focus of various new state laws attempting to ban it at the urging of advocacy groups with names like Protect Texas Kids and Gays Against Groomers, which has chapters in 23 states, including Texas.[5]

Even if there were a legitimate way to curtail Texas's love of drag, S.B. 12 certainly is not it. This legislation undoubtedly violates the First Amendment by improperly broadening the application of the existing indecency law and failing to provide sufficient clarity to what conduct is actually prohibited or what intent is required to be criminally liable under the act, inevitably resulting in selective enforcement.

Especially important to this *amici*, this unconstitutional legislation will curtail the First Amendment rights of playwrights, performers, and their audience and force

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[4] Indeed, the country is now seeing a resurgence of book bans, as a small group of people—11 people are responsible for 60% of books ban requests nationwide—contest any books that provide perspectives different from their own or include content to which they personally object. *See* Hannah Natanson, *Objection To Sexual, LGBTQ Content Propels Spike In Book Challenges*, WASH. POST, 2023 WLNR 17897699 (May 23, 2023).

[5] Ignoring the obvious First Amendment implications, at least fourteen states have passed or considered anti-drag bills, including Arizona, Tennessee, Kentucky, Arkansas, Texas, and Florida. *See* Solcyré Burga, *Tennessee Passed the Nation's First Law Limiting Drag Shows. Here's the Status of Anti-Drag Bills Across the U.S.*, TIME (updated Apr. 3, 2023), https://time.com/6260421/tennessee-limiting-drag-shows-status-of-anti-drag-bills-u-s/.

performers to either risk criminal charges or stop performing altogether in Texas. Such a broad and vague statute as S.B. 12, which has no affirmative defenses and almost no discernible limits, should not be allowed to stand. In deciding whether Appellants have demonstrated that S.B. 12 passes constitutional muster, the Court must look beyond Appellants' stated justifications and consider the vast consequences this law has and will have on the writers, producers, and performers of drag (and on other art swept up by this law), on audiences, and on the LGBTQ+ community as a whole.

In truth, moral panics are as American as drag and apple pie. But, it is also a deeply American tradition to correct course and affirm our core constitutional rights. In Utah, Montana, Florida, Tennessee, and Texas, courts have ruled that these attempts to ban drag performances are unconstitutional.[6] This Court should do the same and affirm the District Court's finding that S.B. 12 is unconstitutional.

[6] *See HM Fla.-ORL, LLC v. Griffin*, 679 F. Supp. 3d 1332 (M.D. Fla. 2023), *appeal docketed*, No. 23-12160 (11th Cir. June 28, 2023); *Blount Pride, Inc. v. Desmond*, No. 3:23-CV-00316-JRG-JEM, 2023 WL 5662871 (E.D. Tenn. Sept. 1, 2023); *S. Utah Drag Stars v. City of St. George*, 677 F. Supp. 3d 1252 (D. Utah 2023); *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831 (W.D. Tenn. 2023).

ARGUMENT

I. S.B. 12 IS AN ANTI-DRAG BILL

In May 2023, the Texas Legislature passed S.B. 12, establishing regulations for "sexually oriented performances" on the premises of commercial enterprises, on public property, and in the presence of minors and attaching civil and criminal penalties for this conduct.

The law empowers the Attorney General to enjoin and impose a fine of up to $10,000 against any "person who controls the premises of a commercial enterprise" where a sexually oriented performance takes places "on the premises in the presence of an individual younger than 18 years of age." ROA.169-70. Municipalities and counties also "may not authorize a sexually oriented performance: (1) on public property; or (2) in the presence of an individual younger than 18," and they are authorized to "regulate" such performances as necessary to promote the public health, safety, or welfare. ROA.170-71. Finally, S.B. 12 creates a misdemeanor criminal offense for "engag[ing] in a sexually oriented performance: (1) on public property at a time, in a place, and in a manner that could reasonably be expected to be viewed by a child; or (2) in the presence of an individual younger than 18." ROA.171-72.

S.B. 12 provides only vague definitions of these terms. A "sexually oriented performance" is a "visual performance" that "(A) features: (i) a performer who is nude," or (ii) any other performer who engages in 'sexual conduct'; and (B) appeals to the prurient interest in sex." ROA.172. "Nude"—the definition taken from the Business & Commerce Code—means "entirely unclothed" or "clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks." TEX. BUS. & COM. CODE § 102.051(1). "Sexual conduct," as defined by S.B. 12, includes:

> (1) "the exhibition or representation, actual or simulated, of sexual acts, including vaginal sex, anal sex, and masturbation;" (2) "the exhibition or representation, actual or simulated, of male or female genitals in a lewd state, including a state of sexual stimulation or arousal;" (3) "the exhibition of a device designed and marketed as useful primarily for the sexual stimulation of male or female genitals;" (4) "actual contact or simulated contact occurring between one person and the buttocks, breast, or any part of the genitals of another person;" and (5) "the exhibition of sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics."

ROA.171. By notable contrast, the law provides no definition or explication of what conduct constitutes an "appeal[] to the prurient interest in sex," and the Appellants admit that the *Miller* obscenity test, which would preclude expression with even *de minimis* artistic value from being regulated by this bill, does not apply here. *See* Appellant Brief at 6-7; Hearing on S.B. 12 before the Texas Senate, 88th Leg., Reg. Sess. at 7:20 (April 4, 2023), https://tinyurl.com/ef7u5w2u.

As written, S.B. 12 can potentially apply to an array of performances, but it was passed specifically to address drag. An earlier version of the bill defined "sexually oriented performances" to include "a male performer exhibiting as a female, or a female performer exhibiting as a male, who uses clothing, makeup, or other similar physical markers and who sings, lip syncs, dances, or otherwise performs before an audience." S.B. 12 Conf. Comm. Rep., 88th Leg., Reg. Sess. (filed May 27, 2023), https://lrl.texas.gov/scanned/88ccrs/sb0012.pdf#navpanes=0. Drag was clearly intended to be prohibited by the draft bill, and because it is arguably prohibited under the bill that passed, it is clear that S.B. 12 is meant to prevent and punish drag performances.

II. S.B. 12 IS VAGUE AND OVERBROAD

As written, S.B. 12 is vague and overbroad because it creates an environment where many types of performances may be sanctioned or subject to criminal penalties without sufficient notice to performers, writers, and producers. A criminal law is invalid if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). The "void for vagueness" doctrine ensures that a "person of ordinary intelligence" has "a reasonable opportunity to know what is prohibited" by a law. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Furthermore, when First Amendment rights are at risk, the standard is relaxed, providing challengers a lower threshold for showing a law's unconstitutional vagueness. *See United States v. Requena*, 980 F.3d 30, 39 (2d Cir. 2020).

The overbreadth doctrine allows courts to "invalidate[] [a statute] as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks omitted); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). As a result of S.B. 12's vague language and lack of *mens rea*, the speech of performers, writers, and their audiences, (who have a separate right to consume the speech of their choosing) will be chilled. *See Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("[W]here a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both.").

A. S.B. 12's Prohibited Conduct is Not Clearly Defined and Thus is Vague and Overbroad

Although the Attorney General argues that S.B. 12 only applies to "highly sexualized conduct," the language of the law does not support that conclusion. Instead, the language of S.B. 12 is vague and overboard, arguably applying to far more performances than the Texas Legislature may have intended.

In defining "sexual conduct," the Texas Legislature failed to properly narrow the prohibited conduct. First, "prurient interest" is not defined or limited by *Miller*, as is required of constitutional laws restricting indecency or obscenity.[7] Based on examples of performances that apparently spurred the Legislature to action, such as a drag brunch in Plano, the bar is low. Potentially any performance "featuring," discussing, or utilizing sex or sexuality will be subsumed in this category. Even more likely, any performance that references non-traditional gender roles, female sexual pleasure, or LGBTQ+ characters will be considered inherently appealing to a prurient interest in sex. The Legislature has made no effort to clear up this vagary and has offered only troubling examples to illustrate its intent.

Second, the law does not define "exhibitions," "representations," "simulated," "gesticulations," or "accessories or prosthetics that exaggerate male or female sexual characteristics."[8] Tex. Penal Code § 43.28(1). Based on the common use of these terms, S.B. 12 prohibits clearly constitutional speech as well as speech that poses no

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[7] In *Ginsberg v. New York*, where a restrictive statute was upheld, the statute defined "harmful to minors" as a depiction that "(i) predominantly appeals to the prurient, shameful or morbid interests of minors, and "(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and "(iii) is utterly without redeeming social importance for minors." 390 U.S. 629, 646 (1968) (Appendix A to opinion of the Court) (quoting N.Y. PENAL LAW §484–h(1)(f)).

[8] Notably, the law is quite clear that "device[s] designed and marketed as useful primarily for sexual stimulation of male of female genitals," for example, dildos and vibrators, are strictly prohibited. This is likely due to Texas's strange crusade against sex toys. TEX. PENAL CODE § 43.21(a)(1)(C); *see also* Russell Falcon, *The Texas law that dictates adult toys*, KXAN (updated June 24, 2023, 3:01PM), https://www.kxan.com/news/texas/the-texas-law-that-dictates-adult-toys/.

harm to minors, and it provides no guidance for which performances would result in prosecution. For example, rude hand gestures by a raunchy comedian may now be illegal. Make up, wigs, certain costumes, and body padding may be considered prosthetics exaggerating sexual characteristics, and thus illegal *See HM Fla.-ORL, LLC*, 679 F. Supp. 3d at 1340 (plaintiff's drag performances arguably proscribed by "vague statutory language," such as "lewd exhibition of prosthetic genitals or breasts" (citation omitted)). S.B. 12 also does not define what is necessary to create a "feature" of a performance that appeals to prurient interests. For example, one drag performance in a variety show or a single scene discussing the character's sex lives may suffice to create criminal liability.

Due to S.B. 12's vague language and municipality-by-municipality enforcement, vast and potentially unknown amounts of conduct are swept into the criminal prohibition. The application of this law is limited only by the imagination of the municipal authorities, will certainly be selectively enforced, and should not be held as constitutional. *See Blount Pride Inc.*, 2023 WL 5662871, at *5.

B. S.B. 12 Lacks a Clear *Mens Rea*

In addition to the vague and overbroad language of S.B. 12, it lacks a clear *mens rea*, potentially rendering it a strict liability law, which will have chilling effects on performances throughout Texas. It is a basic principle of criminal law that a person should not be convicted of a crime if he had no reason to believe that his acts constituted a crime or were wrongful. As the Supreme Court has acknowledge, "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). Therefore, an intent requirement was the general rule at common law. *Id*. Indeed, the absence of a *mens rea* requirement in a criminal statute is a significant departure from longstanding principles of criminal law. *See Staples v. United States*, 511 U.S. 600, 605 (1994). However, here, the Texas Legislature dispenses with this long-standing principle of American criminal jurisprudence by the omitting the culpable state of mind requirement from S.B.12. Without a stated *mens rea*, S.B. 12 can be read to apply either recklessness or strict liability, creating an environment where the criminality of a variety of acts is in question, leaving performers insufficiently apprised of the risks assumed when performing.

i. Texas's General Approach to *Mens Rea*

In Texas, even if "the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element." TEX. PENAL CODE § 6.02(b). If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection 6.02(b), Subsection (c) requires that it amount to at least *recklessness*, and not the implied criminal negligence standard advanced by the State. *See Aguirre v. State*, 22 S.W.3d 463, 472 (Tex. Crim. App. 1999); TEX. PENAL CODE § 6.02(b)-(c); Appellant Br. 17.

Here, it is possible that S.B. 12 requires that the performer "recklessly" engage in a "sexually oriented performance," in order to be susceptible to criminal liability. Recklessness requires that the performer "acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." TEX. PENAL CODE § 6.03(c). Under this standard, "[t]he risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *Id.* Questions of what constitutes a "reckless" drag performance, and whether a performer acted "recklessly" creates a question of fact for a jury as to a culpable state of mind, *Walter v. State*, 581 S.W.3d 957, 972-73 (Tex. App.—Eastland 2019, pet. ref'd), the proof of which will almost always depends upon circumstantial evidence, *Duntsch v. State*, 568 S.W.3d 193, 216 (Tex. App.—Dallas 2018, pet. ref'd).

ii. S.B. 12's Vague Language May Lead to Strict Liability

However, it is not entirely clear that recklessness is the appropriate *mens rea* standard. Texas law generally presumes that a criminal defendant *intended* the natural consequences of his acts. *See Ruffin v. State*, 270 S.W.3d 586, 591 (Tex. Crim. App. 2008). The practical effect of this reading of S.B.12 is that it does not have a *mens rea* requirement at all, and instead is intended to create a strict liability crime, or a crime for which "there is no 'guilty mind' requirement, and the actor does not have to possess the *mens rea* to commit any crime." *Fleming v. State*, 455 S.W.3d 577, 581 (Tex. Crim. App. 2014).

Where a statute is silent as to *mens rea*, whether the State intended to dispense with the scienter element is a question of legislative intent, and such intent should be manifest in the text of the statute in most circumstances. *Lomax v. State*, 233 S.W.3d 302, 304 (Tex. Crim. App. 2007) (citing *Aguirre v. State*, 22 S.W.3d 463, 470 (Tex. Crim. App. 1999)); *see* TEX. PENAL CODE § 6.02(b). When determining whether the Legislature intends to dispense with the *mens rea* requirement, "[t]he conclusive feature would be an affirmative statement in the statute that the conduct is a crime though done without fault. A legislature could make such a statement, but it rarely if ever does so. The typical strict liability statute is 'empty'—it simply says nothing about a mental state." *Aguirre*, 22 S.W.3d at 471.

An important factor in the determination of whether such an "empty" statute dispenses with the requirement of a culpable mental state is the subject of the statute. *Aguirre*, 22 S.W.3d at 473. In this regard, strict liability is generally associated with the protection of the public health, safety, and welfare. *Id.*; *Thompson v. State*, 44 S.W.3d 171, 179 (Tex. App. —Houston [14th Dist.] 2019, no pet.). Long-standing precedent holds that a legislature may create strict liability crimes when there is an "overriding governmental interest in promoting the health, safety and welfare of its citizens." *Dubuisson v. State*, 572 S.W.2d 694, 699 (Tex. Crim. App. 1978). Section 243.0031(b) of S.B. 12, which empowers municipalities to regulate drag performances, as if following a textbook, includes the phrase "necessary to promote the public health, safety, or welfare," suggesting that the legislature likely intends the crime to be a strict liability offense. Indeed, S.B. 12 follows the line of caselaw using public health and safety to regulate "sexual conduct" finding its origins in *Byrne v. State*, where the court found that Texas's child sexual assault law did not have a *mens rea* requirement, and that the "protection of minors from the improper sexual advances of adults is clearly a valid concern of our society and the government may impose strict liability statutes to discourage the practice." 358 S.W.3d 745, 752 (Tex. App.—San Antonio 2011, no pet.).

In practice, a strict liability framework presents a lower threshold of criminal liability for performers as *any* proscribed drag performance is criminal if performed in front of a minor—unknowingly, accidentally, mistakenly, or otherwise. A minor who sneaks into a drag performance using a fake ID creates the necessary elements of a crime under S.B. 12, as does the curious child who watches a performance in secret, avoiding detection by the event hosts and performers. Such a framework would also criminalize accidents such as wardrobe malfunctions, "slips," or other unintentional chains of events that could render an otherwise legal drag performance—if one exists under Texas law—criminal.

The Attorney General attempts to downplay the breadth of S.B. 12 in this regard by claiming that the word "feature" "incorporates an element of intent" as it relates to proscribed nudity because to "feature" is to "give[s] special prominence to." Appellant Br. 18-19. Because this reading is reliant on which definition of the word "feature" is used, it does nothing to create an implied element of intent. The word "feature," as Appellees point out, can be simply defined as "to have as a characteristic." Appellee Br. 33. Absent any applicable *mens rea* element, under a strict liability framework, *any* performance—let alone any drag performance—that has nudity as a characteristic may give rise to criminal liability, regardless of whether the nudity was purposeful or if there was any intent to give that nudity "special prominence" in the first instance.

S.B. 12's lack of a clear *mens rea* requirement, therefore, is an additional factor that renders it so vague and overbroad as to capture *accidents* as events giving rise to criminal liability. This is precisely the type of law that should be rendered unconstitutionally vague and overbroad, as it is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304.

III. IF S.B. 12 IS ENFORCED, IT WILL HAVE A CHILLING EFFECT IN THE PERFORMING ARTS

S.B. 12 is unconstitutional because it was created to harass and intimidate drag entertainers and the LGBTQ+ community; and it is plainly vague and overbroad. It should also be voided as unconstitutional because it will create, and already has created, a chilling effect on the performing arts in Texas and potentially beyond.

A. Appellant Ignores the Historical, Social, and Theatrical Significance of Drag.

While S.B. 12 is clearly intended to push drag from the mainstream to the shadows, it is also clear that the legislators who passed the bill had a willful misunderstanding of drag and its importance, not just in the LBGTQ+ community, but in the broader performing arts generally.

Drag—a multifaceted performance style defined by a performer's apparent impersonation of the opposite gender—has a long history in American culture. *See also* Appellee Brief FN 1; ROA 1374:24-1375:3. Even the most staunch opponents have encountered drag at one point or another—from Shakespeare's classic plays like *Twelfth Night* to modern Broadway musicals like *Hairspray*, *Tootsie*, *Kinky Boots*, and this season's *Some Like It Hot*. There are many more examples in movies and television. Tyler Perry's *Madea*, the Wayans Brothers in *White Chicks*, or Robin Williams in *Mrs. Doubtfire* (adapted as a Broadway musical as well), and even Disney's *Mulan* all use drag as an essential literary device and performance technique.

In Shakespeare's time, it was a historical necessity to use drag performers due to men-only casts. Similarly, "trouser roles" are commonplace in modern theater. For example, in operatic roles like Orpheus and Prince Orlofsky, cis-women play male roles, allowing the performer to fit the vocal range the role originally required.[9] While the inclusion of women in entertainment has removed drag as a tool of necessity, drag is still an effective literary tool that provides important criticism and analysis of—and in some ways, upholds—gender norms. As Andy Warhol stated:

> Drag queens are living testimony to the way women used to be, the way some people still want them to be, and the way some women will actually want to be. Drags are ambulatory archives of ideal movie star womanhood. They perform a documentary service, usually consecrating their lives to keeping the glittering alternative alive and available for (not-too-close) inspection.

Andy Warhol, The Philosophy of Andy Warhol: From A to B and Back Again, New York 1975, p. 54.

Although drag has existed for centuries both in and out of LGBTQ+ spaces, as it has risen in popularity, it is unquestionably associated with the LGBTQ+ civil

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[9] *Opera's Greatest Trouser Roles*, ENO.ORG, https://www.eno.org/discover-opera/explore-more/operas-greatest-trouser-roles/ (last visited Apr. 17, 2024).

rights movement and pop culture. This is in large part due to shows like *RuPaul's Drag Race*, a TV program hosted by RuPaul, who himself performs both in and out of drag, where contestants compete to be crowned America's next drag star. It is this connection with LGBTQ+ rights that explains the passage of the S.B. 12: it is based on a fundamental misunderstanding of the role of drag generally and seemingly upon an intent to slander the LGBTQ+ community as child abusers and groomers.

It is clear the State has no problem with drag by apparently cis-gendered, heterosexual men—a video surfaced of one proponent of the bill, Rep. Nate Schatzline, in "harmless" drag.[10] In support of the bill, the law's proponents cite one example of "harmful" drag, which circulated in the media frenzy. At a drag brunch, a drag queen in Plano, Texas lifted her dress to show her oversized bloomers[11], while lip syncing. These examples illustrate that the bill (and its supporters) oppose drag when performed by gay men, but find it silly and harmless when performed by apparently straight men. Rep. Matt Shaheen of Plano told *The Texas Tribune* that "members had viewed videos of performances in which children were exposed to

[10] Michelle (@LoneStarLeft), X (formerly Twitter) (Feb. 27, 2023, 10:29 PM), https://x.com/LoneStarLeft/status/1630409757667344385.

[11] Mark Lungariello, *Video of drag queen gyrating in front of child has Texas pols pushing for legislative action*, NEW YORK POST (updated Oc. 19, 2022, 10:50 AM), https://nypost.com/2022/10/18/video-of-drag-queen-gyrating-next-to-child-sparks-backlash/.

'lewd, disgusting, inappropriate stuff.'"[12] Though he is referring to the Plano example, it does not actually include any of the elements in the bill—there is no actual or simulated sex, exhibition of genitals, no sex toys, no contact between people of any kind. Apparently, displaying modest undergarments combined with lip syncing is "lewd" and "disgusting." Despite being the cited impetus for the law's passing, the uproar over the Plano drag brunch (and not over Rep. Schatzline's drag skit) demonstrates that the Legislature does not appreciate that these two examples of drag are hardly distinguishable.

S.B. 12 simply ignores that drag itself is not inherently sexual or explicit. Indeed, nudity, drag, gender-swapped roles, and sexuality are literary devices used to explain, criticize, or illustrate the human condition. When someone dresses to impersonate a man or a woman, it can be done for a variety of reasons—including performances in theater or comedy. For example, in *Mrs. Doubtfire*—which includes a scene where "Mrs. Doubtfire" undresses multiple times, while his young neighbors watch across the street—Robin Williams uses drag to allow his character to remain close to his children after his divorce and to understand his ex-wife's

[12] William Melhado, *Bill restricting sexually explicit performances in front of children heads to the governor*, TEXAS TRIBUNE (May 28, 2023, 7:00PM), https://www.texastribune.org/2023/05/28/texas-legislature-drag-show-bill/.

responsibilities as a parent. Drag queens teach math and reading,[13] talk about philosophy and current events,[14] teach literacy,[15] and lip sync to pop tunes. S.B. 12, as discussed above, due to its vague language and incredible overreach, would effectively criminalize this behavior and prevent these performances from taking place in Texas.

B. The Chilling Effect

The chilling effect of this bill is expansive. S.B. 12's definition of "sexual conduct" is so broad that it could encompass performances such as live concerts, comedy shows, parodies, musicals, or many theatrical performances. First, a number of existing plays and productions could not be performed in Texas under S.B. 12. There are numerous examples of iconic plays that would be prohibited such as *Hair*, which depicts the 1960s and 1970s in American history, commenting on the sexual

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[13] Emily Kwong & Eva Tesfaye, *The (Drag) Queen of Mathematics*, NPR.ORG (Feb. 10, 2022, 12:15AM), https://www.npr.org/2022/02/02/1077667303/the-drag-queen-of-mathematics.

[14] Tyler Coates, *Drag Superstars Trixie and Katya on World of Wonder Series 'UHNhhh': "This Show Demystifies Drag"*, HOLLYWOOD REPORTER (June 4, 2023, 11:30AM), https://www.hollywoodreporter.com/tv/tv-features/trixie-katya-world-of-wonder-unhhhh-series-1235505539/#; Tiktok User: @thewendyweather ("The History Drag Queen").

[15] About Page, DRAG QUEEN STORY HOUR, https://www.dragqueenstoryhour.org/about/ (last visited Apr. 17, 2024) ("We envision a world where kids can learn from LGBTQ+ herstories and experiences to love themselves, celebrate the fabulous diversity in their communities, and stand up for what they believe in and each other.").

revolution and the anti-war movement, or, *Cabaret*, which, though taking place in a cabaret, explores the society of Weimar Germany and the rise of the Nazis. It could even prevent the showing of plays like *Bring It On*, that does not portray any more sexual content than a prime time TV show, but does have women doing cheer routines that could technically fall under the definition of "sexual gesticulations" or "representations" of "simulated" "sexual acts."

Similarly, other productions that would generally be considered appropriate may be subject to civil and criminal punishment depending on the municipality where the show takes place. For example, almost any pop star performance arguably contains exhibitions of simulated sexual acts, including Britney Spears, Dua Lipa, Nicki Minaj, and countless others. And, Harry Styles has previously performed while dressed in women's clothes (see below, left).[16]

Going back to the 1950s, Milton Berle popularized the new medium of television by wearing a dress. Indeed, in 1974, American icons, Bob Hope and Jackie Gleason, performed in Central Park in drag, as shown below.[17] All of these

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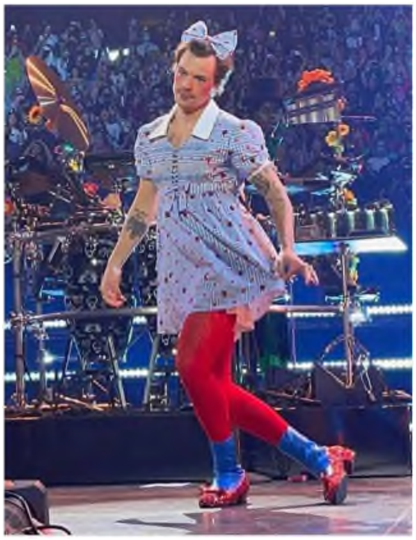
[16] Jem Aswad, *Harry Styles Dresses Up as Dorothy for 'Wizard of Oz'-Themed 'Harryween' Show on Halloween Eve: Concert Review*, Variety (Oct. 31, 2021, 8:47AM), https://variety.com/2021/music/news/harry-style-dorothy-harryween-halloween-1235101308/

[17] Lucinda Franks, *Hope and Gleason Jest in Central Park*, NEW YORK TIMES (Sept. 18, 1974), *available at* https://www.nytimes.com/1974/09/18/archives/hope-and-gleason-jest-in-central-park-a-medley-of-skits.html.

performances arguably would be prohibited under S.B. 12. Rather than determining if a specific show is appropriate to all of Texas's municipalities, performers are likely to simply not perform in Texas at all.



S.B. 12 will not only chill the live performances it overtly targets, but also the expressive acts underlying those performances. Working artists are disincentivized from creating art that is illegal to publicly exhibit. Just as a law that forbids a dancer from presenting a particular dance will discourage the dance's performance, so too will this law discourage the choreographer upstream. By vaguely and opaquely proscribing sexual conduct in visual performances that a child could reasonably view, S.B. 12 would create a climate of uncertainty that would diminish the exhibition of any (potentially) sexually provocative content to avoid the risk of legal sanctions.

For writers and producers of theater, this means that casting certain roles for productions will require notification to all potential cast members that their performance may result in arrest, jail, or prosecution. And S.B. 12 would certainly deprive Texas audiences from seeing touring productions of many popular plays and musicals, including those already described herein and many others, as producers will seek to protect their casts by avoiding the State as a stop on their tours. And non-profit theaters and arts centers will refrain from originating anything that could even remotely be interpreted as falling within the law's overreach.

The application of S.B. 12 to Dallas's acclaimed Kitchen Dog Theater ("KDT") provides a top-to-bottom case in point. Established in 1991, KDT produces theater intended to challenge the moral and social conscience of its audience.[18] KDT's history of past productions reflects this ambition, and it includes a number of thematically sexual works—from Shakespeare's *Romeo and Juliet* to Sarah Ruhl's Tony-nominated *In the Next Room (Or the Vibrator Play)*—that would arguably run afoul of S.B. 12 just by dint of having been performed.[19]

[18] Our Mission, KITCHEN DOG THEATER.ORG, https://www.kitchendogtheater.org/our-mission (last visited Apr. 17, 2024).

[19] Past Plays, KITCHEN DOG THEATER.ORG, https://www.kitchendogtheater.org/past-plays (last visited Apr. 17, 2024).

KDT also regularly provides free writing workshops at local public libraries and Dallas area high schools,[20] and S.B. 12 would pose threats to this public service as well. Because S.B. 12 restricts local governments from authorizing sexually oriented performances, and because S.B. 12 defines "sexually oriented performance" so broadly—and "appeals to the prurient interest in sex" not at all—municipal libraries could plausibly refrain from convening longstanding public playwriting workshops on the off chance that a participant's blocking exercise or read-through contains an off-color sex joke or one hip thrust too many.

A similar analysis would be germane to non-public rehearsal spaces. The risk of fines or prosecution outweighs presenting certain types of events, even those not explicitly, or even intentionally, prohibited by S.B. 12. While the State may claim that it will narrow its enforcement of the legislation, the legislation itself is so broad and delegates so much discretion to each judicial district's prosecutors that no performer or producer of theater for adults can clearly state that its performance will not result in criminal liability in Texas.

In sum, S.B. 12 would render Texas a theatrical desert and, by so doing, do great harm to the Texas economy, by eliminating jobs in non-profit cultural institutions and the performing arts sector and its related industries, like tourism,

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[20] Our History, KITCHEN DOG THEATER.ORG, https://www.kitchendogtheater.org/our-history (last visited Apr. 17, 2024).

hospitality, and restaurants. Even if these lost productions are replaced by other less challenging works, adult audiences would still be limited to experiencing only the art that this law deems to be suitable for minors. Losing a market the size of Texas would limit the ability of artists to create and disseminate protected works, extending the unconstitutional reach of this law far beyond the state's borders."

CONCLUSION

For the reasons set forth above, this Court should affirm the District Court's decision to permanently enjoin the State from enforcing S.B. 12.

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Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,152 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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