

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

UNOPPOSED MOTION OF DRAG ARTISTS AND SUPPORTERS
TO APPEAR AS AMICI CURIAE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that—in addition to the persons and entities listed in the appellees’ Certificate of Interested Persons—the following listed persons and entities as described in [5th Cir. R. 28.2.1](#) have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees

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Brigitte Bandit

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Fiesta Youth
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Amici respectfully seek leave of the Court to file an *amicus curiae* brief in this matter. Pursuant to [5th Cir. R. 27.4](#), counsel for *amici* has contacted all other parties and does not anticipate that an opposition to this motion will be filed. Pursuant to [Fed. R. App. P. 29\(a\)\(3\)](#), *amici* provide the following:

STATEMENT OF INTEREST

Amici are a group of drag performers, trans people, and organizations who have benefitted from Texas drag, namely: Fiesta Youth, Transgender Education Network of Texas, Frankie Gonzales-Wolfe, Barbie Hurtado, Verniss McFarland III, Pidge Stanley, Era Steinfeld, Jay Thomas, and Aimee Villarreal. If allowed to take effect, S.B. 12 would deny *amici* and similarly situated individuals and organizations important opportunities for self-expression, artistic achievement, interpersonal connection, community and political organizing, and economic support. Therefore, *amici* have a direct interest in asking this Court to consider their stories before rendering its decision.

STATEMENT OF DESIRABILITY AND RELEVANCE OF BRIEF

Amici anticipate, based on their lived experiences and the history of anti “cross-dressing” laws in Texas, that S.B. 12 would impact not only drag performances but also the freedom and safety of trans and BIPOC Texans. *Amici*’s particular experiences and concerns illuminate the vagueness of S.B. 12’s language and the potential for discriminatory enforcement. The history of drag artistry and of LGBTQ+ communities in Texas presented in this brief also shines an important light on the

broader context of restrictions on gender expression.

As *amici* attest, drag has created opportunities for them to engage in self-discovery, creative expression, community building, political organizing, and fundraising. They fear that S.B. 12 would take those opportunities away. As this Court considers the legal merits of this case, *amici* respectfully hope that their lived experiences offer context for how S.B. 12 could impact not only drag performers and supporters but also trans and BIPOC Texans in their everyday lives.

CERTIFICATE OF SERVICE

I certify that on April 17, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that service will be accomplished on all registered CM/ECF users by the appellate CM/ECF system.

Dated: April 17, 2024

/s/ Aedan Dunn
Aedan Dunn

Counsel for Amici Curiae

No. 23-20480

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**BRIEF OF GROUP OF DRAG ARTISTS AND SUPPORTERS AS
AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES**

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RULES

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INTEREST OF *AMICI CURIAE*¹

Amici are a group of drag performers, trans² people, and organizations who have benefitted from Texas drag, namely: Fiesta Youth, Transgender Education Network of Texas (“TENT”), Frankie Gonzales-Wolfe, Barbie Hurtado, Verniss McFarland III, Pidge Stanley, Era Steinfeld, Jay Thomas, and Aimee Villarreal. S.B. 12 would deny *amici* and similarly situated individuals and organizations important opportunities for creative expression, interpersonal connection, community and political organizing, and economic support. Therefore, *amici* have a direct interest in this matter.

ARGUMENT

Drag is art. Drag is a source of political commentary and community engagement. Drag is both life-affirming and livelihood for many Black, Indigenous, and People of Color (“BIPOC”), trans, and gender nonconforming³ Texans. Drag permeates Texas history and culture. By targeting drag, S.B. 12 attacks trans communities and core First Amendment values. The history of policing of gender

¹ This brief is submitted under [Federal Rule of Appellate Procedure 29\(a\)\(2\)](#) with the consent of all parties. Undersigned counsel for *amici curiae* certify that this brief was not authored in whole or part by counsel for any of the parties; no party or party’s counsel contributed money for the brief; and no one other than *amici* or their counsel have contributed money for this brief.

² “Trans” is a prefix meaning “on or to the other side of.” *Trans*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/trans> (last visited Apr. 5, 2024). Throughout this brief, it is used as a descriptor term for people who do not identify with the sex they were assigned at birth, including people who identify as transgender and/or non-binary (identifying as neither a man nor a woman).

³ “Gender nonconforming” means “[n]ot fully conforming to gendered social expectations, whether that is in terms of expression, roles, or performance.” *Gender Diversity Terminology*, PENNSTATE STUDENT AFFAIRS, <https://studentaffairs.psu.edu/csgd/explore-lgbtq-resources/identity-based/gender-terms> (last visited Apr. 15, 2024).

expression in Texas and the experiences and fears of *amici* highlight the vagueness and overbreadth of S.B. 12, which would especially harm trans and BIPOC communities if allowed to take effect.

The void-for-vagueness doctrine applies most forcefully where First Amendment rights and criminal prohibitions are at issue, as here. *See Winters v. New York*, 333 U.S. 507, 509–10 (1948). The First Amendment “looks beyond written or spoken words as mediums of expression,” reaching also a range of expressive conduct. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). S.B. 12 is not sufficiently defined for *amici* to “understand what conduct is prohibited” and conform their expressive conduct to avoid criminal prosecution. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Their experiences suggest that S.B. 12 would “encourage arbitrary and discriminatory enforcement” in Texas, just as similar laws have in the past and as the void-for-vagueness doctrine seeks to prevent. *See id.*

I. S.B. 12 IS A STEP BACKWARDS IN HISTORY

A. Drag as an Art Form Has a Vibrant History Dating Back Centuries

The popularity of drag as an art form for audiences of all ages has been common in many different times, places, and cultural contexts. Today, “[d]rag is the theatrical exaggeration of gender,”⁴ which reflects the art form’s history and origins in theater.⁵

⁴ Scottie Andrew, *The US Has a Rich Drag History. Here’s Why the Art Form Will Likely Outlast Attempts to Restrict It*, CNN (Apr. 29, 2023), <https://www.cnn.com/style/article/drag-queen-us-history-explainer-cec/index.html> (quoting drag historian and professor Joe E. Jeffreys).

⁵ James T. Sears, *Rebels, Rubyfruit, and Rhinestones: Queering Space in the Stonewall South* 76 (2001).

Here in the United States, drag balls, events where drag artists gain acclaim by performing for panels of judges,⁶ first appeared in New York’s Harlem neighborhood in the 1860s.⁷ By the 1890s, “Prof. Stewart, the Great Female Impersonator,” “got top billing at the State Fair of Texas.”⁸ As reported at the time by *The Dallas Morning News*, “[t]hat day at the fair was specially set aside for kids, . . . with ‘all schools attending in a body with their teachers admitted free.’”⁹ Auriema, heralded as “the world’s greatest female impersonator,” performed at the Grand in San Antonio in 1914,¹⁰ then later adopted the stage name of Francis Renault¹¹ and reappeared at the legendary Majestic Theater in Dallas in 1925¹² in a show given high marks for its “clean innocent fun and amusement.”¹³ According to at least one account, “the grande dame of female impersonators was Texas-born Ray Bourbon,”¹⁴ whose signature show

⁶ Thaddeus Morgan, *How 19th-Century Drag Balls Evolved into House Balls, Birthplace of Voguing*, HISTORY (Sept. 7, 2023).

⁷ Andrew, *supra* note 4.

⁸ Lauren McGaughy, *A Brief History of Drag Queens in Texas*, DALLAS MORNING NEWS (Oct. 28, 2022), <https://www.dallasnews.com/news/politics/2022/10/28/a-brief-history-of-drag-queens-in-texas/>. The term “female impersonator” was used through the early twentieth century to describe people understood to be men who appeared in female roles in Western theatre. See Lana Mason, *From the Archives: Julian Eltinge, Female Impersonator*, NAT. THEATRE (May 5, 2023), <https://www.nationaltheatre.org/from-the-archives-julian-eltinge-female-impersonator/>.

⁹ McGaughy, *supra* note 8.

¹⁰ *San Antonio Drag*, HOUSTON LGBT HISTORY at image 6, <https://www.houstonlgbthistory.org/san-antonio-drag.html> (last visited Apr. 15, 2024).

¹¹ *Id.*

¹² Sears, *supra* note 5, at 76.

¹³ *Francis Renault-Greatest Female Impersonator Since Palmy Days of ‘Eltinge’*, HOLLYWOOD FILMOGRAPH (July 30, 1932), *clipping available at* DIGITAL TRANSGENDER ARCHIVE, <https://www.digitaltransgenderarchive.net/files/bv73c064n> (last visited Apr. 16, 2024).

¹⁴ Sears, *supra* note 5, at 78.

entitled “Boys Will Be Girls”¹⁵ appeared in the 1930s at Corpus Christi venues like Paradise Club and Elder’s, “where one can take the whole family.”¹⁶

Drag has also held a close connection to the LGBTQ+ community across many decades and places. In 1939, the Jewel Box Revue, “America’s first racially inclusive traveling revue of female impersonators,” was created and operated almost entirely by gay people,¹⁷ including Storme De Laviere, a male impersonator.¹⁸ Its cast included Francis David,¹⁹ who began in Dallas and went on to perform a range of dance styles in venues across Texas, from clubs to the state fair.²⁰ Later, “[a]s drag grew in popularity in the ’60s and beyond, many trans women found themselves performing because rampant transphobia and homophobia made it difficult to find other work.”²¹ A drag artist who performed during the twentieth century recalled that in the 1970s, many of his friends in the drag community had begun living openly as trans women.²² In fact, “many people who in the past have been referred to as cross-dressers,

¹⁵ Randy A. Riddle, *Nightclubs and Broadway*, DON’T CALL ME MADAM: THE LIFE AND WORK OF RAY BOURBON, <https://raebourbon.com/nightclubs-and-broadway/> (last visited Apr. 16, 2024).

¹⁶ *Wagon Wheel Nite Club*, HOUSTON LGBT HISTORY, <https://www.houstonlgbthistory.org/wagonwheel.html> (last visited Apr. 15, 2024).

¹⁷ Wayne Anderson, *The Jewel Box Revue: America’s First Gay Community?*, HUFFPOST (Feb. 2, 2016), https://www.huffpost.com/entry/the-jewel-box-revue-americas-first-gay-community_b_2228790.

¹⁸ *PASSAGES Tony Midnite*, WINDY CITY TIMES (Sept. 9, 2009), <https://www.windycitytimes.com/lgbt/PASSAGES-Tony-Midnite/22835.html>.

¹⁹ *The Jewel Box Revue...*, QUEER MUSIC HERITAGE, <https://www.queermusicheritage.com/fem-jew10.html> (last visited Apr. 15, 2024).

²⁰ Sears, *supra* note 5, at 77.

²¹ Andrew, *supra* note 4.

²² Sears, *supra* note 5, at 287.

transvestites, drag queens, and drag kings today define themselves as *transgender*.”²³ Today, the term “transgender” is understood to include “all those who defy what society tells them their ‘gender’ should be” and for that reason can include a wide range of people,²⁴ depending on each individual person’s identity and the terminology they use to describe it.

B. Starting in the Mid-Nineteenth Century, Localities Within Texas and Across America Enacted Anti Cross-Dressing Laws and Enforced Them Against LGBTQ+ People

From the mid-nineteenth to the mid-twentieth century, states and localities, including Dallas,²⁵ Houston,²⁶ and El Paso,²⁷ passed a variety of anti “cross-dressing” laws.²⁸ While the initial purpose of the laws is obscured,²⁹ they were ultimately used to target LGBTQ+ and other gender non-conforming people.

Enforcement in the first half of the twentieth century made drag performers a target for harassment and drove performers out of many Texas cities. The day after his 1925 performance at the Majestic Theater, Francis Renault was arrested in Dallas for wearing female clothing.³⁰ Later, Ray Bourbon’s drag “revue succumbed to a series of police raids,” ultimately leading Ray, and other performers, to stop appearing in drag.³¹

²³ Leslie Feinberg, *Transgender Warriors* xi (1996).

²⁴ *Gender Diversity Terminology*, *supra* note 3.

²⁵ Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963–86*, 40 L. & HIST. REV. 679, 720 (2023).

²⁶ *Id.* at 719.

²⁷ *Id.* at 721.

²⁸ *Id.* at 687.

²⁹ *Id.*

³⁰ Sears, *supra* note 5, at 76.

³¹ Riddle, *supra* note 15.

When drag artist Tony Midnite returned to Texas in the 1940s and appeared at the renowned Granada Club, his performance was stopped by Texas Rangers.³² The drag performers at the club “were let go as long as [they] would leave Galveston within twenty-four hours—and [they] did.”³³ Similarly, in 1938, four “female impersonators” were arrested at a local venue, the Nite Spot, and “given their choice . . . of leaving San Antonio . . . or going to jail.”³⁴

Enforcement in the second half of the twentieth century targeted not only performers but also LGBTQ+ people whose everyday gender expression did not fit neatly within social norms, making it especially difficult for trans people to live fully and authentically. Because “the visibility of clothing made cross-dressing an easy target,” anti cross-dressing laws became “a central tool for policing queer and trans communities in the 1950s, 1960s, and 1970s.”³⁵ Those facing the harshest policing were BIPOC people, working class butch lesbians,³⁶ and drag queens.³⁷

In 1967, Rita Wanstrom opened the Roaring Sixties, Houston’s first lesbian

³² Sears, *supra* note 5, at 79.

³³ *Id.*

³⁴ Eugene Alviar, *Recovering Queer History in Texas: Female Impersonators, Public Opinion, and Policy Responses in the Early Twentieth Century*, 6 UTSA J. UNDERGRADUATE RES. & SCHOLARLY WORK at 23 (2019), <https://hdl.handle.net/20.500.12588/96>.

³⁵ Clare Sears, *This Isn’t the First Time Conservatives Have Banned Cross-Dressing in America*, JACOBIN (Mar. 15, 2023), <https://jacobin.com/2023/03/cross-dressing-law-united-states-history-drag-bans>.

³⁶ “Butch” is a term used to describe distinctive gender expression; butch lesbians “challenge the narrow definition of what it means to be a woman.” Natalie S. Ohio, *Butch, Please: Female Masculinity & Its Significance to Lesbian Culture*, MEDIUM (Aug. 24, 2023), <https://medium.com/prismnpen/butch-please-female-masculinity-its-significance-to-lesbian-culture-f702e3006786>.

³⁷ Redburn, *supra* note 25, at 690 n.54.

bar.³⁸ Just two months later, police arrived at the bar, and “[t]wenty-five lesbians were hauled to jail for wearing clothing of the opposite sex.”³⁹ In the 1960s and 1970s, “local police used [cross-dressing] ordinance[s] to routinely harass the gay community,” similarly arresting seven men at a club in Fort Worth for wearing evening gowns.⁴⁰ With Wanstrom at the helm, a group of Houston area women sponsored drag shows to raise money to hire a prominent trial attorney.⁴¹ After the next raid, all those arrested at the Roaring Sixties entered “not guilty” pleas with the assistance of their new attorney, and all of the charges against them were dismissed.⁴²

By 1972, Rachelle Annette Mayes, a trans woman in Houston, had been arrested numerous times “on charges of being dressed in clothes of the opposite sex.”⁴³ Although the charges were often dismissed, Mayes recalled of the experience of being arrested: “I felt terrible . . . I had my wig torn off and there were a lot of remarks I didn’t care for.”⁴⁴ Mayes also commented that she had “probably spent \$1,000 in legal fees and bonds” since starting her medical transition, making it difficult for her to afford gender-affirming surgery.⁴⁵

³⁸ *Rita Wanstrom and Roaring Sixties (1967)*, HOUSTON LGBTQ EXHIBITS, <https://digitalprojects.rice.edu/wrc/Houston-LGBTQ/exhibits/show/bar-raids/notable-bar-raids-in-houston--rita-wanstrom-and-roaring-sixt> (last visited Apr. 15, 2024).

³⁹ Sears, *supra* note 5, at 52.

⁴⁰ Todd Camp, *Fort Worth LGBT Community*, TEX. STATE HIST. ASS’N (Mar. 31, 2022), <https://www.tshaonline.org/handbook/entries/fort-worth-lgbt-community>.

⁴¹ Sears, *supra* note 5, at 52–3.

⁴² *Id.* at 55.

⁴³ *Rachelle Annette Mayes*, TEX. OBITUARY PROJECT, <https://www.texasobituaryproject.org/110607mayes.html> (last visited Apr. 16, 2024).

⁴⁴ *Id.*

⁴⁵ *Id.*

C. The Repeal of These Laws, Alongside a Number of Successful Court Challenges, Was a Major Civil Rights Victory of the 1970s and 1980s

In 1971, a list of formal demands published in the *Trans Liberation Newsletter* included “[a]bolition of all cross-dressing laws and restrictions of adornment.”⁴⁶ Across the mid-twentieth century, the LGBTQ+ community grew in visibility and power, and new organizations were created that backed challenges to cross-dressing laws in court with increased resources and strategy.⁴⁷ As a result, courts across the country had dismissed cross-dressing charges by the mid-1980s, and enforcement was exceedingly rare by the 1990s,⁴⁸ enabling LGBTQ+ and especially trans people to live authentically.

Trans people drove this change in Texas and across America. Dating back as early as 1903, trans people began challenging cross-dressing bans in court.⁴⁹ Starting in the 1960s, “[i]n multiple courtrooms, [including in Houston,] doctors appeared as expert witnesses to testify that cross-dressing law interfered with their treatment of transsexuality.”⁵⁰ Most of these cases involved arrests of trans people who raised constitutional objections to anti cross-dressing laws in their defense in court.⁵¹ In 1974, the ACLU represented Toni Rochelle Mayes (also known as Rachelle Annette Mayes) of Houston, who had “decided to challenge the constitutionality of the [Houston]

⁴⁶ Susan Stryker, *Transgender History* 121 (2017).

⁴⁷ Sears, *supra* note 35.

⁴⁸ Redburn, *supra* note 25, at 714 & n.221.

⁴⁹ Sears, *supra* note 35.

⁵⁰ *Id.*

⁵¹ Redburn, *supra* note 25, at 699.

ordinance to help protect other trans people from the” harassment she had experienced.⁵² Although Mayes’ challenge was ultimately unsuccessful,⁵³ it laid the groundwork for continued advocacy.

Starting in the 1980s, and shifting from the challenges made as criminal defendants in the 1970s, trans people began bringing civil lawsuits to affirmatively challenge cross-dressing laws.⁵⁴ In 1980, a group of seven trans women, many of them with prior cross-dressing arrests, brought an anonymous civil lawsuit against the city of Houston.⁵⁵ The U.S. District Court for the Southern District of Texas found Houston’s cross-dressing ordinance unconstitutional “as applied to individuals undergoing psychiatric therapy in preparation for sex-reassignment surgery.” *Doe v. McConn*, 489 F. Supp. 76, 79–80 (S.D. Tex. 1980). The decision “added to activist pressure on the ordinance,” and “[a]fter years of lobbying from Phyllis Frye”—for years, “the only out transgender attorney in Texas,” who went on to become the first trans judge in the United States—the Houston City Council finally repealed the ordinance in the summer of 1980.⁵⁶

The result was that LGBTQ+, and especially trans, people were able to live—and find community—as their authentic selves. For example, a 1990 brochure for the second annual Texas ‘T’ Party in San Antonio, billed as a “fun weekend for cross-

⁵² *Id.* at 711.

⁵³ *Id.* at 712.

⁵⁴ *Id.*

⁵⁵ *Id.* at 713.

⁵⁶ *Id.* at 713 & n.216.

dressers and their friends,” included an assurance that neither state nor local law criminalized gender expression through clothing.⁵⁷ The event organizers went on to explain, “lots of people stayed home last time because it was our first party. Now that they know we were not arrested . . . they can show up.”⁵⁸ The event organizers, married couple Linda and Cynthia Phillips, “were transgender activists in Texas long before the term transgender was part of any discourse on sex and gender difference.”⁵⁹ Still, it was only after the repeal of the cross-dressing ordinances that they could bring together community members from across the country to gather in Texas.

With anti cross-dressing ordinances gone, LGBTQ+ people also used drag for fundraising and organizing. The AIDS crisis arrived just on the heels of repeal of the Houston ordinance in 1980, and quickly “[b]ars became unlikely hosts for memorials, where longtime familiar faces, community leaders, and popular performers were eulogized far too soon and too often.”⁶⁰ Throughout the 1980s, “[i]n almost every gay club in Texas, performers stepped on stage in drag and raised money to fight AIDS.”⁶¹ This work has continued for decades. In 2009, drag shows at San Antonio’s Cornyation raised over \$120,000 for local non-profits, almost all of them AIDS Service

⁵⁷ *Can You Come to Our Texas ‘T’ Party?*, DIGITAL TRANSGENDER ARCHIVE, <https://www.digitaltransgenderarchive.net/downloads/sq87bt68c> (last visited Apr. 15, 2024).

⁵⁸ *Id.*

⁵⁹ *Spotlighting LGBTQ History Month with a Look at UTSA Special Collections*, UTSA (Oct. 5, 2022), <https://lib.utsa.edu/news/spotlighting-lgbtq-history-month-with-a-look-at-utsa-special-collections>.

⁶⁰ Camp, *supra* note 40.

⁶¹ Steve Ramos & David Taffet, *Drag Queens Pulled Us Through, One Dollar at a Time*, DALLAS VOICE (Apr. 25, 2014), <https://dallasvoice.com/drag-queens-pulled-through-dollar-time/>.

Organizations (“ASOs”).⁶² Michele Durham, the director of Black Effort Against the Threat of AIDS (“BEAT AIDS”), a non-profit focused on HIV/AIDS prevention and education, said of the \$35,000 check that BEAT AIDS received from Cornyation, “we can’t survive without it.”⁶³ Cornyation, one of the oldest events included in Fiesta San Antonio,⁶⁴ is “a mock debutante pageant and political satire that started in 1951,” lost its venue in 1964, “and went on hiatus until its revival in the early 1980s,”⁶⁵ returning only as cross-dressing bans were being struck down and repealed across Texas. Today, it is “one of the ‘hottest tickets in town’ during Fiesta” and continues to provide much-needed funding to local ASOs.⁶⁶

II. S.B. 12 STRIKES AT A CULTURAL AND ARTISTIC PRACTICE OF GREAT SIGNIFICANCE TO TRANS COMMUNITIES

A. Drag Is Critically Important Expression for Trans Texans

According to recent data, approximately 600,000 LGBTQ+ adults now live in Texas, and “all major cities in Texas have thriving LGBTQ communities.”⁶⁷ Community celebration of drag performances affirms all LGBTQ+ people, showing that they are “wanted and desired for [their] unique contributions.”⁶⁸ Drag is particularly important for BIPOC communities as a form of cultural expression,

⁶² Amy L. Stone, *Queer Carnival: Festivals and Mardi Gras in the South* 1 (2022).

⁶³ *Id.*

⁶⁴ *Id.* at 55.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 15.

⁶⁸ *See id.* at 81.

community building, and artistic achievement. For many *amici*, it is an opportunity to explore gender identity in a safe and affirming atmosphere. It is a source of education and entertainment for audiences of all ages. It often incorporates social critique, and it is a catalyst for political and community organizing and fundraising. It is also a source of individual income, which can be particularly important to trans people pushed out of other forms of work.

Drag holds particular significance in BIPOC LGBTQ+ communities. Verniss McFarland III, founder and leader of an organization serving trans and queer communities of color in Houston, says drag is recognizable across the country as an art form and historical contribution to the city. Her community emphasizes the Black trans people who have historically graced the city of Houston with their performances and “honor[s] that and pay[s] respects to that.” Jay Thomas, who performs as Bobby Pudrido, says drag for Latine performers “decolonize[s] gender” and shows gender in an extravagant way that engages the community. Bobby Pudrido and Latine drag king troupe Los MENTirosos host Brokeback Cantina at Cheer Up Charlies in Austin, Texas, a show that merges Latine culture with the LGBTQ+ community in a way that allows people “to show up for each other in a safe space and listen to the music they grew up around and be with POC folks.”

Drag is an important form of self-exploration and self-expression, as well as a source of community and joy. Frankie Gonzales-Wolfe is the chief of staff for a county commissioner in Bexar County. She is a trans Latina woman who grew up in San

Antonio in the 1980s. Drag is the catalyst that deepened her understanding of herself and allowed her to begin her journey of self-discovery. When she met another trans woman drag entertainer, she felt for the first time in her life that “I wasn’t alone and I realized that what I was experiencing, someone else was already living.” She began performing in drag and found a community bubbling with laughter and shared memories and experiences. For Frankie, drag is about the sisterhood that gave her a “new and lasting family.”

Barbie Hurtado, a member of Los MENTirosos, first performed at Chingona Fest in 2017, around the time Barbie was questioning their gender identity. Drag helped them play with their gender expression and discover who they are. They describe being called “they” for the first time as “affirming,” explaining, “I finally feel whole.” They view their drag persona, Pancho Panza, as an extension of themselves. Pidge Stanley, a trans young adult who first appeared as their drag persona, Pyro, just a few months ago, explains that “making yourself look exactly the way you want to look is very liberating.” Pidge plans to find more spaces to continue to appear in drag. They think “people envy the freedom that drag gives, but there’s no one stopping them from being free in their own expression too.”

Families bring their children to see drag as a source of both learning and entertainment. Barbie and Los MENTirosos conduct Drag King Bilingual Story Hours. Barbie says the children who attend see the drag personas as characters and the story hour as play time. The drag kings “talk to kids about loving their bodies,” reminding

them, for example, that “fat bodies are okay” and explaining consent (a topic covered in many Los MENTirosos shows) in the context of hugs. They even teach children about their rights, such as reading a book about protesting and then allowing children to express themselves through a craft by making protest signs. The children have fun, dance, ask questions, and come out of their shells. Era has also hosted drag story time events, which she describes as “big hair, bright colors, big silhouettes. It’s eyes wide open—like TV has come to life.” Era sees a sense of wonder in the children that have attended her story hours. She explains that “[a]ny entertainer who works in any industry . . . knows how to shift their art and presentation for different audiences, like an R-rated movie isn’t made for 4-year-olds.” She explains that it is the “same with drag performers—if I’m going to be performing in front of children, I’ll be more covered up and won’t do the same performance I would in a 21+ venue.” Frankie, who has an adult daughter and three grandchildren, would “never see a problem with taking them to see a show because [she] knows that the performers are going to be respectful and understanding of the environment that they’re in.”

TENT wonders whether, if S.B. 12 took effect, children would still be able to even celebrate and support their LGBTQ+ family members at events like Pride where drag performances are common. Pidge also explains that younger siblings of the performers and technical crew for the annual drag show hosted by the Chi Alpha Iota Diaternity (“XAI”) at the University of Texas – Dallas often attend with families, and Pidge would have been disappointed if their younger sister could not attend the

performance only because of her age.

According to Jay, when kids see drag performances, it helps “teach literacy and acceptance” and “de-vilifies” drag. Jay has performed, for example, at Mutual Love, an all-ages festival where drag performers speak to youth and entertain them with arts and crafts. Seeing drag performances can also help children better understand, accept, and express themselves. When Fiesta Youth, San Antonio’s only LGBTQ+ youth-focused group, invited a drag performer to a group event for the first time, the youth were very excited to engage and express themselves. Staff could see children connect with the performance, and for some, it sparked interest in performing in the future.

Drag also allows the trans community to organize politically and address issues of critical importance. Barbie has taken part in several Drag Out the Vote and voter education events. They have performed for people waiting in line and encouraged voter registration at shows. They explain that voting is “important to return [LGBTQ+] people to [a] legislature who won’t attack us.” Drag is an essential strategy used in the LGBTQ+ movement to get voters excited to exercise their democratic rights. As Barbie explains, Drag Out the Vote has been a way to ensure that “trans folks that have a different gender marker on their ID [compared to their gender expression] get to register to vote with folks who won’t judge them.” Similarly using drag as a tool for enacting social change, Era hosts a drag event called Banned Bodies, which features local bands that include queer, trans, and BIPOC people and serves as a forum for community education and resources. As Verniss explains, when “drag performers have

a mic in their hands, they have the ability to tell community where to get HIV testing, where to get hormone care, mental health care.”

Drag also gives LGBTQ+ and BIPOC communities an opportunity to fundraise for critical needs. Fiesta Youth is a beneficiary of drag brunches at Sparky’s, allowing the organization to continue its work with LGBTQ+ youth. TENT’s critical work for trans Texans has also received funding from various drag shows and brunches, events that have provided an important source of both funding and community. As a college student, Pidge worked on XAI’s fundraising drag event at the University of Texas – Dallas. The proceeds from that annual event benefit XAI to sustain a safe space for queer people; the House of Rebirth, a Dallas organization serving Black trans women; and an additional rotating charity chosen annually by popular vote.

Drag also helps the LGBTQ+ community remain strong and sustain its members. Verniss highlights drag as important for “suicide prevention, harm reduction, self-care, community care, and access to funding and resources.” Drag provides a source of income for many trans people. Frankie explains that “drag has been one of the easiest things for [trans people] to do,” especially “folks [who] weren’t afforded an opportunity in school because they are trans—they don’t have as many skills in other areas.” For Frankie, drag served as a professional job through which “you learn a second or third or fourth craft.” She knows others who went on to become makeup artists and costume designers, careers often still closely connected to the drag community and performances, because of their expertise in drag art.

B. S.B. 12 Is an Attack on Trans People and the Trans Community

S.B. 12 attacks the trans community on many fronts at once. Its vagueness has the potential to capitalize on implicit biases of LGBTQ+ and BIPOC people as inherently sexual to potentially criminalize—and, at the least, chill—individual gender expression. Its text enables targeted criminal enforcement in LGBTQ+ and BIPOC communities. It has already emboldened individuals who seek to harass or harm trans people and their allies. It has also begun eroding economic opportunities for many Texas drag artists whose venues and audiences have started to show concern about S.B. 12 and related vigilantism. If permitted to take effect, it would similarly foreclose many opportunities for community and political organizing involving drag performances.

S.B. 12 is so vague as to criminalize many aspects of trans people’s self-expression, including drag performances. It harms all trans people by sexualizing them merely on the basis of existing. The vagueness of S.B. 12 particularly impacts drag artists of color; as Barbie explains, if Latine drag performers “dance with the hips,” it is impossible to know whether some members of law enforcement would deem that “sexual gesticulations.” Pidge also explains that one “can’t escape the sexualization of being queer,” stating that “what [they] fear is that a drag performance will be seen in a sexual light, even if [a person’s] dancing to a Kidz Bop song and totally covered up.” Pidge further explains that, because “being queer is so sexualized, and because drag is so associated with being queer, drag will be lumped in as a sexual performance,” even

in the absence of explicit content. Similarly commenting on how S.B. 12 is “a way to push the narrative that queer folks are inherently sexual,” Jay explains that “it’s very dangerous for the State to say [it’s the] gatekeeper[] on what is sexual and what is not.” Jay says that already, “it’s not safe” in Texas for queer people to show affection, “even if it’s not sexual, because it’s [inevitably] seen that way.” Frankie similarly recognizes S.B. 12 as an attack on the trans community, seeing it as a response to the fact that “[w]e’re no longer in hiding, we became too vocal. They found a way to put us back in our lane.”

S.B. 12 directly attacks trans Texans’ personal expression by threatening them with prosecution just for being themselves in public. Verniss, for example, points out that, “for some people, wearing a skirt above your knee may be sexually explicit.” She critiques S.B. 12 for using the subjective term “sexual,” which would likely lead to biased enforcement. She questions how the law will be used to police Black women—both trans and cisgender—on the shape of their bodies and the way they are dressed in public. Pidge likewise questions how the law will apply to them, explaining that, “even though [they] feel more masculine, [they’re] often perceived as feminine.” They fear that, even while out of drag, “someone with a scrutinizing eye” could mistake their everyday gender expression for drag. Barbie similarly notes that, “outside of drag [they] also wear a binder”⁶⁹ and questions “how [the] law is going to affect [them].”

⁶⁹ A binder is a tight-fitting article of clothing worn to flatten breasts, often to treat gender dysphoria.

Commenting on the vague language of S.B. 12, they also wonder, “if [they’re] packing,⁷⁰ isn’t that ‘exaggerating’” male sexual characteristics, during a drag performance? TENT has heard similar concerns from many transmasculine Texans who do not perform in drag but are accustomed to using a packer to treat their gender dysphoria, and they now fear that if S.B. 12 were to take effect, they could face harassment or police searches because of their everyday gender expression in public. As Era puts it, S.B. 12 is “meant to eradicate trans people from public life.” While “there’s language in it that targets drag and entertainment,” she is concerned that “the definitions could apply to any trans people.” She worries that S.B. 12 could even put her “at risk for wearing a dress” in everyday life. These concerns highlight how the vague and overbroad language of S.B. 12 places trans people, and especially BIPOC people, in a precarious legal position both in and out of drag.

Comparing the historical cross-dressing laws with S.B. 12, “[a]nti-cross-dressing laws and drag bans . . . share a reliance on vague language that makes them flexible tools for policing,”⁷¹ which has historically led to police harassment of the LGBTQ+ community’s open expression and, *amici* fear, is likely to lead to selective enforcement again today if S.B. 12 is permitted to take effect. As Era explains, she does not “trust local law enforcement to fully know what is and isn’t allowed or what

⁷⁰ Packing refers to the use of a penile prosthetic being placed in one’s underwear, often to treat gender dysphoria. It is also common in drag king performances.

⁷¹ See Sears, *supra* note 35.

is and isn't sexually explicit when it comes to drag in front of children or drag in public spaces." Similarly concerned about how S.B. 12 will be enforced, Aimee Villarreal questions whether "drag" and "sexual performances" will be equally policed in non-LGBTQ+ contexts or if enforcement will be targeted toward the LGBTQ+ community, noting that she had previously been "to a Spurs game and the cheerleaders and the Coyote does twerking and sexualized things. The Coyote came out in pink boots and drag—[that is, the Coyote] came out as a girl." She is concerned about societal double standards becoming an issue in enforcement.

S.B. 12 also threatens trans Texans' personal safety and is already leading to vigilantism, which would likely increase if the law were allowed to take effect. Pidge recalls that "Wesley, [a] queer Christian group, [which does] a lot for [the] community . . . hosted a drag queen who was also a pastor to give a sermon, and during that service . . . , rioters show[ed] up. They were very rowdy, they were discriminatory, and one was arrested because of how distressing they were being." As Aimee likewise recounts, a Kingceñera drag theatre production at Jump Start Theater "was the same weekend as a protest against Drag Queen Christmas, and the militias came out to the Aztec Theater," where the latter show took place. Fortunately, the drag performers were able to work alongside "friends who do harm reduction" who could "help secure the theater." The performers ensured that there were people in the audience trained in first aid, and they verified that attendees were ticket-holders as a safety precaution. Performers now take precautions for every Drag King Bilingual Story Time. Similarly,

Barbie remembers that “when the law first came out and there was a lot of protesting, another [drag] troupe in San Antonio had its venue canceled,” with the venue citing fear of protesters. Barbie believes that venues will continue to fear violent protesters and that people, especially families, will be too fearful to attend future events. For example, they cite that the Central Library cancelled a show that they were expected to perform in due to death threats. The terror tactics used by proponents of S.B. 12 will have long-lasting consequences. As Fiesta Youth explains, for “any of our youth who had an inclination of pursuing this as a hobby or career, that’s over.”

This influx of vigilantism is especially concerning because trans people are already at much greater risk of violence,⁷² including from law enforcement, meaning they often cannot rely on police for protection. For example, Frankie recounts how she “was sexually assaulted by three men coming out of a venue and one said, ‘if you want to dress like a woman I will treat you like one.’” Similarly, “a year later, on [her] way home from a venue, [she] was pulled over by an officer. [The officer] tailed [her] from the club, [and] falsely said [she] failed to come to a complete stop. [She] was given an ultimatum: ticket or sexual act. [She] was scared . . . [b]ut [she] took the ticket.” Notably, when she ran for City Council and discussed the issue with the San Antonio Police Officer’s Association, they told her that she “was not the only one” to experience

⁷² See Sandy E. James et al., *Early Insights: A Report of the 2022 U.S. Transgender Survey* 21–22 (2024), available at https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf.

something like that. Recently, when Era and her husband “were driving home from his parents’ house in the hill country, [they] were pulled over for speeding. The cop said, ‘I almost shot you, people like you have to be more careful.’ [Era] was just a trans person in public.” Experiences of police harassment like those described here fall most heavily on trans people of color, who were, among respondents to the 2015 U.S. Transgender Survey, the most likely to have experienced one or more forms of mistreatment during interactions with police.⁷³

By criminalizing many aspects of drag performance, S.B. 12 would also close venues, reduce opportunities, and amount to an attack on trans people’s ability to earn a living. Verniss remarks that already the LGBTQ+ community has “seen club closures. [It has] seen decentering of Black trans and Black drag entertainers in Houston and across Texas. [It has] seen a decline in drag entertainers being hired at private events—just a decentering of the Houston drag community as a whole, even when it comes to things like Pride.” Barbie expresses similar concerns, explaining that Los MENtiroso has received grants from San Antonio Arts & Culture and that the troupe has performed at various colleges in Texas—“S.B. 12 could affect this.” Frankie likewise explains that S.B. 12 is “going to affect the trans community, especially drag queens, because they have it even harder when it comes to simple things like housing and finding a job.”

⁷³ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 186 (2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

These economic harms would be felt most acutely by BIPOC people. Jay explains that “queer folks of color [will be even] more affected [by S.B. 12 than their white counterparts] because [they] have the least amount of access to resources. If [people of color] are already not being booked for shows and there are less shows, that affects people’s wellbeing. It also increases danger. We’re always the most targeted. That’s just how racism works. Mental health resources are also less accessible to [people of color]. So, it affects our mental health.” Verniss similarly predicts that S.B. 12 “will impact Black trans people who depend on drag as a monthly source of income and who depend on drag” for their livelihood, stating that “[i]t puts them in a bind because most drag entertainers don’t have health insurance coverage, so if their income is impacted, then their healthcare, housing, and safety are all impacted.” Verniss’s organization would likely see drag performers increasingly reach out with mutual aid requests for emergency cash grant assistance if S.B. 12 took effect, and the organization may not be able to meet all of those requests. TENT similarly anticipates requests for mutual aid if trans people, many of whom in recent years have increasingly relied on drag as a source of full-time income, lose performance opportunities due to S.B. 12.

S.B. 12 also attacks trans Texans’ ability to organize and participate in the political process as well as engage in expressive conduct. “[D]rag—for all its glamour

and fantasy—[is] a political act.”⁷⁴ For example, drag queens play an integral role in Pride celebrations, which include “activities undertaken by the [LGBTQ+] community to gain visibility, social, and self-acceptance, and demand for legal rights of the community.”⁷⁵ Drag performers also play an important role in creating public forums for discussing and debating political issues on university campuses,⁷⁶ in addition to encouraging voter participation as discussed earlier. In Era’s words, if S.B. 12 were permitted to stand, the use of drag in political organizing, such as the family-friendly programming that Era has participated in at Georgetown Pride, “couldn’t happen anymore.”

CONCLUSION

As the stories shared in this brief illustrate, drag has been an important part of artistic, political, cultural, and individual expression across centuries in Texas. It has also been a source of funds for both individual performers and non-profit organizations that rely on drag performances for fundraising. It has buoyed individuals, families, and communities through times of crisis, and it has entertained them in times of celebration. If S.B. 12 were to take effect, *amici* fear its vagueness would make all drag

⁷⁴ Craig Seligman, *You Just Don’t Silence a Drag Queen*, TIME (Mar. 23, 2023), <https://time.com/6265333/drag-queen-political-act/>.

⁷⁵ Abhinav Tandon & T.S. Sathyanarayana Rao, *Pride Parades*, 3(3) J. PSYCHOSEXUAL HEALTH 209, 209 (2021), <https://doi.org/10.1177/26318318211038118>.

⁷⁶ See, e.g., College of Liberal Arts, *Dragging the Border*, UNIVERSITY TEX. AUSTIN, <https://liberalarts.utexas.edu/latinostudies/events/dragging-the-border> (last visited Apr. 16, 2024) (Dragging the Border “featur[es] drag performers from the Texas Rio Grande Valley” and “showcases the lives of queer and trans people on the Texas-Mexico border during a time in which rhetoric against these communities has increased.”).

performances a target for law enforcement, causing venues to close, performers to stop appearing in drag, and trans people to wonder if their individual gender expression would put them at risk of harassment or even arrest when they leave their homes. All Texans deserve to freely express themselves without fear of criminal prosecution, and all Texans would benefit from the continuation of drag artistry in their state.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 17, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that service will be accomplished on all registered CM/ECF users by the appellate CM/ECF system.

Dated: April 17, 2024

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as incorporated into Fed. R. App. P. 29(a)(5), because it contains 6,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2.

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Dated: April 17, 2024

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