

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

EXTRAGRAMS, LLC; 360 QUEEN
ENTERTAINMENT LLC; AND BRIGITTE
BANDIT,

Plaintiffs,

- against -

WARREN KENNETH PAXTON, in an official
capacity as Attorney General of Texas; DELIA
GARZA, in an official capacity as County
Attorney of Travis County; and JOE D.
GONZALES, in an official capacity as Bexar
County District Attorney;

Defendants.

Case No. 4:23-cv-02847

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

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PRELIMINARY STATEMENT

In 2023, Texas enacted Senate Bill 12 (“S.B. 12”), colloquially referred to as the Texas drag ban, as part of a wave of laws targeting the LGBTQ community. As this Court has previously recognized, “drag performances are expressive content that is afforded First Amendment protection,” and “a ban on drag shows” “fails strict scrutiny.” *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 843, 847 (S.D. Tex. 2023), *vacated and remanded*, 168 F.4th 293 (5th Cir. 2026); *see also, e.g., Spectrum WT v. Wendler*, 151 F.4th 714, 729 (5th Cir. 2025) (holding that a “drag show is protected expression” and that a content-based restriction on drag fails constitutional scrutiny), *reh’g en banc granted, opinion vacated*, 157 F.4th 673 (5th Cir. 2025). But S.B. 12 goes even beyond that, punishing and indeed criminalizing all “sexually oriented performances,” a term whose vague definition could capture a broad range of plays and theatrical performances.

Amicus curiae Dramatists Legal Defense Fund and the members of the Dramatists Guild are deeply concerned about S.B. 12’s potential to lead to censorship and self-censorship across Texas. In regulating “performance,” the law takes aim at artistic expression, infringes the First Amendment rights of playwrights, directors, performers, and their audiences, and chills theater and other performance across Texas and beyond.

FACTUAL BACKGROUND

In May 2023, the Texas Legislature passed S.B. 12, which regulates “sexually oriented performances” on the premises of commercial enterprises, on public property, and in the presence of minors, and imposes both civil and criminal penalties for statutory violations. *See* Tex. Health & Safety Code § 769.002; Tex. Loc. Gov’t Code § 243.0031; Tex Penal Code § 43.28.

S.B. 12 defines “sexually oriented performance” as 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.” Tex. Penal Code § 43.28(a)(2). A “performance”—as defined elsewhere in the Penal Code—can be “a play, motion picture, dance, or other exhibition performed before an audience.” *Id.* § 43.21(a)(3). And “sexual conduct” is defined in S.B. 12 as:

(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.”

Tex. Penal Code § 43.28(a)(1).

Because drag often involves “accessories or prosthetics that exaggerate male or female sexual characteristics”—for example, men wearing wigs, chest padding,

fake eyelashes, and high heels to appear feminine—that latter provision is understood to target drag performance. In fact, 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.” ECF No. 47-6 at 3. And supporters of the bill, like Governor Greg Abbott and Lieutenant Governor Dan Patrick, stated that the “law ban[s] drag performances in public” and that they wanted to prevent children from being “sexualized and scarred for life by harmful drag performances.”¹ Nevertheless, as the author of S.B. 12 acknowledged, the law “is not limited to [drag shows]” but rather extends to “sexually oriented performances in general.” ECF No. 47-7, at 1.

Following this Court’s September 26, 2023 decision permanently enjoining the law as unconstitutional, certain Defendants appealed to the Fifth Circuit.² The Fifth Circuit dismissed some appellants and some appellees and remanded for this Court to apply the *Moody* framework to Plaintiffs’ facial First Amendment challenges and to further analyze Plaintiffs’ facial vagueness challenge.

SUMMARY OF ARGUMENT

¹ @GregAbbott_TX, X (June 25, 2023), <https://perma.cc/K4AR-YH8X> (“Texas Governor Signs Law Banning Drag Performances in Public. That’s right.”); Lt. Gov. Dan Patrick: Statement on the Passage of Senate Bill 12 – Banning Children’s Exposure to Drag Shows (Apr. 5, 2023), <https://perma.cc/BP9K-MMXD>

² Delia Garza and Joe D. Gonzales did not appeal this Court’s decision to the Fifth Circuit. *Amici* therefore understand those Defendants to remain parties to this litigation.

The expression regulated by S.B. 12—including performances involving nudity, simulated sexual arousal, sexual contact, or sexual acts, and “sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics”—is not only protected by the First Amendment; it is also commonplace in theater and other performance.

Because S.B. 12 burdens speech on the basis of content, it is subject to and fails strict scrutiny—as this Court has already held and as the Fifth Circuit tacitly affirmed. And because S.B. 12 applies to potentially vast swaths of artistic expression, while other laws already prohibit obscenity and the display of material harmful to minors, S.B. 12 readily satisfies the requirements for facial relief under *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024).

S.B. 12 also fails constitutional scrutiny because it is impermissibly vague. The requirement that the regulated conduct “appeal[] to the prurient interest in sex,” without the other prongs of the *Miller* test, fails to provide meaningful guidance to reasonable persons trying to understand how the law will be enforced. Equally vague are phrases like “sexual gesticulations” “sexual characteristics,” as well as the threshold “features” requirement. The law’s susceptibility to arbitrary and discriminatory enforcement independently warrants facial invalidation.

ARGUMENT

I. NUDITY, SIMULATED SEXUAL ACTS, AND DRAG ARE IMPORTANT, TIME-HONORED ARTISTIC DEVICES IN

THEATER AND PERFORMANCE

In regulating performances that involve nudity, simulated sexual acts, and sexual gesticulations using accessories that exaggerate male or female characteristics, S.B. 12 threatens the ability to perform innumerable classical and contemporary plays and musicals throughout Texas.

A. Nudity and Simulated Sexual Acts

Nudity and simulated sex or masturbation have been used in theater and performance for millennia. The roots of Ancient Greek theater (and thus Western theater in general) have been traced to the Festival of Dionysus, which featured a sacred procession of a giant phallus, called a Phallophoria.³ As the tradition evolved in the fifth century BC, Greek satyr plays were performed at the Dionysian festival and often included obscene gestures, simulated sex, and bawdy humor. *Cf. Miller v. City of South Bend*, 904 F.2d 1081, 1089 (7th Cir. 1990) (Posner, J., concurring) (“Public performances of erotic dances debuted in Western culture in the satyr places of the ancient Greeks.”), *rev’d sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). In Aristophanes’ *Lysistrata*, the women of Greece embark on a sex strike to end the Peloponnesian War between Greek city states. The play features a number of jokes about leather dildos, used as masturbation aids. In Euripides’ *Bacchae*, the god Dionysus drives the women of Thebes into an ecstatic frenzy.

³ [Appendix A contains images illustrating the examples in this brief.](#)

In seventeenth-century Italy, the clowning tradition of *commedia dell'arte* frequently used erotic physical comedy. In nineteenth-century Victorian England, performers enacted erotic *tableaux vivants*, recreating works of art featuring partially or completely nude figures.

In the twentieth century, nudity and simulated sexual acts became common in both commercial theater like the musicals *Hair*, *Damn Yankees*, and *Cabaret* as well as in more experimental or avant-garde performance works. Richard Strauss's 1905 opera *Salome* culminates in the "Dance of the Seven Veils," in which Salome generally appears nude in what has been called "everyone's favorite example of constitutionally protected striptease." *Miller*, 904 F.2d at 1094 (Posner, J., concurring). Josephine Baker famously performed a musical revue at the Folies Bergère in 1926 wearing a skirt made of artificial bananas and little else. "'Modern dance,' a ballet offshoot pioneered by, among others, the erotic dancer Isadora Duncan, has long been partial to nudity." *Id.* at 1090 (Posner, J., concurring). Visual artists have also staged works with naked bodies—for example, Yves Klein, who used nude women as "human paintbrushes" to publicly create his *Anthropometries* paintings; Carolee Schneemann, who pulled a scroll from her vagina and read from it in *Interior Scroll*; and Marina Abramović, whose recent *Balkan Erotic Epic* involves full dozens of performers baring themselves.

In some cases, "representations" of "simulated" "sexual acts" are written into

the text, such as Terrence McNally’s *Frankie and Johnny in the Clair de Lune*, which opens with a couple making love in a Manhattan apartment. In other cases, a director may stage an eroticized production of a play, for example, *Romeo and Juliet*.⁴ Either way, sex scenes are so prevalent that, in recent years, many theaters have engaged “intimacy coordinators”—specialists at choreographing such scenes.⁵ In addition, because dance moves such as hip thrusts are arguably within the ambit of S.B. 12 as “representations” of “simulated” “sexual acts,” the law may sweep in shows like *Pippin*, whose original Bob Fosse choreography features sensual and provocative orgy and bedroom sequences; *Moulin Rouge*, with its burlesque costumes and seductive dance numbers; or even *Bring It On*, with its fairly banal cheer routines.

B. Use of Accessories to Exaggerate Sexual Characteristics

Using accessories to mimic and exaggerate characteristics of the other sex is likewise a long-standing practice in the theater. Indeed, the trappings of cross-dressing or “drag” are the trappings of theater generally: makeup, wigs, costumes, the act of inhabiting someone else. Wearing accessories to exaggerate sexual characteristics is not limited to cross-dressing. In *commedia dell’arte*, for example, the stock character Pantalone classically wears a padded codpiece.⁶ Very often,

⁴ Sam Gold’s 2024 Broadway production *Romeo + Juliet*, for instance, emphasized the physical eroticism of scenes like the balcony scene and the scene in Juliet’s bedroom.

⁵ “What is an Intimacy Director or Coordinator?” *IDCprofessionals.com Blog* (2022) <https://perma.cc/H4RC-P6EN>.

⁶ Anca-Delia Maldovan, “How Italian Comedy Made Its Way into the Catholic Church,” *The Newberry* (May 18, 2022), <https://perma.cc/FN9Y-QDXN>.

however, theater artists including actors, directors, and costume designers rely on accessories to exaggerate sexual characteristics in the context of men playing women or vice-versa.

All performers in Athenian drama were men, including those playing female roles—and the plays themselves also often involved cross-dressing, whether of male characters disguising themselves as women, as in Aristophanes’ *Thesmophoriazusae* and Euripides’ *Bacchae*, or female characters disguising themselves as men, as in Aristophanes’ *Assemblywomen*. Cf. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 564 (1975) (Douglas, J., concurring) (praising “the most highly regarded works of Aristophanes,” who “debunke[d] [] established tastes and received wisdom”). Kabuki theater in Japan permitted no female actors, giving rise to the *onnagata*, male performers who specialize in playing female roles. Similarly, in Peking opera, men known as *nándàn* played women on stage. So too in Elizabethan theater, where the prohibition on female performers necessitated cross-dressing as a part of every performance. What’s more, Shakespeare’s most beloved female characters—Viola, Rosalind, Julia, Imogen, Portia—all famously dress as boys, whether to protect themselves, to spy, to join the military, or to practice law. And in *Merry Wives of Windsor*, the garrulous anti-hero Falstaff dresses as a woman.

In Victorian theater, female actors (now permitted to perform) turned this tradition on its head. Hundreds of female actresses portrayed classical male roles on

the nineteenth century stage.⁷ American actresses and sisters Charlotte and Susan Cushman made a splash with their 1870 turn as Romeo and Juliet, while poet and actress Adah Isaacs Menken famously portrayed Byron's (male) Mazeppa in a nude body suit while lashed to a horse.⁸ Playwright Brandon Thomas leaned into the comic possibilities of cross-dressing with *Charley's Aunt*. J. M. Barrie's masterpiece *Peter Pan* premiered on Broadway in 1905 with Maude Adams in the role of Peter, while the musical adaptation opened in 1954 starring Mary Martin. The Western operatic tradition is also so full of cross-dressed young women that there is a specific term—"pants role"—for male parts intended to be sung by women. Today, the gender breakdowns of most high school drama classes mean that male parts are routinely played by women dressing as men.

Twentieth and twenty-first century American stage and screen explored the comic potential of cross-dressing. In 1974, American icons, Bob Hope and Jackie Gleason, performed in Central Park in drag.⁹ Films *Some Like it Hot* (1959), *Victor/Victoria* (1982), *Tootsie* (1982), and even *Mrs. Doubtfire* (1993) have been adapted into musicals of the same name. Long-running favorite *Chicago* usually features a male actor in the role of the female reporter Mary Sunshine, while the

⁷ Betsy Golden Kellem, "Gender Play in Nineteenth Century Theater," JSTOR Daily (Mar. 18, 2026), <https://perma.cc/LH7D-2M3Z>.

⁸ *Id.*

⁹ Lucinda Franks, *Hope and Gleason Jest in Central Park*, N.Y. Times (Sept. 18, 1974), <https://perma.cc/MAW2-6S4Y>.

smash hit *Matilda: The Musical* features both a cast of children and, traditionally, a man in the lead role of principal Miss Trunchbull—for example, actor Bertie Carvel who was nominated for a Tony award for that role in 2013. That same year, the Best Actor in a Musical award went to Billy Porter for his portrayal of Lola in *Kinky Boots*, the story of a drag queen who saves a failing shoe factory. Meanwhile, in so-called “quick-change theater,” one or few actors play multiple parts of all genders to the delight of audiences, as in *The Mystery of Irma Vep* and *A Gentleman’s Guide to Love and Murder*.

Cross-dressing is not found only in comedy, of course. David Henry Hwang’s *M. Butterfly*, which won the 1988 Tony Award for Best Play and was a finalist for a 1989 Pulitzer Prize, tells the story of French diplomat Gallimard, who falls in love with a Chinese opera singer and spy, Song, played by a man performing as a woman. *RENT*, which won a Pulitzer Prize in 1996, features the character of Angel both in drag and out as it tells the story of artists struggling to survive in AIDS-ravaged New York City.

The Broadway slate of the last few years is itself a testament to the preeminence of cross-dressing and drag in American theater. 2026’s *CATS: The Jellicle Ball*, which reimagines Andrew Lloyd Weber’s classic musical as a drag ballroom, nabbed several Tonys, while, in 2025, Cole Escola won a Tony for his performance in *Oh Mary!*, in which he played Mary Todd Lincoln, and Jak Malone

won a Tony for playing the female character Hester Leggatt in *Operation Mincemeat*. J. Harrison Ghee won a Tony in 2023 for his performance as Jerry/Daphne in the musical adaptation of *Some Like It Hot*.

These plays and musicals are not only performed on Broadway: They are routinely presented in Texas and elsewhere across the country. To give just a few examples, the ZACH Theater in Austin performed *Matilda* in 2019¹⁰, Theatre Under the Stars in Houston performed *RENT* in 2023,¹¹ and the national tour of *Kinky Boots* is set to hit Houston in the spring of 2027.¹²

Finally, it bears emphasis that cross-dressing and drag, like nudity and simulated sex, are used in many art forms beyond traditional theater nonetheless covered by S.B.12. Pop star Harry Styles, who had a residency in Austin in 2022, has performed while dressed in women's clothes, including high heels and an exaggerated bow in his hair.¹³ Other singers like Dua Lipa and Nicki Minaj twerk and perform moves that could qualify as simulated sexual acts. The SXSW Film & TV Festival and movie theaters across Texas show R-rated films with nudity or sexual content. The law even potentially sweeps in rodeo clowns in tutus and bras,

¹⁰ Roald Dahl's 'Matilda the Musical' at ZACH Theatre, do512family.com, <https://perma.cc/A6UA-DD6E> (last visited July 27, 2026).

¹¹ Theatre Under the Stars, Rent, <https://my.tuts.org/5258>.

¹² Kinky Boots Tickets, Stubhub.com, <https://perma.cc/3LHK-HUH5> (last visited July 27, 2026).

¹³ 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://perma.cc/8452-6GNB>.

and powderpuff football players (women) and cheerleaders (men). In short, the law potentially regulates enormous swaths of artistic activity in Texas across the performing arts.

II. S.B. 12 SATISFIES THE *MOODY* STANDARD FOR FIRST AMENDMENT CHALLENGES

This Court’s prior ruling that S.B. 12 is subject to and fails strict scrutiny was undisturbed by the Fifth Circuit. Accordingly, the sole question remaining with respect to Plaintiffs’ First Amendment challenge is whether Plaintiffs are entitled to facial relief. Because S.B. 12’s predominant applications restrict speech without constitutional justification, facial relief is proper.

A speech regulation is facially invalid—as this Court previously recognized—if “a substantial number of [its] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep.” *Moody*, 603 U.S. at 723; see *Woodlands Pride*, 694 F. Supp. 3d at 847. In *Moody*, the Supreme Court framed this test as a two-step inquiry. Courts first determine a challenged law’s “full range” of applications—i.e., whether it regulates speech in some, most, or all cases. *Moody*, 603 U.S. at 726. They next decide which of the laws’ speech applications “violate the First Amendment,” and compare the constitutional and unconstitutional applications. *Id.* at 725. When the pertinent facts “are the same across the board” and the substantial effect of a law is to regulate protected speech without justification, the law is facially invalid. *Ams. For Prosperity Found. v. Bonta*, 594 U.S. 595, 618–19 (2021). This “less

demanding” standard for First Amendment facial challenges is necessary to “provide breathing room for free expression,” *Moody*, 603 U.S. at 723 (cleaned up), and “prevent” laws like S.B. 12 from “chilling the First Amendment rights of other parties not before the court,” *Merriott v. City of Bossier City*, 179 F.4th 393, 402 (5th Cir. 2026).

Here, at step one, the law regulates expressive speech on its face. It is not limited to performances that “taken as a whole, lack[] serious literary, artistic, [or] political . . . value.” *Miller v. California*, 413 U.S. 15, 24 (1973). Rather, it applies unambiguously to an array of art forms, including “play[s],” “motion picture[s],” “dance,” and “other exhibition[s] performed before an audience.” Tex. Penal Code § 43.21(a)(3). “Motion pictures” and “live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.” *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *see also Se. Promotions*, 420 U.S. at 557 (rejecting the view “that live drama is unprotected by the First Amendment”); *id.* at 563 (Douglas, J., concurring) (“A municipal theater is no less a forum for the expression of ideas than is a public park, or a sidewalk.”); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music and rock concerts “protected under the First Amendment”).

That performances may contain nudity or sexuality does not deprive them of their First Amendment-protected status. *See Schad*, 452 U.S. at 66 (“Nudity alone

does not place otherwise protected material outside the mantle of the First Amendment.”) (cleaned up).¹⁴ “Sexually graphic but nonobscene material” is protected by the First Amendment. *United States v. Williams*, 553 U.S. 285, 288 (2008). Indeed, courts have recognized “the entertainment afforded by a nude ballet at Lincoln Center” as a quintessential example of “protected expression,” *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *aff’d in part*, 422 U.S. 922 (1975), and even a barroom striptease “is expressive conduct protected by the First Amendment,” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991). Nor does the fact that some people under 18 may be in the audience strip a performance of its First Amendment protections. “Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975). And adults “have a First Amendment right to access” even speech that is sexually explicit as to children. *Free Speech Coalition, Inc. v. Paxton*, 606 U.S. 461, 466 (2025).

As set forth in Section I, countless theatrical and other performances involve nudity or “sexual conduct,” belying the State’s contention that S.B. 12’s regulation

¹⁴ See also 1996: Judge: Let ‘Angels’ play: Controversial work opens to street protests, The Charlotte Observer, <https://perma.cc/FZ92-V5FM> (quoting court order permitting performance of *Angels in America* with an “actor who strips nude during a hospital scene” as stating “[t]he play is an artistic presentation. Nudity . . . in the play appears to constitute artistic expression”).

of “sexually oriented performances” regulates only obscene speech or non-expressive conduct. *See* Defs.’ Supplemental Br., ECF No. 147, at 14, 22. Likewise, Texas is wrong that the only “actors” affected by the regulation are “person[s] who control[] the premises of a commercial enterprise” where a “sexually oriented performance [may] be presented” “in the presence of an individual younger than 18 years of age.” Defs.’ Supplemental Br., ECF No. 147, at 5 (quoting Tex. Health & Safety Code § 769.002(c)). If people who program arts venues are prevented or chilled from programming First Amendment-protected performances involving nudity, sex, or drag, the performers themselves and everyone else involved in the would-be productions find themselves censored. Moreover, artists in Texas will be disincentivized from creating art that cannot be produced or exhibited. The proper answer to the question at step one of the *Moody* analysis—“What activities, by what actors, do the laws prohibit or otherwise regulate?” *Moody*, 603 U.S. at 724—is expressive activity by playwrights, directors, actors, dancers, singers, programmers of movie theaters, and other artists and arts administrators across Texas. Every application of the Act necessarily burdens speech.

Turning to step two, all or virtually all of the law’s applications “violate the First Amendment” by regulating speech that is not obscene. *Moody*, 603 U.S. at 725. Indeed, Texas’ Attorney General previously *conceded* that Plaintiffs’ speech is not “obscene.” Br. of Appellant Warren Kenneth Paxton, Case No. 23-20480, Dkt. 84 at

46 (5th Cir. Jan. 9, 2024). But even if it were, any purportedly constitutional application of S.B. 12 to obscenity is “irrelevant,” *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 418 (2015), because existing laws *already* regulate content that is obscene and/or harmful to minors.

Specifically, Texas law has, since 1974, prohibited “produc[ing], present[ing], or direct[ing] an obscene performance or participat[ing] in a portion thereof that is obscene or that contributes to its obscenity.” Tex. Penal Code § 43.23(c)(2). Texas also prohibits the “sale, distribution, or display” of “material harmful to minors,” with a statutory definition of “harmful to minors” that—unlike S.B. 12—tracks the three-part obscenity test under *Miller*. Tex. Penal Code § 43.24; *see Miller*, 413 U.S. at 24. In addition, “public lewdness,” which includes actual sex acts in public places, Tex. Penal Code § 21.07; “disorderly conduct,” which includes intentionally exposing one’s “anus or genitals in a public place” with reckless disregard for “whether another may be present who will be offended or alarmed,” *id.* § 42.01(a)(10); and “indecent exposure,” which is similar to disorderly conduct but “with intent to arouse or gratify the sexual desire of any person,” *id.* § 21.08(a), all are existing offenses under Texas law. In short, “the constitutional ‘applications’ that [Defendants] claim[] prevent facial relief here are irrelevant to [the] analysis” because they are already proscribed by other laws. *City of Los Angeles*, 576 U.S. at 419; *see also, e.g., Spirit Aerosystems, Inc. v. Paxton*, 142 F.4th 278, 286 (5th Cir.

2025) (“The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”) (citation omitted).

For all these reasons, as this Court previously recognized, “a substantial number of [S.B. 12’s] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep,” *Moody*, 603 U.S. at 723, and the law is therefore facially overbroad under *Moody*.

III. S.B. 12 IS UNCONSTITUTIONALLY VAGUE

Plaintiffs are also entitled to facial relief on the independent grounds that S.B. 12 is unconstitutionally vague. “When vagueness permeates the text of a law, it is subject to facial attack.” *NetChoice, LLC v. Bonta*, 170 F.4th 744, 764 (9th Cir. 2026) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality op.)).

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). Notably, Defendants *concede* “there is room for debate as to borderline applications”—a defect they dismiss as true of “most every other statute.” Defs.’ Supplemental Br., ECF No. 147, at 21. But when First Amendment rights are implicated, “a more stringent vagueness test” applies, because the vagueness itself chills speech by forcing people “to ‘steer far wider of the unlawful zone.’” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Baggett v. Bullett*, 377 U.S. 360, 372 (1964).

S.B. 12 is unconstitutionally vague because it creates an environment where many types of performances may be sanctioned without sufficient notice to performers, writers, and producers. First, the law provides no definition or explication of what conduct constitutes an “appeal[] to the prurient interest in sex,” and—by Defendants’ own admission, *see* Hearing on S.B. 12 before the Texas Senate, 88th Leg., Reg. Sess. at 7:20 (April 4, 2023), <https://perma.cc/QT5N-Y889>—the term is not limited by *Miller*’s three-part test, as obscenity laws must be to pass constitutional muster. *See, e.g., Ginsberg v. New York*, 390 U.S. 629, 646 (1968); *Free Speech Coalition*, 606 U.S. at 472-73. Based on examples of performances that apparently spurred the Legislature to action, such as a drag brunch in Plano, the bar for “appeal[ing] to the prurient interest in sex” is low. Any performance “featuring,” discussing, or using sex or nudity, and any performance involving LGBTQ+ themes or drag, could conceivably be subsumed in this category.

Second, the law does not define terms like “lewd,” “sexual gesticulations,” “accessories or prosthetics,” or “sexual characteristics.” Tex. Penal Code § 43.28(1). Are rude hand gestures by a raunchy comedian prohibited? Is a *commedia dell’arte* performance featuring the stock character of Pantalone wearing an ostentatious codpiece to emphasize his manhood a “simulated” “representation” of genitals in a “lewd” state? Do wigs, high heels, and fake eyelashes constitute prosthetics exaggerating sexual characteristics?

Third, S.B. 12 does not explain what it means for a performance to “feature” something that appeals to prurient interests. One drag performance in a variety show or a single scene discussing a character’s sex life may suffice to create liability.

For all these reasons, S.B. 12 is “so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Williams*, 553 U.S. at 304.

The chilling effect of S.B. 12 is aggravated by the fact that the law lacks a clear *mens rea* requirement, potentially rendering it a strict liability law. *See Aguirre v. State*, 22 S.W.3d 463, 471 (Tex. Crim. App. 1999), *as modified on denial of reh’g* (Dec. 8, 1999) (“The typical strict liability statute is ‘empty’—it simply says nothing about a mental state.”). Thus, S.B. 12 could impose criminal liability or civil sanctions for performers who perform certain works in front of a minor *even if they have no idea a minor is in attendance* or even if they do not intend to be nude, as in the case of an accidental wardrobe malfunction.¹⁵

Given the vagueness of the law and risk of strict liability, artists and venue owners will be unlikely to present exhibitions and performances of even moderately sexualized or eroticized works and unlikely to costume performers in even moderately raunchy clothing. Not only will artists be deprived of their First

¹⁵ Because Garza and Gonzales are authorized to enforce Sections Two and Three of S.B. 12, *amici* understand all three provisions, including the Texas Penal Law provision, to be at issue in this litigation. *See* Tex. Health & Safety Code § 769.002; Tex. Loc. Gov’t Code § 243.0031; Tex Penal Code § 43.28. In any event, the “threat of sanctions may deter [the] exercise” of First Amendment freedoms just as effectively as criminal penalties. *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33 (1963).

Amendment rights to perform these works, but Texas audiences will be deprived of their First Amendment right to see works like *Rent* and *Oh Mary!* when producers inevitably cancel Texas stops of national tours. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (First Amendment “necessarily protects the right to receive”) (citations omitted).

CONCLUSION

For the reasons set forth above, S.B. 12 is facially unconstitutional and should be permanently enjoined.

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Respectfully submitted,

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