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

Defendant-Appellant.

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

APPELLEES' OPPOSITION TO MOTION TO STAY PERMANENT INJUNCTION PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 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.

1. Plaintiff-Appellees: The Woodlands Pride, Inc.; Abilene Pride Alliance; Extragrams, LLC; 360 Queen Entertainment LLC; and Brigitte Bandit.
2. Counsel for Plaintiff-Appellees: Brian Klosterboer, Chloe Kempf, Thomas Buser-Clancy, Edgar Saldivar, and Adriana Pinon of ACLU Foundation of Texas, Inc.; Derek R. McDonald, Maddy R. Dwertman, Travis Gray, Katie Jeffress, Brandt Thomas Roessler, and Emily Rohles of Baker Botts L.L.P.

Dated: November 6, 2023

/s/ Brian Klosterboer
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INTRODUCTION

The Attorney General's motion does not show why a stay is necessary to preserve the status quo pending appeal. Instead, the Attorney General focuses on a single factor—likelihood of success on the merits—and asks this Court to decide the entirety of this case at the outset. Far from maintaining the status quo, a stay would allow an unconstitutional law with criminal and civil penalties to go into effect for the first time and irreparably harm the First Amendment freedoms of Plaintiffs and others. The Attorney General is also wrong on the merits: the district court properly found Plaintiffs have standing and Senate Bill 12 ("S.B. 12") is unconstitutional under five independent grounds, two of which the Attorney General does not even address.

S.B. 12 creates a broad category of disfavored speech called "sexually oriented performances," and imposes penalties on anyone who performs or hosts such shows on public property or commercial enterprises where anyone 17-years-old or younger might be present. ROA.169-73. The law goes far beyond obscene performances—which have long been proscribed in Texas[1] under *Miller v. California*'s well-established balancing of First Amendment rights and state interest in regulating obscenity, 413 U.S. 15, 24

[1] Tex. Penal Code § 43.23 (making it an offense to "produce[], present[], or direct[] an obscene performance or participates in a portion thereof").

(1973)—to prohibit any performance involving partial nudity and vague and broadly defined categories of "[s]exual conduct." ROA.171.

The district court found that Plaintiffs have standing to bring this pre-enforcement challenge because all Plaintiffs in this case "partake in conduct arguably proscribed by S.B. 12," ROA.1266, and have not "disclaimed" any intent to engage in performances impacted by the law, as the Attorney General baselessly claims, Mot. 1, 6, 20. Because the law violates Plaintiffs' constitutional rights under five independent grounds—(1) content discrimination; (2) viewpoint discrimination; (3) overbreadth; (4) vagueness; and (5) prior restraint on speech, ROA.1240-95—the court permanently enjoined all Defendants from enforcing S.B. 12 before it took effect. ROA.1295.

The Attorney General now asks this Court to undo that ruling by staying the entirety of the district court's order against all eight Defendants, even though no other Defendant seeks a stay and two did not even appeal.[2] Because S.B. 12 has never taken effect—and has already been blocked for over two months—it would upend the status quo to issue a stay before this Court can fully review the trial record. *See Barber v. Bryant*, 833 F.3d 510, 511 (5th

[2] The Attorney General concedes he is only tasked with enforcing Section 1 of the statute, Mot. 3, and does not allege that he is seeking a stay on behalf of all Defendants. At best, the motion should be treated as a request for a partial stay, but even that should be denied for the reasons stated herein.

Cir. 2016) (preserving the status quo "as it existed before the Legislature's passage and attempted enactment of" a newly passed law) (citation omitted)).

Especially since S.B. 12 imposes criminal and civil penalties, allowing it to take effect before this Court can review the merits would cause upheaval and confusion across the state. Plaintiffs and countless performers would be forced to censor their speech, while police, prosecutors, and other government officials would be suddenly tasked with enforcing an unconstitutionally vague and overbroad law. This would disrupt the administration of justice and invite standardless enforcement that would chill performing arts throughout Texas. The motion for a stay pending appeal should be denied.

BACKGROUND

I. TEXT OF S.B. 12

S.B. 12 creates a new category of disfavored speech—"sexually oriented performances"—and tasks the Attorney General, municipalities and counties, and prosecutors with enforcing the law. ROA.169-72. The Attorney General only has enforcement authority with respect to Section 1, which authorizes fines up to $10,000 and injunctive restraints against any "person who controls the premises of a commercial enterprise" where a sexually

oriented performance is performed "on the premises in the presence of an individual younger than 18 years of age." ROA.169.

S.B. 12 defines "[s]exually oriented performance" as a "visual performance" that (A) features (i) a performer who is nude or (ii) a performer who engages in "sexual conduct"; and (B) appeals to the prurient interest in sex. ROA.172. The law does not define "prurient interest in sex." ROA.172. S.B. 12 borrows a definition of "nude" from the Business and Commerce Code, ROA.172, which includes anyone who is "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.

The law establishes five categories of "[s]exual conduct": (1) "the exhibition or representation, actual or simulated, of sexual acts;" (2) "the exhibition or representation, actual or simulated, of male or female genitals in a lewd state;" (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.

II. TRIAL COURT PROCEEDINGS

Plaintiffs are two civic organizations, two small businesses, and a drag performer that host or perform in drag shows[3] arguably proscribed by S.B. 12. Plaintiffs filed this lawsuit to enjoin the Attorney General and seven other Defendants from enforcing S.B. 12. ROA.20-62. After a consolidated preliminary injunction hearing and full trial on the merits, the court issued a temporary restraining order that prevented Defendants from enforcing S.B. 12 on August 31, 2023, ROA.960-64, which it later extended for 14 days, ROA.1186-88.

On September 26, the district court issued its order declaring S.B. 12 unconstitutional and permanently enjoining Defendants from enforcing it. ROA.1240-95. The district court made extensive findings of fact on standing and determined that "all Plaintiffs partake in conduct arguably proscribed by S.B. 12," and would be harmed if the law takes effect. ROA.1265-72. The court held that all Defendants are properly named and not immune under *Ex parte*

[3] Drag is a type of "performance art" that involves "the overdramatization of a character or a gender." ROA.1374:24-25. Drag artists sometimes create an "illusion[]" of performing as someone they are not, including "celebrity lookalikes" or presenting as a gender different from (or the same as) their gender assigned at birth. ROA.1374:25-1375:3.

Young, 209 U.S. 123, 159 (1908), because "the Defendants all have some role to play in enforcing S.B. 12." ROA.1264-65.[4]

The court found S.B. 12 to be unconstitutional under five independent grounds and determined that "the impending chilling effect S.B. 12 will have is an irreparable injury which favors enjoining" the law. ROA.1293. Because "the infringement of the Plaintiffs' First Amendment rights and the impending chilling effect S.B. 12 will have on speech in general outweigh[] any hardship on the State of Texas," the court permanently enjoined all eight Defendants from enforcing S.B. 12. ROA.1294-95.

ARGUMENT

I. A STAY WOULD UPEND THE STATUS QUO.

The purpose of a stay pending appeal is to "suspend[] judicial alteration of the status quo, so as to allow appellate courts to bring considered judgment to the matter before them." *Freedom From Religion Found., Inc. v. Mack*, 4 F.4th 306, 316 (5th Cir. 2021) (citation omitted). As such, preserving the status quo "'is an important' equitable consideration in the stay decision." *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021) (per curiam) (citation omitted).

[4] The Attorney General admits that his passing assertion of sovereign immunity is duplicative of his standing challenge, Mot. 10; it therefore fails for the same reasons.

Here, the Attorney General asks this Court to judicially disrupt the status quo when the law has been blocked for over two months and merits briefing has already commenced. The Attorney General conceded below that "[n]o appellate court has ruled on the merits of whether a state can restrict the conduct proscribed by S.B. 12 and whether laws similar to S.B. 12 unconstitutionally infringe on an individual's First Amendment right." ROA.1303. Thus, this Court should first review this law fully without allowing it to suddenly take effect and chill the speech of Plaintiffs and others.

Especially when a law triggers criminal penalties and affects free speech, the Supreme Court has found it important to allow injunctions to remain in effect pending appeal:

> There are . . . important practical reasons to let the injunction stand . . . There is a potential for extraordinary harm and a serious chill upon protected speech. . . . No prosecutions have yet been undertaken under the law, so none will be disrupted if the injunction stands. Further, if the injunction is upheld, the Government in the interim can enforce obscenity laws already on the books.

Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 670-71 (2004). Accordingly, this Court should reject the Attorney General's invitation to disrupt the status quo before reviewing the trial record below. *See Barber*, 833 F.3d at 512 ("[C]onsidering that our decision maintains the status quo

in Mississippi as it existed before the Legislature's passage and attempted enactment of HB 1523, the State's motion for stay pending appeal is DENIED.").

II. THE ATTORNEY GENERAL HAS NOT ESTABLISHED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

A. Appellees Have Standing to Bring this Pre-Enforcement Challenge.

As this Court recently observed, "standing rules are relaxed for First Amendment cases so that citizens whose speech might otherwise be chilled by fear of sanction can prospectively seek relief." *Nat'l Press Photographers Assoc. v. McGraw*, --- F.4th ---, 2023 WL 6968750, at *5 (5th Cir. Oct. 23, 2023) (citation and quotation omitted). The Attorney General acknowledges that "[i]n the context of 'pre-enforcement free speech challenges' like this one, 'chilled speech or self-censorship is an injury sufficient to confer standing.'" Mot. 6 (quoting *Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th 211, 215 (5th Cir. 2023)). Plaintiffs testified at length at trial about how S.B. 12 harms their speech and livelihoods, and they satisfy every element necessary to establish injury and traceability against the Attorney General.

1. S.B. 12 Imposes Injuries-in-Fact on Plaintiffs.

Plaintiffs have established injuries-in-fact because "(1) [they] intend[] to engage in a course of conduct arguably affected with a constitutional

interest; (2) the course of action is arguably proscribed by statute; and (3) . . . there exists a credible threat of prosecution under the statute." *Turtle Island Foods,* 65 F.4th at 215-16 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)).

Here, the Attorney General challenges only the second requirement. Because this element concerns the chilling of speech, Plaintiffs are not required to show that their understanding of S.B. 12 is "the *best* interpretation." *Id.* at 218 (quotation omitted). As long as Plaintiffs' "reading is *arguable*, it satisfies this prong." *Id.*

The Attorney General repeatedly relies on a false assertion that Plaintiffs have "affirmatively disclaimed any desire to engage in any of the statutorily defined acts constituting a 'sexually oriented performance[]' in front of minors." Mot. 6 (original alteration) (citing ROA.1472-73, 1549-51, 1665). These record citations from only three of five Plaintiffs do not support this sweeping assertion, nor come close to establishing any "disclaime[r]."[5]

[5] In trying to establish disclaimer, the Attorney General relies on cross-examination questions where plaintiffs were asked whether performers "should be permitted to perform actual or simulated sex acts *for a sexual purpose* at all-age events[.]" ROA.1472:13-16, 1550:3-7, 1665:8-12 (emphasis added). But the statute does not require any action be done "for a sexual purpose." Indeed, even the Attorney General acknowledges that part of S.B. 12 criminalizes performers for mere negligence, and not just intentional or knowing action. Mot. 9.

Instead, the trial record is replete with testimony from all five Plaintiffs explaining how every aspect of S.B. 12 arguably proscribes their performances and chills their speech. Plaintiffs testified that S.B. 12's broad definition of "nude" arguably proscribes their performances, particularly since it criminalizes "wardrobe malfunctions" that "happen[] often" if a performer accidently reveals even a portion of their cleavage or buttocks.[6] At trial, the Attorney General conceded that these wardrobe malfunctions could result in prosecution under S.B. 12.[7]

Plaintiffs' performances are also directly impacted by the law's definition of "sexual conduct." Plaintiffs testified that their shows, including in front of people 17-years-old or younger, involve "accessories or prosthetics that exaggerate male or female sexual characteristics"[8] and gestures and dance moves that could be interpreted as "sexual gesticulations" or "sexual acts," such as twerking, shimmying, thrusting of hips, kissing, or sitting on an audience member's lap.[9] Plaintiffs' performances also involve "the exhibition or representation, actual or simulated, of male or female genitals," including "packers"[10] and "breast plates,"[11] which simulate male and female

6 ROA.1392:14-24, 1430:2-5, 1582:24-1583:9.
7 ROA.1734-1735.
8 ROA.1390:14-1391:20, 1455:16-20, 1572:9-20.
9 ROA.1393:7-12, 1400:12-15, 1525:12-23, 1580:23-1581:25.
10 ROA.1390:23-1391:10, 1453:6-11.
11 ROA.1572:11-17.

genitals and could be considered "lewd" by some.[12] The performers also occasionally touch each other or audience members during performances—including by simulating or actually smacking buttocks, receiving tips in cleavage, and sitting on laps—so Plaintiffs reasonably fear that they will be affected by S.B. 12's prohibition on "actual contact or simulated contact occurring between one person and the buttocks, breast, or any part of the genitals of another person."[13]

Ms. Bandit testified that she sometimes uses a dildo as a prop for comedic effect, so she reasonably fears that she will be accused of exhibiting "a device designed and marketed as useful primarily for the sexual stimulation of male or female genitals."[14]

Plaintiffs also reasonably fear that their performances could be viewed as "appeal[ing] to the prurient interest in sex" because this term is vague and undefined.[15] As further discussed below, the law departs drastically from the well-established *Miller* standard. Plaintiffs fear that S.B. 12 will be enforced against them because the law's statement of intent, and numerous statements of government officials, all reference the law as prohibiting drag

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12 ROA.1392:25-1393:6, 1579:17-25.
13 ROA.1442:22-25, 1526:1-6, 1576:17-1577:9, 1581:1-3.
14 ROA.1577:25:1-1578:6, 1580:11-22.
15 ROA.1391:21-1392:9, 1431:2-13, 1458:13-1458:3, 1547:14-1548:14, 1581:8-1583:9.

shows in public.[16] Plaintiffs have also already had the police called on them and have been told that their shows are "sexual" and "illegal."[17]

The Attorney General seems to acknowledge that performances by Plaintiffs Brigitte Bandit and 360 Queen Entertainment include "sexual conduct" under S.B. 12, Mot. 8, but argues that their shows are mostly limited to adults and that incidental exposure to minors would not meet S.B. 12's *mens rea* requirement, Mot. 8-9. This ignores clear evidence in the record that these shows are visible by minors at the venues where Plaintiffs perform.[18] Moreover, S.B. 12 contains no *mens rea* requirement for the civil penalties of Section 1; and even the implied *mens rea* of criminal negligence (or recklessness) for Section 3 would still chill Plaintiffs' speech and prevent them from performing in their current venues.[19] Indeed, 360 Queen Entertainment testified that it had to cancel all of its shows before S.B. 12 was scheduled to take effect[20]—a clear example of chilled speech and injury-in-fact.

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16 ROA.1582:2-9, 573, 597, 620.

17 ROA.1431:4-13, 1466:20-1468:7.

18 ROA.1415:8-1417:14, 1426:2-7, 1571:1-10, 1575:20-1576:4.

19 Before the trial court, the Attorney General argued that a *mens rea* of intentionally, knowingly, or recklessly could be implied. ROA.749-50. Now, the Attorney General suggests S.B. 12 contains "an implied mens rea requirement . . . of criminal negligence." Mot. 8-9. The implied *mens rea* applies only to the criminal offense in Section 3 because Section 1 incorporates only the definition of "sexually oriented performances" from Section 3 and not the criminal offense.

20 ROA.1435:10-1436:8.

2. Plaintiffs' Injuries Are Traceable to the Attorney General.

The Attorney General argues that Plaintiffs' injuries are not traceable to him because Plaintiffs do not "control[] the premises of a commercial enterprise." Mot. 9-10. But S.B. 12 does not define "control," and the Attorney General cannot support his overly narrow assertion that it only encompasses "owners or proprietors of private businesses." Mot. 10. As the district court noted, "[t]he plain meaning of the term is not limited to owners of property." ROA.1269 at n.82 (citing Black's Law Dictionary (11th ed. 2019) ("To exercise power or influence over."")). Further, Texas law illustrates numerous contexts where individuals and entities other than a legal owner can "control" a premises. *See, e.g.*, *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 474 (Tex. 2017), *as corrected* (Jan. 26, 2018) (temporary third-party contractor can "control" site for premises liability); *Johnson Cnty. Sherriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 285-86 (Tex. 1996) (single-day rodeo lessee had "control" of arena for premises liability); *W. Hills Bowling Ctr., Inc. v. Hartford Fire Ins. Co.*, 412 F.2d 563, 567 (5th Cir. 1969) (insurance company had "effective control" over property during temporary investigation).

Plaintiffs' testimony establishes that they arguably "control" a commercial enterprise for some of their performances. For example, 360

Queen Entertainment, which produces drag shows on a restaurant patio,[21] has "an agreement with the restaurant that the day of the show . . . *we control the space*. We sell tickets, we decide who goes in and out from . . . the show."[22] The fact that the restaurant provides food service to 360 Queen Entertainment's patrons[23] does not undermine the Plaintiff's control of the patio. Mot. 11. Similarly, both The Woodlands Pride and Abilene Pride Alliance testified that the events they hold at local businesses are private, "ticketed event[s]" during which they have "exclusive use" of the premises and are "responsible for regulating who comes in and out" of the event.[24] Thus, the evidence shows that Plaintiffs, not the business owners, exercise the "right to exclude," which the Attorney General agrees is a central element of control.[25] *See* Mot. 11.

Even if no Plaintiff could be said to control a commercial premises, Plaintiffs' injuries are still traceable to the Attorney General because S.B. 12 authorizes him to enjoin and fine commercial enterprises at which Plaintiffs

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21 ROA.1413:17-22.

22 ROA.1415:17-22 (emphasis added).

23 ROA.1415:22-23.

24 ROA.1452:11-17, 1512:20-1513:9, 1529:19-21, 1534:8-15, 1539:6-10, 1557:10-19; *see also* ROA.1544:4-18.

25 For the first time on appeal, the Attorney General introduces the concept of a "business invitee," Mot. 11, which is relevant to the duty owed to an injured plaintiff in premises liability cases and does not pertain to the issue of control. *See Lechuga v. S. Pac. Transp. Co.*, 949 F.2d 790, 795 (5th Cir. 1992) (per curiam).

hold performances. If the Attorney General stops commercial enterprises from hosting Plaintiffs' performances, that enforcement authority directly harms Plaintiffs. Their injuries flow not from "the independent action of some third party not before the court," Mot. 9 (citation omitted), but predictably, and inevitably, from the Attorney General's enforcement of S.B. 12. Thus, Plaintiffs easily establish "*de facto* causality," which is all Article III requires. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566, (2019) (distinguishing standing theories that "rest on mere speculation about the decisions of third parties" from those that rely "on the predictable effect of Government action on the decisions of third parties"); *see also Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) (traceability does not require plaintiff to show that "defendant's actions are the very last step in the chain of causation").

B. The Attorney General Fails to Rebut the Unconstitutionality of S.B. 12.

Because the district court held that S.B. 12 is unconstitutional under *five* independent grounds, the Attorney General is only entitled to a stay if he establishes a substantial likelihood of success on each ground. *Texas v. Biden*, 10 F.4th 538, 552 (5th Cir. 2021) (per curiam). The Attorney General's motion does not challenge two grounds for why S.B. 12 is unconstitutional—viewpoint discrimination and a prior restraint on speech. ROA.1284-86,

1292-93. Nor does the Attorney General challenge the district court's finding that S.B. 12 is not severable, *see* ROA.1273, nor defend the constitutionality of Section 2 of the law.

Accordingly, the Attorney General does "not come close to a 'strong showing' that [he] is likely to succeed on the merits." *Texas*, 10 F.4th at 557 (citation omitted). Even under the three grounds he challenges, the Attorney General does not establish a substantial likelihood of success.

1. S.B. 12 Is an Unconstitutional Content-Based Restriction on Speech.

The Attorney General no longer "dispute[s]" that Plaintiffs' performances "might well constitute 'inherently expressive conduct' protected by the First Amendment." Mot. 14; *cf.* ROA.1274-78. Instead, he argues that Plaintiffs' performances are not regulated by S.B. 12 because it applies only to "highly sexualized conduct." Mot. 14. But S.B. 12 does not use this term, nor is the law limited to "highly sexualized conduct." Moreover, even "'[s]exual expression which is indecent but not obscene is protected by the First Amendment.'" *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

Here, because S.B. 12 singles out expressive conduct due to its content—including whether it meets the five-part test for sexual conduct—it is subject to strict scrutiny. ROA.1278-84; *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *Tex. Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 512 (5th Cir.

2021), *cert. denied,* 142 S. Ct. 2852 (2022) (finding that a state rule "is directed at the essential expressive nature of the latex clubs' business, and thus is a content[ ]based restriction' subject to strict scrutiny").

The Attorney General seeks to evade strict scrutiny by pointing to the secondary effects doctrine. Mot. 16-18. But, if a law is designed to restrict "free expression," the secondary effects doctrine does not apply. *Ass'n of Club Execs. of Dallas, Inc. v. City of Dallas*, 83 F.4th 958, 963 (5th Cir. 2023); *see also Reno*, 521 U.S. at 867-68 (secondary effects doctrine did not apply where statute's purpose is to "protect children from the primary effects of 'incident' and 'patently offensive' speech, rather than any 'secondary' effect of such speech").

Instead of being targeted at "secondary effects," S.B. 12's *primary* purpose is to restrict the content of performances on *all* public property in Texas regardless of if minors are present and at *any* commercial enterprise where minors could be present. ROA.169-73. As the district court properly found, "the plain language of S.B. 12 and the legislative history shows the primary purpose of the law is to regulate based on the content and viewpoint of performances." ROA.1285 n.98. The law is therefore not a "content neutral" regulation whose "*predominate* concerns" are secondary effects, *see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986), especially

since there is no evidence in the legislative history or trial record that "supports a link between the regulated business and the targeted secondary effects," *Ass'n of Club Execs. of Dallas*, 83 F.4th at 966 (citation and quotation omitted).[26]

S.B. 12 sweeps far beyond ordinances that this Court has upheld as regulating "sexually oriented business," and fails strict or even intermediate scrutiny. ROA.1285 n.98. It does not leave open "reasonable alternative avenues of communication," *see* Mot. 18, particularly since the law bans all regulated performances from public property, even when performed solely among adults. ROA.170-71. The law also does not make room for parental consent, and imposes strict liability for civil infractions. *See* ROA.1281-82, 1159. The Attorney General does not point to any case that has upheld such

[26] The Attorney General cites entire legislative hearings without specific citations to "testimony on the topic" of secondary effects, Mot. 17-18. Plaintiffs are unaware of any evidence or studies presented to the Legislature on secondary effects, and the Attorney General did not point to any at trial.

Moreover, the purely hypothesized testimony of the Attorney General's proffered expert witness, who was stricken by the court, ROA.1495-96, is the type of "shoddy data or reasoning" that does not "fairly support" a sweeping restriction on speech like S.B. 12, *see Ass'n of Club Execs. of Dallas*, 83 F.4th at 966 (citation omitted). The district court correctly found the expert's testimony irrelevant because it concerned predominantly exposure to pornography and sexual abuse, and the expert could not render an opinion on whether drag performances were harmful to children. ROA.1494-96. Regardless, any error would be harmless because the expert could not dispute that S.B. 12 targets the content of performances, which renders the secondary effects doctrine inapplicable and subjects the law to strict scrutiny.

a sweeping restriction on speech, nor does he challenge the district court's detailed findings on why S.B. 12 is not narrowly tailored. *See* ROA.1281-84.

2. S.B. 12 Is Unconstitutionally Overbroad.

The district court found the text of S.B. 12 to be "extremely broad" because it sweeps within its ambit "a large amount of constitutionally protected conduct . . . such as cheerleading, dancing, live theater, and other common public occurrences." ROA.1288-89. It is not "fanciful," *see* Mot. 14-15, to find that these performers often engage in "sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics" and could arguably "appeal[] to the prurient interest in sex." ROA.171-72. Indeed, the court found that Plaintiffs' performances are arguably proscribed by S.B. 12, ROA.1266-72, and the term "prurient interest in sex" is undefined and overbroad when cherry-picked from the three-part obscenity test in *Miller*, ROA.1287-88.

The Attorney General claims that the term "prurient interest in sex" limits the statute's scope because it is defined in case law, Mot. 15, but his citation to *Roth v. United States*, 354 U.S. 476 (1957), undermines his argument.[27] There, the Supreme Court, approved of the use of the term

[27] The Attorney General also wrongly claims that shows under S.B. 12 must "*intend*[] to appeal to the prurient interest in sex," Mot. 7-8, but as discussed above, such a requirement is not found in the text of the statute and is contradicted by the Attorney General's own asserted *mens rea* of negligence*, id.* at 9.

"prurient interest in sex" only when "the average person, applying contemporary community standards, [determines whether] the dominant theme of the material taken as a whole appeals to prurient interest." *Roth*, 354 U.S. at 489. *Miller* adopted similar language while including a critical exception for performances that "have serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24.

Notably, S.B. 12 does not require that "appeal[ing] to the prurient interest in sex" be based on the sensibilities of an average person, nor contemporary community standards. ROA.172. Additionally, S.B. 12 does not require that the performance be "taken as a whole," which substantially broadens the law's impact because any minor component or mishap in a performance could trigger civil or criminal penalties. *See Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 387 (6th Cir. 2001) (finding ordinance overbroad where "any movie or video featuring a single shot of a person's nude or partially-covered buttocks or a woman's partially covered breast is a 'sexually oriented' film"). Perhaps most importantly, S.B. 12 omits *Miller*'s exception for works of serious literary, artistic, political, or scientific value. Without this exception, S.B. 12 lacks the guardrail that ensures the law does not substantially sweep in First Amendment protected works.

3. S.B. 12 Is Unconstitutionally Vague.

The Attorney General contends that the district court's vagueness analysis is based only on "two phrases that it found vague: 'prurient interest in sex' and lewd.'" Mot. 19 (citing ROA.1290-91). But the district court also found other parts of the statute vague. ROA.1291 ("Without a clear understanding of 'prurient sexual interest,' *other terms such as* 'lewd' and 'Performer' (which is undefined in S.B. 12) become problematic." (emphasis added)). Because the Attorney General fails to address these other terms, he cannot rebut the district court's finding that the statute is unconstitutionally vague. Moreover, these terms *are* vague when divorced from the *Miller* factors. *See Reno*, 521 U.S. at 873 (finding that one term from the *Miller* obscenity test, without the other factors, is unconstitutionally vague). The statute also fails to give adequate notice of what is proscribed, particularly when First Amendment freedoms and criminal penalties are at stake. *See Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 552 (5th Cir. 2008) (applying a more stringent vagueness test when a law implicates First Amendment rights and contains criminal penalties).

III. THE ATTORNEY GENERAL HAS NOT ESTABLISHED IRREPARABLE HARM.

The Attorney General cannot show irreparable harm because "[a]ny interest [a governmental entity] may claim in enforcing an unlawful (and

likely unconstitutional) [law] is illegitimate." *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 618 (5th Cir. 2021). Even if the Attorney General ultimately prevails on appeal, "any harm to the State . . . is temporal[;] . . . the State's ability to enforce its laws is frustrated only for the duration of an appeal." *Texas v. Ysleta Del Sur Pueblo*, No. EP-17-CV-179-PRM, 2019 WL 5589051, at *2 (W.D. Tex. Mar. 28, 2019). Because "[n]o prosecutions have yet been undertaken under the law, [] none will be disrupted" and "the Government in the interim can enforce obscenity laws already on the books." *Ashcroft*, 542 U.S. at 670-71.

IV. PLAINTIFFS AND OTHERS WOULD BE IRREPARABLY HARMED BY A STAY.

The Attorney General acknowledges that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," Mot. 20 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)), but falsely claims that Plaintiffs "have disclaimed an intention to engage in the conduct actually proscribed by S.B. 12," *id.* As discussed *supra,* this bald assertion is unsupported by the record, which establishes that Plaintiffs will suffer irreparable harm if S.B. 12 takes effect.[28] And because the court found that "[i]t is not unreasonable to read S.B. 12 and

[28] *See, e.g.*, ROA.1391:15-20, 1393:19-1394:14, 1432:14-22, 1458:17-1459:3, 1532:18-1533:15, 1584:1-19.

conclude that activities such as cheerleading, dancing, live theater, and other common public occurrences could possibly become a civil or criminal violation of S.B. 12," ROA.1288, maintaining the status quo is also critical to protect the First Amendment freedoms of countless Texans.

V. THE PUBLIC INTEREST WEIGHS AGAINST ISSUING A STAY.

The public interest weighs in favor of upholding Plaintiffs' constitutional rights and maintaining the status quo, whereas the public consequences of allowing S.B. 12 to take effect would be drastic and severe.

S.B. 12 would immediately chill the free expression of Plaintiffs and others because the law is unconstitutionally overbroad and vague and fails to give adequate guidance of what is prohibited. It would also lead to arbitrary enforcement and require police, prosecutors, and other officials to suddenly enforce this unconstitutional law without guidance from this Court. This would cause confusion and uncertainty that would chill First Amendment freedoms and the performing arts across the state.

The Attorney General wrongly asserts that the balance of equities and public interest merge in this case. Mot. 20. Those factors merge only "'when the Government is the opposing party[,]' *i.e.*, when the government is not the party applying for a stay." *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 353 (5th Cir. 2022) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). And,

"[a]t any rate, 'injunctions protecting First Amendment freedoms are always in the public interest.'" *Id.* (quoting *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013)).

CONCLUSION

For the foregoing reasons, the Attorney General's motion for a stay pending appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 6, 2023, 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 also certify that service will be accomplished on all registered CM/ECF users by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify this opposition complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the portions exempted by Fed. R. App. P. 32(f), this opposition contains 5,290 words.

This opposition also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word in Georgia 14 pt. font for text and 13 pt. font for footnotes.

Dated: November 6, 2023

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