

No. 23-20480

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

**BRIEF OF *AMICI CURIAE* EQUALITY TEXAS AND THE TEXAS
FREEDOM NETWORK IN SUPPORT OF PLAINTIFF-APPELLEES**

Holt Major Lackey
HOLT MAJOR LACKEY, PLLC
111 W. Anderson Ln., Ste. D-211
Austin, TX 78753
(512) 949-9598
Texas Bar No. 24047763

**Attorney for *Amici Curiae*
Equality Texas and
The Texas Freedom Network**

CERTIFICATE OF INTERESTED PERSONS

Case Number and Style: 23-20480, *The Woodlands Pride, Inc., et. al. v. Paxton, et al.*

The undersigned counsel of record for *Amici Curiae* 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 so that the judges of this court may evaluate possible disqualification or recusal.

1. Defendant-Appellant: Warren Kenneth Paxton, In an Official Capacity as Attorney General of Texas.
2. Counsel for Defendant-Appellant: Ken Paxton, Brent Webster, Aaron L. Nielson, Lanora C. Pettit, William F. Cole, and Benjamin E. Prengler of the Office of the Attorney General.
3. Defendants-Appellants: Brett Ligon, In an Official Capacity as District Attorney of Montgomery County; and Montgomery County, Texas.
4. Counsel for Defendants-Appellants: B. D. Griffin and Daniel Plake of the Montgomery County Attorney's Office.
5. Defendants-Appellants: James Hicks, In an Official Capacity as District Attorney of Taylor County; and Taylor County, Texas.

6. Counsel for Defendants-Appellants: Robert B. Wagstaff of McMahon Surovik Suttle, P.C.
7. Defendant-Appellant: City of Abilene, Texas.
8. Counsel for Defendant-Appellant: Ramon Gustave Viada III of Viada & Strayer.
9. Defendant: Delia Garza, In an Official Capacity as County Attorney of Travis County.
10. Counsel for Defendant Delia Garza: Leslie Dippel of the Travis County Attorney's Office.
11. Defendant: Joe D. Gonzales, In an Official Capacity as District Attorney of Bexar County.
12. Counsel for Defendant Joe D. Gonzales: Lisa V. Cubriel of the Bexar County District Attorney's Office.
13. Plaintiff-Appellees: The Woodlands Pride, Inc.; Abilene Pride Alliance; Extragrams, LLC; 360 Queen Entertainment LLC; and Brigitte Bandit.
14. 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.

15. *Amici Curiae*: Equality Texas and Texas Freedom Network.

16. Counsel for *Amici Curiae*: Holt Major Lackey of Holt Major Lackey, PLLC.

Dated: April 17, 2024

/s/ Holt Major Lackey
Holt Major Lackey

***Counsel for Amici Curiae
Equality Texas and
The Texas Freedom Network***

TABLE OF CONTENTS

TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICI CURIAE</i>	1
I. Introduction.....	3
II. Drag has Serious Political and Artistic Value and Particular Importance to the LGBTQ+ Community.....	9
a. Drag is a time-honored and culturally significant art form.....	9
b. Drag has a special place in the history and present of the Texas LGBTQIA+ Community.....	14
III. SB 12 Specifically Targets Drag for the Pro-LGBTQIA+ Content of Its Speech.	17
IV. SB 12 Would Chill the Speech of <i>Amici</i> 's Members.	21
V. Conclusion	25

TABLE OF AUTHORITIES

Cases

<i>303 Creative v. Elenis</i> , <u>600 U.S. 570</u> (2023).....	6
<i>Communist Party of U.S. v. Subversive Activities Control Bd.</i> <u>367 U.S. 1</u> (1961)	22
<i>Doran v. Salem Inn, Inc.</i> <u>422 U.S. 922</u> (1975).....	22
<i>Friends of Georges, Inc. v. Mulroy</i> No. 223CV02163, <u>2023 WL 3790583</u> (W.D. Tenn. June 2, 2023)	23
<i>Ginsberg v. New York</i> <u>390 U.S. 629</u> (1968).....	6
<i>HM Fla.-ORL, LLC v. Griffin</i> No. 6:23-CV-950, <u>2023 WL 4157542</u> (M.D. Fla. June 23, 2023).....	23
<i>Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.</i> <u>515 U.S. 557</u> (1995).....	21
<i>Imperial Sovereign Ct. v. Knudsen</i> No. CV 23-50, <u>2023 WL 6794043</u> (D. Mont. Oct. 13, 2023)	23
<i>Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.</i> <u>993 F.2d 386</u> (4th Cir. 1993).....	7
<i>Kolender v. Lawson</i> <u>461 U.S. 352</u> (1983).....	20, 21
<i>Miller v. California</i> <u>413 U.S. 15</u> (1973)	6, 21, 24
<i>Norma Kristie, Inc. v. City of Oklahoma City</i> <u>572 F. Supp. 88</u> (W.D. Okla. 1983).....	23

Reno v. American Civil Liberties Union
521 U.S. 844 (1997)..... 25

Roark & Hardee LP v. City of Austin
522 F.3d 533 (5th Cir. 2008)..... 20

S. Utah Drag Stars v. City of St. George
 No. 4:23-CV-00044, 2023 WL 4053395 (D. Utah June 16, 2023) 8, 22

Schacht v. United States
398 U.S. 58..... 7

Schad v. Borough of Mount Ephraim
452 U.S. 61 (1981) 22

Southeast Promotions, Ltd. v. Conrad
420 U.S. 546 (1975)..... 22

Ward v. Rock Against Racism
491 U.S. 781, 790 (1989)..... 22

Books and Films

ARISTOPHANES, *LYSISTRATA*. 9

WILLIAM SHAKESPEARE, *AS YOU LIKE IT*..... 10

WILLIAM SHAKESPEARE, *TWELFTH NIGHT* 10

MAKI ISAKA, *ONNAGATA: A LABYRINTH OF GENDERING IN KABUKI THEATER* (2016) 10

NEIL MCKENNA, *FANNY & STELLA: THE YOUNG MEN WHO SHOCKED VICTORIAN ENGLAND* (2014)..... 11

PARIS IS BURNING (Miramax et al. 1990)..... 12

Other Authorities

Ben Rimalower, *From Ancient Greece to Angry Inch, Take a Look at the History of Drag in Theatre*, PLAYBILL (Aug. 15, 2015), <https://playbill.com/article/from-ancient-greece-to-angry-inch-take-a-look-at-the-history-of-drag-in-theatre-com-357650> 10

Beth Sullivan & Sarah Marloff, *The History of the LGBTQ Movement in Austin*, AUSTIN CHRONICLE (Aug. 9, 2019), <https://www.austinchronicle.com/news/2019-08-09/the-history-of-the-lgbtq-movement-in-austin/> 15

Cari Shane, *The First Self-Proclaimed Drag Queen Was a Formerly Enslaved Man*, SMITHSONIAN MAGAZINE (June 9, 2023), <https://www.smithsonianmag.com/history/the-first-self-proclaimed-drag-queen-was-a-formerly-enslaved-man-180982311/> 11

Colette Hemingway, *Theater in Ancient Greece*, METROPOLITAN MUSEUM OF ART HEILBRUNN TIMELINE OF ART HISTORY (October 2004), https://www.metmuseum.org/toah/hd/thtr/hd_thtr.htm9

Daisy Woodward, *Celebrating Ernest ‘Stella’ Boulton: Victorian Drag Pioneer*, ANOTHER MAGAZINE (June 2, 2016), <https://www.anothermag.com/fashion-beauty/8742/celebrating-ernest-stella-boulton-victorian-drag-pioneer> 11

Emily Martin, *From police raids to pop culture: The early history of modern drag*, NATIONAL GEOGRAPHIC (June 2, 2023), <https://www.nationalgeographic.com/history/article/drag-queen-drag-balls-early-history-pop-culture>..... 10, 12

EQUALITY TEXAS, 2017 85TH LEGISLATIVE SESSION LEGISLATIVE REPORT & SCORECARD, <https://www.equalitytexas.org/wpcontent/uploads/2017/06/2017LegislativeReportScorecard.pdf> 20

EQUALITY TEXAS, 2019 EQUALITY TEXAS LEGISLATIVE SCORECARD,
<https://www.equalitytexas.org/wp-content/uploads/2019/10/EQTX-2019-Legislative-Scorecard.pdf> 20

EQUALITY TEXAS, *Equality Texas Petitions the UN about Crisis in Texas* (Jan. 22, 2024),
<https://www.equalitytexas.org/un-petition-press-release/> 8

EQUALITY TEXAS, *Legislative Session Wrap-Up: Our community mobilized with strength and heart* (June 4, 2021),
<https://www.equalitytexas.org/legislative-session-wrap-up-our-community-mobilized-with-strength-and-heart/> 20

EQUALITY TEXAS, *Legislative Bill Tracker 2023*,
<https://www.equalitytexas.org/legislature/legislative-bill-tracker-2023/> 19

Frances Anderton, *A history of drag, from Caligula to RuPaul*, KCRW (Oct. 15, 2019),
<https://www.kcrw.com/culture/shows/design-and-architecture/building-housing-affordably-drag-through-the-ages/a-history-of-drag-from-caligula-to-rupaul> 10

HARLEM WORLD MAGAZINE, *The Legendary Hamilton Lodge Ball Home at the Rockland Palace Dance Hall in Harlem 1920’s* (June 28, 2021),
<https://www.harlemworldmagazine.com/the-legendary-hamilton-lodge-ball-home-at-the-rockland-palace-dance-hall-in-harlem/> 12

Jennifer Wilber, *Gender Roles and Gender Relations in Shakespeare’s “Twelfth Night”*, OWLCATION (Oct. 29, 2023),
<https://owlcation.com/humanities/Gender-Roles-and-Gender-Relations-in-Shakespeares-Twelfth-Night> 10

Keith Caulfield, *Chart Rewind: In 1990, Madonna Was in ‘Vogue’ Atop the Hot 100*, BILLBOARD MAGAZINE (May 19, 2023),
<https://www.billboard.com/pro/rewinding-the-charts-25-years-ago-madonna-was-in-vogue-atop-the/> 12, 13

Kiana Shelton, *The Joy of Drag*, PSYCHIATRIC TIMES (June 29, 2022),
<https://www.psychiatrictimes.com/view/the-joy-of-drag>..... 3

Lauren McGaughy, *A brief history of drag queens in Texas*,
THE DALLAS MORNING NEWS (Oct. 28, 2022),
<https://www.dallasnews.com/news/politics/2022/10/28/a-brief-history-of-drag-queens-in-texas/>..... 14, 15

Michael Calcagno & Kyle Denis, *Here Are All the Shout-Outs on Beyoncé’s ‘Break My Soul (The Queens Remix)’*,
BILLBOARD MAGAZINE, August 16, 2022),
<https://www.billboard.com/photos/beyonce-break-my-soul-queens-remix-shout-outs-1235127000/>..... 13

Peter White, *RuPaul Charles Says “If A Drag Queen Wants To Read You a Story, Listen To Her” After Winning Top Reality Emmy For Fifth Time*, DEADLINE, (Jan. 15, 2024),
<https://deadline.com/2024/01/rupauls-drag-race-emmy-outstanding-reality-competition-1235792135/>..... 13

Ryan Bellinghausen, *Houston’s LGBT History*, MY GAY HOUSTON,
<https://lgbtq.visithoustontexas.com/community/houstons-lgbt-history/>
..... 15

Sayantana Datta, *India’s drag scene is nothing like America’s. Here’s how it’s different & why*, LGBTQ NATION (June 22, 2022),
<https://www.lgbtqnation.com/2022/06/indias-drag-scene-nothing-like-americas-heres-different/> 10

SB 12 (as Introduced),
<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=88R&Bill=SB12>..... 18

Scottie Andrew, *The US has a rich drag history. Here’s why the art form will likely outlast attempts to restrict it*, CNN (April 29, 2023),
<https://www.cnn.com/style/article/drag-queen-us-history-explainer-cec/index.html>..... 4

Steve Ramos and David Taffet, *Drag queens pulled us through, one dollar at a time*, DALLAS VOICE (April 25, 2014), <https://dallasvoice.com/drag-queens-pulled-through-dollar-time/>. 16, 17

Todd Camp, *Fort Worth LGBT Community*, TEX. STATE HISTORICAL ASS'N (May 12, 2021), <https://www.tshaonline.org/handbook/entries/fort-worth-lgbt-community>. 14, 15

Zay Ki, *A drag ball in Harlem was one of the biggest social events in 1920s New York*, LGBTQ NATION (June 22, 2023), <https://www.lgbtqnation.com/2023/02/a-drag-ball-in-harlem-was-one-of-the-biggest-social-events-in-1920s-new-york/>..... 12

INTEREST OF *AMICI CURIAE*

Equality Texas (“EQTX”) engages, educates, and advocates to secure full equality for LGBTQIA+ Texans. In addition to advocating to protect all forms of gender expression, Equality Texas is committed to defending safe spaces for LGBTQIA+ Texans and defending the First and Fourteenth Amendment speech and association rights of LGBTQIA+ Texans.

Among Equality Texas’s 100,000+ members are a number of drag performers and countless Texans who enjoy and appreciate Drag shows as spectators. Their freedoms and their community would be diminished if SB 12 came into effect. Drag performances have also helped raise funds to support the work that Equality Texas does on behalf of the LGBTQIA+ community in Texas.

The Texas Freedom Network (“TFN”) is a nonpartisan, grassroots organization of more than 150,000 religious and community leaders who support religious freedom, individual liberties, and public education.

TFN recognizes that Drag is a joyful art form in which many LGBTQIA+ Texans have found refuge and allyship. As an organization that has been a watchdog protecting freedom for almost three decades

and that advocates for LGBTQIA+ equality, TFN cannot be silent as LGBTQIA+ Texans are deprived of equal protection under the law.

No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae* or thier counsel, made any monetary contribution intended to fund the preparation or submission of this brief. See [Fed. R. App. P. 29\(a\)\(4\)\(E\), \(b\)\(4\); 5th Cir. R. 29.2](#).

I. Introduction

Drag is an inherently expressive and artistic genre of performance with deep roots in the history of theater and of our country. Like other forms of live performance, from ballet to professional wrestling, Drag is inherently expressive and shielded from government censorship by the First Amendment.

Drag is a form of artistic performance involving “the overdramatization of a character or a gender.” [ROA.1374-75](#). This often involves performers creating an illusion that they are someone they are not, whether presenting as a “celebrity lookalike” or presenting as a gender different from (or an exaggerated version of the same as) their gender assigned at birth. *Id.* While there are many interpretations and variations, in general Drag can be defined as “performing in an exaggerated way that . . . challenges male or female stereotypes.”¹ As one scholar of the genre succinctly put it, “Drag is the theatrical exaggeration of gender,” which often “subverts ‘what people think they know about gender.’”²

¹ Kiana Shelton, *The Joy of Drag*, PSYCHIATRIC TIMES (June 29, 2022), <https://www.psychiatrictimes.com/view/the-joy-of-drag>.

² See Scottie Andrew, *The US has a rich drag history. Here’s why the art*

As Richard Montez Jr., co-owner of Plaintiff-Appellee 360 Queen Entertainment testified at the District Court hearing, each performer conveys their own expressive message spanning from pure entertainment to messages of social justice. ROA.1516 (“I think every drag queen tries to articulate something different through their performance art.”). Another witness, Jason Rocha, founder and president of Plaintiff-Appellee The Woodlands Pride, responding to questioning by the District Court about the message of Drag performances, testified that the messages can be comedic, political, or pure entertainment. “It can be all of those things at the same time because that’s what art is to me. . . . So it’s everything plus more, but really a show of solidarity with—for the LGBTQ+ community.” ROA.1516.

Not only is Drag a form of speech, it is an especially important form of speech to *Amici* and their members and constituents throughout the Texas LGBTQIA+ community. Drag has played a particularly important role historically and through the present day in the LGBTQIA+

form will likely outlast attempts to restrict it, CNN (April 29, 2023), <https://www.cnn.com/style/article/drag-queen-us-history-explainer-cec/index.html>.

community with which many of *Amici's* constituents identify. As the president of Plaintiff/Appellee Abilene Pride testified at the hearing in District Court, the non-profit Plaintiffs incorporate Drag performances into their LGBTQIA+ community activities because they are a form of art that “are kind of a nexus of belonging. It’s a way for people in our community to see themselves represented on a larger scale.” [ROA.1451](#).

The message connoted by Drag performance is particularly resonant and important within the LGBTQIA+ community. The core feature of Drag, the exaggeration and dramatization of gender roles in society, deeply resonates with many members of the LGBTQIA+ community and others who challenge the proposition that gender is rigid, hardwired, and mandates everything from what a person wears to whom they love.

By its very forms and conventions, Drag communicates content and a viewpoint on matters of gender. Drag, as a form, articulates that gender and sex roles are socially constructed, fluid, and performative; That gender and sexuality are not a straightjacket; That there is freedom and joy in embracing one’s true self and living authentically and out loud. Drag spreads a message of hope, acceptance, and joy that affirms for

anyone who may question their relationship to gender that they are not alone.

Because Drag inherently celebrates these ideas of gender freedom and equality that are at the core of both the LGBTQIA+ community's policy agenda and the personal lived experience of so many members of that community, the performance and attendance of Drag shows is central to many fundraising and community building events within the LGBTQIA+ community. *See, e.g.* [ROA.1450](#)—51. Drag is a ritual of that community's fellowship.

It would be sufficient to enjoin SB 12 as vague, overbroad, and unconstitutional merely to say that Drag is protected speech like any other performance that does not meet the tests for obscenity under *Miller v. California*, [413 U.S. 15](#) (1973) or *Ginsberg v. New York*, [390 U.S. 629](#) (1968). The Supreme Court has repeatedly reiterated the broad scope of First Amendment protection for “All manner of speech—from ‘pictures, films, paintings, drawings, and engravings,’ to ‘oral utterance and the printed word.’” *303 Creative v. Elenis*, [600 U.S. 570, 587](#) (2023). The First Amendment protection of a performance does not depend on the artistry, quality, or public acceptance of the work. *See Schacht v. United States*,

398 U.S. 58, 61-62 (noting the First Amendment importance of theatrical performances in “the entertainment and education of people in the world” even if a specific performance might be “crude and amateurish and perhaps unappealing”); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 391 (4th Cir. 1993) (The “low quality of entertainment does not necessarily weigh in the First Amendment inquiry” and even amateurish and offensive fraternity skits were “inherently expressive and thus entitled to First Amendment protection.”).

Because the statute is vague and regulates speech based on its content while omitting crucial elements of the Supreme Court’s test for obscenity, it would be unconstitutional even if the speech it chilled did not have serious artistic and political value.

But to millions of Texans, LGBTQIA+ and allies alike, Drag is a particularly important form of speech that expresses a distinct viewpoint, has serious artistic and political value, and serves as a shared expression of community akin to a sacrament of group affirmation and support. Drag frequently, and arguably inherently, communicates “political and social messages regarding . . . self-expression, gender stereotypes and roles, and

LGBTQIA+ identity.” *S. Utah Drag Stars v. City of St. George*, No. 4:23-CV-00044, [2023 WL 4053395](#), at *20 (D. Utah June 16, 2023).

Texas’s attempt to ban Drag shows is accordingly an attack on its own LGBTQIA+ community. As was the express intent of the bill’s sponsors, much of the important speech and performance contained in Drag shows would at least arguably fall within the bill’s restrictions and would be chilled if the bill comes into effect. SB 12 takes dead aim at one of that community’s major rituals of fun, fellowship, and meaning.

SB 12 is part of a broader pattern of legislation rooted in animus toward the LGBTQIA+ community. The 2023 Texas Legislative Session saw a record-breaking 140+ anti-LGBTQIA+ bills filed.³ Other bills passed into law in that session eliminated medical freedom for transgender youth, banned transgender athletes from participating in collegiate sports, and ended diversity and inclusion practices including outreach to LGBTQIA+ students at public universities.⁴ In the context of these other bills targeting the LGBTQIA+ community, the animus

³ See EQUALITY TEXAS, *Equality Texas Petitions the UN about Crisis in Texas* (Jan. 22, 2024), <https://www.equalitytexas.org/un-petition-press-release/>.

⁴ *Id.*

behind SB 12’s attempt to ban a major fellowship ritual of the LGBTQIA+ community is apparent.

II. Drag has Serious Political and Artistic Value and Particular Importance to the LGBTQ+ Community.

a. Drag is a time-honored and culturally significant art form.

The exploration of gender, including themes of cross-dressing and subversion of traditional gender roles, has been at the center of theatrical performance since the beginning of Western theater.⁵ Indeed, from the dawn of theater in Ancient Greece, performances have featured “the exhibition or representation ... of [simulated] male or female genitals in ... a state of sexual stimulation or arousal” and the use of “accessories or prosthetics that exaggerate male or female sexual characteristics.” ROA.171. The Old Comedy genre of Fifth-century BCE Athens featured actors wearing “tights with padding on the rump and belly, as well as a leather phallus.”⁶ Gender bending and cross dressing have remained at the thematic forefront throughout the history of theater and performance, including in canonical works such as Shakespeare’s *Twelfth*

⁵ See, e.g., ARISTOPHANES, *LYSISTRATA* (411 B.C.E.).

⁶ Colette Hemingway, *Theater in Ancient Greece*, METROPOLITAN MUSEUM OF ART HEILBRUNN TIMELINE OF ART HISTORY (October 2004), available at https://www.metmuseum.org/toah/hd/thtr/hd_thtr.htm.

Night and *As You Like It*.⁷ Similar gender-expansive roles and themes are deeply rooted in a variety of theater traditions throughout the world.⁸

The roots of the art form known today as Drag can be directly traced to the late 19th Century.⁹ In 1860s Victorian England, Ernest ‘Stella’ Boulton became the first person to describe a cross-dressing performance as “drag.”¹⁰ After a high-profile arrest and prosecution on sodomy charges stemming from a relationship with a wealthy aristocrat, Boulton brought

⁷ Jennifer Wilber, *Gender Roles and Gender Relations in Shakespeare’s “Twelfth Night”*, OWLCATION (Oct. 29, 2023), <https://owlcation.com/humanities/Gender-Roles-and-Gender-Relations-in-Shakespeares-Twelfth-Night>.

⁸ See, e.g., MAKI ISAKA, ONNAGATA: A LABYRINTH OF GENDERING IN KABUKI THEATER (2016); Ben Rimalower, *From Ancient Greece to Angry Inch, Take a Look at the History of Drag in Theatre*, PLAYBILL (Aug. 15, 2015), <https://playbill.com/article/from-ancient-greece-to-angry-inch-take-a-look-at-the-history-of-drag-in-theatre-com-357650>; Frances Anderton, *A history of drag, from Caligula to RuPaul*, KCRW (Oct. 15, 2019), <https://www.kcrw.com/culture/shows/design-and-architecture/building-housing-affordably-drag-through-the-ages/a-history-of-drag-from-caligula-to-rupaul>; Sayantan Datta, *India’s drag scene is nothing like America’s. Here’s how it’s different & why*, LGBTQ NATION (June 22, 2022), <https://www.lgbtqnation.com/2022/06/indias-drag-scene-nothing-like-americas-heres-different/>.

⁹ Emily Martin, *From police raids to pop culture: The early history of modern drag*, NATIONAL GEOGRAPHIC (June 2, 2023), <https://www.nationalgeographic.com/history/article/drag-queen-drag-balls-early-history-pop-culture>.

¹⁰ *Id.*

the drag act to New York and performed it to great success in off Broadway theater.¹¹

Around the same time, a formerly enslaved performer named William Dorsey Swann became the first self-proclaimed “drag queen.”¹² Swann, a resident of Washington D.C., was repeatedly arrested for throwing drag parties inspired by the tradition of the cakewalks held by enslaved people on Southern Plantations and by Washington’s Emancipation Day parades at which women who “personified freedom for Black people” were crowned as “queens of freedom.”¹³

A similar drag ball, the “Odd Fellows” Ball sponsored by Harlem’s Hamilton Lodge, began as an annual event in the 1860s and became one of the biggest annual social events during the Harlem Renaissance of the 1920s and 1930s, attended by such luminaries of the era as Langston

¹¹ Daisy Woodward, *Celebrating Ernest ‘Stella’ Boulton: Victorian Drag Pioneer*, ANOTHER MAGAZINE (June 2, 2016), <https://www.anothermag.com/fashion-beauty/8742/celebrating-ernest-stella-boulton-victorian-drag-pioneer>; see also NEIL MCKENNA, *FANNY & STELLA: THE YOUNG MEN WHO SHOCKED VICTORIAN ENGLAND* (2014).

¹² Cari Shane, *The First Self-Proclaimed Drag Queen Was a Formerly Enslaved Man*, SMITHSONIAN MAGAZINE (June 9, 2023), <https://www.smithsonianmag.com/history/the-first-self-proclaimed-drag-queen-was-a-formerly-enslaved-man-180982311/>.

¹³ *Id.*

Hughes.¹⁴ Although the Hamilton Lodge ball ceased to be held in the 1930s, the tradition of drag balls would evolve into the “House Ballroom” scene among Black and Brown drag artists, particularly in New York, since the 1970s, as notably documented in Jenny Livingston’s 1990 documentary *Paris is Burning*.¹⁵

Drag remains influential upon and in discourse with the broader mainstream culture to this day. For example, the House Ballroom scene depicted in *Paris is Burning* inspired Madonna’s song “Vogue,” which reached No. 1 on the US Billboard Hot 100.¹⁶ The video for that song, by acclaimed director David Fincher, was nominated for MTV’s Video of the

¹⁴ Zay Ki, *A drag ball in Harlem was one of the biggest social events in 1920s New York*, LGBTQ NATION (June 22, 2023), <https://www.lgbtqnation.com/2023/02/a-drag-ball-in-harlem-was-one-of-the-biggest-social-events-in-1920s-new-york/>; HARLEM WORLD MAGAZINE, *The Legendary Hamilton Lodge Ball Home at the Rockland Palace Dance Hall in Harlem 1920’s* (June 28, 2021), <https://www.harlemworldmagazine.com/the-legendary-hamilton-lodge-ball-home-at-the-rockland-palace-dance-hall-in-harlem/>.

¹⁵ See Martin, *supra* Note 9; See also PARIS IS BURNING (Miramax et al. 1990)(a documentary film about the House Ballroom scene during the late 1980s that has been selected for preservation in the United States National Film Registry by the Library of Congress as being “culturally, historically, or aesthetically significant”).

¹⁶ Keith Caulfield, *Chart Rewind: In 1990, Madonna Was in ‘Vogue’ Atop the Hot 100*, BILLBOARD MAGAZINE (May 19, 2023), <https://www.billboard.com/pro/rewinding-the-charts-25-years-ago-madonna-was-in-vogue-atop-the/>

Year and was also inspired by House Ballroom aesthetics and dance moves.¹⁷ In 2022, Beyoncé issued a remix of her own No. 1 hit song “Break My Soul” (notably titled “The Queens Remix”—plural, not possessive) that incorporated elements of Madonna’s “Vogue” while recontextualizing and re-centering the Black and queer performers who had inspired Madonna’s original hit, giving explicit credit to the House Ballroom scene of the 1980s with references to the House of Xtravaganza, House of Aviance, House of Revlon, House of Labeija, and others.¹⁸

The continued and increasing contribution and significance of Drag within the larger cultural and artistic discourse can be seen in the large viewership and critical and awards acclaim of popular television shows such as *Pose*, a critically acclaimed dramatization of the 1980s Ballroom scene, and *RuPaul’s Drag Race*, which has won the Emmy Award for Outstanding Reality Competition Program in 5 of the past 6 years.¹⁹

¹⁷ *Id.*

¹⁸ Michael Calcagno & Kyle Denis, *Here Are All the Shout-Outs on Beyoncé’s ‘Break My Soul (The Queens Remix)’*, BILLBOARD MAGAZINE, August 16, 2022), <https://www.billboard.com/photos/beyonce-break-my-soul-queens-remix-shout-outs-1235127000/>.

¹⁹ See Peter White, *RuPaul Charles Says “If A Drag Queen Wants To Read You a Story, Listen To Her” After Winning Top Reality Emmy For Fifth Time*, DEADLINE, (Jan. 15, 2024), <https://deadline.com/2024/01/rupauls-drag-race-emmy-outstanding-reality-competition-1235792135/>.

b. Drag has a special place in the history and present of the Texas LGBTQIA+ Community.

Just as Drag has a long artistic history across the country and the globe, it has a long history specifically in Texas as well. In 1880, a female impersonator got top billing for a 1 pm performance at the Texas State Fair, on a day set aside for free admittance for school children.²⁰ Female impersonators were regularly featured in vaudeville shows that toured Texas's major cities in the late 19th and early 20th Centuries.²¹ As in the rest of the country, Drag shows in Texas grew in popularity in the 1920s and 1930s, in part because the prohibition of alcohol drew more people to underground clubs where LGBTQIA+ artists performed.²²

This growing popularity did not immunize Drag performers and the LGBTQIA+ community at large from backlash and repression, with numerous notable raids on drag venues between the 1930s and as late as

²⁰ Lauren McGaughy, *A brief history of drag queens in Texas*, THE DALLAS MORNING NEWS (Oct. 28, 2022), <https://www.dallasnews.com/news/politics/2022/10/28/a-brief-history-of-drag-queens-in-texas/>.

²¹ Todd Camp, *Fort Worth LGBT Community*, TEX. STATE HISTORICAL ASS'N (May 12, 2021), <https://www.tshaonline.org/handbook/entries/fort-worth-lgbt-community>.

²² McGaughy, *supra* Note 20.

1973,²³ when seven drag performers were arrested and charged in Fort Worth under a city ordinance that made it illegal to wear clothing “in a dress not belonging to his or her sex.”²⁴ The charges were dismissed and eventually the city ordinance was stricken from the books in the late 1970s.²⁵

Against this backlash and repression, LGBTQIA+ Texans organized, with a number of gay bars, gay publications, and non-profits being founded in the 1960s and 1970s to support and meet the needs of the LGBTQIA+ community in Texas.²⁶

These community resources would be vital as the LGBTQIA+

²³ *Id.*

²⁴ Camp, *supra* Note 21.

²⁵ *Id.*

²⁶ See e.g. Ryan Bellinghausen, *Houston's LGBT History*, MY GAY HOUSTON, <https://lgbtq.visithoustontexas.com/community/houstons-lgbt-history/> (last visited April 14, 2024) (describing the 1954 founding of The Diana Foundation to support Houston's gay community, the 1965 founding of “The Albatross” newspaper for the Houston LGBTQIA+ Community, and the 1975 founding of The Houston Gay and Lesbian Political Caucus, the oldest LGBTQIA+ civil rights organization in the South, among other noteworthy events in Houston LGBTQIA+ history); Beth Sullivan & Sarah Marloff, *The History of the LGBTQ Movement in Austin*, AUSTIN CHRONICLE (Aug. 9, 2019), <https://www.austinchronicle.com/news/2019-08-09/the-history-of-the-lgbtq-movement-in-austin/> (similarly cataloging important milestones in Austin LGBTQIA+ history).

community faced the horrendous challenges of the AIDS epidemic in the 1980s. Drag was at the center of many of these community resources and played a vital role in the community's efforts to survive that epidemic.

“In the early 1980s when the AIDS epidemic slammed into the community and started killing us, some gay men and trans women shook off the shock and went into action. In almost every gay club in Texas, performers stepped on stage in drag and raised money to fight AIDS. Lots of money.”²⁷ Many of the pillars of the LGBTQ+ community and the support network needed to survive the AIDS epidemic in Texas, including but not limited to Oak Lawn Community Services, AIDS Services of Dallas, AIDS Arms, Bryan's House, AIDS Interfaith Network, and others, were built on the foundation of the money raised at these Drag-show fundraisers.²⁸ Because of these efforts, “[t]he sick and the dying had a place to get medical help, food, a place to live and a place to rest.”²⁹

In addition to raising millions of dollars to fight the AIDS crisis, the drag shows of the 1980s provided escapist entertainment and a sense of

²⁷ Steve Ramos and David Taffet, *Drag queens pulled us through, one dollar at a time*, DALLAS VOICE (April 25, 2014), <https://dallasvoice.com/drag-queens-pulled-through-dollar-time/>.

²⁸ *Id.*

²⁹ *Id.*

community even in the depths of tragedy—“they made people laugh for an hour or two.”³⁰

To this day, Drag-themed fundraisers or fundraisers featuring Drag performance remain a cornerstone of events, like the Woodlands Pride event at issue in this case, at which LGBTQIA+ organizations build community and raise fellowship and funds to protect their rights.

Drag events thus not only have serious artistic and political significance, but are of great importance to the LGBTQIA+ community. Drag events build community and spread a message of hope, acceptance, and joy. Drag’s exaggeration of gender stereotypes is implicitly and inherently expressive of a viewpoint about the nature of human sexuality and the human condition. The Legislature’s attempt to ban Drag through SB 12 seeks to chill this speech on the basis of the speech’s viewpoint.

III. SB 12 Specifically Targets Drag for the Pro-LGBTQIA+ Content of Its Speech.

The sponsors of SB 12 were unambiguous in their stated desire to target Drag. The official statement of legislative intent said that the law was aimed at “drag shows ... performed in venues generally accessible to

³⁰ *Id.*

the public.” [ROA.597](#). This was in keeping with the Texas Lieutenant Governor’s stated list of legislative priorities for the 2023 session, which proclaimed his intent to “Ban Children’s Exposure to Drag Shows.” [ROA.622-23](#). Senator Bryan Hughes, the lead sponsor of SB 12, explained in his statement introducing the bill that the bill was targeted at “sexually explicit performances like drag shows.” [ROA.625](#). Upon signing SB 12, Texas Governor Greg Abbott took to X (formerly Twitter) to proclaim this intent to chill speech associated with Drag shows, writing “Texas Governor Signs Law Banning Drag Performances in Public. That’s right.” [ROA.620](#).

The intent to chill speech based on the viewpoint expressed by Drag as an artform was equally explicit in the originally introduced text of SB 12. As introduced, the first element of SB 12’s definition of a “sexually oriented performance” meant either a performer who was nude or “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.”³¹

³¹ SB 12 (as Introduced) available on Texas Legislature’s website at <https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=88R&Bill=SB12>

While the finally enacted version of SB 12 thus attempts to obscure the laser-focused intent to target Drag-related speech by replacing this broad, blanket description of Drag performance in general with a number of other criteria that are merely often associated with Drag, the purpose of the law and its intent to punish Drag speech for its expressive content remain clear.

Plaintiff/Appellees are correct that their First-Amendment-protected performances are at least arguably within the law's proscription. Not only do their performances arguably meet the elements described in SB 12 as enacted, but their speech is precisely the type of speech the Legislature was trying to suppress.

SB 12's targeting of the LGBTQIA+ community's speech occurred in the context of numerous other bills targeting that community. At the beginning of the 2023 Legislative Session, the Legislature introduced approximately 141 bills seeking to curtail LGBTQIA+ rights.³² This marked a dramatic increase in legislative targeting of the LGBTQIA+ community from just over 30 bills that were introduced in the prior

³² Legislative Bill Tracker 2023, EQUALITY TEXAS, *available at* <https://www.equalitytexas.org/legislature/legislative-bill-tracker-2023/>.

legislative session in 2021,³³ and just over 20 bills in 2019³⁴ and 2017.³⁵

The pointedly anti-LGBTQIA+ political environment and movement that gave rise to SB 12 increases the risk of “arbitrary and discriminatory enforcement” targeted at chilling the constitutionally protected speech of Drag performers and other members of the LGBTQIA+ community. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 546 (5th Cir. 2008).

The evidence in the record demonstrates that there is a motivated constituency of protestors who frequent some of Plaintiff’s events to protest the message of Drag. ROA.1291. The legislative history expressly targeting Drag performance further demonstrates that at least some of Defendant/Appellants will likely understand and enforce SB 12 as aimed

³³ EQUALITY TEXAS, *Legislative Session Wrap-Up: Our community mobilized with strength and heart* (June 4, 2021), <https://www.equalitytexas.org/legislative-session-wrap-up-our-community-mobilized-with-strength-and-heart/>.

³⁴ EQUALITY TEXAS, 2019 EQUALITY TEXAS LEGISLATIVE SCORECARD (2019), <https://www.equalitytexas.org/wp-content/uploads/2019/10/EQTX-2019-Legislative-Scorecard.pdf>.

³⁵ EQUALITY TEXAS, 2017 85TH LEGISLATIVE SESSION LEGISLATIVE REPORT & SCORECARD (2017), available at <https://www.equalitytexas.org/wp-content/uploads/2017/06/2017LegislativeReportScorecard.pdf>.

expressly at the content of Drag speech. The record amply illustrates that Plaintiff/Appellees' performances at least arguably could subject them to prosecution under the vague "prurient interest" factor divorced from the full context of *Miller*. The risk of "arbitrary and discriminatory enforcement" directly targeting Drag speech and the LGBTQIA+ community is thus unacceptably high.

IV. SB 12 Would Chill the Speech of *Amici*'s members.

If SB 12 takes effect, the approximately One Million strong Texas LGBTQIA+ community will have their speech censored, an important community ritual suppressed, and their dignity assailed.

Like opera, professional wrestling, or any number of other genres, the message and meaning of any given Drag performance may be obscure to the uninitiated. But "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, [515 U.S. 557, 569](#) (1995). Nor does the fact that the Texas Legislature may disapprove of Drag's inherent

message about gender render Drag any less protected by the First Amendment. “[T]he freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.” *Communist Party of U.S. v. Subversive Activities Control Bd.*, [367 U.S. 1, 137](#) (1961) (Black, J., dissenting).

The Supreme Court has consistently and uniformly held that live entertainment, including music, theatrical performance, and nude dancing are protected by the First Amendment. *See Schad v. Borough of Mount Ephraim*, [452 U.S. 61, 65-66](#) (1981); *Southeast Promotions, Ltd. v. Conrad*, [420 U.S. 546, 557–58](#) (1975); *Doran v. Salem Inn, Inc.*, [422 U.S. 922, 932–33](#) (1975); *Ward v. Rock Against Racism*, [491 U.S. 781, 790](#) (1989).

In keeping with this Supreme Court precedent, district courts across the country have overwhelmingly concluded, like the District Court in this case, that Drag is protected by the First Amendment and that laws like SB 12 and other efforts to suppress Drag speech are unconstitutional. *See, e.g., S. Utah Drag Stars*, [2023 WL 4053395](#), at *20 (D. Utah June 16, 2023) (finding that drag shows at issue were

“indisputably protected speech,” in part because “speech includes expressive conduct and live entertainment, such as musical and dramatic works”); *Friends of Georges, Inc. v. Mulroy*, No. 223CV02163, [2023 WL 3790583](#), at *33 (W.D. Tenn. June 2, 2023) (permanently enjoining a law that sought to ban drag under the definition of “adult cabaret entertainment”); *HM Fla.-ORL, LLC v. Griffin*, No. 6:23-CV-950, [2023 WL 4157542](#), at *9 (M.D. Fla. June 23, 2023) (preliminarily enjoining a Florida law targeting drag performances under the guise of “adult live performance”); *Imperial Sovereign Ct. v. Knudsen*, No. CV 23-50, [2023 WL 6794043](#), at *21 (D. Mont. Oct. 13, 2023) (preliminarily enjoining a state law prohibiting public drag performances under the label of “sexually oriented shows”); *Norma Kristie, Inc. v. City of Oklahoma City*, [572 F. Supp. 88, 91](#) (W.D. Okla. 1983) (acknowledging that a drag competition was entitled to First Amendment protection despite claims that it lacked artistic merit, and concluding that “The First Amendment is not an art critic. . . . Any inequality in aesthetic value between Plaintiff’s pageant and a musical or play is a distinction without a difference.”).

Nonetheless, as described above, Drag is an inherently expressive and political form of performance with a vital place in the lives of the LGBTQIA+ community represented by *Amici* and their members and constituents. SB 12's attempt to chill this important speech fails to withstand constitutional scrutiny under applicable precedents because the bill relies on a truncated and incomplete version of the *Miller v. California* test that incorporates only the highly subjective "appeals to the prurient interest in sex" element while pointedly omitting the element that, in order to be obscenity that lacks First Amendment protection, "the work, taken as a whole, [must lack] serious literary, artistic, political, or scientific value." *Miller*, 402 U.S. at 23-24.

The performances of Plaintiff-Appellees, like the overwhelming majority of Drag performances taking place in Texas, are not remotely obscene under binding Supreme Court precedent. Indeed, the statute implicitly acknowledges the non-obscenity and expressive artistic and political value of the speech it seeks to prosecute by invoking an incomplete version of the *Miller* test. Such truncated statutes that incorporate only part of the *Miller* test in an effort to censor non-obscene

speech are unconstitutional. *Reno v. American Civil Liberties Union*, [521 U.S. 844](#) (1997).

V. Conclusion

Although Drag would be constitutionally protected speech even if it did not convey important artistic and political meaning, in fact it does occupy a vital space in the history of theater, the country, and the LGBTQIA+ community. The act of Drag performance itself carries important content and viewpoint messages that are valued by *Amici*, their constituents, and countless other Texans. SB 12 is a prior restraint, vague, overbroad, and an impermissible content and viewpoint restriction. SB 12 is likely to be enforced in an arbitrary and discriminatory manner that effectively results in a near-complete chilling of Drag performance. Such a result would not only be unconstitutional, but would be a severe loss to the artistic discourse of the nation and the freedom of Texas's LGBTQIA+ community.

For these reasons, the District Court was correct to permanently enjoin the enforcement of SB 12. *Amici* respectfully urge this Court to affirm.

Dated: April 17, 2024

Respectfully submitted,

By: /s/ Holt Major Lackey

Holt Major Lackey

Texas Bar No. 24047763

HOLT MAJOR LACKEY, PLLC

111 W. Anderson Ln., Ste. D-211

Austin, TX 78752

Tel. (512) 949-9598

holt@holtmajorlackey.com

**Counsel for Amici Curiae
Equality Texas and The
Texas Freedom Network**

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 also certify that service will be accomplished on all registered CM/ECF users by the appellate CM/ECF system.

/s/ Holt Major Lackey _____
Holt Major Lackey

*Counsel for Amicus Curiae
Equality Texas*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify this brief 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 4,629 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 Century Schoolbook 14 pt. font.

Dated: April 17, 2024

/s/ Holt Major Lackey

Holt Major Lackey

*Counsel for Amici Curiae
Equality Texas and The Texas
Freedom Network*

CERTIFICATIONS UNDER ECF FILING STANDARDS

Pursuant to paragraph A(6) of this Court's ECF Filing Standards, I hereby certify that any required privacy redactions have been made and the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Holt Major Lackey
Holt Major Lackey

***Counsel for Amici Curiae
Equality Texas and The
Texas Freedom Network***