

**THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

VORTEX REPERTORY COMPANY,

BROCK ENGLAND,

MARK IVY,

JAMIE BROKAW,

OKTAVEA WILLIAMS,

THE GREATER HOUSTON LGBT
CHAMBER OF COMMERCE,

THE SAN ANTONIO LGBT CHAMBER
OF COMMERCE, and

THE NORTH TEXAS GAY LESBIAN
BISEXUAL TRANSGENDER
CHAMBER OF COMMERCE,

Plaintiffs,

v.

ANGELA COLMENERO, *Interim*
Attorney General, in her official capacity,

DELIA GARZA, *Travis County Attorney,*
in her official capacity,

KIM OGG, *Harris County District*
Attorney, in her official capacity,

THE CITY OF AUSTIN, and

THE CITY OF HOUSTON,

Defendants.

Case No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs VORTEX Repertory Company (“The VORTEX”), Brock England (“England”), Mark Ivy (“Ivy”), Jamie Brokaw (“Brokaw”), Oktavea Williams (“Williams”); the Greater Houston LGBT Chamber of Commerce (“Houston Chamber”), The San Antonio LGBT Chamber of Commerce (“San Antonio Chamber”), and the North Texas Gay Lesbian Bisexual Transgender Chamber of Commerce (“North Texas Chamber”) (collectively “Plaintiffs”), by and through their undersigned counsel, bring this civil action for declaratory and injunctive relief, and allege as follows:

I. INTRODUCTION

1. Senate Bill 12, proposed Tex. Health & Safety Code § 769.001, Tex. Local Gov. Code § 243.0031, and Tex. Penal Code § 43.28 (“S.B. 12” or the “Statute”), presents an existential threat to theater and the performing arts across Texas.¹ The law sweeps so broadly, and is written so vaguely, as to touch virtually every type of performance, from music concerts to ballet performances, and from Broadway musicals to movies. It is an unprecedented attack on Texans’ First Amendment rights that is unconstitutional and void.

2. S.B. 12’s supporters’ vague—and unsupported—references to seeking to protect minors from inappropriate content in the Texas Legislature cannot shield the Statute from unconstitutionality. Even assuming this was their true motive, “moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.” *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818, (2000). And, the prohibitions eventually signed into law go far beyond the purported justification, barring minors from viewing performances that families have enjoyed together for generations.

¹ A copy of the S.B. 12 as enacted is attached as Exhibit 1.

3. By its terms, S.B. 12 targets performances based on content and triggers strict scrutiny. It prohibits and criminalizes, in the presence of any minor, “sexually oriented performances,” a term so broadly defined as to include a limitless array of nudity, partial nudity, and “sexual conduct.” Inevitably, it prevents minors from attending performances they have long been able to access. The Statute is thus far from narrowly tailored and cannot survive strict scrutiny. Further, its terms are undefined and so vague as to render it unconstitutional on that ground alone.

4. S.B. 12 is effective September 1, 2023, and will radically alter the landscape of performing arts across Texas if allowed to take effect. Its impact is already being felt, as members of the performance industry prepare themselves for this cataclysmic shift in their freedom to engage in their livelihoods and in constitutionally protected expression.

II. JURISDICTION AND VENUE

5. This is a civil rights action arising under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 1343.

6. Venue is proper in this Court and Division pursuant to 28 U.S.C. § 1391 because a substantial portion of the acts giving rise to the violations alleged herein occurred in this district and division.

III. PARTIES

7. Plaintiff VORTEX Repertory Company (“The VORTEX”) is a theater in Austin, Texas. Founded in 1988, it is known widely as a pioneering force in Austin’s theater scene. The VORTEX produces and hosts productions that arguably qualify as sexually oriented performances under S.B. 12.

8. Plaintiff Brock England is an actor who has performed in Texas for nearly two decades. He is a specialist in Shakespeare and other early modern theater classics. Many of the roles he has performed in the past, and hopes to perform in the future, would arguably violate S.B. 12.

9. Plaintiff Mark Ivy is a Houston actor who has performed in musical theater productions in Texas for fifteen years. He reasonably fears enforcement under S.B. 12 based on many of the roles he has played in the past and plans to play in the future because they would arguably violate S.B. 12.

10. Plaintiff Jamie Brokaw is a theater artist based in Houston. She works in technical theater and is an actor. She fears enforcement under S.B. 12 because of the many of roles she has played in the past and plans to play in the future would arguably violate S.B. 12.

11. Plaintiff Oktavea Williams is a San Antonio performance artist. She acts in three to four performances each year, mainly in Austin, many of which would arguably violate S.B. 12.

12. Plaintiff Houston Chamber is an organization dedicated to promoting the economic interests of its members and serving the broader LGBT community. It has had to devote significant resources to preparing members for the negative effects of S.B. 12 and will continue to divert those resources if the law is allowed to take effect. The Chamber's members, particularly those in the entertainment industry, are at risk of violating S.B. 12.

13. Plaintiff San Antonio Chamber is an organization that promotes business and other related interests of its members and the broader LGBT community. It too has had to devote significant resources to preparing members for the negative effects of S.B. 12 and will continue to divert those resources if the law is allowed to take effect. The Chamber's members, particularly those in the entertainment industry, are at risk of violating S.B. 12.

14. Plaintiff North Texas Chamber is an organization that supports its members' economic interests as well as the interests of the LGBT community as a whole. It has had to and will continue to divert its resources to help members prepare for and respond to the negative effects of S.B. 12, if the law is not enjoined. The Chamber's members, particularly those in the entertainment industry, are at risk of violating S.B. 12.

15. Defendant Angela Colmenero, sued in her official capacity, is the Interim Attorney General of Texas. The Attorney General—the state's chief law enforcement officer—is specifically authorized to enforce Section 1 of S.B. 12. Ex. 1 (Tex. Health & Safety Code § 769.001 et seq.).

16. Defendant Delia Garza, sued in her official capacity, is the County Attorney of Travis County. She is authorized to enforce Section 3 of S.B. 12. Ex. 1 (Tex. Penal Code § 43.28(c)); Tex. Code. Crim. Pro. art. 2.02.

17. Defendant Kim Ogg, sued in her official capacity, is the Harris County District Attorney. She is authorized to enforce Section 3 of S.B. 12. Ex. 1 (Tex. Penal Code § 43.28(c)); Tex. Gov't Code § 25.1033(k); *id.* § 43.180).

18. Defendant City of Austin is a municipal corporation chartered under the laws of the State of Texas. The city of Austin is charged with enforcing Section 2 of S.B. 12. Ex. 1 (Tex. Local Gov't Code § 243.0031).

19. Defendant City of Houston is a municipal corporation chartered under the laws of the State of Texas. The city of Houston is charged with enforcing Section 2 of S.B. 12. Ex. 1 (Tex. Local Gov't Code § 243.0031).

IV. STATEMENT OF FACTS

20. S.B. 12 prohibits, through criminal and civil penalties, “sexually oriented performances” on all public property and any private property where a person under 18 is present.

The Statute defines a sexually oriented performance as a “visual performance” that:

(A) features:

(i) a performer who is nude, as defined by Section 102.051, Business & Commerce Code; or

(ii) any other performer who engages in sexual conduct; and

(B) appeals to the prurient interest in sex.

Ex. 1 (Tex. Penal Code § 43.28(a)(2)).

21. The Statute defines “sexual conduct” as:

(A) the exhibition or representation, actual or simulated, of sexual acts, including vaginal sex, anal sex, and masturbation;

(B) the exhibition or representation, actual or simulated, of male or female genitals in a lewd state, including a state of sexual stimulation or arousal;

(C) the exhibition of a device designed and marketed as useful primarily for the sexual stimulation of male or female genitals;

(D) actual contact or simulated contact occurring between one person and the buttocks, breast, or any part of the genitals of another person; or

(E) the exhibition of sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics.

Ex. 1 (Tex. Penal Code § 43.28(a)(1)(A–E)).

22. S.B. 12 includes three enforcement mechanisms.

23. *First*, the Statute penalizes venues that host targeted performances. The Statute adds a chapter to the Texas Health & Safety Code permitting the Texas Attorney General to bring a civil action against any “person who controls the premises of a commercial enterprise” and

“allow[s] a sexually oriented performance to be presented on the premises in the presence of an individual younger than 18 years of age.” Ex. 1 (Tex. Health & Safety Code § 769.002(a)). Under this provision, the Attorney General may bring an action to either recover a \$10,000 civil penalty or “obtain a temporary or permanent injunction to restrain the violation.” Ex. 1 (Tex. Health & Safety Code § 769.002(c)). The Attorney General is entitled to recoup “reasonable expenses incurred in bringing an action . . . including court costs, attorneys’ fees, investigative costs, witness fees, and deposition expenses.” Ex. 1 (Tex. Health & Safety Code § 769.002(f)).

24. *Second*, S.B. 12 prevents localities from authorizing targeted performances. It prohibits any municipality from “authoriz[ing] a sexually oriented performance: (1) on public property; or (2) in the presence of an individual younger than 18 years of age.” Ex. 1 (Tex. Local Gov’t Code § 243.0031(c)). The Statute also permits a municipality to pass other laws or ordinances “regulat[ing] sexually oriented performances as the municipality or county considers necessary” Ex. 1 (Tex. Local Gov’t Code § 243.0031(b)).

25. *Third*, S.B. 12 criminalizes the performers. The Statute creates a new Class A misdemeanor to “engage[] in a sexually oriented performance” either (1) “on public property at a time, in a place, and in a manner that could reasonably be expected to be viewed by a child” or (2) “in the presence of an individual younger than 18 years of age.” Ex. 1 (Tex. Penal Code 43.28(b)). In Travis County, such a misdemeanor would be prosecuted by the County Attorney, Defendant Delia Garza, who is charged with prosecuting the vast majority of misdemeanors in the county. Tex. Code Crim. Pro. art. 2.02. In Harris County, District Attorney Kim Ogg is charged with prosecuting all misdemeanors. Tex. Gov’t Code § 25.1033(k); *id.* § 43.180.

26. Taken together, and as explained below, these provisions pose a direct threat to Plaintiffs and Texans across the state by restricting the rights of venues, performers, and audiences

of all ages to access or participate in targeted performances. The First Amendment forbids such strict limits on performances.

A. Senate Bill 12 Was Designed to Target Disfavored Forms of Performance

27. S.B. 12 began as a targeted attack on drag performances. In the fall of 2022, after hearing a report that a Plano-area restaurant hosted an all-ages drag performance, then-Attorney General Ken Paxton called for an investigation into the restaurant.² Recognizing that the performance broke no law, Mr. Paxton called on the Texas Legislature to “expressly prohibit this kind of grossly sexual conduct and empower [his] Office to prosecute when district and county attorneys refuse.”³ Following suit, Lieutenant Governor Dan Patrick made “banning children at drag shows” one of his top 30 priorities for the upcoming legislative session.⁴

28. The Legislature obliged and introduced S.B. 12 on March 10, 2023. According to S.B. 12’s author, the purpose of the law was to “protect children from seeing [affected] performances” based on a judgment that such performances are “harmful.”⁵

29. At a March 23 hearing, dozens of witnesses testified against the bill, highlighting its vagueness, its infringement on performers’ expression, and its curtailment of parents’ rights.⁶

² Robert Downen, *How Texas Activists Turned Drag Events Into Fodder for Outrage*, Tex. Tribune (Feb. 24, 2023, 5:00 A.M.), <https://www.texastribune.org/2023/02/24/texas-drag-protests-children/>

³ *Id.*

⁴ Lieutenant Governor of Texas, Dan Patrick, *Lt. Gov. Patrick Announces Top 30 Priorities for the 2023 Legislative Session* (Feb. 13, 2023), <https://ltgov.texas.gov/2023/02/13/lt-gov-dan-patrick-announces-top-30-priorities-for-the-2023-legislative-session/>

⁵ Research Center, *Bill Analysis: Author’s/Sponsor’s Statement of Intent, S.B. 12* (Jun. 19, 2023) (statement of Sen. Hughes, State Affairs Committee)

⁶ See generally *House Representatives Compilation of Public Comments*, Tex. Leg. Online (May 11, 2023 1:38 A.M.), <https://capitol.texas.gov/tlodocs/88R/publiccomments/billhistory/SB00012H.pdf#navpanes=0>.

30. As initially introduced, the bill included the same three enforcement mechanisms eventually adopted in the final version: (1) empowering the Attorney General to civilly enjoin or fine venues that host “sexually oriented performances,” (2) prohibiting municipalities from authorizing “sexually oriented performances” on public property or in the presence of a minor, and (3) creating a new criminal offense applicable to performers engaging in “sexually oriented performances” on public property or in the presence of a minor.⁷ The definition of “sexually oriented performance,” however, continually broadened as the bill made its way through each chamber.

31. The first iteration of the bill defined “sexually oriented performance” as a visual performance featuring a nude performer 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” that “appeals to the prurient interest in sex.”⁸ The bill was voted out of committee on March 27 and sent to the full Senate.⁹

32. Perhaps recognizing that such a law would constitute unconstitutional viewpoint or content-based discrimination,¹⁰ on April 4th, the Texas Senate attempted to obscure its anti-drag purpose by adding other targets to S.B. 12’s scope, but still prohibiting drag performances. In so doing, the Senate broadened S.B. 12’s ambit to reach innumerable forms of performance.

⁷ S.B. 12 Introduced, 2023 Leg., 88th Sess. (Tex. 2023). Available at: <https://capitol.texas.gov/tlodocs/88R/billtext/pdf/SB00012I.pdf#navpanes=0>

⁸ *Id.* (creating Tex. Penal Code § 43.28(a)(1)(B)).

⁹ S.B. 12 S. Committee Rep., 2023 88th Sess. (Tex. 2023). <https://capitol.texas.gov/tlodocs/88R/billtext/pdf/SB00012S.pdf#navpanes=0>. The Senate Committee also added a severability clause. *Id.* (adding Sec. 4 to S.B. 12).

¹⁰ See *HM Florida-ORL, LLC v. Melanie Griffin*, 6:23-cv-950-GAP-LHP (M.D. Fla. Jun. 23, 2023); *Friends of Georges, Inc. v. Mulroy*, No. 223CV02163TLPTMP, 2023 WL 3790583 (W.D. Tenn. June 2, 2023).

33. Specifically, the Senate expanded the range of expression prohibited as “sexually oriented performance” by drafting a broader definition of “sexual conduct,” which is similar to the definition in the final enacted version.¹¹

34. The full Senate held a hearing on April 4, at which Senator Hughes fielded questions from other legislators on the broad scope of S.B. 12. When asked how police officers were expected to apply the law, Senator Hughes replied, “[i]f it appeals to the prurient interest and meets any of those above prongs, it’s captured by the bill because this is about protecting children, what should be done in the presence of children.”¹²

35. On April 5, the Senate passed S.B. 12 by a vote of 20-11 and sent it to the House.

36. The House State Affairs Committee approved two amendments. First, it removed the specific reference to drag from the definition of “sexually oriented performance.”¹³ Second, it narrowed the scope of liability in the criminal provision, Section 3(b)(1)(2), to performances “in the premises of a commercial enterprise in the presence of an individual younger than 18 years of age.”¹⁴

37. On May 22, the House voted 93-45 to pass the bill. The Senate rejected the House’s changes and sent the bill to a conference committee with members from both chambers.

¹¹ S.B. 12 Engrossed, 2023 Leg., 88th Sess. (Tex. 2023) (“(a) In this section: (1) “Sexual conduct” means: (A) the exhibition or representation, actual or simulated, of sexual acts, including vaginal sex, anal sex, and masturbation; (B) the exhibition or representation, actual or simulated, of male or female genitals in a lewd state, including a state of sexual stimulation or arousal; (C) the exhibition of a device designed and marketed as useful primarily for the sexual stimulation of male or female genitals; or (D) actual contact or simulated contact occurring between one person and the buttocks, breast, or any part of the genitals of another person.”).

¹² Will DuPree, *Gun violence mention pauses Texas Senate debate on drag restrictions*, KXAN (Apr. 4, 2023), <https://www.kxan.com/news/texas-politics/gun-violence-mention-pauses-texas-senate-debate-on-drag-restrictions/>.

¹³ S.B. 12 House Committee Report, 2023 Leg., 88th Sess. (Tex. 2023).

¹⁴ *Id.*

38. The conference committee made additional amendments to the House version of the bill. First, it rejected the “commercial premises” addition to subsection (b)(1)(2), expanding criminal liability to any performance in the presence of a minor, regardless of whether it takes place on commercial premises.¹⁵ Second, it added a subsection (1)(E) to the definition of “sexual conduct” to include “the exhibition of sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics.”¹⁶

39. On May 28, both chambers voted to pass the conference committee version of S.B. 12. It was sent to Governor Abbott the next day, and he signed the bill on June 18.

40. S.B. 12 will go into effect on September 1, 2023.

B. S.B. 12 Prohibits a Broad and Poorly Defined Range of Constitutionally Expression

41. As enacted, S.B. 12 prohibits a broad range of expressive conduct. As explained above, *supra* ¶¶ 20–21, S.B. 12 prohibits “sexually orientated performances” defined as a “visual performance” which:

(A) features:

- (i) a performer who is nude, as defined by Section 102.051, Business & Commerce Code; or
- (ii) any other performer who engages in sexual conduct; and

(B) appeals to the prurient interest in sex.

Ex. 1 (Tex. Penal Code § 43.28(a)(2)).

42. “Sexual conduct” is, in turn, defined as:

- (A) the exhibition or representation, actual or simulated, of sexual acts, including vaginal sex, anal sex, and masturbation;

¹⁵ S.B. 12 Conf. Comm. Rep., 2023 Leg., 88th Sess. (Tex. 2023).

¹⁶ *Id.*

- (B) the exhibition or representation, actual or simulated, of male or female genitals in a lewd state, including a state of sexual stimulation or arousal;
- (C) the exhibition of a device designed and marketed as useful primarily for the sexual stimulation of male or female genitals;
- (D) actual contact or simulated contact occurring between one person and the buttocks, breast, or any part of the genitals of another person; or
- (E) the exhibition of sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics.

Ex. 1 (Tex. Penal Code § 43.28(a)(1)).

43. Together, these provisions enforce a broad and limitless definition of sexually oriented performance, posing an existential threat to Plaintiffs’ artistic expression and that of countless other performers across Texas.

The Statute is Overbroad and Infringes on Protected Expression

44. S.B. 12 sweeps with a broad brush, reaching far beyond obscenity and prohibiting core First Amendment protected expression. While S.B. 12 gestures at performances appealing to the “prurient interest,” Ex. 1 (Tex. Penal Code § 43.28(a)(2)(B)), the law restricts expression far beyond the Supreme Court’s definition of obscenity. Governments may only restrict expressive conduct or speech when such activity meets the three-pronged definition of obscenity set forth by the Supreme Court in *Miller v. California*:

- (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. 15, 24 (1973).

45. S.B. 12 fails the *Miller* test. To trigger liability, S.B. 12 does not require that the performance in question be patently offensive as specifically defined by state law or lack literary,

artistic, political, or scientific value. And while it does require that the work “appeal to the prurient interest in sex,” there is no requirement that the performance *as a whole* appeal to the prurient interest. Instead, a performer or venue could trigger liability merely by having one prurient moment in the course of a long performance.

46. Thus, instead of narrowly targeting obscenity, S.B. 12 restricts, subject to civil and criminal penalties, non-obscene performances at the heart of the First Amendment. The Statute prohibits sexuality, nudity, and physical intimacy, all of which have been themes in art, literature, and performance for centuries. Many of the greatest works of theater through the ages have explored sexual themes in non-obscene, artistic manners. For example, S.B. 12 will prevent minors from seeing Shakespeare’s works come to life on stage, as many of his plays run afoul of the Statute’s definition of “sexual conduct.”

47. It is not only the classics that will suffer. Contemporary performers like Miley Cyrus or Beyonce occasionally use sexually suggestive dance movements, intimate physical contact, and revealing accessories as part of their artistic expression. Even the Dallas Cowboys cheerleaders and professional wrestlers dress in clothing and accessories that exaggerate their features in a sexual manner and “gesticulate” in choreographed performances. S.B. 12 takes these mainstream performances, long open to the public for enjoyment, and forces performers and venues to impose never-before-enacted age restrictions.

S.B. 12 is Unconstitutionally Vague

48. S.B. 12 is filled with vague terms and undefined phrases that leave venues and performers uncertain of their rights and vulnerable to discriminatory enforcement.

49. The definition of “sexual conduct” is particularly difficult to decipher.

50. Subsection (A) begins with “the exhibition or representation, actual or simulated, of sexual acts” “Sexual acts” is not defined, nor is it clear the what conduct it is intended to proscribe. It could refer narrowly to sexual intercourse, or could encompass a wide variety conduct intended or interpreted as sexual. Moreover, it includes the mere “representation” of “simulated” sexual acts. No guidance is provided as to what qualifies as a representation, nor how literal that representation must be. Theater and dance are art forms that rely heavily on metaphor and suggestion. It is unclear from this definition whether every symbolic gesture that refers on some level to sexual acts now subjects the actor to criminal penalties and the venue to fines.

51. Subsection (B) lists “the exhibition or representation, actual or simulated, of male or female genitals in a lewd state, including a state of sexual stimulation or arousal.” It provides no guidance as to what may be considered “lewd,” given that term must include more than “a state of sexual stimulation or arousal.” Again, the definition prohibits the “representation” and “simulation,” of these acts without further elaboration.

52. Similarly, Subsection (C) applies to the “exhibition of a device designed and marketed as useful primarily for the sexual stimulation of male or female genitals.” While this provision sloppily gestures at vibrators and other sex toys, its actual language lacks any precision. Nowhere does the statute define “device” or what it means to be marketed for “sexual stimulation.” Without such definitions, the provision could apply to pushup bras, thongs, condoms, and more. It also lacks any exception for educational purposes, meaning sex-education classes might be covered. Here too, the definition prohibits the “representation” and “simulation,” of these acts without further elaboration.

53. Subsection (D) prohibits “actual contact or simulated contact” between two people in certain situations without defining simulated.

54. Subsection (E) prohibits “the exhibition of sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics.” Aside from the overbroad “gesticulations,” which could refer to virtually any gestures, the definition includes the terms “accessories” and “prosthetics.” It is unclear what these terms refer to—do makeup, wigs, or temporary facial hair count? Do jewelry, belts, push-up bras, and corsets? The answer is nowhere in the text. Nor is “sexual characteristic” defined.

55. Finally, the Statute’s use of the term “visual performance” adds yet another layer of vagueness. Without a definition, the term could be interpreted to apply to movies. Indeed, the subsection of the Penal Code S.B. 12 amends, Subchapter B of Chapter 43, defines “performance” throughout the subchapter as a “play, motion picture, dance, or other exhibition performed before an audience.” Tex. Penal Code § 43.21(a)(3). Movies are obviously visual and therefore S.B. 12 risks punishing venues and performers who display such films to the public.

56. The fear of criminal and civil penalties and the uncertainty about what could give rise to those penalties will keep citizens of Texas from engaging in protected speech—even speech that might fall entirely outside the purview of the statute.

C. S.B. 12 Prevents Plaintiffs from Engaging in, Producing, or Supporting Constitutionally Protected Expression

Plaintiff The VORTEX

57. The VORTEX is an artist owned and operated theater in Austin that has provided performers, staff, and audiences a place to enjoy innovative theater for more than thirty years. The theater and its artists have won more than one hundred major awards and hundreds of nominations for artistic excellence, including B. Iden Payne awards.

58. The VORTEX’s property includes an indoor theater, where most of the productions are staged, a bar, and a Butterfly Garden with a family-friendly food truck, butterfly sanctuary,

and outdoor stage. The property is enclosed with a fence with wide gaps between its planks that allow people walking by easy viewing of what is happening on the outdoor stage. The property is generally open to the public and families often bring their children to enjoy the peaceful atmosphere while shows are going on in the background.

59. Many of The VORTEX's productions would arguably be considered "sexually oriented performances" under S.B 12 and, because there are no enforced age restrictions at the performances, they would likely violate the law. A few examples are illustrative.

60. The VORTEX staged several cybernetic operas in the early 2000s, including *Elytra* and *The X and Y*. There, the actors wore stylized leather breast plates with representations of nipples, phalluses, and other body parts. The actors made movements that could be considered sexual gesticulations, including gestures towards their breasts and genitals. These costumes were also used in public parades in Austin.

61. In 2012, The VORTEX's production of *WATER* included an opening scene with two nude actors hanging in nets with water flowing around them, a metaphor for birth.

62. In 2019, the theater staged *:Humpty*, a satirical take on classic fairy tales. In the play, one character made sexual, groping advances towards others, touched a female actor's breasts, and ended up with her in his lap with her buttocks in contact with his body. Another woman sat on a man's lap and engaged in sexual gesticulations, danced with her body touching his, and made movements representative of sexual activity.

63. The VORTEX also hosts a Summer Youth Theatre ("SYT") program for 13- to 17-year-olds during which the students rehearse and eventually perform to the public a challenging play. For example, in 2015 the SYT put on Moliere's *Tartuffe* in which minors wore corsets, wigs, and stockings and moved energetically around the stage.

64. The VORTEX plans to continue exhibiting similar performances in the future.

65. Because of the law's wide and ambiguous scope, The VORTEX cannot confidently identify what conduct is covered by the law and is concerned that S.B. 12 will subject the theater to civil penalties and its performers to criminal charges.

66. The only way for The VORTEX and its artists to definitively avoid legal consequences is to radically alter the nature of its performances, place strict limits on its artists' expression, and ultimately self-censor. This is the essence of a chilling effect on theatrical performances.

Plaintiff Brock England

67. Plaintiff Brock England has acted in plays around Texas since 2004. He is a specialist in Shakespeare and early modern classical theater. He often performs in "original practices" productions, meaning the plays are performed as they would have been in their own time. For the works of Shakespeare, this includes men playing all the roles and no filtering of the bawdy content for which the playwright is known, much of which, if performed as originally understood, would arguably violate S.B. 12. He reasonably fears that many of his performances would violate S.B. 12 and subject him to the penalties in the statute.

68. In 2013, in Austin, he performed the leading role of Margaret of Anjou in Hidden Room Theatre's *Rose Rage*, a condensed version of Shakespeare's Henry VI trilogy. His costume relied on accessories that exaggerated female sexual characteristics, including a corset, chemise, and wig. The role included an intimate love scene with another actor during which the two embraced and kissed with the fronts of their bodies touching.

69. In 2011, he played the role of Grumio in an interactive production of Shakespeare's *Taming of the Shrew*. In part of the play, he sat in an audience members' lap and another audience

member patted his buttocks. This scene would have arguably violated S.B. 12 and subjected both the actors and the participating audience members to criminal penalties.

70. In 2019, England played the role of Belville in Hidden Room Theatre's *The Rover*, a seventeenth-century play exploring female sexuality. Dressed in exaggerated makeup, with a belt, sword, and high heeled shoes, he smacked the buttocks of an actor, brushed the breasts of another, and danced gesticulating his hips in a manner that was sexual and could have been representative of sexual activity, all of which would arguably violate S.B. 12.

71. England intends to act in similar productions in Austin, Texas in the future thereby possibly subjecting England to civil and criminal penalties.

Plaintiff Mark Ivy

72. Plaintiff Mark Ivy has worked professionally as an actor in Houston for fifteen years. He specializes in musical theater and reasonably fears criminal penalties under S.B. 12 based on the costumes and choreography of his performances.

73. For example, in 2014, he performed in the musical *Reefer Madness* at Theater Under the Stars, wearing only a sarong and gold pleather shorts—accessories that exaggerated his sexual characteristics—while dancing with hip thrusts and other suggestive movements and gesticulations that would arguably violate S.B. 12. There was no age limit on this performance, but instead families could choose for themselves whether it was appropriate for minors, including teenagers.

74. In 2017, he acted in the musical *Five Course Love* at Stages in Houston. He wore an S&M-style harness and short pleather shorts as part of the show's satirical take on a German-style restaurant, and performed hip thrusts and other potentially suggestive choreography that would arguably violate S.B. 12. People under 18 were present, including those in late high school.

75. Ivy has several roles booked with Theatre Under the Stars in Houston for the upcoming season which may put him in jeopardy if S.B. 12 goes into force because they arguably violate the statute.

Plaintiff Jamie Brokaw

76. Plaintiff Jamie Brokaw is an actor who works in technical theater in Houston and actively auditions for a wide variety of acting roles. She reasonably fears that her past performances would have violated S.B. 12 and that she will be subject to criminal liability for performances in the future.

77. Brokaw previously played the role of Sir Galahad's mother in *Spamalot* which required her to wear prosthetic breasts and perform hip thrusts and other potentially sexual gesticulations. For the finale, she raised her skirt to reveal a sparkly gold letter in her genital area. Arguably under S.B. 12, these could have been a lewd display of genitals or representations of sex or just mere sexual gesticulations.

78. Brokaw also performed in the Texas Renaissance Festival for four years. Her costumes accentuated her genital area and she used her sword to make phallic symbols in the air that arguably constituted sexual gesticulations. She and others would lift their skirts to reveal their buttocks, which is considered nudity under S.B. 12. All of these actions would arguably violate S.B. 12.

Plaintiff Oktavea Williams

79. Plaintiff Oktavea Williams is a performance artist who performs in three to four productions in Texas each year, none of which contain age restrictions, and reasonably fears criminal penalties under S.B. 12. Many of her performances arguably violate the Statute.

80. For example, in 2019, Williams acted in *Black Girl Love* where she simulated sexual intercourse with another actor in one scene and in another was cradled by an actor with her back and buttock against the body of that actor. These scenes arguably violated S.B. 12.

81. This year, she performed a one-woman show entitled *i see you. you're seen*. Williams wore revealing outfits throughout the show, including a bustier, exposed bra, fishnet stockings, and sheer shorts while engaging in sexual gesticulations including gyrating her hips and briefly grazing her pubic area and body. All of these movements were arguably “sexual conduct” under S.B. 12’s array of definitions, including gesticulations, or representations of sex. The performances delved into topics of identity and sexual violence in a manner designed to be approachable for older teenage audiences.

82. Williams intends to continue to engage in these types of performances around Texas, but mainly Austin, in the future.

Plaintiff Greater Houston LGBT Chamber of Commerce

83. Plaintiff Greater Houston LGBT Chamber of Commerce was founded in 2016 to promote the growth, development, and sustainability of the LGBTQ+ business community in the greater Houston area. It provides services including networking, business development, advertising and educational opportunities, and support in policy projects.

84. The Houston Chamber represents 394 members and advocates for the broader LGBTQ+ community. Its members range from small nonprofits to large corporations. Members complete an application, pay dues, and abide by Standards of Business Conduct & Ethics.

85. The Houston Chamber is a trusted voice within the Greater Houston LGBTQ+ community and it regularly provides member education and informational materials and helping its members and community partners navigate new laws that will affect their businesses.

86. Because of this trusted role, S.B. 12 has already harmed the Houston Chamber. The Houston Chamber has had to divert resources to educate its members about the meaning, implications, and impacts of S.B. 12. This is time and money that could otherwise be spent promoting policies that support pro-business and pro-LGBTQ+ policies for our community to create economic opportunities.

87. Additionally, while S.B. 12 is commonly referred to as the “drag ban,” its implications for the wider business community are largely unknown by many of the Houston Chamber’s members.

88. S.B. 12 also harms the Houston Chamber’s members. The Chamber is particularly concerned for its entertainment industry members, including theaters, community dance programs, and event services that employ performers. Theater members stage productions that likely include expressive conduct defined as “sexual conduct” under S.B. 12.

89. Many members also host drag events featuring performers who wear clothing that accentuates sexual characteristics and perform choreography some viewers might consider sexual. Drag as an artform is strongly associated with the LGBTQ+ community, and many community fundraisers hosted by the Houston Chamber’s members include drag performances. S.B. 12 will directly cut off this long-held art form and censor the Chamber’s members’ protected expression.

90. Houston Chamber members also host performances on public property by getting City of Houston authorization to construct stages and performance areas in sidewalks, parking lots, and streets. Many of these performances, and especially during Houston Pride, would be considered “sexually oriented” under the meaning of S.B. 12. The law thereby prohibits the Houston Chapter’s members from hosting these previously valuable events because the City of Houston can no longer supply authorization for anything “sexually oriented.”

Plaintiff San Antonio LGBT Chamber of Commerce

91. Plaintiff San Antonio LGBT Chamber of Commerce works at the local, state, and national levels to promote the growth, development, and sustainability of the LGBTQ+ business community in the San Antonio area.

92. The San Antonio Chamber represents 65 members, but also advocates for the broader LGBTQ+ business community. Its members range from small nonprofits to large corporations to individuals.

93. S.B. 12 has already harmed the San Antonio Chamber by forcing it to divert resources to educate its members about the meaning, implications, and impacts of S.B. 12, a burden that will only intensify if S.B. 12 goes into effect. Like the Houston Chamber, many of the San Antonio Chamber's members are seeking guidance on a law that continually altered throughout the legislative process. Only through direct member and community education can the San Antonio Chamber help its region's LGBTQ+ community navigate S.B. 12's impact on their businesses.

94. In addition, S.B. 12 will prevent the San Antonio Chamber from hosting drag performances at fundraisers and community-based events open to all ages, which it reasonably fears will be deemed an illegal "sexually oriented performance" because much of the conduct engaged in by drag performers would arguably violate S.B. 12.

95. S.B. 12 also harms the San Antonio Chamber's members. The Chamber is particularly concerned for its performing arts-based members, including theaters. Those members frequently feature performers with elements of their performances that play on themes of sex and sexual identity that have historically arguably violated S.B. 12. But for S.B. 12, many of the San Antonio Chamber's members would continue to put on performances that would arguably violate S.B. 12 but for the chilling effect of this law.

Plaintiff North Texas Gay Lesbian Bisexual Transgender Chamber of Commerce

96. Plaintiff North Texas LGBT Chamber of Commerce represents 355 members across 13 counties in the North Texas area. Similar to the other Chambers, the North Texas Chamber advocates for the equality of the LGBTQ+ community by promoting economic development within the community.

97. As a result of S.B. 12, the North Texas Chamber has been forced to expend considerable time, money, and other resources educating its membership about the law. Because of the law's lack of clarity, and the many different versions that passed through the legislature, many of its members are confused and self-censoring their protected expression because of the law. Even over the summer, before S.B. 12 went into effect, the law's impending restrictions forced the North Texas Chamber to advise several of its members on whether their planned events would violate the law.

98. The North Texas Chamber itself also hosts events that would violate the law. In the past, drag performances that are arguably "sexually oriented" under the law would come to fundraisers and other events to provide entertainment for guests.

99. Similarly, S.B. 12 imposes serious restrictions on the theaters, performing arts centers, and restaurants that regularly host arguably "sexually oriented performances" without imposing an age restriction. For many of their members and the broader North Texas LGBTQ+ community, these events are artistic expressions of their identities. Similarly, some of its members host dance companies from all over the world that perform in ways reasonably considered "sexually oriented." These are valuable performances for families, minors, and adults to see culturally diverse performances from across the globe.

D. Plaintiffs and Countless Others Face Irreparable Harm and Defendants Must Be Enjoined

100. If not enjoined, S.B. 12 will go into effect on September 1, 2023. Plaintiffs will all be forced to either risk criminal or debilitating civil penalties for continuing their protected expression, or forego their protected activity to ensure they are not penalized under the law.

101. Defendants and other local prosecutors have no choice but to see this law enforced. Pursuant to newly enacted House Bill 17, codified at Local Gov't Code § 87.011, a prosecutor may be removed from office for the “adoption or enforcement of a policy of refusing to prosecute a class or type of criminal offense under state law or instructing law enforcement to refuse to arrest individuals suspected of committing a class or type of offense under state law.” Local Gov't Code § 87.011(3)(B). Therefore, regardless of local norms around sexual material, or contemporary community standards, individuals and venues in every corner of the state must anticipate prosecution if they run afoul of S.B. 12 with their expressive activity.

CAUSES OF ACTION

COUNT ONE: VIOLATION OF 42 U.S.C. § 1983 – FIRST AMENDMENT

(FREEDOM OF EXPRESSION)

102. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

103. As alleged above, S.B. 12 is an unconstitutional violation of the First Amendment both on its face and as applied for the following reasons.

104. *First*, Defendants seek to restrict protected, First Amendment speech based on its content and message. Plaintiffs engage in a range of protected speech centered around theater and the performing arts, *see supra* ¶¶ 57–101. The fact that it may contain elements of non-obscene

sexuality does not dispel First Amendment protections. *See, e.g., Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

105. S.B. 12 is a content-based restriction that only applies to “sexual conduct” in the presence of a minor. As such, it is therefore “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). That is, strict scrutiny.

106. S.B. 12 fails strict scrutiny. Its sweeping effect is divorced from any real purpose. It is broad enough to encompass a wide variety of theatrical performances that are beneficial, not harmful to minors, and removes from parents any freedom to decide what appropriate performances might be. Nor is the law narrowly tailored. It is broad enough to encompass even the most innocuous musicals, and provides virtually no standards by which to determine its scope in practice.

107. The broad nature of the statute, and its vagueness as to what conduct is and is not prohibited, will have a chilling effect on the First Amendment rights of citizens of Texas.

108. ***Second***, S.B. 12 is facially overbroad. A law is facially overbroad and violates the First Amendment when it “encompasses a substantial number of unconstitutional applications ‘judged in relation to the statute’s plainly legitimate sweep.’” *Seals v. McBee*, 898 F.3d 587, 593 (5th Cir. 2018) (citation omitted).

109. The first step in an overbreadth analysis is to determine the reach of the statute. *See Seals*, 898 F.3d at 597. As explained *supra* ¶¶ 44–47, S.B. 12 goes far beyond obscenity and reaches protected speech such as theater, concerts, dance, and even movies. The unprotected speech that S.B. 12 reaches—obscenity—is already proscribed by numerous statutes in Texas law and so the broad sweep of S.B. 12 targets protected expression directly.

110. The law is therefore facially overbroad and impinges on the rights of Plaintiffs and countless others across the State. Such an overbroad law violates the First Amendment.

111. **Third**, S.B. 12 authorizes an invalid prior restraint by prohibiting municipalities from “authoriz[ing] a sexually oriented performance: (1) on public property; or (2) in the presence of an individual younger than 18 years of age.” Ex. 1 (Sec. 2(c)).

112. Prior restraints must (1) contain “narrowly drawn, reasonable and definite standards” and (2) provide at least “three procedural safeguard[s],” as articulated by the Supreme Court, which together provide “adequate procedural protections to enforce that standard,” *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227–28 (1990). S.B. 12’s municipal authorization provision contains neither.

113. First, as explained *supra* ¶¶ 44–56, S.B. 12’s substantive standard is overbroad and vague and provides limitless discretion to municipalities to enforce the authorization provision before a performance even happens. The decisions will rest on a municipality’s *ex ante* judgment that a performance will be sexually oriented without ever seeing the performance.

114. Second, S.B. 12 contains *no* procedural protections, let alone constitutionally adequate ones. It indefinitely restricts performers’ access to *all* public property, including municipal theaters and parks, and puts the burden on the performers, not the government censoring speech, to seek relief.

115. Section 2 of S.B. 12—adding § 243.0031 to the Local Government Code and prohibiting municipalities from authorizing sexually oriented performances—imposes an invalid prior restraint and violates the First Amendment.

**COUNT TWO: 42 U.S.C. § 1983 – FOURTEENTH AMENDMENT DUE PROCESS
(VAGUENESS)**

116. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

117. A law is unconstitutionally vague if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285, 304 (2008) (citations omitted).

118. Here, virtually every part of S.B. 12 is unconstitutionally vague, as it is impossible to determine from the text of the statute what conduct is prohibited. As explained above, *supra* ¶¶ 48–56, the undefined terms throughout the text render the law riddled with ambiguity.

119. Plaintiffs are left without any certainty as to whether they may face criminal or civil penalties for engaging in an array of expressive activities, or whether the penalized activity may vary across the state. As such, S.B. 12 is unconstitutionally vague.

COUNT THREE: 28 U.S.C. § 2201 – DECLARATORY JUDGMENT

120. Plaintiffs incorporate all allegations of fact in all preceding paragraphs as if fully set forth in this Count.

121. 28 U.S.C. § 2201(a) provides: “In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration[.]”

122. This case presents an actual controversy between the Plaintiffs and Defendants as to whether Plaintiffs have a First Amendment right to engage in expressive activity. As alleged, Plaintiffs' claims S.B. 12 violates its First Amendment rights.

123. Plaintiff seeks a declaration that S.B. 12 violates the Constitution on its face.

REQUESTS FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

- A. Declare S.B. 12 is facially unconstitutional, invalid, null, and void;
- B. Permanently enjoin Defendants, their agents, and employees from enforcing S.B. 12;
- C. Preliminarily enjoin Defendants, their agents, and employees from enforcing S.B. 12 pending resolution of this case on the merits;
- D. Award any and all other relief necessary to fully effectuate the injunction against S.B. 12's enforcement;
- E. Award reasonable attorneys' fees and costs;
- F. Enter any other relief that it deems just and proper.

DATED: August 4, 2023

Respectfully submitted,

/s/ Ashley Fernandez Dorsaneo

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