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 DALE CARPENTER, ERWIN CHEMERINSKY, EUGENE VOLOKH, AND THE STANTON FOUNDATION FIRST AMENDMENT CLINIC AT VANDERBILT LAW SCHOOL AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. **Plaintiffs-Appellees**: The Woodlands Pride, Incorporated; Abilene Pride Alliance; Extragrams L.L.C.; 360 Queen Entertainment, L.L.C.; and Brigitte Bandit. None of the Plaintiffs-Appellees are a publicly held corporation; no Plaintiff-Appellee has any parent corporation; and no publicly held corporation owns 10 percent or more of any Plaintiff-Appellee's stock.

2. **Counsel for Plaintiffs-Appellees**: Brian Klosterboer, Chloe Kempf, Thomas Buser-Clancy, Edgar Saldivar, and Adriana Pinon of the ACLU Foundation of Texas, Inc. Derek McDonald, Maddy Dwertman, Katie Jeffress, Brandt Thomas Roessler, and Emily Rohles of Baker Botts LLP.

3. **Defendants-Appellants**: Warren Kenneth Paxton, in his official capacity as Attorney General of Texas; Brett Ligon, in his official capacity as District Attorney of Montgomery County; Montgomery County, Texas; James Hicks, in his official capacity as District Attorney of Taylor County; Taylor County, Texas; and City of Abilene, Texas.

4. **Counsel for Defendants-Appellants**: Aaron L. Neilson, Lanora C. Pettit, William F. Cole, and Benjamin E. Prengler of the Office of the Attorney General.

5. ***Amici Curiae* in District Court**: Texas Values.

6. **Counsel for *Amici Curiae* in District Court**: Jonathan M. Saenz of Texas Values. Kevin Fulton of Fulton Law Group PLLC.

7. ***Amici Curiae***: Professor Dale Carpenter, Dean Erwin Chemerinsky, Professor Eugene Volokh, and the Stanton Foundation First Amendment Clinic at Vanderbilt Law School.

/s/ Eugene Volokh
EUGENE VOLOKH
DALE CARPENTER

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Dale Carpenter is the Judge William Hawley Atwell Chair of Constitutional Law, Altshuler Distinguished Teaching Professor, and Professor of Law at Southern Methodist University Dedman School of Law. A nationally recognized expert in constitutional law, the First Amendment, and LGBT rights, Professor Carpenter regularly teaches courses and publishes in these areas. He has an interest in the reasoned and consistent application of First Amendment doctrine and has frequently participated as *amicus curiae* to that end. *See, e.g.*, Amicus Brief, *Book People, Inc. v. Wong*, No. 23-50668 (5th Cir. Nov. 18, 2023); Amicus Brief, *303 Creative LLC v. Elenis*, No. 21-476 (U.S. May 31, 2022). *Amicus curiae* submits this brief to clarify the ways in which S.B. 12 violates the fundamental right to free expression, protected by the First Amendment.

Amicus Curiae Eugene Volokh is the Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law. He is the author of over 50 law review articles on the First Amendment, and he authored the casebook *The First Amendment and Related Statutes* (7th ed. 2020). He has extensively studied and written about, among many other First Amendment topics, content-based restrictions on speech.

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *Amici Curiae*, its members, or its 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. *Amici* appear in their individual capacity; institutional affiliations are listed for identification purposes only.

See, e.g., *Supreme Court on What Counts as a Content-Based Speech Restriction*, Volokh Conspiracy (Reason), Apr. 21, 2022, 12:07 pm, https://reason.com/volokh/2022/04/21/supreme-court-on-what-counts-as-a-content-based-speech-restriction/.

Amicus Curiae Erwin Chemerinsky is the Dean and the Jesse H. Choper Distinguished Professor of Law at the University of California, Berkeley School of Law. He previously served as the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law, taught at Duke University School of Law for four years, and taught at the University of Southern California for 21 years. Dean Chemerinsky is a nationally prominent expert on constitutional law and civil liberties and is the author of nineteen books, including his treatise *Constitutional Law: Principles and Policies* (7th ed. 2023) and the casebook *Constitutional Law* (6th ed. 2019) and is the author more than 200 articles in top law reviews. He frequently argues cases before the nation's highest courts, including the United States Supreme Court, and also serves as a commentator on legal issues for national and local media. In January 2014, National Jurist magazine named Dean Chemerinsky the most influential person in legal education in the United States.

Amicus Curiae the Stanton Foundation First Amendment Clinic at Vanderbilt Law School defends and advances freedoms of speech, press, assembly, and petition through court advocacy. The Clinic serves as an educational resource on issues of

free expression and provides law students with real-world practice experience to become leaders on First Amendment issues. The Clinic engages in advocacy and representation across the country and has an interest in promoting the sound interpretation of the First Amendment in a way that preserves the important freedoms afforded by the U.S. Constitution and subsequent court precedents.

All appellees have consented to the filing of this brief; all appellants have stated that they do not oppose the filing of this brief.

INTRODUCTION

Texas Senate Bill 12 ("S.B. 12"), which restricts certain "sexually oriented performances," is an unconstitutional content-based restriction on First Amendment-protected speech. The Supreme Court has repeatedly held that similar laws targeting "sexually oriented" speech are content-based and subject to strict scrutiny.

Even though S.B. 12 does not explicitly mention "drag,"[2] the state legislature intended to, and did, functionally target drag performances in Texas, especially when viewable by minors but also when performed on public property regardless of whether in the presence of a minor. *See* Tex. Penal Code § 43.28(b) (criminalizing "engag[ing] in a sexually oriented performance" "on public property" where it

[2] Drag is a type of performance in which men typically dress as women, women as men, or trans and gender non-binary performers as another gender, usually in exaggerated ways. Drag is not limited to dressing as a gender different from the one with which the performer identifies; for example, women can perform in drag of their own gender, often by exaggerating make-up and their own sex characteristics.

"could reasonably be expected to be viewed by a child" or "in the presence" of a minor); Tex. Health & Safety Code § 769.002 (regulating non-public, commercial properties by prohibiting anyone who controls the premises of a commercial enterprise from allowing a restricted performance on the premises in a child's presence); Tex. Loc. Gov't Code § 243.0031(c)(1)–(2) (proscribing a municipality or county from authorizing such a performance "on public property" at all or "in the presence of an individual younger than 18"); Tex. Loc. Gov't Code § 243.0031(c)(1) (banning municipalities from permitting the restricted performances on public property, full stop); *see also* Senator Hughes, *C.S.S.B. 12 Author's / Sponsor's Statement of Intent* (Mar. 30, 2023) (calling for an end to the "recent cultural trend . . . for drag shows to be performed in venues generally accessible to the public"). For these reasons, S.B. 12 is subject to strict scrutiny.

Texas contends that S.B. 12 is not subject to strict scrutiny because it allegedly only bans obscenity and, furthermore, is directed only at the "secondary effects" of the restricted speech. However, neither of these exceptions to strict scrutiny applies here. S.B. 12 restricts far more than obscene speech. Unlike other statutes upheld by the courts on obscenity grounds, it fails to incorporate all essential elements of the "obscenity" test promulgated by the Supreme Court. *See Miller v. California*, 413 U.S. 15, 24 (1973). Contrary to the statements made by the bill's sponsors, *see infra*, drag performance, even sexually provocative drag performance, is not obscene under

Miller. In one glaring omission, S.B. 12 has no exception for speech that has literary, artistic, political, or scientific value.

And the so-called "secondary effects" of the targeted performances raised by Texas—the purported harm to children—is instead a *direct* effect of the speech, a content-based justification requiring the application of strict scrutiny. Analyzing this exact justification for a similar law, the Supreme Court explicitly held that the "secondary effects" doctrine was "irrelevant." *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 806, 812, 815 (2000); *see also Texas v. Johnson*, 491 U.S. 397, 412 (1989) (holding that a law based on the communicative or emotive impact of speech on its audience is content based and subject to "the most exacting scrutiny" (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988))). So, too, here.

Because S.B. 12 must be subject to strict scrutiny and is not narrowly tailored to achieve Texas's asserted interest—it is overbroad and lacks a parental consent exception—it should be struck down.

ARGUMENT

S.B. 12 restricts "[s]exually oriented performance[s]," which are defined as one that features nudity or "sexual conduct" and "appeals to the prurient interest in sex." *See* Tex. Penal Code § 43.28(a)(2). Sexual conduct, in turn, is defined as, among other things, "the exhibition of sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics." *Id.*

§ 43.28(a)(1)(E). None of the key terms—"sexual gesticulations," "accessories or prosthetics," "exaggerate"—are further defined. Texas restricts these performances three ways: (1) S.B. 12 criminalizes the performers by making it a crime to "engage[] in a sexually oriented performance" "on public property" where it "could reasonably be expected to be viewed by a child" or "in the presence" of a minor, *id.* § 43.28(b); (2) it regulates non-public, commercial properties by prohibiting anyone who controls the premises of a commercial enterprise from allowing a restricted performance on the premises in a child's presence, Tex. Health & Safety Code § 769.002; and, (3) it proscribes a municipality or county from authorizing such a performance "on public property" at all or "in the presence of an individual younger than 18," Tex. Loc. Gov't Code § 243.0031(c)(1)–(2). The defined performances are banned regardless of whether they have literary, artistic, political, or scientific value.

As explained below, these provisions fundamentally run afoul of the First Amendment.

I. The District Court Correctly Concluded that S.B. 12 Is a Content-Based Restriction on Speech.

S.B. 12 impermissibly restricts the content of constitutionally protected speech. S.B. 12 is a content-based regulation on its face because it regulates only those visual performances whose subject matter is "sexually oriented." *See* Tex. Loc. Gov't Code § 243.0031 (barring "sexually oriented performances" in a public place *or* in front of a minor); Tex. Health & Safety Code § 769.002 (proscribing "sexually

oriented performances" in the presence of minors on commercial premises); Tex. Penal Code § 43.28(b) (criminalizing such performances in front of a minor (anywhere), or on public property if it "could reasonably be expected to be viewed by a child"). Laws like S.B. 12 are content-based because they single out certain categories of speech based on subject matter. *See City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022) ("A regulation of speech is facially content based under the First Amendment if it 'targets speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" (quoting *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015))); *Denton v. City of El Paso*, 861 F. App'x. 836, 840 (5th Cir. 2021) ("[T]he City's policy is content based because it 'applies to particular speech because of the topic discussed or the idea or message expressed.'"). Indeed, the Supreme Court has repeatedly held that laws like S.B. 12 that seek to protect minors from sexually related material are content based. *See Ashcroft v. ACLU*, 542 U.S. 656, 659–60 (2004) (explaining that a "statute enacted by Congress to protect minors from exposure to sexually explicit materials on the Internet" is a content-based restriction); *Playboy*, 529 U.S. at 806, 811 (same, for a statute intended to protect minors from exposure to "sexually-oriented programming" on cable television).

Even though S.B. 12 is supposedly concerned with impact on the speech's potential audience (minors), it is not content-neutral—it only prohibits a certain subject matter, *i.e.*, that which is sexually based. *See Picard v. Magliano*, 42 F.4th 89, 102 (2d Cir. 2022) (holding a statute is content based because it "explicitly prohibits demonstrations or protests concerning [a specific subject matter] in [front of] courthouse, but does not prohibit similar demonstrations regarding other subjects").[3] To enforce S.B. 12, a law enforcement official must consider the content of a performance to determine whether "the topic discussed" falls within the law's prohibition. *City of Austin*, 596 U.S. at 69 (quoting *Reed*, 576 U.S. at 171).

Further, restrictions like S.B. 12 that are based on the "expressive nature" of a performance, such as clothing requirements for an exotic dancer, are content based. *See Tex. Ent. Ass'n v. Hegar*, 10 F.4th 495, 511–12 (5th Cir. 2021) (holding that a restriction on opaque latex to cover breasts was "directed at the essential expressive nature of the latex clubs' business, and thus is a content based restriction"). S.B. 12

[3] On its face and in its practical effect, S.B. 12 is very similar to several other laws around the country attempting to prohibit "sexually oriented" or "adult" performances in front of minors. Courts have uniformly struck down such laws as facially content-based restrictions. *See Imperial Sovereign Ct. of Mont. v. Knudsen*, No. CV 23-50, 2023 WL 4847007, at *4 (D. Mont. July 28, 2023) (law "impos[ing] significant restrictions on 'sexually oriented' performances"); *HM Fla.-ORL, LLC v. Griffin*, No. 6:23-cv-950, 2023 WL 4157542, at *6–7 (M.D. Fla. July 23, 2023) (statute criminalizing allowing children to attend "adult live performances"); *Friends of Georges, Inc. v. Mulroy*, No. 2:23-cv-02163, 2023 WL 3790583, at *19 (W.D. Tenn. June 2, 2023) (statute criminalizing "adult oriented performances that are harmful to minors").

bars "gesticulat[ing]" while using accessories or prosthetics in a sexually oriented performance. Tex. Penal Code § 43.28(a)(1)(E). These accessories and/or prosthetics are no different than (and in certain instances may include) the clothing that was targeted in the law struck down in *Hegar*. Texas also admits that S.B. 12 prohibits "expressive" performance when it when it bars certain "sexual gesticulations," which Texas defines as "an *expressive* gesture." Tex. Br. at 15 (emphasis added).

As a content-based regulation, S.B. 12 is subject to strict scrutiny and is "presumptively unconstitutional," "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech," *see Reed*, 576 U.S. at 163–64, unless some exception applies. As explained, *infra*, none does.

II. S.B. 12 Does Not Regulate Obscene Speech, the Secondary-Effects of Speech, or Merely the Time, Place, or Manner of Speech.

A. S.B. 12 restricts speech far beyond obscenity.

S.B. 12 cannot be saved from strict scrutiny by characterizing the law as only targeting "obscene" performances, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (noting that obscenity falls outside of First Amendment protection), or even performances considered merely "obscene for minors," *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 269 (5th Cir. 2024). Sexually explicit expression that may be described colloquially by some as "obscene" does not render it obscene in

the legal sense. *Reno v. ACLU*, 521 U.S. 844, 874 (1997) ("[S]exual expression which is indecent but not obscene is protected by the First Amendment." (citation omitted)). Only material that meets all prongs of the following obscenity test will fall outside of First Amendment protections:

> (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.

Miller, 413 U.S. at 24 (emphasis added) (internal citations omitted). This test still applies even for content that is allegedly "obscene for minors" (but not necessarily for adults). *See Free Speech Coal.*, 95 F.4th at 267 & n.3 (showing that the statute at issue defined "sexual material harmful to minors by adding 'with respect to minors' or 'for minors,' where relevant, to the well-established *Miller* test for obscenity").

But S.B. 12 prohibits speech that does not meet the test for obscenity in *Miller*. It only adopts one part of the first prong of the *Miller* test: that a performance is banned if it "appeal[s] to the prurient interest in sex." Tex. Penal Code § 43.28(a)(2)(B). It fails to satisfy or even address the rest of the test. S.B. 12 is not limited to depictions of "patently offensive 'hard core' sexual conduct," such as those that depict "ultimate sexual acts, normal or perverted," "masturbation,

excretory functions, and lewd exhibitions of the genitals." *Miller*, 413 U.S. at 25, 27; *e.g.*, *Hoover v. Boyd*, 801 F.2d 740, 741 (5th Cir. 1986). As discussed below, S.B. 12 attempts to ban "gesticulations," which is far outside *Miller*'s scope. It also does not make any leeway for "contemporary community standards" and does not consider "the work as a whole," *see Miller*, 413 U.S. at 24, which "is critical when it comes to the exercise of free speech, especially when, as here, its exercise has criminal consequences." *Netflix, Inc. v. Babin*, 88 F.4th 1080, 1098 (5th Cir. 2023) (criticizing prosecutor for failing to "show the grand juries the entire length of the film (or even the more immediate context of the few scenes he showed)"). And, importantly, it fails to contain a carveout for sexually oriented performances that have artistic or political value. *See Ashcroft*, 535 U.S. at 578 (noting that a key reason the court struck down the Communications Decency Act in *Reno* was that the statute failed to "exclude[] from the scope of its coverage works with serious literary, artistic, political, or scientific value"); *see also Book People, Inc. v. Wong*, No. 23-cv-00858, 2023 WL 6060045, at *20–21 (W.D. Tex. Sept. 18, 2023) (holding that a statute does not meet *Miller* test where its definition of "sexually relevant material" does not include consideration of literary, artistic, political, and scientific value), *aff'd in part, vacated in part, & remanded on other grounds*, 91 F.4th 318 (5th Cir. 2024).

S.B. 12 also fails to "specifically define[]" the "sexual conduct" it proscribes. *See Reno*, 521 U.S. at 870–72 (vague prohibition on patently offensive sexual material is "problematic for purposes of the First Amendment"). For example, S.B. 12 prohibits "the exhibition of sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics," but there is no real telling what that means, despite Texas's attempts to do so in its brief. *See, e.g.*, *HM Fla.-ORL, LLC*, 2023 WL 4157542, at *7 (prohibition on undefined "'lewd' conduct and exposure of prosthetics[] represent[s] a material departure from the established obscenity outline set forth in *Miller*"). Texas argues that, to the extent drag performers are merely shimmying, shaking, or twerking, they are not engaged in "sexual gesticulations." Tex. Br. at 15. But the dictionary definition of "gesticulation," as Texas itself cites, is quite broad, covering any "expressive gesture made in showing strong feeling or in enforcing an argument." *Id.* (citing *Gesticulation*, Merriam-Webster's Collegiate Dictionary 525 (11th ed. 2003)). Nearly every performer "gesticulates" and shows "strong feeling" during a show or while dancing.

Nor does the modifier "sexual" meaningfully limit the prohibition, if it provides a limitation at all. "Sexual gesticulation"—a term S.B. 12 leaves undefined—easily encompasses run-of-the-mill dancing—including tango, salsa,

twerking, Elvis's hip thrusts[4]—all of which involve sexually "expressive gestures" with one's body. Moreover, drag performers often use prosthetics to imitate and exaggerate sex characteristics, including breastplates or packers.[5] If they do, and "show strong feeling," S.B. 12 makes them criminals. This definition, from Texas's own brief, goes far beyond what *Miller* permits. *See* 413 U.S. at 27 ("Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . . .").

This Court's recent decision in *Free Speech Coalition* does not compel a different result. There, the panel (over a vigorous dissent) held that laws protecting minors from content that is obscene *for minors* need only pass rational-basis review. 95 F.4th at 267–69. But the age-restriction for pornography websites considered in that case is vastly different from the law here. First, the regulation at issue in *Free Speech Coalition* only blocked *minors* from viewing pornography online; any adult

[4] *See* Stacey Anderson, *When Elvis Presley Scandalized America and MC Hammer Topped the Charts*, Rolling Stone (June 7, 2011) ("The press compared [Presley's] 'Hound Dog' shimmy to a striptease, some with more vitriol than others; the *New York Herald Tribune* was one of the most furious outlets, slamming Presley as 'unspeakably untalented and vulgar.' Religious organizations protested the implied sexual nature of the movements and the Parent-Teacher Association condemned Presley and rock & roll as instigators of juvenile delinquency.").

[5] As the District Court correctly described, "packers" are used "to simulate a male bulge" and "breastplates to simulate female breasts." ECF 94 ¶ 81. Both are to help create the illusion of the gender being expressed by the drag performer.

could continue to view the content by simply verifying their age. *Id.* at 275 ("H.B. 1181 allows adults to access as much pornography as they want whenever they want."). S.B. 12, in contrast, prohibits these performances on any public property, regardless of whether a minor is present or not, and it criminalizes the performers even on private property merely if a child "could reasonably be expected to" view their show, which restricts (and chills) much more adult-access to protected speech than an age-verification requirement. *Id.* at 276 ("The law in *Ginsberg*, like H.B. 1181, targeted distribution to *minors*; the law in *Playboy* targeted distribution to *all*."). S.B. 12, by precluding adults from viewing banned performances that would otherwise take place, is much more like the regulation in *Playboy*, which restricted when an adult could view a "sexually-oriented" television programming because a child would be likely to view it at that time. *See* 529 U.S. at 806–07. Second, the law in *Free Speech Coalition* restricted content by incorporating each portion of the *Miller* obscenity test, merely appending "for minors" to every prong. *Free Speech Coal.*, 95 F.4th at 267. S.B. 12, in contrast, only incorporates one portion of the *Miller* test. Accordingly, S.B. 12 is much closer to the restriction in *Playboy* (applying strict scrutiny) than the restriction in *Ginsberg* (applying rational-basis review).

S.B. 12's broad sweep, thus, "extends to [performances] that are not obscene under the *Miller* standard," *Ashcroft*, 535 U.S. at 235, and it restricts the ability of

adults to view the prohibited speech even though the law is primarily (though not exclusively) targeted to minors. Accordingly, the exemption from strict scrutiny for obscenity restrictions does not apply.

B. The secondary-effects doctrine is inapplicable because S.B. 12 regulates the purported primary effect of the targeted speech.

Texas argues that S.B. 12 should be reviewed under intermediate scrutiny because it regulates the "secondary effects" of the speech at issue, namely "the deleterious secondary effects of exposure of minors to sexually explicit conduct." Tex. Br. at 27. But that alleged "effect" on children is a *primary* effect of the banned speech. *See Playboy*, 529 U.S. at 815 (explaining that "the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the *primary effects of protected speech*," namely effects on children (emphasis added)). Similarly, in *Texas v. Johnson*, the Court emphasized that "[t]he emotive impact of speech on its audience is not a secondary effect unrelated to the content of the expression itself," and that "[the defendant's] political expression was restricted because of the content of the message he conveyed." 491 U.S. at 412 (internal quotation marks omitted) (citations omitted).

The secondary-effects doctrine subjects certain regulations aimed at curbing non-speech "effects" (*e.g.*, crime, blight, and decreasing property values) to intermediate scrutiny. *See Young v. Am. Mini Theatres, Inc.,* 427 U.S. 50, 71 n.34

(1976) (explaining that "[t]he Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech"); *City of Renton v. Playtime Theatres, Inc*., 475 U.S. 41, 48 (1986) (reasoning that "[t]he ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views" (cleaned up)); *City of Erie v. Pap's A.M.,* 529 U.S. 277, 279 (2000) (plurality op.) ("ordinance is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments"); *City of Los Angeles v. Alameda Books, Inc*., 535 U.S. 425, 445 (2002) (noting that "[i]f a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection").

In contrast, regulations like S.B. 12 that are aimed at any direct effect of the speech on a listener or viewer must receive strict scrutiny. Such effects are known as the communicative impact of the speech. The supposed harm to children caused by the targeted performances here is a quintessential direct effect, as the Supreme

Court has repeatedly said, in no uncertain terms. In *Playboy*, the Court held that the secondary-effects doctrine was "irrelevant" to analyzing a regulation whose "overriding justification" was "concern for the effect of the subject matter," *i.e.* "sexually oriented programming," "on young viewers." 529 U.S. at 811-12; *see also id.* at 815 ("[T]he lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values *has no application* to content-based regulations targeting the primary effects of protected speech." (emphasis added)). The Court explained that such a concern "focuses *only* on the content of the speech and the direct impact that speech has on its listeners.'" *Id.* at 811 (quoting *Boos*, 485 U.S. at 321). Indeed, it "is the *essence* of content-based regulation." *Id.* at 812 (emphasis added).

Similarly, in *Reno*, the Supreme Court addressed a regulation aimed at "protect[ing] minors from harmful material on the Internet" by "crimiminaliz[ing] the 'knowing' transmission of 'obscene or indecent' messages to any recipient under 18 years of age." 521 U.S. at 844, 859. Though the government argued that the statute "constitute[d] a sort of 'cyberzoning' on the Internet," the Court held that the law could not be properly analyzed as a form of time, place, and manner regulation" because its purpose was "to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech." *Id.* at 868.

Here, SB 12 seeks to regulate certain performances because of their effect on the viewer. Indeed, Texas' invocation of "secondary effects" in its brief only cites the "harms that befall children who are exposed to sexually explicit conduct at an early age." Tex. Br. at 3. The legislative history confirms that the "intent [wa]s to protect children from being exposed to explicit sexual content." Rep. Shaheen, House Sponsor of S.B. 12, 88th Legislative Session, Texas House Floor at 2:19:35-40 (May 19, 2023). S.B. 12 is, thus, "the essence" of a content-based restriction because it targets the primary effect of the speech, *i.e.*, its purported harm to children, as the Court held in *Playboy*. 529 U.S. at 812. The secondary-effects doctrine is "irrelevant." *Id.* at 815.

C. S.B. 12 is not a content-neutral regulation on the time, place, or manner of speech.

The State also argues that S.B. 12 is not a content-based restriction, but rather a "content-neutral 'manner' and 'place' restriction" because its "central feature imposes modest age limitations for attendance at sexually oriented performances." Tex. Br. at 27. Not so.

The "principal inquiry" in determining whether a law is a content-neutral time, place, or manner restriction "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A government regulation is content neutral "so long as it is '*justified* without reference to the content of the regulated speech.'" *Id.*

(citation omitted). Texas's justification for S.B. 12 directly references the content of the speech; in its own words, the law combats the alleged "effects of exposing minors to sexually explicit content." Tex. Br. at 30. The law's statement of intent similarly explains that it was designed to stop shows, including drag shows, in front of children that "often contain sexually explicit performances and music." Senator Hughes, *supra*. Here, S.B. 12 is not content neutral because it's "concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'" *McCullen v. Coakley*, 573 U.S. 464, 481 (2014) (citing *Boos*, 485 U.S. at 321).

Moreover, as discussed above, S.B. 12 draws a content-based distinction on its face. *Cf. id.* at 479. Violations of the law do not depend merely on where a performance takes place, or in front of whom, but what kinds of performance takes place—namely those that are "sexually oriented." That a violation depends upon the kind of performance that takes place distinguishes the law from content-neutral place or manner restrictions. *See id.* at 479–80.

And finally, S.B. 12 does not leave open ample methods of communicating the intended message as required for a valid time, place, or manner regulation. *See Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 295 (1984) (prohibiting overnight camping as part of anti-homelessness demonstration, but otherwise permitting a day-and-night vigil); *Hill v. Colorado*, 530 U.S. 703, 726 (2000)

(limiting speech within an 8-foot zone). S.B. 12 entirely prohibits sexually oriented performances on public property or in the presence of a minor, not the time, place, or manner of such speech. Tex. Loc. Gov't Code § 243.0031(c).

III. S.B. 12 Fails Strict Scrutiny.

Because S.B. 12 is content-based, and no exception applies, it is presumptively unconstitutional. *See Reed*, 576 U.S. at 163. For the law to survive, Texas bears to burden to "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010)). If a less restrictive alternative would serve the government's purpose, the legislature must instead use that alternative. *See Ashcroft*, 542 U.S. at 670. Here, Texas's stated interest is to protect minors from "sexually oriented performances." Yet even if the State has a compelling interest in doing so, S.B. 12 is not narrowly tailored to further that interest.

First, S.B. 12 sweeps too broadly and chills fundamentally protected speech that adults have a right to send and receive for fear that a minor may view it. Although purportedly aimed at protecting children, S.B. 12 prohibits the targeted performances on any public property regardless of whether a child can (or is even likely to) view the performance. *See* Tex. Loc. Gov't Code § 243.0031(c). And, as explained above, S.B. 12 bans performances that are not obscene under *Miller*

because it only incorporates one prong of that test. Crucially, there is no exception for speech with artistic or political value.

Second, the law fails to provide an option for parental consent. The Supreme Court has repeatedly intimated that laws aimed at protecting minors from materials that may harm them should include a provision for parental consent. *See Reno*, 521 U.S. at 846, 877 (holding an act unconstitutional that "suppress[ed] a large amount of speech that adults have a constitutional right to send and receive" and lacked tailoring, for instance, by failing to provide "some tolerance for parental choice"); *id.* (explaining that the indecent material could be marked "to facilitate parental control" rather than banned); *see also Ginsburg v. New York*, 390 U.S. 629, 639 (1968) (explaining that "constitutional interpretation has consistently recognized that [] parents' claim to authority . . . to direct the rearing of their children is basic in the structure of our society," and upholding a law prohibiting minors from purchasing magazines that were only obscene for minors as "rational" in part because it did not prohibit parents from purchasing the magazines for their children); *see also Friends of Georges*, 2023 WL 3790583, at *28 ("Parental consent has been critical to the constitutionality of similar laws that restrict speech that is indecent but not obscene to adults."). The lack of a parental consent provision alone means that S.B. 12 could be more narrowly tailored to the State's purported interest in protecting children. *See Free Speech Coal.*, 95 F.4th at 272 (noting that one of the

main differences identified by the Supreme Court between the statute in *Reno* and the law at issue in *Ginsberg* was that "[p]arental participation or consent could not circumvent the CDA," while it could override the statute in *Ginsberg* and the law in *Free Speech Coalition* (citing *Reno*, 521 U.S. at 865)).

CONCLUSION

To ensure consistent and logical application of First Amendment law that protects speech the government may disfavor, *amici* urge the Court to affirm the District Court's conclusion that petitioner has a likelihood of success on the merits.

April 17, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2024, an electronic copy of the foregoing was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Eugene Volokh
EUGENE VOLOKH

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