

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXTRAGRAMS, L. L. C., *ET AL.*,
Plaintiffs,

v.

WARREN KENNETH PAXTON,
Defendant.

Case 4:23-cv-02847

**DEFENDANT PAXTON’S OPPOSED MOTION FOR NEW OR SUPPLEMENTAL TRIAL
AND FOR DISCOVERY**

Defendant Warren Kenneth Paxton, in his official capacity as Attorney General of Texas (“AG, Paxton”), files his motion for a new or supplemental trial and discovery.

I. INTRODUCTION AND BACKGROUND OF MOTION

The Fifth Circuit on February 25, 2026, vacated the permanent injunction in this case and remanded to this Court for “further proceedings”. *Woodlands Pride, Inc. v. Paxton*, 168 F. 4th 293 (5th Cir. 2026). See Mandate, filed as ECF No. 128, on March 18, 2026.

The Fifth Circuit noted that, understandably, the Court in connection with the August 2023 trial of this case had not conducted the analysis of Plaintiffs’ facial First Amendment challenge to S. B. 12 in accordance with the later Supreme Court decision in *Moody v. NetChoice, LLC*, 603 U. S. 707 (2024). The Fifth Circuit did not specify

precisely what “further proceedings” are necessary in this case on remand, but did note that in connection with the August 2023 trial and permanent injunction:

The district court did not conduct this [*Moody*] analysis, *nor did the parties* brief the proper standard or *adequately develop the record*. 168 F.4th at 308 (emphasis added).

This Court, as directed by the Fifth Circuit, on April 2, 2026, entered its Order dismissing Plaintiffs The Woodlands Pride, Inc. and Abilene Pride Alliance from this case. The Court’s Order also dismissed Defendants City of Abilene, Taylor County, James Hicks, in his official capacity as District Attorney of Taylor County, Montgomery County, and Brad Ligon, in his official capacity as District Attorney of Montgomery County. ECF No. 133. The remaining Plaintiffs after remand (ExtraGrams, L. L. C. (“Extragrams”), 360 Queen Entertainment, L. L. C. (“360 Queen”), and Brigitte Bandit (“Bandit”)) continue this case pursuant to the Original Complaint filed on August 2, 2023 (ECF No. 1).

Defendant AG Paxton is the sole Defendant as to which the Fifth Circuit found any Plaintiffs have standing and is the sole remaining Defendant in this case. This case remains a pre-enforcement facial challenge to S.B. 12. Moreover, it is undisputed that AG Paxton has no authority to enforce any criminal provisions of S. B. 12, so the only portion of that statute now at issue in this case is Section One.

Section One prohibits ‘a person who controls the premises of a commercial enterprise’ from ‘allow[ing] a sexually oriented performance to be presented on the premises in the presence of an individual younger than 18 years of age.’ Tex. Health & Safety Code § 769.002(a). It is enforced by the Attorney General of Texas, see id. § 769.002(c), who is an appellant here.

Woodlands Pride, Inc. v. Paxton, 168 F.4th 293, 299 (5th Cir. 2026).

Under Section One of S. B 12, AG Paxton may sue only for civil penalties or injunctive relief as to violations of Section One. Tex. Health & Safety Code § 769.002(c). Section One of S. B. 12 went into effect on March 19, 2026, after remand of this case. Although the law has been in effect for almost four months, AG Paxton has not filed or threatened to file any civil suits under Section One against any Plaintiffs in this case.

In August 2023, this case went from commencement to trial and entry of injunctive relief against enforcement of S. B. 12 in less than thirty days.¹ Accordingly, there has been no Rule 26(f) conference or any discovery in this case by any parties.²

¹ After trial on August 28 and August 28, 2023, the Court entered a Temporary Restraining Order on August 31, 2023. That TRO was later extended. The Court entered Findings of Fact, Conclusions of Law, and a Permanent Injunction on September 26, 2023. ECF No. 84.

² In March 2026, counsel for AG Paxton raised with Plaintiffs’ counsel the need for discovery in this case. Plaintiffs’ counsel expressed the view that no discovery was needed or permitted because this case had been tried in August of 2023.

Despite the best efforts of this Court and the parties, the impending effective date of S.

B. 12 on September 1, 2023, left very limited time for trial.

As an initial matter, “[f]acial challenges are disfavored.” *Moody v. NetChoice, LLC*, 603 U. S. 707, 744 (2024). Indeed, the Fifth Circuit has stated:

There are a host of reasons for this judicial skepticism. For example, facial challenges rest on speculation, short circuit the democratic process, and sit uncomfortably with Article III. Because of the significant risks associated with facial challenges -- even those under the First Amendment -- challengers bear a heavy burden.

NetChoice, L.L.C. v. Paxton, 121 F.4th 494, 497 (5th Cir. 2024) (internal citations and quotations omitted). “The choice to litigate a facial challenge ‘comes at a cost’: facial challenges are ‘hard to win.’” *Woodlands Pride*, 168 F.4th at 307 (quoting *Moody*, 603 U. S. at 724).

The Fifth Circuit recently elaborated on the reasons for these principles:

Facial challenges too often degenerate into conjecture rather than rulings on concrete controversies . . . Shoddy hypothetical analysis is not what our federalist system requires . . . Proper judicial restraint requires a federal court to construe the provisions so as to avoid a constitutional conflict. A democratically enacted statute is entitled to every reasonable construction in order to save it from being held facially unconstitutional.

La Union de Pueblo Entero v. Abbott, 167 F.4th 743, 754-55 (5th Cir. 2026) (internal citations and punctuation omitted). The Court added:

It is hard to sustain a facial challenge against a democratically enacted state law. With the exception of First Amendment cases, a facial challenge will succeed only if the plaintiff establishes that the act is invalid under all of its applications. Even in the First Amendment context, the burden to sustain a facial challenge is daunting. In a facial challenge under the First Amendment, a state law is unconstitutional only if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.

Id. at 756 (internal quotations and citations omitted).

Just last month, the Fifth Circuit stated in *Students Engaged in Adv. Tex. v. Paxton*, 2026 U. S. App. LEXIS 16226, 177 F.4th 66, 2026 WL 161578 (June 4, 2026) at *8:

“[T]he district court failed to conduct a proper facial-invalidity analysis under *Moody v. NetChoice*, 603 U.S. 707, 144 S. Ct. 2383, 219 L. Ed. 2d 1075 (2024). Plaintiffs who bring facial challenges must demonstrate that ‘the ratio of unlawful-to-lawful applications is . . . lopsided enough to justify the strong medicine of facial invalidation.’ *United States v. Hansen*, 599 U.S. 762, 784, 143 S. Ct. 1932, 216 L. Ed. 2d 692 (2023) (internal quotation omitted). Put another way, Plaintiffs must show that ‘the law’s unconstitutional applications substantially outweigh its constitutional

ones’ to prevail in ‘a facial suit [] based on the First Amendment.’ *Moody*, 603 U.S. at 723-24. It is highly unlikely that Plaintiffs have met this ‘rigorous standard’.”

Plaintiffs in this case also claim that Section One of S. B. 12 is unconstitutionally vague and overbroad. To be unconstitutionally vague, “a statute must be ‘impermissibly vague in all its applications,’ including its application to the party bringing the vagueness challenge [.]” *E.g., United States v. Clark*, 582 F.3d 607, 612-13 (5th Cir. 2009). The plaintiff must establish that the challenged statute is vague “not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.” *La Union de Pueblo Entero*, 167 F.4th at 756 (quoting *Coates v. City of Cincinnati*, 402 U. S. 611, 614 (1971)). Accordingly, the plaintiff shoulders “the weighty burden of demonstrating that the law is ‘impermissibly vague in all its applications.’” *Id.* (quoting *McClelland v. Katy ISD*, 63 F.4th 996, 1013 (5th Cir. 2023)).

In *Roy v. City of Monroe*, 950 F.3d 245 (5th Cir. 2020), the Fifth Circuit rejected a First Amendment vagueness challenge to a city ordinance that prohibited acting “in such a manner as to disturb or alarm the public, or make such a disturbance imminent, or to provoke another or other to retaliatory action or violence”. The Fifth Circuit stated the following standard for determining such facial vague challenges:

“We may reverse the district court only if the city’s ordinance ‘fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits’ or ‘authorizes . . . arbitrary and discriminatory enforcement.’ *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). We will not hold that the ordinance is unconstitutionally vague on its face I’ “it is clear what the ordinance as a whole prohibits’ or if the ordinance ‘is surely valid in the vast majority of its intended applications.’ *Id.* at 733.” *Roy*, 950 F.3d at 252.

Roy involved a criminal statute, but Section One of S. B. 12 is a civil statute. A more lenient standard is applied to civil statutes in void-for-vagueness challenges. “‘The degree of vagueness that the Constitution tolerates ... depends in part on the nature of the enactment,’ with greater tolerance for statutes imposing civil penalties and those tempered by scienter requirements. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).” *Arnett v. Denton*, 2013 U. S. Dist. LEXIS 207186 (W. D. Tex. 2013.) at *11. “In the civil context, ‘the statute must be so vague and indefinite as really to be no rule at all.’ *Okpalobi v. Foster*, 190 F. 3d 337, 358 n.10 (5th Cir. 1999) (quoting *Boutilier v. INS*, 387 U.S. 118, 123, 87 S. Ct. 1563, 18 L. Ed. 2d 661 (1967)).” *Cortes v. City of Houston*, 536 F. Supp. 2d 783, 795 (S. D. Tex 2008).

The constitutional overbreadth doctrine is “sparingly invoked” because its function “attenuates as the regulated expression moves from pure speech toward conduct.” *Ass’n of Club Execs. of Tex. v. Paxton*, 143 F.4th 602, 616 (5th Cir. 2025) (citing *L. A. Police Dept. v. United Rep. Pub. Corp.*, 528 U. S. 32, 39-40 (1999)). Critically, “[a] statute is overbroad only if a ‘substantial number’ of its applications are unconstitutional, ‘judged in relation to the statute’s plainly legitimate sweep.’” *La Union de Pueblo Entero*, 167 F.4th at 762. Thus “[a]n overbreadth challenge requires far more than a court’s ‘conceiving of some impermissible applications of a statute.’” *Id.* at 763 (*United States v. Williams*, 553 U. S. 285, 303 (2008)). “[B]orderline hypotheticals” are best handled by as-applied challenges, not facial challenges. *Id.* That is because of the “presumption that officials will not execute the law in a way that is impermissibly broad and standardless.” *Id.*

II. THE *MOODY V. NETCHOICE* ANALYSIS REQUIRED FOR A FACIAL PRE-ENFORCEMENT FIRST AMENDMENT CHALLENGE REQUIRES BOTH PRESENTATION OF EVIDENCE AT TRIAL AND REASONABLE DISCOVERY.

Almost a year after this case was tried in August 2023, the United States Supreme Court clarified the proper analysis in a facial First Amendment challenge to a state statute like this one in *Moody v. Net Choice, LLC*, 603 U. S. 707 (2024). The *Moody* framework was described by the Fifth Circuit on appeal in this case:

To determine if a law, on its face, violates the Free Speech Clause of the First Amendment, we must ask whether “a

substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (alterations adopted) (quoting *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615, 141 S. Ct. 2373, 210 L. Ed. 2d 716 (2021)). This inquiry begins with an assessment of the law's scope: "What activities, by what actors," does the law "prohibit or otherwise regulate?" *Id.* at 724. We then determine which of the law's applications violate the First Amendment. *Id.* at 725. [*308] And finally, we take the unconstitutional applications and "measure them against the rest." *Id.* The law is not facially invalid unless its "unconstitutional applications substantially outweigh its constitutional ones." *Id.* at 724. The district court did not conduct this analysis, nor did the parties brief the proper standard or adequately develop the record.

168 F.4th at 307-08.

In *Moody*, the Supreme Court concluded that it could not apply this standard because the factual record in the district court was "underdeveloped" and "incomplete". *See* 606 U. S. at 726, 734. Justice Alito, in his concurring opinion noted that this underdevelopment of the record had occurred because the district court had permitted Texas only a brief 30-day period of discovery before cutting off further discovery in the case. *See* 606 U. S. at 777.

On remand, the Fifth Circuit discussed the fact-intensive steps required for a proper *Moody* analysis. *Moody v. NetChoice, LLC*, 121 F.4th 494 (5th Cir. 2024).

As the Supreme Court recognized, it is impossible to apply that standard here because "the record is underdeveloped." *Id.* at 2399. Who is covered by Texas House Bill 20 ("H.B. 20")? For these actors, which activities are covered by H.B. 20? For these covered activities, how do the covered actors moderate content? And how much does requiring each covered actor to explain its content-moderation decisions burden its expression? Because *these are fact-intensive questions that must be answered by the district court in the first instance after thorough discovery*, we remand.

Id. at 497 (emphasis added).

The Fifth Circuit then discussed the factual and legal analysis required of district courts in facial First Amendment challenges in more detail:

A proper First Amendment facial challenge proceeds in two steps. The "first step" is to determine every hypothetical application of the challenged law. *Id.* at 2398 (majority opinion). The second step is "to decide which of the law[']s applications violate the First Amendment, and to measure them against the rest." *Ibid.* If the "law's unconstitutional applications substantially outweigh its constitutional ones," then and only then is the law facially unconstitutional. *Id.* at 2397. "[T]he record" in this case "is underdeveloped" on both fronts. *See id.* at 2399; *see also id.* at 2410-11 (Barrett, J., concurring) (noting the record failed to "thoroughly expose[] the relevant facts about particular social-media platforms and functions"); *id.* at 2411 (Jackson, J., concurring in part and concurring in the judgment) (noting plaintiffs failed to show "how the regulated

activities *actually function*"); *id.* at 2412 (Thomas, J., concurring in the judgment) (noting plaintiffs "failed to provide many of the basic facts necessary to evaluate their challenges to H.B. 20"); *id.* at 2422 (Alito, J., concurring in the judgment) (noting the "incompleteness of this record").

That is a consequence of how the *Moody* case was litigated in district court:

[T]he unfortunate posture of this case stems from the fact that NetChoice steadfastly opposed (and the district court blocked) the very discovery that *Moody* appears to require. In the district court, plaintiffs argued that no discovery was necessary because the issues were purely legal questions. And the district court largely agreed with that, requiring the State of Texas to complete discovery in a mere 30 days to avoid "burdening plaintiffs without good cause." Order, *NetChoice, LLC v. Paxton*, No. 21-51178, at 4 (5th Cir. Sept. 18, 2024) (cleaned up).

In this case, as in *Moody*, it is the Plaintiffs' burden to present factual evidence to the Court that will enable the Court to properly perform the *Moody* analysis. This "fact-intensive" task necessarily requires a new or supplemental trial. The pre-*Moody* August 2023 trial in this case understandably included no factual presentation at all as to the full range of actors who are covered by Section One of S. B. 12, or as to the full range of activities by those actors that are covered by that statutory provision. Unless there is a new or supplemental trial in this case at which Plaintiffs can present such critically

important facts, Plaintiffs cannot possibly carry their burden under *Moody*, and judgment against them on their facial First Amendment challenge to Section One of S. B. 12 would be required.³ Similarly, if there were no new or supplemental trial in this case at which AG Paxton can present evidence relevant to the *Moody* analysis, he would have been deprived of a fundamental due process right that the Federal Rules of Civil Procedure exist to protect.

The Fifth Circuit in this case found that there was error in the determination of Plaintiffs' facial First Amendment challenge in part because the parties did not develop an adequate record at the August 2023 trial:

The district court did not conduct this [*Moody*] analysis, *nor did the parties* brief the proper standard or *adequately develop the record*.

168 F. 4th at 308 (emphasis added).

All parties are now entitled to a fair opportunity to “adequately develop the record” relevant to Plaintiffs' First Amendment challenge to Section One of S. B. 12 before the Court performs the factual and legal analysis required under *Moody*. That requires a new or supplemental trial in this case.

³ See *NetChoice, LLC v. Yost*, 2926 U. S. App. LEXIS 17720, 2026 WL 1758907 (6th Cir. June 18, 2026) (plaintiff declined to provide evidence required by fact-intensive *Moody* analysis and thus failed to carry burden on facial First Amendment challenge).

Development of an adequate factual record in this case also requires reasonable discovery under the Federal Rules of Civil Procedure over a reasonable period of time before trial. AG Paxton respectfully requests and is entitled to reasonable document production and deposition discovery of the named Plaintiffs, and of others potentially in control of commercial premises on which conduct that would violate Section One of S. B. 12 has occurred or may occur.⁴ In addition, since the actors and activities covered by Section One of S. B. 12 are not limited to drag performers or drag shows, AG Paxton is entitled to and intends to take discovery regarding persons who control commercial premises in Texas on which other visual performances unrelated to drag that may violate Section One of S. B. 12 have occurred or may occur.

This discovery will help develop the facts critical to the *Moody* analysis: what “actors” and what “activities” have violated or may violate the challenged statute.⁵

⁴ One non-party from whom discovery certainly is appropriate is Robert Mendez, Sr., who was described as the owner of the Tomatillo Restaurant in San Antonio, Texas, whose commercial premises were used by Plaintiff 360 Queen for performances at issue in this case.

⁵ AG Paxton also is entitled to and likely will seek discovery relevant to Plaintiffs’ facial vagueness claims in this case. Under *Roy*, a factual issue in this case is whether Section One of S. B. 12 “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” *Roy*, 950 F.3d at 252. AG Paxton believes reasonable discovery will develop strong evidence confirming that Texans of ordinary intelligence indeed have a reasonable opportunity to understand what conduct on commercial premises in the presence of minors is prohibited by the challenged statute.

Only then can the parties fairly present the facts through evidence at trial so that the Court can perform the necessary legal analysis under *Moody* required by the Fifth Circuit mandate. Absent an adequate factual record in this case, the Court could only base its determinations in this case on speculation as to the relevant facts or on its own personal experience or subjective beliefs. *Moody* and the Fifth Circuit's mandate in this case require more than that. This Court is entitled to an adequate factual record before deciding the case, not just speculative briefing from lawyers.

AG Paxton respectfully suggests that a reasonable period for such discovery in this case is six months after the initial Rule 26(f) conference. AG Paxton suggests also that the Court schedule a trial in this case at its convenience after the competition of the discovery period. The pending deferred motion for preliminary injunction can be consolidated with that trial pursuant to Fed. R. Civ. P. 65(a) (2).

CONCLUSION

Attorney General Paxton asks that the Court set a reasonable period for discovery in this case in accordance with the Federal Rules of Civil Procedure; set a new or supplemental trial in this case at a date convenient to the Court after competition of discovery; refrain from any decision in this case on the merits prior to a fair opportunity for the parties to present evidence at trial relevant to the *Moody* analysis and Plaintiffs' vagueness and overbreadth claims; and for such other relief as may be appropriate.

Dated: July 14, 2026

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CERTIFICATE OF CONFERENCE

I hereby certify that on July 13, 2026, I conferred with Brad Klosterboer, counsel for Plaintiffs, via email regarding this Motion. Mr. Klosterboer stated that Plaintiffs oppose the motion.

/s/ David Bryant
DAVID BRYANT

CERTIFICATE OF SERVICE

On July 14, 2026, I filed this document through the Court's CM/ECF system, which automatically serves it upon all counsel of record as follows:

/s/ David Bryant
DAVID BRYANT