

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXTRAGRAMS, LLC, *ET AL.*,
Plaintiffs,

v.

WARREN KENNETH PAXTON, IN HIS
OFFICIAL CAPACITY AS ATTORNEY
GENERAL OF TEXAS,
Defendant.

Case 4:23-cv-02847

DEFENDANT PAXTON’S SUPPLEMENTAL BRIEF

Defendant Warren Kenneth Paxton, in his official capacity as Attorney General of Texas (“AG Paxton”) files this Supplemental Brief in response to the Court’s Order dated June 23, 2026. ECF No. 143. The Court directed the parties to file “supplemental briefing responsive to the Fifth Circuit’s instructions, in addition to proposed findings of fact and conclusions of law.” *Id.* AG Paxton is filing the proposed Findings of Fact and Conclusions of Law contemporaneously as a separate document.

In addition, AG Paxton has filed his Motion for New or Supplemental Trial and for Discovery. ECF No. 146. As set forth therein, AG Paxton respectfully submits that this Court cannot properly perform the *Moody v. NetChoice*, 603 U. S. 707 (2024) analysis directed by the Fifth Circuit without a new or supplemental trial at which the facts relevant to that analysis can be heard.

Although a trial in this matter was held on August 28 and 29, 2023, those facts were not presented, and could not reasonably have been presented, at that August 2023 trial because the United States Supreme Court did not decide *Moody* until July 1, 2024.

Accordingly, both the Supplemental Briefing set forth herein and the proposed Findings of Fact and Conclusions of Law filed by AG Paxton contemporaneously must be amended or supplemented after a future trial at which additional evidence relevant to the required *Moody* analysis and facial vagueness claim may be presented by all parties.

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BACKGROUND

This action was filed on August 2, 2023. The plaintiffs asserted facial, pre-enforcement First Amendment challenges to S.B. 12, a statute enacted into law by the 2023 Texas Legislature and signed by the Governor of Texas. The law was not scheduled to go into effect until September 2023.

The District Court conducted a bench trial of the case on August 28 and 29, 2023. The Court then entered a temporary restraining order against enforcement of S. B. 12 on August 31, 2023, holding that S. B. 12 was unconstitutional as a violation of the First Amendment to the United States Constitution. The Court on September 26, 2023, entered a permanent injunction against enforcement of S. B. 12. Most but not all defendants, including AG Paxton, appealed the judgment to the Fifth Circuit Court of Appeals as Case No. 23-20480.

While this case was on appeal to the Fifth Circuit, the United States Supreme Court decided two cases that have particular relevance to this one. That Court decided *Moody v. NetChoice, LLC*, 603 U. S. 707 (2024), and *Free Speech Coalition v. Paxton*, 606 U. S. 461 (2025). The *Moody* case set forth the applicable framework for adjudicating facial First Amendment challenges like those in this case. The *Free Speech Coalition* case clarified and applied the constitutional principles that (a) expression that is obscene as

to minors is not protected by the First Amendment at all and (b) laws that regulate only expression that is obscene as to minors are subject only to rational basis scrutiny.¹

In *Woodlands Pride v. Paxton*, 168 F.4th 293 (5th Cir. 2026), the Fifth Circuit vacated the permanent injunction issued by the District Court. The Fifth Circuit concluded that two of the plaintiffs lacked standing because their intended conduct was not arguably proscribed by S. B. 12. As to plaintiffs Extragrams, LLC (“Extragrams”), 360 Queen Entertainment, LLC (“360 Queen”), and Brigitte Bandit (“Bandit”), the Fifth Circuit concluded there was standing and remanded to this Court for further proceedings. The Fifth Circuit found that such further proceedings were necessary because the Court had not performed the analysis required by the *Moody* case, the parties had not properly briefed the case in light of *Moody*, and the parties had not developed an adequate record in light of *Moody*. *Woodlands Pride*, 168 F.4th at 308.

Because the claims of two plaintiffs were eliminated by the Fifth Circuit’s decision, the District Court on remand dismissed those plaintiffs and all defendants except AG Paxton from this case. ECF No. 133. AG Paxton is authorized by S. B. 12 only to file civil suits to enforce the civil penalties and injunctive provisions of Section

¹ Plaintiffs failed to present evidence at the August 2023 trial of this case that any sexually oriented performance prohibited by Section One of S. B. 12 is not obscene as to minors. But without such evidence, it was and is impossible to show that any conduct prohibited by S. B. 12 is protected by the First Amendment at all under *Free Speech Coalition*.

One of S. B. 12, Section 769.002 of the Texas Health and Safety Code, against a person who controls the premises of a commercial enterprise and allow a sexually oriented performance to be presented on the premises in the presence of an individual younger than 18 years of age.

There are now no pending claims in this case as to other sections of S. B. 12 aside from Section One. Thus, there are no claims in this case as to any provisions of S. B. 12 that are enforceable by criminal penalties.

I. THE *MOODY* ANALYSIS

The Fifth Circuit in this case emphasized that Plaintiffs’ decision 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 723). “But this is a feature, not a bug.” *Woodlands Pride*, 168 F.4th at 307.

That is because “[c]laims of facial invalidity often rest on speculation about the law’s coverage and its future enforcement.” *Id.* (quoting *Moody*, 603 U. S. at 723). Such claims also “threaten to short circuit the democratic process by preventing duly enacted laws from being implemented in constitutional ways.” *Id.* “The *Moody* framework for facial free speech challenges safeguards the democratic will and states’ interests while still ‘provid[ing] breathing room for free expression.’” *Id.* (quoting *Moody*, 603 U. S. at 723). The Fifth Circuit then described the *Moody* framework:

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.” [*Moody*, 606 U. S. at 723.]. . . . 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 274. We then determine which of the law’s applications violate the First Amendment. *Id.* at 725. And finally, we take the unconstitutional applications and “measure them against the rest.” *Id.* The law is not facially

invalid unless the “unconstitutional applications substantially outweigh the constitutional ones.” *Id.* at 724.

Id.

A. What Activities, By What Actors, Does Section One of S.B. 12 Cover?

1. Actors –

What “actors” are covered by Section One of S. B. 12? 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 a person younger than 18 years of age.” Tex. Health & Safety Code § 769.002(c). Thus, the relevant “actors” are those who control the premises of a commercial enterprise. The Fifth Circuit in *Woodlands Pride* opined that “control” is not necessarily limited to ownership but may include unspecified “less permanent control.” One such common form of control of commercial premises by a non-owner is that exercised by a lessee (although the terms of a lease may or may not provide for rights that amount to “control” under Section One of S. B. 12.

With that refinement, the actors covered by Section One logically would include:

- A. Owners of premises used by the owner to conduct a commercial enterprise;
- B. Owners of premises used by a lessee, sublessee, or permittee to conduct a commercial enterprise;

C. Lessees of premises used by the lessee to conduct a commercial enterprise; and

D. Lessees of premises used by a sublessee or permittee to conduct a commercial enterprise.

However, such actors covered by Section One of S. B. 12 do not include individual performers engaging in a sexually oriented performance on premises that they do not own, lease, or otherwise control. An individual performer does not “control the premises of a commercial enterprise.” Nor does an individual performer merely “allow” a sexually oriented performance “to be presented,” which is conduct statutorily required for a violation of Section one. An example of such an individual performer would be Plaintiff Brigitte Bandit, who the District Court found to be “a drag performer who also produces and hosts drag shows, mainly in the Travis County area.”

Thus, based on the testimony at the August 2023 trial, Plaintiff Bandit is not an “actor” covered by Section One of S. B. 12. Bandit testified that she was “a drag artist and performer.” Trial Tran. 227, Aug. 28, 2023. Bandit testified that she performs at nightclubs, drag brunches, in parks, and at “drag story time,” but did not testify that she owns or otherwise controls any such premises at any time. *See* Trial Tran. 233-35, Aug. 28, 2023.

The Court found that Plaintiff Bandit was potentially subject to criminal prosecution under other Sections of S. B. 12 that are no longer at issue in this case, but there is no basis whatsoever to conclude that Bandit is subject to civil suit by AG Paxton under Section One of S. B. 12. There is no evidence in the record from which one could conclude that Bandit is in control of commercial premises and has “allowed” or will “allow” a sexually oriented performance on such premises in the presence of minors. Accordingly, Bandit’s claims in this case are without merit and should be denied.

Similarly, an individual or group who “allows a sexually oriented performance to be presented” but does not “control the premises” on which such performances are allowed does not violate Section One of S. B. 12. Plaintiffs Extragrams LLC is such an actor. Extragrams is a “drag telegram company that provides drag entertainment for celebrations, events, and parties, and hosts drag bingo.” *The Woodlands Pride, Inc. v. Paxton*, 157 F.4th 775, 787 (5th Cir. 2025). The District Court found that Extragrams “utilizes independent contractors, who do drag performances for a variety of events including birthday parties, retirement parties, and corporate events.” ECF No. 94 at 16.

For example, Extragrams may hire a performer to go to the home of a person who is celebrating a birthday and perform a telegram. Neither the performer nor

Extragrams “controls the premises” where the performance occurs in such an instance. The District Court found that the independent contractors hired by Extragrams thus “often perform in open and public areas”, although “[p]erformances also occur in privately owned commercial properties.” ECF No. 94 at 16.

At the August 2023 trial, Extragrams’ founder, owner, and “creative director, Kerry Lynn Sieff, testified that Extragrams is a “drag telegram service and a full-scale drag entertainment company.” Trial Tran. 44, August 28, 2023. Sieff described Extragrams as an “entertainment service.” Trial Trans. 59, August 28, 2023. Sieff testified that Extragrams performers are independent contractors, not employees. Trial Trans. 68, August 28, 2023.

Extragrams’ independent contractor performers “go to houses, places, or work, companies” and “provide drag entertainment for events, parties, weddings, company parties, and holiday events.” Trial Tr. 46, August 28, 2023. Extragrams independent contractor performers also perform in parks. Trial Trans. 57, August 28, 2023. There was no testimony or evidence at the August 2023 trial that Extragrams controls any commercial premises where its independent contractor performers perform.

Based on the trial record and the District Court's findings after trial, Extragrams does not "control" any "commercial premises" on which it allows others to engage in sexually oriented performances. Thus, Extragrams is not an actor subject to civil suit by AG Paxton under Section One of S. B. 12. Accordingly, the Extragrams' claims should be denied.

The remaining Plaintiff, 360 Queen, also does not own or lease any commercial premises, either. The evidence at trial showed that 360 Queen periodically presented drag performances on the patio of Tomatillo's, a San Antonio restaurant owned by the father 360 Queen's co-owner, Richard Montez, Jr. *See* Trial Tr. 83, August 28, 2023. Thus, 360 Queen, like Extragrams, is a "drag production company" that presents drag performances on commercial premises controlled by others.

At 360 Queen failed to present evidence at trial as to any lease or other written or written arrangement pursuant to which it periodically performs on Tomatillo's patio. 360 Queen failed to present evidence that it pays rent to anyone for the use of Tomatillo's patio for its performances or that its informal arrangement for such use has any specific duration.

Richard Montez, Jr. testified at trial that 360 Queen controls entrance to the Tomatillo Restaurant patio on its performance days, and that its performances are

ticketed. Trial Tran. 85. August 28, 2023. But Mr. Montez also testified that 360 Queen generally doesn't allow children at its performances, even though it believes its performances are not detrimental to children. Trial Tran. 86-88, August 28, 2023. It sometimes has made exceptions, but only at the request of parents. Trial Tran. 87, August 28, 2023. Mr. Montez noted that it is possible minors might see some of the 360 Queen performances on the patio of Tomatillo's from the restaurant's dining room, adjacent independent businesses such Genghis Grill or Main Event, or when they are passing by on the street. Trial Tran. 94, 96, August 28, 2023.

Based on the August 2023 trial record, 360 Queen failed to carry its burden to prove it is a person in control of commercial premises who allows sexually oriented performances in the presence of minors. 360 Queen is not an "actor" subject to civil suit by AG Paxton under Section One of S. B. 12. According to the trial testimony, it is Mr. Montez's father, who owns Tomatillo's Restaurant, who is the party in control of those premises, not 360 Queen.

Mr. Montez's father simply allows 360 Queen to present performances on the Tomatillo patio pursuant to an informal arrangement befitting the close family relationship. This arrangement is a tenancy at will under Texas law. *See Musquiz v. Para Todos, Inc.*, 624 S. W. 3d 263, 271-72 (Tex. App. El Paso 2021) (citing

Holcombe v. Lorino, 79 S. W.2d 307 (Tex. 1935)). Mr. Montez’s father, under law, has the right to terminate such an arrangement at any time. Thus, he retains control of the premises at all times.

360 Queen also failed in its burden to show that any minors have ever been or likely will be “present” at any 360 Queen performances that are “sexually oriented performances” under Section One of S. B. 12. Minors who are on public property or otherwise physically not on the premises where a sexually oriented performance occurs cannot reasonably be deemed “present” at a sexually oriented performance, even if they unintentionally might see or overhear some part of that performance from some location not on the premises.

Although there was evidence that 360 Queen allowed a few exceptions to its “no minors” rule at the request of parents, 360 Queen presented no evidence at trial that such minors were present at “sexually oriented performances” as defined in Section One. Accordingly, 360 Queen failed to prove it is an “actor” subject to civil penalties under Section One of S. B. 12, and its claims should be dismissed.

2. Activities –

What “activities” are covered by Section One of S. B. 12? The statute prohibits covered actors from “allow[ing] a sexually oriented performance to be presented on the premises in the presence of a person younger than 18 years of age.” S. B. 12 borrows

the definition of a “sexually oriented performance” from Section 43.28 of the Texas Penal Code. *See* § 769.001(2), Tex. Health & Safety Code. It encompasses a “visual performance” that features a performer who is nude or any other performer who engages in “sexual conduct” and appeals to the prurient interest in sex. § 43.28(a)(2).

“Sexual conduct” is defined in subsection (a)(1) as follows:

- (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 stat, 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.

In construing these statutory terms, courts apply their ordinary meanings where undefined in the statute. “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) (citations and punctuation omitted).

B. Do Any Applications of Section One of S. B. 12 Violate the First Amendment?

1. Is a “Sexually Oriented Performance” in the Presence of Minors First Amendment “Speech” at All?

Conduct is not the same as First Amendment “speech.” “Sexually oriented performance” is conduct but is not necessarily “speech.” The Supreme Court has repeatedly held that some expressive conduct is protected as “speech” by the Free Speech Clause of the First Amendment. *E.g., United States v. O’Brien* (1968).

Are some or all the types of conduct prohibited by Section One of S. B. 12 expressive conduct that is constitutionally protected? Section One of S. B. 12 applies only to “sexually oriented performance” in the presence of minors, which is generally defined as a visual performance in which the performer either (a) is “nude” or involves specified forms of sexual conduct and (b) appeals to the prurient interest in sex. Nude dancing before adults is on the “outer ambit of First Amendment protection” but “generally constitutes expressive conduct.” *See Tex. Ent. Ass’n, Inc. v. Hegar*, 10 F.4th 495, 509 (5th Cir. 2021).

But it is doubtful whether sexual acts encompassed within the definition of “sexual conduct” applicable under Section One of S. B. 12 are protected expressive conduct at all. As the Fifth Circuit’s opinion in *Woodlands* noted:

We have genuine doubt, however, that pulsing prosthetic breasts in front of people, putting prosthetic breasts in people’s faces, and being spanked by audience members, are actually constitutionally protected – especially in the presence of minors. . . .” It is possible to find a kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995), quoting *City of Dallas v. Stanglin*, 490 U. S. 19, 25 (1989).

Id. at *20 n. 4. In *Free Speech Coalition, Inc. v. Paxton*, 606 U. S. 461, 473 (2025), the Supreme Court discussed the concept of obscenity as it applies to minors.

States have a specific interest in protecting *children* from sexually explicit speech. The earliest obscenity decisions recognized that restricting obscenity served two distinct interests – curbing the “corruption of the public mind in general,” and protecting “the manners of youth in particular.” *Sharpless 2 Serge & Rawle*, at 103 (opinion of Yeates, J.); see also *Holmes*, 17 Mass. at 336-37 (upholding an indictment for publishing an obscene book lending to “the manifest corruption and subversion of the youth and other good citizens of [this] Commonwealth”). Similarly, many early

obscenity statutes targeted for special regulation works
 “manifestly tending to the corruption of the morals of youth.”

Thus, the Court held:

When regulating minors’ access to sexual content, the State may broaden *Miller*’s “definition of obscenity” to cover that which is obscene from a child’s perspective. *Ginsberg*, 390 U. S. at 638. To be more precise, a State may prevent minors from accessing works that (a) taken as a whole, and under contemporary community standards, appeal to the prurient interest of minors; (b) depict or describe specifically defined sexual conduct in a way that is patently offensive for minors; and (c) taken as a whole, lack serious literary, artistic, political, or scientific value for minors. See *Miller*, 413 U. S. at 24; *Ginsberg*, 390 U.S. at 635, 638. Restrictions of this kind trigger no heightened First Amendment scrutiny and are subject only to rational basis review, even though they encompass speech that is “not obscene for adults.” *Ginsberg*, 390 U.S. at 637-38. . . .

In sum, *two basic principles govern legislation aimed at shielding children from sexually explicit content*. A State may not prohibit adults from accessing content that is obscene only to minors, *Butler*, 352 U. S. at 3383. *But it may enact laws to prevent minors from accessing such content*. *Ginsberg*, 390 U. S. at 637-38.

Id. at 474 (emphasis added). Section One of S. B. 12 is just such a law: it prevents minors from accessing sexually explicit content. It is therefore permissible under the First Amendment and is subject only to rational basis scrutiny.

C. Does Section One of S. B. 12 Survive the Appropriate Level of Constitutional Scrutiny?

The Supreme Court in *Free Speech Coalition* then discussed the level of scrutiny that was appropriate:

H. B. 1181 is an exercise of Texas’s traditional power to prevent minors from accessing speech that is obscene from their perspective. To the extent that it burdens adults’ right to access such speech, it has “only an incidental effect on protected speech,” making it subject to intermediate scrutiny. *Boy Scouts of Am. v. Dale*, 530 U. S. 640, 659 (2000).

Id. at 478. Section One of S. B. 12, however, does *not* burden adults’ rights to access speech. The ability or right of an adult to attend any “sexually oriented performances” is not adversely affected by Section One. Section One does not even require age verification.

As a result, Section One of S. B. 12 is like the law at issue in *Ginsberg* (which was subject to rational basis review) rather than the law at issue in *Free Speech Coalition* (which was subject to intermediate scrutiny because it incidentally burdened the rights of adults). Section One of S. B. 12 easily survives rational basis review because, like the

law at issue in *Ginsberg* prohibiting the sale of sexually explicit materials to minors, it clearly is rationally related to serving the traditional and compelling state interest in the protection of minors.

But even if Section One of S. B. 12 were subjected to intermediate scrutiny like the law at issue in *Free Speech Coalition*, it would survive. As the Supreme Court noted in *Free Speech Coalition*, Texas (like many states) limits a wide variety of goods and services based on age: for example, alcohol, tobacco, lottery tickets, body piercing, and tattoos. The history of laws barring minors from sexually explicit content, which predates the Constitution, and the “compelling” interest of States in protecting minors both show that Section One would meet the requirements of intermediate scrutiny if they applied.

A statute survives intermediate scrutiny if it “advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. *Texas’s interest in shielding children from sexual explicit performances is important, even “compelling”* . . . H. B. 1181 is sufficiently tailored to Texas’s interest. Under intermediate scrutiny, a regulation is adequately tailored so long as the government’s interest would be achieved less effectively absent the regulation, and the regulation does not burden substantially more speech than is necessary to further that interest. The regulation need not be the least restrictive

means of serving the State's interest. And the regulation's validity does not turn on our agreement with the legislature regarding the most appropriate method for promoting significant governmental interests or the degree to which those interests should be promoted.

Free Speech Coalition, 606 U. S. at 495-96 (emphasis added).

D. Few if Any of Section One's Applications Violate the First Amendment, and Constitutional Applications Clearly Predominate.

The "broad sweep" of Section One of S. B. 12 is plainly consistent with the First Amendment. Visual performances that involve full nudity and appeal to the prurient interest in sex are clearly obscene as to minors and therefore have no First Amendment protection under *Free Speech Coalition*. Not a single Plaintiff testified at the August 2023 trial that such performances would be appropriate in the presence of minors.

Similarly, visual performances in the presence of minors involving actual or simulated sex acts such as vaginal, anal sex, and masturbation and that appeal to the prurient interest in sex plainly are not protected by the First Amendment. The same is true for the other forms of sexual conduct proscribed by Section One of S. B. 12.

Plaintiffs presented testimony at trial about borderline hypotheticals that they believed were not or should not be proscribed by Section One, consistent with the First Amendment. The Court heard testimony regarding "wardrobe malfunctions" that

might briefly expose a nipple to the audience; about conga lines and “hip bumps” that might briefly bring performers into contact with audience members; and about prostheses such as breastplates or hip padding designed to help a man impersonate Dolly Parton or a woman appear to have a “bulge” like a man.

But there was no evidence that *any* such actual or hypothetical incidents were intended to or did “appeal to the prurient interest in sex.” Thus, none of these borderline hypotheticals presented conduct that is violative of Section One of S. B. 12.

Based on the August 2023 trial record, the Court should conclude that unconstitutional applications of Section One of S. B. 12 are nonexistent, or at most minor, as compared to the constitutional applications under *Free Speech Coalition*. This is true both in number and “weight”, as the unconstitutional applications likely would be few and very near the edges of the coverage of the statute. Thus, it is impossible on this record to conclude that the “unconstitutional applications [of Section One] substantially outweigh the constitutional ones, as required under *Moody* for a successful facial pre-enforcement First Amendment challenge. Accordingly, Section One is *not* facially invalid under the First Amendment.

II. SECTION ONE OF S. B. 12 IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD.

At the August 2023 trial, Plaintiffs presented some subjective evidence that some terms in S. B. 12 were confusing to them, or that they feared others might

misinterpret them. For example, Plaintiff Bandit testified that nudity was not clearly defined in S. B. 12 in her view. Trial Tran. 2-12, August 29, 2023. On behalf of Plaintiff Extragrams, Ms. Sieff stated her belief that the term “appeal to the prurient interest in sex” was subject to various interpretations, although she understood it to refer to performances that are sexual in nature.

But Plaintiffs presented no evidence as to the ability or inability of people of ordinary intelligence to understand the substance of what is prohibited or not prohibited by Section One of S. B. 12. Yet that is what is required to carry what the Fifth Circuit describes as the “daunting” burden of a plaintiff asserting a facial vagueness claim in *Roy v. City of Monroe*, 950 F.3d 245, 250 (5th Cir. 2020):

Roy nonetheless faces a “daunting” burden given the facial nature of his challenge. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982); *Steen*, 732 F.3d at 387. 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 if “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.

No Plaintiff could or did testify at the August 2023 trial that they could not determine what Section One of S. B. 12 “as a whole prohibits.”

And Section One is surely valid in the vast majority of its intended application. That there is room for debate as to borderline applications shows only that it is like most every other statute. Such debates are for as-applied challenges that present actual facts, rather than hypotheticals. Plaintiffs’ facial vague challenge to Section One of S. B. 12 is without merit.

Plaintiffs also presented no evidence at trial that could justify the conclusion that Section One of S. B. 12 is constitutionally overbroad. 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)). Because Section One of S. B. 12 covers what is entirely or nearly pure conduct rather than constitutionally protected speech, the function of the overbreadth doctrine is highly attenuated here indeed.

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)). That is because of the “presumption that officials will not execute the law in a way that is impermissibly broad and standardless.” *Id.*

By these governing standards, Section One of S. B. 12 clearly is not constitutionally overbroad. Its plainly legitimate sweep is broad considering *Free Speech Coalition*. Plaintiffs failed to present any evidence at trial that a substantial number (or indeed any) of its applications are unconstitutional. Plaintiffs’ overbreadth arguments are without merit.

Dated: July 14, 2026

Respectfully submitted.

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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.

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