

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

Extragrams, LLC; 360 Queen  
Entertainment LLC; Brigitte Bandit,

Plaintiffs,

v.

Civil Action No. 4:23-cv-02847

Warren Kenneth Paxton, in an official  
capacity as Attorney General of Texas;  
Delia Garza, in an official capacity as  
County Attorney of Travis County;  
Joe D. Gonzales, in an official capacity  
as District Attorney of Bexar County,

Defendants.

**PLAINTIFFS' SUPPLEMENTAL BRIEF ON REMAND**

## TABLE OF CONTENTS

|                                                                                                                              |    |
|------------------------------------------------------------------------------------------------------------------------------|----|
| INTRODUCTION .....                                                                                                           | 1  |
| FACTUAL BACKGROUND.....                                                                                                      | 5  |
| ARGUMENT .....                                                                                                               | 8  |
| I. Issues Beyond the Fifth Circuit’s Remand Instructions Are Now the Law of the Case.....                                    | 8  |
| II. S.B. 12 Remains Facially Vague .....                                                                                     | 13 |
| A. Roy Restates the Same Legal Standards that this Court Relied on in Already Finding S.B. 12 Unconstitutionally Vague ..... | 13 |
| B. S.B. 12 Fails to Provide Adequate Notice of What Is Prohibited.....                                                       | 14 |
| 1. The Term “Prurient Interest in Sex” Fails to Give Sufficient Notice of What S.B. 12 Proscribes .....                      | 14 |
| 2. Other Terms in S.B. 12 Exacerbate Its Vagueness.....                                                                      | 20 |
| 3. The Lack of Scierter Exacerbates S.B. 12’s Vagueness .....                                                                | 23 |
| C. S.B. 12 Will Lead to Arbitrary and Discriminatory Enforcement.....                                                        | 25 |
| III. S.B. 12 Facially Violates the First Amendment under <i>Moody</i> .....                                                  | 28 |
| A. Construing S.B. 12 under <i>Moody</i> Reveals Its Broad Scope .....                                                       | 30 |
| 1. Definition of “Sexually Oriented Performance” .....                                                                       | 30 |
| 2. Other Aspects of S.B. 12 Highlight Its Overbreadth.....                                                                   | 43 |
| B. S.B. 12 Applies to a Vast Array of Constitutionally Protected Performances .....                                          | 46 |
| 1. S.B. 12 Is Not Aimed at Obscenity or Obscenity for Minors .....                                                           | 47 |
| 2. S.B. 12 Suppresses Numerous Non-Obscene Constitutionality Protected Works and Performances .....                          | 52 |
| C. There Are Seemingly No Constitutionally Permissible Applications of S.B. 12 Not Already Prohibited by Other Laws .....    | 57 |
| D. S.B. 12 Fails the <i>Moody</i> Overbreadth Analysis .....                                                                 | 61 |
| CONCLUSION .....                                                                                                             | 62 |

## **TABLE OF AUTHORITIES**

### **Cases**

|                                                                                                                                  |                |
|----------------------------------------------------------------------------------------------------------------------------------|----------------|
| <i>Agostini v. Felton</i> ,<br>521 U.S. 203 (1997) .....                                                                         | 10             |
| <i>Aguirre v. State</i> ,<br>22 S.W.3d 463 (Tex. Crim. App. 1999), <i>as modified on denial of reh’g</i> (Dec. 8,<br>1999) ..... | 25             |
| <i>Andrews v. State</i> ,<br>652 S.W.2d 370 (Tex. Crim. App. 1983) .....                                                         | 19             |
| <i>Ashcroft v. ACLU</i> ,<br>535 U.S. 564 (2002) .....                                                                           | 17, 18, 19, 42 |
| <i>Ashcroft v. Free Speech Coal.</i> ,<br>535 U.S. 234 (2002) .....                                                              | 53             |
| <i>Bd. of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.</i> ,<br>482 U.S. 569 (1987) .....                              | 27             |
| <i>Boos v. Barry</i> ,<br>485 U.S. 312 (1988) .....                                                                              | 61             |
| <i>Broadrick v. Oklahoma</i> ,<br>413 U.S. 601 (1973) .....                                                                      | 61             |
| <i>Brown v. Ent. Merchs. Ass’n</i> ,<br>564 U.S. 786 (2011) .....                                                                | 47             |
| <i>Butler v. State of Mich.</i> ,<br>352 U.S. 380 (1957) .....                                                                   | 52             |
| <i>Chiles v. Salazar</i> ,<br>146 S. Ct. 1010 (2026) (Kagan, J., concurring) .....                                               | 51             |
| <i>Christianson v. Colt Indus. Operating Corp.</i> ,<br>486 U.S. 800 (1988) .....                                                | 10             |

|                                                                                                                                    |        |
|------------------------------------------------------------------------------------------------------------------------------------|--------|
| <i>City of Houston v. Hill</i> ,<br>482 U.S. 451 (1987) .....                                                                      | 57     |
| <i>Counterman v. Colorado</i> ,<br>600 U.S. 66 (2023) .....                                                                        | 23     |
| <i>Daly v. Sprague</i> ,<br>742 F.2d 896 (5th Cir. 1984) .....                                                                     | 8      |
| <i>Deutsche Bank Nat’l Tr. v. Burke</i> ,<br>902 F.3d 548 (5th Cir. 2018) (per curiam) .....                                       | 9      |
| <i>Erznoznik v. City of Jacksonville</i> ,<br>422 U.S. 205 (1975) .....                                                            | 47, 50 |
| <i>F.D.I.C. v. McFarland</i> ,<br>243 F.3d 876 (5th Cir. 2001) .....                                                               | 8      |
| <i>Free Speech Coal., Inc. v. Paxton</i> ,<br>606 U.S. 461 (2025) .....                                                            | passim |
| <i>Free Speech Coal., Inc. v. Paxton</i> ,<br>95 F.4th 263 (5th Cir. 2024), <i>cert. granted, aff’d</i> , 606 U.S. 461 (2025)..... | 45, 50 |
| <i>Ginsberg v. New York</i> ,<br>390 U.S. 629 (1968) .....                                                                         | 49     |
| <i>Grayned v. City of Rockford</i> ,<br>408 U.S. 104 (1972) .....                                                                  | 14, 22 |
| <i>Hang On, Inc. v. City of Arlington</i> ,<br>65 F.3d 1248 (5th Cir. 1995) .....                                                  | 11     |
| <i>Imperial Sovereign Ct. of Mont. v. Knudsen</i> ,<br>170 F.4th 820 (9th Cir. 2026) .....                                         | 4, 16  |
| <i>Kolender v. Lawson</i> ,<br>461 U.S. 352 (1983) .....                                                                           | 27     |

|                                                                                                           |            |
|-----------------------------------------------------------------------------------------------------------|------------|
| <i>Matsumoto v. Labrador</i> ,<br>122 F.4th 787 (9th Cir. 2024) .....                                     | 29         |
| <i>McFadden v. United States</i> ,<br>576 U.S. 186 (2015) .....                                           | 23         |
| <i>Merriott v. City of Bossier City</i> ,<br>No. 25-30325, 2026 WL 1830752 (5th Cir. June 25, 2026) ..... | passim     |
| <i>Miller v. California</i> ,<br>413 U.S. 15 (1973) .....                                                 | passim     |
| <i>Mishkin v. State of New York</i> ,<br>383 U.S. 502 (1966) .....                                        | 24         |
| <i>Moody v. NetChoice, LLC</i> ,<br>603 U.S. 707 (2024) .....                                             | passim     |
| <i>Munn v. City of Ocean Springs</i> ,<br>763 F.3d 437 (5th Cir. 2014) .....                              | 13         |
| <i>Nat’l Press Photographers Ass’n v. McCraw</i> ,<br>90 F.4th 770 (5th Cir. 2024) .....                  | 12         |
| <i>NetChoice v. Murrill</i> ,<br>812 F. Supp. 3d 594 (M.D. La. 2025) .....                                | 52         |
| <i>Nw. Ass’n of Indep. Schs. v. Labrador</i> ,<br>166 F.4th 1148 (9th Cir. 2026) .....                    | 29         |
| <i>Penthouse Int’l, Ltd. v. McAuliffe</i> ,<br>610 F.2d 1353 (5th Cir. 1980) .....                        | 16         |
| <i>Red Bluff Drive-In, Inc. v. Vance</i> ,<br>648 F.2d 1020 (5th Cir. Unit A June 1981) .....             | 17         |
| <i>Reno v. Am. C.L. Union</i> ,<br>521 U.S. 844 (1997) .....                                              | 14, 16, 50 |

|                                                                                            |               |
|--------------------------------------------------------------------------------------------|---------------|
| <i>Roark &amp; Hardee LP v. City of Austin</i> ,<br>522 F.3d 533 (5th Cir. 2008) .....     | 25            |
| <i>Roise v. State</i> ,<br>7 S.W.3d 225 (Tex. App.—Austin 1999, pet. ref’d) .....          | 21            |
| <i>Roth v. United States</i> ,<br>354 U.S. 476 (1957) .....                                | 17, 18, 19    |
| <i>Roy v. City of Monroe</i> ,<br>950 F.3d 245 (5th Cir. 2020) .....                       | 2, 20, 25, 26 |
| <i>Sable Commc’ns of Cal., Inc. v. F.C.C.</i> ,<br>492 U.S. 115 (1989) .....               | 50, 52        |
| <i>Schad v. Borough of Mount Ephraim</i> ,<br>452 U.S. 61 (1981) .....                     | 31, 32        |
| <i>Stanley v. Georgia</i> ,<br>394 U.S. 557 (1969) .....                                   | 45            |
| <i>Tovar v. State</i> ,<br>165 S.W.3d 785 (Tex. App.—San Antonio 2005, no pet.) .....      | 21            |
| <i>Turtle Island Foods Inc. v. Shuford</i> ,<br>818 F. Supp. 3d 846 (W.D. Tex. 2026) ..... | 4, 57         |
| <i>United States v. Alvarez</i> ,<br>567 U.S. 709 (2012) (Breyer, J., concurring) .....    | 23            |
| <i>United States v. Hansen</i> ,<br>599 U.S. 762 (2023) .....                              | 3, 28         |
| <i>United States v. Lee</i> ,<br>358 F.3d 315 (5th Cir. 2004) .....                        | 9             |
| <i>United States v. McCrimmon</i> ,<br>443 F.3d 454 (5th Cir. 2006) .....                  | 9             |

|                                                                                                                                                        |        |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| <i>United States v. Playboy Ent. Grp., Inc.</i> ,<br>529 U.S. 803 (2000) .....                                                                         | 50     |
| <i>United States v. Pompa</i> ,<br>434 F.3d 800 (5th Cir. 2005) .....                                                                                  | 48     |
| <i>United States v. Wiegand</i> ,<br>812 F.2d 1239 (9th Cir. 1987) .....                                                                               | 21     |
| <i>United States v. Williams</i> ,<br>553 U.S. 285 (2008) .....                                                                                        | 47     |
| <i>Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.</i> ,<br>455 U.S. 489 (1982) .....                                                          | 14, 23 |
| <i>Woodlands Pride, Inc. v. Paxton</i> ,<br>694 F. Supp. 3d 820 (S.D. Tex. 2023), <i>vacated and remanded</i> , 168 F.4th 293<br>(5th Cir. 2026) ..... | passim |

## **Statutes**

|                                           |          |
|-------------------------------------------|----------|
| Tex. Bus. & Com. Code § 102.051 .....     | 5, 33    |
| Tex. Health & Safety Code § 769.002 ..... | 5, 6, 46 |
| Tex. Loc. Gov’t Code § 243.0031 .....     | 5, 6, 43 |
| Tex. Penal Code § 12.21 .....             | 7        |
| Tex. Penal Code § 21.07 .....             | 21, 60   |
| Tex Penal Code § 21.08 .....              | 60       |
| Tex. Penal Code § 42.01 .....             | 60       |
| Tex. Penal Code § 43.21 .....             | 31, 58   |
| Tex. Penal Code § 43.23 .....             | 58       |
| Tex. Penal Code § 43.24 .....             | 58       |

|                              |        |
|------------------------------|--------|
| Tex. Penal Code § 43.28..... | passim |
| Tex. Penal Code § 6.02.....  | 24     |
| Tex. Penal Code § 7.02.....  | 7      |

## Other Authorities

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Ana Maria Otalvaro, <i>Erotic Resistance: Performance, Art, and Activism in San Francisco Strip Clubs, 1960s-2010s</i> (2018), available at <a href="https://stacks.stanford.edu/file/druid:cw314pc4142/OTALVARO_COMBINED%20DOCS_TITLE_ABSTRACT_DISS-augmented.pdf">https://stacks.stanford.edu/file/druid:cw314pc4142/OTALVARO_COMBINED%20DOCS_TITLE_ABSTRACT_DISS-augmented.pdf</a> .....                                                                                                     | 53 |
| <i>Feminist Generation Gap: Intersectional Considerations</i> , 10 Pol. & Gender 292, 292 (June 2014), available at <a href="https://www.cambridge.org/core/journals/politics-and-gender/article/abs/bridging-the-feminist-generation-gap-intersectional-considerations/A52C9DE0AFE8E7AA85E57D19C5F0BEBB">https://www.cambridge.org/core/journals/politics-and-gender/article/abs/bridging-the-feminist-generation-gap-intersectional-considerations/A52C9DE0AFE8E7AA85E57D19C5F0BEBB</a> ..... | 53 |
| <i>How I Developed My Glitzy Personal Style</i> , Time (Oct. 12, 2023), <a href="https://time.com/collections/time100-voices/6324637/dolly-parton-behind-the-seams-fashion/">https://time.com/collections/time100-voices/6324637/dolly-parton-behind-the-seams-fashion/</a> .....                                                                                                                                                                                                               | 53 |
| K. Marra & B. Clayton, <i>Phallocracy and Phallic Caricature: Re-Viewing the Iconography of Greek Comedy</i> .....                                                                                                                                                                                                                                                                                                                                                                              | 38 |
| Leigh H. Edwards, <i>Dolly Parton, Gender, and Country Music</i> 44–46 (2018) .....                                                                                                                                                                                                                                                                                                                                                                                                             | 53 |

## INTRODUCTION

Three years ago, this Court correctly declared S.B. 12 unconstitutional under five independent grounds, *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 831 (S.D. Tex. 2023), *vacated and remanded*, 168 F.4th 293 (5th Cir. 2026). On appeal, the Fifth Circuit explicitly found that at least one Plaintiff (360 Queen Entertainment) has standing to bring this facial challenge and that the Attorney General is a proper Defendant and not immune. *Woodlands Pride*, 168 F.4th at 305 n.10, 306. The Fifth Circuit did not identify any error in the outcome of this Court’s merits analysis. *Id.* at 307–08. Instead, the court remanded with instructions to conduct further legal analysis by reconsidering “the plaintiffs’ facial First Amendment challenges to Section One of S.B. 12 under the *Moody* framework” and “plaintiffs’ facial vagueness challenge to Section One of S.B. 12 in light of *Roy*.” *Id.* at 308.

These remand instructions are narrow, and the Fifth Circuit did not disturb this Court’s other findings of fact and conclusions of law that remain the law of the case. These holdings include: (1) Extragrams and Brigitte Bandit also have standing to challenge S.B. 12, *Woodlands Pride*, 694 F. Supp. 3d at 841; (2) S.B. 12 is not severable, *id.* at 841-42; (3) Plaintiffs’ performances are inherently expressive and subject to First Amendment protection, *id.* at 842-44; (4) the law is content and viewpoint-based and cannot survive strict or intermediate scrutiny, *id.* at 844–47;

(5) Section Two operates as a prior restraint, *id.* at 850; (6) Plaintiffs will suffer irreparable harm absent injunctive relief, *id.*; and (7) the balance of harms and public interest weigh in favor of granting a permanent injunction, *id.* at 850-51.

Although these holdings remain the law of the case and are themselves sufficient to once again declare S.B. 12 unconstitutional, the law is also facially unconstitutional under both frameworks identified by the Fifth Circuit for further analysis. To survive a facial challenge under the First and Fourteenth Amendments, laws restricting speech as obscene must include all three prongs of *Miller v. California*, 413 U.S. 15, 24 (1973), or the same three prongs as modified for obscenity as to minors, *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 474 (2025). But, in a stark departure from these longstanding principles, the Texas Legislature expressly declined to incorporate this test into S.B. 12. The law jettisons two entire parts of the test—the “patently offensive” and “serious value” prongs—while omitting any requirement that the prurient interest be based on an average person, community standards, or by taking the work as a whole.

S.B. 12’s departure from the test for obscenity and obscenity for minors renders the law unconstitutionally vague under *Roy v. City of Monroe* because it “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” and “authorizes . . . arbitrary and discriminatory enforcement.” 950 F.3d 245, 252 (5th Cir. 2020). S.B. 12’s free-

roaming use of a “prurient interest in sex” standard, alongside other undefined and unclear terms, makes the law impermissibly vague.

S.B. 12’s departure from the test for obscenity and obscenity for minors also makes the law facially overbroad under *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). *Moody* requires courts to assess “whether a law’s unconstitutional applications are substantial compared to its constitutional ones.” 603 U.S. at 718. “The first step in the proper facial analysis is to assess the state laws’ scope.” *Id.* at 724. “The next order of business is to decide which of the laws’ applications violate the First Amendment, and to measure them against the rest.” *Id.* at 725.

Under this analysis, S.B. 12 remains facially overbroad because the “ratio” of unconstitutional to constitutional applications of the statute is as “lopsided” as it gets. *United States v. Hansen*, 599 U.S. 762, 770 (2023). Since S.B. 12 is aimed exclusively at “performances,” it does not target prurient conduct but only prurience within a performance. As this Court correctly held, such performances are inherently expressive and fully shielded by the First Amendment. *Woodlands Pride*, 694 F. Supp. 3d at 844. This Court further found that S.B. 12 targets performances based on content and viewpoint and does not survive either strict or intermediate scrutiny. *Id.* at 846-47. Critically, “*Moody* [] did not displace the longstanding and myriad precedents setting forth the tiered scrutiny analysis we apply to a facial claim challenging a law on the ground that it is an unconstitutional content [or viewpoint]-

based restriction on speech.” *Imperial Sovereign Ct. of Mont. v. Knudsen*, 170 F.4th 820, 845 (9th Cir. 2026) (affirming the facial unconstitutionality of a law proscribing “sexually oriented performances” and targeting drag shows).

While these claims of content and viewpoint discrimination alone are sufficient to re-declare S.B. 12 unconstitutional, they also underscore the statute’s facial overbreadth. When properly construed under *Moody*, the law’s “unbounded” terms apply to an “unquantifiable” number of “possible applications” shielded by the First Amendment. *Merriott v. City of Bossier City*, No. 25-30325, 2026 WL 1830752, at \*5–6 (5th Cir. June 25, 2026). *Merriott* is the clearest example of the Fifth Circuit conducting *Moody*’s required overbreadth analysis. Like the policy at issue there, S.B. 12 impermissibly “covers a substantial amount of core First Amendment activity in relation to its legitimate sweep.” *Id.* at \*6. Since other Texas laws already prohibit obscenity, public lewdness, and the display of harmful material to minors, any application of S.B. 12 already covered by those laws is not “relevant” to the *Moody* analysis because it is not what the law “actually . . . prohibits.” *Turtle Island Foods Inc. v. Shuford*, 818 F. Supp. 3d 846, 863 (W.D. Tex. 2026) (quoting *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015)). The actual impact of S.B. 12 is to target performances that are neither obscene nor obscene for minors, which makes the law facially overbroad.

S.B. 12 remains as constitutionally deficient as it was three years ago, and this Court should re-affirm its prior holdings that S.B. 12 is facially unconstitutional under all five independent grounds.

### **FACTUAL BACKGROUND**

The Court is familiar with S.B. 12 and the facts in this matter after a full trial on the merits and final judgment. Signed into law in 2023, S.B. 12 proscribes “sexually oriented performance[s],” defined as “visual performance[s]” that (A) feature (i) a performer who is nude or (ii) a performer who engages in “sexual conduct”; and (B) appeal to the prurient interest in sex. Tex. S.B. 12, 88th Leg., R.S. (2023) (codified at Tex. Health & Safety Code § 769.002; Tex. Loc. Gov’t Code § 243.0031; Tex. Penal Code § 43.28) (hereinafter “S.B. 12”). S.B. 12 borrows a definition of “nude” from the Texas Business and Commerce Code, which includes anyone who is “entirely unclothed” or “clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks.” Tex. Bus. & Com. Code § 102.051(1).

The law proscribes five categories of “sexual conduct”: (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;” and (E) “the exhibition of sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics.” Tex. Penal Code § 43.28(a)(1).

Section One of S.B. 12 authorizes the Attorney General to seek a fine of up to \$10,000 and injunctive relief against any “person who controls the premises of a commercial enterprise” where a sexually oriented performance is performed “on the premises in the presence of an individual younger than 18 years of age.” Tex. Health & Safety Code § 769.002(a).

Section Two states that municipalities and counties “may not authorize a sexually oriented performance: (1) on public property; or (2) in the presence of an individual younger than 18,” and it grants local governments the authority to “regulate” all such performances, regardless of their audience or where they occur. Tex. Loc. Gov’t Code § 243.0031.

Section Three creates a criminal offense for any person who “engages in a sexually oriented performance: (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.” Tex. Penal Code § 43.28(b). This is a

Class A misdemeanor punishable by up to a year in jail, a fine not to exceed \$4,000, or both. Tex. Penal Code Ann. § 43.28(c); Tex. Penal Code § 12.21. The general Texas aiding and abetting statute also criminalizes anyone who “solicits, encourages, directs, aids, or attempts to aid” S.B.12’s criminal offense. Tex. Penal Code § 7.02(a)(2).

This Court issued its findings of fact, conclusions of law, and permanent injunction on September 26, 2023. *See generally Woodlands Pride*, 694 F. Supp. 3d at 820. The Court found S.B. 12 to be unconstitutional under five independent grounds and permanently enjoined its enforcement by eight Defendants. *Id.* Six of the eight Defendants appealed this Court’s decision, with Delia Garza, as County Attorney of Travis County, and Joe D. Gonzales, as District Attorney of Bexar County, declining to appeal. *Woodlands Pride*, 168 F.4th at 300 n. 4.

On February 25, 2026, the Fifth Circuit remanded to this Court with instructions to “(1) dismiss the claims against Brett Ligon, James Hicks, Montgomery County, Taylor County, and the City of Abilene; (2) reconsider the plaintiffs’ facial First Amendment challenges to Section One of S.B. 12 under the *Moody* framework; and (3) reconsider the plaintiffs’ facial vagueness challenge to Section One of S.B. 12 in light of *Roy*.” *Id.* at 308. This Court dismissed all claims against Brett Ligon, James Hicks, Montgomery County, Taylor County, and the City

of Abilene—as well as Plaintiffs The Woodlands Pride and Abilene Pride Alliance’s claims against the Attorney General—on April 3, 2026. Dkt. 133.

Plaintiff Extragrams filed a Motion for Temporary Restraining Order and Preliminary Injunction on March 19, 2026. Dkt. 129. On March 24, 2026, Defendant Paxton filed a second Motion to Dismiss. Dkt. 131. On June 23, 2026, this Court denied the Second Motion to Dismiss and deferred ruling on Extragrams’ Motion. Dkt. 143. The Court also ordered supplemental briefing and proposed findings of fact and conclusions of law to assist the Court in fulfilling the Fifth Circuit’s remand instructions. Dkt. 143 at 2-3.

## **ARGUMENT**

### **I. Issues Beyond the Fifth Circuit’s Remand Instructions Are Now the Law of the Case**

The Fifth Circuit’s remand instructions are limited to conducting further legal analysis of Plaintiffs’ facial challenges under the First and Fourteenth Amendments. Other questions of law and fact already adjudicated by this Court need not be re-addressed and are now the law of the case.

“Under the ‘law of the case’ doctrine, ‘a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.’” *F.D.I.C. v. McFarland*, 243 F.3d 876, 884 (5th Cir. 2001) (citation omitted). The “‘law of the case’ rule is based on the salutary and sound public policy that litigation should come to an end.” *Daly v. Sprague*, 742 F.2d 896,

900 (5th Cir. 1984). This is closely associated with the mandate rule, “which is but a specific application of the general doctrine of law of the case.” *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004) (internal quotation marks and citation omitted). The mandate rule requires that “[a] district court on remand ‘must implement both the letter and the spirit of the appellate court’s mandate.’” *United States v. McCrimmon*, 443 F.3d 454, 459 (5th Cir. 2006) (quoting *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002)). In other words, “[t]he mandate rule requires a district court on remand to effect [the appellate court’s] mandate and to do nothing else.” *Deutsche Bank Nat’l Tr. v. Burke*, 902 F.3d 548, 551 (5th Cir. 2018) (per curiam) (citation omitted).

Under these doctrines, the Fifth Circuit’s holdings on appeal are fully binding, including: “360 Queen [] has standing to seek an injunction against the Attorney General,” “the Attorney General has more than *some* connection with the enforcement of Section One” and is a proper Defendant who is not immune, and “360 Queen’s performances are [at least] *arguably* affected with a constitutional interest.” *Woodlands Pride*, 168 F.4th at 305-06, 305 n.10.

This Court’s decisions that were not addressed on appeal also need not be revisited beyond the issues necessary to fulfill the Fifth Circuit’s mandate. Although district courts have “the power to revisit prior decisions of [their] own,” they are “loathe to do so in the absence of extraordinary circumstances such as where the

initial decision was ‘clearly erroneous and would work a manifest injustice.’” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). In general, “a court should not reopen issues decided in earlier stages of the same litigation.” *Agostini v. Felton*, 521 U.S. 203, 236 (1997). Here, there is no extraordinary circumstance requiring this Court to revisit its prior holdings unaddressed on appeal and not part of the Fifth Circuit’s mandate. These holdings include: (1) Extragrams and Brigitte Bandit have standing to challenge S.B. 12, *Woodlands Pride*, 694 F. Supp. 3d at 841;<sup>1</sup> (2) S.B.

---

<sup>1</sup> The Attorney General now agrees that “standing is present” at this stage of the case, Dkt. 140 at 5, and did not seek dismissal against any remaining Plaintiff based on standing in the recently filed (and denied) motion to dismiss. *See* Dkts. 131 and 143.

Although Defendant Paxton asserts that “the Fifth Circuit held that Extragrams ‘do[es] not have standing to assert a facial vagueness challenge’ in the First Amendment context,” Dkt. 136 at 3 n.4 (quoting *Woodlands Pride*, 168 F.4th at 301 n.5), this is based on a clear typographical error from the Fifth Circuit, which expressly reserved opining on standing for either Extragrams or Bandit, *Woodlands Pride*, 168 F.4th at 306 (“Because one plaintiff with standing for a given defendant is sufficient, *we need not determine whether the remaining two plaintiffs [Extragrams and Bandit] have standing to seek an injunction against the Attorney General.*”) (emphasis added).

The Fifth Circuit remanded for further analysis on “*Plaintiffs’* facial vagueness challenge” without dismissing any claims by Extragrams or Bandit. *Woodlands Pride*, 168 F.4th at 306, 308 (emphasis added). Thus, all three Plaintiffs have standing to proceed with all remaining claims, and the Court may reaffirm its prior standing decisions based on the trial record and framework applied by the Fifth Circuit. Alternatively, even if the Fifth Circuit had actually reached the issue of

12 is not severable, *id.* at 841-42;<sup>2</sup> (3) Plaintiffs’ performances are inherently expressive and subject to First Amendment protection, *id.* at 842-44;<sup>3</sup> (4) the law is content and viewpoint-based and does not satisfy strict or intermediate scrutiny, *id.* at 844-47, 847 n.98; (5) Section Two of S.B. 12 operates as a prior restraint, *id.* at

---

vagueness standing for Extragrams and Bandit and found against them, this Court is nevertheless instructed to reach the merits since the Fifth Circuit found that 360 Queen has standing to bring this facial challenge.

<sup>2</sup> Because of this finding on severability, Plaintiffs reference all three sections of S.B. 12 in this brief as relevant to this Court’s analysis, even though the Fifth Circuit only addressed standing against the Attorney General and remanded with instructions to reconsider “challenges to Section One.” *Woodlands Pride*, 168 F.4th at 308.

<sup>3</sup> After explicitly holding that “360 Queen’s performances are [] *arguably* affected with a constitutional interest,” the Fifth Circuit expressed in a footnote “genuine doubt, [] 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.” *Woodlands Pride*, 168 F.4th at 305 and n.11. The court cited *Hang On, Inc. v. City of Arlington* for the proposition that “intentional contact between a nude dancer and a bar patron is conduct beyond the expressive scope of the dancing itself.” 65 F.3d 1248, 1253 (5th Cir. 1995).

In contrast to *Hang On*, S.B. 12 applies only to “performances” and is therefore aimed at inherently expressive activities and not pure conduct. In *Hang On*, the city ordinance prohibited only actual touching “between a nude dancer and a bar patron” and required an explicit *mens rea* of intent. *Id.* In contrast, S.B. 12 contains no *mens rea* for its civil penalties and proscribes even “simulated” contact that is part of a performance. While the narrow ordinance in *Hang On* passed constitutional muster, S.B. 12 is far more sweeping and plainly restricts inherently expressive activities *See Woodlands Pride*, 694 F. Supp. 3d at 843.

850;<sup>4</sup> (6) Plaintiffs will suffer irreparable harm absent injunctive relief, *id.*; and (7) the balance of harms and public interest weigh in favor of granting permanent injunctive relief, *id.* at 850-51.

The Fifth Circuit’s remand instructions are limited to two merits issues: to reconsider Plaintiffs’ “facial First Amendment challenges to Section One of S.B. 12 under the *Moody* framework” and “facial vagueness challenge to Section One of S.B. 12 in light of *Roy*.” *Woodlands Pride*, 168 F.4th at 308.<sup>5</sup> The Court need not reconsider its other prior rulings beyond this mandate, and Plaintiffs’ Proposed Findings of Fact and Conclusions of Law on other issues beyond the mandate reflect the Court’s previous holdings.

---

<sup>4</sup> Even though Montgomery County, Taylor County, and the City of Abilene have now been dismissed from this case, Travis County Attorney Delia Garza is tasked with enforcing both Sections Two and Three of S.B. 12 and did not appeal this Court’s final judgment, *see* Dkt. 70 at 18 n.11, such that this Court’s holding that Section Two is a prior restraint remains fully binding and can be reaffirmed in the Court’s amended final judgment.

<sup>5</sup> Although S.B. 12 has now gone into effect, “no enforcement of any sort by Attorney General Paxton has happened to date.” Dkt. 131 at 7 n.1. Thus, a facial pre-enforcement challenge remains fully appropriate. *See, e.g., Nat’l Press Photographers Ass’n v. McCraw*, 90 F.4th 770, 777 (5th Cir. 2024) (considering facial, pre-enforcement challenge for a law that had already been in effect for ten years).

## II. S.B. 12 Remains Facially Vague

### A. *Roy* Restates the Same Legal Standards that this Court Relied on in Already Finding S.B. 12 Unconstitutionally Vague

In remanding for further analysis of Plaintiffs’ vagueness claims, the Fifth Circuit affirmed the same rule language that this Court invoked when finding S.B. 12 to be “unconstitutionally vague [because] it ‘fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits’ or ‘authorizes arbitrary or discriminatory enforcement.’” *Compare Woodlands Pride*, 168 F.4th at 308 (quoting *Roy*, 950 F.3d at 252), *with Woodlands Pride*, 694 F. Supp. 3d at 849 (citing the same legal standard). Although this Court applied the correct standard, the Fifth Circuit cited additional rule language from *Roy* that courts “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 [*i.e.* not vague] in the vast majority of its intended applications.’” *Woodlands Pride*, 168 F.4th at 308 (quoting *Roy*, 950 F.3d at 252). Because S.B. 12 readily fails both of these prongs, the law remains unconstitutionally vague on its face.

The Due Process Clause “requires that a law provide sufficient guidance such that a man of ordinary intelligence would understand what conduct is being prohibited” and courts “must strike down [laws] if we find that [they] do[] not sufficiently define the line between legal and illegal conduct.” *Munn v. City of Ocean Springs*, 763 F.3d 437, 439 (5th Cir. 2014) (citation omitted). Vague laws “trap the

innocent by not providing fair warning,” “impermissibly delegate[] basic policy matters to policemen, judges, and juries,” and “abut[] upon sensitive areas of basic First Amendment freedoms” because “[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.” *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation marks and citations omitted).

Especially where laws “interfere[] with the right of free speech” or contain criminal penalties, a “more stringent vagueness test” applies. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982); *Reno v. Am. C.L. Union*, 521 U.S. 844, 872 (1997). The vagueness doctrine is thus at its apex for a law like S.B. 12, which contains both criminal penalties and restrictions on speech.

## **B. S.B. 12 Fails to Provide Adequate Notice of What Is Prohibited**

### **1. The Term “Prurient Interest in Sex” Fails to Give Sufficient Notice of What S.B. 12 Proscribes**

The text of S.B. 12 is unconstitutionally vague because it fails to give a reasonable person notice of what is prohibited. Even though multiple aspects of the law render it vague, this Court found that the most glaring issue “relates to the term ‘prurient interest in sex.’” *Woodlands Pride*, 694 F. Supp. 3d at 849. Because this term is undefined in Texas law, lacks a readily ascertainable ordinary meaning, and applies to all performances targeted by the statute, it renders S.B. 12 irredeemably vague. The core problem is that when the term “prurient interest” is stripped of

*Miller*’s prongs, it loses the context that supplies both fair notice and enforcement guidance.

The long-established obscenity test comes from *Miller v. California*, 413 U.S. 15, 24 (1973), and permits the government to restrict speech as obscene after determining: “(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.” *Id.* (internal quotation marks and citations omitted); *see also Free Speech Coal., Inc.*, 606 U.S. at 474 (adapting this test for obscenity as to minors and including the same prongs).

Here, the Texas Legislature expressly declined to incorporate this test into S.B. 12.<sup>6</sup> The law omits two prongs of the test—the “patently offensive” and “serious

---

<sup>6</sup> Throughout this litigation, the Attorney General has agreed that S.B. 12 discards the elements of the obscenity test beyond the term “prurient interest.” *See, e.g.,* Appellant Paxton’s Br., Case No. 23-20480, Dkt. 84 at 46 (5th Cir. Jan. 9, 2024) (conceding that the “definition of ‘sexually oriented performance’ does not include each element of the obscenity test”); Dkt. 78 (Trial Tr. Day 2) at 80:14–18 (stating at trial that “everyone agrees that nude performances are prohibited in front of children by SB 12 if it appeals to the prurient interest only . . . if it appeals to prurient interest, yes”).

value” prongs—while lacking any requirement that the “prurient interest” be based on an “average person,” “contemporary community standards,” or by “tak[ing the work] as a whole.” S.B. 12 therefore seeks to impose a free-wheeling prohibition on performances that “appeal[] to the prurient interest in sex” without defining that term and by divorcing it from the only context through which it is known in case law.

In *Reno*, the Supreme Court found unconstitutionally vague a law that tried to isolate one term from the *Miller* test (the “patently offensive” prong) from the other requirements. 521 U.S. at 872-73. The Supreme Court held that “[j]ust because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague.” *Id.* at 873. As the Court explained, “[e]ach of *Miller*’s additional two prongs—(1) that, taken as a whole, the material appeal to the ‘prurient’ interest, and (2) that it ‘lac[k] serious literary, artistic, political, or scientific value’—critically limits the uncertain sweep of the obscenity definition.” *Id.* The Court noted that the “serious value” prong “is particularly important” because “it is not judged by contemporary community standards” and sets “a national floor for socially redeeming value.” *Id.*; accord *Imperial Sovereign Ct. of Montana v. Knudsen*, 170 F.4th 820, 874 (9th Cir. 2026) (noting that the use of an “inten[t] to appeal to a prurient interest in sex” without *Miller*’s other “critical limitations” did not “adequately clarify or narrow the scope” of a restriction on “sexually-oriented-performance[s]”); see also *Penthouse Int’l, Ltd. v. McAuliffe*, 610

F.2d 1353, 1363 (5th Cir. 1980) (“[I]t is significant to remember that the *Miller* test is conjunctive so every element of the test must be met before a publication may be adjudicated obscene.”).

Throughout this litigation, the Attorney General has urged that the “prurient interest” standard can be applied “as case law has defined it for seven decades,” *see, e.g.,* Appellant Paxton’s Br., Case No. 23-20480, Dkt. 84 at 47 (5th Cir. Jan. 9, 2024), but the cases Defendant Paxton cites reference this term *only* within the broader obscenity test. *See, e.g., Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1026 (5th Cir. Unit A June 1981) (analyzing “prurient interest” only within the three-part obscenity test).

The cases that the Attorney General cited before the Fifth Circuit, *Ashcroft v. ACLU*, 535 U.S. 564, 579 (2002), and *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957), underscore that the term “prurient interest” can only be defined within the broader context of the *Miller* test. *Ashcroft* explicitly warned against isolating any single prong by stating that the “additional two restrictions [of the *Miller* test] substantially limit the amount of material covered by the statute.” 535 U.S. at 579. Moreover, the Supreme Court in *Roth* observed that the term “prurient interest” may be unconstitutionally vague when it is not accompanied by other guardrails. 354 U.S. at 489. Because “judging obscenity by the effect of isolated passages upon the most susceptible persons[] might well encompass material legitimately treating with sex .

. . . it must be rejected as unconstitutionally restrictive of the freedoms of speech and press.” *Id.* The *Roth* Court thus only approved the use of a “prurient interest” standard when it was explicitly tied to “whether [] the average person, applying contemporary community standards” would judge that “the dominant theme of the material taken as a whole appeals to prurient interest.” *Id.*

The Fifth Circuit also cited *Ashcroft* for the proposition that “[t]o appeal to the ‘prurient interest in sex,’ material, at a minimum, must be ‘in some sense erotic.’” *Woodlands Pride*, 168 F.4th at 299 (quoting *Ashcroft*, 535 U.S. at 579). While this enabled the court to assess Plaintiffs’ standing, the Fifth Circuit did not include the full context in which this quote was used, which makes clear that the term “prurient interest” cannot be singled out from *Miller*’s other requirements when assessing a law’s vagueness:

These additional two restrictions substantially limit the amount of material covered by the statute. Material appeals to the prurient interest, for instance, only if it is in some sense erotic. . . . Of even more significance, however, is COPA’s exclusion of material with serious value for minors. . . . In *Reno*, we emphasized that the serious value “requirement is particularly important because, unlike the ‘patently offensive’ and ‘prurient interest’ criteria, it is not judged by contemporary community standards.”

*Ashcroft*, 535 U.S. at 579 (citations omitted). Thus, while *Ashcroft* provides some definition of what “prurient interest” might mean—“in some sense erotic”—the Supreme Court still required that laws use this term within the context of the three-pronged *Miller* test. Without *Miller*’s other guardrails, defining “prurient interest”

as “in some sense erotic” fails to give adequate notice of what is proscribed, especially since “erotic” is a highly subjective word that means different things to various observers.<sup>7</sup>

Like the Supreme Court in *Roth* and *Ashcroft*, Texas state courts have also warned against isolating the term “prurient interest” from the broader obscenity test. The Texas Court of Criminal Appeals has held “that the term, ‘prurient interest,’ should not be singled out, but, instead” is not vague “[o]nly in the context of the definition of the word ‘obscene.’” *Andrews v. State*, 652 S.W.2d 370, 376 (Tex. Crim. App. 1983). Because the definition of “prurient interest” is “essentially circular,” the court explained, jurors are only able to “arrive[] at a proper meaning of the term” when “considering the term in context” alongside all requisite prongs of the obscenity test. *Id.* at 376–77 Thus, there is no stand-alone definition of “prurient interest” in Texas state law that would permit the Legislature to ban performances on this basis without the other required elements from *Miller* and its progeny.

---

<sup>7</sup> The Fifth Circuit’s use of the word “erotic” highlights its indeterminacy if isolated from the broader *Miller* test, since the court found that “twerking—‘a form of expression where you put your hands on your knees essentially and move your buttocks up and down rapidly’” by performers at 360 Queen was arguably proscribed by S.B. 12 as “prurient” or “erotic,” whereas the same “twerk[ing]” dance moves by performers at The Woodlands Pride festival were not. *See Woodlands Pride*, 168 F.4th at 302, 304.

This Court was therefore correct in concluding that “[t]he express omission of the other prongs of the *Miller* test suggests that S.B. 12 is a wider interpretation of ‘prurient sexual interest’” such that “it is not readily known to someone of ‘ordinary intelligence’ how S.B. 12 will be enforced.” *Woodlands Pride*, 694 F. Supp. 3d at 849.

## **2. Other Terms in S.B. 12 Exacerbate Its Vagueness**

Beyond the term “prurient interest in sex,” this Court also correctly held that other aspects of S.B. 12 render it impermissibly vague. “Without a clear understanding of ‘prurient sexual interest,’ other terms such as ‘lewd’ and ‘Performer’ (which is undefined in S.B. 12) become problematic. While the Court notes there are ordinary definitions of the words, where the line is drawn as it relates to S.B. 12 is unclear.” *Woodlands Pride*, 694 F. Supp. 3d at 849. These terms fail the test from *Roy* because they do not provide “a reasonable opportunity to understand what conduct [the law] prohibits” and “authorize[] . . . arbitrary and discriminatory enforcement.” 950 F.3d at 252.

Unlike other laws that use the term “lewd,” “S.B. 12 does not provide any guidance or standard in determining what is lewd or barred by S.B. 12.” *Woodlands Pride*, 694 F. Supp. 3d at 849. At trial, the Attorney General argued that packers, which simulate a male bulge, are not “lewd” because they merely “simulate the normal male bulge that every male has,” Dkt. 78 (Trial Tr. Day 2) at 23:11-24, but

this Court found that “any use of a ‘packer’ to simulate male genitalia could be seen as lewd by some demographic.” *Woodlands Pride*, 694 F. Supp. 3d at 849.

On appeal, the Attorney General admitted that “‘packers’ may be provocative (particularly in some quarters),” Appellant Paxton’s Br., Case No. 23-20480, Dkt. 84 at 16 (5th Cir. Jan. 9, 2024), and cited several cases and dictionary definitions for the term “lewd,” but each of those cases uses the term “lewd” only in conjunction with the *Miller* obscenity test or within the context of child pornography, *id.* at 41-42.<sup>8</sup> As explained below, Texas already has a “public lewdness” statute that defines “lewdness” to require the “(1) act of sexual intercourse; (2) act of deviate sexual intercourse; or (3) act of sexual contact” either in a public place or where “the person is reckless about whether another is present who will be offended or alarmed.” Tex. Penal Code § 21.07. Unlike that law, S.B. 12 gives no definition or context for what makes the “exhibition or representation, actual or simulated, of male or female genitals” to be “lewd.” Tex. Penal Code § 43.28(a)(1)(B). This free-roaming use of the term “lewd,” like S.B. 12’s untethered use of the term “prurient interest,” fails to

---

<sup>8</sup> The cases cited by the Attorney General on the term “lewd” all concern statutes involving child pornography, which is not constitutionally protected like the performances at issue here. *See, e.g., United States v. Wiegand*, 812 F.2d 1239, 1243 (9th Cir. 1987); *Tovar v. State*, 165 S.W.3d 785 (Tex. App.—San Antonio 2005, no pet.); *Roise v. State*, 7 S.W.3d 225 (Tex. App.—Austin 1999, pet. ref’d).

give a “person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Grayned*, 408 U.S. at 108.

As this Court noted, the lack of definition of the term “Performer” is also “problematic.” *Woodlands Pride*, 694 F. Supp. 3d at 849. While this term has a more ascertainable plain meaning than “prurient interest” or “lewd,” it still creates ambiguity about who can be punished under S.B. 12, especially since the statute imposes criminal penalties regardless of “whether compensation for the performance is expected or received.” Tex. Penal Code § 43.28 (b). Thus, an audience member who actively engages in a performance—such as an audience member called on stage to dance or engage in “twerking”<sup>9</sup>—has no notice of whether they too could be criminalized by S.B. 12.

This Court also noted that “S.B. 12 does not define the word ‘control.’” *Woodlands Pride*, 694 F. Supp. 3d at 840 n.82. Although this term has an ordinary meaning that the Fifth Circuit identified in its standing analysis, *see Woodlands Pride*, 168 F.4th at 305 (quoting *Control*, Black’s Law Dictionary (11th ed. 2019) (defining “Control” as, *inter alia*, “[t]o exercise power or influence over”)), this term still fails to give sufficient notice about what S.B. 12 proscribes. Individuals operating a business, hosting an event, performing a routine, or even providing

---

<sup>9</sup> See *supra* n.7.

services for such an event (such as security, lighting, music, etc.) potentially qualify as “a person who controls the premises of a commercial enterprise.” Thus, the law’s broad use of this term fails to give adequate guidance to a reasonably prudent person about whether they exercise enough “control” to be held liable.

### **3. The Lack of Scienter Exacerbates S.B. 12’s Vagueness**

The Supreme Court “has recognized that a scienter requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.” *Vill. of Hoffman Ests.*, 455 U.S. at 499 (1982). “Scienter” requires either “knowledge” or “intent.” *Scienter*, *Black’s Law Dictionary* (12th ed. 2024). “[A]n important tool to . . . stop people from steering ‘wide[ ] of the unlawful zone’—is to condition liability on the State’s showing of a culpable mental state.” *Counterman v. Colorado*, 600 U.S. 66, 75 (2023) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); *see also United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring) (“[M]ens rea requirements [ ] provide ‘breathing room’ for more valuable speech by reducing an honest speaker’s fear that he may accidentally incur liability for speaking.”).

Scienter is especially important in the First Amendment context because it “‘alleviate[s] vagueness concerns,’ ‘narrow[s] the scope of [its] prohibition[,] and limit[s] prosecutorial discretion.’” *McFadden v. United States*, 576 U.S. 186, 197 (2015) (citation omitted). Even for laws that are actually aimed at obscenity, “[t]he

Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity.” *Mishkin v. State of New York*, 383 U.S. 502, 511 (1966).

S.B. 12 plainly lacks any scienter requirement, and the text of the law does not reference any *mens rea*. Before the trial court, the Attorney General argued that a mental culpability of recklessness should be read into the statute, Dkt. 52 at 40-41, and he conceded that the civil penalties of S.B. 12 impose strict liability, Dkt. 78 (Trial Tr. Day 2) at 49:6-7 and 50:16-51:6. On appeal, the Attorney General argued that a standard of criminal negligence should be required for every aspect of S.B. 12, *see* Appellant Paxton’s Br., Case No. 23-20480, Dkt. 84 at 17 (5th Cir. Jan. 9, 2024), but that argument lacks textual or statutory support.

Under the Texas Penal Code’s general culpability statute, Tex. Penal Code § 6.02(b)-(c), S.B. 12’s criminal offense requires a *mens rea* of recklessness or greater. But there is *no* statute or case law to support the application of the Texas Penal Code’s mental culpability statute to the *civil* penalties triggered by S.B. 12, as the Attorney General conceded at trial. Dkt. 78 (Trial Tr. Day 2) at 49:6-7 and 50:16-51:6. Because Sections One and Two of the law do not contain any criminal offense, the culpability requirements of the Penal Code do not apply. Instead, the plain language of S.B. 12’s civil provisions shows that they impose strict liability, which often applies to civil laws “that are regulatory, public welfare, or mala prohibita in

nature, [and] those for example that are designed to protect children.” *Aguirre v. State*, 22 S.W.3d 463, 475 (Tex. Crim. App. 1999), *as modified on denial of reh’g* (Dec. 8, 1999) (internal quotation marks and citations omitted). This lack of *mens rea* not only provides insufficient notice to the general public about who may be ensnared by S.B. 12 but also gives nearly unbridled discretion to enforcement authorities.

### **C. S.B. 12 Will Lead to Arbitrary and Discriminatory Enforcement**

Because so many of its terms are vague and indeterminate, S.B. 12 lacks “explicit standards” that would enable enforcement authorities “to avoid arbitrary and discriminatory applications.” *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 551 (5th Cir. 2008). At trial, the Attorney General agreed that the “prurient sexual interest is up to various legal interpretations” and posited that liability under the law would “be judged eventually by a jury.” Dkt. 77 (Trial Tr. Day 1) at 197:2-3; Dkt. 78 (Trial Tr. Day 2) at 102:6-12. But the text itself fails to give nearly any guidance to enforcing authorities about who may be fined or arrested under the statute or under what standards. The law thus fails the second part of the vagueness test applied in *Roy* because it “fails meaningfully to guide the police and thus poses a substantial risk of arbitrary or discriminatory enforcement.” 950 F.3d at 252.

The Fifth Circuit in *Roy* recognized the importance of striking down vague laws that limit free speech but found a city ordinance in Louisiana to pass

constitutional muster. Because the plaintiff in *Roy* did “not argue that the ordinance fails to provide fair notice of the conduct it prohibits,” the court analyzed only the second vagueness prong of whether the ordinance “permits arbitrary and discriminatory enforcement.” 950 F.3d at 252 (internal quotation marks and citation omitted). Importantly, the Fifth Circuit found the potential vagueness of the ordinance to be “ameliorated by a state court’s authoritative interpretation[.]” concerning “substantially similar [.] language” of “an earlier version of the city ordinance.” *Id.* (citing *State v. Jordan*, 369 So.2d 1347 (La. 1979)). The ordinance’s “commonly understood language” authoritatively interpreted by the state court “provide[d] notice to the public and meaningful guidance to the authorities” that had already proved workable “to a diverse array of factual scenarios” through state court litigation. *Id.* at 253 (internal quotation marks and citations omitted).

S.B. 12 differs markedly from the city ordinance in *Roy*. First, Plaintiffs have asserted throughout this litigation that S.B. 12 fails **both** prongs of the vagueness test, as this Court found. *See Woodlands Pride*, 694 F. Supp. 3d at 849-50. Second, unlike in *Roy*, there is no state court interpretation or commonly understood language that provides adequate notice to the public or meaningful guidance to authorities of what kind of performances are prohibited. Although the Fifth Circuit instructed this Court to consider *Roy*’s additional rule language that courts “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 [*i.e.* not vague] in the vast majority of its intended applications,’” *Woodlands Pride*, 168 F.4th at 308 (quoting *Roy*, 950 F.3d at 252), it is **not** clear what S.B. 12 “as a whole prohibits” **nor** is the law valid under any of its intended applications, let alone a “vast majority of them,” *see infra* Section III. Thus, the facial vagueness rules that *Roy* espouses apply to S.B. 12 and render it impermissibly vague.

Because S.B. 12 does not require that any work or performance be judged as a whole, law enforcement authorities have sweeping discretion to determine if single instances during a performance amount to “prurient” or “lewd” content without any decipherable rule language. As this Court rightly concluded, “opinions on what is lewd and inappropriate is a matter of great divergence amongst the population.” *Woodlands Pride*, 694 F. Supp. 3d at 849-50. This great divergence of opinion shows that S.B. 12 “vests virtually complete discretion in the hands of the police” and other enforcement officials and lacks the “minimal guidelines” required for due process. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Because S.B. 12 “confers on police a virtually unrestrained power to arrest and charge persons with a violation . . . [t]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.” *Bd. of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (internal quotation marks and citations omitted).

The law thus fails both prongs of the facial vagueness test reaffirmed in *Roy* and should be re-declared unconstitutionally vague.

### **III. S.B. 12 Facially Violates the First Amendment under *Moody***

S.B. 12 violates the First Amendment under the *Moody* framework because the “ratio” of unconstitutional applications to constitutional ones is as “lopsided” as it gets, which renders the law facially overbroad. *See Hansen*, 599 U.S. at 770. Under *Moody*, a court’s analysis proceeds in two steps. In conducting the first step, the Court “must evaluate the full scope of the law’s coverage” and conduct an “inquiry into how a law works in all of its applications.” *Moody*, 603 U.S. at 744. In “explor[ing] the laws’ full range of applications,” the Court should go beyond the “heartland” of what the law is aimed at to consider “the sphere of other applications.” *Id.* at 726. Once the law’s scope and breadth are determined, the Court must decide where applications “fall on different sides of the constitutional line.” *Id.*

Importantly, while *Moody* requires this two-step analysis, it does not change the substantive legal standard that this Court previously relied on in declaring S.B. 12 facially overbroad. *Woodlands Pride*, 694 F. Supp. 3d at 847 (“The substantial overbreadth doctrine requires a court to invalidate a law as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep’”) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). Indeed, the Fifth Circuit just recently reaffirmed this exact legal standard in

*Merriott* and emphasized the importance of facial overbreadth challenges “for the benefit of society” because they “prevent [laws or policies] from chilling the First Amendment rights of other parties not before the court.” *Merriott*, 2026 WL 1830752, at \*3 (quoting *Lowery v. Mills*, 157 F.4th 729, 745 (5th Cir. 2025), *cert. denied*, No. 25-927, 2026 WL 1855135 (June 29, 2026)). Thus, while facial overbreadth challenges “come[] at a cost,” *Moody*, 603 U.S. at 723, they remain a critical pathway for guarding against the sweeping censorship of constitutionally protected speech.

Where a statute’s language is so “unbounded” that it creates an “unquantifiable” number of “possible applications,” the Court is not required to list out hundreds or thousands of hypothetical applications. *See Merriott*, 2026 WL 1830752, at \*5–6 (identifying just “a few” examples of constitutionally protected speech that a policy covers while explaining that “[t]he possible applications are unquantifiable, especially when not harnessed by any limiting principle”); *Nw. Ass’n of Indep. Schs. v. Labrador*, 166 F.4th 1148, 1157 (9th Cir. 2026) (rejecting the argument that “Plaintiffs must show both that H.B. 710 has so many unconstitutional applications that it is facially overbroad and that these applications are unambiguously required by the statute.”). Rather, this inquiry can be conducted through legal analysis alone, as the Fifth Circuit and other courts have recently demonstrated. *See Merriott*, 2026 WL 1830752, at \*5; *Matsumoto v. Labrador*, 122

F.4th 787, 806 (9th Cir. 2024). When analyzed through the appropriate *Moody* framework, S.B. 12 remains a law that fails these standards and is facially overbroad.

### **A. Construing S.B. 12 under *Moody* Reveals Its Broad Scope**

Under the first step of the *Moody* analysis, the Court must first “assess the state laws’ scope.” *Moody*, 603 U.S. at 724. “What activities, by what actors, do the laws prohibit or otherwise regulate?” *Id.* “Before a court can do anything else with these facial challenges, it must address that set of issues—in short, [it] must determine what the law covers.” *Id.* at 725. When conducting this analysis, courts “start, of course, with the [law’s] text, and proceed from the understanding that unless otherwise defined, . . . terms are generally interpreted in accordance with their ordinary meaning.” *Merriott*, 2026 WL 1830752, at \*5 (internal quotation marks and citations omitted).

#### **1. Definition of “Sexually Oriented Performance”**

All three sections of S.B. 12 are centered around the term “sexually oriented performances.” *See Woodlands Pride*, 168 F.4th at 298.

S.B. 12 defines “sexually oriented performance” as “a visual performance” that (1) features a performer who is either (a) “nude” or (b) “engages in sexual conduct” and (2) “appeals to the prurient interest in sex.” Tex. Penal Code § 43.28 (a)(2). As this Court previously found, “S.B. 12 is extremely broad, and the five categories of ‘sexual conduct’ are written to go far beyond the established standards

provided for by the United States Supreme Court’s *Miller* test and Texas’ statute for indecent exposure.” *Woodlands Pride*, 694 F. Supp. 3d at 848-49.

**a. Visual Performance**

S.B. 12 only applies to “visual performances.” This means that any conduct or expressive activity that is not part of a “visual performance” is not reached by the statute. While not defined in S.B. 12, the word “performance” is defined in the Texas Penal Code as “a play, motion picture, dance, *or other exhibition* performed before an audience.” Tex. Penal Code § 43.21(a)(3) (emphasis added). Although “visual” and “exhibition” are not defined in S.B. 12 or elsewhere under Texas law, the Court may look to common usage and dictionary definitions when conducting the *Moody* analysis. *See Merriott*, 2026 WL 1830752, at \*5. When assessing the law’s scope, the word “visual” can mean “done or executed by sight” or “attained or maintained by sight.” *Visual*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/visual> (last visited July 9, 2026). “Exhibition” can be defined as “a public showing (as of works of art, objects of manufacture, or athletic skill).” *Exhibition*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/exhibition>.

On its face, S.B. 12 only applies to visual performances, which are generally shielded by the First Amendment unless obscene or obscene for minors. *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (“By excluding live

entertainment . . . [the] ordinance prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments. Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”) (collecting cases); *see also id.* at 66 (“Nor may an entertainment program be prohibited solely because it displays the nude human figure. ‘[N]udity alone’ does not place otherwise protected material outside the mantle of the First Amendment”) (citations omitted).

While some performances that contain no “visual” component at all are excluded from the statute’s reach—such as a book, audiobook, song, or radio program—even shows that rely primarily on singing or the spoken word, such as stand-up comedy, slam poetry, or the opera still contain “visual” elements and fall within S.B. 12’s ambit. This makes the law apply to countless exhibitions and events with an audience, including sports matches, cheerleading and dance contests, karaoke, musicals, art exhibitions, comic book conventions, ballet, college sorority and fraternity events, and more. *Merriott*, 2026 WL 1830752, at \*5-6 (noting that when terms are “so unbounded . . . [t]he possible applications are unquantifiable”).

**b. Nude**

S.B. 12 borrows a broad definition of “nude” from the Texas Business & Commerce Code, which historically only incurred civil—and not criminal—penalties. “Nude” is defined as “(A) entirely unclothed; or (B) clothed in a manner that leaves uncovered *or visible* through less than fully opaque clothing *any portion* of the breasts below the top of the areola of the breasts, if the person is female, or *any portion of* the genitals *or buttocks*.” Tex. Bus. & Com. Code § 102.051(1) (emphases added).

Because neither S.B. 12 nor the Business and Commerce Code define this term’s subparts beyond their plain language, common usage and dictionary definitions can be used to assess the law’s scope under the *Moody* analysis. *See Merriott*, 2026 WL 1830752, at \*5. Here, “visible” can mean “capable of being seen” or “exposed to view.” *Visible*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/visible>. “Portion” is “an individual’s part or share of something.” *Portion*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/portion>. This means that if any “part” of a person’s buttocks, genitals, or breasts below the top of the areola are “exposed” or “capable of being seen,” that person is “nude” under S.B. 12.

“Buttocks” can be defined as “the seat of the body” or “the back of a hip that forms one of the fleshy parts on which a person sits.” *Buttocks*, Merriam-Webster,

<https://www.merriam-webster.com/dictionary/buttocks>. For most observers, it may be impossible to determine where precisely someone’s buttocks begins or ends. And under S.B. 12, anytime a leotard or other garment rides up slightly to expose even a small part of a performer’s butt, that would render the performer “nude.”

Similarly, “breast” can be defined as “either of the pair of mammary glands extending from the front of the chest in pubescent and adult human females and some other mammals” or “something (such as a front, swelling, or curving part) resembling a breast.” *Breasts*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/breasts>. As this Court noted, “it is not clear that the exposure of fake breasts would come into the definition of nude under S.B. 12.” *Woodlands Pride*, 694 F. Supp. 3d at 836.<sup>10</sup> Even if the Court adopts a narrow view and requires that “nude” only includes the showing of people’s natural breasts or buttocks without any padding or prosthetics, S.B. 12’s definition of “nude” is still quite broad.

For example, swimmers or divers in the Olympics could run afoul of S.B. 12 if their swimsuits show even a millimeter of their butts. Celebrity singers like Lady Gaga, Beyoncé, Jennifer Lopez, or Dolly Parton could be accused of being “nude”

---

<sup>10</sup> It is also unclear whether the term “genitals” includes breasts. *See Genitals*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/genitals> (defining “genitals” as “the sexual or reproductive organs located on the outside of the body,” which arguably would include breasts).

for wearing low-cut tops that show cleavage below the areola. Even someone simply having a hole in their swimsuit or undergarments risks being “nude” in violation of the law, even though wardrobe malfunctions and leotards “rid[ing] up the buttocks . . . happen[] all the time in performance art.” Dkt. 77 (Trial Tr. Day 1) at 62:14–24; *Woodlands Pride*, 694 F. Supp. 3d at 836 (noting that Bandit’s breastplate “can slip” even at all-ages events). Based on the plain language of S.B. 12, the definition of “nude” plainly applies to performances that are not obscene or obscene for minors, as further described below.

**c. Sexual Conduct**

S.B. 12 also applies to any performer who “engages in sexual conduct,” which contains five prohibitions:

- (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.

Tex. Penal Code § 43.28(a)(1) (emphases added). Each of these categories applies to huge swaths of performances that are not obscene or obscene for minors.

**i. Sexual Acts**

The “exhibition *or representation*, actual *or simulated*, of sexual acts, including vaginal sex, anal sex, and masturbation” has a broad reach because it is not limited to “actual” sex acts. S.B. 12 defines “sexual acts” to “*includ[e]* vaginal sex, anal sex, and masturbation.” *Id.* § 43.28(a)(1)(A) (emphasis added). Because “includes” is a term of enlargement, the law is not limited to these specific “sexual acts” but plainly includes others that may be similar, such as acts like oral sex, making out, or heavy touching.

This section’s use of the terms “representation” and “simulated” further expands its scope. “Representation” can be defined as a “likeness or image,” *Representation*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/representation>, while “simulated” can be defined as “fake” or “made to look genuine,” *Simulated*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/simulated>. Under the plain meaning of either term, any kind of similarity or depiction of a “sexual act” could be ensnared by S.B. 12. Broadway plays featuring actors kissing passionately or going behind a curtain to “represent” having sex could be accused of performing “sexual acts” on stage. Comedians who jokingly fondle a dildo on stage or move their hand quickly to mimic masturbation

risk being fined or criminally charged. And even common dance moves like hip thrusts, twerking, or rolling one's body could count as a "sexual act."

## ii. Genitals in a Lewd State

The second definition of "sexual conduct" includes "the exhibition *or representation*, actual *or simulated*, of male or female genitals *in a lewd state*, including a state of sexual stimulation or arousal." Tex. Penal Code § 43.28(a)(1)(B) (emphases added). As this Court previously found, "S.B. 12 does not provide any guidance or standard in determining what is lewd or barred by S.B. 12" and it is "obvious opinions on what is lewd and inappropriate is a matter of great divergence amongst the population." *Woodlands Pride*, 694 F. Supp. 3d at 849.

As with the section above, the word "including" is a term of enlargement, and S.B. 12's prohibition on the display of genitals "in a lewd state" is not limited to a "state of sexual stimulation or arousal." The statute contains no definition of the term "lewd," and the only cases that the Attorney General has cited for this term relate specifically to the context of child pornography or obscenity. *See supra* n.8. As with the free-roaming "prurient interest" standard, the term "lewd" untethered from its broader context has no clear meaning, such that "any use of a 'packer' to simulate male genitalia could be seen as lewd by some demographic." *Woodlands Pride*, 694 F. Supp. 3d at 849.

Beyond packers, the use of a dildo as a microphone, stick, pointer, wand, or other object for comedic effect, falls within the ambit of this section as the exhibition of simulated male genitals in a lewd state. Or the ancient Greek plays by Aristophanes featuring exaggerated phalluses worn on the outside of performers' clothing would also be proscribed. See K. Marra & B. Clayton, *Phallocracy and Phallic Caricature: Re-Viewing the Iconography of Greek Comedy*, 34 Theatre Surv. 5 (May 1993).

As noted above, it is not clear whether breasts fall within S.B. 12's definition of "genitals." If they do, then breastplates and other simulated or actual breasts would also violate this part of S.B. 12. And representations relating to vaginas could run afoul of this section too, including Georgia O'Keeffe's flower paintings, certain performances of *The Vagina Monologues*, or music videos of popular songs like *WAP*, which stands for "Wet Ass Pussy," or *Pynk* by Janelle Monáe.

### **iii. Exhibition of a Device**

The third definition of "sexual conduct" is "the exhibition of a device designed and marketed as useful primarily for the sexual stimulation of male or female genitals." Tex. Penal Code § 43.28(a)(1)(C). This includes any exhibition of a dildo, vibrator, butt plug, blow-up doll, or countless other sex toys, and it reasonably

applies to condoms and lubricants if used in a performance.<sup>11</sup> If a performer uses one of these devices as part of a costume, throws them into the crowd, or uses them to mimic a microphone or other prop, it would meet this definition of “sexual conduct.”

#### **iv. Contact**

The fourth definition of “sexual conduct” is “actual contact *or simulated contact* occurring between one person and the buttocks, breast, or any part of the genitals of another person.” Tex. Penal Code § 43.28(a)(1)(D) (emphasis added). The term “contact” can be construed as “a union or junction of surfaces.” *Contact*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/contact>. Many activities fall within this category, including hugging, dancing, conga lines, slaps on the butt, chest bumps, sitting on a lap, falling on another person, gymnastic or acrobatic acts, sitting on someone’s shoulders, riding on someone’s back, etc. This definition is so broad that no actual contact needs to occur. Even “simulated contact” and pretending to do one of these actions is sufficient to qualify a performance as encompassing “sexual conduct.”

---

<sup>11</sup> The Fifth Circuit acknowledged that condoms or lubricants might meet this definition but held that “[a] vendor handing out condoms and sexual lubricant is not ‘a visual performance,’” *Woodlands Pride*, 168 F.4th at 302, when assessing standing.

### v. Gesticulations Using Accessories or Prosthetics

The fifth definition of “sexual conduct” includes “the exhibition of sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics.” Tex. Penal Code § 43.28(a)(1)(E). “Gesticulation” can be defined as “the act of making gestures,” *Gesticulation*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/gesticulation>, which in turn means “the use of motions of the limbs or body as a means of expression,” *Gesture*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/gesture>. The term “gesticulation” is therefore capacious, and the term “sexual” also has a broad meaning “of, relating to, or associated with sex,” *Sexual*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/sexual>. The combined phrase “sexual gesticulation” is thus quite sweeping. It includes any movement or gesture that could be perceived as “sexual,” such as dancing, thrusting of hips, shaking one’s chest, playing with hair, touching one’s breast, shaking one’s butt, crawling on stage, waving seductively to an audience member, blowing a kiss, and more.

The word “accessor[y]” exacerbates this section’s expansive scope. It can be defined as “a thing of secondary or lesser importance.” *Accessory*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/accessory>. While “prosthetic” is narrower, *see Prosthesis*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/prosthesis> (defining this term as “an artificial device to

replace or augment a missing or impaired part of the body”), this does not limit this section’s broad reach since the word “exaggerate” means to “enlarge” or “overstate.”

*Exaggerate*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/exaggerate>.

When this section is construed under step one of *Moody*, any type of breastplate, packer, sock or other padding around the genitals, padding around the hips, or padding around the buttocks could be considered a “prosthetic” that “exaggerate[s]” sexual characteristics. Moreover, “accessories . . . that exaggerate male or female sexual characteristics” are ubiquitous in our society. They include: wigs; hair extensions; makeup; glitter; false eyelashes; jewelry; costumes; padded bras; padding around the chest; high heels; corsets; panty hose; stuffed speedos; and more.

Although this Court correctly found that this section discriminates based on viewpoint by targeting drag artists who “impersonat[e] or exaggerat[e]” sexual characteristics, *Woodlands Pride*, 694 F. Supp. 3d at 847, it is also written so broadly that it applies to countless subtle types of exaggerations of sexual characteristics, regardless of someone’s gender. For example, the statute is not limited to exaggerating characteristics that differ from someone’s sex assigned at birth. Even when a cisgender woman wears a padded bra or longer eyelashes during a performance, that meets the statutory definition of “using accessories or prosthetics

that exaggerate male or female sexual characteristics.” Or when a male actor wears a phallic prop when performing an ancient Greek comedy, that too could violate this section. As the Attorney General admitted at trial: “Performers of all types often don false eyelashes, lavish wigs, dramatic makeup; and anyone desiring to appear[] more well-endowed than they naturally are could enhance themselves with accessories or prosthetics.” Dkt. 78 (Trial Tr. Day 2) at 103:25-104:3.

**d. Appeals to the Prurient Interest in Sex**

S.B. 12 only targets performances that “appeal[] to the prurient interest in sex.” Tex. Penal Code § 43.28(a)(2)(B). As discussed above, this term renders the law unconstitutionally vague when divorced from the broader test for obscenity or obscenity for minors. This also makes S.B. 12 overbroad because the law restricts any performance that may be “prurient” even if it is not obscene or obscene for minors, and without defining how “prurience” can be determined, under what standard, or by requiring that the performance be examined as a whole.

For standing purposes, the Fifth Circuit noted that “prurient” material “at a minimum, must be ‘in some sense erotic.’” *Woodlands Pride*, 168 F.4th at 299. Although the Supreme Court only applied this definition within the context of the three-part *Miller* test, *see Ashcroft*, 535 U.S. at 579, using this definition on its own expands rather than narrows S.B. 12’s scope.

The word “erotic” can be defined as “strongly marked or affected by sexual desire” or “of, devoted to, or tending to arouse sexual love or desire.” *Erotic*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/erotic>. Thus, a scene of two people kissing in a PG movie, the romantic pining in *Romeo and Juliet* or *West Side Story*, or an attractive pop star wearing a low-cut and revealing dress could be viewed as “erotic” depending on people’s subjective interpretation.

## **2. Other Aspects of S.B. 12 Highlight its Overbreadth**

Other aspects of S.B. 12 also underscore its overbreadth. As described above, the statute contains no scienter requirement and no *mens rea* at all for civil penalties, which means it proscribes even unknowing and unintentional “prurience” in performances.

As noted by the Fifth Circuit, “control” can be defined as “[t]o exercise power or influence over.” *Woodlands Pride*, 168 F.4th at 305. This means that “control” is not synonymous with ownership, and any person who “exercise[s] power or influence over” the “premises” during a show is potentially liable for civil penalties under Section One. “Premises” can be defined as “a building or part of a building” or “an area of land with the buildings that are on it.” *Premises*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/premises>. This substantially broadens S.B. 12’s reach beyond a minor being a ticketed observer of a show or being within the line of sight of a prohibited performance. Instead of actually observing a show,

a minor can merely be “present on the premises” such that they trigger liability by simply being in the same building or on the same area of land.

Additionally, S.B. 12 prohibits performances even where no minors are present at all. Section Two proscribes *all* “sexually oriented performances” on *all* public property—regardless of whether minors are present or even nearby. Tex. Loc. Gov’t Code § 243.0031. Under this section, municipalities and counties cannot allow constitutionally protected performances solely among adults if these performances fall within S.B. 12’s ambit. This means that a college theater group cannot host a play with sexual themes on a public university campus even if the audience is limited solely to adults. Or a group of adults cannot rent a public park to show a rated-R movie with nudity and sexual themes, even if no minors are present or even nearby.

Section Three also explicitly allows for criminal penalties to be imposed against performers where minors are not actually present. The text of this section triggers criminal liability for any “person [who] engages in a sexually oriented performance: (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.” Tex. Penal Code § 43.28(b) (emphasis added). Although the statute does not define what it means to perform at a time or place “in a manner that could reasonably be expected to be viewed by a child,” this language is incredibly broad. As this Court already found, “[t]he plain

reading of this could virtually ban any performance in public that is deemed to violate S.B. 12, including drag shows.” *Woodlands Pride*, 694 F. Supp. 3d at 848.

Section Three also imposes criminal penalties for any “sexually oriented performance . . . in the presence of an individual younger than 18 years of age,” regardless of where such a performance occurs. Tex. Penal Code § 43.28(b)(2). This means that S.B. 12 reaches anywhere and everywhere in Texas, including in people’s homes and private spaces. If parents want to stage a drag show that violates S.B. 12 for their 17-year-old’s birthday party in their own home, they risk facing criminal charges. Or if a bachelorette party hires an exotic male dancer and a mom with an infant briefly walks past the show, the performer could be thrown in jail. This is striking and impermissible overbreadth, since “[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.” *Stanley v. Georgia*, 394 U.S. 557, 565 (1969); *see also Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 272 (5th Cir. 2024), *cert. granted, aff’d*, 606 U.S. 461 (2025) (noting the importance of “[p]arental participation or consent” to determine content their children may view).

S.B. 12 also imposes criminal penalties “whether compensation for the performance is expected or received.” Tex. Penal Code § 43.28(b). By banning performances done without compensation, the law extends to individuals performing

for friends, those practicing their performances, and people donating their time and talent at charity fundraisers benefiting philanthropic causes.

The fact that the term “performer” is open-ended stretches S.B. 12’s applicability even further. An audience member who is invited on stage to participate in a dance or game could be accused of “engag[ing] in a sexually oriented performance” and subject to criminal penalties, even if that person did not plan the show nor knowingly engage in activities that might be “in some sense erotic.” Moreover, while S.B. 12 authorizes penalties of up to \$10,000 fines and a class A misdemeanor for “each violation,” Tex. Health & Safety Code § 769.002(b), the law does not define what a “violation” means, such that enforcement authorities have nearly limitless discretion on how many charges to assert against a multi-hour performance or multi-day event. Because the Legislature specifically discarded *Miller*’s requirement that a performance’s prurience be judged “as a whole,” the ambiguity over what constitutes a single violation means that performers could be charged with multiple offenses even for the same dance routine.

#### **B. S.B. 12 Applies to a Vast Array of Constitutionally Protected Performances**

Based on the constructions above under step one of *Moody*, the plain language of S.B. 12 creates an enormous sweep. As this Court correctly concluded, “[i]t is not unreasonable to read S.B. 12 and conclude that activities such as cheerleading, dancing, live theater, and other common public occurrences could possibly become

a civil or criminal violation of S.B. 12.” *Woodlands Pride*, 694 F. Supp. 3d at 848. Because S.B. 12’s terms are so “unbounded,” it is impossible for this Court to list all “possible applications” of the statute, which are “unquantifiable.” *See Merriott*, 2026 WL 1830752, at \*5–6. Thus, in beginning to address the second step of *Moody*—“to decide which of the laws’ applications violate the First Amendment, and to measure them against the rest,” *Moody*, 603 U.S. at 708—it may first be helpful to consider what the statute does *not* cover and how it extends far beyond the government’s constitutional authority to restrict speech.

### **1. S.B. 12 Is Not Aimed at Obscenity or Obscenity for Minors**

S.B. 12 reaches countless performances that are neither obscene nor obscene to minors. Even where such performances involve “erotic” themes such that they “appeal to the prurient interest in sex,” the government lacks “a free-floating power to restrict the ideas to which children may be exposed.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 793-94 (2011). “Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975). “[T]o protect explicit material that has social value,” the Supreme Court has “limited the scope of the obscenity exception, and ha[s] overturned convictions for the distribution of

sexually graphic but nonobscene material.” *United States v. Williams*, 553 U.S. 285, 288 (2008).

During trial and on appeal, the Attorney General disclaimed that S.B. 12 applied to obscenity and defended the law by urging application of the “secondary effects” doctrine. *See, e.g.*, Appellant Paxton’s Br., Case No. 23-20480, Dkt. 84 at 46 (5th Cir. Jan. 9, 2024) (asserting that the Attorney General is not “defending S.B. 12’s constitutionality . . . on the ground that Plaintiffs’ conduct involves obscene speech unprotected by the First Amendment”); *see also* Dkt. 77 (Trial Tr. Day 1) at 165:21-166:24 (striking Defendant Paxton’s expert on the secondary effects doctrine on relevance grounds after he testified that Plaintiffs’ drag shows and much of what is proscribed by S.B. 12 would not be harmful to minors). Later, the Attorney General reversed course and told the Fifth Circuit that S.B. 12 could apply to performances obscene as to minors. Appellant Paxton’s Reply Br., Case No. 23-20480, Dkt. 193 at 29 (5th Cir. May 15, 2024).

Now on remand, the Attorney General explicitly argues for the first time that the type of performances Plaintiffs testified about at trial are obscene as to minors. Dkt. 131 at 10. This belated argument is likely waived since “[a]ny issue not raised in an appellant’s opening brief [or before the trial court] is deemed waived.” *United States v. Pompa*, 434 F.3d 800, 806 n.4 (5th Cir. 2005).

Regardless, Plaintiffs’ performances are clearly not obscene or obscene for minors, and S.B. 12 is not aimed at or tailored towards obscenity for minors. The Texas Legislature knows how to draft a law that is aimed at obscenity for minors. The law at issue in *Free Speech Coalition*, Texas H.B. 1181, defined “[s]exual material harmful to minors” as material that: (1) “is designed to appeal to or pander to the prurient interest” when taken “as a whole and with respect to minors”; (2) describes, displays, or depicts “in a manner patently offensive with respect to minors” various sex acts and portions of the human anatomy, including depictions of “sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, [and] excretory functions”; and (3) “lacks serious literary, artistic, political, or scientific value for minors.” *Free Speech Coalition*, 606 U.S. at 467 (quoting Tex. Civ. Prac. & Rem. Code § 129B.001(6)). When analyzing this law, the Supreme Court explained:

[T]he State may broaden *Miller*’s “definition of obscenity” to cover that which is obscene from a child’s perspective. . . . 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*. . . . 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.”

*Id.* at 474 (emphases added) (citations omitted).<sup>12</sup> Even though H.B. 1181 specifically tracked the *Miller* test and “regulate[d] only speech that is obscene to minors,” the Supreme Court nevertheless applied intermediate scrutiny to it because of the “incidental burden that age verification necessarily has on an adult’s First Amendment right to access speech that is obscene only to minors.” 606 U.S. at 482, 495.

Unlike that law, S.B. 12 is plainly ***not*** aimed at obscenity for minors. S.B. 12 fails to incorporate even one complete prong of the test the Supreme Court approved of in *Free Speech Coalition*—let alone all three. The law at issue in *Free Speech Coalition* also contained a specific *mens rea* for its civil penalties by stating that material must be “***designed*** to appeal to or pander to the prurient interest,” *id.* at 467 (emphasis added), and it had an exception for parental consent, *Free Speech Coal.*, 95 F.4th at 272.

S.B. 12 is thus much broader and entirely distinct from the Texas law aimed at obscenity for minors that passed constitutional muster in *Free Speech Coalition*. Instead of being aimed at obscenity as to minors, S.B. 12 is instead much more akin to content-based restrictions on material deemed “explicit” or “indecent” that have

---

<sup>12</sup> Likewise, the Supreme Court in *Ginsberg v. New York*, only upheld a law aimed at restricting obscenity for minors when it tracked every prong of the obscenity test. 390 U.S. 629 (1968).

long been subject to strict scrutiny under Supreme Court precedent. *See, e.g., United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000); *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989); *Reno*, 521 U.S. at 874.

S.B. 12 also burdens adult speech far more than the law at issue in *Free Speech Coalition*, to which the Supreme Court applied intermediate scrutiny because of the burdens of age verification. 606 U.S. at 495. Far beyond requiring adults to verify their age, S.B. 12 entirely bans “sexually oriented performances” on all public property in Texas, even where no minors are present. While this subjects the law to strict scrutiny under cases involving complete bans on speech like *Erznoznik*, 422 U.S. at 213-14, the statute still fails intermediate scrutiny for the reasons this Court already found, *Woodlands Pride*, 694 F. Supp. 3d at 847 n.98. Namely, the law contains no *mens rea* for its civil penalties, it has no exception for parental consent, it does not distinguish between the age of minors, it does not require performances to be evaluated as a whole, and it does not take into account the serious value or lack of patent offensiveness of performances. Unlike the law at issue in *Free Speech Coalition*, S.B. 12 cannot possibly be viewed as “unrelated to the suppression of free speech” since it “burden[s] substantially more speech than necessary to further” the government’s interests. 606 U.S. at 495-96.

Even if S.B. 12 were aimed at obscenity or obscenity for minors—which it is not—the law’s viewpoint discrimination “directed at the specific act of

impersonating or exaggerating” sexual characteristics, *Woodlands Pride*, 694 F. Supp. 3d at 847, remains independently unconstitutional, *see Chiles v. Salazar*, 146 S. Ct. 1010, 1030 (2026) (Kagan, J., concurring) (“Because viewpoint-based laws always raise that specter [of the ‘official suppression of ideas’], they are the most suspect of all speech regulations. So much so that this Court has refused to permit viewpoint discrimination even within unprotected categories of speech, like fighting words or obscenity.”).

## **2. S.B. 12 Suppresses Numerous Non-Obscene Constitutionality Protected Works and Performances**

“Sexual expression which is indecent but not obscene is protected by the First Amendment,” *Sable*, 492 U.S. at 126, and all of S.B. 12’s applications are unconstitutional because they discriminate against performances based on content and viewpoint without satisfying strict scrutiny. *See, e.g., NetChoice v. Murrill*, 812 F. Supp. 3d 594, 646 (M.D. La. 2025) (“Because the Act’s coverage definition is content-based, strict scrutiny applies to all provisions”). This Court has already determined that S.B. 12 imposes content and viewpoint-based restrictions on protected speech and does not satisfy strict or even intermediate scrutiny. *Woodlands Pride*, 694 F. Supp. 3d at 844-47. Although these claims of content and viewpoint discrimination are distinct from facial overbreadth, *see Merriott*, 2026 WL 1830752, at \*10, they also underscore how nearly all applications of S.B. 12’s potential applications are unconstitutional at step two of the *Moody* analysis.

Even if S.B. 12 were somehow content-neutral (an argument the Attorney General has never advanced), it still prohibits huge swaths of constitutionally protected performances. The fact that S.B. 12 “does not distinguish children by the age of a child” is also “problematic,” *Woodlands Pride*, 694 F. Supp. 3d at 845-46, because it essentially “reduce[s] the adult population [] to [viewing] only what is fit for children” and “burn[s] the house to roast the pig.” See *Butler v. State of Mich.*, 352 U.S. 380, 383 (1957).

Because S.B. 12 does not require that a performance be judged as a whole or take into account social value, a single moment of eroticism in a deeply enriching performance could trigger criminal or civil penalties. This could condemn iconic aspects of American culture, like Elvis’s signature hip gyrations that made people “offended” by “his display of male sexuality,”<sup>13</sup> Dolly Parton’s “big hair[,] flamboyant clothes and [] boobs sticking up” that caused her to be chastised as a “voluptuous sex symbol,”<sup>14</sup> or Miley Cyrus’s “twerking” on stage that was widely

---

<sup>13</sup> Ana Maria Otalvaro, *Erotic Resistance: Performance, Art, and Activism in San Francisco Strip Clubs, 1960s-2010s*, at 253 n.324 (2018), available at [https://stacks.stanford.edu/file/druid:cw314pc4142/OTALVARO\\_COMBINED%20DOCS\\_TITLE\\_ABSTRACT\\_DISS-augmented.pdf](https://stacks.stanford.edu/file/druid:cw314pc4142/OTALVARO_COMBINED%20DOCS_TITLE_ABSTRACT_DISS-augmented.pdf).

<sup>14</sup> Leigh H. Edwards, *Dolly Parton, Gender, and Country Music* 44–46 (2018); Dolly Parton, *How I Developed My Glitzy Personal Style*, Time (Oct. 12, 2023), <https://time.com/collections/time100-voices/6324637/dolly-parton-behind-the-seams-fashion/>.

derided as too sexual.<sup>15</sup> This is why “the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248 (2002) (citing *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam)).

Based on the sweeping language of S.B. 12, there is “no way to read the provisions of S.B. 12 without concluding that a large amount of constitutionally protected conduct can and will be wrapped up in the enforcement of S.B. 12. It is not unreasonable to read S.B. 12 and conclude that activities such as cheerleading, dancing, live theater, and other common public occurrences could possibly” violate the law. *Woodlands Pride*, 694 F. Supp. 3d at 848. While the Fifth Circuit made clear in *Merriott* that the Court need not list an endless stream of hypotheticals when the plain meaning of a law “is so unbounded and covers a substantial amount of core First Amendment activity,” that court nevertheless found it helpful to the *Moody* analysis to list several examples of how the law applied to constitutionally protected speech. 2026 WL 1830752 at \*5-6.

---

<sup>15</sup> Ange-Marie Hancock, *Bridging the Feminist Generation Gap: Intersectional Considerations*, 10 Pol. & Gender 292, 292 (June 2014), available at <https://www.cambridge.org/core/journals/politics-and-gender/article/abs/bridging-the-feminist-generation-gap-intersectional-considerations/A52C9DE0AFE8E7AA85E57D19C5F0BEBB>.

Here, S.B. 12 applies to countless protected performances that might contain elements that are “in some sense erotic” and meet either the law’s definition of “nude” or “sexual conduct” but are not obscene or obscene for minors and are thus constitutionally protected. These examples, or any combination of them, could all trigger liability under S.B. 12 while still being constitutionally protected performances:

### **Nudity**

- A gymnast performing a floor routine wearing a leotard or other garment that rides up and reveals a small part of the butt;
- A vocalist wearing a low-cut dress that reveals a small part of the breast below the top of the areola;
- A ballet dancer who experiences a wardrobe malfunction and reveals a portion of the butt or breasts;

### **Sex Acts**

- A theater group performing a musical with a simulated sex scene on stage;
- A comedian who uses hip thrusts to simulate humping;
- A movie that features a sex scene underneath blankets or behind a curtain;

### **Genitals in a Lewd State**

- A drag king who uses a packer to simulate having a penis;
- An art exhibition with abstract paintings that look like female genitals;

- A comedian using a dildo as a prop;

### **Exhibition of a Device**

- A skit where performers wave around condoms and throw them at the audience;
- A dance where a performer caresses a vibrator;
- A musical where the cast sings a song about anal beads and waves them around on stage;

### **Contact**

- Ballet dancers who touch each other on the butt or breasts while dancing;
- Wrestlers who touch nearly every part of each other's bodies while wearing revealing clothing;
- A drag artist inviting an audience member to tip them and put money into their cleavage;
- A play where a performer pretends to slap the butt of another performer;

### **Gesticulations Using Accessories or Prosthetics**

- A Dolly Parton impersonator who uses a breast plate while dancing and making gestures;
- An Elvis impersonator who uses a packer while shaking and shimmying the hips;
- Professional cheerleaders who use hair extensions, false eyelashes, makeup, and padded bras while performing the splits and handstands.

Much like the “possible applications” that the Fifth Circuit found “unquantifiable” in *Merriott*, these are just “a few” types of constitutionally protected performances that S.B. 12 would impact. 2026 WL 1830752, at \*5. This Court need not list every possible hypothetical to which S.B. 12 would apply because “the potential applications are limitless.” *Id.* at \*7.

**C. There Are Seemingly No Constitutionally Permissible Applications of S.B. 12 Not Already Prohibited by Other Laws**

Even if a performance contains elements that could be considered “sexual” or “erotic,” it is still fully protected by the First Amendment unless it is obscene or obscene for minors. Thus, the only constitutionally permissible applications of S.B. 12 for “performances” under *Moody* are those that are obscene or obscene as to minors. But because other Texas laws already prohibit obscene performances, public lewdness, and the display of harmful material to minors, there are no constitutionally permissible applications of S.B. 12 that are not redundant of other laws and must be excluded from step two of the *Moody* framework.

When assessing whether a statute is facially overbroad, courts “look[] to its applications where it ‘actually authorizes or prohibits conduct,’ not applications that are already covered by other laws.” *Turtle Island Foods Inc.*, 818 F. Supp. 3d at 863 (quoting *Patel*, 576 U.S. at 418). Where “existing law [already] prohibit[s] . . . a small minority of circumstances” to which a new law applies, it is “invalid in a substantial majority of all applications and is appropriately enjoined facially.” *Id.* at

864; *see also City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (setting aside applications of an ordinance already prohibited by the Texas Penal Code in facial overbreadth analysis).

Texas law already defines “obscene” as “material *or a performance* that:

(A) the average person, applying contemporary community standards, would find that taken as a whole *appeals to the prurient interest in sex*;

(B) depicts or describes:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

Tex. Penal Code § 43.21(a)(1) (emphasis added). A person commits the offense of obscenity if, knowing the content and character, “produces, presents, or directs *an obscene performance* or participates in a portion thereof that is obscene or that contributes to its obscenity.” Tex. Penal Code § 43.23(c)(2) (emphasis added). Thus, any performance that “appeals to the prurient interest in sex”—and also satisfies the

other elements of obscenity—has already been prohibited in Texas since 1974. *See* Act of June 14, 1973, 63d Leg., R.S., ch. 399, § 1 (eff. Jan. 1, 1974).

Texas also has a statute that prohibits the “sale, distribution, *or display*” of “material harmful to minors.” Tex. Penal Code § 43.24 (emphasis added). This is defined as “material whose dominant theme taken as a whole:

(A) appeals to the prurient interest of a minor, in sex, nudity, or excretion;

(B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and

(C) is utterly without redeeming social value for minors.

*Id.* § 43.24(a)(2). Although this section does not specifically mention “performances,” it broadly defines “material” as “anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, *observation*, sound, or in any other manner, but does not include an actual three dimensional obscene device.” *Id.* § 43.21(a)(2) (emphasis added). “Obscene device[s]” are separately defined as “a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs,” *id.* § 43.21(a)(7), and it is an offense to “promote[] or possess[] with intent to promote any obscene . . . device.” *Id.* § 43.23(c)(1).

Texas’s “harmful to minors” statute largely mirrors the language that the Supreme Court authorized in *Free Speech Coalition* for permitting states to regulate

obscenity as to minors. Unlike S.B. 12, it contains a modified version of all three prongs of the obscenity test and requires that works be “taken as a whole.” While Texas could make more explicit that “performances” are specifically included in the definition of “harmful to minors,” S.B. 12 is not tailored to that goal and extends far beyond the constitutional authority of what the government may restrict.

Similarly, the offense of “public lewdness” renders duplicative the potential application of S.B. 12 to certain highly sexualized performances. “Public lewdness” is defined as a person engaging in an “(1) act of sexual intercourse; (2) act of deviate sexual intercourse; or (3) act of sexual contact” either in a public place or where “the person is reckless about whether another is present who will be offended or alarmed.” Tex. Penal Code § 21.07. This is generally a Class A misdemeanor and renders redundant S.B. 12’s applicability to actual sex acts or actual sexual contact in public or where minors may be present.

While “nudity” by itself is not illegal in Texas, S.B. 12’s potential applicability to highly inappropriate, naked performances is also redundant under Texas law. A person commits the offense of “disorderly conduct”—a Class C misdemeanor—if they intentionally or knowingly “expose[] [their] anus or genitals in a public place and is reckless about whether another may be present who will be offense or alarmed by [their] act....” Tex. Penal Code § 42.01 (a)(10). Likewise, a person commits the offense of “indecent exposure”—typically, a Class B

misdemeanor—if they “expose[] [their] anus or any part of [their] genitals with intent to arouse or gratify the sexual desire of any person, and [they are] reckless about whether another is present who will be offended or alarmed by [their] act.” Tex Penal Code § 21.08(a).

In light of these existing criminal laws, it is difficult to think of any scenario in which S.B. 12 would be constitutionally applicable and not duplicative of other Texas laws.<sup>16</sup>

#### **D. S.B. 12 Fails the *Moody* Overbreadth Analysis**

In sum, S.B. 12 is facially overbroad under the *Moody* analysis. In the first *Moody* step, an analysis of the law’s sweeping and often undefined terms, lack of scienter, and expansive application to numerous types of property, audiences, and performers reveals S.B. 12’s broad scope. In other words, S.B. 12 “prohibit[s] or otherwise regulate[s]” a wide array of “activities” by a myriad of “actors.” *Moody*, 603 U.S. at 724.

---

<sup>16</sup> Although a “limiting construction or partial invalidation” may limit a statute’s overbreadth in certain circumstances, *see, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), “federal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.” *Boos v. Barry*, 485 U.S. 312, 330 (1988). Like the policy at issue in *Merriott*, S.B. 12 is so “bereft of definitions [] that it contains no textual basis upon which [courts] can fashion a narrowing construction.” 2026 WL 1830752, at \*7. The Attorney General has never urged that S.B. 12’s facial overbreadth can be salvaged by any narrowing construction, nor is it possible given the law’s plainly far-reaching text.

The next step of *Moody* requires courts to “decide which of the laws’ applications violate the First Amendment.” *Id.* at 725. All of S.B. 12’s applications violate the First Amendment because the performances that the law actually impacts are constitutionally protected and targeted for disfavored treatment based on content and viewpoint. Under *Moody*, S.B. 12 therefore has no “legitimate sweep.” *Id.* at 723.

The final stage of the *Moody* analysis is to compare the law’s unconstitutional applications against its constitutional ones. For S.B. 12, its unconstitutional applications—to non-obscene dance, theatrical, comedic, and other performances—entirely eclipse its non-existent constitutionally permissibly applications that are not already prohibited by other laws. Thus, S.B. 12 is “facially invalid” because its “unconstitutional applications substantially outweigh its constitutional ones.” *Id.* at 724, 780 (Alito, J., concurring).

## CONCLUSION

This Court should fulfill the Fifth Circuit’s remand instructions by amending its final judgment to once again declare S.B. 12 unconstitutional under five independent grounds.

Dated: July 14, 2026

Respectfully submitted,

By: /s/ Brian Klosterboer

Brian Klosterboer, attorney-in-charge

TX Bar No. 24107833

SDTX No. 3314357

Chloe Kempf

TX Bar No. 24127325

SDTX No. 3852674

Charelle Lett

TX Bar No. 24139900

SDTX No. 3908204

Thomas Buser-Clancy

TX Bar No. 24078344

SDTX No. 1671940

Edgar Saldivar

TX Bar No. 24038188

SDTX No. 618958

Adriana Pinon

TX Bar No. 24089768

SDTX No. 1829959

ACLU FOUNDATION OF TEXAS,  
INC.

P.O. Box 8306

Houston, TX 77288

Tel. (713) 942-8146

Fax (713) 942-8966

bklosterboer@aclutx.org

ckempf@aclutx.org

clett@aclutx.com

tbuser-clancy@aclutx.org

esaldivar@aclutx.org

apinon@aclutx.org

Derek R. McDonald

TX Bar No. 00786101

SDTX No. 18546

Maddy Dwertman

TX Bar No. 24092371

SDTX No. 3853795

BAKER BOTTS L.L.P.

401 S. 1st Street, Suite 1300

Austin, TX 78704

Tel. (512) 322-2500

Fax (512) 322-2501

Derek.McDonald@BakerBotts.com

Maddy.Dwertman@BakerBotts.com

Brandt Thomas Roessler

TX Bar No. 24127923

SDTX No. 3853796

BAKER BOTTS L.L.P.

30 Rockefeller Plaza

New York, NY 10112

Tel. (212) 408-2500

Fax (212) 408-2501

Brandt.Roessler@BakerBotts.com

Emily Rohles

TX Bar No. 24125940

SDTX No. 3715273

BAKER BOTTS L.L.P.

910 Louisiana Street

Houston, TX 77002

Tel. (713) 229-1234

Fax (713) 229-1522

Emily.Rohles@BakerBotts.com

*Attorneys for Plaintiffs*

### **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this brief falls within the 65-page limit requested by Plaintiffs in their Unopposed Motion to File a Brief that exceeds the Court's page limit.

/s/Brian Klosterboer  
Brian Klosterboer

### **CERTIFICATE OF SERVICE**

The undersigned certifies that on the 14th day of July, 2026, a true and correct copy of the above document was served via the CM/ECF system to all counsel of record.

/s/Brian Klosterboer  
Brian Klosterboer