

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

EXTRAGRAMS, LLC; 360 QUEEN
ENTERTAINMENT LLC; BRIGITTE
BANDIT,

Plaintiffs,

v.

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.

Civil Action No. 4:23-cv-02847

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT PAXTON'S
MOTION FOR NEW OR SUPPLEMENTAL TRIAL
AND FOR DISCOVERY**

INTRODUCTION

Plaintiffs Extragrams, LLC; 360 Queen Entertainment LLC; and Brigitte Bandit (collectively, “Plaintiffs”) respectfully oppose Defendant Paxton’s Motion for New or Supplemental Trial and for Discovery (Dkt. 146) (“Motion”). The Motion should be denied because neither a new trial nor discovery is consistent with the Fifth Circuit’s mandate, the Federal Rules of Civil Procedure, or the remaining legal issues in this case.¹

The Attorney General does not cite any mechanism or rule that would authorize a new trial or discovery. He already had a full opportunity to seek expedited discovery, cross-examine Plaintiffs at trial, present his own witnesses, provide full briefing, and make timely objections at every stage of this case. Critically, Defendant Paxton has not identified any disputed fact that requires

¹ Defendant Paxton is incorrect that he “is the sole remaining Defendant in this case,” Dkt. 146 at 2, because two Defendants had final judgment entered against them and did not appeal. *Woodlands Pride v. Paxton*, 168 F.4th 293, 300 n.4 (5th Cir. 2026). The Attorney General also wrongly claims that Section One is “the only portion of th[e] statute now at issue.” Dkt. 146 at 2. This Court held that all three sections of S.B. 12 are not severable, which the Fifth Circuit did not disturb on appeal. *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 842 (S.D. Tex. 2023).

Plaintiffs also dispute the merits arguments that the Attorney General intersperses throughout the Motion. *See, e.g.*, Dkt. 146 at 6 (“It is highly unlikely that Plaintiffs have met this ‘rigorous standard.’”). Plaintiffs believe their supplemental brief (Dkt. 149) fully rebuts the Attorney General’s merits arguments and incorporate that briefing by reference here.

discovery or a new trial, or that needs to be developed before this Court can fully satisfy the required legal analysis from the Fifth Circuit.

The Fifth Circuit’s mandate is limited to “reconsider[ation]” of Plaintiffs’ facial merits challenges—not a new trial or discovery. The Fifth Circuit relied on the current trial record to resolve claims against five Defendants, which it could not have done if the record were inadequate. *See Woodlands Pride, Inc. v. Paxton*, 168 F.4th 293, 301-03 (5th Cir. 2026). After making explicit findings “[b]ased on the evidence introduced at trial,” the Fifth Circuit held that at least one Plaintiff (360 Queen Entertainment) met its trial burden of proving standing sufficient for this facial, pre-enforcement challenge. *See id.* at 304. As a result, the court remanded to “reconsider”—not retry—the facial challenge on the merits. *Id.* at 308.

While the Attorney General concedes that “standing is present” at this stage of the case, Dkt. 140 at 5, he improperly seeks “reasonable document production and deposition discovery of the named Plaintiffs.” Dkt. 146 at 13. But such discovery is irrelevant to the merits of Plaintiffs’ *facial* challenge to S.B. 12, which is based on questions of law and the text of the statute, not its application to specific Plaintiffs. The only issue relevant to Plaintiffs’ specific venues and performances would be standing, which has now been resolved as the law of the case, and the Attorney General concedes is not at issue.

Throughout the Motion, the Attorney General fails to identify any contested or material fact that needs to be developed to aid this Court’s analysis. Because the facial issues that the Fifth Circuit instructed this Court to reconsider are purely legal in nature, the Attorney General is not entitled to discovery or a new trial. Where “Plaintiffs bring [a] First Amendment challenge against [a law] on its face, not as applied . . . courts have commonly held that parties do not need discovery to defend a law’s facial validity.” *Fund Tex. Choice v. Deski*, No. 1:22-CV-859-RP, 2023 WL 8856052, at *14 (W.D. Tex. Dec. 21, 2023); *see also Gen. Elec. Co. v. Johnson*, 362 F. Supp. 2d 327, 337 (D.D.C. 2005) (explaining that “a facial challenge to the text of a statute does not typically require discovery for resolution because the challenge focuses on the language of the statute itself”).

Just today, the *en banc* Eleventh Circuit assessed a facial challenge to the constitutionality of Florida’s law prohibiting minors from attending “adult live performance[s]” using only legal analysis and “additional briefing” following a preliminary injunction ruling, without any discovery. *See HM Fla.-ORL, LLC v. Sec’y of Fla. Dep’t of Bus. & Pro. Regul.*, No. 23-12160, slip op. at 4 (11th Cir. Aug. 4, 2026) (*en banc*) (Exhibit 1). Because that law “tracks the *Miller* standard as adapted for minors”—barring the admission of minors to performances “only if they predominately appeal to the prurient interest, are patently offensive to prevailing adult standards with respect to what is suitable for that child’s age, *and* lack serious

literary, artistic, political, or scientific value for that child’s ages”—the court found the law to not be overbroad. *Id.* at 18-19. And because the Florida Supreme Court had “authoritatively construed the meaning of the word ‘lewd,’” the court found the law to not be vague. *Id.* at 19. This stands in stark contrast to S.B. 12, which, as Plaintiffs explain in their supplemental brief, Dkt. 149, intentionally eschews the *Miller* test and lacks any authoritative foundation to clarify the law. The Eleventh Circuit decision further illustrates that the facial analysis of Plaintiffs’ First Amendment and vagueness claims can be conducted through legal analysis alone without further factual development.

Although there is no need for discovery or a new trial in this facial challenge, the Attorney General cites language from the Fifth Circuit that the Parties must “adequately develop the record” as the primary basis for the Motion. *See* Dkt. 146 at 2 (quoting *Woodlands Pride*, 168 F.4th at 308). But the Parties have fulfilled this obligation by providing supplemental briefing to the Court and applying the existing trial transcript to the proper legal frameworks from *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024), and *Roy v. City of Monroe*, 950 F.3d 245 (5th Cir. 2020). Even the Attorney General’s supplemental brief claims victory in his favor by applying these legal frameworks to the trial record—without identifying a single fact in dispute. *See, e.g.*, Dkt. 147 at 19 (“***Based on the August 2023 trial record***, the Court should conclude that unconstitutional applications of Section One of S. B. 12 are

nonexistent, or at most minor, as compared to the constitutional applications under *Free Speech Coalition*.”) (emphasis added). The Attorney General cannot have it both ways by simultaneously declaring victory under *Moody* while seeking to delay all proceedings through discovery and a new trial. Moreover, he cannot show any prejudice from the lack of new trial or discovery since he contends that “*it is the Plaintiffs’ burden* to present factual evidence to the Court that will enable the Court to properly perform the *Moody* analysis,” Dkt. 146 at 11 (emphasis added), such that only Plaintiffs would be injured if the trial record were not adequately developed.

As Defendant Paxton’s own supplemental brief illustrates, this Court is well-equipped to fulfill the Fifth Circuit’s remand instructions by conducting the facial legal analysis required and issuing an amended final judgment, without any discovery or new trial. Restarting this case from the beginning—as the Attorney General urges—would be procedurally improper and deeply prejudicial to Plaintiffs, whose freedom of speech would continue to be curtailed by S.B. 12 during months or years of delay. The Attorney General’s Motion should therefore be denied.

ARGUMENT

I. The Attorney General Cites No Vehicle or Rule Permitting a New Trial or Discovery

Defendant Paxton’s Motion contains no standard of review, nor does it cite any rule or mechanism that authorizes a new trial or discovery. “Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record

or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial.” *Nat’l Union Fire Ins. of Pittsburgh, Pennsylvania v. Puget Plastics Corp.*, 735 F. Supp. 2d 650, 653 (S.D. Tex. 2010) (Hanan, J.) (quoting *Sibley v. Lemaire*, 184 F.3d 481, 487 (5th Cir. 1999)). Moreover, “motions for new trial or to alter or amend a judgment should not be avenues for relitigating old matters, raising new arguments, or submitting evidence that could have been presented before.” *Gaddy v. Taylor Seidenbach, Inc.*, 446 F. Supp. 3d 140, 150 (E.D. La. 2020), *aff’d sub nom. Adams v. Ethyl Corp.*, 838 F. App’x 822 (5th Cir. 2020).

Federal Rule of Civil Procedure 59(b) mandates that a motion for new trial be filed “no later than 28 days after the entry of the judgment.” The Attorney General has far exceeded this deadline, both from the original final judgment and the Fifth Circuit’s mandate issuing four months ago, and he does not cite any rule or mechanism that would permit a new trial absent explicit instructions from the Fifth Circuit. As with any motion, “[t]he movant bears the burden of proving that he is entitled to relief,” *Anderson v. United States*, No. CR H-05-482, 2010 WL 11629619, at *2 (S.D. Tex. July 1, 2010) (Hittner, J.), and a motion without any cited legal basis fails this burden.

II. The Fifth Circuit Remanded for Additional Legal Analysis and Reconsideration, Not a New Trial or Discovery

Defendant Paxton is incorrect that the Fifth Circuit’s remand instructions authorize or require a new trial. Under the mandate rule, “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). Here, the Fifth Circuit’s mandate explicitly requires “reconsider[ation]” of Plaintiffs’ claims—not discovery or new trial. In general, the 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) (emphasis added).

While the Fifth Circuit remanded for “reconsider[ation]” of Plaintiffs’ facial claims, it did not identify a single disputed fact that would require discovery or a new trial, nor did it imply that a new trial or discovery would be warranted. *See Woodlands Pride*, 168 F.4th at 308. The Fifth Circuit knows how to remand for a new trial and often does so explicitly. *See, e.g., Clapper v. Am. Realty Invs., Inc.*, 95 F.4th 309, 317 (5th Cir. 2024) (“These statements affected Clapper’s ‘substantial rights’ and warrant a new trial.”); *Poullard v. Turner*, 298 F.3d 421, 424 (5th Cir. 2002) (“[W]e vacate the judgment below and remand for a new trial on damages only.”); *Ratliff v. City of Gainesville, Tex.*, 256 F.3d 355, 357 (5th Cir. 2001) (“[W]e reverse in part and remand for a new trial.”). Indeed, the Fifth Circuit’s decision following *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024), explicitly remanded to

the district court by identifying “fact-intensive questions that must be answered by the district court in the first instance *after thorough discovery*.” *NetChoice, L.L.C. v. Paxton*, 121 F.4th 494, 497 (5th Cir. 2024) (emphasis added).

Here, the Fifth Circuit did not state or even imply that discovery or a new trial is required.² To the contrary, the court “rel[ied] on the evidence presented at trial” and ordered dismissal without prejudice of claims against five Defendants based on the complete trial record. *Woodlands Pride*, 168 F.4th at 301, 308. A court that regarded the trial record as inadequate would not have used that same record to resolve claims against five Defendants. But the court took the “trial evidence” as it found it and ordered dismissal of multiple parties while instructing this Court to “reconsider” the merits against the Attorney General. *Id.* at 302, 308.

Despite the clarity and scope of the Fifth Circuit’s mandate, the Attorney General seems to hinge his entire Motion on a single quote, where the Fifth Circuit explained that “[t]he district court did not conduct this [*Moody*] analysis, nor did the parties brief the proper standard *or adequately develop the record*.” Dkt. 146 at 2 (quoting *Woodlands Pride*, 168 F.4th at 308). Although the Attorney General

² The canon of *expressio unius*, where “[t]he expression of one thing implies the exclusion of others,” *United States v. Vargas*, 74 F.4th 673, 686 (5th Cir. 2023) (en banc) (quoting Scalia & Garner, *Reading Law: the Interpretation of Legal Texts* 107 (2012)), suggests that the Fifth Circuit’s silence as to discovery, disputed, facts, or a new trial—in an opinion that expressly directed dismissal of some claims and reconsideration of others—is best read as deliberate.

implies that “develop[ing] the record” must be distinct from “brief[ing] the proper standard,” *id.*, nothing in the opinion supports that reading, and the plain meaning of the terms does not require it. A trial court’s “record” includes “[t]he official report of the proceedings in a case, ***including the filed papers***, a verbatim transcript of the trial or hearing (if any), and tangible exhibits.” *Record*, Black’s Law Dictionary (12th ed. 2024) (emphasis added). Although “develop[ing] the record” could include fact discovery in certain contexts, it can just as easily mean supplementing the trial court record through legal briefing to explain canons of construction, dictionary definitions, and other tools to analyze Plaintiffs’ facial overbreadth and vagueness claims. *See, e.g., Merriott v. City of Bossier City*, 179 F.4th 393, 404 (5th Cir. 2026) (conducting facial overbreadth and vagueness analysis by relying on the text of an ordinance and dictionary definitions); *United States v. Hansen*, 599 U.S. 762, 771 (2023) (engaging in facial overbreadth analysis using the text of the statute and canons of construction). The Attorney General’s assertion that a new trial or discovery is needed to “develop the record” defies the narrow scope of the Fifth Circuit’s mandate to “reconsider” Plaintiffs’ facial claims.

III. The Remand Instructions Concern Claims that Are Purely Legal in Nature, and No Facts Are Needed to Aid the Court’s Analysis

This Court is well-positioned to fulfill the Fifth Circuit’s remand instructions without discovery or a new trial because Plaintiffs’ facial vagueness and overbreadth claims that the Court is tasked with reconsidering are purely legal in nature and

require no factual development. “On a facial challenge, [courts] do not look beyond the text” because a “‘facial challenge’ to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual.” *Freedom Path, Inc. v. Internal Revenue Serv.*, 913 F.3d 503, 508 (5th Cir. 2019) (citations omitted).

The Attorney General’s own supplemental brief illustrates that this Court can fully engage in the facial First Amendment and vagueness analysis without a new trial or discovery.³ In his supplemental brief, he contends that “***[b]ased on the trial record*** and the District Court’s findings after trial,” Extragrams’ claims “should be denied,” “***[b]ased on the August 2023 trial record***,” 360 Queen “failed to carry its burden” and “its claims should be dismissed,” and “***[b]ased on the August 2023 trial record***, the Court should conclude that unconstitutional applications of Section One of S. B. 12 are nonexistent, or at most minor”—among other arguments based solely on the current trial record. *See* Dkt. 147 at 9, 10-11, and 19 (emphases added). The Attorney General cannot have it both ways and argue that a new trial needs to occur

³ Although the Attorney General claims at the outset of the supplemental brief that “this Court cannot properly perform the *Moody v. NetChoice*, 603 U. S. 707 (2024) analysis directed by the Fifth Circuit without a new or supplemental trial at which the facts relevant to that analysis can be heard,” Dkt. 147 at 1, the rest of the brief undermines that claim, since it nevertheless engages in facial analysis based on the current trial record without identifying any specific facts requiring further development.

while simultaneously asserting that judgment may be entered in his favor based on the current trial record.

As evidenced by Defendant Paxton’s supplemental brief, the “reconsider[ation]” of Plaintiffs’ facial overbreadth and vagueness claims turns on S.B. 12’s text and its universe of hypothetical and real applications—*legal* questions that are developed through analysis and briefing, not fact discovery and trial. If the Court were instead conducting an *as-applied* analysis, then the specifics of Plaintiffs’ performances and venues would be relevant. But for purposes of Plaintiffs’ *facial* First Amendment and vagueness claims, the Court looks to the text of the statute, canons of construction, and the law’s sweep rather than any Plaintiff-specific facts. *See, e.g., S.C. Freedom Caucus v. Jordan*, 677 F. Supp. 3d 352, 366 (D.S.C. 2023), *opinion clarified*, No. 3:23-CV-795-CMC, 2023 WL 12204510 (D.S.C. Aug. 17, 2023) (“Discovery is not necessary for the court to decide whether laws [facially] . . . violate the United States Constitution.”).

The only case that the Attorney General cites as authorizing discovery for facial overbreadth claims, *Moody v. NetChoice*, concerned vastly different—and more complex—laws that required factual development before courts could assess what the laws covered. 603 U.S. at 726 and 734. The Supreme Court found the trial court preliminary injunction records “underdeveloped” and “incomplete” because they did not answer threshold questions like: “Starting with Facebook and the other

giants: To what extent, if at all, do the laws affect their other services, like direct messaging or events management?” *Id.* at 724. “And beyond those social-media entities, what do the laws have to say, if anything, about how an email provider like Gmail filters incoming messages, how an online marketplace like Etsy displays customer reviews, how a payment service like Venmo manages friends’ financial exchanges, or how a ride-sharing service like Uber runs?” *Id.* at 725. Because of these specific factual questions about how the laws applied across internet platforms, the Fifth Circuit explicitly remanded to the district court for “discovery” before the facial *Moody* analysis could be conducted. *See NetChoice, L.L.C.*, 121 F.4th at 497.

Unlike the “online world” that was so “variegated and complex” that courts needed factual development before they could assess what the laws in *Moody* covered, 603 U.S. at 725, S.B. 12 can be analyzed on its face without further fact development. S.B. 12 relates to “visual performances” that can be assessed based on the text of the statute, legal canons of construction, and the Court’s inherent understanding of real-world and hypothetical performances. *See, e.g., Woodlands Pride*, 694 F. Supp. 3d at 848 (“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 become a civil or criminal violation of S.B. 12.”). Indeed, the Fifth Circuit was able to use the current trial record to review Plaintiffs’

standing and ordered remand analysis only on the merits without identifying a single fact in need of development.

The Attorney General also fails to show that discovery or a new trial is needed to assess Plaintiffs’ facial vagueness challenge. In a footnote, he claims that “[u]nder *Roy*, a factual issue in this case is whether Section One of S. B. 12 ‘fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.’” Dkt. 146 at 13 n.5 (quoting *Roy v. City of Monroe*, 950 F.3d 245, 252 (5th Cir. 2020)). Although this restates the legal standard from *Roy*, it is **not** a fact issue. The Fifth Circuit in *Roy* relied on **legal** and **facial** analysis of the plaintiff’s vagueness claims while **denying** the plaintiff’s request to reopen discovery. 950 F.3d at 253 and 256 n.7. The court did not need specific facts to assess facial vagueness because whether a statute fails to provide adequate notice is a question of law—not a fact issue. See *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 546 (5th Cir. 2008) (finding facial vagueness claims ripe for adjudication because it is a “purely legal inquir[y]” and “no further factual development is necessary”); *United States v. Rudzavice*, 586 F.3d 310, 315 (5th Cir. 2009) (“Whether a criminal statute is unconstitutionally vague is a question of law, which we review de novo.”).

The Attorney General is therefore incorrect that the Parties must seek discovery or trial testimony from “Texans of ordinary intelligence,” Dkt. 146 at 13 n.5, before this Court can assess the facial vagueness of terms like “prurient interest

in sex,” “lewd,” “performer,” and “control.” Rather than being fact-bound in any way, the facial vagueness analysis under *Roy* involves quintessential questions of statutory construction and constitutional law that this Court is fully able to assess. The vagueness standards articulated in *Roy* are also not new since *Roy* was decided in 2020, such that the Attorney General already had an ample opportunity at trial to offer any evidence he thought relevant to Plaintiffs’ facial vagueness claims.

IV. Defendant Paxton Seeks Improper Discovery Relevant Only to Issues of Standing, Which He Concedes Is Now Resolved

Throughout his Motion and other briefing in this case, the Attorney General does not identify any fact issue in need of further development specific to Plaintiffs’ facial First Amendment or vagueness claims. He avers generally that he wants “reasonable document production and deposition discovery of the named Plaintiffs” and that he “intends to take discovery regarding persons who control commercial premises in Texas on which other visual performances unrelated to drag that may violate Section One of S. B. 12 have occurred or may occur.” Dkt. 146 at 13. Neither of these categories is relevant to the Fifth Circuit’s remand instructions and would impermissibly relitigate what the Attorney General already had an opportunity to introduce and cross-examine at trial.

Defendant Paxton could have sought expedited discovery at the outset of this case, but he declined to do so. On the first day of trial, his attorneys did not object to the Court consolidating Plaintiffs’ Motion for Preliminary Injunction with a full

trial on the merits. The Attorney General stated only that factual development may be required for an “as-applied challenge” and did not object to Plaintiffs’ facial challenges being finally adjudicated on the merits without any discovery:

MS. GIFFORD: For the record, there are – to the extent the plaintiffs have brought an as-applied challenge, we believe that there could be fact issues that need to be developed and we’ve not had an opportunity to develop those.

THE COURT: What are the fact issues? Because somebody wanted a jury trial and you said no, and he withdrew it. What now? Did you ask for a jury trial or any kind of fact issues to determine?

MS. GIFFORD: We have not yet, Your Honor.

Dkt. 77 (Trial Tr. Day 1) at 12:23-13:7. The Attorney General thus consented to Plaintiffs’ facial challenge to S.B. 12 proceeding to trial, where he had a full opportunity to introduce evidence and cross-examine every Plaintiff.

Defendant Paxton’s belated request to depose each Plaintiff would have no bearing on the merits analysis required by the Fifth Circuit but would only be relevant to standing. This Court found that all Plaintiffs have standing, *Woodlands Pride*, 694 F. Supp. 3d at 841; the Fifth Circuit affirmed as to 360 Queen and expressly declined to reach Extragrams and Bandit, leaving this Court’s ruling undisturbed, 168 F.4th at 306-07; and the Attorney General now concedes the point by agreeing that “standing is present.” Dkt. 140 at 5. Deposing each Plaintiff or questioning them in a new trial would therefore retread settled ground and would not bear at all on the *facial* analysis required by the Fifth Circuit. *See S.C. Freedom*

Caucus, 677 F. Supp. 3d at 366 (denying discovery because “[n]one of the items on which Defendants seek discovery bears on the constitutionality of the challenged statutes, but instead Defendants seek to wade into the weeds of Plaintiff’s formation and operation”).

The Attorney General’s second request—that he seeks discovery into *all* “persons who control commercial premises in Texas on which other visual performances unrelated to drag that may violate Section One of S. B. 12 have occurred or may occur,” Dkt. 146 at 13, seeks information that is neither relevant to any claim or defense nor proportional to the needs of this case, *see* Fed. R. Civ. P. 26(b)(1). He seems to envision requesting information from countless businesses, drag artists, and other types of performers across Texas who may be ensnared by S.B. 12, regardless of whether they are Plaintiffs in this suit. This dragnet approach illustrates why discovery is not needed to adjudicate the merits of this case and would invite burdensome, and potentially limitless, delay. As the Attorney General’s own supplemental brief avers, S.B. 12 applies to anyone “who control[s] the premises of a commercial enterprise.” Dkt. 147 at 5. Thus, opening up discovery into every business in Texas is plainly unreasonable and unnecessary.

Moreover, the Attorney General is the state official charged with enforcing Section One of S.B. 12. The scope of the statute and how it may be applied or enforced does not involve fact issues he must discover from strangers; it is

information already within his knowledge and control. *See, e.g.*, Dkt. 147 at 5-6, 11-12 (enumerating the covered actors and identifying the covered activities by reference to the statutory text). Whatever the Attorney General believes the facial breadth of S.B. 12 to be, he can say so and had a full opportunity to present such evidence at trial in 2023. He does not need to depose “Texans of ordinary intelligence” to ask what they think S.B. 12 might mean. *Contra* Dkt. 146.

Ultimately, the Attorney General has not identified any disputed fact that is relevant to this Court’s facial analysis under the First and Fourteenth Amendments, nor any legitimate basis for new trial or discovery.

V. Requiring a New Trial or Discovery Would Irreparably Harm and Prejudice Plaintiffs

Both the mandate rule and the law-of-the-case doctrine are “based on the salutary and sound public policy that litigation should come to an end” and that when a court “remand[s] on the specific and narrow grounds of [a] First Amendment claim,” it does not “remand for a reconsideration of the whole controversy.” *Daly v. Sprague*, 742 F.2d 896, 900 (5th Cir. 1984).

Granting a new trial and months or years of discovery would violate both the letter and spirit of the Fifth Circuit’s mandate instructions while also irreparably harming Plaintiffs whose speech is actively being chilled by S.B. 12. This harm is not hypothetical or deferred. The permanent injunction has been vacated, such that S.B. 12 is now in effect, and Plaintiffs have been subject to its unconstitutional

restrictions on speech ever since. The Attorney General seeks six months of discovery measured from a Rule 26(f) conference that has not yet been scheduled, followed by a trial at the Court's convenience, which would easily result in a delay of a year or more. He further asks that Plaintiff Extragrams' pending motion for a preliminary injunction (Dkt. 129) be folded into that future proceeding under Rule 65(a)(2), Dkt. 146 at 14, which seeks to deny Plaintiffs even interim relief.⁴

This Court has already found S.B. 12 to be unconstitutional under five independent grounds. The Fifth Circuit rejected none of them on the merits; it directed only that two be reconsidered. Because “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,” *Woodlands Pride*, 694 F. Supp. 3d at 850 (quoting *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 19 (2020)), it would irreparably harm Plaintiffs to delay this case for months or years to allow for a new trial and discovery. This Court is well-equipped to fully satisfy the Fifth Circuit's remand instructions through legal analysis alone, and it is “sound public policy that litigation should come to an end.” *Daly*, 742 F.2d at 900.

⁴ If the Court determines that any further proceedings are necessary, either through discovery or otherwise, Plaintiff Extragrams respectfully requests that its pending Motion for Preliminary Injunction (Dkt. 129) be promptly considered, and other Plaintiffs also reserve the right to seek interim relief.

VI. The Attorney General Cannot Show Any Prejudice from Lack of Discovery or New Trial

Even if the Court accepted the Attorney General's erroneous view of the Fifth Circuit's remand instructions and need for factual development as true, he would still not be entitled to discovery or a new trial. As Defendant Paxton contends, "*it is the Plaintiffs' burden* to present factual evidence to the Court that will enable the Court to properly perform the *Moody* analysis." Dkt. 146 at 11 (emphasis added). Here, Plaintiffs testified at trial, successfully moved to strike the only witness Defendant Paxton proffered, and relied on the trial record in submitting supplemental briefing to fulfill the Fifth Circuit's remand instructions. The Attorney General cannot claim prejudice from a lack of new trial or discovery when he concedes that the evidentiary burden falls on Plaintiffs, who would be the ones injured if the trial record were inadequately developed. *Cf. Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 603 (5th Cir. 2004) ("[A] party who is not aggrieved by a judgment of the district court has no standing to appeal it.").

Defendant Paxton's claim that denying him a new trial somehow deprives him of "a fundamental due process right," Dkt. 146 at 12, is hyperbolic and unfounded. He has had just as much process as Plaintiffs and had ample opportunity to seek expedited discovery, present witnesses, and cross-examine every Plaintiff. There is no "process" that the Attorney General is now "due," especially since no party is entitled to needless discovery or delay.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Attorney General's Motion for New or Supplemental Trial and for Discovery in its entirety, decline to reopen discovery or trial proceedings, and proceed to resolve the *Moody* facial-overbreadth and *Roy* facial-vagueness questions on the existing record and briefing, consistent with the Fifth Circuit's mandate.

Dated: August 4, 2026

Respectfully submitted,

By: /s/ Brian Klosterboer

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 4th day of August, 2026, a true and correct copy of the above document was served via the CM/ECF system to all counsel of record.

/s/ *Emily Rohles*
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