

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXTRAGRAMS, LLC, *et al.*,

Plaintiffs,

v.

WARREN KENNETH PAXTON, IN HIS
OFFICIAL CAPACITY AS ATTORNEY
GENERAL OF TEXAS, *et al.*,

Defendants.

CASE NO. 4:23-CV-02847

**REPLY IN SUPPORT OF DEFENDANT PAXTON’S OPPOSED MOTION FOR NEW OR
SUPPLEMENTAL TRIAL AND FOR DISCOVERY**

Defendant Warren Kenneth Paxton (“AG Paxton”) files his Reply in support of his motion for a new or supplemental trial and discovery (ECF No. 146):

SUMMARY

Plaintiffs in their Response in Opposition to Defendant Paxton’s Motion for New or Supplemental Trial and for Discovery (ECF No. 162) (the “Opposition” “Opp.”) invite this Court to ignore the clear direction of the Fifth Circuit Court of Appeals in this case, and at the same time to deprive AG Paxton of the basics of due process of law. Plaintiffs urge the Court to commit reversible error by refusing to allow AG Paxton any opportunity for discovery, or for a trial or evidentiary hearing, on the application of the *Moody v. NetChoice* analysis mandated by the United States Supreme Court in a facial constitutional challenge like that the Plaintiffs chose to file in this case. The Court should reject Plaintiffs’ invitation.

Plaintiffs wrongly urge the Court *not* to develop the “adequate record” the Fifth Circuit mandated. The Fifth Circuit in this case described the analysis required

in facial statutory challenges by the United States Supreme Court in *Moody v. NetChoice, LLC*, 603 U. S. 707, 723 (2024). *Woodlands Pride, Inc v. Paxton*, 168 F.4th 293, 307-08 (5th Cir. 2026). Because *Moody* was not decided until well after this case was tried in 2023, none of the parties presented evidence relevant to this *Moody* analysis at the two-day trial in August 2023. Similarly, because *Moody* had not been decided at that time, none of the parties briefed the *Moody* analysis to the Court in 2023.

The Fifth Circuit stated that “the district court did not conduct this [*Moody*] analysis, *nor did the parties brief the proper standard or adequately develop the record.*” 168 F. 4th at 308 (emphasis added). The Fifth Circuit thereby made it inescapably clear that:

(1) the record created at the August 2023 trial was not adequate to provide the Court with the evidence required for the *Moody* analysis; and

(2) the Court on remand should allow the parties to adequately develop the record, as well as properly brief the Court on the *Moody* analysis.

Plaintiffs in their Opposition earnestly argue against what the Fifth Circuit already clearly decided in this case and directed in its mandate.¹ Plaintiffs argue that the record at the August 2023 trial was a fully adequate basis for the *Moody* analysis. Opp. at 4 (claiming mandate to “adequately develop the record” on remand was fulfilled by “applying the existing [August 2023] trial transcript to the proper legal framework from *Moody*”). Plaintiffs also argue that, although the Fifth Circuit directed that the remand should include both (a) legal briefing as to the *Moody* analysis and (b) adequately developing the factual record, the Fifth Circuit somehow really meant that only the legal briefing was necessary and developing an adequate

¹ Ironically, Plaintiffs ignore the Fifth Circuit’s mandate and the law of the case doctrine, while at the same time lecturing Attorney General Paxton on the necessity of enforcing the mandate rule and the law of the case doctrine. Opp. at 17-18.

record can and should be ignored.

Plaintiffs can argue against what the Fifth Circuit directed to be done on remand, but they cannot possibly win that argument. The Fifth Circuit concluded that the August 2023 trial record was inadequate for a proper *Moody* analysis and directed a remand in part for the parties to develop an adequate factual record. AG Paxton hereby requests an opportunity to do so. Plaintiffs' argument that no opportunity to create an adequate factual record should be allowed is doomed to failure.

I. <Plaintiffs Misunderstand the Factual Record Required for the Moody Analysis.

Plaintiffs argue that Attorney General Paxton has not identified the factual issues that require discovery or trial and asserts that Plaintiffs' facial challenges to S. B. 12 are "based on questions of law and the text of the statute, not its application to specific Plaintiffs." Opp. at 2. Plaintiffs thereby evidence that they badly misunderstand *Moody* and what a *Moody* analysis requires. This same misunderstanding permeates Plaintiffs' Supplemental Brief on Remand (ECF No. 149).²

Plaintiffs seem not to understand that *Moody* itself described the fact-intensive process required for "disfavored" facial challenges like this one, in which plaintiffs "bear a heavy burden." *Moody*, 144 S. Ct. at 2309, 2409. "As the Supreme Court

² Plaintiffs also misunderstand the scope of this case that remains after remand. Contrary to Plaintiffs' assertions, see Opp. at 1 n.1, Section One of S. B. 12 – which provides for no criminal penalties, but only civil remedies -- is the *only* portion of S. B. 12 now at issue in this case. There is no standing as to any claims under the other Sections of S. B. 12, because Attorney General Paxton has no authority to enforce them. 168 F.4th at 307 ("plaintiffs only have standing to assert their claims against the Attorney General, and the Attorney General only has the authority to enforce Section One").

recognized, it is impossible to apply that [*Moody*] standard when ‘the record is undeveloped’. *NetChoice, LLC v. Paxton*, 121 F.4th 494, 497 (5th Cir. 2024), quoting *Moody* at 2399.

Who is covered by [the challenged Texas statute]? For these actors, which activities are covered by [the challenged Texas statute]? Because these are fact-intensive questions that must be assessed by the district court in the first instance after thorough discovery, we remand.

121 F.4th at 497. Plaintiffs’ insistence that no fact discovery is necessary -- or even permitted -- for the *Moody* analysis the Fifth Circuit has directed in this case is simply wrong.

In their Supplemental Brief on Remand, ECF No. 149, Plaintiffs engage in repeated and extensive comparison of isolated statutory terms in S. B. 12 with their dictionary definitions. *Id.* at pp. 31-43. Plaintiffs stretch the dictionary definitions well beyond the boundaries of common sense in an attempt to show how expansively the statute could be applied in a future hypothetical world.³ Then Plaintiffs unsurprisingly conclude that the absurd hypothetical applications of S. B. 12 *they*

³ For example, Plaintiffs expansively re-imagine the term “nude”. ECF No. 149, at 33-35. S. B. 12 borrows the definition of this term from § 102.051(1) of the Tex. Bus. & Comm. Code, which has been part of Texas law since 2007 as part of the Sexually Oriented Business Fee Act (“SOBF”). The SOBF Act (including the definition of “nude” now incorporated by reference in S. B. 12) has been upheld against First Amendment challenges again and again. *See Combs v. Tex. Ent. Ass’n*, 347 S. W.3d 277 (Tex. 2011); *Tex. Ent. Ass’n v. Hegar*, 10 F. 4th 495 (5th Cir. 2021); *9000 Airport, Ltd. v. Hegar*, 2025 WL 1024951 (5th Cir. 2025) (constitutionality of SOBF was *res judicata*).

have imagined are almost all unconstitutional.⁴

Thus, Plaintiffs engage in precisely what the Supreme Court and Fifth Circuit have made clear *Moody* prohibits: a claim of facial invalidity that rests entirely on “speculation about the law’s coverage and its future enforcement.” 168 F.4th at 307, quoting *Moody v. NetChoice, LLC*, 603 U. S. 777, at 723. The analysis mandated by *Moody* instead requires a *factual* record regarding the scope of the challenged law: “What activities, by what actors”, does the law prohibit or otherwise regulate? One cannot make such a factual record by simply introducing *Merriam-Webster’s Dictionary* into evidence, as Plaintiffs seem to imagine. Instead, this requires evidence from witnesses with relevant real-world knowledge. In this instance, that would possibly include persons with knowledge of law enforcement as applied to an array of sexually oriented businesses and/or persons with experience in providing premises for, or operating, sexually oriented businesses. It could also include witnesses from the drag entertainment industry, like Plaintiffs,⁵ but the scope of S. B. 12 is by no means limited to drag entertainment, so the relevant knowledge and

⁴ Plaintiffs correctly note that Section One of S. B. 12 only covers performances in the presence of minors that “appeal to the prurient interest in sex.” ECF No. 149, at 42. Plaintiffs then absurdly argue that the “romantic pining in *Romeo and Juliet* or *West Side Story*” could be viewed as “appealing to the prurient interest.” *Id.* at 43. This term has familiar in the law for over fifty years, and the *Miller* test has been upheld against vagueness challenges again and again. *E.g., Reno v. ACLU*, 521 U. S. 844, 873 (1997); *Fort Wayne Books, Inc. v. Indiana*, 489 U. S. 46, 57-58 (1989). *See also United States v. Kirkpatrick*, 2016 WL 5173245 (5th Cir. 2016) at *6 (rational trier of fact could find videos appealed to “prurient interest in sex”); *Ford v. State*, 53 S. W. 2d 451, (Texas App Houston – 1st Dist. 1988) (Texas statute not unconstitutionally vague in its use of term “prurient interest”).

⁵ Plaintiffs claim that Attorney General Paxton seeks discovery “Relevant Only to Issues of Standing”. Opp. at 14. This is obviously false; Attorney General Paxton instead seeks discovery relevant to the *Moody* analysis to make the adequate record the Fifth Circuit ordered be made on remand.

experience of Plaintiffs is substantially narrower than that required for a *Moody* analysis.⁶

The second step of the *Moody* analysis also requires a factual record in order to weigh the unconstitutional applications of the statute against the constitutional ones. See *NetChoice v. Paxton*, 121 F.4th 494, 499 (“there is serious need for factual development at the second step as well”). As *Moody* and the Fifth Circuit instruct, the court must take what it determines to be the unconstitutional applications and “weigh them against the rest.” The law is not facially unconstitutional unless its “its unconstitutional applications substantially outweigh its constitutional ones.” 168 F.4th at 307-08, quoting *Moody*, 603 U. S. at 724-25.

This weighing process requires a real-world factual record. If a challenged statute would be unconstitutional if applied in twenty imagined circumstances that never or rarely occur in the real world,⁷ but would be constitutional in the two circumstances that are extremely common in the real world, that is highly relevant to the court’s task of weighing unconstitutional applications against constitutional

⁶ That is another reason why the trial record in August 2023 was entirely inadequate for a proper *Moody* analysis. Plaintiffs’ witnesses testified almost entirely about drag performances, and specifically about their own drag performances. But Plaintiffs’ performances, and even drag performances in general, represent only a fraction of the scope of coverage of S. B. 12.

⁷ As just one of their many wildly unrealistic examples, Plaintiffs envision that someone could claim Olympic swimmers violate S. B. 12 because it could be argued that a tiny part of their buttocks show when they swim – and thus arguably an Olympic swimming event in the presence of minors might constitute a “nude” visual performance. See ECF No. 149, at p. 34. But does anyone really believe Attorney General Paxton or anyone else would ever seek to enjoin such an Olympic swimming event by arguing that it is a nude performance aimed that “appeals to the prurient interest”? Of course not.

ones.⁸

Did Plaintiffs make such a factual record at the August 2023 trial? Of course not. That’s why Plaintiffs’ invitation to this Court to decide this case based solely on the evidence in the 2023 trial record is an invitation to reversible error that the Court should decline. The Court instead is entitled to decide this case on a factual record made by the parties with knowledge of the requirements of *Moody* and reasonable discovery directed to those requirements. The August 2023 trial record is utterly inadequate in that regard, as the Fifth Circuit made clear.

II. Plaintiffs seek to deprive Attorney General Paxton of basic due process.

Plaintiffs apparently are desperate to block basic due process for Attorney General Paxton in this case. Only desperation could explain an argument by Plaintiff that “Defendant Paxton could have sought expedited discovery at the outset of this case, but he declined to do so”. Opp. at 14. This argument is not only false but ignores that the discovery AG Paxton now seeks relates to the analysis required by *Moody* – that did not exist “at the outset of this case”.

Similarly nonsensical is Plaintiffs’ argument that Attorney General Paxton “had ample opportunity to seek expedited discovery, present witnesses, and cross-examine every Plaintiff.” Opp. at 19. See also Opp. at 1. Attorney General had no such fair opportunity in the August 2023 proceedings that went from Complaint to close of trial in less than thirty days. But in any event, it is indisputable that AG

⁸ Yet another facile argument Plaintiffs make is that Attorney General Paxton does not need discovery from “strangers” because the scope of Section One of S. B. 12 is “information already within his knowledge and control” as the “state official charged with enforcing” that statute. Even though Attorney General Paxton has a view of Section One’s scope, that view is contested by Plaintiffs and he is entitled to reasonable discovery of evidence to make an “adequate record” that supports his view.

Paxton then had no opportunity to take discovery, present witnesses or cross-examine witnesses *relevant to the Moody analysis*, which was nonexistent until the following year.

Equally sophistical is Plaintiffs' argument that "the Attorney General cannot claim prejudice from a lack of new trial or discovery when he concedes that the evidentiary burden falls on Plaintiffs." Opp. at 19. Neither the Federal Rules nor the Constitution deprive parties of the right to trial or discovery simply because the opposing party bears the burden of proof. Attorney General Paxton is entitled to discovery both to challenge the evidence Plaintiffs may offer to carry their burden and to develop his own evidence. And he is entitled to a fair trial at which he may present evidence rebutting Plaintiffs' claims.

Plaintiffs' desperation also shows in their attempt to argue away the Fifth Circuit's clear recognition in *Moody v. NetChoice, LLC*, 121 F.2d F.4th at 97, that facial challenges like this one are fact-intensive and require discovery at the trial court level. Plaintiffs argue that the next for fact discovery in facial challenges only applies to "variegated and complex" factual contexts. Opp. at 12. Unfortunately for this argument, the Fifth Circuit in *NetChoice v. Paxton*, 121 F. 4th 494 (5th Cir. 2024), nowhere stated or so much as suggested that factual development is required only for "variegated and complex" factual contexts. To the contrary, the Fifth Circuit ended *NetChoice v. Paxton* with the following broad and unqualified statement: "It is plaintiffs' burden to develop a factual record to support their request for facial injunctive relief against enforcement of a state statute." 121 F. 4th at 500.

That requirement applies in every "request for facial injunctive relief against enforcement of a state statute", including this one. Attorney General Paxton acknowledges that more complex facts may require more discovery, and less complex facts may require less discovery. But it remains true that *all* facial challenges are fact-intensive and require reasonable discovery. This is one of the (many) reasons

why “facial challenges are hard to win.” *See also McAllister v. Clark County*, 746 F. Supp. 3d 918, 940 (D. Nev. 2024) (“development of a factual record is required to tease out this threshold question” after *Moody*).

III. Attorney General Paxton is entitled to reasonable discovery and trial on Plaintiffs’ void-for-vagueness claim.

Although discovery and a trial are necessary to fulfill the Fifth Circuit mandate that the parties provide an “adequate record” for the Court to make a *Moody* analysis, discovery and trial is also necessary in connection with the Fifth Circuit mandate to “reconsider the plaintiffs’ facial vagueness challenge to Section One of S. B. 12 in light of *Roy* [v. City of Monroe]”, 168 F.4th at 308. *Roy* emphasized that “Courts generally disfavor facial challenges, and for good reason.” 950 F.3d 245, 251 (5th Cir. 2020), quoting *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013). *Roy* added that a facial vagueness plaintiff faces a “daunting “burden.950 F.3d at 252.

Roy noted this standard: does the challenged enactment “fail to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” or “authorizes . . . arbitrary and discriminatory enforcement.” *Id.* Attorney General Paxton is entitled to take discovery and present evidence as to whether people of ordinary intelligence, including participants in sexually oriented businesses and law enforcement personnel who enforce similar laws, have a reasonable opportunity to understand what Section One of S. B. 12 prohibits. Plaintiffs’ argument against this – that the Court *could* make this determination as a matter of law without relevant facts – provides no reason why the Court should or must make that determination without relevant facts or that Attorney General Paxton should be deprived of the opportunity to discover and present those relevant facts.

CONCLUSION

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

Date: August 11, 2026

Respectfully submitted.

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CERTIFICATE OF SERVICE

On August 11, 2026, I filed this document through the Court's CM/ECF system, which automatically serves it upon all counsel of record.

/s/ David Bryant
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