SHANTAY DRAG STAYS: ANTI-DRAG LAWS VIOLATE THE FIRST AMENDMENT

MARK SATTA*

ABSTRACT

This article explains why virtually any law aimed specifically at restricting, suppressing, or banning drag performances violates the First Amendment. The key reasons for this are as follows. First, drag performances are expressive conduct protected by the First Amendment. Second, drag performances generally do not fall into any uncovered category of speech, such as obscenity. Third, drag performances express viewpoints. Fourth, the Supreme Court has set an extremely high standard for permitting viewpoint discrimination—even for speech not covered by the First Amendment. Laws aimed at restricting drag performances do not meet this high standard because, among other reasons, such laws are not precisely tailored. Thus, laws that pick out drag performances for restriction over and above other forms of covered (or even uncovered) speech violate the First Amendment. After offering these arguments, this article examines how these First Amendment facts impact anti-drag laws in Tennessee, Arkansas, and Montana. These three case studies provide further evidence for the conclusion that anti-drag laws are generally unconstitutional by examining issues of overbreadth and vagueness, with an emphasis on how vague and overbroad anti-drag laws like these impermissibly chill the speech and expression of drag performers and of trans people.

INTRODUCTION 96

I. WHAT IS A DRAG PERFORMANCE? 97

II. DRAG IS EXPRESSIVE CONDUCT 100

III. DRAG PERFORMANCES EXPRESS VIEWPOINTS 105

IV. DRAG IS NOT OBSCENE 108
- A. CURRENT SUPREME COURT OBSCENITY JURISPRUDENCE 109
- B. ISSUES CONCERNING VARIABLE OBSCENITY STANDARDS FOR MINORS 113

V. ANTI-DRAG LAWS LIMITED TO OBSCENE DRAG ARE UNCONSTITUTIONAL 117

* Mark Satta is Assistant Professor of Philosophy at Wayne State University. He received his JD from Harvard Law School and his PhD in Philosophy from Purdue University. Thanks to Naomi Schalit, Thommy Snell, Anwar Uhuru, and Josh Wilburn for helpful discussion about the topic of this article.

VI. ALL ANTI-DRAG LAWS VIOLATE THE FIRST AMENDMENT 120
A. THE GOVERNMENT SPEECH DOCTRINE 123
VII. RECENT EXAMPLES OF UNCONSTITUTIONAL ANTI-DRAG LAWS 125
A. TENNESSEE 126
B. ARKANSAS 132
C. MONTANA 135
CONCLUSION 140

INTRODUCTION

So far in 2023, at least twenty states have introduced bills aimed at limiting, eliminating, or otherwise suppressing drag performances.[1] Several of those bills have been enacted as state laws.[2] One of those laws has already been found to violate the First Amendment's protection of free speech.[3] This article explains why virtually all anti-drag laws violate the First Amendment.

By an "anti-drag law" I mean a law that specifically targets drag performances in order to restrict, suppress, or ban them. Included in the category of anti-drag laws are laws enacted by any level of government—federal, state, or local—and can include laws that appear, on their face, not to target drag but which are aimed at doing so. Excluded from the category of anti-drag laws are laws that government entities impose on themselves against sponsoring or endorsing drag performances when engaged in government speech and laws that regulate drag performances in a manner comparable to other kinds of speech. Thus, a municipal policy of not including drag performances in municipal events may not be anti-

1. Virginia Chamblee, *Anti-Drag Legislation Is Sweeping the Nation: Here's Where Each State Stands on Drag Bans,* PEOPLE (June 6, 2023), https://perma.cc/MW9C-PS4E. This article was accepted for publication in July 2023 and is written to reflect the state of affairs at that time. Since then, a number of additional courts have ruled on anti-drag laws. Examples include Imperial Sovereign Court of the State of Montana et al. v. Austin Knudsen, No. CV 23-50-BU-BMM (D. Mont. July 28, 2023) (granting a preliminary injunction against Montana H.B. 359 on the grounds that the plaintiffs demonstrated a likelihood of success in challenging H.B. 359 as violating the First Amendment's protection of free speech and under the Fifth Amendment for vagueness and overbreadth) and The Woodlands Pride, Inc. et al. v. Warren Kenneth Paxton et al., No.Case 4:23-cv-02847, at *2, *54 (S. D. Tex. Sept. 26, 2023) (holding that Texas S.B. 12–"touted as a 'Drag Ban' from its inception"–impermissibly infringes on the First Amendment and chills free speech).

2. *See* TENN. CODE ANN. §§ 7-51-1401, 1407 (West, Westlaw through the 2023 Reg. Sess. & 1st Extra. Sess.); TENN. CODE ANN. §39-17-901 (West, Westlaw through the 2023 Reg. Sess. & 1st Extra. Sess.); FLA. STAT. § 827.11 (West, Westlaw through the 2023 Spec. B and C Sess. & 2023 1st reg. sess.); MONT. CODE ANN. §§ 45-8-117–118, 20-7-135 (West, Westlaw through 2023 Sess.); TEX. HEALTH & SAFETY CODE ANN. § 9-769 (West, Westlaw through 2023 Reg. & 2nd Called Sess.), TEX. LOC. GOV'T CODE ANN. § 243.0031 (West, Westlaw through 2023 Reg. & 2nd Called Sess.); TEX. PENAL CODE ANN. § 43.28 (West, Westlaw through 2023 Reg. & 2nd Called Sess.).

3. Mark Satta, *Why a Federal Judge Found Tennessee's Anti-Drag Law Unconstitutional*, THE CONVERSATION, (June 8, 2023), https://perma.cc/LXR8-L4PJ. A second anti-drag law in Florida has been temporarily enjoined, with the outcome from the full trial on the merits still pending. *See* HM Florida-ORL, LLC. v. Griffin, No. 6:23-cv-950-GAP-LHP, 2023 WL 4157542, at *9 (M. D. Fla June 23, 2023).

drag law as I am using the term, and, in at least some circumstances, such a policy will not violate the First Amendment.[4] Similarly, if a state limits drag performances using fairly imposed content-neutral time, place, and manner restrictions in the same way that it limits other forms of speech, those restrictions are not anti-drag laws and, in many circumstances, will not violate the First Amendment either.[5]

But most of the laws that states have passed or are considering passing are not restricted to the fairly benign situations that my definition excludes. Rather, these laws target drag performances for especially disfavored treatment. This, I will argue, is unconstitutional because it violates the First Amendment.[6] The key reasons for this are as follows. First, drag performances are expressive conduct protected by the First Amendment. Second, drag performances generally do not fall into the category of obscenity or any other uncovered category of speech. Third, virtually all drag performances express viewpoints. Fourth, the Supreme Court has set an extremely high standard for permitting viewpoint discrimination—even for speech not covered by the First Amendment. Laws aimed at restricting drag performances do not meet this high standard. Thus, any law that picks out drag performances for restriction over and above other forms of covered (or even uncovered) speech likely violates the First Amendment. After offering these arguments in detail, this article examines how these First Amendment facts played out in the public and legislative debates over drag laws in Tennessee, Arkansas, and Montana. These case studies further support the conclusion that anti-drag laws are generally unconstitutional. This article also examines issues of vagueness and overbreadth in legislation that attempts to suppress drag, with an emphasis on how such vague and overbroad laws impermissibly chill the speech and expression of drag performers and trans people.

I. WHAT IS A DRAG PERFORMANCE?

While a number of bills introduced and laws passed this year in Republican-controlled state governments are clearly aimed at suppressing, restricting, or eliminating drags shows, it is less clear what exactly counts as drag (or what the legislators defending such bills and laws think drag is). Drag is, in brief, a category of performance art that plays with, and often violates, norms of gender

4. *See* the discussion of the government speech doctrine *infra* section VII.

5. The way in which I'm using the term "anti-drag laws" is similar to how some have used the term "drag ban." I've chosen "anti-drag laws" here to make clear that the First Amendment violations extend beyond circumstances in which drag is completely banned. Many laws that would allow some drag performances, but on unequal terms compared to other forms of expressive conduct, also violate the First Amendment.

6. I think there are also strong arguments to be made that such laws violate the Equal Protection Clause of the Fourteenth Amendment too, but this article focuses solely on the First Amendment issues. For a discussion of the Fourteenth Amendment issues *see* Katherine Read, *Dressing the First Amendment in Drag*, 11 S. U. J. RACE, GENDER & POVERTY 37 (2020).

expression.[7] It is difficult to give a precise definition of drag because drag is constantly evolving.[8] Part of why it continues to evolve is because social conceptions of gender and gender norms (and thus what constitute violations of those norms) also continue to evolve. Paradigmatic forms of drag include male performers who dress, act, or otherwise present in exaggerated stereotypically feminine ways and female performers who dress, act, or otherwise present in exaggerated stereotypically masculine ways.[9] These forms of drag have perhaps been most clearly targeted by many recent anti-drag laws and bills.[10]

That said, drag comes in many forms. Here are just a few examples. Drag queens like Lady Bunny and Peaches Christ are cisgender men who typically perform as women in drag.[11] Drag queens like Gottmik and Box Crayonz are trans men who typically perform as women in drag.[12] Drag queens like Peppermint and Sasha Colby are trans women who typically perform as women in drag.[13] Drag queens like Sigourney Beaver and Crème Fatale are cisgender women who

---

7. *Cf.* Scottie Andrew, *The US has a Rich Drag History. Here's Why the Art Form will Likely Outlast Attempts to Restrict it,* CNN (Apr. 29, 2023, 4:03 AM), https://perma.cc/HNE3-8WUA (quoting drag historian, Joe E. Jeffreys as saying "Drag is the theatrical exaggeration of gender."); *Drag*, MERRIAM-WEBSTER ONLINE, https://perma.cc/4SYH-7953 (describing drag as "entertainment in which performers caricature or challenge gender stereotypes (as by dressing in clothing that is stereotypical of another gender, by using exaggeratedly gendered mannerisms, or by combining elements of stereotypically male and female dress) and often wear elaborate or outrageous costumes."); Kiana Shelton, *The Joy of Drag*, PSYCHIATRIC TIMES (June 29, 2022), https://perma.cc/KG85-R967 ("Drag has many interpretations but is loosely defined as performing in an exaggerated way that caricatures or challenges male or female stereotypes.").

8. *Cf.* Mark Edward, Chris Greenough & Stephen Farrier, *Drag Culture May be Mainstream but its Forms are Constantly Evolving*, THE CONVERSATION (Oct. 23, 2019, 5:42 AM) https://perma.cc/7Z4Y-YVFR.

9. *Cf.* Verta Taylor & Leila J. Rupp, *Chicks with Dicks, Men in Dresses: What It Means to Be a Drag Queen,* 46 J. HOMOSEXUALITY 113, 114-15 (2004) ("Drag queens . . . are gay men who dress and perform as but do not want to be women or have women's bodies."); Jeff McMillan, *EXPLAINER: Drag queens and how they got pulled into politics,* ASSOCIATED PRESS (Oct. 29, 2022), https://perma.cc/WJW8-ET2P ("Drag is the art of dressing and acting exaggeratedly as another gender, usually for entertainment such as comedy, singing, dancing, lip-syncing or all of the above."); Brett V. Ries, *Don't Be A Drag: How Drag Bans Can Violate the First Amendment,* 33 TUL. J. L. & SEXUALITY (forthcoming 2023-24) ("Drag . . . can be described as a type of performance art in which an individual dresses and presents themselves as a different gender than what they identify as.").

10. *See*, *e.g.*, Tennessee's "Adult Entertainment Act" (criminalizing certain performances by "male or female impersonators").

11. Ilana Novick, *Drag Legend Lady Bunny Talks Transphobia, Caitlin Jenner In New Stonewall Inn Show*, GOTHAMIST (Oct. 2, 2016), https://perma.cc/N9FT-8WU5; KQED Arts, *My Life in Drag: Better Known as Peaches Christ*, KQED Truly CA, YOUTUBE 2:12, 3:21 (June 18, 2020), https://perma.cc/5VGH-828D.

12. *See* Christian Allaire, *Gottmik, the First Trans Man on Drag Race, Is Already a Winner, Baby*, VOGUE (Mar. 3, 2021), https://perma.cc/UZ88-XAEG. Greg Marku, *Trans Man: Drag Queen,* PAVEMENT PIECES (Dec. 13, 2021), https://perma.cc/3MVB-TC2H.

13. *See* Janet Mock, *Drag Race Finalist Peppermint Reveals How Drag Enabled Her to Experiment as a Trans Woman,* ALLURE (July 26, 2017), https://perma.cc/N3TP-BEH8; Tómas Mier, '*Highly Trans, Highly Goddess*': *Sasha Colby on Her Historic 'RuPaul's Drag Race' Win,* ROLLING STONE (Apr. 19, 2023), https://perma.cc/KZ4E-7V2S.

typically perform as women in drag.[14] Drag kings like Landon Cider and Christian Adore are cisgender women who typically perform as men in drag.[15] There are also many drag performers who do not identify as either male or female. For example, drag queen Jackie Cox identifies as "gender expansive" out of drag, using he/him, she/her, or they/them pronouns, but when in drag embodies a female character who uses she/her pronouns.[16] Drag performer Dahli identifies as non-binary out of drag and has a signature drag style that blends elements of hyper-masculinity with hyper-femininity.[17] In drag, Dahli typically paints their face with a mustache and in other ways that are closely tied to social conceptions of masculinity.[18] They often pair that with an outfit and body proportions that are closely tied to social conceptions of femininity. For example, they may wear a dress over a silhouette giving them a narrow waist and big hips.[19] Some drag performers also identify in a way that more closely aligns with the masculine or feminine while still being non-binary. For example, out of drag, Boxa Crayonz identifies as a non-binary trans man and drag queen. Willow Pill identifies as trans femme, which is a label used by people assigned male at birth but who identify more with a feminine identity.[20]

The wide range of drag performers' identities is matched by the wide range of drag performances. When drag queen Lipsinka performs a lip-synch, that's a drag performance.[21] When drag king Murray Hill performs a stand-up routine, that's a drag performance.[22] When drag queen Monét X Change sings opera, that's a drag performance.[23] When drag queen Anetra puts on a show combining stunts, ballroom vogueing, and martial arts, that's a drag performance.[24] When drag queen Divine acted in John Waters films, those were drag performances.[25]

---

14. Pinball McQueen, *Women in Drag* (Dec. 1, 2021), https://perma.cc/NV7E-U8JV.

15. Landon Cider, *Dear Drag Race: It's Time to Let Kings Compete*, ADVOCATE (Sept. 1, 2016, 5:38 AM), https://perma.cc/6WUM-KDRZ; Ella Braidwood, *Sequins, Spoofs and Salaciousness: Meet Drag King and Queen Improv Duo Dragprov*, BACKSTAGE (Feb. 18, 2020 at 7:45 AM), https://perma.cc/A3LG-JR3V.

16. Jackie Cox (@jackiecoxnyc), INSTAGRAM (October 7, 2020), https://perma.cc/B44K-YYZD.

17. Catherine Earp, *The Boulet Brothers' Dragula Star Dahli Responds to Criticism Over Their Drag Style*, DIGITAL SPY (Dec. 18, 2021), https://perma.cc/MPA8-LS78.

18. *Id.*

19. *Id.*

20. Marku, *supra* note 12; Stephen Daw, '*RuPaul's Drag Race' Star Willow Pill Comes Out as Trans Femme: 'I'm Starting to Feel Bits of Happiness,'* BILLBOARD (Mar. 4, 2022), https://perma.cc/97UZ-UC8Y.

21. Joshua Barone, *Ballet Theatre Gives the Stage to This Pianist's Drag Persona*, N.Y. TIMES (Oct. 26, 2021), https://perma.cc/55Z9-2NED.

22. AM Brune, *Murray Hill: 'I'm More Than a Drag King. Why Can't You Just Call Me a Comedian?'*, THE GUARDIAN (Mar. 28, 2016, 5:15 PM), https://perma.cc/XV8Y-4FCP.

23. Saskia Maxwell Keller, *Monét X Change Makes Opera Debut in The Daughter of the Regiment,* OUT (Dec. 20, 2022, 11:40 AM), https://perma.cc/28UC-Q6UY.

24. Bernardo Sim, Drag Race*'s Anetra Reflects on Fan Reaction To Her Viral Variety Show,* PRIDE (Feb. 3, 2023, 2:45 PM), https://perma.cc/3KGK-D5YN.

25. Aimee Ferrier, *Exploring the Influential Partnership Between John Waters and Divine*, FAR OUT MAGAZINE (Apr. 22, 2023, 7:00 AM), https://perma.cc/GCU3-KK5E.

When drag queen Jinkx Monsoon performed in the role of Mama Morton in *Chicago* on Broadway, those were drag performances.[26] When members of the drag organization Sisters of Perpetual Indulgence put on a street performance, that's a drag performance.[27] When drag queens Bob the Drag Queen, Eureka O'Hara, and Shangela Laquifa Wadley appear in their unscripted HBO show, *We're Here*, that's a drag performance.[28] When drag queens Jaida Essence Hall and Heidi N. Closet host an episode of their podcast, *Hall and Closet*, that's a drag performance.[29] And when drag queen Mrs. Kasha Davis reads during a children's story hour to promote a message of kindness, that's a drag performance.[30]

If all these things are drag performances, this makes it plausible that a wide variety of other forms of entertainment ought to count as drag performances too, from Bing Crosby and Danny Kaye donning dresses and lip-synching to female vocals in *White Christmas* to Tyler Perry's performances as the fictional character Madea. Not all anti-drag laws seek to restrict all the kinds of performances listed above (although some do), but it will be useful to keep in mind what drag is and its many forms while assessing the arguments in this Article.

II. DRAG IS EXPRESSIVE CONDUCT

The First Amendment protects more than just speech in the colloquial sense. It also protects various forms of *expressive conduct*—i.e. conduct intended to communicate a message.[31] While the Supreme Court has not ruled on this specific question, precedent strongly suggests that drag is expressive conduct and thus subject to First Amendment protection. In addition, because anti-drag laws are aimed at expressive elements of drag performers' conduct, anti-drag laws are subject to strict scrutiny.

Seeing why this is so requires, among other things, understanding the Supreme Court's tests for expressive conduct. There are two different levels of protection for expressive conduct, depending on whether the government restriction of expressive conduct at issue is one that aims at suppressing an expressive element of the conduct or a non-expressive element of the conduct. If it aims at suppressing

26. Conor Clark, Drag Race *Winner Jinkx Monsoon Extends Run in Chicago on Broadway*, GAY TIMES (Feb. 28, 2023), https://perma.cc/RRP6-EKKL.

27. Daniel Villarreal, *Who are the Sisters of Perpetual Indulgence? Get to Know the Nuns of Drag*, LGBTQ NATION (June 2, 2023), https://perma.cc/E8CV-RCGW/.

28. Samuel Maude, *We're Queer and We're Here: Bob the Drag Queen, Eureka O'Hara, and Shangela on the HBO Hit's New Season*, ELLE (Nov. 22, 2022), https://perma.cc/YY3U-BZ7D.

29. Apple Podcasts, *Hall* & Closet with Jaida Essence Hall and Heidi N Closet, MOM (2022), https://perma.cc/PPB8-PC3G.

30. Joey Nolfi, *RuPaul's* Drag Race All Stars 8 *star Mrs. Kasha Davis Reveals 'Agenda' of Drag Story Hour: 'It's About Kindness,'* ENTERTAINMENT WEEKLY (Apr. 29, 2023, 02:00 PM), https://perma.cc/F3MV-UDKL.

31. *See, e.g.*, Richard P. Stillman, *A Gricean Theory of Expressive Conduct*, 90 U. CHI. L. REV. 1239 (2023).

an expressive element of the conduct, the restriction is subject to strict scrutiny.[32] If it aims at suppressing the conduct for other reasons and thus burdens expression only incidentally, then it is subject to the *O'Brien* test, which is a form of intermediate scrutiny.[33]

The distinction can be shown with examples. In *United States v. O'Brien,* 391 U.S. 367 (1968), the Supreme Court upheld a law against destroying draft cards for the Selective Service, even though protesters had burned their draft cards as an expressive act meant to convey opposition to the draft.[34] The Court reasoned that the ban on destroying draft cards was aimed at promoting the efficient operation of the Selective Service registry and that this aim was unrelated to the suppression of expressive conduct.[35] The Court also reasoned that the government had a substantial interest in preventing the destruction of draft cards, given the many functions the draft cards played in the efficient and effective operation of the Selective Service registration process.[36] The Court held that the law did not violate the First Amendment because the law (1) was "within the constitutional power of the Government," (2) furthered "an important or substantial governmental interest," that (3) was a government interest "unrelated to the suppression of free expression," and (4) was only an "incidental restriction on alleged First Amendment freedoms" that was "no greater than is essential to the furtherance of that interest."[37]

In contrast, in *Texas v. Johnson* 491 U.S. 397 (1989), the Supreme Court held that a Texas law that prohibited desecration of the American flag violated the First Amendment because desecration of the American flag was expressive conduct that the law aimed to suppress.[38] As such, the Court subjected Texas' law and its asserted interests to "the most exacting scrutiny."[39] Thus, while it is true that in some cases expressive conduct receives less protection than actual speech, this is not so when a law is aimed at restricting the expressive elements of expressive conduct. Instead, the Court held that "the distinction between written or spoken words and nonverbal conduct . . . is of no moment where the nonverbal conduct is expressive . . . and where the regulation of that conduct is related to expression."[40] Thus, protection of expressive conduct is part of a "more generalized guarantee of freedom of expression" that "makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription" under the First Amendment.[41]

32. *See, e.g.*, Spence v. Washington, 418 U.S. 405, 411 (1974).
33. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968).
34. *Id.* at 370, 372.
35. *Id.* at 381–82.
36. *Id.* at 378–80.
37. *Id.* at 377.
38. Texas v. Johnson, 491 U.S. 397, 407 (1989).
39. *Id.* at 412.
40. *Id.* at 416.
41. *Id.* at 406 (quoting Comty. for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 ((D.C. 1983) (Scalia, J., dissenting) (emphasis in original)).

As this Article will show, because anti-drag laws are *aimed* at suppressing expressive conduct by virtue of aiming to suppress drag performances themselves, they are subject to strict scrutiny, which they fail. However, even if a court were to find that an anti-drag law was not aimed at expressive conduct, such a law likely would not pass even the *O'Brien* test. These conclusions rest on the assumption that drag is indeed expressive conduct. As I show in the remainder of this section, that assumption is well supported by both Supreme Court and lower court precedent about what expressive conduct is.

In *Spence v. Washington,* the Supreme Court held that a college student engaged in expressive conduct when he displayed a privately owned American flag with a peace sign taped to it in order to express his view that "America stood for peace."[42] The Court reasoned that this was expressive conduct because the appellant who displayed the flag had "[a]n intent to convey a particularized message" and "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it"—or, at least, it was likely that most citizens would not "miss the drift of appellant's point."[43]

Over time, the Court has adopted an expansive understanding of what level of specificity of message is sufficient for something to count as expressive conduct, especially when the conduct is performative in nature. Particularly instructive here is the Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* that a privately organized St. Patrick's Day and Evacuation Day parade held annually on public streets in Boston was expressive conduct.[44] The Court concluded that, as a result, the parade organizers had a free speech right to exclude the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) from marching in the parade.[45]

In reasoning to this conclusion, the Court noted that they had previously recognized that the First Amendment protected acts "beyond written or spoken words as mediums of expression" including "saluting a flag (and refusing to do so)," "wearing an armband to protest a war," "displaying a red flag," and "even marching, walking or parading in uniforms displaying the swastika."[46] The Court reasoned that this set of cases showed that "a narrow, succinctly articulable message is not a condition of constitutional protection."[47] The Court further reasoned that if it were, then the First Amendment would not protect "the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[48] These examples are instructive because

42. *Spence*, 418 U.S. at 406, 408 (1974).

43. *Id.* at 410–11.

44. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 570 (1995).

45. *Id.* at 580–81.

46. *Id.* at 569 (citing W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 632, 642 (1943), Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503, 505–06 (1969), Stromberg v. California, 283 U.S. 359, 369 (1931), and even Nat'l Socialist Party of America v. Skokie, 432 U.S. 43 (1977).

47. *Hurley*, 515 U.S. at 569.

48. *Id.*

Pollock's art is famously abstract, Schoenberg's compositions were instrumental, and Lewis Carroll's poem consisted largely of made up words that Carroll did not provide a fixed meaning for (e.g., "'Twas brillig, and the slithy toves [d]id gyre and gimble in the wabe"). There are many messages such artists may have intended to communicate with their art, and there are no doubt many messages that receivers have interpreted in them. But this ruling is in keeping with the Court's practice to include artistic expression under the protection of the First Amendment, going so far as to recognize nude dancing as expressive conduct.[49]

Despite the plurality of messages a parade's participants may have intended and the multitude of messages spectators may have interpreted, the Court concluded that "[n]ot many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of them."[50] The Court reached this conclusion, despite never explicitly rejecting the findings of the Supreme Judicial Court of Massachusetts that the parade contained "a wide variety of 'patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes,' as well as conflicting messages" and that "[t]he only common theme among the participants and sponsors is their public involvement in the Parade."[51] This did not phase the Court, which held that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[52]

In reasoning that the parade organizers had a free speech right to exclude GLIB from marching in the parade, the Court argued that GLIB's participation in the parade would itself be expressive conduct.[53] It was precisely the parade organizers' desire not to have that expressive conduct influence their own expressive conduct that grounded their right to exclude GLIB. The Court cited approvingly the view that "[p]arades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration."[54] The Court acknowledged that for GLIB to have marched in the parade would have been for GLIB "to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants" and "show that there are such individuals in the community."[55] The Court held that this would have been "equally expressive" to the parade's other speech, explaining that "[a]lthough GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and

49. Barnes v. Glen Theatre, 501 U.S. 560, 565 (1991).
50. *Hurley*, 515 U.S. at 569.
51. *Id.* at 562.
52. *Id.* at 569–70.
53. *Id.* at 570.
54. *Id.* at 568 (quoting S. Davis, Parades and Power: Street Theatre in Nineteenth-Century Philadelphia 6 (1986)).
55. *Id.* at 570.

the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics."[56]

If GLIB marching in a parade would constitute expressive conduct expressing the view "that some Irish are gay, lesbian, or bisexual" and that gay, lesbian, and bisexual people "have as much claim to unqualified social acceptance as heterosexuals,"[57] then it is hard to see how drag performances, given the social role that drag plays in our culture, could fail to generally be acts of expressive conduct too. The messages sent by drag performances often seem much clearer than those sent by parade marching, abstract art, instrumental music, nonsense poetry, or nude dancing. And at least some of the messages drag sends seem remarkably close to the messages the Court recognized for GLIB in *Hurley*. This includes the message that gender nonconforming people exist. Drag also typically expresses messages about the value, dignity, and worth of challenging gender norms, and expresses a rejection of rigid gender norms, a fixed gender-binary view of the world, and the hegemony of heteronormativity. In addition, given the close associations between these things and the LGBTQIA+ community, drag also seems to send the message that LGBTQIA+ people exist along with messages about the value, dignity, and worth of LGBTQIA+ people. Drag performances often also send the message that such people and such views are worth celebrating, promoting, patronizing, and applauding.

Thus, drag performances are expressive conduct in virtue of being artistic performances that express a variety of messages, similar to those the Supreme Court has already recognized.[58] This is in keeping with the Supreme Court's recognition that live entertainment, such as musical and dramatic works, fall under the coverage of the First Amendment.[59] The claim that drag performances are expressive conduct is further supported by various rulings that common elements of drag performance themselves constitute expressive conduct. For example, there have been several Supreme Court cases holding that wearing clothes that express a message constitute expressive conduct,[60] and lower courts have held that one's choice of hairstyle and even drag pageants themselves are expressive conduct.[61] That drag performances are frequently a form of live entertainment where

56. *Hurley*, 515 U.S. at 570, 574.

57. *Id*. at 574.

58. *See* discussion of why drag is art *infra* section V.

59. Schad v. Mt. Ephraim, 452 U.S. 61, 65-6 (1981) (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Schacht v. United States, 398 U.S. 58 (1970); Jenkins v. Georgia, 418 U.S. 153 (1974); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Doran v. Salem Inn, Inc. 422 U.S. 922 (1975). *See also* California v. LaRue, 409 U.S. 109, 118 (1972); Young v. American Mini Theatres, Inc., 427 U.S. 50, 61 (1976).

60. *See, e.g.,* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Cohen v. California, 403 U.S. 15 (1971); Minn. Voters All.v. Mansky, 138 S. Ct. 1876 (2018).

61. Betenbaugh v. Needville Indep. Sch. Dist., 701 F. Supp. 2d 863, 882–83 (S.D. Tex. 2009); Norma Kristie, Inc. v. City of Okla. City, 572 F. Supp. 88, 91 (W.D. Okla. 1983).

clothing and hair choices are an integral part of the performance only further shows that drag shows are expressive conduct.[62]

III. DRAG PERFORMANCES EXPRESS VIEWPOINTS

Here I show not only that drag performances are expressive conduct, but that they express particular viewpoints. It will be useful to categorize the viewpoints expressed via drag performances into two types. First, there are those viewpoints that drag performances convey generally, just in virtue of being drag performances. Second, there are viewpoints that specific drag performances may convey that, while not viewpoints that drag performances express as a category, are nevertheless viewpoints that couldn't be expressed as clearly or at all via any other method than drag. This section examines both kinds of viewpoints expressed through drag. Later sections of the paper show why anti-drag laws discriminate against both kinds of viewpoints, and why, as a result, anti-drag laws are subject to strict scrutiny.

To begin, let's consider what kinds of viewpoints drag expresses. In holding that a Tennessee law criminalizing certain performances involving "male and female impersonators" violated the First Amendment, Judge Thomas Parker recently concluded that by targeting "male or female impersonators," the law engaged in unconstitutional viewpoint discrimination.[63] Specifically, he concluded that the "phrase discriminates against the viewpoint of gender identity—particularly, those who wish to impersonate a gender that is different from the one with which they are born."[64] To illustrate his point, Parker used the example of two Elvis impersonators dressed in revealing but non-obscene outfits.[65] If one performer were male and the other female, Tennessee's law would make it more likely that the female Elvis impersonator would be subject to prosecution than the male Elvis impersonator.[66] That situation discriminates against those engaged in certain expressions of gender non-conformity.

Similarly, in another recent decision, Judge David Nuffer enjoined a city's refusal to issue a permit for a drag show.[67] In reasoning that the city had engaged in unconstitutional discrimination against the drag performers' First Amendment rights, Nuffer held that "drag shows of a nature like the planned Allies Drag Show are indisputably protected speech and are a medium of expression containing political and social messages regarding (among other messages) self-

62. *Cf*. S. Roy Gutterman, *Clothing is Protected by the First Amendment, Too: S. Roy Gutterman,* THE POST-STANDARD (July 19, 2018,10:44 a.m.), https://perma.cc/M7A3-W7VN; Roy S. Gutterman, *Masking Free Speech: The First Amendment Implications of Masks, Clothing, and Public Health* 53 LOY. U. CHI. L. J. 476 (2022).

63. *Friends of George's Inc. v. Mulroy*. No. 2:23-cv-02163-TLP-tmp (W.D. Tenn, June 2, 2023).

64. *Id*. at 43*.

65. *Id*. at 43–4*.

66. *Id*.

67. *Southern Utah Drag Stars v. City of St. George*. No. 4:23-cv-00044-DN-PK. (D. Utah, June 16, 2023).

expression, gender stereotypes and roles, and LGBTQIA+ identity."[68] He also approvingly cited the statement of Mitski Avalōx, one of the organizers for the relevant drag event, who claimed that drag expresses a "valuable political message to convey that individuals with gender presentation and identities outside the majoritarian norm are welcome in public places."[69]

The positions taken by Parker, Nuffer, and Avalōx align closely with the position put forward by Brett V. Ries, who has argued that drag "inherently contains a viewpoint that critiques gender norms, especially since the medium of drag itself relies on bending gender norms."[70] Ries notes that as "a form of gender nonconformity," performing drag "communicates opposition to the gender binary."[71] He also observes that "because gender norms are so pervasive in our society, one cannot view drag without recognizing that the performer is defying gender expectations, and drag artists cannot perform without communicating a viewpoint on gender norms."[72] This point is particularly compelling when thinking about the criteria used to identify expressive conduct in *Spence*, which include the fact that, in the surrounding circumstances, the likelihood is great that the expressor's message would be understood by those who viewed it.[73]

While Parker, Nuffer, Avalōx, and Ries each put their points somewhat differently, this poses no problem for viewing drag as expressive conduct from the perspective of *Hurley* where the Court held that a speaker "does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[74] The voices may be multifarious and the messages inexact, but there is clearly a common song here, made all the more artistic by harmonious forms of pushback against gender norms through various kinds of expression through drag. Given the intrinsic nature of the messages critiquing gender norms that drag sends—at least in our current cultural context—drag, as Ries puts it, "does not just *happen* to express a particular viewpoint," but rather "*is* the viewpoint and cannot be separated from the viewpoint it inherently holds."[75]

Drag is an important part of queer culture and is closely associated with the LGBTQIA+ community.[76] Thus, at least in our cultural context, drag also seems

68. *Drag Stars* at 42* (alternative pagination 38*).

69. *Drag Stars* at 42* (alternative pagination 37-38*).

70. Brett V. Ries Note, *Don't Be a Drag: How Drag Bans Can Violate the First Amendment*. 33 TULANE J. OF L. AND SEXUALITY (forthcoming 2023-2024) (manuscript at 8*).

71. *Id*. at 9*.

72. *Id*.

73. Spence v. Washington, 418 U.S. 405, 411 (1974).

74. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569–70 (1995).

75. Ries, *supra* note 70, at 10* (emphasis in original).

76. *See, e.g*., Mario Campana, Katherine Duffy, and Maria Rita Micheli, *RuPaul's Drag Race: Our Research Shows How It Helps Destigmatise the LGBTQ+ Community*, THE CONVERSATION (Feb. 16, 2023, 12:21 PM), https://perma.cc/9KWH-DU44.

inherently linked to a second set of viewpoints about LGBTQIA+ people.[77] Just as members of GLIB marching in a parade expressed the viewpoint that gay, lesbian, and bisexual Irish Americans existed and were worthy of equal respect and dignity, similarly drag performances express the viewpoint that gay, lesbian, bisexual, trans, and other queer people exist and are worthy of equal respect and dignity. Drag performances also express related viewpoints such as that a diverse array of sexual orientations and gender identities ought to be celebrated and can be beautiful.

These viewpoints are all ones expressed by the performance of drag, but drag performers themselves are not the only ones who send messages and convey viewpoints during drag shows. Drag performances also create a unique medium from which audience members can send messages and convey viewpoints. Standing in line to watch, cheering loudly for, and tipping drag performers are all ways of expressing approval of drag and of the various viewpoints that drag represents. This is in keeping with the Supreme Court's acknowledgment that the right to receive speech is itself part of what the First Amendment protects.[78]

In addition to the viewpoints that drag conveys by its very nature given our current cultural context, there are also a variety of viewpoints and messages that drag artists express that could not be expressed at all or as well through any other medium. For example, drag artist and cancer survivor HoSo Terra Toma incorporated her experience undergoing chemotherapy into her performance in the finale of the drag competition show *Dragula*.[79] This conveys a viewpoint about the ability to use illness as a way to create drag art; a viewpoint that likely could not be communicated as vividly in any way other than through a drag performance itself. Similarly, part of the signature style of drag performer Sasha Velour is performing bald. Sasha has said that her drag style is a tribute to her late mother, who embraced being bald during her five year battle with cancer.[80] By using baldness as part of her feminine drag persona, Velour shows the power and beauty of baldness for a woman in a way that she could not if she was not violating the gender norms expected of her as a person assigned male at birth. Drag is also used to convey more explicitly political messages. For example, during her time on season

77. *Cf.* Spence, 418 U.S. at 410 ("[T]he context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol."); Gay Students Org. of Univ. of New Hampshire v. Bonner, 509 F.2d 652, 661 (1st Cir. 1974) (holding that a "basic message" gay associations can send is "that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society."); Ries, *supra* note 70, at 10* (citing *Bonner* and stating that "More generally, because drag has historically been a staple of the LGBTQ+ community and is often performed in LGBTQ+ spaces, it also sends the message that 'public understanding of [LGBTQ+ individuals'] attitudes and problems is desirable for society.'").

78. *See, e.g.*, Richmond Newspapers v. Va., 448 U.S. 555, 576 (1980) ("Free speech carries with it some freedom to listen. In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'") (citing Kleindienst v. Mandel, 408 U.S. 753, 762 (1972)).

79. *HoSo Terra Toma*, DRAG RACE WIKI, https://perma.cc/TJ52-FPNT.

80. Jasmine Andersson, *Sasha Velour Opens Up About her Inspiration Behind her Signature Bald Look*, PINK NEWS (Oct. 30, 2017), https://perma.cc/3AKP-6GNZ.

13 of *RuPaul's Drag Race,* drag queen Symone often used her runway looks to convey messages about the worth, beauty, and struggles of Black people and in support of the Black Lives Matter movement.[81] While messages in support of Black lives and the Black Lives Matter movement can and do happen in many ways, Symone's performances arguably sent specific messages about the value of queer Black people, including those assigned male at birth who embrace more feminine personas and styles of dress.

The Supreme Court has recognized that changing the context in which a message is sent can change the message and has taken this into account when assessing whether sufficient alternative channels of communication are left open when speech is regulated.[82] Banning drag or other related activities like performances that involve "male or female impersonation" will at times ban the only means by which a particular viewpoint could be communicated. As will be discussed in more detail in section VII, given the extremely high First Amendment bar for permitting viewpoint discrimination, the inherent viewpoint expression of drag renders virtually all anti-drag laws unconstitutional.

One other point worth noting: in addition to expressing a viewpoint, drag also has specific content. This, for First Amendment purposes, is analytically true. Under the First Amendment, to express a viewpoint is to have content.[83] But one can see independently that any law targeting drag will not only target the viewpoints expressed by drag but will also target a particular set of subject matters and, thus, content. Therefore, even if a court erroneously concluded that drag does not express viewpoints, a court would still have a hard time avoiding the clear conclusion that to regulate specifically drag performances is to regulate on the basis of content. Supreme Court precedent also sets a high bar for content discrimination, although that bar varies some depending on the type of forum.

IV. DRAG IS NOT OBSCENE

So far we've seen that drag performances are acts of expressive conduct that have a viewpoint. As such, they receive a high level of First Amendment protection. However, many attempts at limiting drag performances have sought to categorize many drag performances as falling outside of First Amendment protection entirely on the grounds that drag performances constitute legal obscenity, which is a category of speech that is not covered by the First Amendment.[84] This strategy does not work because drag is not, as a category, obscene.

---

81. Joey Nolfi, *How Symone Pulled off the Most Powerful Look in RuPaul's Drag Race Herstory*, ENTERTAINMENT WEEKLY (Mar. 08, 2021, 2:59 PM), https://perma.cc/7ZCS-YBR5.

82. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 56–7 (1994).

83. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995) (explaining that viewpoint discrimination is an "egregious form of content discrimination" and is "presumptively unconstitutional").

84. *See, e.g.*, Chaplinsky v. N.H., 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to

This doesn't mean that there cannot be obscene drag performances. There can be and are. But this says more about the nature of obscenity than it does the nature of drag. Not all movies, magazines, or photographs are obscene, but there can be, and are, obscene movies, magazines, and photographs. The law can regulate obscene material, including obscene movies, magazines, photographs, and drag performances.[85] But the law cannot treat most or all movies, magazines, or photographs as obscene just because some are. So too, the law cannot treat most or all drag performances as obscene just because some are. Regulations of obscene material—regardless of the format via which that material is delivered—need to avoid vagueness and overbreadth so as to not improperly restrict or chill protected speech.[86] In addition, such regulations need to be limited to speech which meets the actual standard of legal obscenity, not that which meets the standard of obscenity only in the common vernacular or via a modified standard of obscenity that conflicts with the Supreme Court's own precedent on what obscenity is.[87]

To understand why drag is not legally obscene, two topics need to be covered. The first is current obscenity doctrine, as expounded by the Supreme Court, and why drag performances typically are not legally obscene under the current standard. The second topic concerns attempts by legislatures to create alternative obscenity standards for minors and the current shortcomings of attempts to restrict drag performances based on those alternative standards. Then in the next section, I show how even laws that target only the small subcategory of drag performances that are legally obscene are still unconstitutional, given the Supreme Court's ban on content- and viewpoint-based restrictions on even unprotected speech.[88]

A. CURRENT SUPREME COURT OBSCENITY JURISPRUDENCE

The current general standard for determining if something is legally obscene comes from the Supreme Court's decision in *Miller v. California*, 413 U.S. 15 (1973). There, the Court acknowledged "the inherent dangers of undertaking to regulate any form of expression" and held as a result that "'[s]tate statutes designed to regulate obscene materials must be carefully limited.'"[89] To accomplish these ends, the Court held that "basic guidelines" for determining if something is proscribable as obscenity are the following:

---

raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words").

85. *See, e.g.*, Miller v. California, 413 U.S. 15, 25-26 (1973); Ginzburg v. United States, 383 U.S. 463, 466-67 (1966).

86. *See* discussions of vagueness, the overbreadth doctrine, and chilled speech *infra* section VIII.

87. *Cf. Friends of Georges*, 2023 WL 3790583 at 39 ("There is no question that obscenity is not protected by the First Amendment. But there is a difference between material that is 'obscene' in the vernacular, and material that is 'obscene' under the law.").

88. *See, e.g.,* R.A.V. v. St. Paul, 505 U.S. 377 (1992).

89. *Miller*, 413 U.S. at 23.

> (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.[90]

Only if the answer to all three questions is yes does speech fall outside of the First Amendment's protection.

It is important to note, however, that a state regulation of obscenity can be unconstitutional even if it regulates only material that, taken as a whole, appeals to a prurient interest, is patently offensive, and lacks serious literary, artistic, political, or scientific value. This is because the second prong requires that the regulated conduct must be "specifically defined by the applicable state law." This means that state laws cannot simply restate the *Miller* test in regulating obscenity. They must add specificity to any statute regulating obscenity. The Court included this open-endedness in the *Miller* test on the grounds that it is not the Court's "function to propose regulatory schemes for the States" and that states themselves needed to engage in such "concrete legislative efforts."[91] When state legislatures fail to do this, their obscenity laws can be struck down as unconstitutionally vague. The Court has held that this standard applies to federal attempts to regulate obscenity as well. In concluding that the Communications Decency Act of 1996 (CDA) passed by Congress was unconstitutional, the Court held that

> the CDA is not saved from vagueness by the fact that its patently offensive standard repeats the second part of the three-prong obscenity test set forth in *Miller v. California*. The second *Miller* prong reduces the inherent vagueness of its own patently offensive term by requiring that the proscribed material be specifically defined by the applicable state law.[92]

The Court concluded instead that "[t]he vagueness of such a content-based regulation, coupled with its increased deterrent effect as a criminal statute, raise special First Amendment concerns because of its obvious chilling effect on free speech."[93]

Despite leaving concrete legislative efforts to the legislators, the Supreme Court has provided guidance as to how to interpret the three prongs of the *Miller*

---

90. *Id*. at 24.
91. *Id*. at 25.
92. Reno v. ACLU, 521 U.S. 844, 845-46 (1997) (citations and internal quotation marks omitted).
93. *Id*. at 845 (citations omitted).

test. Regarding the first and second prongs, "contemporary community standards" determine what "appeals to the prurient interest" and what counts as "patently offensive."[94] Prurience, for the purposes of identifying obscenity, is "that which appeals to a shameful or morbid interest in sex."[95] The term "patently offensive" is left undefined, but the Court has given as "a few plain examples of what a state statute could define for regulation under" the second prong of the *Miller* test "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[96] This does not mean, of course, that all representations or descriptions of ultimate sex acts, masturbation, excretory functions, or lewd exhibition of the genitals could be restricted as legally obscene. Not all such representations or descriptions are patently offensive. The Court gives the example of medical texts that may contain "graphic illustrations and descriptions."[97] And some representations that are patently offensive may still fail the third prong of the *Miller* test by having serious literary, artistic, political, or scientific value.

Unlike the first two prongs of the *Miller* test, triers of fact do not use a community standard in assessing the third prong.[98] The Court has held that this feature of the *Miller* test is not an "oversight" but rather "a deliberate choice."[99] The Court's position is that "[j]ust as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."[100]

With this in mind, we can now see why most drag performances are not legally obscene. To begin with, legal obscenity is restricted "to works which depict or describe sexual conduct."[101] Many events hosted by drag performers, such as story hours for children, do not depict or describe sexual conduct.[102] Thus, they

94. *See, e.g.*, Pope v. Illinois, 481 U.S. 497, 500-01 (1987).

95. *See, e.g.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985) (citing Roth v. United States, 354 U.S. 476 (1957)).

96. Miller v. California, 413 U.S. 15, 25 (1973).

97. *Id.* at 26.

98. *See, e.g.*, *Pope*, 481 U.S. at 500.

99. *Id.*

100. *Id.* at 500-01.

101. *Miller*, 413 U.S. at 23-4.

102. One might argue that anyone who dresses in a manner associated with a gender other than one's own (or other than the gender assigned to one at birth) depicts "sexual conduct." But this argument is a non-starter that strains credulity. Most people most of the time wear clothing that is culturally associated with a particular gender. No one treats all such dress as depicting sexual conduct. And there is no good reason to think that conduct is sexual just because the person wearing the clothing has a gender, or has been identified as having a gender, other than the gender culturally associated with that clothing. This is why no one thinks that every appearance of Robin Williams as Mrs. Doubtfire depicts sexual conduct.

cannot be legally obscene. Second, many drag performances that depict or describe some sexual conduct do so only in a way that would appeal to normal sexual interest and not prurient interest, which requires a *shameful or morbid* interest in sex. Similarly, many drag performances that depict or describe some sexual conduct do so in a way that is not patently offensive. For particularly prudish or sensitive communities, a larger portion of drag shows may strike the average community member as appealing to a prurient interest in a patently offensive way. However, even then, typical drag shows—using a reasonable person standard that is not limited to the community under consideration—will accurately be deemed, when taken as a whole, as having serious literary, artistic, political, or scientific value.

Given the widespread recognition that drag is both artistic and political, it is this last factor that perhaps most clearly prevents most drag performances from being legally obscene. It is clear that drag is an art form. It typically comprises a variety of activities that themselves are considered artistic expression, such as applying makeup, designing and donning elaborate outfits, lip-synching, singing, dancing, and telling jokes. Given this, it is no surprise that drag is considered an art form by those who study and participate in it. In *The Art of Drag*, journalist Jake Hall writes that drag is "one of the world's most glamorous, hilarious, and rebellious art forms" and that "[e]very day, artists across the globe dig deep into their dressing-up boxes, using lavish costumes and make-up to magic up larger-than-life alter-egos that dazzle and amaze."[103] The Boulet Brothers, a drag duo and the hosts of the drag reality competition *Dragula*, remind the contestants each episode that "drag is art."[104] And in his recent decision, Judge Nuffer reported drag artist Mitski Avalōx's claim that drag is an "art form, a source of entertainment, and a form of activism."[105] This all aligns well with a description given by social worker Kiana Shelton that "[a]t its core, drag is a creative act—a powerful and personal form of self-expression" and "an art that demands many hours, material investment, and creative risks."[106] Given drag's popularity, it seems that many recognize the artistic value of drag.[107]

Perhaps just as widely attested to is drag's political value. In analyzing drag performances in the late 1980s by drag queens like Doris Fish, Lypsinka, RuPaul, and Lady Bunny, Craig Seligman writes that "today, we can see just how much

103. JAKE HALL, THE ART OF DRAG 7 (2020).

104. Juan Barquin, *Bored of* Drag Race*? Dragula Awaits with Open, Blood-Soaked Arms*, THE AV CLUB (Feb. 18, 2022), https://perma.cc/V36E-8Z2Y.

105. S. Utah Drag Stars v. City of St. George, No. 4:23-CV-00044-DN-PK, 2023 WL 4053395, at *20 (D. Utah June 16, 2023); *cf. Friends of Georges*, 2023 WL 3790583 at *16 (referring to drag as "an art form").

106. Shelton, *supra* note 7.

107. Andrew, *supra* note 7; Jonathan W. Marshall, *How Drag as an Art Form Sashayed From the Underground and Strutted into the Mainstream*, THE CONVERSATION (May 24, 2023, 4:10 PM), https://perma.cc/U5E6-9VEB.

drag—for all its glamour and fantasy—was a political act."[108] Fenton Bailey and Randy Barbato, co-founders of World of Wonder and DragCon and executive producers of *RuPaul's Drag Race*, wrote in 2018 that "drag only becomes more pointedly political in an environment where an illegitimate regime seeks—picking just one example—to impose reductive and cruel ideas about gender that fly in the face of gender's proven complexity."[109] The idea that drag is political is one shared by many drag artists themselves. Drag queen Alaska Thunderfuck, who hosts a segment called "Let's Get Political" on the bi-weekly podcast she hosts with fellow drag queen Willam, has stated that "[d]rag has always been a stronghold against shitty politicians."[110] Similarly, Sasha Velour claims that she sees drag as a "political and historical art form."[111] And drag queen and *Drag Den* contestant Pura Luka Vega has said that "[i]t's not something to be shocked about, when drag queens become political. The act of putting on makeup, being loud and proud and out there is already political."[112] Ironically, as drag shows become an increasingly frequent target for political suppression, the political value of drag performances increases as they become an even clearer way of sending a political message rejecting such attempts at suppression. Thus, drag performances—by and large—simply do not meet the criteria of legal obscenity and do not lose their status as protected expression as a result.

B. ISSUES CONCERNING VARIABLE OBSCENITY STANDARDS FOR MINORS

While most drag performances clearly are not legally obscene for adults, there remain questions about when, if ever, drag performances might properly be considered legally obscene for minors and what, if any, the legal significance of some drag performances being obscene for minors might be. As Judge Parker has correctly noted, "speech that is not obscene—which may even be harmful to minors—is a different category from obscenity. Simply put, no majority of the Supreme Court has held that sexually explicit—but not obscene—speech receives less protection than political, artistic, or scientific speech."[113]

That said, the Court has permitted states to create a "variable" standard for obscenity for minors.[114] In *Ginsberg v. New York*, the Supreme Court upheld a New

108. Craig Seligman, *You Just Don't Silence a Drag Queen*, TIME (Mar. 23, 2023, 7:00 AM), https://perma.cc/SL4Y-CGBC.

109. Daniel Villarreal, *Drag Queens are More Political Than Ever. Can They Lead a Movement?*, VOX (Nov. 5, 2018, 12:30 PM), https://perma.cc/MXD3-UEBW.

110. Isabelle Kliger, '*For Queer Individuals, This is Life or Death': the Drag Race Stars Getting Political*, THE GUARDIAN (Oct. 28, 2020, 11:13 AM), https://perma.cc/9L24-698T.

111. *Sasha Velour On Why Drag Is A 'Political And Historical Art Form*, WBUR (July 24, 2017), https://perma.cc/3E4E-XTRT.

112. Amanda T. Lago, *Can Drag be Too Political? The Queens of 'Drag Den' Weigh in*, RAPPLER (Jan. 28, 2023, 1:16 PM), https://perma.cc/23WL-54TA.

113. *Friends of Georges*, 2023 WL 3790583 at *19 (citing Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002) and Reno v. ACLU, 521 U.S. 844, 874 (1997)).

114. Ginsberg v. New York, 390 U.S. 629, 635 (1968); *cf.* David L. Hudson Jr., *Harmful to Minors Laws*, FREE SPEECH CENTER (Jan. 1, 2009), https://perma.cc/5GSP-2LWS ("The Supreme Court

York statute that made it illegal to sell certain sexually explicit materials to minors, even though those materials were deemed non-obscene for adults.[115] In reaching this conclusion, the Court held that "New York's regulation in defining obscenity on the basis of its appeal to minors under 17" was not "an invasion of such minors' constitutionally protected freedoms" because the regulation merely "adjusts the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in term[s] of the sexual interests of such minors" and that the state had the power to make such adjustments because "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."[116] While *Ginsberg* was decided prior to *Miller*, nothing in *Miller* explicitly overruled the "variable obscenity" for minors holding in *Ginsberg*, and courts continue to treat variable obscenity for minors laws as a viable constitutional option.[117]

That said, it is important to recognize that speech which is deemed obscene for (at least some) minors but not for adults cannot be considered speech categorically uncovered by the First Amendment. This is because speech that is sexually explicit or indecent but not obscene for adults is speech covered by the First Amendment (assuming it doesn't then fall into some other unprotected category like perjury or fighting words). If speech that was deemed obscene for minors but not obscene for adults were to be treated as categorically uncovered by the First Amendment, then there would be some speech—namely, that which is obscene for minors but not for adults—that both would be and would not be categorically uncovered by the First Amendment. But that position is incoherent. There is no need to posit such illogic as part of First Amendment precedent. Rather, this merely reveals that the variable obscenity for minors doctrine should be understood another way. The most natural way to view the variable obscenity for minors doctrine is that it allows some covered speech to become uncovered speech in certain contexts where minors are present or could reasonably be expected to be present. This is precisely the kind of system the Court put in place in *Ginsberg*. The Court did not conclude that the sexually explicit magazines the storekeeper sold were uncovered speech. Nor did the Court conclude that the storekeeper selling these magazines to adults was an act unprotected by the First Amendment. Rather, the Court held only that New York had the power to prohibit sale of those sexually explicit magazines to minors by treating those magazines as obscene in the context of a sale to a minor.

But because speech that is obscene for minors but not adults is still speech covered by the First Amendment, the Court has made it clear that laws restricting speech that is obscene for minors but not adults must be narrowly tailored so as to

---

approved of the concept of variable obscenity when it upheld a New York harmful-to-minors law in *Ginsberg v. New York* (1968).").

115. *Ginsberg v. New York*, 390 U.S. at 631-33.

116. *Id.* at 638.

117. *See* Hudson, *supra* note 114.

not infringe on the free speech rights of adults. For example, in *Sable Communications of Cal. v. FCC*, the Court held that while "protecting the physical and psychological well-being of minors" is a compelling government interest, in order "to withstand constitutional scrutiny" under the First Amendment, the government must stick to "narrowly drawn regulations" designed to serve that interest "without unnecessarily interfering with First Amendment freedoms."[118] The Court put the point succinctly, writing that "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."[119]

The Court has set a high bar for what counts as a sufficiently narrowly tailored law that regulates non-obscene material in the interest of preventing harm to children.[120] One of the Court's core guiding principles in this area has been that "the government may not reduce the adult population to only what is fit for children."[121] For example, in *Butler v. Michigan*, 352 U.S. 380 (1957), the Court invalidated as unconstitutional a Michigan law restricting material containing "obscene, immoral, lewd or lascivious language, or . . . figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth."[122] In doing so, the Court reasoned that while the state "insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare," doing so surely "is to burn the house to roast the pig" and that the legislation was "not reasonably restricted to the evil with which it is said to deal."[123] Similarly, in *Bolger v. Youngs Drug Prods. Corp.*, the Court held that a federal law preventing the unsolicited mailing of information about contraceptives violated the First Amendment.[124] In so holding, the Court reasoned that "the fact that protected speech may be offensive to some does not justify its suppression" and that the

118. Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989) (citing Hynes v. Mayor of Oradell, 425 U.S. 610, 620; First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980)).

119. *Id.* The Court has taken a different approach for broadcast media. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) ("In FCC v. Pacifica Foundation, 438 U.S. 726 (1978), this Court did recognize that the government's interest in protecting the young justified special treatment of an afternoon broadcast heard by adults as well as children. At the same time, the majority "[emphasized] the narrowness of our holding," explaining that broadcasting is "uniquely pervasive" and that it is "uniquely accessible to children, even those too young to read." . . . Our decisions have recognized that the special interest of the federal government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication.") (cleaned up).

120. *See e.g.*, *Sable Commc'ns*, 492 U.S. at 119; Reno v. ACLU, 521 U.S. 844 (1997); Ashcroft v. ACLU, 535 U.S. 234 (2002).

121. Sable Commc'ns (cleaned up) (distinguishing FCC v. Pacifica Found., 438 U.S. 726 (1978); citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73 (1983); Butler v. Michigan, 352 U.S. 380, 383 (1957)).

122. Butler v. Michigan, 352 U.S. 380, 381, 384 (1957).

123. *Id.* at 382–83.

124. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

"level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."[125]

Variable obscenity for minors laws tend to be framed in terms of regulating speech considered "harmful to minors."[126] Some such "harmful to minors" laws have been upheld.[127] Others have been struck down as violations of the First Amendment.[128] A common issue facing such "harmful for minors" laws is the issue of overbreadth due to vagueness. For example, in *Reno v. ACLU*, the Court held that the Communications Decency Act of 1996 violated the First Amendment because, among other reasons, the act's vague provisions chilled free speech by making it unclear when speech was proscribed.[129]

Another issue with laws seeking to limit the speech available to minors is that such laws may run afoul of the free speech rights of minors themselves, which are still robust despite being more limited than the free speech rights of adults.[130] For example, in *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975), the Supreme Court held that while "a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults," minors are nevertheless "entitled to a significant measure of First Amendment protection" and that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them."[131] In *Erznoznik*, the Court held that a Jacksonville ordinance preventing drive-in movie theaters from showing films containing nudity if the theater's screen was visible from a public place violated the First Amendment.[132] One of the arguments that Jacksonville made was that the ordinance was a constitutional "exercise of the city's undoubted police power to protect children."[133] The Court rejected this argument.[134] It held instead that:

> Clearly all nudity cannot be deemed obscene even as to minors. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths

125. *Id.* at 71, 74.

126. *Cf.* Hudson, *supra* note 114.

127. *See, e.g.*, Am. Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990).

128. *See, e.g.*, ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999); PSINet, Inc. v. Chapman, 362 F.3d 227 (4th Cir. 2004).

129. Reno v. ACLU, 521 U.S. 844, 871–72 (1997).

130. *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 805 (2011) (holding that a state law banning the sale of certain violent video games to minors "abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (stating, while upholding the right of minors to wear black armbands symbolizing protest to the Vietnam war in school, that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

131. *See, e.g.*, Erznoznik v. Jacksonville, 422 U.S. 205, 212–13 (1975) (citing *Tinker*; Interstate Cir., Inc. v. City of Dallas, 390 U.S. 676 (1968); Rabeck v. New York, 391 U.S. 462 (1968)).

132. *Erznoznik*, 422 U.S. at 217–18.

133. *Id.* at 212.

134. *Id.* at 214.

> 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. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.[135]

Just as it is clear that not all nudity can be deemed obscene for minors, so too it is clear that not all drag is obscene for minors. Rather, age-appropriate drag need not be prurient or patently offensive and can have great political and artistic value for minors. To regulate drag in a manner that does not recognize this is to ignore "the values protected by the First Amendment," that "are no less applicable when the government seeks to control the flow of information to minors."[136]

The vast majority of drag shows do not meet the standard for legal obscenity—either generally or for minors—and current free speech law makes it extremely unlikely that a legislature could ban or limit most drag performances under the obscenity doctrine or the doctrine of variable obscenity for minors. But even if, contrary to fact, a large portion of drag shows could be legislated as obscene—either for adults or just for minors—the First Amendment still would not permit anti-drag laws because the Supreme Court has made it clear that regulation of even uncovered speech is unconstitutional when it discriminates based on content or viewpoint.[137]

V. ANTI-DRAG LAWS LIMITED TO OBSCENE DRAG ARE UNCONSTITUTIONAL

To review: drag performances are acts of expressive conduct covered by the First Amendment. Specifically, they constitute artistic and political expression of various viewpoints. Drag shows rarely fall into the category of the legally obscene, and in the case of a large portion of drag shows it seems highly unlikely that they can constitutionally be regulated as obscene for minors. For drag shows that can be regulated as obscene for minors, such regulations need to be narrowly tailored, both to respect minors' free speech rights and to make sure that such regulations do not reduce the adult population to expressing or viewing only what is fit for children. For these reasons, anti-drag laws are, as a general matter, unconstitutional.

For perhaps these same reasons, some legislators have sought to pass limited anti-drag laws that target only obscene drag.[138] But even anti-drag laws that target only obscene drag are unconstitutional because the Supreme Court made it clear in *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992), that even when only regulating speech uncovered by the First Amendment, the government cannot engage in

135. *Id.* at 213–14.

136. *Id.*

137. *See, e.g.*, R. A. V. v. St. Paul, 505 U.S. 377 (1992) which is discussed in detail in the next section.

138. *See, e.g.*, TENN. CODE ANN. §7-51-14 (West, Westlaw through the 2023 Reg. Sess. & 1st Extra. Sess.).

content discrimination that might drive a particular political viewpoint from the "marketplace" of ideas.[139] The Court treated this as an extension of the more general principle that the First Amendment does not permit the government to impose special prohibitions on speakers who express views on disfavored subjects.[140]

In *R.A.V.*, the Supreme Court accepted the Minnesota Supreme Court's conclusion that a St. Paul ordinance that made it a misdemeanor to place "on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" was a regulation only on fighting words, which the Court acknowledged was one of the limited areas of speech that was generally considered to fall outside First Amendment protection.[141] Despite this conclusion, the Court struck down the ordinance as a violation of the First Amendment because the law impermissibly regulated expressive conduct on the basis of content and viewpoint due to the fact that the law applied "only to fighting words that insult, or provoke violence, on the basis of race, color, creed, religion or gender."[142]

In support of its conclusion that the ordinance was impermissibly content based, the Court observed that "[d]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics," and that those "who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered."[143] The Court concluded that this violated the First Amendment's content-neutrality requirement because the "First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[144]

In support of its conclusion that the ordinance was impermissibly viewpoint based, the Court observed various ways in which the ordinance could be used in viewpoint discriminatory ways. The Court noted that 'fighting words' that "do not themselves invoke race, color, creed, religion, or gender" would "seemingly be usable ad libitum in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' *opponents*."[145] As an example, the Court notes that, under the ordinance, "[o]ne could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not

139. R. A. V. v. St. Paul, 505 U.S. 377, 387 (1992).
140. *Id*. at 391.
141. *Id*. at 380.
142. *Id*. at 391 (internal citation marks omitted).
143. *Id*.
144. *R. A. V*., 505 U.S. at 391 (citing Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229-30 (1987)).
145. *Id*. at 392.

that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.'"[146] On this basis, the Court concluded that "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[147]

The Court acknowledged that past precedent had spoken about categories of expression that are "not within the area of constitutionally protected speech," but clarified that what such statements "mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content."[148]

Thus, debates over whether and to what extent an anti-drag law bans only obscene drag miss an important constitutional point. Even for anti-drag laws targeting only obscene speech, such laws—by virtue of being laws that target drag—engage in content and viewpoint discrimination. As the Court noted "just as the power to proscribe particular speech on the basis of a noncontent element (e. g., noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of one content element (e. g., obscenity) does not entail the power to proscribe it on the basis of other content elements," such as whether or not the speech involves drag performances or "male or female impersonators."[149] Similarly, just as it would be constitutionally impermissible for a city council to "enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government," so too it is constitutionally impermissible for government to enact a law prohibiting only those legally obscene works that express or endorse gender nonconformity.[150]

The Court's reasoning below from *R.A.V.* applies particularly well in explaining where even anti-drag laws limited to restricting obscene drag only go constitutionally awry:

> The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express

146. *Id.*
147. *Id.*
148. *Id.* at 383–84.
149. *Id.* at 386.
150. R. A. V., 505 U.S at 384.

> that hostility—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.[151]

Just as St. Paul could have achieved its compelling interests by prohibiting *all* fighting words, so too a government that wants to protect minors from obscene performances can prohibit all obscenity. But what it cannot do is engage in content or viewpoint discrimination by prohibiting specifically all obscene drag performances, while leaving other potentially obscene performances unregulated or less regulated. The "only interest distinctively served" by such a law is the "displaying" of the regulating body's "special hostility" toward drag performances and the distinctive messages they communicate.[152] That is indeed "precisely what the First Amendment forbids."[153]

One may think that the Court's commitment to the centrality of content- and viewpoint-neutrality is misguidedly strong. There are perhaps good philosophical reasons to push back on the Court's current position, especially when it comes to the content and viewpoints expressed by hate speech or other forms of speech that seem capable of undermining the foundations of democratic society. But such criticisms do not change the fact that a central tenet of First Amendment jurisprudence is that "the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[154]

VI. ALL ANTI-DRAG LAWS VIOLATE THE FIRST AMENDMENT

One of the points on which the Supreme Court has been most emphatic in its First Amendment jurisprudence is that "[v]iewpoint discrimination is thus an egregious form of content discrimination."[155] In *Rosenberger v. Rector*, the Court grounded its conclusion that "government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction" on the premise that "[w]hen the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[156]

As Professor R. Randall Kelso has noted "viewpoint discrimination appears to trigger strict scrutiny in every context in which it occurs (public forum, nonpublic forum, government funding of speech, speech in the context of schools, commercial speech, or speech otherwise not protected by the first amendment, such as advocating illegal conduct, true threats, fighting words, or obscenity)," except in cases of government speech or where government action regulates only

151. *Id*. at 395–96.
152. *Id*.
153. *Id*. at 396.
154. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U. S. 819, 830 (1995).
155. *See id*. at 829–30.
156. *Id*.

conduct.[157] However, the Court often treats the bar for permitting viewpoint discrimination as so high that viewpoint discrimination is simply categorically banned as a result. For example, in *Iancu v. Brunetti*, 588 U.S. (2019), the Court flat footedly held that "a core postulate of free speech law" is that "government may not discriminate against speech based on the ideas or opinions it conveys."[158] In *Minn. Voters All. v. Mansky*, the Court held that, at least in public forums and designated public forums, "restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited."[159] And in *Rosenberger v. Rector*, the Court held that "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[160]

Setting aside the Court's statements suggesting that in many cases, a law being viewpoint discriminatory is sufficient on its own to render the law unconstitutional, an examination of the Court's standard for strict scrutiny in the free speech domain is sufficient to show why laws that target drag performances won't survive strict scrutiny. To satisfy strict scrutiny, a law must (1) advance a compelling government interest, (2) be directly and substantially related to advancing that interest, and (3) be the least restrictive means to advance those ends, such that the restriction is "necessary" and "precisely" or "narrowly" tailored.[161] Importantly, a law fails the precise tailoring requirement when it unnecessarily engages in content or viewpoint discrimination.[162]

States that have enacted or are considering enacting anti-drag laws have claimed that the laws are designed to protect children from harm.[163] This is indeed a compelling government interest.[164] But it is implausible that laws banning or suppressing drag writ large meet these ends. It is implausible, for example, to claim that drag queens reading age-appropriate books to children cause children harm or diminish their well-being. And anti-drag laws—by virtue of being laws that target drag performances specifically—will always fail to be appropriately tailored to meet the compelling government interest in protecting children from harm. To see why consider the following: either the supposed "harm" to children by witnessing drag performances is the product of something

157. R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 356 (2019).

158. Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019).

159. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018) (citing Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009), which also held that "restrictions based on viewpoint are prohibited" in public forums).

160. Rosenberger, 515 U.S. at 829 (1995) (citing Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46 (1983)).

161. *See, e.g.*, Kelso, *supra* note 157 at 393–94.

162. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 395–96 (1992).

163. *See, e.g.*, the discussion of Florida legislators' stated aims in HM Florida-Orl, LLC. v. Melanie Griffin, No: 6:23-cv-950-GAP-LHP (MlD.f Fa., June 24, 2023).

164. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 869b(1997).; Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 134 (1989).

unique to drag or it is not. If it is not, then a law that targets drag specifically picks out drag performances for special disapprobation over and above other performances that also cause the same harm. Under *R.A.V.*, this is an unacceptable course of action, and the law should be struck down as violating the First Amendment for engaging in viewpoint and content discrimination that was not necessary to meet the government's end.

So, for example, if the proposed harm that the state is seeking to shield children from is exposure to material that is obscene for minors, the state may enact general civil or criminal penalties for exposing children to that which is obscene for them (so long as the law meets other constitutional requirements). This will serve the government's compelling interest without singling out the viewpoints and content expressed by drag for disfavored status. But what the state cannot do is seek to shield children from exposure to material that is obscene for minors only, or especially, in the case of drag performances. This suppresses the speech of those wanting to discuss certain topics and to express certain perspectives.

But what if the supposed "harm" to children by witnessing drag performances is the product of something unique to drag? If drag performances did uniquely threaten the well-being of children, then laws that specifically targeted drag performances likely could be upheld as constitutional. But the problem with this horn of the dilemma is that advocates of anti-drag laws have yet to identify any harm to children that is caused by drag performances specifically. This is because there are no such harms to identify. Advocates of anti-drag laws have either identified harms to minors caused by obscene or indecent material generally—and thus identified harms caused neither by all drag performances nor only by drag performances—or they have identified things that are not really harms at all, like acceptance of gender nonconformity or LGBTQIA+ people on their own terms. But "protecting" children from such non-harms is not a compelling government interest.

This dilemma faces lawmakers looking to pass anti-drag laws that suppress, or ban drag in private spaces, in public forums, in designated forums, and in nonpublic forums because any such regulation will require strict scrutiny. [165] But what about laws that seek only to prevent a governmental entity from funding drag or from engaging in government speech that supports drag? As stated earlier, my focus in this article is on anti-drag laws, by which I mean laws that specifically target drag in a way that would restrict, suppress, or ban drag performances. But I don't consider a lack of government sponsorship or endorsement of a particular kind of speech—or even laws preventing such sponsorship or endorsement—to be a form of restricting, suppressing, or banning that speech. Laws or policies that governmental entities self-impose that prevent them from endorsing or sponsoring

165. *See, e.g.*, Kelso, *supra* at 157; *cf.* City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) (holding that "a special respect for individual liberty in the home has long been part of our culture and our law" and that this "principle has special resonance when the government seeks to constrain a person's ability to speak there.").

drag performances when speaking on their own behalf normally will be constitutional under the government speech doctrine.[166] That said, this represents a fairly limited category of laws. These laws can easily go astray and end up violating the First Amendment by doing more than simply regulating government speech or government sponsorship, even if the relevant governmental entity does not intend to do anything other than limit its own speech. For these reasons, it is worth explaining the government speech doctrine and its limits.

A. THE GOVERNMENT SPEECH DOCTRINE

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court held that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."[167] Thus, governmental decisions to fund or sponsor some messages or modes of communication over others do not, on their own, constitute viewpoint discrimination or a violation of the First Amendment. This holding in *Rust* was a precursor to the Court's later development of the government speech doctrine.[168] In recent years, the Court has consistently held that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech," and that a "government entity has the right to 'speak for itself.'"[169] On this basis the Court has held, for example, in *Pleasant Grove City v. Summum*,

166. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (2009). Laws that prevent *other* governmental entities from endorsing or sponsoring drag might be another matter. For example, a state law that prevented municipal governments from sponsoring or endorsing drag shows might be more likely to violate the First Amendment; *but see* Eugene Volokh, *Do state and local governments have free speech rights?*, WASH. POST (June 24, 2015, 5:17 PM), https://perma.cc/5ZWY-HFYW ("Note that local governments and state agencies likely have no First Amendment rights against *state* governments, because the state is entitled to control the conduct of its subdivisions; likewise, federal agencies have no First Amendment rights against the federal government").

167. Rust v. Sullivan, 500 U.S. 173, 193 (1991).

168. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (stating that the "government-speech doctrine is relatively new, and correspondingly imprecise" but that two "clear" points of the doctrine are that "the need to recognize the legitimacy of government's power to speak despite objections by dissenters whose taxes or other exactions necessarily go in some measure to putting the offensive message forward to be heard" and that "the need to recognize the legitimacy of government's power to speak despite objections by dissenters whose taxes or other exactions necessarily go in some measure to putting the offensive message forward to be heard").

169. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467–468 (2009) (citing Johanns v. Livestock Marketing Assn., 544 U.S. 550, 553, (2005); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) (Stewart, J., concurring); Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217 (2000); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995); Rust v. Sullivan, 500 U.S. 173, 194 (1991); and National Endowment for Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment)). The Court has also been careful to clarify that this "is not to say that a government's ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech. And the Free Speech Clause itself may constrain the government's speech if, for

that placing a permanent monument (as opposed to a temporary display) in a public park is an act of government speech, and, in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.,* that, given the history of using license plates to convey government speech, a state engages in government speech when it issues specialty license plates, at least while "maintain[ing] direct control over the messages conveyed on its specialty plates" and "exercising final approval authority" over those plates.[170]

But the Court has also acknowledged that "[t]he line between a forum for private expression and the government's own speech is important, but not always clear," and that the Court's decision in *Walker* "likely marks the outer bounds of the government-speech doctrine."[171] Due to the limits of the government speech doctrine, in *Shurtleff v. Boston* the Court held that the city of Boston engaged in viewpoint discrimination and thus violated the First Amendment in denying the request of a private group to temporarily raise a religious flag on one of the flagpoles outside of Boston City Hall.[172] This is because Boston City Hall had unwittingly turned that particular flagpole into a public forum by allowing a large number of other flags to be temporarily displayed there without exercising sufficient selectivity or control over those flag raisings.[173] For these reasons, the Court held that these temporary flag raisings were not government speech, despite Boston's claim that this was their intention.[174] The Court's holding here was not that flag raising on public property was *never* government speech. On the contrary, the Court held that the City of San Jose, California maintained government speech with its flag raising by providing in writing that its "flagpoles are not intended to serve as a forum for free expression by the public" and by providing a list of "approved flags that may be flown 'as an expression of the City's official sentiments.'"[175] This contrast shows that while government can engage in selective government speech, it cannot appeal to the government speech doctrine when it has opened a platform for speech to most but wants to selectively exclude those who wish to speak on disfavored topics or who have disfavored messages.

Similarly, the government cannot set such a low bar or arbitrary standard for what counts as government-sponsored speech, that the standard ends up suppressing disfavored topics, messages, or mediums by not providing them with the sponsorship easily obtained by most others. This formed part of Judge Nuffer's grounds in *Southern Utah Drag Stars v. City of St. George* for an injunction

---

example, the government seeks to compel private persons to convey the government's speech." Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015) (internal citation omitted).

170. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 213 (2005).

171. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022); Matal v. Tam, 582 U.S. 218, 238 (2017).

172. Shurtleff, 142 S. Ct. at 1593.

173. *Id.*; cf. Shurtleff, 142 S.Ct at 1601(Alito J., concurring).

174. Shurtleff, 142 S. Ct. at 1593.

175. *Id.*

against St. George's enforcement of a ban on advertising public events prior to final city approval that has been used as "a pretext for discrimination" against drag performances.[176] In that case, Southern Utah Drag Stars applied for a special event permit to host a family-friendly drag show at a public park in St. George.[177] After being told by a city official that they had an "unofficial hold" on a park for their performance, Drag Stars began advertising the event.[178]

After complaints were made about the content of drag performances, St. George decided to "strictly enforce" a rule that it had never before enforced that prevented groups from advertising events taking place in public spaces prior to final formal approval of the event from the city.[179] Despite the fact that many groups were violating the rule, St. George used the rule specifically to cancel Drag Stars' event.[180] St. George sought to accomplish this by adopting an exemption for recurring events and city-sponsored events.[181] However, St. George had such an ill-defined and broad conception of what counted as a city-sponsored event that almost all other events were excluded from the policy.[182] Here it would be no defense for the city to claim that it was engaged in government speech by choosing which events to sponsor. To do so would be to—at least temporarily—turn the city's public forums into spaces that could be arbitrarily limited to city-endorsed messages, and thus used to target disfavored speech in a discriminatory manner. Judge Nuffer correctly pointed out that "even laws that are content- or viewpoint-neutral on their face"—like St. George's ban on advertising public events before final permit approval—"can be enforced in a discriminatory manner, in which case, strict scrutiny is required."[183] In this case, Nuffer held that St. George had used its ban on advertising to engage in content- and viewpoint-discrimination in a manner that did not satisfy strict scrutiny.[184]

VII. RECENT EXAMPLES OF UNCONSTITUTIONAL ANTI-DRAG LAWS

For the most part, the foregoing discussion has considered the issues with anti-drag laws as a class. But it can be illuminating to see how various anti-drag laws and proposed anti-drag laws run afoul of the First Amendment in practice. Below are several examples of anti-drag laws and a discussion of the various ways in which they violate the First Amendment. These examples, which constitute a fairly representative sample of the types of anti-drag laws being debated and passed by various state legislatures, both show how anti-drag laws violate the

176. S. Utah Drag Stars v. City of St. George, No. 4:23-cv-00044-DN-PK, 2023 WL 4053395, at *2 (D. Utah June 16, 2023).
177. *Id*. at *4.
178. *Id*. at *4, *7.
179. *Id*. at *7–8.
180. *Id*. at *13.
181. *Id*. at *8.
182. *Id*. at *9.
183. *Id*. at *20.
184. *Id*. at *21–2.

First Amendment in ways already discussed and also reveal additional First Amendment hurdles that anti-drag laws often fail to clear, such as issues of vagueness, overbreadth, and impermissible chilling of speech.

A. TENNESSEE

Tennessee was the first state to pass an anti-drag law in 2023.[185] It was also the first state to have enforcement of its anti-drag law ruled unconstitutional and permanently enjoined by a federal judge.[186] An examination of the original bill submitted, the way in which that bill was amended before passing into law, and the various rationales given by the federal judge who ruled the law unconstitutional are instructive in demonstrating why anti-drag laws violate the First Amendment.

In November 2022, members of the Tennessee General Assembly—in both the Senate and the House of Representatives—introduced a bill aimed at suppressing drag performances on public property and in front of minors.[187] The bill targeted drag performances by prohibiting certain "adult cabaret performances, defined to mean "a performance in a location other than an adult cabaret that features topless dancers, go-go dancers, exotic dancers, strippers, *male or female impersonators who provide entertainment that appeals to a prurient interest, or similar entertainers*, regardless of whether or not performed for consideration."[188] The bill made it an offense "for a person to engage in an adult cabaret performance: (A) On public property; or (B) In a location where the adult cabaret performance could be viewed by a person who is not an adult."[189] A first offense was a misdemeanor, and subsequent offenses were felonies.[190]

Had this bill been enacted into law, it would have been unconstitutional for several reasons. By preventing "adult cabaret performances" from happening on *any* public property, the law would have banned adult cabaret performances from ever happening in public forums or designated public forums. And by preventing such performances from happening in any location where the "performance could be viewed by a person who is not an adult," given a plain reading of the text, the law would have prevented such performances from happening in a large number of private spaces, including bars, entertainment venues, or private homes. The bill engaged in content-discrimination on its face (by singling out male and female impersonators, among others) and plainly was not limited to restricting only obscene material (by referencing only one of the three-prongs of the *Miller* test). Thus, the law was, without a doubt, seeking to suppress constitutionally

185. Mark Satta, *Why Tennessee's law limiting drag performances likely violates the First Amendment*, THE CONVERSATION (Mar. 6, 2023, 4:35 PM), https://perma.cc/PCC8-PYEC.

186. *Friends of Georges*, 2023 WL 3790583 at *1 (W.D. Tenn. June 2, 2023).

187. S.B. 0003, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); *see also* H.B. 0009, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

188. Tenn. S.B. 0003 (emphasis added).

189. *Id.*

190. *Id.*

protected speech on the basis of content in public forums and private spaces. Such a law would not have been upheld.

Tennessee recognized at least one of these issues in the original bill—namely, that it sought to regulate much more than merely obscene speech. As a result, the Tennessee legislature amended its original bill in February 2023.[191] The amended version of the bill was aimed only at restricting drag performances that were "harmful to minors" using the state's variable standard for obscenity for minors. The standard defines harmful to minors as follows:

> "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual excitement, sexual conduct, excess violence or sadomasochistic abuse when the matter or performance:
>
> A. Would be found by the average person applying contemporary community standards to appeal predominantly to the prurient, shameful or morbid interests of minors;
>
> B. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and
>
> C. Taken as whole lacks serious literary, artistic, political or scientific values for minors.[192]

The Tennessee Supreme Court has upheld Tennessee's variable obscenity standard for minors as constitutional at least in some applications under a narrowing construction by which the material restricted is that which it "applies only to those materials which lack serious literary, artistic, political, or scientific value for a reasonable 17-year-old minor," but there has been no ruling on the constitutionality of this standard generally from either Tennessee or a federal court.[193]

Using this definition of "harmful to minors," the amended bill defined "adult-oriented performances" as those that are "harmful to minors" and that "feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers." Within the amended text, an "entertainer" is defined as:

---

191. *See* H.A. 0011, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); *see also* S.A. 0002, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

192. TENN. CODE ANN. § 39-17-901 (West, Westlaw with laws from 2023 Sess. & 1st Extra. Sess.).

193. *See* Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 528 (Tenn. 1993); *cf. Friends of Georges*, 2023 WL 3790583 at *30 (W.D. Tenn. June 2, 2023) ("The Court finds that Defendant overstates the Tennessee Supreme Court's holding in *Davis-Kidd*. The text of the Tennessee Supreme Court's opinion is clear: 'Accordingly, we hold that the *display statute* applies only to those materials which lack serious literary, artistic, political, or scientific value for a reasonable 17-year-old minor.' *Davis-Kidd*, 866 S.W.2d at 528 (emphasis added). Defendant's argument would transform the Tennessee Supreme Court's holding to 'Accordingly, we hold that the *'harmful to minors' standard in Tenn. Code. Ann. § 39-17-901* applies only to those materials which lack serious literary, artistic, political, or scientific value for a reasonable 17-year-old minor.' The Tennessee Supreme Court never held that and neither will this Court").

> a person who provides:
>
> (A) Entertainment within an adult-oriented establishment, regardless of whether a fee is charged or accepted for entertainment and regardless of whether entertainment is provided as an employee, escort as defined in § 7-51-1102, or an independent contractor; or
>
> (B) A performance of actual or simulated specified sexual activities, including removal of articles of clothing or appearing unclothed, regardless of whether a fee is charged or accepted for the performance and regardless of whether the performance is provided as an employee or an independent contractor.[194]

Similar to the original version of the bill, the amended version made it a misdemeanor for first-time offenders and a felony for second-time offenders to "perform adult cabaret entertainment" on public property or in any location "where the adult cabaret entertainment could be viewed by a person who is not an adult."[195] This version of the bill was passed by both houses of the Tennessee General Assembly and signed into law by Tennessee Governor Bill Lee in March 2023 as the "Adult Entertainment Act."[196]

Unlike proponents of the original bill, defenders of the amended Adult Entertainment Act (AEA) were able to mount at least a plausible case that the law would comply with the First Amendment because the kinds of drag performances that would be restricted were only those which were obscene for minors. Still, the AEA was rife with First Amendment shortcomings, which were laid out in detail when a federal judge permanently enjoined enforcement of the law on the grounds that it violated the First Amendment.[197]

In his decision, the district court judge held that (1) the AEA was a content- and viewpoint-based regulation on speech subject to strict scrutiny, which it failed because it was not narrowly tailored nor the least restrictive means of meeting the government's compelling interest of protecting children, (2) the AEA was passed for the "impermissible purpose of chilling constitutionally-protected

194. H.A. 0011, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

195. *Id.*

196. *See, e.g.*, Jon Freeman, *Tennessee Enacts Nation's First Law Restricting Drag Shows,* ROLLING STONE (Mar. 2, 2023), https://perma.cc/GM3Q-ZBE8.

197. *Friends of George's*, 2023 WL 3790583, at *1. Because the only defendant in this case was the district attorney for Shelby County, technically, the court only enjoined enforcement of the law in Shelby County. But there is nothing about the court's reasoning that would not hold in application anywhere else in Tennessee; *cf.* Emily Cochrane, *Judge Finds Tennessee Law Aimed at Restricting Drag Shows Unconstitutional*, N. Y. TIMES (June 3, 2023), https://perma.cc/T9W4-CP3R ("Regina L. Hillman, an assistant professor of law at the University of Memphis who challenged laws banning marriage equality in the state, said that though the ruling was not binding outside of Shelby County, 'it's certainly heavily, heavily persuasive.' 'The analysis is not limited, regarding the constitutionality of it,' she added, noting that it is likely that other challenges emerge elsewhere in the state that cite Judge Parker's findings. Should there be an appeal, she said, that ruling could also result in a broader decision for the entire state.").

speech," and (3) the AEA was substantially overbroad because it "applies to public property or 'anywhere' a minor could be present."[198]

Because the court's reasoning for concluding that the AEA was an instance of impermissible viewpoint discrimination was discussed earlier, I do not discuss that again here.[199] However, it is worth examining three points in more detail: (a) why the court concluded that the law was passed for the impermissible purpose of chilling free speech, (b) why the court denied Tennessee's appeal to the "secondary-effects doctrine" for setting a lower standard of judicial review, and (c) why the court held that the law was substantially overbroad. The court's reasoning on these matters, if adopted by other judges, would likely be sufficient to invalidate many kinds of anti-drag laws.[200]

In ruling that the AEA was passed for an impermissible purpose, the district court reasoned as follows: The court held that the AEA was a content-based regulation on its face, but still went out of its way to provide an "alternative and independent basis for" the conclusion that the AEA needed to be assessed as a content-based regulation—namely, that there was "evidence that an impermissible purpose or justification underpins" the AEA.[201] Citing Supreme Court precedent and practice as its guide, the court used the legislative history of the AEA, in combination with the statute's language, to conclude that the Tennessee General Assembly "passed the AEA for the inappropriate purpose of chilling constitutionally-protected speech."[202] More specifically, the district court judge concluded that

> The Court finds that the AEA's text discriminates against a certain viewpoint, imposes criminal sanctions, and spans a virtually unlimited geographical area. As a criminal statute that regulates the performers, the AEA offers neither a textual scienter requirement nor affirmative defenses. For these reasons, the AEA can criminalize—or at a minimum chill—the expressive conduct of those who wish to impersonate a gender that is different from the one with which they were born in Shelby County. Such speech is protected by the First Amendment.[203]

198. *Friends of Georges*, 2023 WL 3790583 at *14. The district court also held that the law was unconstitutionally vague, but the court treated this primarily as a due process issue, not a First Amendment issue. I*d*. at *30.

199. *See supra* Section IIII.

200. Judges have already begun relying on the court's reasoning in this decision in other cases enjoining enforcement of anti-drag laws. *See, e.g*., S. Utah Drag Stars v. City of St. George, No. 4:23-cv-00044-DN-PK, 2023 WL 4053395, at *16 n. 155 (D. Utah June 16, 2023)*; see also* Woodlands Pride, Inc. v. Paxton, No. H-23-2847, 2023 WL 6226113, at *13 (S.D. Tex. Sept. 26, 2023).

201. *Friends of George's*, 2023 WL 3790583, at *22 (citing Austin v. Reagan Nat'l Advertising of Austin, 142 S.Ct. 1464, 1475 (2022)).

202. *Id*. at *22–3.

203. *Id*. at *23.

Evidence that the court relied on in reaching this conclusion included the fact "that 'drag' was the one common thread in all three specific examples of conduct that was considered 'harmful to minors,' in the legislative transcript" and that this included a legislator discussing the harm of a drag show that had been labeled "family-friendly" and that he had not even seen.[204] The Court also appealed to the AEA as a criminal statute that exhibited "alarming breadth," despite concerns that had been raised during the legislative session about the AEA's broad scope.[205] Given the tendency of legislators sponsoring anti-drag bills in other states to frame their motivation—either in legislative sessions or in other contexts—in terms of the suppression of drag, the court's reasoning here could be used by other judges to conclude that other anti-drag laws were passed for the impermissible purpose of seeking to chill the constitutionally protected speech of drag performers.[206]

A second important conclusion from the district court was that the secondary-effects doctrine did not apply to the AEA. There are a set of cases in which the Supreme Court has ruled that a content-based law should be assessed as if it were content-neutral because any regulation of speech under such laws is merely a "secondary effect" of the government's legislative aim to prevent certain compelling non-speech harms.[207] In practice, this means that for cases that fall under the secondary effects doctrine, there are times where a law regulating speech that would ordinarily be subject to strict scrutiny is subject to intermediate scrutiny instead.[208] The Supreme Court tends to only apply the secondary effects doctrine to licensing, zoning, or other land-use regulations for adult establishments.[209] This is because the Court has held that there are legitimate non-speech harms that governments seek to prevent through regulating adult-oriented businesses, even though such regulations result in regulating the speech of those businesses and their performers.[210]

---

204. *Id.* at *24.

205. *Id.* at *50.

206. *Cf. Griffin*.

207. *See,* e.g., Young v. Am. Mini Theatres, 427 U.S. 50, 71 n.34 (1976) (finding that the city ordinance's secondary effect was to prevent crime and neighborhood deterioration, not the "dissemination of 'offensive' speech."); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–49 (1986) (upholding city zoning scheme targeting adult theaters because the "ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects").

208. *See e.g., Friends of Georges*, 2023 WL 3790583 at *25 (citing Richland Bookmart, Inc. v. Nichols, 137 F.3d 435, 440 (6th Cir. 1998)).

209. *See, e.g*., *Am. Mini Theatres*, 427 U.S. 50 (upholding constitutionality of city ordinance prohibiting operation of adult movie theater, bookstore, and similar establishments within 1,000 feet of any other such establishment, or within 500 feet of a residential area); *Renton*, 475 U.S. 41 (upholding constitutionality of zoning ordinance prohibiting adult theaters from locating within 1,000 of any residential zone, church, park, or school); *cf.* City of Erie v. Pap's A.M., 529 U.S. 277, 317 (2000) (Stevens, J., dissenting) ("Until now, the 'secondary effects' of commercial enterprises featuring indecent entertainment have justified only the regulation of their location.").

210. *See Am. Mini Theatres*, 427 U.S. at 71 ("It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either

The defendant in the challenge to the AEA argued that the secondary effects doctrine should be applied in this case because the AEA "inherently addresses the secondary effects associated with exposure to such content–namely, an increase in 'sexual exploitation crimes.'"[211] The court rejected this argument for several reasons. Most significantly, while the "secondary effect" the defense claimed the AEA was meant to address was "sexual exploitation crimes," the district court noted that this harm was barely discussed in the legislative history.[212] Only one witness, Landon Starbuck–who is a self-proclaimed "advocate for children harmed by child sexualization and exploitation" without relevant training or credentials–discussed this issue via unsubstantiated claims about how "normalizing the sexualization of children empowers child predators and increases the demand to exploit and sexually abuse children."[213] The court held that the "predominate concern" of the legislature instead seemed to involve "the suppression of unpopular views of those who wish to impersonate a gender that is different from the one with which they were born," as evidenced by a record "replete with references to the expressive conduct of 'male or female impersonators,' 'drag shows,' 'Pride' events, and more."[214]

While the district court did not address the following point, it is worth noting that Tennessee's law would not even survive an application of intermediate scrutiny under the secondary effects doctrine. This is because restricting drag performances does not further the legitimate government interest of decreasing sexual exploitation crimes, by virtue of the fact that there is no empirical support for the claim that drag performances increase sexual exploitation crimes.[215]

A third important conclusion from the court was that the AEA "reeks with constitutional maladies of vagueness and overbreadth fatal to statutes that regulate First Amendment rights."[216] In ruling that the statute was overbroad, the court focused on a variety of ways in which the speech of drag performers and other entertainers was chilled by passage of the AEA.[217] For example, the court noted

---

event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.").

211. *Friends of Georges*, 2023 WL 3790583 at *25.

212. *Id*. at *26.

213. *Id*. at *5, *26.

214. *Id*. at *26.

215. *See* Timothy W. Jones, *Calling Drag Queens 'Groomers' and 'Pedophiles' is the Latest in a Long History of Weaponising those Terms Against the LGBTIQA Community*, THE CONVERSATION (May 16, 2023, 4:09 PM), https://perma.cc/4AGF-S6B3 (discussing history of relying on "moral panic" regarding child sexual abuse as tool to distract from research that demonstrates children are most at risk of abuse at home); Jeff McMillan, *Analysis: Political Rhetoric, False Claims Obscure the History of Drag Performance*, PBS NEWSHOUR (Oct. 30, 2022 9:30 AM), https://perma.cc/2XRQ-5UG5. This point has been noted by drag performers themselves. *See, e.g.*, @SheaCoulee, TWITTER (Dec. 29, 2022, 2:13 PM), https://perma.cc/Y3EM-UYBZ ("Just thinking about that show 'To Catch A Predator' and how they exposed husbands, fathers, faith leaders, & community leaders. But NEVER a Drag Queen. . .").

216. *Friends of George's*, 2023 WL 3790583 at *32.

217. *Id*. at *31–2.

that the "threat of prosecution from a law officer armed with a vague 'harmful to minors' standard from the AEA could chill a drag show group into paralysis" and that the AEA seemed to have significantly deterred sponsorship and funding for "a major festival for the LGBTQ community in Memphis."[218] Given the similarly vague language in and impermissible motives for anti-drag laws in others states, it is likely that these anti-drag laws will be struck down as overbroad.[219] It is worth noting that there is also a substantial risk that anti-drag laws like the AEA will negatively impact the speech of trans people. Many drag performers are not trans and most trans people are not drag performers. Still, trans people may reasonably fear what law officers–armed with anti-drag laws and ignorant views about the relationship between trans identity and drag (or between trans identity and "male or female impersonation")– might do, in a way that chills the speech and the expression of trans people.[220] This should be taken into account when assessing the constitutionality and chilling effects of anti-drag laws.

B. ARKANSAS

As in Tennessee, members of the Arkansas legislature introduced an anti-drag bill that was clearly unconstitutional in its first form. And as in Tennessee, the bill was later amended. But unlike Tennessee, Arkansas' bill was so thoroughly amended before it became law, it is unclear if the law is still an anti-drag law, as the term is defined in this paper. This situation is a good example of how a state's conforming its law with the First Amendment requires a state not to target drag. Even still, given the impermissible purpose that motivated the initial introduction of the bill, the Arkansas law raises some unique questions about the constitutionality of laws that are at least arguably viewpoint neutral in their text but which then may be applied in a viewpoint discriminatory manner.

In January 2023, members of the Arkansas State Legislature submitted a bill with the stated purposes being "to classify a drag performance as an adult-oriented business" and "to add additional location restrictions to an adult-oriented business."[221] Previously, Arkansas had defined an "adult-oriented business" as "an adult arcade, an adult bookstore or video store, an adult cabaret, an adult live entertainment establishment, an adult motion picture theater, an adult theater, a massage establishment that offers adult services, an escort agency, or a nude

218. *Id.*

219. *Cf.* HM Florida-ORL, LLC v. Griffin, No. 6:23-cv-950-GAP-LHP, 2023 WL 4157542, at *6 (M.D. Fla. June 23, 2023) (denying defendant's motion to dismiss after finding that plaintiff had sufficiently alleged that the anti-drag statute created a "substantial risk to its licenses due to [statute's] vague and overbroad language.") For a more detailed discussion of the vagueness doctrine as applied to state laws, see Joel S. Johnson, *Vagueness and Federal-State Relations,* 90 U. CHI. L. REV. 1565 (2023).

220. *See* Ileana Garnand, *How Drag Bans Fit into Larger Attacks on Transgender Rights*, THE CENTER FOR PUBLIC INTEGRITY (Apr. 14, 2023), https://perma.cc/WU6X-DSP3 ("I'm scared and horrified, in part because I'm less concerned about these things as a drag performance and I'm a lot more concerned about these things as a trans person. What you see, especially when you know the history, is that . . . trans people have always been attacked using these drag bans").

221. S.B. 43, 94th Gen. Assemb., (Ark. 2023).

model studio."[222] It is worth noting that all the types of businesses classified as "adult-oriented" included the modifier "adult" with the exception of "an escort agency" and "a nude model studio." It is also worth noting that, unlike drag performances, all of the entities listed are in fact types of businesses.

SB43 proposed to add "a drag performance" to the list of "adult-oriented businesses" where a drag performance was defined as a performance:

> (A) In which one (1) or more performers:
>
> (i) Exhibits a gender identity that is different from the performer's gender assigned at birth using clothing, makeup, or other accessories that are traditionally worn by members of and are meant to exaggerate the gender identity of the performer's opposite sex; and
>
> (ii) Sings, lip-synchs, dances, or otherwise performs before an audience of at least two (2) persons for entertainment, whether performed for payment or not; and
>
> (B) That is intended to appeal to the prurient interest.[223]

The original bill, seeming to follow Tennessee's lead, would have prevented adult-oriented businesses from being "(1) On public property; or (2) Where a minor can view what the adult-oriented business is otherwise offering to the public that qualifies it as an adult-oriented business."[224]

Like Tennessee's bill, this Arkansas bill engaged in content discrimination on its face and would have regulated much more than merely obscene drag performances in all public forums and in many private spaces. For these reasons, such a bill would be clearly unconstitutional if it had become law. Arkansas' bill also more pointedly created reasonable fears that trans people could be targeted by the law. For example, Miss Gay Arkansas 2022 wondered whether such a law could be used against trans people doing innocent or mundane tasks like performing karaoke.[225]

In response to pushback, the bill underwent several amendments, with the final version—passed as Act 131—no longer referencing drag at all.[226] In the Act, the legislature avoids the category mistake of treating an individual performance as a "business" and instead adds a definition for "adult-oriented performance" to the

---

222. ARK. CODE ANN. § 14-1-302(6) (West, Westlaw through the 2023 Reg. Session & First Extra. Sess.).

223. S.B. 43, 94th Gen. Assemb., (Ark. 2023).

224. *Id.*

225. Neale Zeringue, *Arkansas Drag Performance Bill Explained by Sponsor, Opposed by Miss Gay Arkansas 2022*, KARK (Jan. 10, 2023, 10:45pm), https://perma.cc/BMG6-5MKU.

226. *See e.g.*, Ashley Godwin, *LGBTQ+ Community Gathers in Protest of Drag Performance Bill*, THV11 (Jan. 10, 2023, 10:44pm), https://perma.cc/8SG6-A9RL; Brooke Migdon, *Arkansas House Strikes Drag Shows From Bill Restricting Aadult" Performances,* THE HILL (Feb.7, 2023, 12:44pm), https://perma.cc/9WD7-EUUT.

Arkansas Code.[227] The Act defines an "adult-oriented performance" as "a performance that is intended to appeal to the prurient interest and that features: (A) A person who appears in a state of nudity or is seminude; (B) The purposeful exposure, whether complete or partial, of: (i) A specific anatomical area; or (ii) Prosthetic genitalia or breasts; or (C) A specific sexual activity."[228] According to the Act, an adult-oriented performance "shall not: (1) Take place on public property; (2) Admit any minor for attendance; or (3) Be funded in whole or in part with public funds."[229]

Given that the act no longer mentions drag performances or any language, like Tennessee's use of 'male or female impersonation', that clearly serves as a way of targeting drag specifically, it is unclear whether this law still constitutes an anti-drag law. However, given the legislative history, it would be reasonable for a judge to subject this law to strict scrutiny on the grounds that it was passed for the impermissible purpose of chilling the constitutionally protected speech of drag performers.[230] But the very fact that Arkansas removed all references to drag in the Act is a good example of how legislative efforts to conform to the demands of the First Amendment should result in laws that do not target drag.

While Arkansas may have conformed to the First Amendment in this dimension, the law still includes serious First Amendment defects. For example, the law still regulates far more than merely obscene speech in all public forums and many private spaces, given that it makes no exception for performances that, while perhaps appealing to a prurient interest and offending local sensibilities, clearly have serious literary, political, artistic, or scientific value. The law also—to quote the opinion of the judge in the case of Tennessee's Adult Entertainment act—"reeks with constitutional maladies of vagueness and overbreadth fatal to statutes that regulate First Amendment rights."[231] Such vague and overbroad provisions include regulation of appearances in the "seminude" and "purposeful exposure," including "partial" exposure, of a "specific anatomical area." At what point is someone seminude? Is a cisgender man who has taken off his shirt seminude? What about a trans man or nonbinary person who has had top surgery? What about a trans man or nonbinary person who hasn't? What about a shirtless woman? Does purposeful exposure of one's earlobes count as purposeful exposure of a "specific anatomical area? What about ankles, knees, or thighs? Does a typical Dolly Parton outfit qualify as partial exposure of the specific anatomical area of her breasts? What about a Dolly Parton impersonator who shows the same level of cleavage while wearing "prosthetic . . . breasts"? These vague and overbroad provisions could reasonably chill extensive amounts of expression,

227. Act 131, 94th Sess. Ark. Gen. Assembly.

228. *Id.*

229. *Id.*

230. *Cf. Friends of George's*, 2023 WL 3790583, at *44; City of Austin v. Reagan National Advertising of Austin, 142 S.Ct. 1464, 1475 (2022).

231. *Friends of George's*, 2023 WL 3790583, at *32.

especially among drag performers, trans people, and other gender nonconforming persons, given the law's legislative history. For these reasons, whether or not Arkansas's Act is an anti-drag law as defined in this paper, it violates the First Amendment.

C. MONTANA

Like Tennessee and Arkansas, Montana's anti-drag bill was significantly amended before being passed into law. But unlike those other states, the law passed by the Montana State Legislature and signed into law by Governor Greg Gianforte contains a much more explicit attack on drag performances.[232] The law does several things, including preventing "sexually oriented businesses" from allowing minors to view "sexually oriented performances," but I will restrict my focus here to the provision that deals explicitly with drag performances.[233]

Montana's new anti-drag law states that "[a] school or library that receives any form of funding from the state may not allow a sexually oriented performance or drag story hour, as defined in [section 1], on its premises during regular operating hours or at any school-sanctioned extracurricular activity."[234] The term "drag story hour" is defined as "an event hosted by a drag queen or drag king who reads children's books and engages in other learning activities with minor children present."[235] The terms "drag king" and "drag queen" are defined in turn, respectively, as "a male or female performer who adopts a flamboyant or parodic male persona with glamorous or exaggerated costumes and makeup" and "a male or female performer who adopts a flamboyant or parodic feminine persona with glamorous or exaggerated costumes and makeup."[236]

Thus, Montana's new law bars any male or female performer adopting any flamboyant or parodic male or female persona using glamorous or exaggerated costume or makeup while engaging in any "learning activities" at any library or school receiving any public funding from the state of Montana. As numerous commentators have pointed out, this language is both extremely vague and extremely broad.[237] For example, Greg Gonzalez correctly points out that

232. H.B. 359, Mont. Legis., 64th Sess. (Mont. 2023).

233. *Id.*

234. *Id.* at §3.2.

235. *Id.* at §1.3.

236. *Id.* at §1.1-2.

237. *See e.g.*, *PEN America: Sweeping Ban on Drag Performances in Montana in Effect Criminalizes a Wide Range of Artistic Choices*, PEN AMERICA (May 26, 2023), https://perma.cc/86EB-NYWD ("A sweeping bill that bans drag performances in Montana would effectively criminalize a wide range of sartorial and artistic choices for performers in a breathtaking array of contexts . . . The law defines drag in vague terms . . . Jonathan Friedman, director of PEN America's Free Expression and Education Programs, said: 'In their effort to censor drag and LGBTQ+ expression, Montana legislators have enacted a law that is nothing short of an assault on the free expression of every Montanan.'"); Amelia Hansford, *Montana Passes 'Vague' Anti-drag Bill that Could Ban Lady Gaga and Halloween Costumes,* PINK NEWS (May 3, 2023), https://perma.cc/SBL6-34XK (noting that HB0359's "definition of drag is so loosely defined in the bill that it would ban most forms of pantomime, music concerts, Shakespearean plays and many other performances. Even some halloween costumes could fall under the

"Montana's definitions capture a 'female performer' who adopts either a 'flamboyant … male' *or* 'feminine persona' using 'glamorous or exaggerated costumes and makeup,'" such that "a woman may be prohibited from reading to children if she dresses *too* feminine or if she dresses *too* masculine."[238] Gonzalez notes that "Montana's statute is so vague and broad it could even prohibit a woman dressed as Snow White from reading 'Snow White and the Seven Dwarves,' or an actor dressed as a flamboyant pirate from reading Robert Louis Stevenson's classic, 'Treasure Island,' to children in Montana libraries."[239] Gonzalez lays out the legal significance of this:

> Vague and overbroad laws like Montana's drag statute give unfettered power to government officials to enforce laws in inconsistent ways, favoring one viewpoint or certain types of expression over others. The statute's definitions of "drag queen" and "drag king" could be used against nearly anyone who reads to children in a library in anything but the most nondescript garb. The law gives Montanans no clear guidance of what is permissible and what is unlawful.[240]

For these reasons, Gonzalez concludes, correctly, that the "law no doubt will face constitutional challenge in short order" and that "the court reviewing it should strike it down."[241]

The significance of the vagueness and overbreadth of this law is compounded by the harsh penalties it enacts for violation. According to the law:

> A library, a school, or library or school personnel, a public employee, or an entity described in subsection (3)(b) or an employee of the entity convicted of violating the prohibition under this section shall be fined $5,000 and, if applicable, proceedings must be initiated to suspend the teacher, administrator, or specialist certificate of the offender under 20-4-110 for 1 year. If an offender's certificate has previously been suspended pursuant to this subsection (4), proceedings must be initiated to permanently revoke the teacher, administrator, or specialist certificate of the offender under 20-4-110 on a subsequent violation of this section.[242]

The law also allows minors who attend a drag story hour or the minor's parent or legal guardian to bring a private action against "a person who knowingly

---

bill's wording . . . This could be bad news for pop stars such as Lady Gaga, Elton John or even Lana Del Rey – all of whom could be considered to be a 'parodic persona' in costume and make-up.").

238. Greg Gonzalez, *What a Drag — Montana Outlaws 'Glamorous' Attire in Public Schools and Libraries*, FIRE NEWSDESK. (May 26, 2023), https://perma.cc/5BGK-E8MK (emphasis in original).

239. *Id.*

240. *Id.*

241. *Id.*

242. H.B. 359, Mont. Legis., 64th Sess. §3.4 (Mont. 2023).

promotes, conducts, or participates as a performer" in drag story hour up to 10 years after the event.[243] Those who succeed in this private action are entitled to "actual damages, including damages for psychological, emotional, economic, and physical harm," "reasonable attorney fees and costs incurred in bringing the action," and "statutory damages of $5,000."[244]

Given the vague language, overbroad applications, and the significant sanctions for violation, it is unsurprising that the law is already chilling constitutionally protected speech. For example, in response to the passage of this law, a Montana Public Library canceled an event where an Indigenous trans woman, Adria Jawort, was going to give a public lecture on LGBTQIA+ and two-spirit history.[245] While this event certainly would not constitute "drag story hour" in ordinary parlance, the law's extremely vague and broad provisions could create a reasonable fear of legal sanctions for both the public library as an institution and for library staff members personally. Jawort pointed out on social media that "The irony is I testified against this bill saying it would target trans people that would include, of course, me."[246] Speaking of the Montana legislature, she said "They denied it. Now here I am, targeted."[247] Given the poor drafting of Montana's law, courts will likely conclude that the law violates the First and Fifth Amendments due to overbreadth and vagueness. But an important additional question remains for thinking about the status of anti-drag laws generally: If Montana had more clearly and more narrowly defined what constituted 'drag story hour,' would courts uphold as constitutional a ban on drag story hours at schools or libraries funded by Montana?

Note here that Montana makes no attempt to limit just obscene drag speech, as Tennessee arguably at least aimed to do. 'Drag story hour,' as defined in the law, clearly covers lots of constitutionally protected speech. Montana seems to be trying a different route to allow for discrimination against drag—namely, trying to place limits on what Montana does as a speaker and funder. As discussed earlier, the Supreme Court has held that the same rules against viewpoint discrimination do not apply when the government is speaking its own message.[248] This extends to certain cases where the government funds, buys, or patronizes specific acts of expression.[249] But Montana's law differs from those cases in significant ways. Instead, Montana's law looks like the exact sort of scenario the Court has said in numerous cases should not be covered under the government's ability to control its own message as a speaker or funder.

---

243. H.B. 359, Mont. Legis., 64th Sess. §4 (Mont. 2023).

244. *Id.*

245. Amy Beth Hanson, *Library Cancels Trans Speaker After Montana Bans Drag Readings*, AP NEWS (June 1, 2023, 8:23 AM), https://perma.cc/4SEJ-5KQL.

246. *Id.*

247. *Id.*

248. *See supra* section VII.

249. *See e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

For example, in *Rust v. Sullivan,* the Court distinguished between situations in which the government imposes a speech-based restriction as a condition on receiving funding for "a particular program or service," on the one hand and placing such conditions on "the recipient of the subsidy" generally on the other.[250] Speech-restricting conditions on funding for programs or services may be constitutional, but the Court put speech-restricting conditions on recipients of funding generally in the "unconstitutional conditions" category.[251] Montana's restriction barring a "school or library that receives any form of funding from the state" from hosting drag story hour on its premises or in any of its extracurriculars clearly falls into the latter unconstitutional category as a condition on the *recipients* of aid—i.e. schools and libraries—rather than on specific programs or services offered by those schools or libraries.[252] As Justice Blackmun noted in *Rust*, "[w]hatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech."[253]

In *National Endowment for the Arts v. Finley*, the Court held that Congress did not violate the First Amendment by requiring the National Endowment for the Arts (NEA) to take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public" when determining who should receive NEA funding.[254] Crucial to the Court's reasoning was that this requirement "imposes no categorical requirement" on the NEA and was merely "advisory."[255] The Court presumed that the NEA could satisfy the requirement of taking these things into account while still funding organizations or artists whose messages ran counter to these "general standards of decency and respect."[256]

In doing so, the Court in *Finley* was careful to distinguish a variety of other circumstances in which a requirement on funding would have been unconstitutional.[257] For example, the Court wrote that "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case.[258] We have stated that, even in the provision of subsidies, the Government may not aim at the

250. *Rust*, 500 U.S. at 197.

251. *Id.*

252. *Cf.* FCC v. League of Women Voters, 468 U.S. 364, 400 (1984) (striking down as a violation of the First Amendment a federal law that prohibited noncommercial television and radio stations that receive federal grants from engaging in editorializing even for "a noncommercial educational station that receives only 1% of its overall income from [federal] grants" such that it was "barred from using even wholly private funds to finance its editorial activity").

253. Rust, 500 U.S. at 207 (Blackmun, J., dissenting) (citing Speiser v. Randall, 357 U.S. 513, 518-19 (1958)).

254. Finley, 524 U.S. at 572-73.

255. *Id.* at 581.

256. *Id.*

257. *Id.*

258. *Id.*

suppression of dangerous ideas, and if a subsidy were manipulated to have a coercive effect, then relief could be appropriate."[259] With its anti-drag law, Montana does just what the Court describes. It seeks to "leverage its power to award subsidies" to create "a penalty on disfavored viewpoints" expressed by drag. And it seeks to "aim at the suppression" of ideas it considers dangerous through manipulation and coercion. This is evidenced by the harsh penalties, the wide array of persons subject to such penalties, and the creation of a private right of action that can be exercised up to ten years after a performance. Unlike Congress in the case of the NEA, Montana is seeking to coercively suppress libraries and schools from hosting drag story hours, very broadly construed.

For these reasons, Montana's law looks much more like the policy struck down in *Rosenberger v. Rector* rather than the advisory requirement upheld in *Finley*. In *Rosenberger*, the Court held that the University of Virginia's policy of only subsidizing the printing costs of non-religious student publications violated the First Amendment.[260] There the Court distinguished between its government speech cases and cases where the government is providing a more general subsidy to facilitate the speech of others.[261] The Court held that it does not follow from the government speech doctrine "that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."[262] The Court made clear that "[a] holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles."[263]

Montana's law is not about merely trying to control its own message. It is trying to impose viewpoint-based restrictions as a condition for subsidizing the speech of others. This falls far outside the scope of government speech and funding cases. As Justice Souter once noted "outside of the contexts of government-as-buyer and government-as-speaker, we have held time and time again that Congress may not discriminate invidiously in its subsidies in such a way as to aim at the suppression of ideas."[264] Montana's law does not fall into the context of government-as-buyer or government-as-speaker. Rather, this law is about suppressing ideas by holding subsidies hostage to ideological conformity. But, as the

259. *Id.* at 587 (internal citations and quotation marks omitted) (citing Regan, 461 U.S. at 550 and Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting)).

260. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 846 (1995).

261. *See id.* at 833–34.

262. *Id.* at 834.

263. *Id.*; *cf.* Maher v. Roe, 432 U.S. 464, 475–76 (1977)("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.").

264. Finley, 524 U.S. at 612-613 (Souter, J., dissenting) (internal quotation marks and ellipses omitted).

Court has held "[a] regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.'"[265]

CONCLUSION

Anti-drag laws are but one of many ways in which conservative state legislators are seeking to restrict the freedom of the LGBTQIA+ community and other gender-nonconforming people.[266] These laws are unconstitutional. In the case of anti-drag laws, they are unconstitutional because they violate the First Amendment's protections of expressive conduct and against viewpoint discrimination. But the unconstitutionality of these laws alone won't protect queer people. Judge Learned Hand once observed that "[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."[267] Hand was mistaken to imply that liberty lies only in the hearts of men and women. It lies in the hearts of all people. But he was right to realize that constitutions, laws, and courts alone will not ensure liberty. We, the people, must use speech—both in and out of drag—to demand it.

265. Consol. Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 546 (1980).

266. *See e.g., Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, AM. C. L. UNION (Nov. 3, 2023), https://perma.cc/4WZN-UQ99.

267. Quoted in ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE 107 (2007).