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Anti-Drag Laws and Free Speech: The First Amendment Case for Protecting Drag

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Cover Page Footnote

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Anti-Drag Laws and Free Speech: The First Amendment Case for Protecting Drag

Dr. Joel Timmer*

In 2023, there were six federal court cases involving anti-drag laws or government denials of permission to hold drag shows on public property. All but one of these cases concluded that drag shows constituted expressive conduct protected by the First Amendment. Four of the cases involved challenges to recently enacted anti-drag laws, and in each of those cases, the courts found the laws to violate the First Amendment on multiple grounds, including not being narrowly tailored to achieve their purpose, as well as being vague and overbroad. However, one court, ruling on a denial of permission to hold a drag show, concluded that drag shows were not protected by the First Amendment. This Article considers these court decisions on state anti-drag laws and the reasons the laws were found to be unconstitutional. It also considers court arguments for and against providing protection to drag shows as expressive conduct under the First Amendment, concluding that drag shows do qualify for First Amendment protection.

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INTRODUCTION

In 2023, lawmakers in sixteen states introduced at least thirty-two bills targeting drag shows and drag performers.¹ Six of those bills actually became laws,² although they do not appear to have had the impact that the proponents of the bills had hoped for—anti-drag laws in Tennessee and Texas were struck down for violating the First Amendment, while anti-drag laws in Florida and Montana were temporarily blocked.³ These laws generally characterized drag

¹ Jo Yurcaba, *From Drag Bans to Sports Restrictions, 75 Anti-LGBTQ Bills Have Become Law in 2023*, NBC NEWS (Dec. 17, 2023, 7:00 AM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/75-anti-lgbtq-bills-become-law-2023-rcna124250> [<https://perma.cc/F4QL-FH27>]; Suzanne Nossel, *The Drag Show Bans Sweeping the US Are a Chilling Attack on Free Speech*, GUARDIAN (Mar. 10, 2023, 6:04 AM), <https://www.theguardian.com/culture/commentisfree/2023/mar/10/drag-show-bans-tennessee-lgbtq-rights> [<https://perma.cc/T5QG-WZCR>].

² Yurcaba, *supra* note 1.

³ *Id.* Two other laws, in Arkansas and North Dakota, were also passed, but “were so watered-down during state legislative debates that advocates no longer consider them to be targeting drag.” *Id.*; see also Tess Vrbin, “Gutted” Arkansas Bill No Longer Targets Drag Performers or LGBTQ Community, Activists Say, ARK. ADVOC. (Feb. 3, 2023, 7:30 PM), <https://arkansasadvocate.com/2023/02/03/gutted-arkansas-bill-no-longer-targets-drag-performers-or-lgbtq-community-activists-say/> [<https://perma.cc/K2SB-VZWD>] (“Arkansas legislators amended a bill that originally would have restricted where drag performances can be held but now does not mention the word ‘drag’ at all. Activists who have opposed Senate Bill 43 since it was introduced in January say the heavily amended language no longer targets LGBTQ Arkansans.”); Tess Vrbin, *Bill That Initially Targeted*

shows as sexually-oriented performances and often took issue with individual performers appearing as a different gender than assigned at birth.⁴ Some other common elements of these laws include classifying and regulating drag shows as “adult-oriented businesses,” prohibiting minors from attending drag shows, banning drag shows on public property, and forbidding the use of government funds to pay for drag shows.⁵

Four of the recently enacted state anti-drag laws were found to violate the First Amendment.⁶ In coming to this conclusion, each of the courts found drag to be protected by the First Amendment, although the courts provided very little support for this conclusion within their opinions. Not all courts that have considered the issue, however, have concluded that drag shows are protected by the First Amendment. Significantly, one court came to the opposite conclusion: that drag shows did not necessarily constitute expressive conduct entitled to First Amendment protection.⁷ This Article will consider arguments on both sides of this issue before coming to the

Drag Shows Becomes Arkansas Law, ARK. ADVOC. (Feb. 27, 2023, 5:00 AM), <https://arkansasadvocate.com/briefs/bill-that-initially-targeted-drag-shows-becomes-arkansas-law/> [<https://perma.cc/9H57-V4K9>]; Jeremy Turley, *North Dakota Lawmakers Water Down Bill That Would Have Banned Public Drag Shows*, BISMARCK TRIB. (Apr. 13, 2023), https://bismarcktribune.com/news/state-and-regional/govt-and-politics/north-dakota-lawmakers-water-down-bill-that-would-have-banned-public-drag-shows/article_5389ae54-da10-11ed-b8c5-ff9486ad09d6.html [<https://perma.cc/Q8Q6-PDXT>] (“A North Dakota bill that originally sought to ban drag shows on public property and in the presence of children has been reduced to legislation that would make only minor changes to the state’s existing obscenity laws.”).

⁴ See Mark Satta, *Why Tennessee’s Law Limiting Drag Performances Likely Violates the First Amendment*, CONVERSATION (Mar. 7, 2023, 9:46 AM), <https://theconversation.com/why-tennessees-law-limiting-drag-performances-likely-violates-the-first-amendment-201126> [<https://perma.cc/27EZ-SLHK>].

⁵ See Kathleen Carlson, *Drag Show Laws*, FIRST AMEND. ENCYC. (Nov. 17, 2023), <https://www.mtsu.edu/first-amendment/article/2185/drag-show-laws> [<https://perma.cc/CN49-NXEP>].

⁶ See *Friends of Georges, Inc. v. Mulroy*, No. 2:23-cv-02163-TLP-tmp, 2023 U.S. Dist. LEXIS 96766, at *3 (W.D. Tenn. June 2, 2023); *HM Fla.-Orl, LLC v. Griffin*, No. 6:23-cv-950-GAP-LHP, 2023 U.S. Dist. LEXIS 111612, at *21 (M.D. Fla. June 23, 2023); *Imperial Sovereign Ct. of Mont. v. Knudsen*, No. CV 23-50-BU-BMM, 2023 U.S. Dist. LEXIS 184720, at *2 (D.C. Mont. Oct. 13, 2023); *Woodlands Pride, Inc. v. Paxton*, No. H-23-2847, 2023 U.S. Dist. LEXIS 171268, at *51 (S.D. Tex. Sept. 26, 2023).

⁷ See *Spectrum WT v. Wendler*, No. 2:23-CV-048-Z, 2023 U.S. Dist. LEXIS 168753, at *16 (N.D. Tex. Sept. 21, 2023).

conclusion that drag shows and drag performances constitute expressive conduct protected by the First Amendment.

First, Part I of the Article provides a brief overview of drag and drag shows, as well as the motivations behind recent anti-drag legislation. Part II examines the court decisions involving anti-drag laws which have found drag performances to be deserving of First Amendment protection. Here, the Article describes the multiple ways in which state anti-drag laws were found to infringe on First Amendment free speech rights. Finally, Part III analyzes court decisions addressing whether drag performances are protected by the First Amendment—not all of which have come to the same conclusion—and other relevant case law to explain the legal justifications for providing drag shows with full First Amendment protection.

I. DRAG OVERVIEW AND MOTIVATIONS BEHIND ANTI-DRAG LAWS

Drag shows typically involve female impersonators performing in front of an audience dressed in elaborate costumes and makeup. Performances can include comedic monologues, skits, and interaction with the audience.⁸ Singing and dancing is often a primary component of drag shows, particularly lip-syncing to songs while dancing and emoting.⁹ A common feature of LGBTQ+ culture, drag can be considered “an art form in which performers play with gender norms,”¹⁰ one “that celebrates gender fluidity, self expression and self acceptance.”¹¹ Drag, then, can be “artistic and political[, as] [d]rag performers use drag to push artistic boundaries and to discuss pressing political issues.”¹²

⁸ See Carlson, *supra* note 5.

⁹ See *id.*; Satta, *supra* note 4.

¹⁰ Satta, *supra* note 4.

¹¹ Jaclyn Diaz, *At Least 9 GOP-Led State Legislatures Want to Restrict or Criminalize Drag Shows*, NPR (Feb. 8, 2023, 7:06 AM), <https://www.npr.org/2023/02/08/1151731736/at-least-10-state-legislatures-trying-restrict-criminalize-drag-shows> [https://perma.cc/2JJN-RGRC].

¹² Satta, *supra* note 4. For a more in-depth discussion of the different types of drag shows and drag performers, see generally Mark Satta, *Shantay Drag Stays: Anti-Drag Laws Violate the First Amendment*, 25 GEO. J. GENDER & L. 95 (2023).

Drag has grown in visibility and mainstream popularity in recent years, with events like drag brunches and drag story hours reaching audiences other than those in LGBTQ+ nightclubs.¹³ Drag brunches involve drag queens performing in restaurants while serving brunch,¹⁴ while drag story hours involve drag queens reading age-appropriate books to children at local libraries.¹⁵ This increased visibility of drag shows and drag performers has contributed to a backlash against drag, resulting in the recent wave of anti-drag legislation in Republican-led statehouses.¹⁶

Part of the impetus behind this legislation is “discomfort and distaste for expression that defies conventional gender norms.”¹⁷ For example, drag queen story hours are intended, in part, “to provide ‘unabashedly queer role models’ for kids[, but] have led some to question whether young children should be exposed to those who defy traditional gender patterns.”¹⁸ The opposition to drag seems to be “part of a wider backlash against the increased visibility of transgender and non-binary identities,” which includes state and local efforts to ban “books featuring transgender characters and prohibit[] teaching about transgender identities in school.”¹⁹ Legislators tout these efforts, along with drag show bans, as being necessary to protect children.²⁰ They argue that drag shows “can have sexualized language and suggestive performances that may be too mature for

¹³ Diaz, *supra* note 11.

¹⁴ Joey Skladany, *Everything You Need to Know About Attending Drag Brunch*, FOOD NETWORK (June 6, 2022), <https://www.foodnetwork.com/restaurants/articles/drag-brunch-what-to-know> [<https://perma.cc/R74Z-L5G9>].

¹⁵ Satta, *supra* note 4.

¹⁶ See Diaz, *supra* note 11.

¹⁷ Nossel, *supra* note 1.

¹⁸ *Id.* (citation omitted).

¹⁹ *Id.*

²⁰ See Ashley Cerrentano, Comment, *Miss Anita Lawya: Drag Bans and the Erosion of Rights and Erasure of the LGBTQIA+ Community*, 92 UMKC L. REV. 407, 408 (2023).

younger viewers,”²¹ with some legislators even considering such performances to be obscene.²²

A statement from Montana State Representative Braxton Mitchell, made when he introduced the bill that became Montana’s anti-drag law, illustrates some of the purported concerns behind anti-drag legislation. Mitchell stated that “drag shows in recent years have been specifically aimed at children,” alleging that “there’s no such thing as a family-friendly drag show.”²³ Mitchell characterized drag queens as “hyper-sexualized” and drag shows as being “damaging to a child’s psychology and general welfare;” this led Mitchell to conclude that “there’s clearly a sick agenda being pushed here.”²⁴ Additional discussion of the motivations behind recent anti-drag laws is provided in Section II.B below. Next, the Article examines the various reasons why the four state anti-drag laws passed in 2023 were found to violate the First Amendment.

II. CONSTITUTIONALITY OF ANTI-DRAG LAWS

As of the end of 2023, federal courts have ruled on the constitutionality of four state anti-drag laws—those of Tennessee, Florida, Montana, and Texas—uniformly finding them to be unconstitutional infringements of First Amendment free speech rights.²⁵ The

²¹ Rick Rojas et al., *Tennessee Law Limiting ‘Cabaret’ Shows Raises Uncertainty About Drag Events*, N.Y. TIMES (Mar. 5, 2023), <https://www.nytimes.com/2023/03/05/us/tennessee-law-drag-shows.html?partner=slack&smid=sl-share> [https://perma.cc/UCX3-MZRU].

²² See, e.g., Carlson, *supra* note 5; Diaz, *supra* note 11 (noting that some anti-drag legislation proponents even go so far as to allege that “drag queens and the LGBTQ community are ‘grooming’ young children”).

²³ *Imperial Sovereign Ct. of Mont. v. Knudsen*, No. CV 23-50-BU-BMM, 2023 U.S. Dist. LEXIS 184720, at *33 (D.C. Mont. 2023).

²⁴ *Id.*

²⁵ *Friends of Georges, Inc. v. Mulroy*, No. 2:23-cv-02163-TLP-tmp, 2023 U.S. Dist. LEXIS 96766, at *2–3 (W.D. Tenn. June 2, 2023) (permanently enjoining a law that sought to ban drag under the definition of “adult cabaret entertainment”); *HM Fla.-Orl, LLC v. Griffin*, No. 6:23-cv-950-GAP-LHP, 2023 U.S. Dist. LEXIS 111612, at *21 (M.D. Fla. June 23, 2023) (holding that Florida’s law targeting drag performances under the guise of “adult live performances” likely violates the First Amendment and is vague and overbroad); *Imperial Sovereign Ct.*, 2023 U.S. Dist. LEXIS 184720, at *2, *7 (granting a temporary restraining order to stop a state law prohibiting public drag performances under

laws themselves, and the reasoning of the courts for finding the laws unconstitutional in each of these cases are strikingly similar. The laws, with few exceptions, were found to be content-based,²⁶ view-point-based,²⁷ and based on an impermissible legislative purpose,²⁸ each of which was sufficient to subject the laws to strict scrutiny, which the laws failed for not being narrowly tailored to achieve their purpose.²⁹ The laws were also found to be vague and overbroad.³⁰ Each of these determinations is discussed in more detail below. First, though, a brief overview of each of the four state laws is provided.

Generally speaking, the anti-drag laws attempted to prohibit or restrict drag performances by classifying them as adult or sexually oriented entertainment. For example, the Tennessee law prohibited “adult cabaret entertainment” on public property or in places where it could be viewed by minors.³¹ “Adult cabaret entertainment” was defined in the law as “adult-oriented performances that are harmful to minors . . . and that feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers. . . .”³² “Adult cabaret entertainment” was considered “harmful to minors” under the law when it:

(A) Would be found by the average person applying contemporary community standards to appeal predominantly to the prurient, shameful or morbid interests of minors;

the label of “sexually oriented shows”); *Woodlands Pride, Inc. v. Paxton*, No. H-23-2847, 2023 U.S. Dist. LEXIS 171268, at *6, *52 (S.D. Tex. Sept. 26, 2023) (enjoining enforcement of a Texas law targeting drag shows under the guise of a ban on “sexually oriented performances”).

²⁶ See discussion *infra* Section II.A.

²⁷ See discussion *infra* Section II.C.

²⁸ See discussion *infra* Section II.B.

²⁹ See discussion *infra* Section II.D.

³⁰ See discussion *infra* Section II.E.

³¹ *Friends of Georges, Inc. v. Mulroy*, No. 2:23-cv-02163-TLP-tmp, 2023 U.S. Dist. LEXIS 96766, at *4–5 (W.D. Tenn. June 2, 2023) (quoting TENN. CODE ANN. § 7-51-1407 (2023)).

³² *Id.* at *4 (quoting TENN. CODE ANN. § 7-51-1401 (2023)).

(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 minors³³

The Florida law similarly prohibited children from being admitted to an “adult live performance,”³⁴ which was defined as:

[A]ny show, exhibition, or other presentation in front of a live audience which, in whole or in part, depicts or simulates nudity, sexual conduct, sexual excitement, or specific sexual activities as those terms are defined [elsewhere in Florida law], lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts when it:

1. Predominantly appeals to a prurient, shameful, or morbid interest;
2. Is patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and
3. Taken as a whole, is without serious literary, artistic, political, or scientific value for the age of the child present.³⁵

The Florida law also prohibited “any defense based on ‘a person’s ignorance of a child’s age, a child’s misrepresentation of his or her age, or a bona fide belief of a child’s consent.’”³⁶

³³ *Id.* at *5–6 (quoting TENN. CODE ANN. § 39-17-901 (2023)).

³⁴ HM Fla.-Orl, LLC v. Griffin, No. 6:23-cv-950-GAP-LHP, 2023 U.S. Dist. LEXIS 111612, at *2 (M.D. Fla. June 23, 2023) (citations omitted).

³⁵ *Id.* at *2–3 (quoting FLA. STAT. § 827.11(1)(a) (2023)).

³⁶ *Id.* at *3 (quoting FLA. STAT. § 827.11(2) (2023)).

Likewise, the Montana law similarly prohibited “sexually oriented performances” in libraries, schools, public property, and properties that received state funding.³⁷ A “sexually oriented performance” was defined as:

[A] performance that, regardless of whether performed for consideration, is intended to appeal to a prurient interest in sex and features” any of the following: “the purposeful exposure, whether complete or partial, of . . . genital[ia], the pubic region, buttocks], or a female breast, if the breast is exposed below a point immediately above the top of the areola” or “prosthetic genitalia, breasts, or buttocks,” “strip-ping,” or “sexual conduct.”³⁸

The definition of “sexually oriented” also included “salacious dancing” as well as “any lewd or lascivious depiction or description of human genitals or of sexual conduct. . . .”³⁹

The Montana law went further than the Tennessee or Florida laws in that it also prohibited “drag story hours’ in schools and libraries that receive any amount of state funding.”⁴⁰ A “drag story hour” was 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.”⁴¹ “Drag king” and “drag queen” here were defined as “a male or female performer who adopts a flamboyant or parodic [male or female] persona with glamorous or exaggerated costumes and makeup.”⁴² In addition to criminal liability for violations, the Montana law also provided for private rights of action.⁴³ This provision allowed a minor who attended a drag story hour or “sexually oriented performance” in violation of the law, or the minor’s parent, to “bring a civil action up to ten years after an

³⁷ *Imperial Sovereign Ct. of Mont. v. Knudsen*, No. CV 23-50-BU-BMM, 2023 U.S. Dist. LEXIS 184720, at *7 (D.C. Mont. 2023) (citations omitted).

³⁸ *Id.* at *7–8 (quoting H.B. 359, 68th Leg., Reg. Sess. § 1(10) (Mont. 2023)).

³⁹ *Id.* at *8 (quoting H.B. 359, 68th Leg., Reg. Sess. § 1(8) (Mont. 2023)).

⁴⁰ *Id.* at *7 (citations omitted).

⁴¹ *Id.* (quoting H.B. 359, 68th Leg., Reg. Sess. § 1(3) (Mont. 2023)).

⁴² *Id.* (quoting H.B. 359, 68th Leg., Reg. Sess. § 1(1)–(2) (Mont. 2023)).

⁴³ *Id.* at *9.

alleged violation against any ‘person who knowingly promotes, conducts, or participates as a performer.’”⁴⁴

Finally, the Texas law targeted “sexually oriented performances,” providing for “civil penalties for commercial entities who host such performances and criminal penalties for performers, as well as granting counties and municipalities the ability to ban and regulate such performances.”⁴⁵ A “sexually oriented performance” was defined under the law “as a ‘visual performance’ that (A) features (i) a performer who is nude or (ii) a performer who engages in ‘sexual conduct’; and (B) appeals to the prurient interest in sex.”⁴⁶ There were five categories of prohibited “sexual conduct” under the law:

(1) “the exhibition or representation, actual or simulated, of sexual acts, including vaginal sex, anal sex, and masturbation;”

(2) the “exhibition or representation, actual or simulated, of male or female genitals in a lewd state, including a state of sexual stimulation or arousal;”

(3) “the exhibition of a device designed and marketed as useful primarily for the sexual stimulation of male or female genitals;”

(4) “actual contact or simulated contact occurring between one person and the buttocks, breast, or any part of the genitals of another person;” and

⁴⁴ *Id.* (quoting H.B. 359, 68th Leg., Reg. Sess. § 4(1), (3) (Mont. 2023)).

⁴⁵ *Woodlands Pride, Inc v. Paxton*, No. H-23-2847, 2023 U.S. Dist. LEXIS 171268, at *4 (S.D. Tex. Sept. 26, 2023).

⁴⁶ *Id.* at *7 (quoting S.B. 12, 88th Leg., Reg. Sess. § 3 (Tex. 2023)).

(5) “the exhibition of sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics.”⁴⁷

Each of the four state anti-drag laws, then, sought to achieve their objectives by targeting adult or sexually oriented performances that were harmful to minors and/or appealed to the prurient interest in sex. Next, this Article examines the various reasons these laws were found to violate the First Amendment.

A. *Content-Based*

Each of these four state laws were challenged for violating the First Amendment,⁴⁸ which generally prohibits the government from enacting laws “abridging the freedom of speech.”⁴⁹ In *Friends of Georges v. Mulroy*,⁵⁰ the U.S. District Court for the Western District of Tennessee began its review of the state’s law by observing that laws that are content-based, or those that target “speech based on its communicative content,” are “presumptively unconstitutional” and subject to strict scrutiny.⁵¹ Under strict scrutiny, the government must prove that the content-based law is “narrowly tailored to serve compelling state interests”⁵² and is “the least restrictive means among available, effective alternatives” of achieving the government’s interest.⁵³

⁴⁷ *Id.* at *7–8 (quoting S.B. 12, 88th Leg., Reg. Sess. § 3 (Tex. 2023)).

⁴⁸ *See generally* *Friends of Georges, Inc. v. Mulroy*, No. 2:23-cv-02163-TLP-tmp, 2023 U.S. Dist. LEXIS 96766 (W.D. Tenn. June 2, 2023); *HM Fla.-Orl, LLC v. Griffin*, No. 6:23-cv-950-GAP-LHP, 2023 U.S. Dist. LEXIS 111612 (M.D. Fla. June 23, 2023); *Imperial Sovereign Ct.*, 2023 U.S. Dist. LEXIS 184720; *Woodlands Pride*, 2023 U.S. Dist. LEXIS 171268.

⁴⁹ *Friends of Georges*, 2023 U.S. Dist. LEXIS 96766, at *52 (quoting U.S. CONST. amend. I).

⁵⁰ *Id.*

⁵¹ *Id.* at *53–54 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)); *see also id.* at *54 (“As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” (quoting *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 573 (2002))).

⁵² *Id.* at *82 (quoting *R.A.V. v. City of St. Paul*, 576 U.S. 377, 395); *see also id.* (“When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.” (quoting *Ashcroft*, 542 U.S. at 665)).

⁵³ *Id.* at *82–83 (quoting *Ashcroft*, 542 U.S. at 666).

On the other hand, content-neutral regulations, or those which are “agnostic as to content,” are subject to intermediate scrutiny.⁵⁴ Under intermediate scrutiny, the law must advance “important governmental interests unrelated to the suppression of free speech and . . . not burden substantially more speech than necessary to further those interests.”⁵⁵ Thus, the first question for the courts reviewing these anti-drag laws was whether those laws were content-based.⁵⁶

In each of the cases, the courts determined that the laws were content-based and thus subject to strict scrutiny. For example, the Tennessee district court found the law to be content-based because it drew “distinctions based on the message a speaker conveys: adult-oriented performances that are harmful to minors are sanctioned with a criminal penalty while others are not.”⁵⁷ The court found the law thus targeted “speech based on its communicative content,” (i.e., “content that is not obscene for adults but may be indecent and harmful to minors”)⁵⁸ which is protected by the First Amendment.⁵⁹

In *HM Florida-Orl v. Griffin*,⁶⁰ the U.S. District Court for the Middle District of Florida reviewed Florida’s anti-drag law. It observed that the law likewise targeted “performances based on [their] communicative content.”⁶¹ On this point, the court observed that the only content prohibited by the law was

⁵⁴ *Id.* at *54 (quoting *Austin v. Reagan Nat’l Advert. of Austin*, 596 U.S. 61, 69 (2022)).

⁵⁵ *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997).

⁵⁶ See *Friends of Georges*, 2023 U.S. Dist. LEXIS 96766, at *54; *HM Fla.-Orl, LLC v. Griffin*, No. 6:23-cv-950-GAP-LHP, 2023 U.S. Dist. LEXIS 111612, at *15–16 (M.D. Fla. June 23, 2023); *Imperial Sovereign Ct. of Mont. v. Knudsen*, No. CV 23-50-BU-BMM, 2023 U.S. Dist. LEXIS 184720, at *30 (D.C. Mont. Oct. 13, 2023); *Woodlands Pride, Inc. v. Paxton*, No. H-23-2847, 2023 U.S. Dist. LEXIS 171268, at *39 (S.D. Tex. Sept. 26, 2023).

⁵⁷ *Friends of Georges*, 2023 U.S. Dist. LEXIS 96766, at *57–58 (citations omitted).

⁵⁸ *Id.* at *55–56 (citations omitted).

⁵⁹ *Id.* at *57 (“No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.” (quoting *Brown v. Ent. Merchs. Ass’n.*, 564 U.S. 786, 794 (2011))); see also *id.* (“For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.” (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978))).

⁶⁰ *HM Fla.-Orl*, 2023 U.S. Dist. LEXIS 111612.

⁶¹ *Id.* at *14.

content that ‘depicts or simulates nudity, sexual conduct, sexual excitement, . . . lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts when it . . . offends the prevailing standards in the adult community . . . with respect to what is suitable material . . . for the age of [a] child present.’⁶²

The court found that the “‘overriding justification’” for the law was “concern for the effect of the subject matter on young viewers,”⁶³ leading it to find the law to be content-based.⁶⁴

In *Imperial Sovereign Court of Montana v. Knudsen*,⁶⁵ the U.S. District Court for the District of Montana reviewed Montana’s law, noting that it banned “drag story hours . . . in schools and libraries that receive any public funding.”⁶⁶ It also noted that the law restricted “‘sexually oriented’ performances and ‘sexually oriented businesses’ based upon broad definitions of sexual and gendered content.”⁶⁷ This led the court to conclude that the Montana law “focuses on the communicative content of the speakers,” making it content-based.⁶⁸

In *Woodlands Pride v. Paxton*,⁶⁹ the U.S. District Court for the Southern District of Texas likewise considered whether the Texas law was content-based. The court observed that the law restricted “‘sexual oriented performances’ . . . by laying out five broad categories of ‘sexual conduct.’”⁷⁰ To the court, the fact that the law targeted sexually oriented conduct “alone suggests a content-based restriction.”⁷¹ This led the court to conclude that the Texas law targeted “the content of speech, i.e., ‘sexual oriented performances,’”

⁶² *Id.* at *14–15 (quoting FLA. STAT. § 827.11(1)(a) (2023)). The court misquotes the statute; however, the meaning was not changed.

⁶³ *Id.* at *15 (quoting *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 811 (2000)).

⁶⁴ *Id.* at *15 (“[T]he Act is content-based on its face . . .”).

⁶⁵ No. CV 23-50-BU-BMM, 2023 U.S. Dist. LEXIS 184720 (D.C. Mont. Oct. 13, 2023).

⁶⁶ *Id.* at *26–27 (citing H.B. 359, 68th Leg., Reg. Sess. § 3(2) (Mont. 2023)).

⁶⁷ *Id.* at *27 (quoting H.B. 359, 68th Leg., Reg. Sess. §§ 2, 3 (Mont. 2023)).

⁶⁸ *Id.* at *30 (citing *City of Austin v. Reagan Nat’l Advert. of Austin, LLC.*, 596 U.S. 61, 69 (2022)).

⁶⁹ No. H-23-2847, 2023 U.S. Dist. LEXIS 171268 (S.D. Tex. Sept. 26, 2023).

⁷⁰ *Id.* at *38 (quoting S.B. 12, 88th Leg., Reg. Sess. § 3 (Tex. 2023)).

⁷¹ *Id.*

which made the law content-based and “subject to strict scrutiny.”⁷² Thus, all four state laws were found to be content-based.

B. Impermissible Purpose

The Tennessee district court went on to provide another basis for determining the Tennessee law to be content-based, relying on the U.S. Supreme Court’s holding in *City of Austin v. Reagan Nat’l Advert. of Austin*⁷³ that even “facially content-neutral laws will be considered content-based if ‘there is evidence that an impermissible purpose or justification underpins’ the law.”⁷⁴ On this point, the court found that the Tennessee law’s text and legislative history showed that it was, in fact, passed for an impermissible purpose.⁷⁵ That the law was overbroad in several respects, discussed in more detail below,⁷⁶ indicated an impermissible purpose behind the law.⁷⁷ The court also found evidence in the legislative history that legislators intended to target drag performers and drag shows.⁷⁸

For example, the court observed that while the word “drag” was not in the text of the law, “‘drag’ was the one common thread in all three specific examples of conduct that was considered ‘harmful to minors’” by legislators debating the proposed law.⁷⁹ Further, the legislative history contained several references to “drag” and to “male and/or female impersonators.”⁸⁰ This, and other statements by Tennessee legislators,⁸¹ led the court to find that the Tennessee law

⁷² *Id.* at *39 (quoting S.B. 12, 88th Leg., Reg. Sess. § 3 (Tex. 2023)).

⁷³ 596 U.S. 61 (2022).

⁷⁴ *Friends of Georges, Inc. v. Mulroy*, No. 2:23-cv-02163-TLP-tmp, 2023 U.S. Dist. LEXIS 96766, at *64 (W.D. Tenn. June 2, 2023) (quoting *City of Austin*, 596 U.S. at 76).

⁷⁵ *Id.* at *68–69.

⁷⁶ See *infra* notes 153–155 and accompanying text.

⁷⁷ See generally *Friends of Georges*, 2023 U.S. Dist. LEXIS 96766, at *68–74.

⁷⁸ *Id.* at *70–72.

⁷⁹ *Id.* at *71 (citation omitted).

⁸⁰ *Id.* at *70 (citation omitted).

⁸¹ For example, Representative Chris Todd, a House sponsor of the bill, when asked why he introduced the bill, pointed to a drag show in Jackson, Tennessee that was promoted as “family friendly” as a concern behind the bill. The court observed, however, that Todd had not seen the show, “and therefore could not have made a sound determination about the show’s sexual impropriety for minors.” *Id.* at *71–72; see also Melissa Brown, *Tennessee Passes Controversial Drag Show Bill*, TENNESSEAN (Mar. 2, 2023, 10:19 AM), <https://www.tennessean.com/story/news/politics/2023/02/23/tennessee-drag-bill-to-ban->

“was not proposed to empower the state to protect minors from actual instances of indecent ‘adult cabaret entertainment,’ but rather . . . [to place] prospective blocks on drag shows—regardless of their potential harm to minors.”⁸²

In Florida, the district court did not explicitly consider the issue of whether the state legislature had passed the law for an impermissible purpose.⁸³ However, in the very first paragraph of the decision, the court noted that the state claimed the law’s purpose was “to protect children generally from obscene live performances.”⁸⁴ The court observed that Florida already had laws that did this, which led it to conclude that the Florida law was “specifically designed to suppress the speech of drag queen performers.”⁸⁵ To further support this conclusion, the court pointed to a statement by a sponsor of the bill that the law would “protect our children by ending the gateway propaganda to this evil—Drag Queen Story Time.”⁸⁶

The Montana district court did examine the legislative history of that state’s law to determine if there was an impermissible motivation behind it.⁸⁷ The court found that the bill’s “amendment process reflects a continuing focus on restricting the speech and expression of drag performers and gender non-conforming people.”⁸⁸ For example, the legislative history showed that “extensive public concerns about the bill’s constitutionality [were] raised by organizations, private individuals, and legislators.”⁸⁹ This concern led the legislature to remove references to “drag” in the law, which were

certain-performances-passes-general-assembly/69935840007/ [https://perma.cc/K2C9-2Wss] (discussing comments made by Tennessee State Representative Chris Todd regarding the bill).

⁸² *Id.* at *72.

⁸³ *See* HM Fla.-Orl, LLC v. Griffin, No. 6:23-cv-950-GAP-LHP, 2023 U.S. Dist. LEXIS 111612, at *15 (M.D. Fla. June 23, 2023).

⁸⁴ *Id.* at *1.

⁸⁵ *Id.*

⁸⁶ *Id.* (citation omitted).

⁸⁷ Imperial Sovereign Ct. of Mont. v. Knudsen, No. CV 23-50-BU-BMM, 2023 U.S. Dist. LEXIS 184720, at *31–32 (D.C. Mont. Oct. 13, 2023) (“Courts apply strict scrutiny to content-neutral statutes where ‘there is evidence that an impermissible purpose or justification underpins’ the law.” (quoting *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022))).

⁸⁸ *Id.* at *42.

⁸⁹ *Id.* at *43.

restored after supporters of the bill expressed concerns that removing the references to drag would preclude the law's "application to drag performances and drag story hours and thereby . . . 'completely derail[]' the bill's purpose."⁹⁰ The Montana district court also observed that the law's supporters "offered only anecdotal and/or unsupported evidence of a purported link between drag and gender nonconformity with harm to children."⁹¹ All of this led the court to find that the law's legislative history showed "an overt and impermissible purpose to target the speech and expression of LGBTQ+ community members."⁹² To the court, this alone would merit the application of strict scrutiny to the law.⁹³

The Texas district court did not explicitly consider whether the Texas law was passed for an impermissible purpose, but it did observe that the law "was touted as a 'Drag Ban' from its inception" and that the same day he signed the bill into law, Texas Governor Greg Abbott tweeted, "Texas Governor Signs Law Banning Drag Performances in Public. That's Right."⁹⁴ The court also observed that there were numerous statements by officials and legislators that "explicitly state or strongly suggest that [the law] is meant to be a ban on drag shows."⁹⁵ Thus, all four courts pointed to evidence that state legislators were targeting drag shows with these laws, with the Tennessee and Montana courts explicitly determining that the laws were thus passed for an impermissible purpose.

⁹⁰ *Id.* at *42–43 (citation omitted).

⁹¹ *Id.* at *43.

⁹² *Id.* at *44.

⁹³ *See id.*

⁹⁴ *Woodlands Pride, Inc. v. Paxton*, No. H-23-2847, 2023 U.S. Dist. LEXIS 171268, at *4 (S.D. Tex. Sept. 26, 2023) (citation omitted).

⁹⁵ *Id.* at *9; *see also id.* at *8–9 ("When [the law] was first introduced . . . the Author's/Sponsor's Statement of Intent noted a concern about a 'recent cultural trend' of 'drag shows . . . performed in venues generally accessible to the public, including children.'" (citation omitted)); *id.* at *9–10 (statement of Lieutenant Governor Dan Patrick) ("[I]t is shocking parents would allow their young children to be sexualized by drag shows.").

C. Viewpoint-Based

In addition to being content-based, the Tennessee district court found the state's anti-drag law to be viewpoint-based.⁹⁶ The court observed that “viewpoint-based regulations ‘raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the market place. . . .’”⁹⁷ Viewpoint-based regulations, like content-based regulations, are subject to strict scrutiny.⁹⁸ The Tennessee district court noted that the Tennessee law criminalized “performances that are ‘harmful to minors’ by ‘male or female impersonators’”⁹⁹ This, the court found, “targets the viewpoint of gender identity—particularly those who wish to impersonate a gender that is different from the one with which they are born . . . [making the law a] viewpoint-based regulation on speech.”¹⁰⁰

In determining whether the Montana law was also viewpoint-based, the Montana district court noted that the Montana law shared many similarities with the Tennessee law. Just as the Tennessee law targeted the speech of “male or female impersonators,”¹⁰¹ the Montana law was aimed at “‘drags king[s]’ and ‘drag queen[s],’ defined as ‘male or female performer[s] who adopt[] a flamboyant or parodic [masculine or feminine] persona with glamorous or exaggerated costumes and makeup.’”¹⁰² Like the Tennessee district court, this led the Montana district court to conclude that their state's law was also facially viewpoint-based and thus subject to strict scrutiny.¹⁰³

⁹⁶ *Friends of Georges, Inc. v. Mulroy*, No. 2:23-cv-02163-TLP-tmp, 2023 U.S. Dist. LEXIS 96766, at *58 (W.D. Tenn. June 2, 2023).

⁹⁷ *Id.* (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992)); *see also id.* (“Government discrimination among viewpoints—or the regulation of speech based on the ‘specific motivating ideology or the opinion or perspective of the speaker’—is a ‘more blatant’ and ‘egregious form’ of content discrimination.” (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015))).

⁹⁸ *Imperial Sovereign Ct.*, 2023 U.S. Dist. LEXIS 184720, at *25 (D.C. Mont. Oct. 13, 2023). *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

⁹⁹ *Friends of Georges*, 2023 U.S. Dist. LEXIS 96766, at *61–62.

¹⁰⁰ *Id.* at *64.

¹⁰¹ *Imperial Sovereign Ct.*, 2023 U.S. Dist. LEXIS 184720, at *30 (quoting TENN. CODE ANN. §§ 7-51-1401(2), (12) (2023)).

¹⁰² *Id.* at *30–31 (quoting H.B. 359, 68th Leg., Reg. Sess. § 1(1)–(3) (Mont. 2023)).

¹⁰³ *Id.* at *31.

The Florida district court did not consider whether that state's law was viewpoint-based.¹⁰⁴ In the Texas case, the court observed that the law targeted “performers who use prosthetics to simulate a gender other than the one they are assigned.”¹⁰⁵ The Texas district court noted that the law also targeted “the exhibition of sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics.”¹⁰⁶ The court found this language to be “directed at the specific act of impersonating or exaggerating a sex other than the one a performer is assigned,” leading the court to conclude that the law was viewpoint-based.¹⁰⁷ Thus, the three district courts which considered the issue found the laws to be viewpoint-based.

D. Application of Strict Scrutiny

A determination that a law is content-based on its face,¹⁰⁸ that it is content-based because it was passed for an impermissible purpose,¹⁰⁹ or that it is viewpoint-based,¹¹⁰ is sufficient to merit applying strict scrutiny to that law. The courts reviewing the Tennessee and Montana laws found all three justifications to be present in their respective cases, the Texas court found the law to be content and viewpoint-based, and the Florida court found the law to be content-based.¹¹¹ Both content- and viewpoint-based laws are presumptively unconstitutional and subject to strict scrutiny.¹¹² To survive strict scrutiny and be found constitutional, the government must show that the law at issue is “narrowly tailored to serve compelling state

¹⁰⁴ See *HM Fla.-Orl, LLC v. Griffin*, No. 6:23-cv-950-GAP-LHP, 2023 U.S. Dist. LEXIS 111612, at *15 (M.D. Fla. June 23, 2023) (discussing only whether the regulation is content-based without discussion whether it is viewpoint-based).

¹⁰⁵ *Woodlands Pride, Inc. v. Paxton*, No. H-23-2847, 2023 U.S. Dist. LEXIS 171268, at *42 (S.D. Tex. Sept. 26, 2023).

¹⁰⁶ *Id.* at *42–43 (quoting S.B. 12, 88th Leg., Reg. Sess. § 3 (Tex. 2023)).

¹⁰⁷ *Id.* at *43.

¹⁰⁸ See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

¹⁰⁹ See *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022).

¹¹⁰ See *Imperial Sovereign Ct. of Mont. v. Knudsen*, No. CV 23-50-BU-BMM, 2023 U.S. Dist. LEXIS 184720, at *25 (D.C. Mont. Oct. 13, 2023).

¹¹¹ See discussion *supra* Sections II.A–C.

¹¹² See *Imperial Sovereign Ct.*, 2023 U.S. Dist. LEXIS 184720, at *26; *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

interests.”¹¹³ This means that the law must be “the least restrictive means among available, effective alternatives” of achieving the government’s interests.¹¹⁴

The Tennessee district court observed that there was “no question that Tennessee ha[d] a compelling state interest in ‘protecting the physical and psychological well-being of minors, which extended to shielding them from indecent messages that are not obscene by adult standards.’”¹¹⁵ Nevertheless, the court noted that laws restricting indecent speech, which is protected by the First Amendment, “must be ‘relatively narrow and well-defined.’”¹¹⁶ The court found the Tennessee law to be neither of these, leading it to conclude that the law was “not narrowly tailored to serve its legitimate compelling interest.”¹¹⁷

One reason for this conclusion was because the Tennessee law “criminally sanctions qualifying performers virtually anywhere—this includes private events at people’s homes or arguably even age-restricted venues.”¹¹⁸ Also supporting this conclusion was the fact that the law did not require any intent or knowledge of wrongdoing by those charged with violating it.¹¹⁹ Nor did the law provide any affirmative defenses for alleged violators, including parental consent.¹²⁰ On this point, the court observed that “[p]arental consent has been critical to the constitutionality of similar laws that restrict speech that is indecent but not obscene to adults.”¹²¹

¹¹³ *Id.* at *44 (quoting *Reed*, 576 U.S. at 163).

¹¹⁴ *Id.* (quoting *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 666 (2004)).

¹¹⁵ *Friends of Georges, Inc. v. Mulroy*, No. 2:23-cv-02163-TLP-tmp, 2023 U.S. Dist. LEXIS 96766, at *83 (W.D. Tenn. June 2, 2023) (citing *Reno v. Am. C.L. Union*, 521 U.S. 844, 879 (1997)).

¹¹⁶ *Id.* (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975)); *see also id.* (“No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.” (quoting *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 794 (2011))).

¹¹⁷ *Id.* at *86.

¹¹⁸ *Id.* at *84.

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ *Id.* at *84–85 (first citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); and then *Davis-Kidd v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993) (upholding obscenity law that contained a parental consent affirmative defense)).

The Florida district court likewise considered whether that state's law was the least restrictive means of achieving a compelling government interest.¹²² As in Tennessee, the Florida district court found that the government had "a compelling interest in protecting the physical and psychological well-being of minors."¹²³ Again, however, the court found the law was not narrowly tailored in a number of ways.¹²⁴ For example, this law, too, failed to provide for parental consent.¹²⁵ In addition, the law was not limited to "commercial transactions," so could apply to "anyone, anywhere . . . rang[ing] from a sold-out burlesque show to a skit at a backyard family barbecue."¹²⁶ Finally, the law failed to define several key terms, such as "live performance," "child," "lewd conduct," and "lewd exposure of prosthetic or imitation genitals or breasts," which allowed for the possibility of those terms being interpreted broadly by law enforcement officials.¹²⁷

The Montana district court also found that the state had "a legitimate and compelling interest in protecting the safety and welfare of children."¹²⁸ However, the court found that the government had failed to show that the law's restrictions had any connection to this interest.¹²⁹ For example, the state had not provided any evidence to show that "limiting children's exposure to speech and expression critical of gender norms or by gender non-conforming people bears any relationship to promoting children's welfare."¹³⁰ In fact, the court found that the state's justification for the law "relies on a conflation of sexual abuse with exposure to sexual orientation, gender

¹²² HM Fla.-Orl, LLC v. Griffin, No. 6:23-cv-950-GAP-LHP, 2023 U.S. Dist. LEXIS 111612, at *15–16 (M.D. Fla. June 23, 2023).

¹²³ *Id.* at 16 (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 482 U.S. 115, 126 (1989)).

¹²⁴ *See id.* at *19.

¹²⁵ *Id.* at *17.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Imperial Sovereign Ct. of Mont. v. Knudsen, No. CV 23-50-BU-BMM, 2023 U.S. Dist. LEXIS 184720, at *44 (D. Mont. Oct. 13, 2023).

¹²⁹ *Id.* at *44–45.

¹³⁰ *Id.* at *45.

identity, and gender expression.”¹³¹ This contributed to the court’s determination that the law was not narrowly tailored.¹³²

The Texas district court likewise applied strict scrutiny to that state’s law. Again, the court found that “Texas has a compelling interest in protecting children,” but that the law was not narrowly tailored to achieve this “for a multitude of reasons.”¹³³ The court observed the law prohibited “sexually oriented performances” that appeal “to the prurient interest in sex.”¹³⁴ The court noted that the “prurient interest” requirement “[was] borrowed from the Supreme Court’s *Miller* test for obscenity.”¹³⁵ The *Miller* test provides the elements to be used by courts in determining the constitutionality of laws targeting obscene speech, which are:

- (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.¹³⁶

The Texas law thus incorporated the *Miller* requirement that the regulated conduct “appeals to the prurient interest in sex.”¹³⁷ However, the law failed to incorporate any of the other narrowing elements of the *Miller* test,¹³⁸ nor was the term “prurient interest” defined in the law.¹³⁹ The fact that “prurient interest” was not defined was even more problematic, because the law did “not distinguish children by the age of a child,” when what might appeal to the prurient interest in sex would not be the same for an older teenager as a

¹³¹ *Id.* at *45–46.

¹³² *Id.* at *50.

¹³³ *Woodlands Pride, Inc. v. Paxton*, No. H-23-2847, 2023 U.S. Dist. LEXIS 171268, at *39 (S.D. Tex. Sept. 26, 2023).

¹³⁴ *Id.* at *7 (quoting S.B. 12, 88th Leg., Reg. Sess. § 1 (Tex. 2023)).

¹³⁵ *Id.* at *8 n.15.

¹³⁶ *Miller v. California*, 413 U.S. 15, 24 (1973) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

¹³⁷ S.B. 12, 88th Leg., Reg. Sess. § 3 (Tex. 2023).

¹³⁸ *Woodlands Pride*, 2023 U.S. Dist. LEXIS 171268, at *39; *see also id.* at *8 n.15.

¹³⁹ *Id.* at *8.

much younger child.¹⁴⁰ The Texas law also failed “to provide any affirmative defenses, such as consent by a parent or a mistake on the part of the performer,” which could have helped the law be more narrowly tailored.¹⁴¹ All of this led the court to conclude that the Texas law was not narrowly tailored to promote its compelling purpose of protecting children.¹⁴² All four state laws, then, were found to fail strict scrutiny for not being narrowly tailored, which resulted in their being unconstitutional.

E. Vagueness and Overbreadth

In addition to the above grounds for determining whether each of the four state laws violated the First Amendment, all four courts also considered whether the laws were unconstitutionally vague or overbroad. A law is unconstitutionally vague “if its prohibitions are not clearly defined.”¹⁴³ There are a few justifications for this. First, “because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.”¹⁴⁴ Second, laws must provide explicit standards for those who enforce them to prevent arbitrary and discriminatory enforcement.¹⁴⁵ Third, when vague laws affect protected speech, they can inhibit people from engaging in protected speech for fear of prosecution under those laws, thus chilling speech.¹⁴⁶

On the other hand, a law is unconstitutionally overbroad when it “punishes a ‘substantial’ amount of protected free speech, ‘judged in relation to the statute’s plainly legitimate sweep. . . .’”¹⁴⁷ The concern behind overbroad laws is that, as with vague laws, they “may

¹⁴⁰ *Id.* at *39–40.

¹⁴¹ *Id.* at *40.

¹⁴² *Id.* at *41.

¹⁴³ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 109.

¹⁴⁷ *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

deter or ‘chill’ constitutionally protected speech. . . .”¹⁴⁸ “Chilling speech” is a concern “because many people will abstain from speech instead of taking on the burden of vindicating their rights through litigation,” which can result in “society as a whole” being “deprived of an uninhibited marketplace of ideas.”¹⁴⁹

In the Tennessee case, the court found the law’s use of the phrase “harmful to minors” to be unconstitutionally vague because it applied the same standard to minors of all ages,¹⁵⁰ when “contemporary community standards” about what is “harmful” are not the same for minors of different ages.¹⁵¹ The court found this “could chill performers faced with great uncertainty as they run the risk of violating a criminal statute with their speech.”¹⁵² The definition of the “harmful to minors” standard also resulted in Tennessee’s law being overbroad, as it applied to anyone younger than eighteen years of age, as did the law’s application to “anywhere a minor could be present.”¹⁵³ The court interpreted the latter provision as meaning that the law “criminally sanctions qualifying performers virtually anywhere[, including] private events at people’s homes or arguably even age-restricted venues.”¹⁵⁴ As a result, the Tennessee law was found to be “substantially overbroad.”¹⁵⁵

The Florida district court found that state’s law to be unconstitutionally vague because it failed to “define several important terms.”¹⁵⁶ In particular, the law failed to define the terms “lewd conduct” and “lewd exposure of prosthetic or imitation genitals or

¹⁴⁸ *Id.* at 119; *see also* *Friends of Georges, Inc. v. Mulroy*, No. 2:23-cv-02163-TLP-tmp, 2023 U.S. Dist. LEXIS 96766, at *93 (W.D. Tenn. June 2, 2023) (citing *United States v. Williams*, 553 U.S. 285, 293 (2008)).

¹⁴⁹ *S. Utah Drag Stars v. City of St. George*, No. 4:23-cv-00044-DN-PK, 2023 U.S. Dist. LEXIS 105876, at *34 (D.C. Utah June 16, 2023) (first citing *Virginia*, 539 U.S. at 119; and then quoting *id.*).

¹⁵⁰ *Friends of Georges*, 2023 U.S. Dist. LEXIS 96766, at *88–91 (discussing generally *Am. C.L. Union v. Mukasey*, 534 F.3d 181 (3d Cir. 2008)).

¹⁵¹ *Id.* at 89–90.

¹⁵² *Id.* at *88.

¹⁵³ *Id.* at *93–94.

¹⁵⁴ *Id.* at *84.

¹⁵⁵ *Id.* at *20.

¹⁵⁶ *HM Fla.-Orl., LLC v. Griffin*, No. 6:23-cv-950-GAP-LHP, 2023 U.S. Dist. LEXIS 111612, at *17 (M.D. Fla. June 23, 2023).

breasts.”¹⁵⁷ Because these terms were undefined, the court found that one had to consult state jury instructions for a definition of “lewd conduct.”¹⁵⁸ The court found this unhelpful, however, as the jury instructions’ “definition serves only to further broaden the scope of what may be covered by using terms like ‘wicked,’ ‘lustful,’ and ‘unchaste’—all vulnerable to broad subjectivity which ultimately leaves an individual of common intelligence to ‘necessarily guess at [their] meaning.’”¹⁵⁹

This also contributed to the court’s finding the Florida law to be overbroad.¹⁶⁰ As the Florida district court observed, “[a] fully clothed drag queen with cleavage-displaying prosthetic breasts reading an age-appropriate story to children may be adjudged ‘wicked’—and thus ‘lewd’—by some, but such a scenario would not constitute the kind of obscene conduct prohibited by” the *Miller* test for obscenity.¹⁶¹ In addition, the court found that the law’s “focus on ‘prosthetic or imitation genitals or breasts’ raises a host of other concerns not simply answered,” such as “what are the implications for cancer survivors with prosthetic genitals or breasts?”¹⁶² The Florida district court thus found the law’s “vague language [to be] dangerously susceptible to standardless, overbroad enforcement which could sweep up substantial protected speech.”¹⁶³ The Florida law was thus found to be vague and overbroad.

The Montana district court likewise found that state’s law to be unconstitutionally “vague and overbroad.”¹⁶⁴ This determination was based in part on the law’s failure to define several key terms, including “lewd and lascivious,”¹⁶⁵ “‘flamboyant or parodic [gendered] persona,’ ‘glamorous or exaggerated costumes and makeup,’ ‘salacious dancing,’ ‘sexual manner,’ and ‘presence of an individual

¹⁵⁷ *Id.* at *20 (quoting FLA. STAT. § 827.11(1)(a) (2023)).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *20–21 (citations omitted).

¹⁶⁰ *Id.* at *13.

¹⁶¹ *Id.* at *21 (footnote omitted).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Imperial Sovereign Ct. of Mont. v. Knudsen*, No. CV 23-50-BU-BMM, 2023 U.S. Dist. LEXIS 184720, at *59 (D.C. Mont. Oct. 13, 2023).

¹⁶⁵ *Id.* at *52 (quoting H.B. 359, 68th Leg., Reg. Sess. § 1(8) (Mont. 2023)).

under the age of 18[.]”¹⁶⁶ The court also found that the law’s definitions of other key terms, such as those “for ‘drag king,’ ‘drag queen,’ ‘drag story hour,’ ‘nude,’ ‘public property,’ ‘sexually oriented,’ ‘sexually oriented business,’ ‘sexually oriented performance,’ and ‘stripping’ [presented] a significant risk of vagueness and overbreadth.”¹⁶⁷

The court observed, for example, that a “‘flamboyant or parodic’ gendered persona with ‘glamorous or exaggerated costumes or makeup’ could be interpreted to include any number of theatrical and artistic performances.”¹⁶⁸ In addition, “[a] performer who removes no clothing or who removes only outer layers still might fall within [the law’s] definition of ‘[s]tripping.’”¹⁶⁹ Moreover, the law’s definition of “nude” “could apply both to someone fully clothed, with part of their buttocks visible through partially sheer fabric, and to someone in a bathing suit that partially uncovers the lower portion of a breast.”¹⁷⁰ The Montana district court thus found the law to be “vague and overbroad,” which “chill[ed] protected speech and create[ed] a risk of disproportionate enforcement against trans, Two-Spirit, and gender nonconforming people.”¹⁷¹

The Texas district court similarly found that state’s law to be unconstitutionally vague.¹⁷² As with the other state laws, the court found issues with the law’s definitions of its key terms. For example, the term “lewd” was not defined in the law, leaving both the public and law enforcement officials without “any guidance or standard in determining what is lewd or barred” by the law.¹⁷³ The Texas district court went on to find that the Texas law’s inclusion of the “prurient

¹⁶⁶ *Id.* (quoting H.B. 359, 68th Leg., Reg. Sess. §§ 1(1)–(2), (8), (11), 3(3)(a) (Mont. 2023)).

¹⁶⁷ *Id.* at *52–53 (quoting H.B. 359, 68th Leg., Reg. Sess. §§ 1(1)–(4), (6), (8)–(11) (Mont. 2023)).

¹⁶⁸ *Id.* at *53 (quoting H.B. 359, 68th Leg., Reg. Sess. §§ 1(1)–(2) (Mont. 2023)).

¹⁶⁹ *Id.* (quoting H.B. 359, 68th Leg., Reg. Sess. § 1(11) (Mont. 2023)).

¹⁷⁰ *Id.* at *53 (citing H.B. 359, 68th Leg., Reg. Sess. § 1(4)(b) (Mont. 2023)).

¹⁷¹ *Id.* at *59 (citing *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)). “The term ‘Two-Spirit’ reflects ‘traditional Indigenous acceptance of trans and non-binary definitions of gender.’” *Id.* at *3 (citation omitted).

¹⁷² *Woodlands Pride, Inc. v. Paxton*, No. H-23-2847, 2023 U.S. Dist. LEXIS 171268, at *47 (S.D. Tex. Sept. 26, 2023).

¹⁷³ *Id.* at *48–49.

interest” component of the *Miller* test for obscenity,¹⁷⁴ combined with its omission of other elements of that test, also resulted in its being both vague and overbroad.¹⁷⁵ The omitted *Miller* elements served to narrow the applicability of that test, such as requiring that “the average person, applying contemporary community standards” must evaluate the work “taken as a whole.”¹⁷⁶ Other narrowing elements of the *Miller* test omitted from the Texas law included the requirements “that the work be patently offensive” and that content “that is comical or has serious literary, artistic, political, and scientific value” be excluded from the reach of the law.¹⁷⁷ To the court, this suggested a wider interpretation of “prurient sexual interest” in the Texas law than in *Miller*.¹⁷⁸ The omission of the other *Miller* elements also made it difficult for “someone of ‘ordinary intelligence’” to know how the law would be enforced, making the law vague as well.¹⁷⁹

The Texas district court also found the Texas law lacked other “key definitions,” which contributed to its overbreadth.¹⁸⁰ For example, the law applied “to any type of ‘visual performance’” and to “any performer (which is also not defined) who ‘regardless of whether compensation for the performance is expected or received,’ violates the law.”¹⁸¹ The court interpreted these provisions as potentially encompassing “a large amount of constitutionally protected conduct,” including “activities such as cheerleading, dancing, [and] live theater.”¹⁸² Moreover, the Texas law applied “‘on public property at a time, in a place, and in a manner that could reasonably be expected to be viewed by a child’ OR ‘in the presence of an individual younger than eighteen years of age.’”¹⁸³ All of this contributed

¹⁷⁴ *Id.* at *7.

¹⁷⁵ *Id.* at *44–47.

¹⁷⁶ *Id.* at *45 (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at *48.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at *45–47.

¹⁸¹ *Id.* at *45 (citation omitted).

¹⁸² *Id.* at *45–46.

¹⁸³ *Id.* at *46.

to the court's finding the Texas law to be "substantially overbroad."¹⁸⁴

All four state laws, then, were found to be unconstitutional violations of the First Amendment on multiple grounds, any one of which would be sufficient for a finding of unconstitutionality. The laws all failed strict scrutiny because they were not narrowly tailored. In addition, the laws were all vague and overbroad. While the courts each made strong arguments as to why the respective laws before them were unconstitutional, the courts generally did not provide much justification for why drag performances merit First Amendment protection in the first place. That subject is considered next.

III. FIRST AMENDMENT PROTECTION FOR DRAG

Perhaps the most comprehensive discussion by a court on First Amendment protection for drag performances comes from the case finding Texas' anti-drag law unconstitutional, *Woodlands Pride, Inc. v. Paxton*.¹⁸⁵ In that case, the court surveyed court decisions on that issue, finding that there is "little divergence from the opinion that drag performances are expressive content that is afforded First Amendment protection."¹⁸⁶ The court cited five cases to support this conclusion, which appear to have been all the decisions on the issue at the time.¹⁸⁷

The first of those cases was the 1983 case *Norma Kristie, Inc. v. City of Oklahoma City*.¹⁸⁸ In that case, plaintiff Norma Kristie, Inc. sought permission to hold "a national contest for female impersonators entitled the 'Miss Gay America Pageant'" at a convention

¹⁸⁴ *Id.* at *47.

¹⁸⁵ *See id.* at *33–34.

¹⁸⁶ *Id.* (citations omitted).

¹⁸⁷ *Id.* at *34 (first citing *Norma Kristie, Inc. v. City of Oklahoma City*, 572 F. Supp. 88 (W.D. Okla. 1983); then citing *Friends of Georges, Inc. v. Mulroy*, No. 2:23-cv-02163-TLP-tmp, 2023 U.S. Dist. LEXIS 96766 (W.D. Tenn. June 2, 2023); *HM Fla.-Orl, LLC v. Griffin*, No. 6:23-cv-950-GAP-LHP, 2023 U.S. Dist. LEXIS 111612 (M.D. Fla. June 23, 2023); *S. Utah Drag Stars v. City of St. George*, No. 4:23-cv-00044-DN-PK, 2023 U.S. Dist. LEXIS 105876 (D. Utah June 16, 2023); *Imperial Sovereign Ct. v. Knudsen*, No. CV 23-50-BU-BMM, 2023 U.S. Dist. LEXIS 131233 (D. Mont. July 28, 2023)).

¹⁸⁸ *See Norma Kristie, Inc. v. City of Oklahoma City*, 572 F. Supp. at 89.

center in Oklahoma City, Oklahoma.¹⁸⁹ The City Manager of Oklahoma City denied the organization permission to hold the event at the convention center, believing it “to be an open expression of homosexuality,” which he considered to be obscene.¹⁹⁰ Challenging the denial, plaintiffs explained that the competition was “based on the way a person transforms himself through the ‘art of illusion’ to look like a woman.”¹⁹¹ The city, on the other hand, argued that the Miss Gay America Pageant should not be protected by the First Amendment “because it is a commercial enterprise and not a noteworthy artistic endeavor such as a play or musical.”¹⁹² The city also argued that “a blatant showing of men parading in women’s apparel is not artistic.”¹⁹³

Responding to the city’s arguments, the court found that artistic merit and aesthetic value made no difference “in the extent of constitutional protection,” as “[t]he First Amendment is not an art critic.”¹⁹⁴ The court noted that the contest included “a talent competition with singing and dance,” which the Supreme Court has held to be protected by the First Amendment.¹⁹⁵ The court also dismissed the city’s allegations that the pageant was obscene, observing that the city produced no evidence to support this assertion, instead relying on the argument that “the exposure of a male in female attire is immoral.”¹⁹⁶ The court thus found the pageant to be protected by the First Amendment.¹⁹⁷

The four remaining cases cited by the *Woodlands Pride* court to support the proposition that drag shows are protected by the First Amendment are all cases decided in 2023 dealing with recent laws or other government actions against drag shows and/or drag performers. Three of those four cases—*Friends of Georges, Inc. v.*

¹⁸⁹ *Id.* at 90.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 91.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 92.

¹⁹⁷ *Id.*

Mulroy (Tennessee law),¹⁹⁸ *HM Florida-Orl, LLC v. Griffin* (Florida law),¹⁹⁹ and *Imperial Sovereign Court of Montana v. Knudsen* (Montana law)²⁰⁰—concluded that the anti-drag laws at issue violated the First Amendment without providing much explanation of the justifications for providing drag shows with First Amendment protection.

Friends of Georges v. Mulroy dealt with Tennessee’s anti-drag law.²⁰¹ Finding the law unconstitutional, the Tennessee district court in that case determined that the law “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 Such speech is protected by the First Amendment.”²⁰² The court, however, failed to provide much of an explanation as to the justifications for providing such speech with First Amendment protection. Likewise, in *HM Florida-Orl v. Griffin*, the Florida district court held that Florida’s law targeting drag performances likely violated the First Amendment.²⁰³ In coming to this conclusion, however, the court did not provide any detailed analysis of why drag performances were entitled to First Amendment protection. In the last of these three cases, *Imperial Sovereign Court v. Knudsen*, the Montana district court granted a preliminary injunction against Montana’s anti-drag law.²⁰⁴ Considering the issue of whether drag shows are protected by the First Amendment, that court merely pointed to the Tennessee and Florida district courts’ conclusions that their respective state laws violated the First Amendment.²⁰⁵

Another case cited by the *Woodlands Pride* court provided more explanation than the three just-discussed cases for why drag shows

¹⁹⁸ No. 2:23-cv-02163-TLP-tmp, 2023 U.S. Dist. LEXIS 96766, at *2 (W.D. Tenn. June 2, 2023).

¹⁹⁹ No. 6:23-cv-950-GAP-LHP, 2023 U.S. Dist. LEXIS 111612, at *1 (M.D. Fla. June 23, 2023).

²⁰⁰ No. CV 23-50-BU-BMM, 2023 U.S. Dist. LEXIS 184720, at *60 (D. Mont. July 28, 2023).

²⁰¹ *Friends of Georges*, 2023 U.S. Dist. LEXIS 96766, at *4–5.

²⁰² *Id.* at *68–69.

²⁰³ *See HM Fla.-Orl*, 2023 U.S. Dist. LEXIS 111612, at *19.

²⁰⁴ *See Imperial Sovereign Ct.*, 2023 U.S. Dist. LEXIS 184720, at *60.

²⁰⁵ *Id.* at *26 (first citing *Friends of Georges*, 2023 U.S. Dist. LEXIS 96766, at *19; and then citing *HM Fla.-Orl*, 2023 U.S. Dist. LEXIS 111612, at *1).

are protected by the First Amendment. That case, *S. Utah Drag Stars v. City of St. George*,²⁰⁶ did not involve a law targeting drag shows, but rather a city government denial of a permit to hold a drag show in a public park.²⁰⁷ The court in this case described the types of speech involved in the drag show at issue, pointing to plaintiffs' statements that their community drag show conveyed "messages of diversity, inclusion, and support for individuals with non-traditional gender expression and identities."²⁰⁸ Plaintiffs in that case also explained that drag "is an art form, a source of entertainment, and a form of activism" and that it conveys a "valuable political message . . . that individuals with gender presentation and identities outside the majoritarian norm are welcome in public places."²⁰⁹ The court went on to observe that "[g]iven current political events and discussions, 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-expression, gender stereotypes and roles, and LGBTQIA+ identity."²¹⁰ The court concluded that the drag show was protected by the First Amendment,²¹¹ and it further noted that the city's "arguments to the contrary do not merit discussion."²¹²

The lack of detailed justification in these cases for providing First Amendment protection to drag performances was noted by a subsequent court decision, one that held that drag shows were not necessarily protected by the First Amendment.²¹³ In that case, *Spectrum WT v. Wendler*, the court observed that the Tennessee district court "provided no analysis on why restrictions on drag shows

²⁰⁶ No. 4:23-cv-00044-DN-PK, 2023 U.S. Dist. LEXIS 105876, at *7 (D. Utah June 16, 2023).

²⁰⁷ *Id.* at *7.

²⁰⁸ *Id.* (citation omitted).

²⁰⁹ *Id.* at *53 (citations omitted).

²¹⁰ *Id.*

²¹¹ *Id.* at *53–54 (first citing *Norma Kristie, Inc. v. City of Oklahoma City*, 572 F. Supp. 88, 92 (W.D. Okla. 1983); and then citing *Friends of Georges*, 2023 U.S. Dist. LEXIS 96766, at *19).

²¹² *Id.* at *53.

²¹³ *Spectrum WT v. Wendler*, No. 2:23-CV-048-Z, 2023 U.S. Dist. LEXIS 168753, at *33 (N.D. Tex. Sept. 21, 2023).

necessarily restrict ‘expressive conduct.’”²¹⁴ The *Spectrum WT* court likewise observed that the *Drag Stars* court found drag shows to be protected speech, without considering arguments to the contrary.²¹⁵

Apart from the 1983 *Norma Kristie* case discussed above,²¹⁶ and *Spectrum WT* case discussed in more detail below, the only case to provide much detailed analysis about whether and why drag shows merit First Amendment protection is *Woodlands Pride*, which dealt with Texas’ anti-drag law.²¹⁷ One of the plaintiffs in the case was drag performer Brigitte Bandit.²¹⁸ The court noted that Bandit considered “drag to be an artistic endeavor that allows her to express herself, explore her identity outside of traditional gender norms, share messages of kindness and acceptance, and convey political messages.”²¹⁹ For example, the court observed that Bandit engaged in political speech:

[S]he wore a dress with the names of the Uvalde school shooting victims on the dress, to testify before a Texas senate committee. When asked what the message was, she stated, “I was trying to say that we’re sitting here arguing about drag performances and drag queens . . . under the concern of safety for kids while kids are being shot in our schools here in Texas.”²²⁰

In addition to this, plaintiffs in *Woodlands Pride* argued that “there are multiple messages and expressive purposes to drag performances, including messages of celebration, equality, and acceptance,” as well as “messages of a political and social justice nature.”²²¹ The *Woodlands Pride* court agreed:

²¹⁴ *Id.* at *25 n.27 (quoting *Friends of Georges*, 2023 U.S. Dist. LEXIS 96766, at *18).

²¹⁵ *Id.* (quoting *S. Utah Drag Stars*, 2023 U.S. Dist. LEXIS 105876, at *53). The *Spectrum WT* court also distinguished the *Friends of Georges* and *Southern Utah Drag Stars* cases, amongst other reasons, as not being school campus cases. *See id.*

²¹⁶ *See supra* notes 188–197 and accompanying text.

²¹⁷ *Woodlands Pride, Inc. v. Paxton*, No. H-23-2847, 2023 U.S. Dist. LEXIS 171268, at *3–4 (S.D. Tex. Sept. 26, 2023).

²¹⁸ *Id.* at *18.

²¹⁹ *Id.* (citation omitted).

²²⁰ *Id.* (citation omitted).

²²¹ *Id.* at *33 (citation omitted).

Drag shows express a litany of emotions and purposes, from humor and pure entertainment to social commentary on gender roles. There is no doubt that at the bare minimum these performances are meant to be a form of art that is meant to entertain, alone this would warrant some level of First Amendment protection.²²²

The court went on to find that some drag shows went beyond “pure entertainment” to provide “political, social, and cultural messages.”²²³ Thus, the *Woodlands Pride* court found that drag performances are “expressive conduct that warrants First Amendment protection.”²²⁴

In coming to this conclusion, the *Woodlands Pride* court observed that the *Spectrum WT* court had recently come to a contrary conclusion, noting that that decision was “one of the only federal cases where drag shows did not receive First Amendment protection.”²²⁵ In *Spectrum WT v. Wendler*,²²⁶ the court concluded that “at this point in Free Speech jurisprudence, it is not clearly established that all ‘drag shows’ are categorically ‘expressive conduct’” protected by the First Amendment.²²⁷ This Article next considers some of the *Spectrum WT* court’s primary arguments supporting its conclusion, along with other relevant court precedents.

In *Spectrum WT v. Wendler*, the student organization Spectrum WT at West Texas A&M University sought to hold a fundraiser to raise funds for LGBTQ+ suicide prevention.²²⁸ The event was to be “a ‘drag show’ open to children accompanied by a parent or guardian.”²²⁹ University President Walter Wendler, however, denied

²²² *Id.* at *34–35.

²²³ *Id.* at *36.

²²⁴ *Id.* at *36–37.

²²⁵ *Id.* at *35 (citing *Spectrum WT v. Wendler*, No. 2:23-CV-048-Z, 2023 U.S. Dist. LEXIS 168753, at *1 (N.D. Tex. Sept. 21, 2023) (denying a preliminary injunction to stop a college president from barring a drag show on a campus)).

²²⁶ *Spectrum WT*, 2023 U.S. Dist. LEXIS 168753.

²²⁷ *Id.* at *16 (citing *Edge v. City of Everett*, 929 F.3d 657, 669 (9th Cir. 2019)).

²²⁸ *Id.* at *2.

²²⁹ *Id.* (citation omitted).

permission for Spectrum WT to host a drag show on campus,²³⁰ which Spectrum WT challenged.²³¹ The *Spectrum WT* court upheld the denial.²³² In its opinion, the U.S. District Court for the Northern District of Texas provided a detailed explanation of the reasons for its conclusion that drag shows did not necessarily constitute expressive conduct entitled to First Amendment protection.

For the *Spectrum WT* court, the first issue was whether drag shows qualified as expressive conduct protected by the First Amendment, the test for which, the court observed, was specified in *Texas v. Johnson*.²³³ In that case, Johnson was convicted of violating a Texas law against desecrating a flag after he burned an American flag as part of a political protest.²³⁴ Taking up the case, the Supreme Court first considered “whether Johnson’s burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction.”²³⁵ The Court noted that while the “First Amendment literally forbids the abridgment only of ‘speech,’” the Court had long “acknowledged that conduct may be ‘sufficiently imbued with elements of communication’” to qualify for First Amendment protection.²³⁶

²³⁰ *Id.* at *3 (citation omitted). Of note, President Wendler’s denial came before the *Friends of Georges* and *Southern Utah Drag Stars* decisions were handed down, both of which found anti-drag laws and regulations violated the First Amendment. *See id.* at *25 n.27; *see also* *Friends of Georges, Inc. v. Mulroy*, No. 2:23-cv-02163-TLP-tmp, 2023 U.S. Dist. LEXIS 96766 (W.D. Tenn. June 2, 2023); *S. Utah Drag Stars v. City of St. George*, No. 4:23-cv-00044-DN-PK, 2023 U.S. Dist. LEXIS 105876 (D. Utah June 16, 2023). The *Spectrum WT* court noted that the relevant question was whether Wendler’s actions were objectively reasonable at the time he issued his decision. *See Spectrum WT*, 2023 U.S. Dist. LEXIS 168753, at *25 n.27 (citation omitted). The *Spectrum WT* court went on to emphasize that, “[c]ritically, even if the lower court cases were directly on point, it would be ‘insufficient to create a robust consensus’ that would clearly establish the asserted constitutional right beyond debate.” *Id.* at *25 (quoting *Morrow v. Meachum*, 917 F.3d 870, 879–80 (5th Cir. 2019)).

²³¹ *Spectrum WT*, 2023 U.S. Dist. LEXIS 168573, at *5.

²³² *Id.* at *32–34.

²³³ *Id.* at *15 n.14 (“[W]e have interpreted *Hurley* to leave intact the Supreme Court’s test for expressive conduct in *Texas v. Johnson* [491 U.S. 397 (1989)]” (quoting *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 n.6 (2d Cir. 2004))).

²³⁴ *Texas v. Johnson*, 491 U.S. 397, 399 (1985).

²³⁵ *Id.* at 403.

²³⁶ *Id.* at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

The *Johnson* court then specified that in “deciding whether particular conduct possesses sufficient communicative elements” to be protected under the First Amendment, the Court asks “whether ‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’”²³⁷ Conduct determined to qualify for First Amendment protection under this test includes “students’ wearing of black armbands to protest American military involvement in Vietnam,”²³⁸ “a sit-in by blacks in a ‘whites only’ area to protest segregation,”²³⁹ “the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam,”²⁴⁰ and “picketing about a wide variety of causes.”²⁴¹

The *Johnson* Court added that to determine whether an action is expressive for First Amendment purposes, the context in which the action occurred is considered.²⁴² Here, the Court observed that “Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent.”²⁴³ Johnson’s flag burning was thus found to be “‘sufficiently imbued with elements of communication’ to implicate the First Amendment.”²⁴⁴

Nevertheless, not all conduct intended to express a message is protected by the First Amendment. The Supreme Court has thus cautioned against protecting “an apparently limitless variety of conduct [as] ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”²⁴⁵ For conduct to be protected as speech,

²³⁷ *Id.* (quoting *Spence*, 418 U.S. at 410–11).

²³⁸ *Id.* (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969)).

²³⁹ *Id.* (citing *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966)).

²⁴⁰ *Id.* (citing *Schacht v. United States*, 398 U.S. 58, 63 (1970)).

²⁴¹ *Id.* (first citing *Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313–14 (1968); and then citing *United States v. Grace*, 461 U.S. 171, 176 (1983)).

²⁴² *Id.* at 405.

²⁴³ *Id.* at 406.

²⁴⁴ *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

²⁴⁵ *United States v. O’Brien*, 391 U.S. 367, 376 (1968)).

the party asserting its conduct is expressive must show that the First Amendment applies, “and that party must advance more than a mere ‘plausible contention’ that its conduct is expressive.”²⁴⁶

Returning to *Spectrum WT v. Wendler*, the main thrust of the *Spectrum WT* court’s argument was that drag shows did not necessarily constitute expressive conduct, largely because there was either a lack of intent to communicate a specific message, or there was a failure to communicate a message that would be clearly understood by the audience.²⁴⁷ To support this conclusion, the *Spectrum WT* court distinguished many of the cases cited by plaintiffs to support their position, without considering the guidance those cases might provide on what constitutes expressive conduct entitled to First Amendment protection.

For example, the court noted plaintiff’s reliance on *Schad v. Borough of Mount Ephraim*, in which “an ordinance banning ‘all live entertainment, including nonobscene nude dancing . . . otherwise protected by the First Amendment’” was found to be unconstitutionally overbroad.²⁴⁸ The *Spectrum WT* court did not consider what guidance *Schad* might provide on whether the proposed *Spectrum WT* show constituted protected speech. Instead, the court simply dismissed *Schad* by stating that *Schad* involved overbreadth arguments while the present case did not.²⁴⁹ Plaintiffs also cited *Schacht v. United States* to support their argument that the First Amendment protects people when they get up on stage and perform.²⁵⁰ The *Spectrum WT* court also distinguished *Schacht*, which involved a play intended to show opposition to the United States’ participation in the Vietnam War as involving “core *political* speech—not mere expressive conduct and certainly not sexualized expressive conduct” as in the present case.²⁵¹

²⁴⁶ *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 (2d Cir. 2003) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984)).

²⁴⁷ *Spectrum WT v. Wendler*, No. 2:23-CV-048-Z, 2023 U.S. Dist. LEXIS 168753, at *15–17 (N.D. Tex. Sept. 21, 2023).

²⁴⁸ *Id.* at *18 (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981)).

²⁴⁹ *Id.* (citing and discussing *Schad*, 452 U.S. at 76).

²⁵⁰ *Id.* at *17 (citing *Schacht v. United States*, 398 U.S. 58, 63 (1970)).

²⁵¹ *Id.* (referencing *Schacht*, 398 U.S. 58).

The *Spectrum WT* court similarly critiqued plaintiff's reliance on *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University*.²⁵² In that case, the Sigma Chi fraternity staged an "ugly woman contest," in which male fraternity members appeared "dressed as caricatures of different types of women, including one member dressed as an offensive caricature of a black woman."²⁵³ Responding to complaints about the event, the university found that the fraternity's contest "had created a hostile learning environment for women and blacks, incompatible with the University's mission," and sanctioned the fraternity as a result.²⁵⁴ The fraternity challenged the sanctions as violating the First Amendment.²⁵⁵

The *Sigma Chi* court observed that live entertainment, so long as it is not obscene, is generally protected by the First Amendment.²⁵⁶ This led the court to ask whether the contest skit qualified as protected entertainment.²⁵⁷ While the court characterized the skit as "an exercise of teenage campus excess" with an "obvious sophomoric nature,"²⁵⁸ it nevertheless concluded that "the low quality of entertainment" did not affect the First Amendment analysis.²⁵⁹ This led the court to conclude that, "even as low-grade entertainment, [the fraternity's skit] was inherently expressive and thus entitled to First Amendment protection."²⁶⁰

The *Sigma Chi* court went on to state that even if the skit was not inherently expressive, it would still qualify for protection as expressive conduct under the test in *Texas v. Johnson*, which requires "'an intent to convey a particularized message' and a great likelihood 'that the message would be understood by those who viewed

²⁵² *Id.* at *22 (citing *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993)).

²⁵³ *Sigma Chi Fraternity*, 993 F.2d at 387–88.

²⁵⁴ *Id.* at 388.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 389 (first citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565, 2460 (1991) (regarding nude dancing); then citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975) (regarding the musical "Hair"); *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985) (regarding blackface performance)).

²⁵⁷ *Id.* at 390.

²⁵⁸ *Id.* at 389.

²⁵⁹ *Id.* at 391.

²⁶⁰ *Id.* (citations omitted).

it.”²⁶¹ The *Sigma Chi* court noted that under this test, “the intent to convey a message can be inferred from the conduct and the circumstances surrounding it.”²⁶² The court observed that the university sanctioned the fraternity because the “message conveyed by the Fraternity’s conduct—that racial and sexual themes should be treated lightly—was completely antithetical to the University’s mission of promoting diversity and providing an educational environment free from racism and sexism.”²⁶³ This was significant to the court, as it established that the university punished the fraternity “because its boorish *message* had interfered with the described University mission,” which showed that “University officials thought the Fraternity intended to convey a message.”²⁶⁴ As the court characterized it, “the Fraternity’s purposefully nonsensical treatment of sexual and racial themes was intended to impart a message that the University’s concerns, in the Fraternity’s view, should be treated humorously.”²⁶⁵

The *Sigma Chi* court also applied—and found satisfied—the second prong of the *Johnson* test, finding that “there was a great likelihood that at least some of the audience viewing the skit would understand the Fraternity’s message of satire and humor.”²⁶⁶ The court noted that some audience members were entertained by the performance.²⁶⁷ This led the court to conclude that “the Fraternity’s ‘ugly woman contest’ satisfied the *Johnson* test for expressive conduct.”²⁶⁸

The *Spectrum WT* court did not address the *Sigma Chi* court’s conclusion that “the First Amendment protects the Fraternity’s skit because it is inherently expressive entertainment,”²⁶⁹ even though the same reasoning would seem to apply to drag performances. Instead, the *Spectrum WT* court chose to distinguish the decision because the university punished the fraternity for its actions in *Sigma*

²⁶¹ *Id.* at 392 (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*; see also *Spectrum WT v. Wendler*, No. 2:23-CV-048-Z, 2023 U.S. Dist. LEXIS 168753, at *22–23 (N.D. Tex. Sept. 21, 2023).

Chi, while there was no punishment in the present case.²⁷⁰ The *Spectrum WT* court further distinguished *Sigma Chi* on the basis that it was “the conduct contained in the fundraiser that President Wendler identified as the problem [in the present case]—not the message.”²⁷¹ In doing so, the *Spectrum WT* court seemed to ignore that part of Wendler’s justification for denying permission for the drag show fundraiser to take place on campus seemed to be because of the message the show would send. In his denial, Wendler asserted that

[a]s a performance exaggerating aspects of womanhood (sexuality, femininity, gender), drag shows stereotype women in cartoon-like extremes for the amusement of others and discriminate against womanhood. Any event which diminishes an individual or group through such representation is wrong[.] Should I let rest misogynistic behavior portraying women as objects?²⁷²

This sounds very much like the objections of George Mason University officials to the *Sigma Chi* fraternity’s “ugly woman” skit.²⁷³ Yet the *Spectrum WT* court didn’t address this, instead dismissing *Sigma Chi*’s relevance.²⁷⁴

Continuing its consideration of whether drag shows were expressive conduct under the *Johnson* test, the *Spectrum WT* court asserted that “an objective viewer observing biological men

²⁷⁰ *Spectrum WT*, 2023 U.S. Dist. LEXIS 168753, at *23.

²⁷¹ *Id.* (citation omitted).

²⁷² *Id.* at *3 (citation omitted).

²⁷³ See *Sigma Chi Fraternity*, 993 F.2d. at 392 (noting that the University objected to the fraternity’s skit because it conveyed the message that “racial and sexual themes should be treated lightly” which was “antithetical to the University’s mission”).

²⁷⁴ *Spectrum WT*, 2023 U.S. Dist. LEXIS 168753, at *23. Apparently, the *Spectrum WT* court would only be satisfied by cases that were directly on point, involving the exact same circumstances and legal arguments. The court seemed unwilling to consider whether the arguments for protecting speech in the cases cited by the plaintiffs applied to the present case. In distinguishing cases cited by plaintiffs to support their position, the *Spectrum WT* court said, “[n]one of these cases involved drag shows of the type that have become increasingly controversial. And, except for *Conrad*, none involved potentially lewd conduct. Nor are they especially helpful in addressing the limits of reasonable ‘time, place, and manner’ restrictions on indecent conduct or ways school officials might justify restrictions on protected forms of expression.” *Id.* at *24–25.

‘performing’ while dressed in attire stereotypically associated with women—without accompanying political speech or dialogue—would not necessarily discern an ‘unmistakable’ or ‘overwhelmingly apparent’ communication of ‘LGBTQ+ rights.’”²⁷⁵ The *Spectrum WT* court, however, seems to be setting the bar too high for expressive conduct entitled to First Amendment protection by requiring drag shows to provide “an ‘unmistakable’ or ‘overwhelmingly apparent’ communication of ‘LGBTQ+ rights.’”²⁷⁶

The Supreme Court’s decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*²⁷⁷ provides some guidance here. In that case, the Irish-American Gay, Lesbian & Bisexual Group of Boston (“GLIB”) was denied permission to participate in a Saint Patrick’s Day parade sponsored by the South Boston Allied War Veterans Council, and challenged this denial as violating its constitutional rights.²⁷⁸ The issue for the Court was whether the state could require the parade’s organizers “to include among the marchers a group imparting a message the organizers do not wish to convey.”²⁷⁹

The *Hurley* Court was first tasked with determining whether the parade constituted expression implicating the First Amendment.²⁸⁰ In doing so, the Court observed that:

If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one. Real “parades 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.”²⁸¹

²⁷⁵ *Id.* at *16 (citation omitted).

²⁷⁶ *Id.*

²⁷⁷ 515 U.S. 557 (1995).

²⁷⁸ *Id.* at 560–61.

²⁷⁹ *Id.* at 559.

²⁸⁰ *Id.* at 567–68.

²⁸¹ *Id.* at 568 (citation omitted).

The *Hurley* Court thus observed that the term “parade” indicated “marchers who are making some sort of collective point, not just to each other but to bystanders along the way.”²⁸² This led the Court to conclude that parades are a form of expression.²⁸³

In coming to this conclusion, the Court specified that “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jaberwocky verse of Lewis Carroll.”²⁸⁴ This statement by the Supreme Court seems to be at odds with the *Spectrum WT* court’s requirement that “an objective viewer observing [a drag show must] discern an ‘unmistakable’ or ‘overwhelmingly apparent’ communication of ‘LGBTQ+ rights’” for the drag show to constitute expressive conduct entitled to First Amendment protection.²⁸⁵

The *Hurley* Court went on to elaborate on its point that “a narrow, succinctly articulable message” is not required for constitutional protection.²⁸⁶ The Court noted that the parade’s sponsor and organizer, the South Boston Allied War Veterans Council “selects the expressive units of the parade from potential participants, and though [this] may not produce a particularized message, each contingent’s expression in the Council’s eyes comports with what merits celebration on that day.”²⁸⁷ The *Hurley* Court also found that GLIB’s marching in the parade would likewise send a message, even though it too might not be a narrow, succinctly articulable message.²⁸⁸ Allowing that GLIB’s message “is not wholly articulate,” the Court nevertheless found that

a contingent marching behind the organization’s
banner would at least bear witness to the fact that

²⁸² *Id.* (citation omitted)

²⁸³ *Id.*

²⁸⁴ *Id.* at 569 (citation omitted).

²⁸⁵ *Id.*; *Spectrum WT v. Wendler*, No. 2:23-CV-048-Z, 2023 U.S. Dist. LEXIS 168753, at *16 (N.D. Tex. Sept. 21, 2023) (citation omitted).

²⁸⁶ *Hurley*, 515 U.S. at 569.

²⁸⁷ *Id.* at 574.

²⁸⁸ *Id.*

some Irish are gay, lesbian, or bisexual, and 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[.]²⁸⁹

The Court added that speakers do not lose First Amendment protection simply because they fail “to edit their themes to isolate an exact message as the exclusive subject matter of the speech.”²⁹⁰ The *Spectrum WT* court, however, did not take notice of any of the Supreme Court’s reasoning or conclusions in *Hurley*, instead only mentioning *Hurley* in two footnotes.²⁹¹

The *Spectrum WT* court thus concluded that “it is not clearly established that all drag shows are inherently expressive as defined in *Johnson*,”²⁹² which led it to conclude that “at this point in Free Speech jurisprudence, it is not clearly established that all ‘drag shows’ are categorically ‘expressive conduct’” protected by the First Amendment.²⁹³ This appears to be the only federal case to conclude that drag performances do not necessarily merit First Amendment protection, in contrast to the six cases discussed above which come to the opposite conclusion.

CONCLUSION

Despite a conclusion to the contrary by the *Spectrum WT* court, the weight of authority is thus that drag shows constitute expressive conduct entitled to the protection of the First Amendment. Only a handful of courts appear to have considered the issue, however, and only one of those courts provided much explanation to support this conclusion. That was the *Woodlands Pride* court’s ruling on Texas’ anti-drag law. In that opinion, the court found that drag shows are “a form of art that is meant to entertain,” which alone would entitle

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 569–70.

²⁹¹ *Spectrum WT v. Wendler*, No. 2:23-CV-048-Z, 2023 U.S. Dist. LEXIS 168753, at *6 n.5, *15 n.14 (N.D. Tex. Sept. 21, 2023).

²⁹² *Id.* at *19 (citing *Texas v. Johnson*, 491 U.S. 397, 406 (1989)).

²⁹³ *Id.* at *16 (citing *Edge v. City of Everett*, 929 F.3d 657, 669 (9th Cir. 2019)).

them to First Amendment protection.²⁹⁴ In addition, the court found that drag shows often express “political, social, and cultural messages.”²⁹⁵ Further, the court observed that “a single articulable message is not necessary to be afforded First Amendment Protection.”²⁹⁶ All of this led the *Woodlands Pride* court to the conclusion that drag performances are protected by the First Amendment.²⁹⁷

Despite there being some split of opinion by courts on the issue of whether drag performances should be protected by the First Amendment, it seems clear that drag shows do constitute expressive conduct entitled to First Amendment protection. As the *Woodlands Pride* court observed, “[d]rag shows express a litany of emotions and purposes, from humor and pure entertainment to social commentary on gender roles,” all of which is protected by the First Amendment.²⁹⁸ Laws seeking to ban or restrict drag performances thus face a strong likelihood of being found to be unconstitutional infringements of First Amendment rights. While there are those who are uncomfortable with drag shows and drag queens, this is an insufficient basis for regulating drag. As the Supreme Court has stated, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²⁹⁹

²⁹⁴ *Woodlands Pride, Inc. v. Paxton*, No. H-23-2847, 2023 U.S. Dist. LEXIS 171268, at *34–35 (S.D. Tex. Sept. 26, 2023).

²⁹⁵ *Id.* at *36.

²⁹⁶ *Id.* at *33.

²⁹⁷ *Id.* at *36–37.

²⁹⁸ *Id.* at *34.

²⁹⁹ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).