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Don't Be a Drag: How Drag Bans Can Violate the First Amendment

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Drag is currently under attack in the United States, and anti-drag violence is increasing. As part of the attack on drag, state governments across the country are attempting to ban or restrict drag performances. At the root of these restrictions and oppositions to drag is ultimately lawmakers' disapproval with the inherent message drag sends: gender nonconformity is okay. This Article makes an argument as to why drag is expressive conduct that inherently contains a viewpoint on gender norms. Then, by pulling themes from recent anti-drag legislation, this Article lays out the relevant First Amendment tests and then applies them to drag restrictions to analyze whether these restrictions pass constitutional muster. It argues that while some types of drag performances may be constitutionally restricted, such restrictions would ultimately only cover a small amount of what drag can be.

Drag can and has moved audiences and liberated individuals. It spreads a message of love and acceptance across the country and the world. People, including government officials, do not have to agree with that message or expression. But, if the Supreme Court has made anything clear in its First Amendment cases, it is that the government cannot prohibit expression just because it disagrees with the message. Drag artists should continue to share their art and spread their messages, reaffirming our country's commitment to freedom of expression.

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1. Vinny Vidi Vici is a drag artist, political activist, and writer on LGBTQ+ issues.

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I.	INTRODUCTION	

On November 9, 1973, a Gay Students Organization (GSO) sponsored a dance on the University of New Hampshire campus.² The GSO was a recognized student organization at the University, and there were no incidents reported at the event.³ Yet, subsequent media coverage of the event and criticism from state officials caused the University to reconsider its position on the organization.⁴ Shortly after, the University's Board of Trustees issued a "Position Statement" stating that the University would try to determine the "legality and appropriateness of scheduling social functions by the Gay Students Organization," and, in the meantime, "the University administration would schedule no further social functions by the Gay Students Organization until the matter [was] legally resolved."⁵ The First Circuit later ruled that the University had violated the GSO's First Amendment rights.⁶

Fast forward to 2022 when a Gender and Sexualities Alliance group at South Dakota State University hosted a drag show on the University's

2. Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 654 (1st Cir. 1974).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 662.

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campus.⁷ Backlash from state lawmakers ensued, which prompted the South Dakota Board of Regents to temporarily prohibit minors from attending events hosted by student organizations on campus.⁸ Additionally, state lawmakers introduced a bill in the 2023 legislative session to prohibit state agencies and public schools from using public funds or state-owned facilities and property to “develop, implement, facilitate, host, promote, or fund any lewd or lascivious content.”⁹ Not surprisingly, drag was included in the definition of “lewd or lascivious content.”¹⁰ A court never had to intervene, though, because the bill ultimately failed.¹¹

Almost half a century separates these two events, yet the stories are still too similar: LGBTQ+ individuals lawfully exercise their First Amendment rights; outspoken dissenters voice their opposition; and government officials subsequently attempt to infringe on LGBTQ+ individuals’ First Amendment rights. Put simply, attempts to silence LGBTQ+ individuals have not ceased; they have merely changed form.¹²

Unfortunately, not only do debates over the morality and utility of drag still exist, but the debates have also become violent. Drag events, such as Drag Queen Storytime, have resulted in “bias-motivated harassment and intimidation online, in-person harassment and intimidation, alleged assault at [Drag Queen Storytime] events and bias-motivated property damage.”¹³ In 2022, there were at least 141 incidents

7. Jazzmine Jackson, *South Dakota Lawmaker Introduces Bill to Ban Drag Shows Using State Money, Resources*, KELOLAND NEWS (Jan. 25, 2023, 10:02 AM), <https://www.keloland.com/keloland-com-original/south-dakota-lawmaker-introduces-bill-to-ban-drag-shows/>.

8. *Id.*

9. *Id.*; H.B. 1116, 98th Leg., Reg. Sess. (S.D. 2023).

10. Jackson, *supra* note 7; H.B. 1116, 98th Leg., Reg. Sess. (S.D. 2023) (introduced). The bill was later amended to no longer explicitly include drag. *See* H.B. 1116, 98th Leg., Reg. Sess. (S.D. 2023) (amended).

11. Morgan Matzen, *Both of South Dakota’s Anti-Drag Bills Have Now Been Defeated*, ARGUS LEADER (Feb. 28, 2023, 10:04 AM), <https://www.argusleader.com/story/news/politics/2023/02/28/both-of-south-dakotas-anti-drag-show-bills-have-now-been-defeated-sd-senate-lgbtq/69953658007>.

12. For a more thorough discussion on “repressive tolerance” and how it has impacted the LGBTQ+ community, *see* Brett V. Ries, *The Relationship Between LGBTQ+ Representation on the Political and Theatrical Stages* (Mar. 26, 2020) (B.A. thesis, University of South Dakota) (available at <https://red.library.usd.edu/cgi/viewcontent.cgi?article=1074&context=honors-thesis>).

13. Justin R. Ellis, *A Fairy Tale Gone Wrong: Social Media, Recursive Hate and the Politicization of Drag Queen Story Time*, 86 J. CRIM. L. 94, 95 (2022) (citing DR Stone, *Drag Queen Storytimes*, 4 J. INTELL. FREEDOM & PRIV. 65 (2019)).

of protests and threats targeted at drag events.¹⁴ Armed right-wing protestors faced off against armed left-wing protestors outside a drag brunch event in Roanoke, Texas,¹⁵ and a man in Tulsa, Oklahoma, threw a Molotov cocktail into a donut shop that was planning to host a drag queen event.¹⁶ The Department of Homeland Security has even issued a warning that LGBTQ+ individuals are under threat of potential acts of domestic terrorism.¹⁷

State governments have not remained neutral in the debate. Tennessee lawmakers passed a law criminalizing certain drag performances on public property or in front of minors,¹⁸ although a federal judge has blocked the law from being enforced.¹⁹ At least fourteen other states proposed some form of a drag ban in 2023.²⁰ And, anti-drag violence occurring simultaneously is no coincidence. Clear messages are being sent, and viewpoints are being attacked.

As it did nearly fifty years ago, the First Amendment will likely play a critical role in fending off government attacks on drag today, as the Tennessee story already highlights.²¹ This Article argues that because drag is expressive speech with an inherent viewpoint, laws banning

14. *UPDATED GLAAD Report: Drag Events Faced at Least 141 Protests and Significant Threats in 2022*, GLAAD (Nov. 22, 2022), <https://www.glaad.org/blog/updated-glaad-report-drag-events-faced-least-141-protests-and-significant-threats-2022>.

15. Martin Pengelly, *Armed Left and Rightwing Protestors Face Off at 'Drag Brunch' in Texas*, GUARDIAN (Aug. 30, 2022, 12:08 PM), <https://www.theguardian.com/us-news/2022/aug/30/texas-drag-brunch-armed-protesters-roanoke>.

16. Ruth Bashinsky, *Vandal Throws Molotov Cocktail Through Oklahoma Doughnut Shop Window Days Before It Was Set to Host Drag Queen Event*, DAILY MAIL (Nov. 4, 2022, 3:09 PM), <https://www.dailymail.co.uk/news/article-11391049/Doughnut-shop-hosted-drag-event-vandalized-second-time.html>.

17. U.S. DEP'T OF HOMELAND SEC., NATIONAL TERRORISM ADVISORY SYSTEM BULLETIN (Nov. 30, 2022), https://www.dhs.gov/sites/default/files/ntas/alerts/22_1130_S1_NTAS-Bulletin-508.pdf; Claire Hansen, *DHS Adds LGBTQ Community to List of Potential Terror Targets*, U.S. NEWS (Nov. 30, 2022, 4:41 PM), <https://www.usnews.com/news/articles/2022-11-30/dhs-adds-lgbtq-community-to-terror-threat-advisory>.

18. S.B. 0003, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023) (amended).

19. *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 878 (W.D. Tenn. 2023).

20. *See, e.g.*, S.B. 1026, 56th Leg., Reg. Sess. (Ariz. 2023); S.B. 43, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); S.B. 149, 2023 Leg., Reg. Sess. (Kan. 2023); S.B. 115, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023); H.B. 1903, 93d Leg., Reg. Sess. (Minn. 2023); H.B. 498, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023); H.B. 359, 68th Leg., Reg. Sess. (Mont. 2023); L.B. 371, 108th Leg., 1st Reg. Sess. (Neb. 2023); H.B. 2186, 59th Leg., 1st Reg. Sess. (Okla. 2023); H.B. 3616, 125th Gen. Assemb., Reg. Sess. (S.C. 2023); H.B. 1116, 98th Leg., Reg. Sess. (S.D. 2023); H.B. 643, 88th Leg., Reg. Sess. (Tex. 2023); H.B. 329, 2023 Leg., Reg. Sess. (Utah 2023); H.B. 3176, 86th Leg., Reg. Sess. (W.V. 2023).

21. *See generally Friends of Georges*, 675 F. Supp. 3d 831; *see also* U.S. CONST. amend. I.

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drag—in many forms—likely violate the First Amendment because they entail unconstitutional viewpoint discrimination. At the very least, they entail content discrimination. And, those that do constitutionally restrict drag likely only cover a very small portion of drag. Part II discusses the art of drag and why drag is expressive speech with an inherent viewpoint. Part III begins by summarizing anti-drag legislation introduced across the country in 2023 to provide context for which areas of First Amendment jurisprudence may be relevant. It then discusses the legal rules in each of the relevant areas of First Amendment jurisprudence and how to analyze each issue. Finally, Part IV applies the aforementioned First Amendment tests to the different types of bans on drag artists and drag shows that the federal or state governments may choose to enact.

Drag can and has moved audiences and liberated individuals. It spreads a message of love and acceptance across the country and the world. People, including government officials, do not have to agree with that message or expression. But, if the Supreme Court has made anything clear in its First Amendment cases, it is that the government cannot “prohibit expression simply because it disagrees with its message.”²²

II. THE ART (AND VIEWPOINT) OF DRAG

The Free Speech Clause of the First Amendment does not apply, of course, if there is no speech involved. As such, subpart A details why drag is expressive conduct protected as speech under the First Amendment. And, because the content and viewpoint (or lack thereof) of speech matters—for reasons explained in Parts III and IV—subpart B argues that drag is speech content and inherently has a viewpoint. At its core, drag sends a message (and viewpoint) on gender norms that is inextricable from the medium of drag.

A. *Drag As Expressive Conduct*

Drag has existed for over a century, and it can be described generally as a type of performance art in which an individual dresses and presents themselves as a different gender than what they identify as.²³ What a drag artist does with their drag, though, depends on the type of drag the artist wishes to perform. Some drag includes “adult cabaret” type performances

22. Texas v. Johnson, 491 U.S. 397, 416 (1989).

23. See Billie Olsen, *What Is the Art of Drag?*, LGBTQ & ALL (Dec. 10, 2021), <https://www.lgbtqandall.com/what-is-the-art-of-drag>.

with lip-syncing or actual singing that is suitable only for adults.²⁴ Drag can also include drag queen story time—where drag queens read stories to children, often in public libraries—and family-friendly performances at Pride events.²⁵ Drag also serves as a political platform: many drag artists raise awareness of social issues, fundraise for charities, and even give TEDx talks.²⁶ Though drag can take these many different forms, these forms all stem from the roots of drag as a form of self-expression.²⁷ It is a way for individuals to explore their sexual and gender identities and how they express themselves.²⁸

Thus, drag falls in line with the Supreme Court’s test for expressive conduct protected under the First Amendment. For expressive conduct to be protected, it must satisfy three conditions: (1) there must be an “an intent to convey a particularized message”; (2) the likelihood must be great that “the message would be understood by those who [are viewing] it”;²⁹ and (3) the message must be “created by the conduct itself” and not “the speech that accompanies it.”³⁰ Importantly, when analyzing these requirements, the *context* in which the expressive conduct is being used matters.³¹ Alternatively, the expressive conduct can be protected if it falls within a traditionally protected genre, such as painting, poetry, music, or a parade.³² If it is in this second category, it does not need a “narrow, succinctly articulable message.”³³

24. See Emma Williams, *The Definition of Drag Has Expanded—And So Has the Demand for Performances*, TEX. STANDARD (June 30, 2022, 1:52 PM), <https://www.texasstandard.org/stories/the-definition-of-drag-has-expanded-and-so-has-the-demand-for-performances/>.

25. See generally DRAG STORY HOUR, <https://www.dragstoryhour.org/> (last visited May 9, 2024).

26. See, e.g., Vinny Vidi Vici, TEDx TALKS, *Platform (Heels) and Pitfalls*, YOUTUBE (Aug. 22, 2023), <https://www.youtube.com/watch?v=CuKtRmjWWzk>.

27. See Kiana Shelton, *The Joy of Drag*, PSYCHIATRIC TIMES (June 29, 2022), <https://www.psychiatrictimes.com/view/the-joy-of-drag>.

28. See *id.*

29. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quotations omitted) (citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)) (reaffirming the first two elements).

30. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006) (adding the third element).

31. *Spence*, 418 U.S. at 410.

32. *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (“As some of these examples show, 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 Schönberg, or Jabberwocky verse of Lewis Carroll.” (citation omitted)).

33. *Id.*

Courts have recognized many particular types of conduct similar to drag as expressive. As early as 1983, drag pageants have been ruled as protected expression.³⁴ Live entertainment and music also fall within First Amendment protection.³⁵ So, too, can clothing and hair.³⁶ The Supreme Court has also recognized that some forms of entertainment can “communicate ideas . . . through features distinctive to the medium.”³⁷ At the far end of the continuum, the Supreme Court has even gone so far as to say that nude dancing is expressive conduct.³⁸ At the end of the day, “[t]he First Amendment is not an art critic,” and neither are courts, even if the art is viewed as “distasteful.”³⁹

Because drag can involve pageantry, live entertainment, music (lip-syncing or actual singing), dancing, and clothing and hair, it would be hard to argue that drag is not expressive conduct. It fits comfortably into the traditionally protected genres, but even if the other test is used, drag likely passes as expressive conduct. Drag intends “to convey a particularized message,” and the likelihood is great that “the message would be understood by those who [are viewing] it.”⁴⁰ Drag artists intend to convey an inherent message that gender norms and expectations do not need to be strictly followed, and how drag artists present themselves can communicate important parts of their identities.⁴¹ Additionally, those

34. *Norma Kristie, Inc. v. City of Okla. City*, 572 F. Supp. 88, 91 (W.D. Okla. 1983).

35. *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 567 (9th Cir. 1984).

36. *Zalewska v. County of Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003) (citation omitted) (stating that dress may sometimes be protected as speech); *Canady v. Bossier Par. Sch. Bd.*, 240 F.3d 437, 440-41 (5th Cir. 2001) (stating that choice of clothing can be sufficiently communicative); *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 701 F. Supp. 2d 863, 882-83 (S.D. Tex. 2009) (holding that hair can be expressive conduct); *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *3-4 (Mass. Super. Ct. Oct. 11, 2000) (ruling that dress can be expressive, especially for transgender individuals).

37. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (discussing how video games are a form of expression).

38. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (stating that nude dancing is expressive conduct).

39. *Norma Kristie*, 572 F. Supp. at 91-92.

40. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989).

41. *See Jennifer Minear, Performance and Politics: An Argument for Expanded First Amendment Protection of Homosexual Expression*, 10 CORNELL J. L. & PUB. POL’Y 601, 624 (2001) (“[W]hen drag queens misperform their gender . . . they are exposing gender as a construction.”); Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 193-94 (2013) (“When the state regulates gender nonconformity, it is not merely regulating conduct. By singling out dress and appearance that deviates from these gender norms, the state suppresses communication of gender nonconformity.”); Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881, 900 (2018) (“[O]ur outward facing identities contribute to the social tableau

viewing the message likely understand it.⁴² We are taught from a very young age what behaviors and clothing are associated with particular genders.⁴³ Drag artists use exaggerated features—whether through makeup, hair, or clothing—and gendered movement to distinguish that the performer is in drag.⁴⁴ Pushback and opposition to drag artists shows that audiences understand the message.⁴⁵ Finally, for similar reasons, the message is created “by the conduct itself” and does not require any speech to accompany it.⁴⁶ A drag queen does not have to say “I am a drag queen” or “I am defying gender expectations” in order for an audience to understand.

The more critical part, then—for reasons that will be explained in Parts III and IV—is whether the message conveyed through drag inherently contains a viewpoint.

and shape others’ identities. In the end, our identities say something. They say something personal, and often political. They are individually expressive . . .” (footnotes omitted)); Katherine Read, *Dressing the First Amendment in Drag: An Argument for Why Dress as a Protected Form of Symbolic Speech Should Be the Alternative Argument for Fourteenth Amendment Claims*, 11 S.U. J. RACE, GENDER & POVERTY 37, 68 (2020) (citing RUSTY BARRETT, FROM DRAG QUEENS TO LEATHERMEN 36 (2017)) (“Dressing in drag is . . . meant to create a cognitive dissonance in the viewers traditional views of gender roles.”).

42. Kosbie, *supra* note 41, at 204 (“Gender nonconformity should be protected as speech because speakers and listeners understand the conduct as communicative.”); Skinner-Thompson, *supra* note 41, at 904 (citing *Fricke v. Lynch*, 491 F. Supp. 381, 383 (D.R.I. 1980) (“The deviation from social norms is meaningful enough to communicate something external—and, in certain instances, is being read as expressive by the government regulator and regulated for that reason.”)).

43. Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 122 (2015) (“At a very early age, children begin to understand that certain articles of clothing (e.g., dresses, high heels, tutus) are feminine and certain gender-specific behaviors express a message to others about an individual’s self-identification with one of two gender classifications.”).

44. See Read, *supra* note 41, at 68 (“Today, dressing in drag is for a male performer to produce an exaggerated look of a woman, so that it is clear to viewer that the performer is actually a male.”).

45. See discussion *supra* Part I; *c.f.* *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *4 (Mass. Super. Ct. Oct. 11, 2000) (explaining that the “school’s vehement response and some students’ hostile reactions” to a transgender student’s clothing “are proof of the fact that the [transgender student’s] message clearly has been received”).

46. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006). After this Article was originally written, federal courts have agreed that drag is protected expressive conduct under the First Amendment. See, e.g., *Woodlands Pride, Inc. v. Paxton*, No. H-23-2847, 2023 WL 6226113, at *14 (S.D. Tex. Sept. 26, 2023) (“The Court finds it is evident drag shows express either pure entertainment or, like most types of expressive art, an underlying deeper message. (Such as music, theater, and poetry).”). Only one federal court has doubted that drag is inherently expressive conduct. See *Spectrum WT v. Wendler*, No. 2:23-CV-048-Z, 2023 WL 6166779, at *7 (N.D. Tex. Sept. 21, 2023) (“And consequently, at this point in Free Speech jurisprudence, it is not clearly established that all ‘drag shows’ are categorically ‘expressive conduct.’”).

B. Drag as a Viewpoint: Critique on Gender Norms

Drag inherently contains a viewpoint that critiques gender norms, especially since the medium of drag itself relies on bending gender norms.⁴⁷ By definition, drag artists present themselves as a gender different from what they identify as. As a form of gender nonconformity, then, drag “communicates opposition to the gender binary.”⁴⁸ And, as a form of live art, drag specifically serves as “an effective vehicle for social challenge, the communication of ideas, and personal expression.”⁴⁹ Additionally, because gender norms are so pervasive in our society, one cannot view drag without recognizing that the performer is defying gender expectations, and drag artists cannot perform without communicating a viewpoint on gender norms.⁵⁰ In other words, drag is

47. See Minear, *supra* note 41, at 624 (“[W]hen drag queens misperform their gender . . . they are exposing gender as a construction.”); Read, *supra* note 41, at 67-68 (“Research has shown that ‘drag queens use nonverbal aesthetics to communicate a coherent drag identity as queens to blur gender lines and use performances as a space in which to bend dominant American gender narrative binary.’”). Since this Article was originally written, three federal courts have ruled that drag restrictions constitute viewpoint discrimination based on viewpoints on gender identity. See *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 864 (W.D. Tenn. 2023); *Woodlands Pride*, 2023 WL 6226113, at *17; *Imperial Sovereign Ct. v. Knudsen*, No. CV 23-50-BU-BMM, 2023 WL 6794043, at *11 (D. Mont. Oct. 13, 2023).

48. See Kosbie, *supra* note 41, at 206 (“Gender nonconformity also communicates opposition to the gender binary.”).

49. See Anne Salzman Kurzweg, *Live Art and the Audience: Toward a Speaker-Focused Freedom of Expression*, 34 HARV. C.R.-C.L.L. REV. 437, 452 (1999) (“Live art has a long and illustrious history as an effective vehicle for social challenge, the communication of ideas, and personal expression.”).

50. See Kosbie, *supra* note 41, at 207 (“Because gender nonconformity is always situated against social norms, it is difficult to conceive of cases where people do not intend gender nonconformity to be communicative.”). One might argue that nudity also clearly communicates an opposition to social norms. Yet, the Supreme Court has long held that being “in a state of nudity” is not an inherently expressive condition, although some forms of nudity, such as nude dancing, may be expressive conduct. See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000). Additionally, the Court has held that general prohibitions on public nudity are content-neutral because such bans prohibit conduct, not speech, and are aimed at regulating the secondary effects (harms to “public health, safety, and welfare”) of the non-communicative aspects of the conduct (the nudity). See *id.* at 289-91. Drag can be distinguished from nudity in the sense that it is an inherently expressive condition, so any bans on drag ban *both* the conduct and its expression. See Kosbie, *supra* note 41, at 207. Plus, the Court has never held that drag poses a harm to “public health, safety, and welfare” like it has for nudity. See *id.* In other words, drag can be distinguished from nudity both in terms of the clarity of its message and its effects.

Courts have also held that wearing clothing that violates notions of decorum or acceptable attire is not sufficiently communicative if it is not “such a break from the norm.” See *Zalewska v. County of Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003). Again, drag can be distinguished because of the strength of its “break from the norm.” See *id.* In the transgender context, courts have already

“more than a mere personal style”: it uses “dress, appearance, and other gendered behavior” to send its message promoting freedom from gender norms.⁵¹ This message is particularly conveyed when performed by men because “male masculinity is enforced and policed in society more strictly than female femininity.”⁵²

More generally, because drag has historically been a staple of the LGBTQ+ community and is often performed in LGBTQ+ spaces, it also sends the message that “public understanding of [LGBTQ+ individuals’] attitudes and problems is desirable for society.”⁵³ Courts have recognized that the “expression of some performers reflects a particular political view and that some performers may, apart from their [expressive conduct], represent a particular ideology or way of life.”⁵⁴ In fact, just “their very *appearances* [can] carry differing political or social messages.”⁵⁵ Drag artists, just by their very appearance, carry a particular political or social message about gender norms and LGBTQ+ equality more generally. At bottom, drag does not just *happen* to express a particular viewpoint: drag *is* the viewpoint and cannot be separated from the viewpoint it inherently conveys.

For example, in *Zalewska v. County of Sullivan*, the Second Circuit recognized that clothing can communicate an array of ideas about the wearer, but it determined Zalewska’s desire to wear a skirt at work was not sufficiently communicative since “a woman today wearing a dress or a skirt on the job does not automatically signal any particularized message about her culture or beliefs” and was not “such a break from the norm.”⁵⁶

ruled that dressing in defiance of the gender binary is sufficiently communicative. *See supra* note 36 and accompanying text. Drag similarly entails dressing in defiance of the gender binary.

51. Kosbie, *supra* note 41, at 253 (“Gender nonconformity is more than a mere personal style. We use dress, appearance, and other gendered behavior to define and express our identity.”).

52. Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 TENN. L. REV. 575, 632 (2016) (“[M]ale masculinity is enforced and policed in society more strictly than female femininity, . . . gender nonconforming gay men are more likely targets for discrimination than gender conforming gay men, and ‘men are disproportionately the victims of violence at the hands of other men.’” (first citing Lorene Gottschalk & Janice Newton, *Rural Homophobia: Not Really Gay*, 5 GAY & LESBIAN ISSUES & PSYCHOL. REV. 153, 154 (2009); and then quoting NANCY E. DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE 3 (2010))).

53. *See* Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 661 (1st Cir. 1974) (recognizing that LGBTQ+ groups send the basic message “that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society”).

54. *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 568 (9th Cir. 1984).

55. *Id.* at 569 (emphasis added).

56. 316 F.3d 314, 320 (2d Cir. 2003).

In contrast, drag *is* a break from the norm and is *defined* as being a break from the norm.⁵⁷ It is not just a general style preference where people would not automatically understand the message being sent: it inherently critiques gender norms and is recognized immediately by audiences *because* it breaks those norms.

Further examples illustrate how banning drag inherently involves viewpoint discrimination. In *Tinker v. Des Moines Independent Community School District*, Des Moines public schools adopted a policy banning students from wearing armbands to school in light of students' plans to wear black armbands in protest of the Vietnam War.⁵⁸ Although at first glance banning armbands from schools may seem viewpoint neutral, the Court found that it was clear the schools were prohibiting expression of "one particular opinion"—opposition to the country's involvement in the Vietnam War.⁵⁹ The students may have worn the black armbands to protest the war for different reasons: economic, political, religious, or some other reason. That did not matter; they all still shared the viewpoint of opposition to the war. The black armbands were inherently going to be associated with a particular viewpoint based on the cultural context of the time period, and the government prohibited expression of that viewpoint in a particular way.⁶⁰ Similarly, if a government banned only rainbow flags, it would likely be viewpoint discrimination because rainbow flags *inherently* contain a message about LGBTQ+ rights given our current cultural context, even if people may fly the flag for different reasons within that message.⁶¹

Likewise, people are going to inherently associate drag with a viewpoint on gender expectations—that is why legislators have to specifically define drag as individuals dressing or presenting themselves in a way not aligned with their gender assigned at birth. True, some drag

57. See, e.g., H.B. 2736, 59th Leg., 1st Reg. Sess. (Okla. 2023) (defining "drag performance" in part as "a performance in which a performer exhibits a gender identity that is different from the gender assigned to the performer at birth"). Of course, there may come a day when clothing or presentation is not associated with a particular gender. That could complicate the analysis, but it does not change the fact that *today* drag defies gender expectations.

58. 393 U.S. 503, 504 (1969).

59. *Id.* at 510-11.

60. See *id.*

61. Cf. *Stromberg v. California*, 283 U.S. 359, 369-70 (1931) (striking down as unconstitutional a state statute prohibiting an individual from displaying a red flag as a sign of "opposition to organized government"); *Texas v. Johnson*, 491 U.S. 397, 406, 416 (1989) (holding that the viewpoint of burning an American flag was "intentional and overwhelmingly apparent" and that the principle that government "may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea").

artists may have different viewpoints *within* the viewpoint: some may wish to get rid of the gender binary altogether, and others may wish to preserve the gender binary but continue to defy it. Like the students in *Tinker*, though, drag artists still share the viewpoint and send the message that the gender binary need not be strictly followed—that viewpoint is inherent in their literal act of defying the gender binary.⁶²

By leaving performers who dress according to their gender assigned at birth untouched yet restricting performers who dress differently from their gender assigned at birth, the government is favoring a certain viewpoint on gender expectations.⁶³ It does not matter that opponents to the gender binary have chosen drag as their “particular mode in which [they chose] to express an idea”; the government still cannot restrict the expression of that viewpoint.⁶⁴

Further proving that drag contains an inherent viewpoint is the fact that those who oppose drag do so because of the messages it sends. Opponents represent gender nonconformity as “deviant, and a threat to children.”⁶⁵ And, some “extrapolate the ‘deceptive’ framing of gender fluidity of drag performance to paedophilia [sic], a label which perpetuates the legacy of same-sex attraction and gender fluidity as deviant.”⁶⁶ It is no surprise, then, that some opponents call drag and drag

62. See Kosbie, *supra* note 41, at 207; *Tinker*, 393 U.S. at 510-11.

63. *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 864 (W.D. Tenn. 2023).

64. See *Johnson*, 491 U.S. at 406, 416 (holding that the viewpoint of burning an American flag was “intentional and overwhelmingly apparent” and that the principle that government “may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea”).

65. See Ellis, *supra* note 13, at 99 (“In the context of outrage and protest against [Drag Queen Storytime], this framing perpetuates representations of gender fluidity as deviant, and a threat to children.”); *Anti-LGBTQ*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-lgbtq> (last visited Apr. 26, 2024) (“Anti-LGBTQ groups on the SPLC hate list often link being LGBTQ inherently to criminal behavior; claim that the concept of marriage equality and LGBTQ people in general are dangers to children and families; contend that being LGBTQ itself is dangerous; and support the criminalization of LGBTQ people and transgender identity.”); Jaclyn M. White Hughto et al., *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, 147 SOC. SCI. & MED. 222, 222 (2015) (“In the US, transgender individuals are considered deviant for having a gender identity or expression that is discordant with the gender typically associated with their assigned birth sex and experience widespread stigma as a result.” (citations omitted)). For an example of anti-drag show commentary, see generally Katelynn Richardson, *Don’t Normalize ‘Drag Queen Story Hour’ Events for Children*, WASH. EXAM’R (June 7, 2022, 12:00 AM), <https://www.washingtonexaminer.com/opinion/beltway-confidential/dont-normalize-drag-queen-story-hour-events-for-children> (“Exposing children to drag queens is not ‘inclusive.’ It’s perverted.”).

66. Ellis, *supra* note 13, at 105 (citing DR Stone, *supra* note 13).

artists “perverted.”⁶⁷ This is likely a product of decades of attempts to “steer children towards a ‘normal’—and therefore what they consider to be a more moral—straight life,” which “includes keeping children away from known gay people and perceived gay influences.”⁶⁸

Put simply, everything about drag—the definition, makeup, hair, costuming, performance, and even its opposition—stems from its inherent viewpoint about gender nonconformity and expression. It seems that everyone, proponents and opponents alike, are on the same page that drag contains a viewpoint about gender nonconformity. They differ, though, as to whether that viewpoint—expressed through a *particular* form of expressive conduct (drag)—should be shared with others.

III. THE MANY PARAMETERS OF FREE SPEECH JURISPRUDENCE

LGBTQ+ issues have long played a part in the Supreme Court’s First Amendment jurisprudence.⁶⁹ Speech restrictions can take many forms, which is why subpart A begins by summarizing 2023 legislative proposals to restrict drag expression. After pulling themes from those proposals, the rest of Part III outlines the areas of First Amendment jurisprudence that are most likely applicable to drag bans: obscenity, content and viewpoint discrimination, public forum, and overbreadth analyses.

A. Recent Legislative Attacks

Anti-drag bills were introduced in at least fifteen different states in 2023.⁷⁰ It would be laborious to elaborate on each bill individually, but

67. See, e.g., Richardson, *supra* note 65 (“Exposing children to drag queens is not ‘inclusive.’ It’s perverted.”).

68. See Boso, *supra* note 52, at 615 (“Beyond neutral and benign heterosexual immersion, many adults actively discourage homosexuality and attempt to steer children towards a ‘normal’—and therefore what they consider to be a more moral—straight life. Part of that conditioning sometimes includes keeping children away from known gay people and perceived gay influences.” (footnotes omitted)); Richardson, *supra* note 65.

69. See Skinner-Thompson, *supra* note 41, at 886 (“[T]he first two LGBTQ cases to ever be considered by the Supreme Court were challenges to government efforts to censor publications discussing gay and lesbian subject matter as violating obscenity laws.”); see generally *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (reversing the Ninth Circuit’s decision that a gay magazine was obscene); *Manual Enters., Inc. v. Day*, 370 U.S. 478, 494-95 (1962) (holding that a gay magazine was not obscene).

70. See S.B. 1026, 56th Leg., Reg. Sess. (Ariz. 2023); S.B. 1028, 56th Leg., Reg. Sess. (Ariz. 2023); S.B. 1030, 56th Leg., Reg. Sess. (Ariz. 2023); S.B. 1698, 56th Leg., Reg. Sess. (Ariz. 2023); S.B. 43, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); S.B. 149, 2023 Leg., Reg. Sess. (Kan. 2023); S.B. 201, 2023 Leg., Reg. Sess. (Kan. 2023); S.B. 115, 2023 Gen. Assemb., Reg. Sess.

some general themes can be pulled from these bills. Most intend to do one or both of these things: (1) define drag as “obscene,” as adult cabaret entertainment, as an adult-oriented performance, or as some similar term and prohibit such performances on public property or in front of minors;⁷¹ or (2) prohibit the use of state funds or property for drag performances.⁷² Some of these bills limit definitions of drag for purposes of the statute as those “appeal[ing] to a prurient interest”⁷³ or containing “lewd and lascivious” content,⁷⁴ and some do not.⁷⁵ Some limit their prohibitions on drag shows to those in front of minors, and some do not.⁷⁶

The Tennessee bill passed in 2023 provides a representative template of the first general type of drag ban.⁷⁷ The bill first defines “adult cabaret performance” in part as “adult-oriented performances” that are harmful to minors (defined using the *Miller* test that will be explained in the next subpart) and include drag performers (“male or female impersonators”).⁷⁸ Listed next to drag performers as types of individuals who provide adult cabaret entertainment are “topless dancers, go-go dancers, exotic dancers, strippers, . . . or similar entertainers.”⁷⁹ And,

(Ky. 2023); H.B. 1903, 93d Leg., Reg. Sess. (Minn. 2023); H.B. 498, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023); H.B. 359, 68th Leg., Reg. Sess. (Mont. 2023); L.B. 371, 108th Leg., 1st Reg. Sess. (Neb. 2023); H.B. 2186, 59th Leg., 1st Reg. Sess. (Okla. 2023); H.B. 2736, 59th Leg., 1st Reg. Sess. (Okla. 2023); H.B. 3616, 125th Gen. Assemb., Reg. Sess. (S.C. 2023); H.B. 1116, 98th Leg., Reg. Sess. (S.D. 2023); H.B. 1125, 98th Leg., Reg. Sess. (S.D. 2023); S.B. 0003, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); H.B. 643, 88th Leg., Reg. Sess. (Tex. 2023); H.B. 708, 88th Leg., Reg. Sess. (Tex. 2023); H.B. 1266, 88th Leg., Reg. Sess. (Tex. 2023); S.B. 476, 88th Leg., Reg. Sess. (Tex. 2023); H.B. 329, 2023 Leg., Reg. Sess. (Utah 2023); H.B. 3176, 86th Leg., Reg. Sess. (W.V. 2023).

71. See, e.g., Tenn. S.B. 0003 (as signed).

72. See, e.g., Ariz. S.B. 1026.

73. See, e.g., Tenn. S.B. 0003 (as signed).

74. See, e.g., S.D. H.B. 1125.

75. For an example of a statute that does limit its definition of “illegal” drag performances to those that are obscene/harmful to minors, see Tenn. S.B. 0003 (as signed). For an example of a statute that does not limit its definition of drag, see Ky. S.B. 115 (placing restrictions on establishments hosting *any* type of drag performance); Neb. L.B. 371 (banning *all* drag shows in front of individuals of certain ages).

76. See, e.g., Ariz. S.B. 1026 (limiting its prohibition on using state funds for drag shows to those in front of minors); Tenn. S.B. 0003 (as signed) (prohibiting “adult cabaret performance” on public property regardless of whether minors are in attendance).

77. See Tenn. S.B. 0003 (as signed). The bill was codified in §§ 7-51-1401 and 7-51-1407 of the Tennessee Code but has been blocked from taking effect. See *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 878 (W.D. Tenn. 2023); TENN CODE ANN. §§ 7-51-1401(3), (7), -1407(c) (2023).

78. Tenn. S.B. 0003 (as signed).

79. *Id.* This may strengthen the viewpoint discrimination argument. If the proposals were *really* about prohibiting nudity or sexual conduct in front of children, drag performers who

“entertainer” is defined as “a person who provides: (A) [e]ntertainment within an adult-oriented establishment . . . or (B) [a] performance of actual or simulated specified sexual activities, including removal of articles of clothing or appearing unclothed”⁸⁰ Then, the bill makes it a criminal offense to “perform adult cabaret entertainment” on public property *or* where it could be viewed by a minor.⁸¹ The first offense is a Class A misdemeanor, and subsequent offenses are Class E felonies.⁸² Notably, though, the bill is limited to performances that are obscene to minors using the Supreme Court’s *Miller* definition.⁸³

An Arizona bill is illustrative of the second general category of drag bans.⁸⁴ The proposed bill prohibited the usage of “tax monies of this state, federal monies passing through the state treasury or any other state monies” by “*any* person or entity, including *any* state-funded institution or facility, for a drag show targeting minors.”⁸⁵ It also prohibited giving the same type of funding to any person or entity that *operates* a drag show targeting minors.⁸⁶ The bill’s definition of “drag show” was not limited to obscene performances: just performing in drag was enough.⁸⁷ Any state employee, officer, or agent who violated the law would have been guilty of a Class 1 misdemeanor, and the person or entity that was convicted “[could] not receive or spend any state monies for thirty-six months after the conviction.”⁸⁸

Bills regarding allocation of government funding for speech purposes can implicate several First Amendment doctrines; this Article does not attempt to cover all of them. Most generally, “when the State is

incorporate these elements would *already* fit the categories of “topless dancers” or “exotic dancers.” The fact that legislators are singling out drag specifically could arguably be evidence of intent to prohibit a certain form of expressive conduct because of its viewpoint.

80. *Id.*

81. *Id.*

82. *Id.* The stakes are even higher when drag is criminalized because of the discrimination LGBTQ+ individuals face in the criminal justice system—particularly in jury trials. *See generally* Brett V. Ries, Note, *Not Up for Deliberation: Expanding the Peña-Rodriguez Protection to Cover Jury Bias Against LGBTQ+ Individuals*, 72 DUKE L.J. 1567 (2023).

83. *See* Tenn. S.B. 0003. The *Miller* definition is explained *infra* subpart III.B.

84. *See* Ariz. S.B. 1026.

85. *Id.* (emphasis added).

86. *Id.*

87. *See id.* (defining a “drag show targeting minors” as a performance where “performers dress in clothing and makeup opposite of the performer’s or group of performers’ gender at birth to exaggerate gender signifiers and roles and engage in singing, dancing or a monologue or skit in order to entertain a target audience of persons under eighteen years of age”).

88. *Id.*

the speaker, it may make content-based choices.”⁸⁹ As such, the government can make content-based choices when it is hiring a private entity to deliver a governmental message or when it is delivering the message itself.⁹⁰ But, when the government is allocating funds to “encourage a diversity of views from private speakers,” it has created a public forum and thus cannot discriminate based on viewpoint.⁹¹ Allocation of “student activity funds” at public universities can be an example of such indiscriminate funding.⁹² In regards to First Amendment analysis of restrictions on government spending, like the Arizona bill above, this Article focuses on analyzing restrictions on government spending for these types of indiscriminate public forums, not restrictions the government imposes on its own speech.

Therefore, because most of the drag bans are tied to obscenity or public forums, the following First Amendment doctrines are most relevant in discussing these types of bans: obscenity, content and viewpoint discrimination, public forums, and overbreadth.

B. *The What: Obscenity Doctrine*

Obscene material is not protected under the First Amendment,⁹³ and the Supreme Court’s test for obscene material from *Miller v. California* asks three essential questions.⁹⁴ The first question is “whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest.”⁹⁵ The second question is “whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.”⁹⁶ The third and final question is “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”⁹⁷ If the answer to any of these questions is no, the speech does not fall within the obscenity

89. *Rosenberger v. Rector*, 515 U.S. 819, 833 (1995).

90. *Id.* (“[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”).

91. *Id.* at 830, 834 (“It does not follow, however, . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”).

92. *See id.* at 824, 830 (“The [Student Activities Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”).

93. *Miller v. California*, 413 U.S. 15, 23 (1973) (citing *Kois v. Wisconsin*, 408 U.S. 229 (1972)).

94. *See id.* at 24.

95. *Id.* (quoting *Kois*, 408 U.S. at 230).

96. *Id.*

97. *Id.*

exception and is protected under the First Amendment, assuming it does not fall within another exception.

For the first prong, the Court has been clear that “appeals to the prurient interest” means “a shameful or morbid interest in sex” and not “normal” interests in sex.⁹⁸ And, sexual interest is in fact required.⁹⁹ Thus, not only is a *sexual* interest required at the threshold, it must be a sexual interest above “normal” interests in sex.¹⁰⁰

For the second prong, the Court has also been clear that “patently offensive” is essentially synonymous with “hard core pornography.”¹⁰¹ In *Miller*, the Court gave examples of what types of conduct laws could prohibit under this prong: (1) “[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated”; and (2) “[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”¹⁰² But, again, the representations or descriptions must be *patently offensive*, which seems to require a “hard core” representation and not just *any* representation or description of sexual acts. As such, depicting nudity alone does not make the material obscene.¹⁰³

The third prong as to “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value” has also been further clarified.¹⁰⁴ Unlike the first and second prongs, the question of the “value” of the work is *not* “to be determined by reference to community

98. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 497, 504-05 (1985) (citing *Roth v. United States*, 354 U.S. 476 (1957)).

99. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792-93 (2011).

100. *See id.*; *Brockett*, 472 U.S. at 497, 504-05.

101. *See Miller*, 413 U.S. at 27, 29 (“But today . . . a majority of this Court has agreed on concrete guidelines to isolate ‘hard core’ pornography from expression protected by the First Amendment.”); *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974) (noting that “no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct. . . .” (quoting *Miller*, 413 U.S. at 27)); *Manual Enters., Inc. v. Day*, 370 U.S. 478, 489 (1962) (“At least one important state court and some authoritative commentators have considered *Roth* and subsequent cases to indicate that only ‘hard-core’ pornography can constitutionally be reached under this or similar state obscenity statutes.” (footnote omitted)); *see also* Kurzweg, *supra* note 49, at 461 (“The Court’s opinions reveal an attempt to limit the category of obscenity to “‘hard core’ sexual conduct’ and the crass commercialization of sex.” (quoting *Miller*, 413 U.S. at 27, 34-35)).

102. *Miller*, 413 U.S. at 25.

103. Kurzweg, *supra* note 49, at 461 (“[M]ere nudity is not sufficient to support a finding of obscenity”); *Manual Enters.*, 370 U.S. at 490 (“Of course not every portrayal of male or female nudity is obscene.”); *Jenkins*, 418 U.S. at 161 (“[N]udity alone is not enough to make material legally obscene under the *Miller* standards.”); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (“Clearly all nudity cannot be deemed obscene even as to minors.”).

104. *See Miller*, 413 U.S. at 24; *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

standards.”¹⁰⁵ So, instead of asking “whether an *ordinary* member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material,” the question is “whether a *reasonable* person would find such value in the material, taken as a whole.”¹⁰⁶ That makes the test much more objective and not subjective to the community in which an individual lives.

The final thing worth noting under the Court’s obscenity doctrine is how the test is changed when minors are involved. The consensus is that the test for obscenity as to materials distributed to minors is the same as the *Miller* test but with “to or for minors” added to the prongs.¹⁰⁷ For example:

- (a)[T]he average person, applying contemporary community standards, would find the work, taken as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
- (b) [T]he work depicts or describes, in a manner patently offensive with respect to minors, sexual conduct specifically defined by applicable state law; and
- (c)[T]he work taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.¹⁰⁸

Thus, the same limitations discussed above—such as the requirement of sexual interest and hard-core depictions—apply in the test for minors, just through a different lens.

C. *The Why: Content and Viewpoint Discrimination*

A critical part of First Amendment free speech analysis is whether the government’s restriction on speech is based on content or viewpoint.¹⁰⁹ Because expressive conduct involves both speech and non-speech elements, “[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.”¹¹⁰ Thus, because drag is a form of expressive conduct, this

105. *Pope*, 481 U.S. at 500.

106. *Id.* at 500-01 (emphasis added).

107. EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES*, 125-26 (7th ed. 2020).

108. *Id.*

109. *See* *Rosenberger v. Rector*, 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”)

110. *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

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subpart only discusses the tests for content and viewpoint discrimination for expressive conduct.

1. Content-Based Discrimination

If the restriction is related to the content of the expressive conduct, strict scrutiny will be applied,¹¹¹ meaning “the restriction must be narrowly tailored to serve a compelling government interest.”¹¹² The “narrowly tailored” element is often fatal for government restrictions because it requires the law to not be overinclusive or underinclusive, and the law must be the *least* restrictive alternative.¹¹³ Alternatively, if the restriction on expressive conduct is content neutral, a less-demanding “intermediate scrutiny” test will be applied that requires “an important or substantial government interest” but also still requires narrow tailoring.¹¹⁴

To determine whether a restriction on expressive conduct is content neutral, it must be determined whether “the governmental interest is unrelated to the suppression of free expression.”¹¹⁵ In other words, “[i]t is . . . not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.”¹¹⁶ For example, in *United States v. O'Brien*, O'Brien was convicted for burning his draft card, even though he was doing it as a form of antiwar protest.¹¹⁷ The Court upheld the conviction on the premise that the government had a “legitimate and substantial interest in preventing [draft cards'] wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully [sic] destroy or mutilate them.”¹¹⁸ Put differently, the law was “an appropriately narrow means of protecting [the] interest and condemns only the *independent noncommunicative*

111. See *id.* at 412 (stating that restrictions on expressive conduct relating to the content of the message must be subjected to “the most exacting scrutiny” (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988))).

112. *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 679 n.11 (2010).

113. See *VOLOKH*, *supra* note 107, at 259-61.

114. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). This “intermediate scrutiny” test is sometimes called the *O'Brien* test and states that the restriction will pass constitutional muster if: (1) the restriction is “within the constitutional power of the Government”; (2) “if it furthers an important or substantial governmental interest”; (3) “if the governmental interest is unrelated to the suppression of free expression”; and (4) “if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.*

115. *Johnson*, 491 U.S. at 407 (quoting *O'Brien*, 391 U.S. at 377).

116. *Id.* at 406-07.

117. 391 U.S. at 369-70.

118. *Id.* at 380.

impact of conduct within its reach.”¹¹⁹ Thus, if the restriction is sufficiently narrow and only focuses on the *noncommunicative* aspect of the expressive conduct, it will likely pass constitutional muster.¹²⁰

As another example, the Court has held that general bans on public nudity—even though they restrict nude dancing (a form of expressive conduct)—receive the intermediate scrutiny test applied in *O’Brien* because such bans “[do] not target nudity that contains an erotic message; rather, [they ban] all public nudity, regardless of whether that nudity is accompanied by expressive activity.”¹²¹ In other words, such bans “[do] not attempt to regulate the primary effects of the expression, *i.e.*, the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare.”¹²²

2. Viewpoint-Based Discrimination

Relatedly, viewpoint discrimination is a type of content-based restriction, but the two terms are not interchangeable. If a restriction is content neutral, it is also viewpoint neutral. If a restriction is viewpoint based, it is also content based. However, a restriction can be *content based* but *viewpoint neutral*. For example, a ban on profanity would be content based but viewpoint neutral because one must look at the *content* of the speech, but one can do so without looking at the *viewpoint* of the speech.¹²³ As becomes apparent in the next subpart on public forums, sometimes the analysis depends on whether the restriction is content based but viewpoint neutral. A restriction that is viewpoint based must always satisfy strict scrutiny; in practice, viewpoint discrimination is almost always forbidden.¹²⁴

The difficulty arises in determining whether a restriction is based on viewpoint. A restriction is *not* viewpoint based just because: (1) it is based on the legislators’ viewpoint; (2) the speech it restricts happens to express

119. *Id.* at 382 (emphasis added).

120. *See id.*

121. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 290 (2000).

122. *Id.* at 291 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 50 (1986)).

123. *See* VOLOKH, *supra* note 107, at 622.

124. *See* *Matal v. Tam*, 582 U.S. 218, 234 (2017) (“The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.” (quoting *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993))); *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

a viewpoint; or (3) it disproportionately affects some viewpoints.¹²⁵ Instead, “the question is whether the law inherently restricts some viewpoints while leaving others unrestricted.”¹²⁶ For example, restrictions that ban “offensive” speech are viewpoint based and thus unconstitutional because “[g]iving offense is a viewpoint.”¹²⁷ The Court has been clear that “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”¹²⁸ The same applies to bans on “immoral” or “scandalous” speech.¹²⁹ Such bans “distinguish[] between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation.”¹³⁰

These concepts apply whether the statute is facially discriminatory or discriminatory in application.¹³¹ And, a finding of viewpoint discrimination ends the inquiry: it does not matter “whether [the restriction] might admit some permissible applications.”¹³² That is because viewpoint discrimination triggers strict scrutiny, which prohibits overinclusiveness—prohibiting protected conduct in an effort to prohibit unprotected conduct.¹³³

Several other examples further illustrate these concepts. First, in *Texas v. Johnson*, Johnson burned an American flag as a form of anti-Republican protest.¹³⁴ The Court reversed his conviction on First Amendment grounds because “[w]hether Johnson’s treatment of the flag violated Texas law . . . depended on the likely communicative impact of his expressive conduct.”¹³⁵ The Texas government was worried that permitting such speech would be offensive to the meaning of the American flag and cause offense to others.¹³⁶ In other words, it disagreed

125. VOLOKH, *supra* note 107, at 622.

126. *Id.*

127. *Matal*, 582 U.S. at 243.

128. *Id.* at 244 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)).

129. *Iancu v. Brunetti*, 139 S.Ct. 2294, 2297 (2019).

130. *Id.* at 2300.

131. *See id.* at 2301-02.

132. *Id.* at 2302.

133. *See id.* (“Once we have found that a law ‘aims at the suppression of’ views, why would it matter that Congress could have captured some of the same speech through a viewpoint-neutral statute? But in any event, the ‘immoral or scandalous’ bar is substantially overbroad.” (citation omitted)).

134. 491 U.S. 397, 399, 406 (1989).

135. *Id.* at 411.

136. *Id.* at 408-10.

with the message Johnson was sending.¹³⁷ In response, the Court reaffirmed that “the government may not prohibit expression simply because it disagrees with its message,” and this principle “is not dependent on the particular mode in which one chooses to express an idea.”¹³⁸ More famously, the Court stated that “[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” and that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹³⁹

Second, in *Rosenberger v. Rector*, a public university prohibited government funding for student-led newspapers that contained religious editorial viewpoints.¹⁴⁰ The Court held that this was unconstitutional viewpoint discrimination, even though it applied to all religions or lack thereof (“an entire class of viewpoints”).¹⁴¹ In the Court’s eyes, “[i]t is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.”¹⁴² In contrast, in *Christian Legal Society v. Martinez*, the Court held that a university denying student groups certain benefits for refusing to agree to its “all-comers” policy—which required “all student groups to accept all comers”—was a viewpoint-neutral policy.¹⁴³ In the Court’s eyes, it was “hard to imagine a more viewpoint-neutral policy” because the policy drew “no distinction between groups based on their message or perspective.”¹⁴⁴ Put differently, it did not matter that the speech it restricted happened to express a viewpoint or that it had a differential impact on certain groups.¹⁴⁵

* * *

In sum, if a government restriction on expressive conduct discriminates based on the content or viewpoint of the speech, it will be

137. *Id.* at 411.

138. *Id.* at 416.

139. *Id.* at 414-15 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

140. 515 U.S. 819, 822-23 (1995).

141. *Id.* at 831, 832, 845-46.

142. *Id.* at 831.

143. 561 U.S. 661, 694 (2010).

144. *Id.*

145. *Id.* at 696.

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subject to strict scrutiny and likely fail. But, this analysis becomes more nuanced once public forums are involved.

D. The Where: Public Forum Analysis

Analysis for First Amendment issues also depends on *where* the government speech restriction applies. If a person speaks on government property or by using a government benefit program designed to promote private speech, courts will have to determine which “forum” category applies: (1) a traditional public forum; (2) a designated public forum; (3) a limited public forum; or (4) a nonpublic forum.¹⁴⁶

A “traditional public forum” includes “places which by long tradition or by government fiat have been devoted to assembly and debate” such as streets and parks, “which ‘have immemorially been held in trust for the use of the public.’”¹⁴⁷ A “designated public forum” is one that “the state has opened for use by the public as a place for expressive activity.”¹⁴⁸ A “limited public forum” is government property or a government program “limited to use by certain groups or dedicated solely to the discussion of certain subjects,” such as a public university-run student newspaper.¹⁴⁹ Finally, “nonpublic forums” are any other government property that is “generally open to a defined group of people, but not for the purpose of promoting private speech,” like an airport.¹⁵⁰

The type of forum matters because courts will apply different tests depending on the forum involved. For both traditional public forums and designated public forums, any content-based speech restriction on expressive conduct must satisfy strict scrutiny.¹⁵¹ If the restriction is content-neutral, the “intermediate scrutiny” test will be applied.¹⁵² For limited public forums and nonpublic forums, the speech restrictions must only be “reasonable and viewpoint-neutral.”¹⁵³ Whether a restriction is reasonable depends on whether the restriction is “consistent with the [government’s] legitimate interest in ‘preserving the property for the use

146. VOLOKH, *supra* note 107, at 619-21.

147. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

148. *Id.*

149. *Christian Legal Soc’y*, 561 U.S. at 679 n.11 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009)).

150. *See* VOLOKH, *supra* note 107, at 620.

151. *Christian Legal Soc’y*, 561 U.S. at 679 n.11 (citing *Summum*, 555 U.S. at 469).

152. *See* *United States v. O’Brien*, 391 U.S. 367, 377 (1968); *see also supra* note 114 and accompanying text.

153. *See* VOLOKH, *supra* note 107, at 259-61.

to which it is lawfully dedicated.”¹⁵⁴ Whether a restriction is viewpoint-neutral was previously explained,¹⁵⁵ but it is worth emphasizing that viewpoint discrimination is generally prohibited, *even if* it is a limited or nonpublic forum.¹⁵⁶

These different standards—strict scrutiny, intermediate scrutiny, and reasonable plus viewpoint-neutral—are drastically different. If the forum is a traditional public forum or designated public forum, the government cannot restrict expressive conduct based on its content unless it passes strict scrutiny.¹⁵⁷ Strict scrutiny in the First Amendment context is such a demanding test that Justice Scalia once remarked, “It is rare that a regulation restricting speech because of its content will ever be permissible.”¹⁵⁸ Even if the restriction in the traditional or designated public forum is content-neutral, the government must still pass “intermediate scrutiny,” requiring a substantial government interest and narrow tailoring.¹⁵⁹ In contrast, if the forum is a limited public forum or a nonpublic forum, the government *can* restrict expressive conduct *based on its content* as long as the restriction is reasonable and not viewpoint based.¹⁶⁰ In other words, the government has more latitude to restrict expressive conduct if it is operating within a limited public forum or a nonpublic forum. But, again, strict scrutiny will be applied in all forums if the restriction on expressive conduct contains viewpoint discrimination.¹⁶¹

154. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 50-51 (1983) (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’n*, 453 U.S. 114, 129-30 (1981)).

155. See discussion *supra* subpart III.C.

156. See *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995) (stating that the State cannot engage in viewpoint discrimination, “even when the limited public forum is one of its own creation”).

157. See *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 679 n.11 (2010).

158. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (quoting *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 818 (2000)).

159. See *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

160. See *Christian Legal Soc’y*, 561 U.S. at 679 n.11.

161. See *Matal v. Tam*, 582 U.S. 218, 234 (2017) (“The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. . . .” (quoting *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993))); *Rosenberger*, 515 U.S. at 829 (“Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

E. The How: Overbreadth

Overbreadth is another avenue to striking down a statute on First Amendment grounds. Usually, a law can only be struck down as unconstitutional “if the challenger’s own conduct (which the law forbids) is constitutionally protected.”¹⁶² But, this is different in free speech cases: one can challenge a law even if *their* conduct is not protected but *someone else’s* conduct is protected under the Free Speech Clause of the First Amendment.¹⁶³ The question is whether “the law [on its face] unconstitutionally restricts a substantial amount of other people’s speech.”¹⁶⁴ Note, though, that the overbreadth must be “substantial.”¹⁶⁵ And, the law may be struck down on overbreadth grounds if, on its face, it contains viewpoint discrimination.¹⁶⁶

For example, in *Iancu v. Brunetti*, the Court struck down the part of the Lanham Act that prohibited the registration of “immoral or scandalous” trademarks.¹⁶⁷ It did not matter to the Court that some interpretations of “immoral” or “scandalous” may have been constitutionally permissible: the fact that the statute, on its face, prohibited certain types of viewpoints doomed it.¹⁶⁸ Of course, this partly depends on how the Court construes the statute as written, but it is nonetheless a path to strike down a statute on First Amendment grounds.

It is also worth noting that “overbreadth” is *not* the same as “overinclusiveness.” Overinclusiveness analyzes whether a statute prohibits speech that is outside the government’s stated interest as part of strict scrutiny analysis; overbreadth analysis applies when someone is trying to invalidate a statute on its face.¹⁶⁹ The two concepts overlap—overinclusive restrictions may also be overbroad—but they are part of distinct analyses.¹⁷⁰

162. VOLOKH, *supra* note 107, at 11.

163. *Id.* at 12.

164. *Id.*

165. *Id.*; *New York v. Ferber*, 458 U.S. 747, 769 (1982).

166. *See Iancu v. Brunetti*, 139 S.Ct. 2294, 2302 (2019).

167. 139 S.Ct. at 2297, 2302.

168. *Id.* at 2302 (“Once we have found that a law ‘aims at the suppression of’ views, why would it matter that Congress could have captured some of the same speech through a viewpoint-neutral statute? But in any event, the ‘immoral or scandalous’ bar is substantially overbroad.” (citation omitted)).

169. VOLOKH, *supra* note 107, at 264.

170. *Id.*

IV. SO, CAN IT BE DONE? ANALYZING GOVERNMENTAL ATTACKS ON DRAG

Now that examples of drag bans and the tests used by courts have been laid out, they can be applied to different types of drag bans. Using 2023 legislation as a guide, this Part attempts to analyze most forms that drag bans may take, although legislative creativity sometimes knows no limit. And, for the reasons discussed in Part II, this Part will assume that drag is protected expressive conduct under the First Amendment.¹⁷¹ Hopefully, two things become clear by the end of this Part. First, most drag bans—or at least the most expansive and restrictive—likely violate the First Amendment. Second, the proposals that *do* pass constitutional muster are likely to be ones that do not prohibit a significant portion of what drag encompasses.

A. *The What: Obscenity Analysis*

The government can prohibit obscenity without violating the First Amendment, and the bar may be lower for minors—but that does not mean all drag can be banned as obscenity.

Drag could certainly contain obscenity in the performance that would put it within the government's ability to ban it, such as movies containing "hard core pornography" involving drag performers. Depictions of such lewd conduct, especially in front of minors, would fit the definition of obscenity under the *Miller* test.¹⁷² To that end, bills that generally ban obscenity on public property or in front of minors would encompass obscene drag and still likely pass constitutional muster.¹⁷³ If the drag performers are literally engaging in "hard core pornography" or other obscene conduct in front of an audience, it likely would not even qualify as speech (and thus would not have First Amendment protection) because the audience would need accompanying speech to know what was being communicated.¹⁷⁴

The issue, however, is that most drag is not obscene, and attempts to ban *all* drag performances as obscene would likely violate the First Amendment.¹⁷⁵ These types of anti-drag bills would likely flunk all three

171. See discussion *supra* subpart II.A.

172. See *Miller v. California*, 413 U.S. 15, 24-25 (1973).

173. See, e.g., S.B. 0003, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023) (as signed) (limiting its prohibition of adult cabaret entertainment on public property or in front of minors to performances, including drag, that violates the *Miller* obscenity test for minors).

174. See *supra* notes 29-31 and accompanying text.

175. See, e.g., S.B. 149, 2023 Leg., Reg. Sess. (Kan. 2023) ("As used in this subsection, an obscene performance includes, but is not limited to, a drag performance.").

prongs of the *Miller* test.¹⁷⁶ First, drag does not always appeal to the prurient interest. A sexual interest is required under this prong,¹⁷⁷ or, more specifically, a “shameful or morbid interest in sex,” not a “normal” one.¹⁷⁸ For example, drag artists reading stories to children does not appeal to a sexual interest, even though some opponents who describe drag artists as pedophiles may disagree.¹⁷⁹ Neither does a lip sync to “Let It Go” from *Frozen* at a family-friendly Pride event.¹⁸⁰ Second, a patently offensive depiction or description of sexual conduct would be required,¹⁸¹ and not all drag uses that type of conduct. Even a brief depiction of nudity would not alone make the material obscene,¹⁸² but, still, a lot of drag performances do not even include nudity at all, let alone any “hard core” depictions of sexual acts.¹⁸³ Third, a *reasonable* person could find “serious literary, artistic, political, or scientific value” in the material.¹⁸⁴ As noted earlier, drag can include political commentary, positive messaging of love and acceptance through song and dance, and even educational value if drag artists help teach children how to read.¹⁸⁵ All of these forms of drag would have the value necessary to pull the expressive conduct out of the obscenity realm.

In other words, the government cannot just make an anti-drag regulation look like obscenity regulation by using the *Miller* test. The Court has been clear that “the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of ‘sexual conduct.’”¹⁸⁶ So, governments can pass regulations that prohibit obscenity (and some drag performances may constitutionally be prohibited under these types of regulations), but if the regulation is limited to obscene performances, most drag artists can rest assured their conduct would not be covered unless it would be labeled obscene using the *Miller*

176. *See Miller*, 413 U.S. at 24.

177. *See Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792-93 (2011).

178. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498, 504-05 (1985).

179. As one district judge noted, “The conflation of gender and sexual minority identities with child sexual abuse or ‘hyper-sexualization’ contributes to the marginalization of LGBTQ+ people.” *Imperial Sovereign Ct. v. Knudsen*, No. CV-23-50-BU-BMM, 2023 WL 6794043, at *16 (D. Mont. Oct. 13, 2023).

180. *See id.*

181. *See Miller*, 413 U.S. at 24-25.

182. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (“Clearly all nudity cannot be deemed obscene even as to minors.”).

183. *See discussion supra* subpart II.A.

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

185. *See discussion supra* subpart II.A.

186. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792-93 (2011) (quoting *Miller*, 413 U.S. at 24).

test. Given the high bar of the *Miller* test, though, most drag content would not be labeled as obscene.

B. The Why: Content and Viewpoint Discrimination Analysis

Banning drag is content *and* viewpoint discrimination because drag inherently contains political and social viewpoints critiquing gender norms.¹⁸⁷ By definition, drag artists present themselves as a gender different from what they identify as, and, as a form of gender nonconformity, drag “communicates opposition to the gender binary.”¹⁸⁸ Not surprisingly, then, statutes directly banning drag *have* to define drag by reference to gender norms being defied.¹⁸⁹ Thus, any statute banning or restricting drag will inherently require the government to analyze the *content* of the expressive conduct, namely, whether someone is presenting themselves as a gender other than what they identify as. And, by only banning the expressive conduct if one is wearing clothing that does not match the gender with which they identify, the government is discriminating based on a particular viewpoint of the gender binary.¹⁹⁰

At the very least, by needing to analyze the *content* of the expressive conduct, the government is engaging in content discrimination. For any ban on the expressive conduct of drag to be content-neutral, the governmental interest must be “unrelated to the suppression of free

187. See Minear, *supra* note 41, at 624 (“[W]hen drag queens misperform their gender . . . they are exposing gender as a construction.”); Read, *supra* note 41, at 60–61 (“Research has shown that ‘drag queens use nonverbal aesthetics to communicate a coherent drag identity as queens to blur gender lines and use performances as a space in which to bend dominant American gender narrative binary.’” (quoting Nathaniel Simmons, *Speaking Like a Queen in RuPaul’s Drag Race: Towards a Speech Code of American Drag Queens*, 18 *SEXUALITY & CULTURE* 630, 631 (2014))). Since this Article was originally written, three federal courts have agreed with this Article’s analysis and have ruled that drag restrictions constitute viewpoint discrimination based on viewpoints of gender identity. See *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 864 (W.D. Tenn. 2023); *Woodlands Pride, Inc. v. Paxton*, No. H-23-2847, 2023 WL 6226113, at *17 (S.D. Tex. Sept. 26, 2023); *Imperial Sovereign Ct. v. Knudsen*, No. CV 23-50-BU-BMM, 2023 WL 6794043, at *11 (D. Mont. Oct. 13, 2023).

188. See Kosbie, *supra* note 41, at 206 (“Gender nonconformity also communicates opposition to the gender binary.”).

189. See, e.g., Tenn. S.B. 0003 (as signed) (referring to drag artists as “male or female impersonators”); H.B. 2736, 59th Leg., 1st Reg. Sess. (Okla. 2023) (defining “drag performance” in part as “a performance in which a performer exhibits a gender identity that is different from the gender assigned to the performer at birth”).

190. Cf. *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *4 (Mass. Super. Ct. Oct. 11, 2000) (holding that a school policy prohibiting transgender students from wearing clothing associated with the gender they identify with was not content neutral because “the school is prohibiting the plaintiff from wearing clothes a biological female would be allowed to wear”).

expression.”¹⁹¹ But, absent a prohibition only on *nude* or *obscene* drag performances (which would, instead, either only focus on the noncommunicative aspect of the expressive conduct or only target unprotected speech, respectively), the government does not have an interest that is unrelated to the content of the expressive conduct.¹⁹² Or, put differently, the interests involved would rely on the “harmful” *effect* of the speech or be motivated by a desire to *silence* the message challenging gender norms. Some government officials may want to ban drag to protect children or because they think drag is immoral, offensive, or not suitable for their communities. Each of these interests, though, relies on the *effect* of drag based on its content (dressing opposite of one’s gender identity) and its viewpoint. At the end of the day, some governments are trying to ban drag because of its content, which includes its inherent viewpoint: that defying gender norms is okay.

By banning or restricting drag, the government is “inherently restrict[ing] some viewpoints while leaving others unrestricted.”¹⁹³ Opposition to drag because of the ideology or opinion the speaker holds or because it is “offensive” or “immoral” is textbook viewpoint discrimination.¹⁹⁴ “[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein,”¹⁹⁵ and that is exactly what the government is trying to do when it bans or restricts all forms of drag: it is trying to reinforce the gender binary, and by banning or restricting drag, it is restricting one viewpoint on the issue while leaving others unrestricted. It does not matter that the laws would apply equally to all genders. Restricting “an entire class of viewpoints” is still viewpoint discrimination.¹⁹⁶ And, again, drag does not just *happen* to express a viewpoint: drag *is* the viewpoint. It is a form of expressive

191. See *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

192. See *Imperial Sovereign Ct.*, 2023 WL 6794043, at *9-10 (holding that restrictions on drag story hours and “sexually oriented” performances were content-based restrictions).

193. VOLOKH, *supra* note 107, at 622.

194. See *Matal v. Tam*, 582 U.S. 218, 234 (2017); *Iancu v. Brunetti*, 139 S.Ct. 2294, 2297 (2019); *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

195. *Johnson*, 491 U.S. at 397, 414-15 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

196. See *Rosenberger*, 515 U.S. at 831-32 (“It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.”).

conduct that relies upon defying gender norms, and that viewpoint cannot be separated from the expressive conduct.¹⁹⁷ Even if one does not believe drag contains an inherent viewpoint, though, drag bans would still—at the very least—be content discrimination because one would have to analyze and determine both the speaker’s gender and whether the speaker’s presentation (i.e., clothing) aligns with that gender (presumably under then-applicable social norms).¹⁹⁸

Since drag bans would be content and viewpoint discrimination, the government passing such a ban would have to pass strict scrutiny, which requires a compelling government interest and narrow tailoring.¹⁹⁹ The interest in promoting “proper” community values is not compelling and is, in fact, impermissible.²⁰⁰ “Avoiding offense and restricting bad ideas” are also not compelling interests alone.²⁰¹

True, protecting “the psychological well-being of minors” is a compelling government interest,²⁰² but “only in relatively narrow and well-defined circumstances” can the government prohibit minors from viewing certain materials or expressive conduct.²⁰³ In fact, the Court has expressly stated that “[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.”²⁰⁴ The government would have to show an “actual problem” and a direct causal link between exposure to drag artists and harm to minors.²⁰⁵ This is a “demanding standard,” and “[i]t is rare that a regulation restricting speech because of its content will ever be

197. See discussion *supra* subpart II.B.

198. See *Imperial Sovereign Ct. v. Knudsen*, No. CV 23-50-BU-BMM, 2023 WL 6794043, at *9-10 (D. Mont. Oct. 13, 2023) (holding that restrictions on drag story hours and “sexually oriented” performances were content-based restrictions).

199. See *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (describing the strict scrutiny test).

200. *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 573 (9th Cir. 1984) (“The desire to inculcate Americanism or ‘proper’ community values in its youth cannot justify Burbank’s efforts to ban ‘hard rock’ music. . . . The first amendment limits governmental efforts to inculcate values, at least when such efforts serve to suppress or stifle other forms of protected expression.”).

201. *VOLOKH*, *supra* note 107, at 258.

202. *Id.*

203. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975) (“Nevertheless, minors are entitled to a significant measure of First Amendment protection and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.” (citation omitted)); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 794 (2011) (quoting *Erznoznik*, 422 U.S. at 212-13)).

204. *Erznoznik*, 422 U.S. at 213-14.

205. See *Brown*, 564 U.S. at 799 (finding that the government did not prove a “direct causal link between violent video games and harm to minors”).

permissible.”²⁰⁶ Further, drag bans that ban *all* drag performances on public property or in general would not be narrowly tailored in regards to the interest of protecting minors: such a ban would be overinclusive (because while obscene or nude drag performances may directly affect the well-being of minors, not all drag does) and would not be the *least restrictive alternative* (because the government could ban only obscene or nude performances).²⁰⁷

But, even if the government is limiting its restrictions to obscene or nude performances, it must still be careful not to engage in content and/or viewpoint discrimination *within* those constitutionally permissible restrictions. If a restriction “includes a content discrimination *in addition to* the one that makes the speech unprotected,” the restriction must pass strict scrutiny.²⁰⁸ Thus, it is permissible for the government to generally ban or restrict obscene or nude performances, and such bans would cover obscene or nude drag performances. However, if the government singles out or specifically bans obscene or nude *drag* performances, then it is arguably participating in viewpoint discrimination within the unprotected speech. It would only be prohibiting obscene or nude performances that include an inherent viewpoint about gender norms, which it is not allowed to do.²⁰⁹ So, if the government wants the regulation to remain content-neutral or within the obscenity exception, it cannot *specifically* ban obscene or nude drag performances.

C. *The Where: Public Forum Analysis*

The previous discussion on viewpoint discrimination will also be critical in the public forum analysis. Many of the anti-drag bills prohibit certain drag performances on “public property,” or prohibit the use of indiscriminate state funding (such as general funding to public university student groups to promote intellectual diversity)²¹⁰ toward drag performances, which means public forum analysis will be deployed.²¹¹

206. *Id.* (quoting *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 818 (2000)).

207. *See* *Imperial Sovereign Ct. v. Knudsen*, No. CV 23-50-BU-BMM, 2023 WL 6794043, at *15-17 (D. Mont. Oct. 13, 2023) (holding that restrictions on drag story hours and “sexually oriented” performances were not narrowly tailored to the government’s interest in protecting children).

208. VOLOKH, *supra* note 107, at 304.

209. *See id.* (noting that a regulation that restricts “obscenity including offensive *political* messages” would have to pass strict scrutiny).

210. For examples of such limited public forum student group programs, *see generally* *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010); *Rosenberger v. Rector*, 515 U.S. 819 (1995).

211. *See, e.g.,* Tenn. S.B. 0003 (as signed); Ariz. S.B. 1026.

“Public property” is expansive and theoretically includes several different types of public forums. Traditional public forums, such as parks, seem to be implicated. So, too, do designated public forums, such as state-funded theatres or performance venues. Thus, any regulations that specifically prohibit or restrict drag performances in these types of forums will have to satisfy strict scrutiny since such regulations would entail content and viewpoint discrimination.²¹² “Public property” or “usage of state funds” may also implicate limited public forums, such as libraries and public university programs designed to promote diverse ideas, and nonpublic forums, such as airports. For these types of forums, the restriction has to be “reasonable and viewpoint-neutral.”²¹³ As stated in subpart IV.B, regulations that specifically prohibit or restrict drag performances will be viewpoint based, and, as such, regulations in these types of forums that do the same thing would also have to pass strict scrutiny, something that is incredibly difficult to do.²¹⁴ If a court is not convinced that a drag ban is viewpoint discrimination, though, then the content versus viewpoint discrimination distinction will be highly relevant in bans that involve limited public forums—such bans will be upheld, even if drag bans are content-based discrimination, as long as they are reasonable and do not involve a more specific form of viewpoint discrimination, like banning drag that opposes war.²¹⁵

Of course, regulations in these forums *can* be written in a way so that they are content and viewpoint neutral or in a way that does not implicate protected speech. The government is free to ban obscenity in these forums, so long as it does not include content discrimination *within* such bans.²¹⁶ And, the government’s regulation would be content neutral if it is just prohibiting *nude* performances.²¹⁷ But, again, if the government specifically restricts nude *drag* performances, it has enacted a content-based (and, arguably, a viewpoint-based) restriction and is back in strict scrutiny territory.²¹⁸ Additionally, the government is still free to set up

212. See *Christian Legal Soc’y*, 561 U.S. at 679 n.11; see also discussion *supra* subpart III.B.

213. See VOLOKH, *supra* note 107, at 259-61.

214. See *id.*; *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011).

215. See VOLOKH, *supra* note 107, at 259-61 (noting that restrictions in limited public forums that are reasonable and viewpoint neutral, even if content based, will be upheld).

216. See *id.* at 304.

217. See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 290 (2000).

218. See discussion *supra* subpart IV.B.

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limited public forums with particular goals in mind.²¹⁹ For example, the government would not be required to permit drag performances if it opens a forum only for the purpose of discussing building new sidewalks. But, if it opens a limited public forum to promote diverse viewpoints, such as a public university providing funding to student organizations for events, then it would be violating the First Amendment by prohibiting such funding from going to drag events.²²⁰

It is worth re-emphasizing, though, that even if the government does regulate obscene or nude drag in a way that complies with the First Amendment, that still is only going to cover *very little* of what drag entails, which means these types of bills may cover less conduct than people fear. So long as drag artists performing in traditional, designated, or some types of limited and nonpublic forums do not put on obscene or nude performances, their performances likely will not be covered under the regulations. And, if the government opens limited public forums in which it would not be required to host drag performances, there still remains plenty of other forums in which drag events may take place.²²¹

D. The How: Overbreadth Analysis

Anti-drag bills could also be struck down on the basis that they are overbroad and prohibit drag performances that are not obscene or otherwise unprotected under the First Amendment. For example, in *Albanese Enterprises, Inc. v. City of Jacksonville*, the City of Jacksonville amended its zoning ordinance to provide restrictions on “dancing entertainment establishments,” such as the plaintiff’s “bikini bar” where

219. See *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 679 (2010) (recognizing a state’s right “to preserve the property under its control for the use to which it is lawfully dedicated” (citation omitted)).

220. See *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995) (stating that the State cannot engage in viewpoint discrimination, “even when the limited public forum is one of its own creation”). So, bills that prohibit the usage of state funding or property for drag performances, such as the Arizona bill, likely would not pass an as-applied challenge if a public university refused to fund a student organization’s drag show or let them use university facilities. See *Ariz. S.B. 1026*; see generally *Healy v. James*, 408 U.S. 169 (1972) (explaining how a public university’s refusal to register a certain political organization because of its beliefs violated the First Amendment); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974) (explaining how a public university’s refusal to allow the gay student organization to hold social events violated the First Amendment); *Gay All. of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976) (explaining how a public university’s refusal to register a pro-homosexual rights group as a student organization violated the First Amendment).

221. For example, public parks, public libraries, or state-funded theatres (traditional or designated public forums) would still be on the table.

there would be exotic dancers performing.²²² But the city “changed the definition of a ‘dancing entertainment establishment’ . . . by removing the requirement that the establishment sell or offer alcoholic beverages for sale or consumption on the premises.”²²³ As such, it “unambiguously encompass[ed] ‘any establishment where any worker dances’ and accepts tips or compensation from, or on behalf of, a customer” and “include[d] far more expressive conduct than the ‘bikini’ dancing that the City [sought] to regulate,” including “a hamburger restaurant . . . with dancing drag queen hostesses.”²²⁴ The court, therefore, ruled that the ordinance was unconstitutionally overbroad, and it would not rule otherwise just because “‘the Government promised to use it responsibly.’”²²⁵ Similarly, in *Schad v. Borough of Mount Ephraim*, the Supreme Court struck down as overbroad an ordinance that prohibited all forms of “live entertainment” as a means to prohibit live nude dancing.²²⁶

Thus, any anti-drag bills that prohibit expressive conduct protected under the First Amendment within its prohibition of unprotected expressive conduct, such as obscene performances, could be struck down as overbroad.²²⁷ For example, House Bill 2736 introduced in Oklahoma prohibited presenting “any drag performance” in front of a minor.²²⁸ And, the definition of “drag performance” was not confined to obscene drag performances: it included all drag performances.²²⁹ That bill, if enacted, would have likely been struck down as overbroad, as it restricted protected expressive conduct *beyond* unprotected conduct (i.e., obscene performances).

* * *

In sum, there likely is no constitutional path to fully banning drag performances. The government may be able to restrict certain types of drag, such as obscene or nude drag performances, but, even then, it must

222. No. 3:13-cv-1471-J-34MCR, 2014 WL 585425, at *1, 3 (M.D. Flo. Feb. 14, 2014).

223. *Id.* at *3.

224. *Id.* at *7.

225. *Id.* at *7, 9 (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)).

226. 452 U.S. 61, 65, 76-77 (1981).

227. Since this Article was originally written, several federal courts have struck down anti-drag legislation as being overbroad and vague. *See Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 877 (W.D. Tenn. 2023); *HM Florida-ORL, LLC v. Griffin*, 679 F. Supp. 3d 1332, 1343-44 (M.D. Fla. 2023); *Woodlands Pride, Inc. v. Paxton*, No. H-23-2847, 2023 WL 6226113, at *18-19 (S.D. Tex. Sept. 26, 2023); *Imperial Sovereign Ct. v. Knudsen*, No. CV 23-50-BU-BMM, 2023 WL 6794043, at *18 (D. Mont. Oct. 13, 2023).

228. H.B. 2736, 59th Leg., 1st Reg. Sess. (Okla. 2023) (emphasis added).

229. *See id.*

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DON'T BE A DRAG

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do so carefully. And, that will only cover a small amount of what drag performances can be. As long as drag performers (1) do not violate such restrictions or any other content-neutral restrictions and (2) do not engage in conduct that is *unprotected* under the First Amendment (i.e., incitement or obscenity), then their drag artistry is likely constitutionally protected under the First Amendment.

V. CONCLUSION

Drag is under attack, but attacks on LGBTQ+ speech are nothing new. While these attacks have been consistent, so has the Supreme Court's commitment to prohibiting the government from discriminating against certain speech based on viewpoint. To be clear, this is not about forcing everyone to think the same way or have the same viewpoint on drag. Rather, it is about preventing the *government* from regulating speech based on its drag content. Fifty years ago, the courts stepped in when government officials tried to infringe on the First Amendment rights of LGBTQ+ individuals.²³⁰ The courts will likely have to do so again today if lawmakers are successful in their attempts to ban drag. In the meantime, if the history of the LGBTQ+ movement has taught us anything, it is that the battle for our rights must be won inside *and* outside the courtroom. Drag artists should continue to share their art and spread their messages of love and acceptance. I know I will.

230. See *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 663 (1st Cir. 1974).