

NOTES

“Pink Pony Club”: Can We Keep Dancing? The Sixth Circuit’s Ban on Drag Performances

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I. OVERVIEW

The United States Court of Appeals for the Sixth Circuit overturned a decision enjoining a statute prohibiting drag performances in Tennessee,¹ erasing a significant victory in the nationwide battle against bans on drag performances.² In 2023, the Tennessee General Assembly passed Tenn Code Ann. § 7-51-1407(c)(1) (2023) also known as the Adult Entertainment Act (AEA).³ The AEA makes it an offense “to perform adult cabaret entertainment . . . [o]n public property” or in a location where minors could view the performance.⁴ The statute defines adult cabaret as adult-oriented performances that are harmful to minors, as “ . . . featur[ing] topless dancers, . . . strippers, male or female impersonators, or similar entertainers.”⁵ According to proponents of the AEA, the intention of the statute is to protect minors from viewing obscenities.⁶ However, the statute intentionally discriminates against drag performers like plaintiff-appellee Friends of George (FOG), with broader discriminatory impacts against the LGBTQ+ community.⁷

1. Friends of George’s, Inc. v. Mulroy, 108 F.4th 431, 433 (6th Cir. 2024).

2. Caroline Anders, *Tennessee Drag Ban Is Unconstitutional, Federal Judge Rules*, WASH. POST (June 3, 2023), <https://www.washingtonpost.com/politics/2023/06/03/tennessee-drag-law-unconstitutional/>.

3. *Friends of George’s, Inc.*, 108 F.4th at 433.

4. *Id.*

5. *Id.*

6. *Id.* at 434.

7. Friends of George’s, Inc. v. Mulroy, 675 F. Supp. 3d 831, 861 (W.D. Tenn. 2023).

FOG is a Tennessee-based non-profit theatre company organization that performs drag shows to raise money for LGBTQ+ organizations.⁸ FOG's performances do not contain sexual acts but make references to sexual conduct it feared would violate the AEA.⁹ FOG sought an injunction against Tennessee governor, Attorney General, and District Attorney General of Shelby County, Steven J. Mulroy to prohibit the AEA's enforcement.¹⁰ In its initial complaint, FOG alleged the AEA was a direct response to a drag performance at a 2022 pride festival in Jackson, Tennessee.¹¹ FOG asserted that the AEA is unconstitutional because the statute is "both a content- and viewpoint-based restriction, and that it is substantially overbroad because it applies to anywhere a minor could be present."¹²

United States District Court, Tennessee Western Division granted the temporary restraining order permanently enjoining Mulroy from enforcing the statute before it entered into force.¹³ Moreover, the court held that FOG satisfied Article III standing requirement but, more substantially, that the AEA was unconstitutional by violating the First Amendment.¹⁴ District Attorney General Mulroy—Appellant appealed the judgement arguing: FOG lacked Article III standing; AEA is constitutional, and the injunction was overbroad.¹⁵ Following the July 18, 2024, decision, FOG filed a petition for rehearing en banc, which the Sixth Circuit denied on September 20, 2024.¹⁶ The United States Court of Appeals for the Sixth Circuit *held* that Friends of George lacked standing to bring reinforcement action against the AEA.¹⁷

II. BACKGROUND

As early as the mid-nineteenth century, laws criminalized wearing clothing society deemed inappropriate for the respective sex. Most common anti-cross-dressing regulations prohibited "a dress not belonging

8. *Friends of George's, Inc.*, 108 F.4th at 443.

9. *Id.* at 434.

10. *Id.*

11. Complaint at 10, *Friends of George's, Inc. v. Mulroy*, 675 F. Supp. 3d 831 (W.D. Tenn. 2023) (No. 23-cv-02163), 2023 WL 3324398.

12. *Friends of George's, Inc.*, 675 F. Supp. 3d at 847.

13. *Id.* at 878.

14. *Friends of George's, Inc.*, 108 F.4th at 434.

15. *Id.*

16. Order, *Friends of George's, Inc. v. Mulroy*, 108 4th 431 (6th Cir. 2024) (No. 23-5661), 2024 WL 4441454, at *1.

17. *Friends of George's, Inc.*, 108 4th at 433.

to his or her sex.”¹⁸ Often these laws were embedded in anti-vice and decency laws to target vagrancy, gambling, prostitution, public nudity, indecent exposure, lewd acts, and immoral performances.¹⁹ A series of states and cities passed anti-masquerade and anti-disguise laws for “avoiding identification.”²⁰ Anti-masquerade laws did not specifically cite gender or clothing but were used to target cross-dressing individuals.²¹ In 1903, San Francisco passed the first law directly and specifically targeting cross-dressing.²² As late as 1952, Miami passed a law banning female impersonators from performing.²³

Early cross-dressing prohibitions were passed by local municipalities, not on the federal or state level, and remained in effect into the twentieth century.²⁴ By the 1960s, scholars estimate that at least seventy municipalities across the nation enacted cross-dressing regulations.²⁵ Anti-cross-dressing laws became a central policing tool for LGBTQ+ community.²⁶ Toward the latter half of the twentieth century, courts across the United States began considering the legality of cross-dressing regulations. Cross-dressing legal defenses aimed at statutory interpretation and constitutional argument.²⁷ A series of cases did not invalidate the laws, but found their enforcement inapplicable where cross-dressing used as a cause of action included mental state of defendant²⁸ and failure to meet criminal standard outline in statute.²⁹ However, defendants in state supreme courts successfully argued that anti-cross dressing laws were unconstitutional.

18. CLARE SEARS, *ARRESTING DRESS: CROSS-DRESSING, LAW, AND FASCINATION IN NINETEENTH-CENTURY SAN-FRANCISCO 2*; Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963-86*, 40 *LAW HIST. REV.* 679, 687 (2022).

19. Maham Javaid, *New Anti-Drag Laws Mirror Cross-Dressing Bans from the 1800s: ‘Déjà Vu,’* WASH. POST (June 30, 2023), <https://www.washingtonpost.com/history/2023/06/30/drag-show-laws-cross-dressing-bans/>.

20. SEARS, *supra* note 18, at 4.

21. *Id.*; see also Redburn, *supra* note 18, at 680.

22. Clare Sears, *This Isn’t the First Time Conservative Have Banned Cross-Dressing in America*, JACOBIN (Mar. 15, 2023), <https://jacobin.com/2023/03/cross-dressing-law-united-states-history-drag-bans>.

23. *Id.*

24. SEARS, *supra* note 18, at 3-4.

25. Redburn, *supra* note 18 at 687.

26. SEARS, *supra* note 18, at 4; Eliot T. Tracz, *Drag: Art. Obscenity. Crime*, 23 *CONN. PUB. INT L.J.* 46, 47-48 (2023).

27. Redburn, *supra* note 18, at 699.

28. *City of Columbus v. Zanders*, 266 N.E.2d 602, 603-04 (Ohio Mun. Ct., 1970).

29. *People v. Simmons*, 357 N.Y.S.2d 362, 366-68 (Kings Cnty. Crim. Ct. 1974).

In *City of Columbus v. Rogers*, the Supreme Court of Ohio ruled the “dress not belonging to his or her sex” statute to be unconstitutional because it violated the Fourteenth Amendment relying on the U.S. Supreme Court ruling in *Papachristou v. City of Jacksonville*.³⁰ In *Papachristou*, the Court held a vagrancy regulation to be “void for vagueness.”³¹ The city’s regulation was unconstitutional because it failed to provide adequate information about legally prohibited behavior and delegated too much power to law enforcement.³² Similarly, in *City of Chicago v. Wilson*, the Illinois Supreme Court held anti-cross-dressing ordinance was “unconstitutional infringement of their liberty interest.”³³

By the 1980s, there were two instances of federal courts taking up cross-dressing regulation in a more contemporary context of drag performances. In 1986, the Eighth Circuit invalidated an “indecent or lewd act of behavior” ordinance following an arrest of a female impersonator at a cabaret-type nightclub in St. Louis.³⁴ In *District of Columbia v. City of St. Louis*, the court held a law against an unconstitutionally vague law, where it sought to use words to control conduct.³⁵ In 1983, the Western District of Oklahoma ruled in favor of the Miss Gay America Pageant, where contestants dressed as female impersonators, after it was denied, a zoning permit due to alleged open expression of homosexuality by violating prevailing community standards and promoting obscenity.³⁶ *Norma Kristie, Inc. v. City of Oklahoma City* illustrated a shift in the view of the court viewing drag performance in the context of obscenity and First Amendment protections relying on *Miller v. California*.³⁷

Norma Kristie, Inc. contextualized drag bans in existing Supreme Court jurisprudence detailing the relationship between obscenity and protected speech.³⁸ Legal precedent established obscenity is not protected speech or press.³⁹ A state controls what is obscene to “protect the health safety, welfare, and morals of its community.”⁴⁰ *Miller* established the constitutional test of the state regulation of obscene materials:

30. *Columbus v. Rogers*, 324 N.E.2d 563, 565-66 (Ohio 1975).

31. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

32. *Id.*

33. *City of Chicago v. Wilson*, 389 N.E.2d 522, 525 (Ill. 1978).

34. *D.C. v. City of St. Louis*, 795 F.2d 652, 654-55 (8th Cir. 1986).

35. *Id.*

36. *Norma Kristie, Inc. v. Okla. City*, 572 F. Supp. 88, 92 (W. D. Okla. 1983).

37. *Id.* at 91-92.

38. *Id.* at 92.

39. *Ginsberg v. New York*, 390 U.S. 629, 635 (1968).

40. *Id.* at 636.

The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁴¹

Later, the Supreme Court clarified when, “. . . evaluating free speech rights of adults, we have made it perfectly clear that ‘sexual expression which is indecent but not obscene is protected by the First Amendment.’”⁴²

In 2023, the nexus of obscenity and First Amendment protections again entered the federal courts with six federal cases addressing anti-drag bans, rendering five unconstitutional.⁴³ The United States District Court of Utah, in *Southern Utah Drag Stars v. City of St. George* found that drag shows are “indisputably protected speech and are a medium of expression” protected by the First Amendment.⁴⁴ Southern Utah Drag Stars, a local drag performance organization, sued the City of St. George, Utah, after being denied the ability to publicly promote its family-friendly drag show.⁴⁵ The city council expressed anti-transgender sentiment, claiming that drag shows were akin to strip shows.⁴⁶ Despite these alleged concerns, the District of Utah held that drag shows are protected speech.⁴⁷ During his analysis, Justice Nuffer relied on the testimony of drag artists that drag “is an art form, . . . a source of activism” that present political and social acceptance of gender identity in the community.⁴⁸

In contrast, the Northern District of Texas held that a university’s ban on drag performance did not violate the student group’s First Amendment rights and failed to show the organization had established it was in “imminent peril.”⁴⁹ *Spectrum WT v. Wendler* arose after West Texas A&M University student organization’s drag performance

41. Miller v. California, 413 U.S. 15, 24 (1973) (internal citation omitted).

42. Reno v. ACLU, 521 U.S. 844, 874 (1997) (quoting *Sable Commc’ns of Cal. v FCC*, 492 U.S. 115, 126 (1989)).

43. Joel Timmer, *Anti-Drag Laws and Free Speech: The First Amendment Case for Protecting Drag*, 34 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 949, 949 (2024).

44. S. Utah Drag Stars v. City of St. George, 677 F. Supp. 3d 1252, 1286 (D. Utah 2023).

45. *Id.* at 1275.

46. *Id.* at 1273.

47. *Id.* at 1286.

48. *Id.*

49. Spectrum WT v. Wendler, 693 F. Supp. 3d 689, 707-08 (N. D. Tex. 2023).

fundraiser was prohibited by the university's president.⁵⁰ The court addressed broader questions of sovereign and qualified immunity.⁵¹ However, in his opinion, Justice Matthew J. Kacsmayk weighed the relationship between drag performances, First Amendment protections, and obscenity in the context of other nationwide bans on drag performances, drawing contrast in the educational environment where this case occurred.⁵² The decision focused on the different standards of constitutional expressive conduct when presented to children, determining that the student organization advertised that the performance was open to children and may contain "highly sexualized conduct" and that the president was in his power to prevent "lewdness" prohibited by the school policy.⁵³ Plaintiffs submitted this case to Supreme Court of the United States, who denied the application.⁵⁴

While sharing commonality about the First Amendment and obscenity, the other cases arose out of legislation prohibiting drag performances in public places, citing the need to protect children from obscenity as justification.⁵⁵ The Middle District of Florida, in *HM Florida-ORL, LLC v. Griffin*, held that Florida's law targeting drag performances under the guise of "adult live performances" violated the First Amendment and was overly broad.⁵⁶ Proponents of the statute claimed the bill would protect children "by ending the gateway propaganda to this evil—'Drag Queen Story Time.'"⁵⁷ The Court determined that the defining statutory language "lewd conduct" and "lewd exposure of prosthetic or imitation genitals or breast" using community standards to determine suitability for children to be unconstitutional.⁵⁸ The Middle District distinguished from Supreme Court precedent by explaining, "[a] fully clothed drag queen with cleavage-displaying prosthetic breasts reading an age-appropriate story to children may be adjudged 'wicked'—and thus 'lewd'—by some, but such a scenario would not constitute the kind of obscene conduct prohibited by the statutes in cases like *Miller*."⁵⁹

50. *Id.* at 696.

51. *Id.* at 700, 708.

52. *Id.* at 701.

53. *Id.* at 705-06.

54. *Spectrum WT v. Wendler*, 144 S. Ct. 1053 (2024).

55. *Ginsberg v. New York*, 390 U.S. 629, 635 (1968).

56. *HM Florida-ORL, LLC v. Griffin*, 679 F. Supp. 3d 1332, 1344 (M. D. Fla. 2023).

57. *Id.* at 1335.

58. *Id.* at 1341, 1344.

59. *Id.* at 1344.

Also, in *Imperial Sovereign Ct. of Mont. v. Knudsen*, the federal district court granted a temporary restraining to stop a state law prohibiting public drag performances under the label “sexually oriented shows.”⁶⁰ The suit developed out of the denial of permits for Montana’s annual LGBTQ+ Pride event due to recent passage of Montana House Bill 359 § 7 criminalized “drag story hours” in schools and libraries in context of other sexually oriented performances.⁶¹ H.B 359 explicitly referenced drag queens and drag kings and outlined the consequences for businesses and parent if children attended drag performance.⁶² In his analysis, Chief District Judge Brian Morris examined other district court First Amendment challenges to anti-drag statutes.⁶³ Justice Morris emphasized that the ascertainment of “sexually oriented” depends on differentiating between “prosthetic and female breasts.”⁶⁴ Moreover, this distinction relied on authorities committing identity and gender-based discrimination.⁶⁵ When addressing the obscenity standard, Justice Morris distinguished H.B. 369 as failing to “carveout” for speech of value required by *Miller*.⁶⁶

In *Woodlands Pride, Inc. v. Paxton*, the Southern District of Texas, Houston Division held the proposed drag ban to be an unconstitutional restriction and drag is constitutionally protected speech.⁶⁷ The plaintiffs, a group of pride event organizers and entrainment groups, sought a preliminary injunction in response to Senate Bill 12.⁶⁸ The legislation intended to ban “sexually oriented performances,” imposing criminal liability on businesses and owners engaged in the performances.⁶⁹ Proponents of the bill claimed S.B. 12 intended to protect children who may be exposed to overly sexually explicit material, which could include drag.⁷⁰ However, the opinion referred to the bill’s statement of intent, which raised concern about the recent pop culture trend of drag shows being performed in venues accessible to children.⁷¹ After surveying

60. *Imperial Sovereign Ct. of Montana v. Knudsen*, 684 F. Supp. 3d 1095, 1100 (D. Mont. 2023).

61. *Id.* at 1100-1101.

62. *Id.*

63. *Id.* at 1104.

64. *Id.* at 1106.

65. *Id.*

66. *Imperial Sovereign Ct. of Mont. v. Knudsen*, 684 F. Supp. 3d 1095, 1104 (D. Mont. 2023).

67. *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 851 (S. D. Tex. 2023).

68. *Id.* at 829.

69. *Id.*

70. *Id.* at 831-832.

71. *Id.* at 831.

several other nationwide anti-drug bans, Justice David Hittner concluded that the plaintiff sufficiently proved a potential threat of injury.⁷² This content-based restriction targeted sexually oriented speech, a viewpoint that targets drag performers, and was overly broad in its application of the *Miller* obscenity standard.⁷³ In this analysis, Justice Hittner opined that “[d]rag shows express a litany of emotions and purposes . . . There is no doubt that at a bare minimum these performances are meant to be a form of art . . . alone this would warrant some level of First Amendment protection.”⁷⁴

Similarly, Tennessee passed the Adult Entertainment Act in 2023, which was the subject of litigation in *Friends of George’s v. Mulroy* in the Western District of Tennessee.⁷⁵ AEA made it an offense “to perform adult cabaret entertainment: (a) On public property; or (b) In a location where the adult cabaret entertainment could be viewed by person who is not an adult.”⁷⁶ The legislation defines adult cabaret entertainers defined as topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers.⁷⁷ Further specifying adult oriented performances harmful to minors as “any actual or simulated [live] performance of specified sexual activities, including removal of articles of clothing or appearing unclothed.”⁷⁸

The language used in the AEA was pulled from the Adult-Oriented Establishment Registration Act of 1987, which regulates adult-oriented business that are zoned in fixed locations.⁷⁹ The 1987 Act is the earliest inclusion of “male or female impersonators” situated in the context of adult oriented performers.⁸⁰ The 1987 legislation-imposed penalties for “[business] operators hosting adult-oriented entertainment when minors were present”⁸¹ Unlike previous zoning ordinances focused on targeting obscenity by businesses, legislators hoped the AEA would expand beyond the existing zoning ordinance governing “adult-oriented establishments” by clarifying that if there is “adult cabaret entertainment” occurs in any location where minors can view it, it would violate the

72. *Id.* at 850.

73. *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 845, 849 (S. D. Tex. 2023).

74. *Id.* at 843.

75. *Friends of George’s, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 843 (W. D. Tenn. 2023).

76. TENN. CODE ANN. § 7-51-1407(c)(1) (2023).

77. TENN. CODE ANN. § 7-51-1401(2) (2023).

78. TENN. CODE ANN. § 7-51-1401(4) (2023).

79. *Friends of George’s, Inc.*, 675 F. Supp. 3d at 863.

80. *Id.* at 863-864.

81. *Id.* at 867.

statute.⁸² A performer's first offense is classified as a Class A misdemeanor, while any subsequent offenses will be classified as a Class E felony.⁸³

Proponents of AEA, including many members of the Tennessee General Assembly, voiced concerns and the need for legislation in response to drag performances in front of children as a need to amend the statute.⁸⁴ Several legislators complained after viewing drag performances at local pride events advertised as family-friendly, including sexual acts and stripping.⁸⁵ One opponent complained that drag performances “grooms [children] into accepting adult sexual behavior as normal”⁸⁶ Opponents raised concerns about grouping drag impersonators in the same category as adult-oriented performers based solely on the performer's clothing choice.⁸⁷

In response, FOG sued under 42 U.S.C. § 1983 to prevent enforcement of the statute.⁸⁸ FOG alleged the AEA “is an unconstitutional restriction on free speech under the First Amendment, as incorporated to the states by the Fourteenth Amendment of the United States Constitution.”⁸⁹ The United States District Court for the Tennessee Western Division ruled that while Tennessee had a legitimate state interest in protecting minors, the entire AEA is unconstitutional.⁹⁰

The court found the AEA was enacted with an impermissible purpose and rebutted the State's argument that it was clarifying zoning requirements.⁹¹ The court concluded that the AEA was a content and viewpoint-based regulation that discriminates based on gender identity.⁹² The court delineated the difference from previous versions of the statute by distinguishing from the political climate at the time of the first restriction against “male and female impersonators” by situating revisions in terms of LGBTQ legal and social progress.⁹³ But the court also highlighted that the AEA assigned criminal liability to performers, not the business, based on their identity discrimination. The court supported this

82. *Id.* at 842.

83. *Id.*

84. *Id.* at 844.

85. *Friends of George's, Inc. v. Mulroy*, 108 4th 431, 442 (6th Cir. 2024).

86. *Id.*

87. *Id.* at 443.

88. *Friends of George's, Inc.*, 675 F. Supp. 3d at 841.

89. *Id.*

90. *Id.*

91. *Id.* at 871.

92. *Id.* at 865.

93. *Id.* at 863-64.

conclusion by examining the legislative history of the AEA and citing a 100-page legislative transcript, where there were twenty-nine references to drag, eleven to male or female impersonators, as compared to nine references to “age-restricted venues.”⁹⁴

In addition, the court recognized the construction of the AEA lacked of textual scienter requirement and affirmative defenses that helped to facilitate this discrimination. Explaining “the AEA can criminalize—or at a minimum chill—the expressive conduct of those who wish to impersonate a gender that is different from the one with which they were born in Shelby County.”⁹⁵ The court distinguished between sexually explicit content and obscene material, stating that the evaluation should be based on the *Miller* obscenity test.⁹⁶ If the material is not deemed obscene, it should be afforded the same protections as political, artistic, or scientific speech as outlined by the First Amendment.⁹⁷ The court rejected the State’s argument that the AEA was structured after the standard outlined in *Miller* and dismissed claim that protecting children was a guise for discriminatory legislation.⁹⁸

Further, the court found AEA’s language to be unconstitutionally vague and overly broad, rejecting the State’s argument that the legislation is narrowly tailored.⁹⁹ Specifically, the phraseology “harmful to minors” was deemed vague because it did not provide clarity as what age it concerns and could allow law enforcement the ability to “chill a drag show group into paralysis.”¹⁰⁰ As a result, the AEA’s criminalization of speech on public property raised concerns that adult cabaret entertainment could occur anywhere, leading to infringement on constitutionally protected speech. In this analysis, the court considered the AEA’s economic impact on LGBTQ Pride Festival in Memphis as proof of unconstitutional application and effect on “a major festival for the LGBTQ community.”¹⁰¹

III. COURT’S DECISION

In the noted case, the Sixth Circuit Court of Appeals concluded that FOG did not satisfy Article III standing requirements by failing to meet

94. *Id.* at 867.

95. *Id.* at 866.

96. *Id.* at 862.

97. *Id.*

98. *Id.* at 857.

99. *Id.* at 873-74.

100. *Id.* at 876.

101. *Id.* at 877.

the burden required to show pre-enforcement injury.¹⁰² The court reversed and remanded with instructions to dismiss for lack of standing.¹⁰³

First, the court addressed whether FOG's performances violate the statutory requirements outlined in the AEA, entitling the organization to pre-enforcement review. FOG bears the burden of showing injury under the AEA.¹⁰⁴ FOG presented evidence of past performances that it believed violated the AEA. However, the court rejected the claim for protection under the First Amendment, which requires "considering the work as a whole."¹⁰⁵ Further, the court rebuked testimony that FOG's performances rise to the level outlined in the AEA.¹⁰⁶ The court determined that FOG did not satisfactorily meet that burden to show pre-enforcement injury under the AEA to establish standing.¹⁰⁷ Departing from the district court's conclusion that the evidence was significant to illustrate threat of pre-enforcement injury.

Second, the court examined whether the AEA violated a constitutional interest. FOG claimed the AEA violated its right to freedom of speech and expression.¹⁰⁸ The court emphasized existing precedent that there is a constitutional interest in protecting minors from sexually explicit materials.¹⁰⁹ The AEA does not ban performances for adults, only those seen by a minor.¹¹⁰ Citing Supreme Court support of *Miller's* obscenity standard application in state legislation with the intent to protect minors.¹¹¹ Highlighting the "harmful to minors" standards established in the Tennessee Supreme Court case *Davis-Kidd Booksellers v. McWherter*, which only restricts adult-oriented performances that "lack literary, artistic, political, or scientific value for a reasonable 17-year-old."¹¹² The court placed the burden on FOG to demonstrate that its adult content "lacked value for reasonable 17-year-olds" in order to prove constitutional standing; the court determined FOG did not meet this

102. *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 438 (6th Cir. 2024).

103. *Id.* at 440.

104. *Id.* at 434.

105. *Id.* at 437 (quoting *Ashcroft v. Free Speech Coal*, 535 U.S. 234, 248 (2002)).

106. *Id.* at 437-38.

107. *Id.* at 438.

108. *Id.* at 434.

109. *Id.* at 438.

110. *Id.*

111. *Id.*

112. *Id.* at 435.

burden.¹¹³ Sixth Circuit underlined that the district court declined to apply this standard in its analysis.¹¹⁴

Finally, the court evaluated the legitimacy of the threat of prosecution by District Attorney Mulroy under the AEA. The court examined if FOG met the Sixth Circuit standard outlined in *McKay v. Federspiel* incorporated these standards for pre-enforcement.¹¹⁵ The *McKay* factors include the following criteria: a history of previous enforcement actions, warnings regarding the plaintiff's conduct that is being challenged under the statute, a provision within the statute that facilitates or increases the likelihood of enforcement, and the defendant's refusal to renounce enforcement actions against the plaintiff.¹¹⁶ The court determined that FOG failed to show pre-enforcement injury by citing that FOG did not have evidence of threat of prosecution or history of enforcement under the AEA.¹¹⁷ The court also rejected other claims by FOG, stating that the statute imposed strict criminal liability, allowing for further enforcement.¹¹⁸ The Sixth Circuit supported this decision by citing similar Supreme Court precedents and cases, comparing FOG's situation to the credible threats of pre-enforcement.¹¹⁹ The Sixth Circuit criticized the district court's decision for ignoring these factors.¹²⁰

Justice Mathis's dissent criticized the majority's determination that FOG satisfied Article III standing requirements, instead agreeing with the district court's ruling. First, the dissent concluded that FOG satisfied the requirements for standing under *McKay* factors.¹²¹ The dissent argues that the majority improperly applied the legal precedent for standing. FOG did show it suffered an injury.¹²² Citing evidence at trial showed "substantial probability" that FOG's performances constituted adult performances under the AEA, thus subject to liability.¹²³ Justice Mathis opined that AEA hindered "FOG's 'ability to further its goals [through the

113. *Id.* at 439.

114. *Id.* at 434.

115. *Id.* at 439.

116. *Id.* (citing *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 550 (6th Cir. 2021)).

117. *Id.*

118. *Id.* at 440, 451.

119. *Id.* at 440.

120. *Id.*

121. *Id.* at 450-52.

122. *Id.* at 453 (Mathis, J. dissenting).

123. *Id.*

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performance of drag-centric entertainment] has been “perceptively impaired.””¹²⁴

Finally, Justice Mathis’s argument parallels arguments made by the district court’s conclusion about the AEA as a content-based regulation suppressing free expression.¹²⁵ Mathis adds to the district court’s conclusion about legislative intent by adding a lack of legitimate legislative intent concerned with children’s sexual exploitation.¹²⁶ Further, the dissent added to the district court’s view that the AEA was not narrowly tailored to safeguard minors.¹²⁷ Mathis cited Mulroy’s attempt to rewrite the AEA addressing the variety of issues outlined by the district court.¹²⁸ Mathis agreed that FOG failed to establish standing pertaining to performances in public places, however, Judge Mathis would have affirmed the district court’s ruling to enjoin the enforcement of the AEA. Justice Mathis concluded that AEA is a content-based restriction that is unconstitutional restriction on speech.

IV. ANALYSIS

The noted case is significant because it is the first federal appellate court decision to address the constitutionality of drag bans, shifting from historical and recent district court jurisprudence recognizing drag as protected speech. First, the Sixth Circuit’s decision goes against consistent contemporary rulings that drag performances are protected by the First Amendment. Second, the Sixth Circuit’s interpretation of obscenity and free speech show inconsistencies with other rulings. Third, contemporary drag bans parallel the historic efforts to use bans on dress to discriminate against the LGBTQ+ community.

First, the Sixth Circuit’s decision to dismiss FOG’s case for lack of standing does not expressly address drag as protected speech but invalidating the Western District of Tennessee’s decision leaves drag performers in the state susceptible to criminal liability.¹²⁹ The Western District of Tennessee found the AEA, like similarly litigated legislation, to be unconstitutional for several reasons. The Sixth Circuit focused its analysis on whether the FOG’s claim should have been heard by the court, failing to address substantive issues discussed by the lower court. The

124. *Id.* at 445 (alteration in original) (quoting *Greater Cincinnati Coal. for the Homeless v. City of Cincinnati*, 56 F.3d 710, 716 (6th Cir. 1995)).

125. *Id.* at 454.

126. *Id.* at 455-56.

127. *Id.* at 456.

128. *Id.*

129. *Id.* at 440.

Sixth Circuit did not consider gender identity discrimination, which was a crucial part of the district court's analysis.¹³⁰ While the Sixth Circuit is not the first federal appellate court to address anti-drag bans, its analysis made no acknowledgement of other judicial discussions by other courts on drag bans. It did, however, address its "sister circuits" when interpreting Supreme Court precedent dealing with minors and sexually explicit materials.¹³¹ Most plaintiffs in drag-ban cases could overcome any procedural hurdles that the Sixth Circuit used to dismiss the case.

The decision in *Spectrum WT* most similarly paralleled the Sixth Circuit logic despite differing facts.¹³² The Northern District found that the student organization failed to prove that the university's policy did not infringe on constitutional rights and that there was no continuous threat.¹³³ Despite these similarities in striking down the success of the merits, Justice Kacsmark acknowledged and used *Norma Kristie, Inc.* and *Friends of George* to distinguish his decision.¹³⁴ *Woodland Parks, Inc.*, provides the most comprehensive acknowledgment of the wave of cases addressing the ban, when issuing the decision. The *Knudsen* decision similarly acknowledged other federal districts courts "drag bans" as facially content-based restrictions.¹³⁵

The acknowledgement and reference to similar litigation shows the conversation between the courts and conclusions of law that illustrate a majority trend from which the Sixth Circuit deviates. The Western District of Tennessee with its sister circuit provided a litany of reasons why AEA and similar laws are unconstitutional. The Western District pointed to content-viewpoint discrimination used to "effectively drive certain ideas or viewpoints" of gender identity from Tennessee.¹³⁶ The Western District of Tennessee referenced instances in the record showing that the AEA targeted drag performers and the greater LGBTQ+ community.¹³⁷ The Middle District of Florida expressly acknowledged, "[T]his statute is specifically designed to suppress the speech of drag queen performers."¹³⁸ Further, the structure of the AEA and ambiguity allows an ease of enforcement that stretches beyond just drag

130. *Id.* at 437-38, 440.

131. *Id.* at 436.

132. *Spectrum WT v. Wendler*, 693 F.Supp.3d 689, 700, 709 (N. D. Tex. 2023).

133. *Id.* at 709, 712.

134. *Id.* at 701, 704, 708.

135. *Imperial Sovereign Ct. v. Knudsen*, 684 F. Supp. 3d 1095, 1104 (D. Mont. 2023).

136. *Friends of George's, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 862 (W. D. Tenn. 2023).

137. *Id.* at 852.

138. *HM Fla.-Orl, LLC v. Griffin*, 679 F. Supp. 3d 1332, 1335 (M.D. Fla. 2023).

performances, they are attacks on the performer themselves.¹³⁹ The Western District of Tennessee recognized that this a shift from previous regulations targeting business for obscenity violations.¹⁴⁰

Other district courts echoed this sentiment and indicated the that the purpose, target, and enforcement are enmeshed in larger LGBTQ+ discrimination. Similarly, Justice Neffer recognized the LBTQ+ bias and anti-trans sentiments underlying the city council's determination.¹⁴¹ In Montana, the law allowed enforcement based on perceptions of identity and gender-based discrimination.¹⁴² The Middle District of Florida raised a similar concern that the vagueness and ambiguous key terms in the Florida statute would expose various performances to liability.¹⁴³ Similar constitutional arguments parallel the early decisions overturning anti-cross-dressing policies and acknowledging the constitutional protections of speech based on identity. The Sixth Circuit's failure to acknowledge and uphold this decision strays from this practice.

Second, the Sixth Circuit's decision highlights the continued dispute on sexual content in First Amendment-protected speech. Both the Sixth Circuit and Western District of Tennessee acknowledged that obscenity is not protected speech or press; however, not all sexually explicit material is considered obscene. The structure of these nationwide drag bans relies on the decision in *Miller v. California*.¹⁴⁴ Drafters of the AEA adapted *Miller* to apply to minors and justified the bill by citing its constitutionality, which leans into the community standards component of the test. The Western District of Tennessee opined that legal obscenity is not the same as obscenity in the "vernacular."¹⁴⁵ The Southern District of Texas made a similar conclusion that "sexual oriented performances" do not all rise to the definition of obscenity.¹⁴⁶ *Norma Kristie, Inc.* appears to be the first case to use obscenity as a means of banning drag. In its opinion, the Western District of Oklahoma concluded that community standards of obscenity could not be used to prevent "an open expression of homosexuality."¹⁴⁷

The Western District of Tennessee raised the concern that the AEA will allow sexual speech that is not obscene but potentially harmful to

139. *Friends of George's, Inc.*, 675 F. Supp. 3d at 874-75.

140. *Id.* at 863.

141. *S. Utah Drag Stars v. City of St. George*, 677 F. Supp. 3d 1252, 1273 (D. Utah 2023).

142. *Imperial Sovereign Ct. v. Knudsen*, 684 F. Supp. 3d 1095, 1106 (D. Mont. 2023).

143. *HM Florida-ORL, LLC*, 679 F. Supp. 3d at 1340.

144. Tracz, *supra* note 26, at 59.

145. *Friends of George's, Inc.*, 675 F. Supp. 3d at 862.

146. *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 845 (S.D. Tex. 2023).

147. *Norma Kristie, Inc. v. Okla. City*, 572 F. Supp. 88, 92 (W.D. Okla. 1983).

minors—as a “vehicle for content discrimination unrelated to [its] distinctively proscribable content.”¹⁴⁸ This is consistent understanding among courts addressing this issue. The court found that these laws prohibiting drag improperly applied *Miller*. The Sixth Circuit agreed with the Tennessee Supreme Court’s application of *Miller*, *extending only when it provides value to a reasonable 17-year-old*.¹⁴⁹ This shifts the intent away from protecting children and targeting based on identity.

Finally, the Sixth Circuit’s decision is the first major legal decision to allow states to implement anti-drag legislation for the first time in decades. The use of obscenity laws justified by the need to protect children reflects the community decency standards used in the nineteenth and twentieth centuries to police LGBTQ+ communities. Like the anti-cross dressing, anti-masquerade, and vagrancy laws use of regulating adult entertainment is used as a vehicle to discriminate against the LGBTQ+ community. Elliot T. Tracz argues in *Drag: Art. Obscenity. Crime* that the 2023 drag bans are “simply a reinvention of . . . ordinances targeted at a narrower community.”¹⁵⁰ The Western District of Tennessee and other district courts recognized drag as expressive content protected by the First Amendment and legally enmeshed with the LGBTQ+ community.

As discussed above, these courts acknowledged that the content and viewpoint discrimination paired with the structure of AEA allow broad policing based on gender identity. Further, the Western District of Tennessee acknowledges the impact AEA has on organizations whose mission is to advocate for the LGBTQ+ community.¹⁵¹ The District of Utah similarly recognized in its opinion that drag is protected speech but also communicate “social messages regarding . . . self-expression, gender stereotypes and roles, and LGBTQIA+ identity.”¹⁵² In contrast, the district court in *Spectrum WT*, suspected if all viewers of drag “discern that the performers’ conduct communicates ‘advocacy in favor of LGBTQ+ rights.’”¹⁵³ The Sixth Circuit failed to fully recognize the broader implications for LGBTQ+ rights in its opinion, particularly regarding drag, free speech, and the community’s future.

148. *Friends of George’s, Inc.*, 675 F. Supp. 3d at 864.

149. *Friends of George’s, Inc. v. Mulroy*, 108 4th 431, 439 (6th Cir. 2024).

150. Tracz, *supra* note 26, at 48.

151. *Friends of George’s, Inc.*, 675 F. Supp. 3d at 877.

152. *S. Utah Drag Stars v. City of St. George*, 677 F. Supp. 3d 1252, 1286 (D. Utah 2023).

153. *Spectrum W.T. v. Wendler*, 693 F. Supp. 3d 689, 703 (N. D. Tex. 2023).

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V. CONCLUSION

The noted case, on its face, addresses basic procedural and constitutional requirements. The Sixth Circuit's decision comes at a time when drag performances have become a vehicle for LGBTQ+ discrimination. While not binding precedent outside of the Sixth Circuit, dismissing the case for lack of Article III standing allows the AEA to stand and Friends of George's, Inc. to be susceptible to criminal liability. It is the first appealed drag ban case to reimplement constitutionally disputed obscenity laws. The bans on drag follow a historical pattern of using community decency to criminalize the LGBTQ+ community. For the last five decades, the U.S. courts have ruled in favor of constitutionally protecting drag and one's freedom of gender expression. Again, the Sixth Circuit's decision does not prevent freedom of gender expression but allows enforcement of a law that was created with the intent to police gender identity. Further, the noted case emphasizes the subjectivity of legal obscenity standards and protected speech. The Sixth Circuit's decision highlights the susceptibility of the First Amendment and its use to be weaponized by bias.

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