

FREEDOM FROM RELIGION *foundation*

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June 7, 2023

SENT VIA FAX AND U.S. MAIL: 605-773-4711

Kristi Noem
Governor of South Dakota
500 East Capitol Avenue
Pierre, SD 57501

Re: Drag Shows on College Campuses

Dear Governor Noem:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) regarding your recent letter to the South Dakota Board of Regents. FFRF is a national nonprofit organization with more than 40,000 members across the country, including members in South Dakota. Our purposes are to protect the constitutional principle of separation between state and church, and to educate the public on matters relating to nontheism.

In a letter dated May 25, 2023, you outlined a list of goals you wanted the South Dakota Board of Regents to focus on in order to “revitaliz[e] the institutions under its control and lead[] the nation by example.”¹ Ensuring that the state’s colleges and universities are the best that they can possibly be is an admirable goal, and critical to ensuring South Dakota’s future success. The list you have outlined, however, makes it clear that your actual goal is censoring viewpoints that you are personally uncomfortable with, and demonizing LGBTQIA+ students on college campuses.

Most indicative of this are your back to back contradictory statements regarding free speech and drag shows on college campuses:

4. Some universities have restricted free speech in topics some deem “offensive.” The Board of Regents should remove any policy or procedure that prohibits students from exercising their right to free speech...

5. Our universities should not be hosting and/or promoting drag shows, regardless of whether they are sponsored by a student organization. Board of Regents should prohibit drag shows from taking place on university campuses.²

¹ See attached.

² *Id.*

We write to demand that you immediately reverse course and ensure that all students' right to free speech is protected, including those that you disagree with.

As governor, you have a responsibility to uphold the first amendment rights of all South Dakota residents, regardless of your personal beliefs. Your call to censor drag performances, regardless of their actual content, isolates a specific viewpoint for censorship. Viewpoint discrimination is an especially potent concern animating free speech jurisprudence. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 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.”). While you may take personal issue with drag performances, you may not abuse your position as governor to censor student groups who view drag performances as a celebration of gender identity and expression simply because that view is contrary to your own.

The law regarding the constitutionality of banning drag shows is sparse but rapidly developing. In a recent decision in Tennessee, a federal judge ruled that Tennessee's law requiring that drag performances be restricted to age-limited venues is “an unconstitutional restriction on the freedom of speech.” *Friends of Georges, Inc., v. Mulroy*, No. 2:23-cv-02163-TLP-tmp, 2 (W.D. Tenn. 2023). This decision indicates that any government restriction on drag performances likely must be narrowly tailored, following the well established line of cases regarding obscenity and sexually explicit content. *Id.* at 39. It is well established that the for bar legal obscenity is an exceptionally high one, requiring as a part of a three pronged test that the speech “not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 21 (1973). While not all drag performances are sexually explicit, the court in *Friends of Georges* also correctly notes that “no majority of the Supreme Court has held that sexually explicit—but not obscene—speech receives less protection than political, artistic, or scientific speech.” *Friends of Georges* at 39 (citing *Ashcroft v. A.C.L.U.*, 535 U.S. 234, 245 (2002) (“It is also well established that speech may not be prohibited because it concerns subjects affecting our sensibilities.”); *Reno v. A.C.L.U.*, 521 U.S. 844, 874 (1997) (reaffirming that the First Amendment protects sexual expression which is indecent but not obscene).

A blanket ban on drag shows on college campuses clearly violates the very right to free speech you claim to be so fiercely protective of. As you say in your letter to the Board of Regents:

Colleges need to implement policies and practices that develop and strengthen resiliency among students. Students need to be prepared to address opposing ideas

in a civil way, and we have a responsibility to provide an environment that prepares them to do so.³

Students who have an opposition to drag performances should be held to the same standards of “resiliency” and civility that you expect those that oppose other forms of speech to adhere to, and be trusted as the adults they are to manage the responsibility of deciding for themselves if drag is a form of art they wish to view or participate in. It is unconstitutional for you to silence one form of speech on campus simply because you disagree with it.

This policy of blatant censorship is an egregious abuse of power that violates the United States Constitution. You must reverse course to ensure that the rights of *all* South Dakota students are protected, not just the ones that you agree with.

Sincerely,

A handwritten signature in black ink, appearing to read "Kat D. Grant". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kat D. Grant

Equal Justice Works Fellow (sponsored by the Wm. Collins Kohler Foundation)

Freedom From Religion Foundation

Enclosure

³ See attached.

4. Some universities have restricted free speech in topics some deem "offensive." **The Board of Regents should remove any policy or procedure that prohibits students from exercising their right to free speech.**
 - Black Hills State University was recently challenged on and ultimately removed a policy that allowed administrators to silence opinions they disagreed with.⁶
 - Colleges and universities need to review and revise all policies that may infringe on students' right to free speech.
 - Additionally, colleges need to implement policies and practices that develop and strengthen resiliency among students. Students need to be prepared to address opposing ideas in a civil way, and we have a responsibility to provide an environment that prepares them to do so.

5. Our universities should not be hosting and/or promoting drag shows, regardless of whether they are sponsored by a student organization. **Board of Regents should prohibit drag shows from taking place on university campuses.**
 - Just as other dangerous theories have been allowed to thrive on college campuses, gender theory has been rebranded and accepted as truth across the nation.
 - These theories should be openly debated in college classrooms, but not celebrated through public performances on taxpayer-owned property at taxpayer-funded schools.
 - Our universities should require the highest standards of behavior and decency. These standards do not mean that free expression must be stifled.