



April 22, 2022

M. Katherine Banks  
1246 TAMU  
Texas A&M University  
College Station, Texas 77843-1246

*Sent via U.S. and Electronic Mail (president@tam.u.edu)*

Dear President Banks:

The Foundation for Individual Rights in Education (FIRE), a nonpartisan nonprofit dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses, is concerned that Texas A&M University has declined to sponsor the Draggieland student event, allegedly due to the viewpoints espoused.

FIRE appreciates that TAMU is one of the few institutions in the country whose policies earn an overall "green light" rating from FIRE. However, any such decision to deny Draggieland sponsorship squarely contradicts TAMU's First Amendment obligations, which bar the institution from denying funding to student events based on the viewpoint of the student organizations or performers involved.

**I. TAMU Administrators Deny Draggieland Sponsorship with No Explanation**

Our understanding of events is derived from publicly available information. We appreciate that you may have additional information to offer and invite you to share it with us.

Draggieland is a student-organized drag show hosted by a coalition of LGBTQ+ student organizations, including oSTEM, LGBTQ Aggies, MUA Aggies, and Transcend.<sup>1</sup> Draggieland first took place in February 2020,<sup>2</sup> with Memorial Student Center (MSC) Town Hall sponsoring, which afforded the students access to university resources to organize and

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<sup>1</sup> TAMU oSTEM, Transcend, LGBTQ Aggies, and MUA Aggies, *Joint Media Statement* (Feb. 3, 2022), [https://docs.google.com/document/d/1G-02VbiqosV1wUDUsmlF6g1\\_im-b6HqeX4xM5\\_ignaQ/edit?usp=sharing](https://docs.google.com/document/d/1G-02VbiqosV1wUDUsmlF6g1_im-b6HqeX4xM5_ignaQ/edit?usp=sharing) [<https://perma.cc/W6YM-C827>].

<sup>2</sup> *DRAGgieland 2020*, FACEBOOK (last visited April 12, 2021), <https://www.facebook.com/events/rudder-theatre/draggieland-2020/568648000580607/> [<https://perma.cc/KLJ8-H6YU>].

promote the event and assistance with up-front costs; the event sold out and made a profit from ticket sales.<sup>3</sup>

MSC Town Hall sponsored Draggieland again the following year, in April 2021.<sup>4</sup> That sponsorship guaranteed the event organizers access to the profits from Draggieland 2020, held in a university-controlled bank account, along with the other benefits sponsorship conferred. The 2021 event was once again profitable, with organizers anticipating the profits would be used to fund Draggieland 2022.<sup>5</sup>

In August 2021, administrators informed former Draggieland organizer Bella Lopez that MSC Town Hall would no longer sponsor the event, and event organizers were told not to submit an application for sponsorship.<sup>6</sup> Administrators have repeatedly declined to provide an explanation for this decision.<sup>7</sup> In response to losing MSC Town Hall sponsorship, students from oSTEM, LGBTQ Aggies, MUA Aggies, and Transcend worked together to organize an independently funded version of the event.

Students have voiced concerns that the decision to deny MSC Town Hall sponsorship resulted from pressure by student and alumni groups, such as the Rudder Association. Rudder Association president Joe Bourgeois, however, told the student newspaper he requested members not infringe on the Draggieland organizers' First Amendment rights.<sup>8</sup>

Revoking university sponsorship has burdened Draggieland organizers by barring their access to the profits from Draggieland 2021. This forced the students to fundraise independently to support the 2022 event, despite an estimated \$8,000 of profits from Draggieland 2020 and 2021 going unused.<sup>9</sup>

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<sup>3</sup> Nico Lang, *Texas A&M, America's Largest College, Won't Say Why It Defunded Its Campus Drag Show*, THE DAILY BEAST (April 15, 2022) <https://www.thedailybeast.com/texas-aandm-americas-largest-college-wont-say-why-it-defunded-its-campus-drag-show>.

<sup>4</sup> *DRAGgieland 2021*, FACEBOOK (last visited Apr. 12, 2022), <https://www.facebook.com/events/450990213003289/473253194110324/> [<https://perma.cc/9QDD-NVAP>].

<sup>5</sup> Lang, *supra* note 3.

<sup>6</sup> Julia Potts, *Taking say away from students*, THE BATTALION (Feb. 17, 2022), [https://www.thebatt.com/news/taking-say-away-from-students/article\\_b5e66028-8fb7-11ec-9f86-f74ea57fcef2.html](https://www.thebatt.com/news/taking-say-away-from-students/article_b5e66028-8fb7-11ec-9f86-f74ea57fcef2.html).

<sup>7</sup> Grant Maclaurin, *SGA special session attended by President Banks*, THE BATTALION (Feb. 22, 2022), [https://www.thebatt.com/news/sga-special-session-attended-by-president-banks/article\\_3b5cbb42-93f7-11ec-9d1f-c7e90f8156ac.html](https://www.thebatt.com/news/sga-special-session-attended-by-president-banks/article_3b5cbb42-93f7-11ec-9d1f-c7e90f8156ac.html).

<sup>8</sup> Nathan Varnell, *The Rudder Association: A deep dive into the conservative former student group with plans to 'put the Aggie back in Aggieland'*, THE BATTALION (Mar. 6, 2022), [https://www.thebatt.com/news/the-rudder-association-a-deep-dive-into-the-conservative-former-student-group-with-plans-to/article\\_ee9f31ec-9dae-11ec-a4cc-efe4856b436c.html](https://www.thebatt.com/news/the-rudder-association-a-deep-dive-into-the-conservative-former-student-group-with-plans-to/article_ee9f31ec-9dae-11ec-a4cc-efe4856b436c.html).

<sup>9</sup> Lang, *supra* note 3.

Draggieland 2022 took place April 18 in Rudder Theatre, a venue in MSC Town Hall, but the student organizations funded and promoted the event without the support or resources afforded by MSC Town Hall sponsorship.<sup>10</sup>

## **II. The First Amendment Prohibits Denying Draggieland Sponsorship on the Basis of Viewpoint**

The lack of clarity as to the rationale driving the denial of MSC Townhall sponsorship for Draggieland undermines student and public confidence that TAMU will make decisions without regard to an event’s or student organization’s viewpoint. If the denial of sponsorship rests on the viewpoints of the student organizations planning Draggieland, or on student and alumni opposition to the performers, that denial is a violation of the expressive rights that TAMU is legally bound to provide students under both the First Amendment and the university’s own speech-protective policies.<sup>11</sup> It has long been settled law that the First Amendment is binding on public universities like TAMU<sup>12</sup> and that their decisions and actions must comport with the First Amendment. TAMU further commits itself to the expressive rights of its students and faculty, stating that “the free and open exchange of ideas and information is valued, promoted, and encouraged.”<sup>13</sup>

### ***A. Denial of Draggieland sponsorship predicated on viewpoint would violate TAMU’s First Amendment obligations to students’ expressive rights.***

If TAMU has a legitimate, non-viewpoint-based reason for refusing to sponsor Draggieland, it has refused to provide it. While some members of the university community may find drag shows offensive, this is not a defensible basis to limit student expression.

#### **i. Holding and performing a drag show is expressive conduct.**

Both the act of wearing drag and performing in a drag show qualify as expressive conduct encompassed and protected by freedom of expression. In determining that a drag pageant—whose content mirrored Draggieland—was expressive conduct within the ambit of First Amendment protection, the court in *Norma Kristie, Inc. v. Oklahoma City* opined as follows: “The First Amendment is not an art critic. Plaintiff’s production includes a talent competition with singing and dance, expression which the Supreme Court cited . . . as protected.”<sup>14</sup>

<sup>10</sup> *Draggieland 2022*, FACEBOOK (last visited Apr. 12, 2021), [https://www.facebook.com/events/1383938562049236/?acontext=%7B%22event\\_action\\_history%22%3A\[%7B%22surface%22%3A%22page%22%7D\]%7D](https://www.facebook.com/events/1383938562049236/?acontext=%7B%22event_action_history%22%3A[%7B%22surface%22%3A%22page%22%7D]%7D) [<https://perma.cc/L9XN-J46Y>].

<sup>11</sup> *First Amendment at Texas A&M*, TEXAS A&M UNIV., <https://bit.ly/3uIky5L> [<https://perma.cc/BDG9-WPRQ>].

<sup>12</sup> *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

<sup>13</sup> *First Amendment at Texas A&M*, *supra* note 9.

<sup>14</sup> 572 F. Supp. 88, 91 (W.D. Okla. 1983) (citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)).

This holding reflects that freedom of expression “does not end at the spoken or written word.”<sup>15</sup> To the contrary, conduct “intend[ed] to convey a particularized message” likely to “be understood by those who viewed it” is expressive conduct, and while authorities may enforce content-neutral regulations that may incidentally impact expressive conduct, they cannot restrict the expressive conduct “because it has expressive elements.”<sup>16</sup> This principle encompasses conduct which falls within a traditionally protected genre—such as music, paintings, and parades—all of which is expressive, even if it does not convey a “narrow, succinctly articulable message.”<sup>17</sup> This is what protects the act of saluting a flag (or refusing to do so),<sup>18</sup> wearing black armbands to protest war,<sup>19</sup> musical or theater productions,<sup>20</sup> burning an American flag,<sup>21</sup> picketing or leafletting,<sup>22</sup> and participating in a sit-in.<sup>23</sup>

Freedom of expression also protects students’ sartorial choices intended to convey a message, particularly when it is of political or social import. In fact, the Supreme Court’s seminal case addressing student expressive rights, *Tinker v. Des Moines School District*, turned entirely on student expression through clothing.<sup>24</sup> In *Tinker*, the Supreme Court held that high school students wearing black armbands protesting the Vietnam War was protected expression.<sup>25</sup> Similarly, in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, a federal appellate court overturned on First Amendment grounds a university’s sanctions on a fraternity for conducting an “ugly woman contest” with “racist and sexist” overtones. The court held that fraternity members who dressed in drag as “ugly” women and performed a skit intended to convey a message—both through their mode of dress and by performing in a theatrical skit.<sup>26</sup> The court noted that “some forms of entertainment are so inherently expressive as to fall within” the scope of freedom of expression “regardless of their quality,” as “[e]ven crude street skits come within the First Amendment’s reach.”<sup>27</sup>

*Iota Xi*’s “ugly woman contest” bears similarity to the female impersonation at issue at TAMU, albeit presenting crude and mocking messages through the fraternity’s performances rather than those of creativity and empowerment intended by Draggieland’s organizers and performers. If freedom of expression protects the right to expressive conduct intended to demean others through female impersonation, it undoubtedly embraces a right to engage in expression intended to positively express one’s own views on sexuality and gender.

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<sup>15</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

<sup>16</sup> *Id.* at 404, 406.

<sup>17</sup> *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1995).

<sup>18</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943).

<sup>19</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

<sup>20</sup> *Se. Promotions*, 420 U.S. at 557.

<sup>21</sup> *Johnson*, 491 U.S. at 414.

<sup>22</sup> *U.S. v. Grace*, 461 U.S. 171, 176 (1983).

<sup>23</sup> *Brown v. Louisiana*, 383 U.S. 131, 383 (1966).

<sup>24</sup> 393 U.S. at 505.

<sup>25</sup> *Id.*

<sup>26</sup> *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 389–90, 392 (4th Cir. 1993).

<sup>27</sup> *Id.* at 390.

ii. **Expression does not lose protection because it is subjectively offensive.**

The principle of freedom of speech does not exist to protect only non-controversial expression. Rather, it exists precisely to protect speech that some or even most members of a community may find controversial or offensive. The Supreme Court has repeatedly and consistently held that speech cannot be restricted simply because it offends others, on or off campus.<sup>28</sup>

The freedom to offend some listeners is the same freedom to move or excite others. As the Court observed in holding that burning the American flag is protected expression, the “bedrock principle underlying the First Amendment” is the notion that authorities “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>29</sup> In *Cohen v. California*, which held wearing a jacket reading “Fuck the Draft” was protected expression, the Court observed that although “the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive” expression, that people will encounter offensive expression is “in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve.”<sup>30</sup>

In short, a university administration cannot restrict student expression, including student-organized drag shows, simply because the message is contrary to the values of the institution or offends members of its community. TAMU’s binding legal obligations under the First Amendment cannot be subordinated to views—from administrators, other students, or alumni—on whether constitutionally protected expression is appropriate.

### III. **Conclusion**

Given TAMU administrators’ unwillingness to be transparent about the denial of Draggieland’s sponsorship, student organizers are fairly left to presume the denial must be predicated on complaints about views expressed at the event.

We accordingly call on TAMU to identify any legitimate basis for the denial of sponsorship and the administrators responsible for this decision. We also ask that TAMU clarify the criteria used to make MSC Town Hall sponsorship decisions and to ensure this process does not involve unlawful consideration of the views of student organizations, invited speakers, or performers. Draggieland 2023 must be justly considered for sponsorship under such a viewpoint-neutral scheme.

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<sup>28</sup> See, e.g., *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”).

<sup>29</sup> *Johnson*, 491 U.S. at 414.

<sup>30</sup> 403 U.S. 15, 24–25 (1971).

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Friday, May 6, 2022.

Sincerely,

A handwritten signature in cursive script that reads "Anne Marie Tamburro".

Anne Marie Tamburro  
Program Officer, Individual Rights Defense Program

Cc: Luke Altendorf, Director, Memorial Student Center  
Ray Bonilla, General Counsel  
Joe E. Ramirez, Jr., Vice President of Student Affairs