No. 23A___

In The
Supreme Court of the United States

SPECTRUM WT, ET AL.,
Applicants,

v.

WALTER WENDLER, ET AL.,
Respondents.

To the Honorable Samuel Alito, Associate Justice
of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW

IMMEDIATE RELIEF REQUESTED

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QUESTIONS PRESENTED

1. Whether public university administrators violate the First Amendment when they ban student expression from campus simply because it offends others, as several circuits have recognized in similar cases.

2. Whether the courts below erred in not enjoining a viewpoint-based prior restraint on an entire category of protected stage performances.

PARTIES, RULE 29.6 STATEMENT, AND RELATED PROCEEDINGS

Applicants are Spectrum WT, a recognized student organization at West Texas A&M University, Barrett Bright, and Lauren Stovall. They are Plaintiffs in the United States District Court for the Northern District of Texas, and Appellants in the United States Court of Appeals for the Fifth Circuit. Applicants each represent that they have no parent entities and do not issue stock.

Respondents are Walter Wendler, Dr. Christopher Thomas, and John Sharp.

The related proceedings are:

Spectrum WT v. Wendler, 2:23-CV-048-Z (N.D. Tex. Sep. 21, 2023), denying Plaintiffs' motion for a preliminary injunction and granting in part Defendants' motion to dismiss, attached as Exhibit A;

Spectrum WT v. Wendler, 23-10994 (5th Cir. Oct. 11, 2023), denying Plaintiffs' motion to expedite the appeal, attached as Exhibit B;

Spectrum WT v. Wendler, 2:23-CV-048-Z (N.D. Tex. Feb. 5, 2024), declining to expedite Plaintiffs' motion for an injunction pending appeal, attached as Exhibit C; and

Spectrum WT v. Wendler, 23-10994 (5th Cir. Feb. 22, 2024), carrying Plaintiffs' motion for an injunction pending appeal with the case, attached as Exhibit D.

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To the Honorable Samuel A. Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Without the Court's intervention before March 22, 2024, a viewpoint-based prior restraint will silence students at a public university.

This Application presents this Court with an extraordinary circumstance in which, for almost a year, a university president and key administrators have imposed a prior restraint on protected speech, "the most serious and the least tolerable infringement" of the First Amendment. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 558–59 (1976). This act of censorship is predicated on nothing more than the president's personal opinion that a planned performance on campus "demeans," "mock[s]," and "denigrates" women. App. 91–93. But the president's actions defy basic constitutional principles: The First Amendment protects speech even when it is offensive because "[g]iving offense is a viewpoint," *Matal v. Tam*, 582 U.S. 218, 243 (2017), and "[v]iewpoint discrimination is . . . an egregious form of content discrimination" that is "presumptively unconstitutional." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995)**.** This act of speech suppression has endured not because the officials involved are ignorant of their constitutional duties, but despite *the president's frank confession* that his actions violate "the law of the land." App. 93.

Ordinarily, judicial review provides a constitutional safety net against prior restraints. As this Court has recognized, "[b]ecause the censor's business is to censor, there inheres the danger that he may well be less responsive than a court . . . to the constitutionally protected interest in free expression." *Freedman v. Maryland*, 380 U.S. 51, 57–58 (1965). But here, the judicial safety net broke down. The district court

denied injunctive relief without even addressing plaintiffs' prior restraint claim, and the court of appeals declined either to expedite the appeal or timely entertain a motion for injunction pending appeal. As a consequence, the university is poised to repeat and perpetuate its act of censorship, preventing the planned annual performance this coming March 22, 2024. In this unique circumstance, only this Court can halt an ongoing violation of two of the most fundamental First Amendment protections: the bars against prior restraint and viewpoint-based censorship.

Specifically, this case involves efforts by Applicants Spectrum WT, Barrett Bright, and Lauren Stovall (Plaintiffs) to perform Spectrum WT's charity drag show on March 22, 2024, at West Texas A&M University. Plaintiffs did everything by the book to get approval for a similar show in 2023, but President Walter Wendler, along with Vice President Christopher Thomas, denied Plaintiffs the use of campus facilities for the event. The president sent an edict to the university community to justify the cancellation based on what he called drag shows' supposed "ideology," claiming such performances are "derisive, divisive, and demoralizing." App. 91–93. President Wendler's decree that "West Texas A&M will not host a drag show on campus" remains in place and will block Plaintiffs' annual charity event set for March 22 unless this Court grants the requested relief.

Plaintiffs filed a complaint eleven months ago and sought a preliminary injunction after President Wendler banned the show in March 2023. The district court denied relief based on the premise that drag shows are not "inherently expressive," in the face of this Court's well-established precedents that public officials cannot use

a prior restraint to suppress an artistic performance they believe would not be "clean and healthful and culturally uplifting," *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 549–52 (1975), and that that expression "on a state university campus may not be shut off in the name alone of 'conventions of decency." *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) (per curiam). The district court did not address the First Amendment's near-categorical ban on viewpoint discrimination, *Matal*, 582 U.S. at 243, or the bedrock principle that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). And while Applicants have sought expedited appeal of this clear legal error as well as an injunction pending appeal, the courts below declined to act before March 22, ensuring that neither will consider these grave constitutional questions in time for a remedy.

This would be bad enough if the problem were confined to having the president of one small public university in the Texas Panhandle defy what he knows to be the First Amendment's command. But it isn't. Public university and college officials nationwide from across the political spectrum are appointing themselves censors-in-chief, separating what they consider "good" from "bad" expression on their campuses. For instance, California's Clovis Community College refused to let students post anti-communist and pro-life flyers on a campus bulletin board, claiming they were inappropriate and offensive. *Flores v. Bennett*, 635 F. Supp. 3d 1020 (E.D. Cal. 2022), *aff'd*, No. 22-16762, 2023 WL 4946605 (9th Cir. Aug. 3, 2023). And in New York, Long Island University punished students who criticized International Women's Day social

media posts celebrating transgender women, claiming the criticism was "offensive."[1] These are just two stark examples of many showing today's campus censors flouting the First Amendment's great virtue of neutrality. If courts abdicate their responsibility to provide oversight when university officials overstep constitutional bounds, it will hollow out this Court's well-settled rule that university presidents cannot arbitrarily parcel out First Amendment rights only to those groups of which they approve. *Healy v. James*, 408 U.S. 169 (1972).

Any other outcome will embolden campus leaders to silence unpopular speech on campus. The Court should grant this application, staying "true to the principle that when it comes to the interpretation and application of the right to free speech, we exercise our own independent judgment." *Christian Legal Soc'y Chapter of the Univ. of Cal. Hastings v. Martinez,* 561 U.S. 661, 721 (2010) (Alito, J., dissenting) ("[T]here is no reason why we should bow to university administrators."). In particular, the Court should grant a writ of injunction, pending appeal, prohibiting Respondents from denying Plaintiffs' use of campus facilities open to expressive activity based on the content or viewpoint of Spectrum WT's charity drag show planned for March 22, 2024. Alternatively, the Court should treat this application as a petition for a writ of certiorari, grant certiorari, and issue an injunction pending a ruling on the merits.

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[1] William Biagani, "Long Island University Suspends American Club for Declaring Men Are Not Women," Campus Reform (March 27, 2023), https://www.campusreform.org/article/long-island-university-suspends-american-club-declaring-men-not-women-/21587.

OPINIONS BELOW

The district court denied Plaintiffs' motion for a preliminary injunction on September 21, 2023. App. 4–29. Less than a month later, the Fifth Circuit denied Plaintiffs' motion to expedite the appeal of the district court's ruling. App. 31. On February 5, 2024, the district court declined to expedite Plaintiffs' motion for an injunction pending appeal. App. 33, Then, on February 22, 2024, the Fifth Circuit ordered that it will carry Plaintiffs' motion for an injunction pending appeal with the case. App. 36.

JURISDICTION

Applicants have a pending interlocutory appeal in the United States Court of Appeals for the Fifth Circuit, under 28 U.S.C. § 1292. Briefing is complete, and oral argument is tentatively calendared for the week of April 29, 2024, more than a month after Spectrum WT's scheduled performance. The Court has jurisdiction under 28 U.S.C. § 1651.

STATEMENT OF THE CASE

West Texas A&M opens Legacy Hall to all for expressive activities.

West Texas A&M policy prohibits "deny[ing] [a student] organization any benefit generally available to other student organizations" because of the "political, religious, philosophical, ideological, or academic viewpoint expressed by the organization or of any expressive activities of the organization." App. 99. One of those benefits is reserving university facilities for events. App. 46–47 ¶¶ 28, 32–34. And those facilities include Legacy Hall, a performance venue open to both student

organizations and the public for expressive activity, including past drag shows, beauty pageants for men and women, singing competitions, concerts, and political speeches. App. 47–49 ¶¶ 33–34, 40; *see also* App. 110–117 ¶¶ 6–20; App. 126–82.

Spectrum WT has a message to share though performance.

Spectrum WT is a longstanding, recognized student organization at West Texas A&M. App. 41 ¶ 10. Plaintiffs Barrett Bright and Lauren Stovall are two of Spectrum WT's student leaders. App. 42–43 ¶¶ 14–15. Spectrum WT often organizes campus events like proms, movie nights, and discussions about history, all focusing on issues important to the LGBTQ+ campus community. App. 42 ¶ 13. Its members express themselves through these events, raising awareness of LGBTQ+ culture on campus and in the surrounding community. App. 41–43 ¶¶ 11, 13–15.

To that end, in November 2022, Spectrum WT started planning its first annual charity drag show for March 31, 2023, at Legacy Hall. App. 52 ¶¶ 52–56. For Spectrum WT and its members, the show was important to express support and advocate for the LGBTQ+ community. App. 55 ¶ 74. Proceeds from the event would benefit an LGBTQ+ suicide prevention charity. App. 42.

The students planned their event to be anything but risqué. They instructed performers to avoid profane music and "lewd" conduct. App. 55–56 ¶¶ 79, 81. They also planned only performances appropriate for those over 13 years old. App. 55 ¶¶ 76–79; App. 58 ¶ 94. And the students also barred minors from attending, except those accompanied by a parent or guardian so that performers' family members could attend. App. 55 ¶ 80.

University staff helped Spectrum WT plan the show, working with the students and helping them with promotional materials. App. 53 ¶ 60; App. 56–59 ¶¶ 86–94, 99–100. They expressed support for the event, praised the students' leadership, and approved the show to move forward. *Id.*

President Wendler cancels Spectrum WT's performance, rebuking drag shows as "expression which denigrates" women.

Eleven days before Spectrum WT's March 2023 show, Defendant and Vice President for Student Affairs Christopher Thomas informed Spectrum WT that President Wendler was canceling the drag show. App. 59 ¶¶ 103–04. Thomas explained that Wendler disliked the idea of the drag show, believing it discriminated against women. *Id.* ¶ 104.

Wasting no time, President Wendler published an edict and emailed it to the campus community, declaring that "West Texas A&M will not host a drag show on campus" because a "harmless drag show" could never be "possible." App. 91–93. Wendler's 734-word edict focused on the "ideology" underlying drag shows. *Id.* Drag, he wrote, is "a performance exaggerating aspects of womanhood (sexuality, femininity, gender)" that, through "slapstick," "stereotype women in cartoon-like extremes for the amusement of others." *Id.* And he insisted that "[d]rag shows are derisive, divisive and demoralizing," promoting "ideology" by focusing on "group membership," not "individual" achievement. *Id.*

At the same time, Wendler admitted the Constitution stood in his way:

> I will not appear to condone the diminishment of any group at the expense of impertinent gestures toward another group for any reason, *even when the law of the land appears to require it*.

App. 93 (emphasis added). Nowhere in Wendler's 734-word edict did he raise concerns about "lewdness" or similar conduct App. 91–93.

Plaintiffs sue to stop Defendants' First Amendment violations.

On March 24, 2023, Plaintiffs sued to enjoin the campus drag show ban. *See.* Dist Ct. Dkt. 1. They also moved for a temporary restraining order and preliminary injunction. Dist. Ct. Dkt. 8. As the March 31 show date neared without a TRO ruling, Spectrum WT made the difficult decision to move the event off-campus so their charity show could go on. App. 62 ¶¶ 122–126.

Shortly after, Spectrum WT applied to hold a second annual drag show on March 22, 2024. App. 201 ¶ 17. Just like the 2023 performance, Spectrum WT is planning a PG-13 performance in Legacy Hall and it is meeting the requirements to perform at the campus venue. *Id.* ¶¶ 17–28.

Seeking to prevent Defendants from imperiling the upcoming March 2024 drag show, Plaintiffs amended their complaint on April 18, 2023, App. 38–101, and their preliminary injunction motion, two days later. Dist. Ct. Dkt. 30. In response, President Wendler argued, for the first time—contrary to his edict—that drag shows are not inherently expressive. Dist. Ct. Dkt. 37 at 11–14. He also suggested for the first time that Plaintiffs' planned show was "lewd," despite never letting the students take the stage. *Id.* at 16–17. But Wendler submitted no affidavit or other evidence

that he considered "lewdness" when he exiled drag shows from campus. *See* App. 91–93. *See generally* Dist. Ct. Dkt. 37–37-4.

The district court denies injunctive relief.

In late September, the district court denied Plaintiffs' motion for a preliminary injunction. App. 4–29. Reasoning that "it is not clearly established that all drag shows are inherently expressive," the district court effectively held that Plaintiffs' planned drag shows lack First Amendment protection. App. 17. It also discounted *Papish* and *Southeastern Promotions* as factually different, while never addressing *Matal*. App. 17, 19–20. Equally troubling, the district court ignored Plaintiffs' prior restraint claim.[2] App. 4–29.

Plaintiffs timely appealed to the Fifth Circuit, moving to expedite the appeal on the hope they could secure injunctive relief before their upcoming March 22, 2024 show. Dist. Ct. Dkt. 61. The Court declined to expedite the appeal. App. 31. The appeal is fully briefed and is tentatively set for oral argument the week of April 29.

President Wendler's imminent censorship is certain.

After blocking Plaintiffs' 2023 drag show, President Wendler revealed in a television interview his determination to ban campus drag shows: "I wouldn't have done anything any differently."[3] To that end, Wendler has not renounced his public edict banishing drag shows from campus. ROA. 61 ¶ 119.

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[2] It did hold, however, that Plaintiffs have standing as to Respondents Chancellor John Sharp and Vice President Christopher Thomas, and rejected Wendler's claim to sovereign immunity. App. 27.

[3] Walter Wendler Full Interview, KAMR (Apr. 27, 2023), https://www.myhighplains.com/video/walter-wendler-full-interview/8598931, at 25:11–26:36.

Instead, Wendler recently reaffirmed his commitment to censorship, acknowledging in the Fifth Circuit his "rejection of future drag shows." Ct. App. Dkt. 94 at 32. Wendler also claims he and other "officials" (presumably Defendants Vice President Thomas and Chancellor John Sharp) have unfettered authority to "assess" the content of students' planned events and deny Plaintiffs' "application" to host any future event. *Id*. at 1–2, 23, 36, 39, 41. For his part, Chancellor Sharp has permitted Wendler's censorship to go on for a year, despite having legal authority to stop it.[4]

The courts below decline to expedite relief pending appeal.

Spectrum WT is prepared to hold its scheduled March 22 drag performance. It has reserved Legacy Hall and received tentative approval for the show from university staff. App. 237 ¶ 5. All that remains for Spectrum WT is not-yet-due paperwork, like marketing materials and proof of insurance. *Id.*

In short, Spectrum WT is in the same position as it was when President Wendler cancelled their 2023 show and banned drag shows from campus. App. 59–59, ¶¶ 84–102. So on January 31, 2024, Plaintiffs moved for an injunction pending appeal in the district court under Fed. R. Civ. P. 62(d). Dist. Ct. Dkt. 82. Plaintiffs informed the district court that if it did not grant relief, they would seek an injunction pending appeal in the Fifth Circuit by February 9, 2024. *Id*. The district court declined to expedite the motion, starting it would not depart from the usual briefing

[4] *E.g.*, Tex. A&M Univ. Sys. Office of the Chancellor, Sys. Pol'y 02.02 §§ 1.12, 2.1 (May 20, 2021), https://policies.tamus.edu/02-02.pdf; Tex. A&M Univ. Sys. President of Sys. Member Univs., Sys. Pol'y 02.05 (Aug. 26, 2021), https://policies.tamus.edu/02-05.pdf.

deadlines. App. 33. Plaintiffs then moved for an injunction pending appeal in the Fifth Circuit on February 9. Ct. App. Dkt. 114. The Fifth Circuit declined to rule on the motion, instead carrying it with the case. App. 36.

REASONS FOR GRANTING THE APPLICATION

This Court can and should enjoin the ongoing infringement of Plaintiffs' protected expression under the All Writs Act, which authorizes an individual Justice or the Court to "issue all writs necessary or appropriate in aid of" the Court's "jurisdiction[]." 28 U.S.C. § 1651(a); *see also* Rule 23.1. To obtain relief under Section 1651, an applicant must make a "strong showing" that it is "likely to prevail," while also showing that "denying . . . relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). A Justice or the Court may also grant injunctive relief "[i]f there is a 'significant possibility' that the Court would" grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J.) The Court may issue an injunction "based on all the circumstances of the case," without its order "be[ing] construed as an expression of the Court's views on the merits" of the underlying claim. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171, 1171 (2014).

Without an immediate injunction, a viewpoint-driven prior restraint that has hung over West Texas A&M for nearly a year will continue to irreparably injure

college students' free expression. Prior restraints are "the most serious and the least tolerable infringement" of the First Amendment, unjustified even to thwart publication of military secrets. *Neb. Press Ass'n*, 427 U.S. at 558–59. Yet one persists at a public university. That is an intolerable First Amendment violation, born of President Wendler's open disregard for the Constitution.

Here, all paths support an injunction pending appeal, or alternatively, granting certiorari and issuing an injunction pending a ruling on the merits.

I. Plaintiffs Are Likely to Succeed on the Merits, As It Is Indisputably Clear That the University Officials Are Violating the First Amendment.

When Americans get on stage and express themselves, the First Amendment provides broad protection to their performances, even if the performances are not a government official's cup of tea. *Se. Promotions*, 420 U.S. at 557. That is why the First Amendment protects drag performance, including in a designated public forum like Legacy Hall at West Texas A&M. By denying First Amendment protection to Spectrum WT's performance, the district court departed from this Court's rulings—so sharply that even kneeling at the 50-yard line or wearing an armband in protest would fall victim to the district court's reasoning.

By banning drag performance from a public university just because he thinks it "demeans" and "mocks," President Wendler's ban on drag shows violates the First Amendment three times over. It is a prior restraint, it discriminates based on viewpoint, and it discriminates based on content in a designated public forum. Strict scrutiny applies. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). And Respondents cannot meet it.

A. Like with any stage performance, the First Amendment protects Spectrum WT's drag performance.

The First Amendment protects stage performance, whether a drag show, a classical ballet, or a Christmas pageant. The Court confirmed this fundamental principle in *Southeastern Promotions*. 420 U.S. at 557–58. In holding otherwise, the district court deserted this Court's long-settled precedent, imperiling protected expressive conduct.

1. The Court's precedent affirms that stage performance like drag is protected expressive conduct, including at public universities.

This Court has "long recognized" the First Amendment's "protection does not end at the spoken or written word." *Johnson*, 491 U.S. at 404. As Justice Thomas explained, the First Amendment protects "a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag. . . . wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 657 & n.1 (2018) (Thomas, J., concurring) (collecting cases).

In *Southeastern Promotions*, the Court confirmed that the First Amendment protects stage performance, because theatre, like film, is not "subject to a drastically different standard" under the First Amendment. 420 U.S. at 557–58 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). The First Amendment makes "freedom of expression the rule," no matter whether one expresses himself through speaking, writing, acting, or dance. *Se. Promotions*, 420 U.S. at 558 (quoting *Burstyn*, 343 U.S. at 503).

That lack of a constitutional distinction makes sense. Stage performances like drag shows are inherently expressive, and have been since the Ancient Greeks took the Athenian stage and Shakespeare's plays were performed at the Globe Theatre in Elizabethan England. And as this Court made clear in *Johnson,* the First Amendment protects inherently expressive conduct. 491 U.S. at 406.

The specific context of drag shows, including Plaintiffs', cements why the First Amendment protects them. *Id.* at 405–06. Audience members, having bought a ticket to view a show promoted to raise LGBTQ+ awareness and support a suicide prevention charity, would see performers on stage dancing in eye-catching clothing and makeup, with lighting and music. App. 53 ¶¶ 40(c), (i); App. 58 ¶¶ 63–66, 94–97. With those cues, the audience would know Spectrum WT's performers are trying to communicate a message. Just as context distinguishes Cirque du Soleil from playing on a park jungle gym, it distinguishes a choreographed drag show on stage from putting on steel-toe boots for a shift at the job site.

The First Amendment protects Spectrum WT's show just as strongly on the campus stage at West Texas A&M, no different than if they took the municipal stage in *Southeastern Promotions*. This Court's decisions "leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large," and its protection is "nowhere more vital" than on college campuses. *Healy*, 408 U.S. at 180. As the Fourth Circuit correctly concluded, the First Amendment protects stage entertainment at a public university even if some might find it "low quality" and "crude." *Iota Xi Chapter of Sigma Chi*

Fraternity v. George Mason Univ., 993 F.2d 389, 392 (4th Cir. 1993) (holding a fraternity's "ugly woman contest" was protected expressive conduct). So too here. The First Amendment protects Spectrum WT's campus performance, no matter if President Wendler thinks the performance will be "demeaning" and "divisive."

2. The district court departed from the Court's decades of precedent establishing constitutional protection for expressive conduct.

By concluding that the First Amendment does not protect Plaintiffs' show, the district court made several fundamental errors misconstruing the Court's precedent. Not only did the district court shun *Southeastern Promotions*' ruling that stage performance is not subject to a different First Amendment standard, but it also misread the Court's precedent on expressive conduct.

For one thing, the district court suggested that under *Texas v. Johnson,* the First Amendment protects only expressive conduct that conveys "'overtly political' message[s]." App. 17. *Johnson* says no such thing. Otherwise censors could prevent students from a host of expressive conduct, like kneeling to pray or displaying a wide variety of art, if it offends their tastes.

Whether one views drag performance as political commentary, high art, or slapstick entertainment, the First Amendment protects it. The Court has "long recognized that" when it comes to First Amendment protection, "it is difficult to distinguish politics from entertainment, and dangerous to try." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011); *Winters v. New York*, 333 U.S. 507, 510 (1948) ("The line between the informing and the entertaining is too elusive for the protection of

that basic right. . . . What is one man's amusement teaches another's doctrine."). Likewise, when art meshes with "live entertainment, such as musical and dramatic works," it "fall[s] within the First Amendment guarantee." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). The Constitution does not distinguish between dancing on stage to "Born in the U.S.A." at a political rally, performing under the stage lights to Prince in a feather boa, or gliding across the stage to Tchaikovsky in a tutu.

Nor does it matter to the First Amendment if the audience cannot discern a single, specific message from a stage performance. The district court got this wrong, too. It reasoned that expressive conduct must "obviously convey or communicate a discernable, protectable message." App. 9. But the Court squarely rejected that reasoning decades ago: "[A] narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1995). If the First Amendment were "confined to expressions conveying a particularized message, [it] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Id.* Thus, even if "an observer" of Plaintiffs' drag performance "may not discern that the performers' conduct communicates 'advocacy in favor of LGBTQ+ rights,'" as the district court claimed, App. 16, the First Amendment still protects Plaintiffs' performance because they intend to communicate *something*—and the audience understands that. *Johnson*, 491 U.S. at 404.

Suppose Spectrum WT were a recognized student group interested in history, taking the Legacy Hall stage to reenact the Battle of Fort Sumter. Some audience members might perceive an educational message. But others might see it as glorifying treason and slavery. Differing interpretations of the performance's message would not deprive it of First Amendment protection, even if one interpretation is offense. *See Hurley*, 515 U.S. at 569.

So too with Spectrum WT's PG-13 drag performance. The First Amendment does not teeter on President Wendler's personal sensitivities. In fact, that Wendler perceives *some* message from drag shows underscores that Plaintiffs' planned performance is inherently expressive; he calls it "artistic expression" and a "performance exaggerating aspects of womanhood," while accusing it of "impertinent gestures." That he misperceives the intended message does not deprive Plaintiffs of the First Amendment. If public officials bent on silencing expressive conduct can invoke (or invent) perceived messages to justify censorship, no viewpoint is safe—including at public universities, where too often administrators invoke offense and controversy to excuse silencing students. *See infra* Section III.

But they cannot. "[T]he First Amendment extends to all persons engaged in expressive conduct," underpinning "this Court's enduring commitment to protecting the speech rights of all comers, no matter how controversial—or even repugnant—many may find the message at hand." *303 Creative LLC v. Elenis*, 600 U.S. 570, 600–

01 (2023).[5] And that is the heart of this case: The Constitution bars public universities from wrapping censorship in concerns about controversy, offense, or upset feelings.

B. The district court's refusal to consider the ongoing prior restraint highlights why this is an extraordinary case, making the Court's intervention vital.

For nearly a year, a ban on drag performance has persisted at West Texas A&M—all before Plaintiffs took the stage, and all because President Wendler thinks the shows will demean and mock others. That is a classic prior restraint, "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n*, 427 U.S. at 559. Yet in denying Plaintiffs a preliminary injunction, the district court did not address the prior restraint once. *See* App. 4–29. When a federal court fails to address such an intolerable prior restraint, let alone enjoin it, this Court's intervention is both necessary and appropriate.

Southeastern Promotions shows why Wendler's ban is unconstitutional. There, the Court concluded that city officials imposed a prior restraint by excluding the musical "Hair" from a municipal theater because it did not fit the city's "clean and healthful and culturally uplifting" criteria. 420 U.S. at 549. President Wendler's edict imposed a prior restraint on Spectrum WT based on a similar rationale: He barred

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[5] The district court also claimed the Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR)*, 547 U.S. 47, 66 (2006), limits First Amendment protection for inherently expressive stage performance like Spectrum WT"s show. App. 15 & n.16. Not so. As Chief Justice Roberts noted during oral argument in *303 Creative*, *FAIR* "involved [law] schools providing rooms for the military recruiter," and "what the Court said is empty rooms don't speak." Tr. of Oral Arg. At 65:1–9, *303 Creative*, 600 U.S. 570 (2023) (No. 21-476). A stage filled with costumed and choreographed performers dancing to music under the lights is no empty room. It is inherently expressive, and thus protected. And as the Court's opinion in *303 Creative* confirmed, "[n]o government, *FAIR* recognized . . . may 'interfer[e] with' [a speaker's] 'desired message.'" 600 U.S. at 596 (quoting *FAIR*, 547 U.S. at 64).

Plaintiffs' drag shows from campus forums because their message does not meet Wendler's criteria about what does or does not "demean women." App. 93.

Under *Southeastern Promotions*, public officials cannot bar stage performances "in advance of actual expression," except where two stringent requirements are met: First, the performance "must fit within one of the narrowly defined exceptions to the prohibition against prior restraints," like obscenity; and second, the system for preemptively banning the performance must be "bounded" by "narrow, objective, and definite standards." 420 U.S. at 553, 559 (quoting, in part, *Shuttlesworth v. City of Birmingham*. 394 U.S. 147, 150–51 (1969)).

The University officials have met neither here. On the former, Wendler's edict does not even hint at obscenity, nor has he argued that Spectrum WT's performance would qualify as obscenity. *See Miller v. California*, 413 U.S. 15, 24 (1973) (to qualify as obscene, the expression must "appeal to the prurient interest in sex," "portray sexual conduct in a patently offensive way," and "not have serious literary, artistic, political, or scientific value"). On the latter, Wendler had "unbridled discretion" to decide whether Spectrum WT's performance could go on, the content of which he had no way of knowing in advance. *Se. Promotions*, 420 U.S. at 553. As the Court explained in *Southeastern Promotions*, "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand," when "the risks of freewheeling censorship are formidable." *Id.* at 559. Thus, only *after* misconduct occurs can the University enforce a constitutional policy against it.

Under *Southeastern Promotions*, then, Wendler's edict should never have survived a day, let alone an entire year. Nor is there any distinction between a municipal stage and one at a public university: The First Amendment stands strong at both. *Healy*, 408 U.S. at 180; *see also Iota Xi*, 993 F.2d at 392–93.

And it must. Too often public university officials block controversial speech for ideological reasons or impose unbounded speech-licensing schemes, just as President Wendler has. *See infra* Section III. Only the First Amendment and the "heavy presumption against [a prior restraint's] constitutional validity" stand in the way. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Nothing Wendler or the University can muster overcomes that heavy presumption: They have banned protected expression from campus forums for nearly a year, just to placate Wendler's sensitivities. The Court should immediately enjoin that prior restraint at West Texas A&M.

C. President Wendler's edict discriminates against perceived "offensive" viewpoints.

A government official must overcome strict scrutiny when he preemptively stops a stage performance from going forward because he thinks it may offend. In striking down a restriction of speech at a prominent public university, the Court left no doubt: "Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829. "Denigrat[ing]," "demeaning," or otherwise offending others via a stage performance are viewpoints Wendler perceives—and strongly disagrees with. App. 92. So when Wendler chose to block Spectrum WT's performance before it happened because of that disagreement, he

imposed an ongoing prior restraint based on viewpoint discrimination. And in cases of viewpoint discrimination, this Court applies strict scrutiny.

If Spectrum WT's performance is allowed to go forward, it will take place at Legacy Hall, a venue the University has opened to student organizations and the public for expressive activity. App. 47–49 ¶¶ 33–34, 40; *see also* App. 110–117 ¶¶ 6–20; App. 126–82. That makes it a designated public forum on campus, where any content-based restriction is subject to strict scrutiny. *See Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981) (applying strict scrutiny to denial of religious student group's use of a "generally open forum" at a public university campus); *Reed v. Town of Gilbert*, 576 U.S. at 163 (holding content-based restrictions are subject to strict scrutiny). Two Supreme Court cases make clear that Wendler cannot preemptively block a stage performance at such a forum because of potentially offensive content: *Papish* and *Matal*. Either case should have compelled the district court to enjoin Wendler's ban, but the combination deals it a lethal blow.

In *Papish*, the Court held the First Amendment prohibits universities from restricting student speech because it is immoral or indecent. *Papish* was a per curiam opinion, but it was only so short because the Court considered the result to be so obvious. 410 U.S. at 670 (noting that the result was "clear"). The Court had just ruled on *Healy*, which held that a university president could not deny a student club recognition based his disagreement with the group's "philosophy." 408 U.S. at 187–88 ("The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be

abhorrent."). Relying on this holding, the *Papish* Court held that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university may not be shut off in the name alone of 'conventions of decency.'" *Id.* at 670. Wendler clearly views drag shows in the same light that the University of Missouri chancellor in *Papish* viewed political cartoons of "policemen raping the Statue of Liberty." *Id.* at 667. But no matter how personally abhorrent Wendler may find such performances, *Papish* makes clear that the First Amendment requires he let the show go on.

Matal is the final nail in the coffin for Wendler's edict because it affirms the "bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend." *Matal*, 582 U.S. at 223. At issue was a "disparagement clause" in the trademark code that denied trademark registration to any mark that was "offensive" to "any person, group, or institution." *Id.* at 243, 246 (emphasis omitted). The Court rejected the idea that an "evenhanded[]" prohibition on all disparagement was viewpoint-neutral. *Id.* at 243. Even though the disparagement clause "applie[d] equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue," it still discriminated on the basis of viewpoint, because ultimately, "[g]iving offense is a viewpoint." *Id.*

President Wendler's rationale for banning Spectrum's performance maps onto *Matal* so well it could be a verbatim quote: He finds their message "derisive, divisive and demoralizing misogyny." App. 92. But just as the Trademark Office could not refuse to register Simon Tam's mark he used to empower because those officials

thought it would disparage, Wendler and other University officials cannot bar Plaintiffs' stage performance they use to empower because Wendler thinks it will demean. *See Matal*, 582 U.S. at 228. Wendler's offense at Spectrum WT's performance was the sole basis for his ban, and that is nothing but viewpoint discrimination. Yet the district court did not address *Matal*. *See* App. 4–29.

The combination of *Papish* and *Matal* should have made Wendler's prior restraint on offensive performance dead on arrival. Viewpoint discrimination alone is grounds for strict scrutiny, particularly in a designated public forum. *Rosenberger,* 515 U.S. at 828 ("Discrimination against speech because of its message is presumed to be unconstitutional."); *accord Reed*, 576 U.S. at 163 ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). That is why, for example, a public university could not bar a student group from publishing a religious magazine. *Rosenberger*, 515 U.S. at 835–37. Banning expression from a public campus, based merely on the fact that a university president finds it offensive, should invite the highest degree of constitutional skepticism from this Court. And as the next section demonstrates, Wendler's edict fails that skepticism and strict scrutiny.

D. The University officials' ongoing viewpoint- and content-based ban on drag performance cannot survive strict scrutiny.

The University officials cannot show that the ban on drag shows "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar,* 454 U.S. at 270. In no case do public university officials have a

compelling interest in banishing a class of protected speech from campus like President Wendler has done.

The Court rejected a similar viewpoint-driven speech restriction in *Widmar*, explaining that singling out a Christian student group from facilities "available for . . . registered student groups" was subject to "the most exacting scrutiny." *Id*. at 264–65, 276. Because the university "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in" protected expression, the Supreme Court concluded that the university's stated goal, "achieving greater separation of church and State," was not a compelling interest. *Id*. at 269, 277–78.

In the same way, advancing President Wendler's belief that drag shows "demean" women and promote "misogyny" is not a compelling interest that excuses preemptively barring protected expression from a designated public forum. App. 92–93. Drag shows present no tangible harm to women—and the University has failed to show otherwise. At most, Wendler's edict contains offhand remarks about the "U.S. Equal Opportunity Commission," "prejudice in the workplace and our campus," and "humor becom[ing] harassment" App. 92–93, which the district court pointed to in not enjoining Wendler's censorship. App.10. But Wendler's edict states no more. Even if he had detailed his concerns about "harassment," it would not justify censorship: "There is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State Coll. Area Sch. Dist*., 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.). Muzzling expression that offends or demeans is unconstitutional viewpoint

discrimination, even if it flows from an interest in curbing prejudice or harassment. *See Matal*, 582 U.S. at 243; *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (recognizing the "severe, pervasive, and objectively offensive" standard for harassment in education).

Here, any interest in preventing harassment is especially weak, given that Plaintiffs will perform in front of a willing audience in an enclosed space. A compelling interest demands more, for good reason. Permitting public university presidents to quash speech on flimsy concerns about harassment would endanger protected expression from political speech to pure entertainment.

While Wendler claimed an interest in trying to prevent "lewd" conduct only after Plaintiffs sued, Dist. Ct. Dkt. 37 at 14–16,[6] that does not make out a legitimate interest, let alone a compelling one. Indeed, the Court all but settled in *Papish* that censoring speech on a state university campus in the name of "lewdness" does not

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[6] The district court went a step further, fixating on interests in protecting minors from "sexualized" speech. App. 9. Not even Wendler went so far. In any case, those interests are not compelling for several reasons. First, labeling protected expression like drag shows "lewd" or "sexualized" does not give the University a license to censor those shows, especially when Plaintiffs have never taken the stage. Second, neither "lewd" nor "sexualized" expression fall within the few narrow categories of unprotected speech, like "obscenity" does, and no one has claimed the shows are obscene. *See Brown* 564 U.S. at 804. Third, censorship on a college campus because officials deem it "sexualized" serves no compelling interest; otherwise, expressive conduct from displaying a replica of Michelangelo's David to ballet dancers in skin-tight outfits would be at the mercy of every college administrator's particular tastes. Finally, expression "cannot be suppressed solely to protect the young from ideas or images" that an official "thinks unsuitable for them." *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975). That includes on a university campus: In *Papish*, the Court upheld the First Amendment right to distribute what university officials called "indecent" material, even in a part of campus the dissent described as frequented by "many" minors. *Papish*, 410 U.S. at 670; *id.* at 675–76 (Rehnquist, J., dissenting). And here, Plaintiffs empower parents to decide, prohibiting minors from a ticketed PG-13 show on a university campus after-hours unless accompanied by a parent or guardian. App. 55 ¶ 80; App. 201 ¶ 19; *cf. Brown* 564 U.S. at 804 (2011) (officials cannot dictate what "parents ought to want.")

serve a compelling interest. 410 U.S. at 669–70. And in all cases, concerns about potential "lewdness" do not justify a prior restraint on theatrical performance. *Se. Promotions*, 420 U.S. at 555.

What is more, Wendler offered no evidence that he considered "lewdness" when banning drag shows; in fact, his edict is silent on it. App. 91–93. The Court has cautioned against the dangers of after-the-fact justifications for interfering with free expression. *E.g.*, *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022). Those dangers are at a zenith here.

Not only does the University fail the compelling interest requirement, but it fails narrow tailoring and the least-restrictive means requirements, too. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) (content-based regulation must "choose[] the least restrictive means to further the articulated interest") (cleaned up). A content-based law is not narrowly tailored if it leaves untouched a significant amount of expression causing the same problem. *Reed*, 576 U.S. at 172. And that's exactly what this ban does, leaving untouched music, visual art, books, cheerleading, or other expression that some might think demeans women. *See Iota Xi*, 993 F.2d at 393 ("[A] public university has many constitutionally permissible means to protect female and minority students" short of censorship.).

At bottom, exiling protected expression from a university campus just to shield some from offense is neither narrowly tailored nor a least restrictive means. Instead, those who find a drag show offensive can simply not attend and "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen v.*

California, 403 U.S. 15, 21 (1971). As this Court observed, "the First Amendment leaves matters of taste and style so largely to the individual," because government officials "cannot make principled distinctions" between what is "palatable" or "distasteful." *Id.* at 25. President Wendler, like so many censors before him, has proven this Court right.

II. Without a Swift Injunction Against the Ongoing Prior Restraint, Plaintiffs Will Suffer Irreparable Harm to Their Expressive Freedoms.

Wendler has every intent to enforce the ban against Plaintiffs' future drag shows, like the one planned for March 22, 2024. App. 63 ¶ 130(b). He has refused to renounce his published edict. App. 61 ¶ 119. At the same time, Wendler declared that "I wouldn't have done anything any differently."[7] He even recently defended his "rejection of future drag shows," claiming power to deny Spectrum WT's "application" for future events. Ct. App. Dkt 94 at 1–2, 23, 32 36, 39, 41.

In the end, Plaintiffs' performance will most likely never see the campus stage without an immediate injunction, causing them irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). And Plaintiffs' loss of First Amendment freedoms here has exceeded any "minimal period." For nearly a year, Plaintiffs and their fellow students have lived under a prior restraint imposing President Wendler's preferred values over campus expression. Not only has this ongoing censorship stifled Plaintiffs' right to express themselves, but it

[7] *See supra* note 3, "Walter Wendler Full Interview."

also has stifled their fellow students right to see and hear Spectrum WT's performances. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]his right to receive information and ideas, regardless of their social worth, is fundamental to our free society.") (citation omitted). Swift intervention to enjoin that prior restraint and restore the First Amendment to campus cannot come soon enough.

III. Ensuring Public University Presidents Do Not Impose Their Views Over Free Expression on Campus is Critical to the Public Interest.

Protecting First Amendment rights is always in the public interest. *See*, *e.g.*, *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 19–21; *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) ("[I]njunctions protecting First Amendment freedoms are always in the public interest.") (citation omitted). And at America's public universities, "[t]he vigilant protection of constitutional freedoms is nowhere more vital," as they are "peculiarly the 'marketplace of ideas." *Healy* 408 U.S. at 180–81 (citations and internal quotation marks omitted); *see also Rosenberger*, 515 U.S. at 836 ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."). So when campus officials single out speech they find distasteful just to censor it, enjoining that censorship serves the public interest in protecting First Amendment rights. *See*, *e.g., Roman Cath. Diocese of Brooklyn*, 592 U.S. at 19–21.

Enjoining that censorship also meets the strong public interest in free expression on college campuses. *E.g.*, *Papish*, 410 U.S. at 668–70. Alas, judicial intervention to defend that public interest is no less needed today than it was 50 years

ago when the Court decided *Papish* and *Healy*. The modern campus censor regularly ignores the First Amendment, retreating into vague and infantilizing justifications about offense and divisiveness, just like President Wendler has. Or they offer bare-faced ideological reasons for muzzling free expression. Either way, examples beyond West Texas A&M paint an ever-stark tide of campus censorship. One that immediate action from this Court can help quell.

Wendler is far from the only administrator trying to stifle expression on the public university performance stage. For instance, administrators at Santa Monica College hassled students to cancel a play depicting a romantic relationship between an enslaved man and a male slave owner in the 1850s after some "employee-based organizations" complained it contained offensive themes. Cebelihle Hlatshwayo et al., "SMC 'By The River Rivanna' Production Is Cancelled," The Corsair (Oct. 20, 2023).[8] The show's playwright had "no reason to believe [students] would have voted to cancel the play if the . . . administration hadn't harassed them." *Id.* Likewise, administrators at California State University, Long Beach canceled a scheduled performance of the play "N*W*C" (standing for "nigger," "wetback," and "chink") because the university's president received complaints about the title. Andrew R. Chow, "A Charged Title. A Canceled Show. Now a Cal State Official Resigns," N.Y. Times (Sept. 13, 2016).[9] The president's heavy-handed censorship silenced three actors of Black, Asian, and Latino

[8] https://www.thecorsaironline.com/corsair/2023/10/20/smc-by-the-river-rivanna-production-is-cancelled.

[9] https://www.nytimes.com/2016/09/14/theater/a-charged-title-a-canceled-show-now-a-cal-state-official-resigns.html.

descent who, like the speaker from *Matal*, use the slurs to reclaim them and quell their harmful effects. *Id.* Unwilling "to continue working for someone that canceled a show like that," the university's performing arts director resigned. *Id.*

So too have public college officials trampled student speech to stake out positions in the culture wars. For example, in California, a local college official withheld approval for a registered student organization to post anti-communist and pro-life flyers on a student bulletin board, claiming the flyers conveyed "inappropriate or offense language or themes." *Flores*, 635 F. Supp. 3d at 1027–28. And in March 2023, administrators at Long Island University suspended a registered student organization for its Instagram posts criticizing International Women's Day posts celebrating transgender women, pointing to the school's "respect for others" requirement. William Biagani, "Long Island University Suspends American Club for Declaring Men Are Not Women," Campus Reform (Mar. 27, 2023).[10]

Today's public college censor even targets religious speech. Chike Uzuegbunam sought to share his Christian faith with fellow students in the public spaces of Georgia's Gwinnett College. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021). But although Uzuegbunam obtained a permit and spoke in a designated location, a campus police officer ordered to him to stop and threatened disciplinary action because "people had complained about his speech." *Id.* at 797.

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[10] https://www.campusreform.org/article/long-island-university-suspends-american-club-declaring-men-not-women-/21587.

In short, public college officials remain all too willing to embrace censorship under an inconsistently-raised banner of fighting offense, discomfort, and harassment. Just take the Israel-Hamas conflict, revealing a host of campus censors eager to silence speech—on both sides—in the name of preventing offense.[11] If history tells us anything, it is that public university presidents will keep abusing their authority trying to submit free expression to their subjective values. So long as public university officials shun the Court's commands from cases like *Papish*, *Healy*, and *Matal*, the courts must exercise "independent judgment" and refuse to "bow to university administrators" who fancy themselves arbiters of what speech is worthy. *Christian Legal Soc'y*, 561 U.S. at 721 (Alito, J., dissenting). Indeed, for students, the First Amendment—and the courts tasked with upholding it—are the last line of defense against public university administrators cowed by other students, faculty, lawmakers, donors, and squeaky wheels.

But here, the courts below declined that vital role, failing to halt President Wendler's year-long campaign of knowingly violating this Court's clear holdings against prior restraints and against viewpoint discrimination on college campuses. When that happens, extraordinary circumstances are at hand—and they call for this

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[11] *See, e.g.,* Emma Camp, "Brooklyn College Forced a Student To Take Down Anti-Israel Signs While Leaving Other Posters Untouched," Reason (Dec. 14, 2023) https://reason.com/2023/12/14/brooklyn-college-forced-a-student-to-take-down-anti-israel-signs-while-leaving-other-posters-untouched (police officers at Brooklyn College forcing student to remove two door signs that read "Free Palestine" and "Zionism is fascism," while leaving other political door signs untouched); Josh Hammer, "The University of Michigan Failed To Protect My Right To Free Speech," Newsweek (Nov. 24, 2023), https://www.newsweek.com/university-michigan-failed-protect-my-right-free-speech-opinion-1846259 (University of Michigan heckler's veto of a pro-Israel speech hosted by Young Americans for Freedom).

Court's intervention. The Court should enjoin Respondents from blocking Plaintiffs' access to the campus stage as the First Amendment guarantees, and reaffirm the First Amendment's primacy at our public universities.

IV. Alternatively, the Court Should Treat This Application as a Petition for Certiorari and Grant Certiorari Now, As This Case Reveals Conflict Between Lower Courts Over a Constitutional Issue of Immediate Importance.

The district court's rationale (untouched by the Fifth Circuit pending appeal) for denying Spectrum WT and its members the right to perform splits with the Third, Fourth, and Eleventh Circuits (as well as several of this Court's rulings, *see supra* Section I), on an issue of great national importance, so this Court will very likely grant certiorari when the merits appeal percolates up through the Fifth Circuit. That satisfies the standard for injunctive relief under the All Writs Act, which permits an injunction when there is a "significant possibility that this Court would grant plenary review and reverse" the courts below, and supports this Court granting an injunction pending appeal. *Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1331 (1975).

When the Fifth Circuit decided to carry Spectrum WT's emergency motion with its merits appeal, it effectively denied it by guaranteeing that no decision will come out in time for Spectrum WT's scheduled performance. App. 36. Plaintiffs' appeal has been tentatively calendared for oral argument the week of April 29, and no ruling will issue for at least weeks or months later. That will be far too late for Spectrum WT's performance to go forward on March 22, 2024.

When the merits of this case do make it to this Court, there is a "significant possibility" this Court will grant certiorari: Any grounds for ruling against Plaintiffs

will create a circuit split with at least the Third, Fourth and Eleventh Circuits. In *Iota Xi*, the Fourth Circuit ruled that a college stage performance was protected by the First Amendment, and the university administration violated the First Amendment when they sanctioned fraternity members based on viewpoint. 993 F.2d at 393. The fraternity's "ugly woman contest" skit featured various male students dressed up "as caricatures of different types of women," and even the fraternity admitted "the contest was sophomoric and offensive." *Id.* at 387–88. When university officials sought to punish the fraternity for this display, the Fourth Circuit held that they did so "because [the fraternity's performance] ran counter to the views the University sought to communicate to its students and the community." *Id.* at 393. That court forbade University officials from "silencing speech," including drag, "on the basis of its viewpoint." *Id.* at 393.

Similarly, though less directly apposite on the facts, the Third and Eleventh Circuits have both held that university rules addressing harassment must yield to the First Amendment, not the other way around. *Compare, e.g.*, *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1125–29 (11th Cir. 2022) ("[I]t is imperative that colleges and universities toe the constitutional line when monitoring, supervising, and regulating student expression."), and *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 252 (3d Cir. 2010) (concluding that a university harassment provision was "overbroad in violation of the First Amendment" because it could "be used to punish *any* protected speech, without forewarning"), *with* App. 10 (district court ruling that "binding

harassment laws, regulations, and policies" must be considered as to whether Wendler's edict violated "applicable Free Speech standards").

For these same reasons and others articulated throughout this application, in the alternative, the Court should treat this application as a petition for certiorari and grant certiorari, with an interim injunction that would allow Spectrum WT's performance to go forward on March 22, 2024. Certiorari is warranted due to the important federal questions at issue, the conflicts with this Court's precedents, and the decision's creation of a growing split in authority over what protection to afford offensive stage performances on campus.

CONCLUSION

The First Amendment's promise of neutrality is at its zenith at America's public colleges and universities, where "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire,* 354 U.S. 234, 250, 77 (1957). But President Wendler has deprived West Texas A&M students of that promise for a year—and knowingly so. When courts below have allowed a viewpoint-based prior restraint to persist, the judicial safety net has broken down.

Under these extraordinary circumstances, the Court should intervene and immediately enjoin Respondents, pending appeal, from denying Plaintiffs' use of campus facilities open to expressive activity based on the content or viewpoint of Plaintiffs' planned March 22, 2024 drag show performance.

Respectfully Submitted,

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