in his individual capacity and his official capacity as the President of West Texas A&M University,

CHRISTOPHER THOMAS, in his official capacity as Vice President for Student Affairs at West Texas A&M University,

JOHN SHARP, in his official capacity as Chancellor of the Texas A&M University System,

ROBERT L. ALBRITTON, JAMES R.

WALTER WENDLER,

Dated: March 24, 2023
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Respectfully submitted,

/s/ JT Morris
JT MORRIS
TX Bar No. 24094444
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION
700 Pennsylvania Ave., SE
Suite 340
Washington, DC 20003
Tel: (215) 717-3473
Fax: (267) 573-3073
jt.morris@thefire.org

CONOR T. FITZPATRICK*
MI Bar No. P78981
ADAM B. STEINBAUGH*

CERTIFICATE OF REASONABLE EFFORTS TO GIVE NOTICE OF TRO AND OF CONFERENCE

Under Fed. R. Civ. P. 65(b)(1)(B) and Local Rule 7.1, I certify that on the morning of March 24, 2022, I sent a copy of Plaintiffs' verified complaint by email to Ray Bonilla (rbonilla@tamus.edu), general counsel for the Texas A&M University System. I informed Mr. Bonilla of Plaintiffs' intent to file a temporary restraining order and preliminary injunction motion later in the day on March 24, and asked if Defendants had a position on Plaintiffs' motion. Mr. Bonilla has not provided a position.

Immediately after filing Plaintiffs' TRO g

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2023, a true and correct copy of the foregoing document was transmitted via using the CM/ECF system, which automatically sends

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

SPECTRUM WT, BARRETT BRIGHT, and LAUREN STOVALL,

Plaintiffs,

v.

WALTER WENDLER, in his individual capacity and his official capacity as the President of West Texas A&M University,

CHRISTOPHER THOMAS, in his official capacity as Vice President for Student Affairs at West Texas A&M University,

JOHN SHARP, in his official capacity as Chancellor of the Texas A&M University System,

ROBERT L. ALBRITTON, JAMES R. BROOKS, JAY GRAHAM, MICHAEL A. HERNANDEZ III, TIM LEACH, BILL MAHOMES, ELAINE MENDOZA, MICHAEL J. PLANK, CLIFF THOMAS, and DEMETRIUS L. HARRELL JR., in their official capacities as members of the Board of Regents of the Texas A&M University System,

Defendants.

Case No.: 2:23-cv-00048-Z

Hon. Matthew J. Kacsmaryk

ORDER GRANTING PLAINTIFFS’ I[illegible]

injunctive relief. The Court also finds that the balance of the equities favors Plaintiffs, and that the public interest will be served by this Order.

This Temporary Restraining Order is issued without notice because (1) Plaintiffs have established that they have suffered and continued to suffer immediate and irreparable harm to their First Amendment rights to freedom of speech, including to hold an expressive event protected under the First Amendment that is scheduled for March 31, 2023; and (2) Plaintiffs have made reasonable efforts to provide notice to Defendants.

Thus, the Court hereby ORDERS that:

1. Defendants, and their employees, agents, servants, officers, and persons in concert with Defendants, are enjoined from preventing Plaintiffs' March 31, 2023 event from moving forward in the manner Tentatively Confirmed by West Texas A&M University on March 14, 2023, and shall allow Plaintiffs to complete the remaining steps expressly required by university written policy for events, if any.
2. Defendants, and their employees, agents, servants, officers, and persons in concert with Defendants, are

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

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INTRODUCTION

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groups for expressive activities, simply because the show does not match Wendler's worldview. *Id.*

Indeed, the Constitution's bar against viewpoint discrimination is vital to preserving freedom of speech at public colleges and universities

This Court should grant Plaintiffs' motion for a temporary restraining order and preliminary injunction to preserve the supremacy of the Constitution and First Amendment at West Texas A&M and protect Plaintiffs against President Wendler's ongoing defiance of the First Amendment.

STATEMENT OF FACTS[1]

Spectrum WT, like many recognized student groups, has a message to share.

Plaintiff Spectrum WT, formed in 2009, is a recognized student organization at West Texas A&M. (Dkt. 1, Verif. Compl. ¶ 8.) As West Texas A&M's website explains, "Spectrum is a student organization for West Texas A&M's LGBTQIA+ students and allies." (Verif. Compl. ¶ 10.) Spectrum WT's goals are to provide a space for "LGBT+ students and allies to come together," to "raise awareness of the LGBT+ community," and to "promote diversity, support, and acceptance on campus and in the surrounding community." (Verif. Compl. ¶ 9.) To help spread its message, Spectrum WT hosts various events, like Lavender Prom, and "regularly volunteers in the community." (Verif. Compl. ¶¶ 10–11

organizations at the university," because of "political, religious, philosophical, ideological, or academic viewpoint expressed by the organization or any expressive activities of the organization." (West Texas A&M Policy No. 08.99.99.W1 ("Expressive Activity on Campus"), Rule 1.3; Tex. Educ. Code § 51.9315(g); Verif. Compl. ¶ 34.) And student organizations at West Texas A&M enjoy some benefits—including the right to use university facilities for group functions and events. (Verif. Compl. ¶¶ 26–35.)

These facilities include "Legacy Hall

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Compl. ¶ 44

email, writing: "I appreciate your attention to the event as you navigate everything else a college student has going on. We want to help ensure you have a great event." (Verif. Compl. ¶ 60.) Bright, Stovall, and the rest of Spectrum WT continued their efforts to plan and promote the event, including inviting attendees. (Verif. Compl. ¶¶ 63–69.)

Spectrum WT received "Tentative Confirmation" for its event on February 27, 2023. (Verif. Compl. ¶¶ 64, 71.) Bright kept doing everything to meet the university's requirements for holding an event. (Verif. Compl. ¶¶ 71–73.) But less than two weeks before the scheduled event, President Wendler thwarted Spectrum WT's efforts by spurning the facility-use procedure and banning drag shows at West Texas A&M. (Verif. Compl. ¶ 74.)

President Wendler decides to impose his personal views instead of following the Constitution.

Around lunchtime on March 20—just 11 days before the drag show—Bright received an email from Dr. Chris Thomas, West Texas A&M's Vice President for Student Affairs, asking to "meet with you and discuss your upcoming event." (r) 0., 0.2 ( ) 2s A10

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opposition to his perceived

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approval procedures. (Verif. Compl. ¶ 93.) And not only are Plaintiffs thus injured financially, but they are suffering harm to their charitable goal in organizing the drag show and carrying out their overall mission. (Verif. Compl. ¶ 94.)

Indeed, even if Plaintiffs could find an alternative venue in days' time, exiling Plaintiffs' expressive activities to an off-campus venue both burdens their ability to reach their intended audience and sends the message that their expressive activity is unwelcome at West Texas A&M, a public university. (Verif. Compl. ¶ 98.). And of course, a new venue would cost money and require Plaintiffs to obtain both audio-visual equipment and security out-of-pocket. (*Id.*)

ARGUMENT

Plaintiffs are entitled to a temporary restraining order and preliminary injunction because Plaintiffs satisfy their burden to demonstrate "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury to [Plaintiffs] outweighs any harm to [Defendants] that may result from the injunction; and (4) that the injunction will not undermine the public interest." *Smith v. Tarrant Cnty. Coll. Dist.*, 670 F. Supp. 2d 534, 537 (N.D. Tex. 2009) (granting in part temporary restraining order against university for violating the First Amendment).

I. Plaintiffs Are Substantially Likely to Succeed on the Merits Against the University's Brazen Censorship of Protected Expression.

"The First Amendment is not an art critic," and drag shows, like other forms of theatrical performance, are expressive conduct that the First Amendment prohibits President Wendler from censoring. *Norma Kristie, Inc. v. City of Okla. City*, 572 F.

Supp. 88, 91 (W.D. Okla. 1983) (holding drag shows are protected First Amendment expression).

The freedom of expression enshrined in the First Amendment "does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Whatever the mode of expression, the First Amendment protects conduct "inten[ded] to convey a particularized message," (*id.* at 404, 406), and it prohibits public university officials from suppressing student expression simply because they disagree with its viewpoint or find the message offensive. *Papish*, 410 U.S. at 670. If anything, whether speech is protected by the First Amendment is a legal, not moral, analysis. *Dodds v. Childers*, 933 F.2d 271, 273 (5th Cir. 1991). d26(d)(,)i 0 0 50q 0.24 0T 9-326.9mtfd

Cir. 1985) (holding a blackface performance is protected First Amendment expression, even when it is "sheer entertainment" without a political message).

Under core First Amendment principles, Defendants' ongoing suppression of a peaceful charity drag show constitutes unlawful viewpoint and content discrimination. The Court should stop the ongoing injury to Plaintiffs' First Amendment freedoms and restore constitutional order on West Texas A&M's campus

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includes the First Amendment prohibition on viewpoint discrimination.

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unconstitutional prior restraint. To the same end, this Court should put a stop to Defendants' ongoing viewpoint-based censorship of Plaintiffs' PG-13 charity

Even if President Wendler's opinion were shared by all but the students here, he cannot justify stifling Plaintiffs' expression on moral grounds. That argument lost in *Southeastern Promotions*. It lost in

up an area for indiscriminate use . . . by some segment of the public, such as student organizations, such area may be deemed to be a designated public forum").

Under the First Amendment, "a government . . . has no power to restrict expression because of its message, its ideas, its subject matter, or its content" unless it satisfies strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (cleaned up). To meet that high bar here, Defendants "must show that [their] regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270.[3] They cannot meet that burden. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions").

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for women and

speech,[5] to pro-life groups having to fight for recognition at the University of Arizona,[6] censorship of expression on public campuses continues to fester. But students' expressive rights should not, and do not, turn on the whims of college administrators. The First Amendment does not play favorites.

President Wendler's censorship singles out one type of artistic expression out of many—drag shows—for differential treatment and censorship simply because he dislikes the message he perceives. It is unconstitutional viewpoint discrimination for the reasons explained. And putting aside President Wendler's confessed motives, the ban is unlawful content discrimination. A temporary r92 cm B -0.1 ( ) 13.2 (a) -0.2 (s) 0.1 (i

Plaintiffs' ongoing injuries go further. While the effects of President Wendler's unilateral cancelation of Plaintiffs' event will reach their peak on March 31, his announcement is causing *current* harm to Plaintiffs' First Amendment rights, which only this Court's swift intervention will cure.

Plaintiffs made great efforts to plan the March 31 event and follow the university's steps for securing a campus space, and toward staffing, promotion, and other logistics. (Verif. Compl. ¶¶ 37–40, 50–56, 58, 60–64, 67–69, 71–72.) And they have made efforts to inform would-be audience members of the event's date, time, and location. (Verif. Compl. ¶¶ 67–69.) President Wendler's cancelation of the event has jeopardized those efforts and Plaintiffs' ability to hold the show, causing ongoing and irreparable injury to Plaintiffs.

Because of President Wendler's order, Spectrum WT—staffed by busy students like Plaintiffs Bright and Stovall—must now seek alternative, off-campus venues to host the event, multiplying the cost and effort to put on the show. If the Court does not enjoin Wendler's efforts to exile the event, Plaintiffs will be forced to reach into their barren college-student pockets for a new venue and security, or instead self-censor. (Verif. Compl. ¶ 98.)

The ongoing ban on campus drag shows is also injuring Plaintiffs' ability to reach their intended audience. Spectrum WT's mission is to bring its message to *campus*—a mission frustrated if they are required to hold their event in exile. (Verif. Compl. ¶ 98.) Their intended audience and Spectrum WT's members may be less

WT's ability to raise charitable funds for suicide prevention in support of its mission will suffer. (Verif. Compl. ¶ 94.)

President Wendler's edict is also chilling Spectrum WT's plans to hold similar events. For example, while Spectrum WT intends to hold an annual drag show, the

In addition, the Fifth Circuit has been clear that "injunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter.*, 732 F.3d at 539 (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)). *See also Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 298 (5th Cir. 2012) (same). Even the State of Texas would seemingly agree that an injunction here would benefit the public interest, having passed a 2019 campus free speech law forbidding universities from "tak[ing] action against a student organization or deny[ing] the organization any benefit generally available to other student organizations at the institution on the basis of a political, religious, philosophical, ideological, or academic viewpoint expressed by the organization or of any expressive activities of the organization." Tex. Educ. Code § 51.9315(g). In sum, a temporary restraining order and preliminary injunction will serve the public interest. That is one more reason to grant Plaintiffs' motion.

IV. The Court Should Waive the Bond Requirement Because Plaintiffs Seek Only to Protect Their First Amendment Rights.

The amount of security for a bond under Fed. R. Civ. P. 65 is within the Court's discretion, meaning a Court may waive the bond requirement. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir.1996). When, as here, plaintiffs seek to vindicate their constitutional rights and the potential monetary harm to the defendants is negligible, courts have rightly waived the bond requirement. Indeed, the Fifth Circuit explained that "public-interest litigation" is "an area in which the courts have recognized an exception to the Rule 65 security requirement." *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981). Because Plaintiffs

are engaging in public-interest litigation to vindicate First Amendment rights, the Court should waive the bond requirement. *See, e.g.*, *Gbalazeh v. City of Dallas, Tex.*, No.: 18-cv-0076, 2019 WL 2616668, at *2 (N.D. Tex. June 25, 2019) (citing *City of Atlanta* and waiving bond requirement when granting preliminary injunction on First Amendment grounds against charitable solicitation ordinance); *Gordon v. City of Houston, Tex.*, 79 F. Supp. 3d 676, 695 (S.D. Tex. 2015) (waiving bond requirement when granting preliminary injunction on First Amendment grounds against political contribution limits).

Philadelphia, PA 19106
Tel: (215) 717-3473
Fax: (267) 573-3073
conor.fitzpatrick@thefire.org
adam@thefire.org
jeff.zeman@thefire.org

* *Pro Hac Vice* Motions Forthcoming

Attorneys for Plaintiffs Spectrum WT, Barrett Bright, and Lauren Stovall