

CERTIFICATE OF INTERESTED PARTIES

The cause number and style of the case is No. 23-10994, Spectrum WT v. Wendler (USDC Civil No.2:23-CV-48, Northern District of Texas).

The undersigned counsel of record certifies that the following listed persons or entities described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

This appeal involves important questions about First Amendment protection for art, entertainment, and similar expression, including when, if ever, public university officials can censor that expression on campus because they dislike the intended or perceived message. The opportunity to address details about these questions at oral argument will aid the Court's decision-making process.

For those reasons, Plaintiffs respectfully request oral argument.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. Plaintiffs-Appellants Spectrum WT, Barrett Bright, and Lauren Stovall appeal from the district court's September 21, 2023, order denying their amended motion for a preliminary injunction. ROA.849–74. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). Plaintiffs filed a timely notice of appeal on September 26, 2023. ROA.882–84.

STATEMENT OF ISSUES

1. From stage performances to video games, the Supreme Court has long held that the First Amendment protects art and entertainment because it is expressive. Plaintiffs wish to perform a PG-13 charity drag show at West Texas A&M University, which the University's president agreed is "performance" and "artistic expression." Did the district court err in concluding that Plaintiffs' drag show lacks First Amendment protection?

2. Public officials violate the First Amendment when they stifle protected expression based on their personal worldview. Before anyone took the stage, West Texas A&M's president banned drag shows in campus forums open to student expression because, in his view, drag shows promote values that clash with his own. Did the district court err in not enjoining this viewpoint-based prior restraint on protected expression?

STATEMENT OF THE CASE

This case is about a public university president openly defying the Constitution to ban students' on-stage drag performances from campus public forums because he believes drag shows send a "demeaning" and "derisive" message. ROA.265–67. In refusing to enjoin President Wendler's viewpoint-driven ban on Plaintiffs' PG-13 charity drag show, the district court overlooked President Wendler's stated reasons for imposing a prior restraint on Plaintiffs' expression and instead accepted Wendler's after-the-fact rationale, abandoning a century of First Amendment jurisprudence.

West Texas A&M opens its facilities to student expression, including stage performance.

West Texas A&M University opens certain campus spaces for students, recognized student organizations, and the general public to use for a broad range of expressive activity. ROA.220–21 ¶¶ 27–33. Texas law and university policy bar administrators from denying access to these spaces based on students' "political, religious, philosophical, ideological, or academic viewpoint" or the content of their "expressive activities." Tex. Educ. Code § 51.9315(g); ROA.339–41.

One of these spaces is Legacy Hall in West Texas A&M's student center. ROA.221 ¶¶ 33–34. The university

To that end, in November 2022, Spectrum WT started planning a March 31, 2023, charity drag show at Legacy Hall. ROA.226 ¶¶ 52–56. For Spectrum WT and its members, the show was important to express support and advocate for the LG BTQ+ community. ROA.229 ¶ 74. Proceeds from the event would benefit an LGBTQ+ charity, just as prior

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.

ROA.267 (emphasis added). Nowhere in Wendler’s 734-word email did he even hint about concerns of “lewdness.” ROA.265–67.

Defendant and Texas A&M System Chancellor John Sharp, having authority over President Wendler,¹ chose not to rein in Wendler’s boastful departure from the First Amendment, even as public attention mounted. ROA.218 ¶ 18; ROA.235 ¶ 120; ROA.243 ¶ 158. And Chancellor Sharp could have—he often intervenes in free speech controversies within the Texas A&M system.²

¹ Tex. A&M Univ. Sys., Sys. Policy 02.02, Office of the Chancellor, §§ 1.12, 2.1, available at <https://policies.tamus.edu/02-02.pdf> [<https://perma.cc/XF69-TU2Q>].

² E.g., Shannan Najmabadi, Texas House Calls on Texas A&M Chancellor to Halt White Nationalist Rally, Tex. Trib. (Aug. 14, 2017), <https://www.texastribune.org/2017/08/14/texas-house-calls-texas-m-chancellor-stop-white-nationalist-rally-occu> [<https://perma.cc/4M5S-XEZC>]; Michael Hardy, Country Revival, Tex. Monthly (July 2017), <https://features.texasmonthly.com/editorial/country-revival> [<https://perma.cc/DCK5-C56C>].

The district court denies injunctive relief.

On March 24, 2023, Plaintiffs sued President Wendler and Texas A&M System officials. ROA.16. The same day, they moved for a temporary restraining order and a preliminary injunction. ROA.126–62.

The students explained that without immediate relief, they would have to seek an off-campus venue, as the banned campus event was scheduled for the next Friday. ROA.157.

Three days later, the district co

Chancellor Sharp and Vice President Thomas, and rejected Wendler's claim to sovereign immunity. ROA.868–72. In sum, the district court

Id. Texas has appealed Judge Hittner's ruling. *Woodlands Pride v. Paxton*, No. 23-20480 (5th Cir. Oct. 3, 2023).

The drag show ban is irreparably harming Plaintiffs, including their constitutional right to put on a show this March.

As public attention grew after Plaintiffs sued, President Wendler revealed in a television interview his resolve to bar drag shows from campus: "I wouldn't have done anything any differently." ROA.623. ⁵ And he has stuck to his word. Wendler has not renounced his public edict banishing drag shows from campus. ROA.235 ¶ 119.

Spectrum WT has applied to hold a drag show in Legacy Hall on March 24, 2024. ROA.237 ¶ 130(b). But Defendants' ongoing campus drag show ban imperils that exercise of Plaintiffs' First Amendment rights. ROA.238–39 ¶¶ 133, 136. As Wendler has shown, he will throttle Spectrum WT's planned show at the last minute because he finds it "inappropriate" and "denigrat[ing] and demean[ing to] women." ROA.265–67. And even now, Plaintiffs are itutT.6w1111st milo S, dainen."

an on-campus performance that

SUMMARY OF THE ARGUMENT

From the public square to public universities, the government must remain neutral not only in our “political system,” but also our “cultural life.” *Turner Broad. Sys., Inc. v. FCC* , 512 U.S. 622, 641 (1994). Yet the president of West Texas A&M University, Walter Wendler, has been anything but neutral. Before Plainti

ban threatens Plaintiffs' First Amendment right to hold their charity drag show planned for March 24, 2023, at Legacy Hall, a designated public forum on campus. Only swift injunctive relief can protect Plaintiffs from irreparable harm.

Yet the district court refused to enjoin Defendants' sweeping attack on protected expression at a public university. The district court stands alone in erroneously holding that drag shows lack the same uncompromising First Amendment protection that all art and entertainment enjoys. Every other federal court to address drag shows has held that the First Amendment protects them.⁶ And a century of Supreme Court decisions protecting expressive conduct against the value judgments of public officials proves those courts right—and the district court wrong.

Because the First Amendment protects drag performance, the district court also erred by not enjoining Defendants' drag ban as a viewpoint-driven, content-based, prior restraint in a campus public forum. Nothing justifies such stark censorship. Wendler's fear-mongering about "lewdness"—before Plaintiffs have even taken the

⁶ See cases cited *infra* p. 17 n.7.

campus stage for their PG-13 show—is no license to silence protected expression, especially when Wendler raised “lewdness” only after

injunction turns on a mixed question of law and fact, it, too, is reviewed de novo.” *Id.* (cleaned up). Thus, de novo review is apt here.

Plaintiffs are entitled to a preliminary injunction on the first three causes of action—for viewpoint discrimination, exclusion from a public forum, and prior restraint in violation of the First Amendment—in their First Amended Complaint. ROA.241–53. See generally *Byrum*

that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, 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*, 138 S. Ct. 1719, 1741–42 (2018) (Thomas, J., concurring). So when Americans get on stage and express themselves, whether through pantomime, an evocative ballet, or an electric guitar wailing the national anthem, the First Amendment protects it.

That protection extends to drag performance. E.g., *Norma Kristie, Inc. v. City of Oklahoma City*, 572 F. Supp. 88, 91–92 (W.D. Okla. 1983) (“Any inequality between [a drag show] and a musical or play is a distinction without a difference.”). In fact, every court to consider the question has held that the First Amendment protects drag shows.⁷ But

⁷ *Norma Kristie*, 572 F. Supp. at 92; *Woodlands Pride*, 2023 WL 6226113 (enjoining Texas’ statutory drag ban); *Friends of Georges, Inc. v. Mulroy*, ___ F. Supp. 3d ___, 2023 WL 3790583 (W.D. Tenn. June 2, 2023) (Parker, J.) (enjoining Tennessee’s statutory drag ban); *Imperial Sovereign Ct. of Mont. v. Knudsen*, ___ F. Supp. 3d ___, 2023 WL 6794043 (D. Mont. Oct. 13, 2023) (Morris, J.) (enjoining Montana’s statutory drag ban); *HM Fla.-ORL, LLC v. Griffin*, ___ F. Supp. 3d ___, 2023 WL 4157542 (M.D. Fla. June 23, 2023) (O’neetSell, J.) (enjoining Florida’s statutory drag ban); *S. Utah Drag Stars v. City of St. George*, ___ F. Supp. 3d ___, 2023 WL 4053395 (D. Utah June 16, 2023) (Nuffer, J.) (ordering city to grant permit for drag show on public property). To date, *Woodlands Pride*, *Friends of Georges*, and *HM Fla.-ORL* are on appeal.

Supreme Court has “long recognized th at it is difficult to distinguish politics from entertainment, and dangerous to try.” *Brown*, 564 U.S. at 790. This is because “[w]hat is one man’s amusement, teaches another’s doctrine.” *Winters v. New York*, 333 U.S. 507, 510 (1948). Entertainment “may affect public attitudes and beha vior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which ch aracterizes all artistic expression.” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

Likewise, the Constitution protects all modes of artistic expression, including “books,” “plays,” “movies,” and “video games.” *Brown*, 564 U.S. at 790. So even when art meshes wi th “live entertainment, such as musical and dramatic works” it still “fall[s] within the First Amendment guarantee.” *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

B. The First Amendment protec ts drag shows because they are expressive.

Drag shows communicate a wide range of messages. As Judge Hittner recently explained, “[d]rag shows express a litany of emotions and purposes, from humor and pure entertainment to social commentary on gender roles.” *Woodlands Pride*, 2023 WL 6226113, at *14. Likewise, Judge Nuffer from the District of Utah recently held that drag shows “are

indisputably protected speech and are a medium of expression, containing political and social messages regarding (among other messages) self-expression, gender st

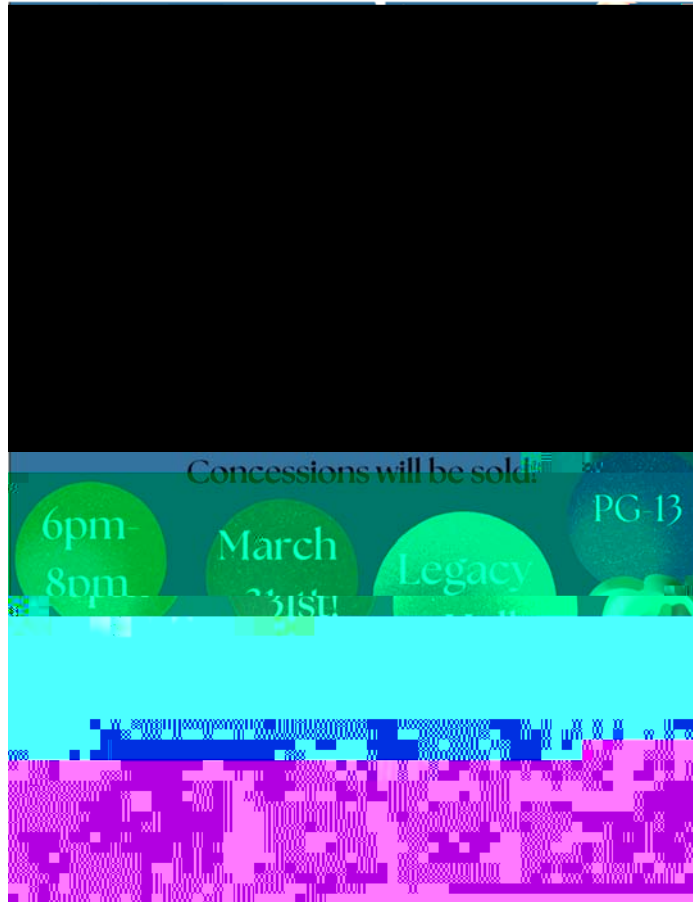
Not only does the district court stand alone, but its holding also defies a century of First Amendment jurisprudence about what constitutes protected expression.

articulable message is not a condition of constitutional protection .”
Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. , 515 U.S. 557, 569
(1995) (emphasis added). As it explained, if the First Amendment were
“confined to expressions conveying a particularized message, [it] would
never reach the unquestionably shi

paintings of Jackson Pollock from the drips on a tarp below a house painter.” *Robar v. Vill. of Potsdam Bd. of Trustees* , 490 F. Supp. 3d 546, 565 (N.D.N.Y. 2020) (cleaned up) (landowner’s display of disused toilets in a garden constituted protected expression). Context is why, for example, Americans understand that a coach kneeling at the 50-yard line is expressing himself. See generally *Bremerton Sch. Dist.* , 142 S. Ct. at 2426–27.

The context of Plaintiffs’ planned drag performances shows the district court erred. Here, Spectrum WT intends to communicate a message with performances wearing gender non-conforming clothes, on stage in a venue intended for student expression, dancing to themed music. Its performance would take place in front of a willing, ticketed audience invited to attend an event advertised for the purpose of supporting an LGBTQ+ charity.

All of that also highlights why viewers of Plaintiffs’ shows would understand them to be expressive. E.g., *Woodlands Pride* , 2023 WL 6226113, at *14; *S. Utah Drag Stars* , 2023 WL 4053395, at *20. And Plaintiffs’ flyers for the event leave no doubt as to its context as a pro-LGBTQ+ event, by LGBTQ+ groups, in support of an LGBTQ+ charity:



ROA.232 ¶ 94.

The district court cited *Tagami v. City of Chicago* in discounting the context of Plaintiffs' show. ROA.861 (citing 875 F.3d 375, 378 (7th Cir. 2017)). But *Tagami* helps illustrate why drag shows are inherently expressive. There, the Seventh Circuit held the First Amendment did not protect a woman publicly baring her breasts as a form of protest because there were no "facts from which it might reasonably be inferred that onlookers would have readily understood that this public display of nudity was actually a political protest against the City's public-indecency

ordinance.” *Id.* Contrast that decision with the Supreme Court holding that nude dancing on a stage is protected expressive conduct, given the difference between live entertainment conveying a message and mere public nudity. See *Pap’s A.M.*, 529 U.S. at 289. While Plaintiffs’ PG-13, non-lewd show is worlds away from nude dancing, the constitutional principle applies the same.

Drag shows like Plaintiffs’ are inherently expressive. Even the Attorney General of Texas recently told the Court “that these types of drag-show performances might well constitute ‘inherently expressive conduct’ protected by the First Amendment.”⁸ The Court should reverse the district court’s error concluding otherwise.

3. Neither *Rumsfeld v. FAIR* nor history weakens First Amendment protection for drag shows.

Below, Wendler insisted that *Rumsfeld v. FAIR* imposed a new rule that if conduct requires “explanatory speech,” it is not “inherently expressive” and lacks First Amendment protection. ROA.453–54. The district court reasoned similarly, citing *FAIR* for the notion that without “accompanying political or dialogue,” observers won’t understand a drag

⁸ Appellant’s Opposed Motion for Stay Pending Appeal, *Woodlands Pride, Inc. v. Paxton*, No. 23-20480, Doc. 42 at 14 (5th Cir. Oct. 27, 2023).

show is “communicat[ing] . . . LGBTQ+ rights,” rendering drag performance unprotected. ROA. 860–61 & n.16. Both are wrong.

FAIR is a compelled-speech case, not one limiting protection for expressive conduct. 547 U.S. at 62–65. Law schools wanting to bar military recruiters claimed the government was compelling them to speak in favor of the military by allowing recruiters on campus. The Supreme Court rejected their argument, noting that excluding military recruiters was “expressive only because the law school accompanied their conduct with speech explaining it.” *Id.* at 66.

But FAIR does not hold that an accompanying explanation divests expressive conduct of First Amendment protection. Nor could it—an explanation often augments the message inherently expressive conduct conveys. Imagine a painter revealing her latest work. If half the audience sheds tears because the painting evokes sadness, the painter doesn’t lose the First Amendment if she explains her work is supposed to convey happy thoughts. The audience understood the painting communicated something—and that’s enough. *Hurley*, 515 U.S. at 569; *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1241 (citation omitted). In the same way, drag performers do not lose the First Amendment if their intended

message differs from how another perceives it, just as President Wendler says he perceives the “artistic expression” of drag shows to be “mocking” and “cartoon-like . . . amusement.” ROA.265–66.

FAIR simply reaffirmed Johnson’s recognition that the First Amendment protects “inherently expressive” conduct. 547 U.S. at 66. And because live entertainment, music, and theatre—all intrinsic to drag shows—are inherently expressive, the First Amendment protects them, with explanation or without. *Schad*, 452 U.S. at 65–66 (collecting cases). These mediums are expression. Getting on stage and performing is expression, and has been since the Ancient Greeks took to the Athenian

suggestion that expressive conduct was unknown to America's historical "Free Speech ecosystem." ROA.851–52.

In any event, the district court's appeal to *Bruen* does not change the outcome here. ROA.851 (citing *N.Y. State Rifle & Pistol Ass'n., Inc. v. Bruen*, 142 S. Ct. 2111, 2161 (2022)). *Bruen* requires that the government justify regulation of Second Amendment rights by pointing to text, history, and tradition. *Bruen*, 142 S. Ct. at 2126, 2131–33. It does not require Americans to prove a historic right against their government controlling ideas and expression. See *id.* at 2132. ("Just as the First Amendment protects modern forms of communications . . .") (citation omitted). Our founding documents establish that enduring freedom. And as explained, a long line of Supreme Court jurisprudence upholding the First Amendment's guarantee of free expression controls here.

In short, Plaintiffs' planned drag shows have an unmistakable expressive intent. Getting on stage and dancing in costume is quintessentially expressive, and those who observe it would understand the events communicate something. That is why the First Amendment protects the Plaintiffs' performance at West Texas A&M.

C. First Amendment protection for drag performance is just as robust at public universities.

First Amendment protection for drag shows does not lose its potency at public universities. Rather, the First Amendment applies with no “less force on college campuses than in the community at large.” *Healy*, 408 U.S. at 180. The need to preserve adult college students’ ability to “generate, debate, and discuss both general and specific ideas, hopes, and experiences” is why “courts must be especially vigilant against” limits on campus expression. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 339 (5th

speech, the Supreme Court announced that expression “on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” *Id.* at 670.

If the First Amendment protected the cartoon in *Papish*, it protects campus drag shows like *Spectrum* WT ’s, featuring clothed performers dancing to non-profane music. Yet the district court departed from *Papish* and turned instead to *Fraser*—a case regulating minors’ speech

232, 247 (3d Cir. 2010); see also *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2049 n.2 (2021) (Alito, J., concurring) (due to their “age, independence, and living arrangements,” regulating college students’ speech “may raise very different questions from those presented” in K–12 cases).

While primary and secondary schools act *in loco parentis*, public universities “are intended to function as marketplaces of ideas,” where students and faculty “often have values, views, and ideologies that are at war with the ones” held by college officials. *McCauley*, 618 F.3d at 243–44 (cleaned up). In that way and others, public universities are far removed from K–12 schools, instead closer to a town where students are “contributing citizens” and gather in public streets and parks—traditional forums for the First Amendment. *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 117 (5th Cir. 1992). At bottom, there is no comparison between the captive audience of a K–12 classroom and the marketplace of ideas of a university campus.

In the end, the First Amendment protects drag shows on- and off-campus, just as strongly as it protects every other form of art and entertainment for which the Supreme Court has upheld First

Amendment protection. Because of that robust protection, Defendants are violating the First Amendment by shutting down Plaintiffs' drag shows because they offend President Wendler's views.

III. Because the First Amendment Protects Drag Performance, Plaintiffs Are Substantially Likely to Succeed on the Merits.

Because drag performances are protected expression, the First Amendment prohibits President Wendler and the other Defendants from banning the performances from campus public forums, discriminating against the shows based on perceived viewpoint, or imposing a prior restraint on drag performances. Plaintiffs are likely to succeed on the merits of these claims because Defendants cannot meet strict scrutiny's exacting standard. The district court erred in concluding otherwise. ROA.873.

A. The district court erred by not enjoining Defendants' viewpoint-based ban on Plaintiffs' expression.

President Wendler proclaimed to the West Texas A&M community that he banned drag shows from campus because the message he thinks drag shows convey offends his views and offends others. ROA.233–34 ¶ 105; ROA.265–67. That is textbook viewpoint discrimination. And no

after-the-fact justification can save

U.S. 819, 829 (1995). That is why viewpoint discrimination is “presumptively unconstitutional.” *Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273, 284 (5th Cir. 2003). Public officials cannot suppress speech because it affronts their values.

“[C]ensorship based on a state actor’s subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination.” *Robinson v. Hunt Cnty.*, 921 F.3d 440, 447 (5th Cir. 2019) (citing *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017)). The Court’s holding in *Robinson* echoes that “bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Johnson*, 491 U.S. at 414.

That unyielding First Amendment protection against viewpoint discrimination applies at public universities like West Texas A&M. *Rosenberger*, 515 U.S. at 835–36; *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993) (because

the sweep of the First Amendment.”) . That protection extends to all campus public forums, and even nonpublic ones. Prof’l Ass’n of Coll. Educators, TSTA/NEA v. El Paso Cnty. Cmty. Coll. Dist ., 730 F.2d 258, 263 (5th Cir. 1984); Chiu , 260 F.3d at 350.

In sum, when campus officials refuse to stay neutral on the viewpoints students express, and instead suppress speech student speech based on subjective tastes, they violate the First Amendment. Papish , 410 U.S. at 670; Iota Xi, 993 F.2d at 393.

2. President Wendler’s words prove he banned drag performances from campus based on viewpoint.

By elevating Wendler’s personal views over Plaintiffs’ protected expression, Defendants are violating the First Amendment. In fact, Defendants’ ongoing censorship singles out one type of artistic expression—drag performance—from many, all because President Wendler dislikes the message he thinks drag performance sends.

And his words prove it.

In his edict to the West Texas A&M campus, Wendler accepts that drag shows are “performance” and “artistic expression.” ROA.265–67. But he denounces the messaging, accusing it of “mocking another person or group.” Id. He condemns Plaintiffs’ yet-to-be-conveyed message as

“derisive, divisive and demoralizi

of “mocking” them. In that case, he likely would encourage others to both go to the show and “send the dough.” See ROA.265–67.

The district court also erred by suggesting that Plaintiffs must show President Wendler targeted Plaintiffs’ “specific motivating ideology or the opinion or perspective.” ROA.865 (quoting *Rosenberger*, 515 U.S. at 829). Setting aside that Wendler’s letter invoked ideology (ROA.265–66), *Rosenberger* does not go that far. Rather, the Supreme Court rejected the idea that viewpoint discrimination is “bipolar,” explaining that “exclusion of several views on” an issue “is just as offensive to the First Amendment as exclusion of only one.” *Rosenberger*, 515 U.S. at 831.¹¹

It matters not if Wendler has targeted Plaintiffs’ expression because he deems it offensive to women, and not because he disagrees with Plaintiffs’ pro-LGBTQ+ message. He is still censoring speech based on viewpoint. Even if President Wendler mistakenly believed Plaintiffs’ intended message was to offend, his actions would still violate the First

¹¹ The district court also pointed to *Robertson v. Anderson Mill Elementary School*, a case about an elementary school principal refusing to include an LGBTQ+-themed essay in a school-sponsored, fourth-grade essay booklet for ostensibly viewpoint-neutral reasons. ROA.865 n.24 (citing 989 F.3d 282, 290 (4th Cir. 2021)). Those facts are a far cry from President Wendler imposing his personal views to block a recognized student organization’s performance in a public university venue open to student expression.

Amendment. See *Heffernan v. City of Paterson*, 578 U.S. 266, 273 (2016) (holding that a police officer could challenge his demotion for perceived political activity under the First Amendment, “even if, as here, the employer makes a factual mistake about the employee's behavior.”).

Letting the district court’s reasoning to stand would allow campus administrators to gag students and disfavored speech just by labeling speech “offensive” or “divisive,” when they know the message is anything but. And here, there is no mistake about the students’ intended message: Plaintiffs verified in their complaint that their drag show is important to “convey messages advocating for an

through expressive conduct, contrary to what the district court suggested. ROA.864–85. In fact, the Supreme Court in *Johnson* explained the “enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea” *Johnson*, 491 U.S. at 416 (emphasis added). Just as Texas could not limit flag burning to conveying only messages that “d[o] not endanger the flag's representation of nationhood and national unity,” *id.* at 417, Defendants cannot limit campus stage performances to only those that do not offend President Wendler.

Wendler's edict recalls the city officials who censored the controversial rock musical “Hair” in *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975). Those officials denied a group's application to perform “Hair” in a municipal auditorium, insisting that the musical “was not in the best interest of the community” because it clashed with their standard of “clean and healthful and culturally uplifting” performances. *Id.* at 549. But the Supreme Court struck down the denial, refusing to “hold theater subject to a drastically different standard” of First Amendment protection than other forms of expression. *Id.* at 557–

58. If the First Amendment barred officials from censoring a spicy musical based on what they believed “clean and healthful,” then surely it bars Defendants from stifling Plaintiffs’ PG-13 drag show because it doesn’t meet President Wendler’s preferences.

Wendler’s edict also recalls the George Mason University officials from the Fourth Circuit’s decision in *Iota Xi*. There, administrators sanctioned a fraternity for hosting an “ugly woman contest,” insisting the contest was riddled with “racist and sexist” overtones, including contestants “dressed as caricatures of different types of women. . . .” *Iota Xi*, 993 F.2d at 387–88. The Fourth Circuit rejected those reasons because they violated the First Amendment’s bar on viewpoint discrimination, as “the ‘ugly woman contest’ . . . ran counter to the views the University sought to communicate to its students and the community.” *Id.* at 393. So too should this Court reject Wendler’s viewpoint-based concerns about sexism and misogyny he gave for banning Plaintiffs’ protected expression. ROA.265–67, 865–67.

4. Defendants cannot invent after-the-fact reasons to avoid Wendler’s viewpoint-based edict.

President Wendler offered a newfound basis for his censorship in his district court briefing: He accused Plaintiffs’ PG-13 drag show of

“lewd[ness].” E.g., ROA.447. As Plaintiffs explain later, even if the Court considers that basis, it fails to pass strict scrutiny. See *infra* Section III.C.2. But the Court need not consider it. Instead, the Court should bind President Wendler to the viewpoint-based reasons he stated in his edict for muzzling Plaintiffs’ protected expression, and hold that the district court erred in considering Wendler’s after-the-fact excuse for censorship.

Start and end with President Wendler’s thorough explanation for his decision.¹² ROA.265–67. President Wendler’s edict rests only on his belief that a drag show is a “show, performance or artistic expression” inherently offensive to women. *Id.* Neither “lewd” nor any similar word appears in Wendler’s 734-word email. *Id.* The edict cites no university policy on lewdness. *Id.* And Wendler did not offer an affidavit or other contemporaneous evidence below suggesting that he considered “lewdness,” or anything similar, when he banished Spectrum WT’s drag show from campus.

Courts routinely reject post hoc explanations for silencing protected speech like Wendler’s. Just last year, the Supreme Court refused a school

¹² Wendler’s statement was deliberate, and he told the media that he “probably spent ten minutes per word” on his email: “It was very carefully done, every word chosen carefully.” ROA.623 at 25:00–27:47.

protects student expression from public college administrators who would bend the campus to their beliefs. The Court should affirm that principle and reverse.

- B. Excluding Plaintiffs' drag show from a public forum because of its content violates the First Amendment.

Legacy Hall is a designated public forum under the First Amendment, and thus the content-based restriction Wendler's edict imposes on Plaintiffs' use of Legacy Hall, and any other campus public forum, is presumptively unconstitutional.

1. Legacy Hall is a designated public forum open to students and the public for performances.

When a public university opens a space to student expressive activity, it creates a designated public forum. *Hays Cnty. Guardian*, 969 F.2d at 116; see also *Justice for All v. Faulkner*, 410 F.3d 760, 769 (5th Cir. 2005) (holding that when a university opens its parts of its university for student expression, it creates a designated public forum). West Texas A&M does precisely that with Legacy Hall and similar spaces.

By policy, West Texas A&M allows any person, "subject to reasonable time, place, and manner restrictions, to engage in expressive activities on campus." ROA.272–73. It broadly defines "campus" to

include both its “land and buildings.” ROA.272. It allows student organizations to use these facilities to plan “any special event,” including “fundraising activity” or “social gatherings or functions.” ROA.269, 272. And it broadly prohibits administrators from “action” or denial of “any benefit” on the “basis of a political, religious, philosophical, ideological, or academic viewpoint expressed by the organization or of any expressive activities of the organization.” ROA.273.

The university also holds out Legacy Hall as available to students and the public for many uses, including expressive ones. ROA.221 ¶¶ 32–34; ROA.327–32 ¶¶ 6–16; ROA.343–83. And consistent with the university’s policies and promotion, students have long used these spaces for performances, concerts, worship services—and even previous drag shows. *Id.*

When a public university creates “a forum generally open for use by student groups,” like West Texas A&M has with Legacy Hall, it must show that its restrictions “satisfy the standard of review appropriate to content-based exclusions.” *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). Content-based restrictions, like excluding drag from a designated public

forum, “are presumptively unconstitutional” and subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

2. The university’s prohibition on “drag shows” is a content-based restriction.

Content discrimination occurs when the government “target[s] speech based on its communicative content.” *Reed*, 576 U.S. at 163. Defendants’ ban on drag shows is content-based. It singles out a particular type of expression—drag performance—for differential treatment. Defendants do not restrict the dance team, cheerleaders, theatre productions, or any other student group from holding events involving performers dancing to music—only drag shows. See ROA.327–28 ¶¶ 6–7, ROA.329–30 ¶ 10, ROA.343–50, ROA.361–67 (showing various performances at West Texas A&M like a “Scholarship Pageant” featuring “seven beautiful contestants,” a “male beauty pageant,” and a “song-and-dance competition”). Nor has President Wendler barred student organizations from showing “R” or “PG-13” movies if minors are present.

Wendler singled out drag shows. That is content discrimination. Indeed, courts time after time have held that restrictions targeting drag shows are content-based. See *Imperial Sovereign Ct. of Mont.*, 2023 WL

6794043, at *9–10 (citing cases and similarly holding that a ban on drag shows “targets speech based upon content”).

Still, the district court assumed that a regulation of “sexualized” speech is not content-based, and that it is “more regulable” as a “time, place, or manner” restriction.” ROA.854–55. That was error. A time, place, or manner restriction must be “justified without reference to the content of the regulated speech,” “narrowly tailored to serve a significant governmental interest,” and “leave open ample alternative channels” for expression. *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (cleaned up). The district court did not apply that standard, much less explain why Defendants’ drag show ban meets it.

Putting aside the scarcity of evidence in the record suggesting Plaintiffs’ PG-13 show is “sexualized,” the Supreme Court’s decision in *Reno v. ACLU* makes short work of the district court’s error. There, the Supreme Court struck down a restriction on “indecent” and “patently offensive” speech, intended “to protect children,” as a “content-based blanket restriction on speech” that “cannot be ‘properly analyzed as a form of time, place, and manner regulation.’” *Reno v. ACLU*, 521 U.S.

U.S. at 264–65. The Supreme Court explained that singling out a particular subject for differential treatment is subject to “the most exacting scrutiny.” *Id.*

silence students “in the name alone of ‘conventions of decency.’” *Papish*, 410 U.S. at 670.

The district court erred in shifting the burden to Plaintiffs to “reconcile” the “competing legal obligations” imposed by harassment law, as “expressly or impliedly invoked” by Wendler’s letter. ROA.855. It is Defendants’ burden, not Plaintiffs’,

Fenves, 979 F.3d 319, 338–39 (5th Cir. 2020) (noting “the consistent line of cases that have uniformly found campus speech codes unconstitutionally overbroad or vague”).

2. Post-hoc concerns for “lewdness” or “sexualized conduct” do not meet Defendants’ compelling interest burden.

After Plaintiffs sued, Wendler for the first time claimed Plaintiffs’ show was “lewd.” ROA.446–47. As explained, the Court should reject Wendler’s after-the-fact excuse. See supra Section II.A.4. But even if the Court considers Wendler’s appeal to “lewdness,” it fails to show a compelling interest. Likewise, so does the district court’s rationale in labeling Plaintiffs’ drag show “sexualized.” ROA.853.

Neither “lewd” nor “sexualized” expression fall within the few narrow categories of unprotected

speech on a state university campus in the name of “lewdness” does not serve a compelling interest. 410 U.S. at 669–70.

Likewise, censoring speech at a public university because it is “sexualized” is not necessary to serve a compelling interest. If it were, expressive conduct, from displaying a replica of Michelangelo’s David to the short-skirted cheerleading squad, would be at the mercy of every college administration’s particular tastes. And here, while the district court painted drag shows as “sexualized,” the record refutes that view. Not only did Plaintiffs forbid profane music and shun “lewd” dancing, but President Wendler never mentioned anything “sexualized” in his drawn-out edict. ROA.229–30 ¶¶ 79, 81; ROA.265–67.

3. Banning Plaintiffs’ age-restricted drag shows does not serve a compelling interest in protecting minors.

Despite the record, the district court still fixated on “sexualized conduct,” reasoning that it “is more regulable under various First Amendment doctrines—especially when children are in the audience.” ROA.854 (citing *Pap’s A.M.*, 529 U.S. at 295; *FCC v. Pacifica Found.*, 438 U.S. 726, 732 (1978)). That erred on the facts and the law.

Again, the district court overlooked the record: Plaintiffs’ planned drag shows prohibit children from attending unless accompanied by a

parent or guardian. ROA.229 ¶ 80. There was and is no danger of children “in the audience” at Plaintiffs’ drag show, performed on a university campus after-hours, without a parent’s or guardian’s blessing. And Defendants have no compelling.

of a federal law targeting “dial-a-porn” telephone services under the First Amendment. 492 U.S. at 128 (cleaned up).

Sable also shows why *FCC v. Pacifica*, which the district court cited in raising its concern about “children . . . in the audience” (ROA.854), does not support a compelling interest here. There, the Supreme Court reiterated that even though *Pacifica* recognized an interest in protecting children from “indecent material,” its “emphatically narrow holding” is limited to the “unique attributes of broadcasting,” like broadcast’s ability to “intrude on the privacy of the home” and be “uniquely accessible to children, even those too young to read.” *Sable Commc’ns of Ca.*, 492 U.S. at 127 (cleaned up) (quoting *Pacifica*, 438 U.S. at 748–49). On the other hand, *Pacifica*

effects from expression. 529 U.S. at 295. But here, Defendants are directly restricting Plaintiffs' protected expression.

In the end, the district court erred in concluding that a sweeping ban on age-restricted campus drag shows serves a compelling interest protecting minors—an interest President Wendler did not raise in his edict.

4. Defendants' drag show ban is not narrowly tailored or the least restrictive means.

Defendants' ban on drag shows is neither narrowly tailored nor the least restrictive means of furthering their goals. See *Playboy Ent. Grp.*, 529 U.S. at 813 (content regulation permissible only if the government "chooses 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; see also *Brown*, 564 U.S. at 805 (explaining that banning minors from purchasing violent video games "is seriously underinclusive" because it "excludes portrayals other than video games"). But that's precisely what Defendants' ban does. There is no evidence Wendler has banned any other expression which might "denigrate or demean women." ROA.267.

Again, Defendants do not restrict the dance team, scantily clad cheerleaders, theatre productions, or any other student group using campus facilities to perform and dance to music—only drag shows. Likewise, based on Wendler’s edict, “lewd” music, movies, television shows, and the like on campus remain untouched. See ROA.265–67.

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 might find a drag show misogynistic or offensive can simply not attend and “effectively avoid further bombardment of their sensibilities simply by averting their eyes.” Cohen, 403 U.S. at 21. The First Amendment ensures the people have that choice, instead of public officials making it for them.

5. The district court erred by invoking intermediate scrutiny.

The district court proposed that the drag ban is subject to intermediate scrutiny. ROA.873. It is not. Intermediate scrutiny applies only if “the governmental interest is unrelated to the suppression of free expression.” *United States v. O’Brien*, 391 U.S. 367, 377 (1968). But President Wendler’s ban relates solely to banning drag shows as a form of “artistic expression.” ROA.266. This case is not *Tagami*, where a

generally applicable ban on public nudity conflicted with someone wanting to use nudity as a form of protest. 875 F.3d at 378; see also ROA.861 (citing *Tagami*). Plaintiffs' planned drag shows violate no law, and Defendants have never claimed otherwise.

Defendants are stuck with strict scrutiny. And they have failed to "specifically identify an actual problem in need of solving" and show that "the curtailment of free speech [is] actually necessary to the solution." *Brown*, 564 U.S. at 786. The Court should reverse.

- D. The district court erred by not enjoining Defendants' ongoing drag show ban as an unconstitutional prior restraint.

President Wendler banned the students' performance before they ever took the stage. That is a classic prior restraint, as Plaintiffs alleged and showed in moving for a preliminary injunction. ROA.250–53, 311–13. Yet the district court overlooked Plaintiffs' prior restraint claim, addressing it nowhere in its decision. That, along with not enjoining the drag ban at West Texas A&M as a prior restraint, was error.

1. President Wendler imposed a prior restraint by blocking expression based on subjective criteria.

When officials like President Wendler deny speakers access to a public forum because the message does not conform to subjective criteria,

they impose an unconstitutional prior restraint. *Southeastern Promotions*, discussed above, says so. There, the Supreme Court concluded that city officials imposed an unconstitutional prior restraint by excluding “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. Likewise, President Wendler imposed a prior restraint by barring Plaintiffs’ drag shows from campus forums because the message does not meet Wendler’s criteria about what does or does not “demean women.” ROA.265–67.

Actions “regulating speech contingence

restraint. “[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

convey ideas about homosexuality,” which he believed were harmful. *Id.* at 1322 (emphasis omitted).

Wendler’s edict is no different, a accusing drag of conveying messages that are “demeaning,” “derisive,” “mocking,” “objectifying,” and “inappropriate.” ROA.265–67. But the First Amendment prohibits Defendants from restraining Plaintiffs’ PG-13 charity show before they step on stage, just because of Wendler’s “perception” that Plaintiffs will “attempt to convey ideas” that Wendler believed were harmful. *Gay Student Servs.*, 737 F.2d at 1322.

That is why the Court should reject President Wendler’s after-the-fact complaint about off-campus performances by “Miss Myka,” the slated guest emcee for Plaintiffs’ cancelled 2023 drag show. E.g., ROA.447, 864. For one thing, President Wendler never mentioned “Miss Myka” in his email banning drag shows. ROA.265–67. Only after Plaintiffs sued Wendler did he dig around for information about “Miss Myka” to speculate that the performer might have defied Plaintiffs’ clear instruction to avoid lewd conduct. ROA.229 ¶ 79; ROA.447, 449. And even then, Wendler never contended he knew of “Miss Myka” or had concerns about the guest emcee. See ROA.442–67. Just as the Court

should refuse any after-the-fact appeal to “lewdness,” it should refuse any after-the-fact speculation about “Miss Myka.” See *supra* Section III.A.4.

Even had Wendler considered “Miss Myka” when issuing his edict, the ban would still be a prior restraint. Mere conjecture about expression cannot justify blocking it. See *Promotions*, 420 U.S. at 554–55; *Gay Student Servs.*, 737 F.2d at 1325. Under Wendler’s view, public university officials could bar a celebrated actress from performing on campus if she once appeared nude in a performance, even in the face of assurances that the campus performance contained no nudity. Or they could prevent students from inviting a prominent political thinker to campus just because he once said something offending an administrator’s beliefs. The Court should reject that expression-chilling view.

The only way public officials can justify a prior restraint on access to a public forum—if ever—is with “narrow, objective, and definite standards to guide” officials in granting or denying access. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969). But Wendler’s skewed criteria are none of those. And even if they were, Defendants have failed to (1) prove that Plaintiffs’ speech is unprotected; (2) provide an adversarial proceeding and judicial determination of whether the speech

is protected; and (3) ensure that “within a specified brief period,” the school “either issue[s] a license or go [es] to court to restrain” the speech. *Freedman v. Maryland*, 380 U.S. 51, 58–59 (1965).

3. The district court erred in ignoring Plaintiffs’ prior restraint claim.

For the above reasons, the district court erred in passing over Plaintiffs’ prior restraint claim, let alone not enjoining Defendants’ drag ban as an unconstitutional prior restraint—even while acknowledging the Founders’ disdain for prior restraints. See ROA.851–82. That discrepancy magnifies the error. So too does Defendants’ failure to contest Plaintiffs’ prior restraint claim beyond insisting—wrongly—that drag performance is not inherently expressive. ROA.716.

A preliminary injunction is needed to restore the First Amendment to West Texas A&M and remove the prior restraint stifling Plaintiffs’ protected expression. That is one more reason the Court should reverse.

- E. Plaintiffs have standing against Defendants Wendler, Thomas, and Sharp.

While it erred on the First Amendment merits of Plaintiffs’ claims, the district court correctly held that Plaintiffs have standing to sue Vice President Thomas and Chancellor Sharp for prospective relief in their

official capacities. ¹³ ROA.870–72. It also correctly rejected President

held . . . that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction.” *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 539 (5th Cir. 2013) (cleaned up). And President Wendler has signaled every intent to continue enforcing his ban against Plaintiffs’ future drag shows—including one planned for March 22, 2024. ROA.237 ¶ 130(b).

Even after Plaintiffs filed suit, President Wendler has proven resolute in preventing drag shows on campus. In an April 27, 2023, television interview, Wendler said he couldn’t “talk about” his email edict due to the litigation, only to affirm: “I wouldn’t have done anything any differently.” ROA.623 at 25:00–27:47.

Absent injunctive relief, every sign indicates that President Wendler will again overturn his staff members’ approval of Plaintiffs’ events; that Vice President Thomas will do Wendler’s bidding; and that Chancellor Sharp will again stand behind Wendler’s censorship. And given his stated disdain for Plaintiffs’ expression, Wendler has every incentive to make Plaintiffs wait an

expression. That uncertainty harms Plaintiffs' expression even more, as

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CERTIFICATE OF SERVICE

This certifies that on November

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1. This brief complies with the type-volume limitation of Fed. App. P. 32(a)(7)(B) because this brief contains 12,961 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Local Rule 32.2.

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Dated: November 13, 2023

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